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Scanlon's Contractualism and Its Critics

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SCANLON'S CONTRACTUALISM AND ITS CRITICS

by

KENNETH R WEISSHAAR

A dissertation submitted to the Graduate Faculty in Philosophy in partial fulfillment of the
Requirements for the degree of Doctor of Philosophy, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in
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ABSTRACT

Scanlon's Contractualism and Its Critics

by

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Advisor: Sibyl A Schwarzenbach, Ph.D.

This dissertation examines whether Thomas Scanlon's contractualism satisfactorily explains its intended domain of morality which he terms "what we owe to each other." Scanlon proposes that such interpersonal morality is based on justifying one's actions to others by behaving according to principles that could not be reasonably rejected. This idea accounts for two key functions of a moral theory: explaining how moral judgments are made and why agents generally act according to these judgments. After reviewing the nature of constructivist moral theories to show why I chose to focus on Scanlon's theory, I assess how effectively it fulfills these two roles. I argue that the concept of justifiability is necessary for making moral judgments because it enables agents to determine which of an action's attributes are morally relevant and to choose between conflicting principles. However, I also argue that the contractualist procedure is unable to specify principles in certain cases where the aggregation of harms across multiple persons legitimately outweighs an individual's concerns and in other cases where differences in agents' experiences and sensibilities lead to conflicting moral judgments and objectionable relativism. Regarding normativity, I argue that justifiability provides sufficient reason for agents to act in accordance with these principles in most, but not all, cases, even if the agents are not motivated by the contractualist goal of finding common principles. In summary, I conclude that contractualism provides an insightful account of morality, but it is one with several significant defects that cannot be remedied.

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Chapter 1 Introduction

Moral philosophy has a rich tradition ranging from the classical theories of Plato and Aristotle, through the Enlightenment theories of Hume and Kant, to today's naturalist and non-cognitivist alternatives. Each theory differs in its conception of the essence of morality, and there appears to be no likelihood that moral theorists will converge on a common view about the critical questions a theory must address: the nature of moral judgments, how agents are able to make these judgments, and why these judgments strongly influence agents' actions.

Kant promulgated the idea that morality is based on people's rational nature. According to Kant, the fundamental moral law is the categorical imperative which says that right actions comply with maxims that one can will to be principles for everyone without contradiction. Kant's theory is said to be "constructivist" in that moral principles are determined by a rational procedure—they do not exist independently of the agents who apply the formula. In the latter part of the twentieth century, John Rawls's adoption of what he terms *Kantian constructivism* for his political theory of justice marked the beginning of a renewed interest in constructivist theories. Rawls's ideas have influenced other philosophers, like Christine Korsgaard and Thomas Scanlon, who have developed constructivist theories with different goals and procedures.

I have been interested in constructivist theories ever since I encountered Kant's categorical imperative. Morality, I believe, should be based on reasons and justification: what are the relevant reasons for and against an action, and do these reasons, properly understood, warrant the action being proposed. Constructivist theories use this kind of reasoning while many other types of theories do not. At the same time, I am well aware of the issues critics raise about constructivist theories. Thus, my goal for this dissertation is to select the constructivist theory

that is likely to provide the best account of morality and then to assess whether it can, in fact, deliver what it promises. This introduction provides a road map of that investigation.

Chapter 2 explains why I decided to focus my analysis on Thomas Scanlon's *contractualism*.¹ The first part provides an overview of constructivist moral theories along with two other competing types of moral theories, realist and expressivist; and it includes a summary of the main objections raised against the last two types. My aim is to give the reader a sense of why I am dissatisfied with these latter theories rather than to provide a formal critique because I recognize that proponents have developed detailed and sophisticated responses to these objections.

The rest of the chapter examines three well-known constructivist theories: Rawls's *justice as fairness*,² Korsgaard's *procedural realism*,³ and Scanlon's *contractualism*. These overviews are designed to illustrate the nature of constructivist theories and to highlight differences among the theories. Rawls's goal is to develop the basic principles of justice for a liberal democratic society. He develops these principles using what he terms the "original position"—a hypothetical initial situation that limits the information available to rational and reasonable representatives who must select the principles of justice that provide the best outcome for all the society's citizens. Korsgaard's goal is to determine all practical reasons for action including moral reasons. She argues that human rationality requires individuals to take control of their actions,

¹ T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998). Hereafter referred to in the text as 'WVO.'

² John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971, 1999). *Political Liberalism* (New York: Columbia University Press, 2005). Hereafter referred to in the text as 'TJ' and 'PL,' respectively.

³ Christine M. Korsgaard and Onora O'Neill, *The Sources of Normativity* (Cambridge; New York: Cambridge University Press, 1996). Christine M. Korsgaard, *Self-Constitution : Agency, Identity, and Integrity* (Oxford; New York: Oxford University Press, 2009). Hereafter referred to in the text as 'SN' and 'SC,' respectively.

and that a successful person “unifies herself” by choosing her own actions rather than following the dictates of outside forces. Successful unification requires acting according to Kant’s categorical imperative which is then the source of moral principles. Finally, Scanlon’s goal is to provide an account of people’s obligations to others. He argues that valuing life requires recognizing and respecting humans’ distinctive capacity to actively govern their lives, and that this is best done by treating others in ways that they could not reasonably reject. Hence, moral principles are ones that cannot be reasonably rejected by others as determined by the theory’s procedure.

All these constructivist theories are interesting, but ultimately three features made Scanlon’s theory compelling to me. First, Scanlon’s idea of “justification to others” based on “reasonable rejection” provides a convincing unified explanation for both the way moral principles are determined and the reason agents have for acting morally. Second, the contractualist procedure seems likely to provide a wide range of workable moral principles. And, finally, the normativity of these principles is explained by the value of the relationships that result from acting in ways that others cannot reasonably reject. Many philosophers provide excellent critiques of particular elements of Scanlon’s theory, but I have not found a work that assesses how well it meets all the critical aspects of a moral theory. My goal is to fill that gap.

Before proceeding to my assessment, it is important to note there are two types of ethical theories. Realist and expressivist theories are classified as metaethical theories because they seek to understand the metaphysics of moral facts and the meaning of moral language. In contrast, contractualism is classified as a normative theory which focuses on the examination of standards for the rightness and wrongness of actions and does not directly concern itself with metaphysics and language. Scanlon is not concerned about this difference. In his view, the key issues in

understanding morality are characterizing the method of reasoning on which moral judgments are based and explaining why these judgments are given an important role in determining actions. If these are understood, the metaphysical status of moral facts is no longer interesting, at least for him (*WWO* 2). Also, Scanlon views his claims about morality as consistent with any account of reasons that is compatible with ordinary notions of reasons and rationality; thus, contractualism is not dependent on a certain conception of the nature of reasons. Scanlon himself takes the idea of a reason to be primitive and is a realist about reasons (*WWO* 17). He defends this view at length in *Being Realistic About Reasons*.⁴ For those so inclined, the combination of Scanlon's metaphysical view of reasons and his contractualist moral theory go a long way to creating a metaethical account of morality. However, this dissertation will bracket any metaphysical questions and adhere to Scanlon's focus on questions about the determination and normativity of contractualism's principles.

Returning to the road map, Chapter 3 examines how effectively contractualism uses the concept of reasonable rejection to determine moral principles. After reviewing the key elements of the contractualist procedure, I assess three key criticisms. The most basic criticism is that the concept of reasonable rejection is unnecessary to determine principles. Certain properties of actions like cruelty or unfairness are what make actions immoral, and any judgment of reasonable rejection is somehow based on existing views about whether actions have these properties. I argue, however, that the concept is not redundant because it is needed to understand which of an action's attributes are relevant in making a moral judgment. Justifiability to others also provides an additional reason to act morally in certain situations where an agent is wavering. Further, the need to justify actions to others is a primary factor in explaining why agents are

⁴ T. M. Scanlon, *Being Realistic About Reasons* (Oxford: Oxford University Press, 2014).

motivated to act according to contractualist principles. Thus, the contractualist procedure passes the basic test of being necessary for the determination of moral principles and being able to determine at least some of the desired principles.

Nonetheless, there are two situations where the procedure has difficulty or is unable to determine moral principles: cases of aggregation and cases of problematic relativism. Cases involving aggregation pose a dilemma for contractualism. One of the theory's strengths is that its procedure restricts the reasons for determining reasonable rejection to those of single individuals, thus preventing small benefits to many persons from being used to justify significant harms being incurred by one or a few. However, this feature raises questions about how contractualism deals with situations where widely held moral intuitions support the aggregation of harms, such as when a rescuer has a binary choice to save either one or many persons. Scanlon argues that contractualism can still justify a principle requiring the rescue of the larger number when harms are *equal*. I disagree and argue that contractualism cannot have it both ways. The same procedure cannot be used to distinguish situations where the individual should be protected from those in which aggregation of harms is appropriate. Further, there are cases where potential harms are unequal but aggregation is justified because the lesser harm is sufficiently severe that it would be right to prevent multiple occurrences by allowing a greater harm to a small number of people. I argue that it is not possible to justify a contractualist principle that would cover these cases; and, if one could, it would have the unintended consequence of justifying the aggregation of extreme numbers of trivial harms which would permit the initial aggregation problem that contractualism is designed to avoid. Thus, cases of aggregation pose a significant problem for contractualism.

Contractualism is also susceptible to undesirable relativism. Under contractualism, moral judgments are made by individuals, and variations in individuals' experiences and sensibilities

can lead to conflicting judgments in situations where it is difficult to compare competing reasons for rejecting alternative principles. Scanlon argues that this problem is minimized by the universality of reason judgments, a principle stating that the same reasons apply to individuals who are in relevantly identical situations. He also argues that unacceptable practices that are permitted by certain societies will be rejected under contractualism's procedure because valid reasons are based on what persons have reason to want, not what they actually think or want due to cultural acclimation. I use the nature of contractualist judgments along with various examples to argue that these considerations are insufficient to prevent objectionable relativism. Even if the same reasons apply, different agents may "weigh" those reasons in varied ways and justify conflicting principles, particularly given Scanlon's inability to offer much guidance on how such judgments should be made. When this happens, there is no agent-neutral way to determine which principle is correct, and the theory results in conflicting principles for morally similar situations. Likewise, there is no principled way to exclude many practices that are condoned by certain societies but conflict with widely held moral intuitions. Thus, concerning contractualism's ability to determine principles that dictate actions, the procedure faces significant problems in cases where aggregation is required and where unacceptable relativism is unavoidable.

Chapter 4 examines the normativity of contractualist principles. I argue that justifiability provides sufficient reason for agents who endorse contractualism to act in accordance with these principles in most, but not all, cases. According to Scanlon, agents should follow principles that cannot be reasonably rejected because this is the best way to respect the value of an individual's capacity to choose how to live, and acting in such a way supports a desirable relationship of mutual recognition with others. Critics question whether the value of such a relationship can overcome competing reasons to act immorally from the point of view of a conflicted agent. I

argue that it can, particularly when the agent also considers additional reasons to act morally based on the negative effect immoral actions, such as cruelty or deception, have on others. At the same time, I argue that there are situations where reasons supporting morality are insufficient from the point of view of an agent who has strong personal reasons to act otherwise, perhaps to protect a friend or loved one. My argument questions Scanlon's version of personal relationships and personal projects which relies on an inherent sensitivity to the demands of right and wrong, thus limiting the way these relationships and projects can be pursued. Several examples are used to illustrate that an agent's moral judgment about a principle is a different kind of judgment than that of deciding what action to take in a conflicted situation. Thus, an agent can recognize an action as immoral while still having greater reason to pursue it.

A related issue is whether contractualist principles apply to persons who do not care about morality and are not motivated by contractualism's goal of identifying and living by principles that others cannot reasonably reject. Critics contend that such principles do not apply to these persons because their lack of moral motivation places them outside the scope of contractualism. Here, I argue that Scanlon's position that principles *do* apply is correct because the importance of having (at least some) interpersonal relationships applies to the unmotivated regardless of whether they care about these relationships from a moral perspective. Finally, there is the question of how contractualism relates to persons who follow other moralities. I point out that contractualists should be able to live harmoniously with those who ascribe to moral theories that respect contractualism's basic tenets of human equality and self-determination. Also, contractualists should attempt to, and be able to, incorporate religious or culturally-based reasons into their judgments of which principles cannot be reasonably rejected if such reasons are

significantly important to a way of life and do not prevent the recognition of other contractualists' similarly significant reasons.

Finally, Chapter 5 steps back and summarizes my overall assessment of contractualism. I conclude that, while the theory provides an insightful account of morality, it has significant flaws in its ability to specify moral principles. Interestingly, its reliance on the idea of reasonable rejection and its emphasis on individuals are sources of both its strengths and weaknesses. On the side of attractiveness, the theory reflects common views about morality in its focus on relationships between people and its emphasis on reasons and justifications. The concepts of 'reasonable rejection' and 'justification to others' provide a unified explanation of how moral principles are determined and why agents have strong reasons to follow them. At the same time, however, the theory faces serious problems in the determination of moral principles due to problems in certain situations involving the aggregation of harms and certain situations resulting in objectionable relativism as described above. Further examination of the sources of these issues indicates that the aggregation problem can be somewhat alleviated, but that there is not a way to modify the theory to address both of these issues satisfactorily. Thus, my assessment is that contractualism is an insightful but flawed theory. It provides an explanation of many facets of morality but ultimately disappoints those who are looking for a complete moral theory.

Chapter 2 The Nature of Moral Constructivism

In constructivist theories, moral principles are derived from a procedure of rational deliberation or choice. The procedure determines the principles; it is not a method for gaining knowledge about truths that already exist. This type of account differs significantly from other types of moral theories. For example, realist theories posit the existence of agent-independent moral facts, and expressivist theories claim that moral judgments represent an agent's feelings or attitudes. This chapter illustrates the general nature of constructivist theories by first contrasting them with realist and expressivist theories. It then compares three prominent constructivist theories: John Rawls's *justice as fairness*, Christine Korsgaard's *procedural realism*, and Thomas Scanlon's *contractualism*. Finally, the chapter explains why I chose Scanlon's theory for a detailed assessment and outlines my approach.

My purpose here is to present a general picture of the way moral theories differ in order to help the reader understand why I am sympathetic to constructivist theories and to explain why Scanlon's theory is the most suitable account for my analysis. I am not trying to provide a formal critique of the non-constructivist theories mentioned or a general defense of constructivism—these goals are outside the scope of my project.

1. Types of Moral Theories

This section provides an overview of constructivist, realist, and expressivist theories. It also summarizes some of the main objections to the latter theories as a partial explanation of why I have focused my efforts on constructivist theories.

1.1. Constructivist theories: *Constructivism* and *contractualism* are different types of moral theories that often overlap in practice.¹ According to Onora O’Neill,

Contractualists ground ethical or political justification in *agreement* of some sort, whereas constructivists ground them in some conception of *reason*. This will not provide any neat separation of the two approaches to justification since agreement may provide a basis for reasons and reasoning a way of achieving agreement.²

Moral contractualism represents a family of theories that attempt to justify morality by appealing to rational or reasonable agreement among individuals who are subject to morality’s constraints. Different versions of contractualism are distinguished by the philosophical goals of the theories and by the type of agreement involved in determining moral principles.³ In contrast, moral constructivism holds that insofar as there are normative truths, they are generated by an idealized process of rational or reasonable deliberation or choice. Significantly, constructivists reject—or at least bracket as unknowable or unprovable—the stronger claims of moral realism, taking the alternative position that the existence and nature of moral properties are decided by the theory’s procedure. Thus, the constructivist is not using the theory’s procedure to discover or understand pre-existing agent-independent moral truths. There are no moral truths without the procedure.

¹ Reviews of the nature of constructivist and contractualist moral theories can be found in the following papers: Christine M. Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy," *Journal of Philosophical Research* 28 (2003); Onora O’Neill, "Constructivism Vs. Contractualism," *Ratio* 16, no. 4 (2003); Mark Timmons, "The Limits of Moral Constructivism," *ibid.*; Carla Bagnoli, "Constructivism in Metaethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2011).
² O’Neill, 319.

³ Scanlon references the following theories as being among those “commonly called contractualist”: Rawls’s *justice as fairness*, David Gauthier’s *morals by agreement*, and Brian Barry’s *justice as impartiality* (*WWO* 375, fn.2).

In the latter part of the twentieth century, Rawls's adoption of what he terms *Kantian constructivism* for his political theory of justice marked the beginning of a renewed interest in constructivism. Kantian constructivism pays particular attention to the nature of the moral agent. The term 'Kantian' comes from the resemblance to Kant's doctrine rather than any strict adherence to Kant. According to Rawls:

What distinguishes the Kantian form of constructivism is essentially this: it specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice. Expressed another way: this kind of view sets up a certain procedure of construction which answers to certain reasonable requirements, and within this procedure persons characterized as rational agents of construction specify, through their agreements, the first principles of justice.⁴

As will be discussed, the way Korsgaard and Scanlon conceive of agents also plays a significant role in their theories.

Another crucial aspect of constructivism, according to Rawls, is that justification of principles is not an epistemological problem of understanding existing moral rules; rather it is a practical problem.⁵ Korsgaard, too, emphasizes that for constructivism the function of a normative concept is not to describe reality; instead, a normative concept refers to the solution of a practical problem. A constructivist account of a moral concept is an attempt to work out a solution to that problem.⁶ In providing these solutions, constructivists still hold that at least some objective, action-guiding ethical principles can be justified despite their dependence on human judgment and the lack of agent-independent moral facts. Thus, to be successful, it is necessary that a constructivist theory's conception of an individual and the specific procedure it uses combine effectively to determine sufficiently objective principles.

⁴ John Rawls, "Kantian Constructivism in Moral Theory," *The Journal of Philosophy* 77, no. 9 (1980): 516.

⁵ *Ibid.*, 554.

⁶ Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy," 99.

1.2. Realist theories: The key claim of realist theories is that morality refers to an independent realm of moral facts and values so that judgments about these facts are either true or false. What is right or wrong exists separately from, and prior to, any efforts to determine what is moral. The independence of moral facts is said to accord morality a special kind of authority because it is not influenced by prejudices or emotions. This special status is attractive to many who see morality as a code that forces people to face and overcome their frailties.

A classic example can be found in Plato's conception of moral value as an impersonal, absolute reality. For Plato, the forms of the good and of justice existed apart from objects in the world and people's thoughts or feelings. Today, realist theories divide into two types: *non-naturalist* theories akin to Plato's and *naturalist* theories in which moral value is somehow related to properties and facts that can be understood using the senses.

According to non-naturalist versions of moral realism, moral facts are not reducible to any kind of natural fact and are beyond the apprehension of the natural sciences.⁷ This view ensures that morality is objective, and the separation of moral values from features of the world seems consistent with morality's role of prescribing what people ought to do as opposed to describing the way things are. However, non-naturalism raises significant questions about the nature of moral facts and the way moral truths are known since they are not scientific truths that can be accessed empirically. Further, even if it is possible to learn about such truths, how do they motivate people if they have no obvious connection to their interests or desires?

Naturalist versions of realism attempt to deal with these concerns by holding that moral facts are identical with, or constituted by, natural facts in some way, and thus are empirically

⁷ Non-naturalist realism is described and defended in Russ Shafer-Landau, *Moral Realism : A Defence* (Oxford; Oxford; New York: Clarendon ; Oxford University Press, 2003). My discussion of the characteristics of various moral theories is based partly on this work.

accessible. For example, one naturalist theory is based on the idea of an individual's "objective personal interests"—what would be best for her independent of her actual desires and level of knowledge.⁸ Moral rightness is said to reflect a hypothetical society in which each individual's objective interests are given equal consideration. This type of theory is less susceptible to epistemological and motivational issues if one accepts the difficult assumption that an individual's best interests can be determined. However, there are still significant questions about whether objective interests based on natural well-being, or some other naturalist formulation, can do justice to the wide variety of moral issues that need to be addressed. Further, a morality based on objective interests most likely favors the welfare of society at the expense of individual rights, and it is not concerned about how benefits are distributed. These features conflict with the moral intuitions of many people.

1.3. Expressivist theories: Expressivist theories, by contrast, avoid concerns about the nature of moral facts and their motivational efficacy. These theories claim moral judgments express feelings, attitudes or stances; they are not judgments about external facts or values. For example, moral judgments might express states of approval or disapproval; they might also express states of norm-acceptance or of planning to act in some way.⁹ Expressivists are non-cognitivists who deny that moral statements are literally true or false. Thus, expressivism fits comfortably with a scientific view of the world because there are no non-scientific facts that need to be explained and known. People recognize what is right or wrong based on the way they

⁸ Peter Railton's theory as described in Peter Railton, "Moral Realism," *The Philosophical Review* 95, no. 2 (1986).

⁹ The theories of Simon Blackburn and Allan Gibbard, respectively. See Simon Blackburn, *Spreading the Word : Groundings in the Philosophy of Language* (Oxford; New York: Clarendon Press ; Oxford University Press, 1984); *Essays in Quasi-Realism* (New York: Oxford University Press, 1993); Allan Gibbard, *Wise Choices, Apt Feelings : A Theory of Normative Judgment* (Cambridge, Mass.: Harvard University Press, 1990); *Thinking How to Live* (Cambridge, Mass.: Harvard University Press, 2003).

respond to a given moral situation, and the nature of their response motivates them to act in a certain way. The appeal of expressivist theories is based, in large part, on their simple explanation of the nature of morality and the way this explanation avoids concerns about realism.

The view that moral judgments are projections of agents' own attitudes removes most questions about how morality is apprehended and why moral judgments are motivating; however, critics argue that expressivist theories still face a number of problems.¹⁰ First, such theories are subject to charges of objectionable relativism because there is no single standard for choosing among differing moral judgments given that competing attitudes are accorded equal validity. Why, for example, is the expression of one person's attitudes normative for others in situations which call for advice or where the justifiability of an action is under debate? Why should people care about someone else's moral judgments if they merely represent her attitudes towards something? Second, ordinary talk about morality requires constancy in meaning. This appears inconsistent with the view that moral statements are expressions of attitudes or feelings. Examples include taking at face value statements like "it is true that murder is wrong," explaining the source of moral disagreement as a search for knowledge about moral truths, and believing that moral argument takes the logical form of other kinds of argument. Finally, there is the question of how to explain moral error. Cognitivists can account for a moral mistake as an example of false belief. Expressivists require a different explanation, but finding one is difficult if a moral judgment expresses an agent's attitude.¹¹

¹⁰ The criticisms here are taken from Scanlon, *Being Realistic About Reasons*, 53-68; and Shafer-Landau, 18-38.

¹¹ Expressivists like Blackburn and Gibbard espouse what they term *quasi-realism*, which is intended to explain how the judgments expressed can also be true or false so that what is right or wrong is not simply a reflection of the subjective feelings of each individual but is somehow independent of us and our attitudes. As a result, we can still have meaningful dialogue about morality as if moral judgments were beliefs about facts in the world. Nonetheless, critics still question whether this explanation resolves the types of issues raised in the text.

To summarize, non-naturalist realist theories that posit mind-independent moral properties are appealing because they appear to be objective and authoritative. But they also generate difficult questions about the nature of moral properties, how people come to learn about them, and the motivational source of their authority. Naturalist theories address some of these issues, but raise other questions about their ability to represent moral views consistent with certain convictions. Expressivist theories explain morality as a projection of attitudes; thus, their answers provide a better account of how morality is known and why moral judgments are motivating. But they lose authority because of concerns about relativism and the difficulty of accounting for the type of justification-based reasoning that underlies morality. Admittedly, this review is too cursory to support specific conclusions about any of the issues raised. Nevertheless, it highlights the types of misgivings which convinced me that neither realist nor expressivist theories can provide a satisfying analysis of morality.

In the next sections, I review and comment on the constructivist theories of Rawls, Korsgaard, and Scanlon. Each review is organized as follows: 1) the theory's scope—the specific domain to which the theory is being applied, 2) its conception of the individual including the nature of reason, 3) the procedure used to determine moral principles, 4) the justification argument for why the resulting principles are morally significant, and 5) my observations about the theory.

2. Rawls's *Justice as Fairness*

In *A Theory of Justice*, first published in 1971, John Rawls presents a conception of justice he terms *justice as fairness* that both generalizes and carries to a higher level of abstraction the familiar theory of the social contract found in the tradition of Locke, Rousseau, and Kant. Rawls's goal is to identify the set of principles that renders the basic structure of a society just; the identification itself is the result of a process of agreement in which both the nature of persons and the bargaining situation reflect values embedded in that society.¹²

2.1. Scope: According to Rawls, a conception of justice is a set of principles that performs two functions. It provides a way to assign the rights and duties of citizens as specified by the basic institutions of a *liberal democratic society* (e.g., the political constitution and the principal economic and social arrangements), and it defines the distribution of the benefits and burdens of the social cooperation upon which the society is based (*TJ* 4, 6). Rawls calls his conception 'justice as fairness' in recognition of the emphasis it places on ensuring that each citizen shares fairly the benefits and burdens in such a society.

2.2. The Nature of Agents: Rawls's theory aims to determine the principles of justice that *free and equal persons* in a *well-ordered society* would accept in defining the fundamental terms of their association (*TJ* 10). Parties (representative citizens) come together to agree on these principles under the constraints of the *original position* (described below). As *rational*, the parties act in a self-interested way to further their own ends. They enact principles that allow them to gain the largest amount of primary social goods (liberties, opportunities, positions of

¹² Rawls's justice as fairness is a political conception that addresses the basic political structure of a liberal democratic society. In general, political philosophy is concerned with political and social authority and organization whereas moral philosophy is the study of normative systems that guide individual's choices of action. Moral beliefs may influence the choice of political structure. I interpret this as being the case for Rawls's theory which is influenced by a Kantian emphasis on the well-being and rights of individuals as opposed to a utilitarian emphasis on the best overall outcome for society.

authority, wealth, and the social basis of self-respect). These goods, in turn, enable them to pursue their conception of a good life most effectively. As *capable of a sense of justice* (later renamed *reasonableness*), the parties can rely on each other to understand and act according to whatever principles are agreed to. They will not enter agreements they know they cannot keep (*TJ* 123-26). For Rawls, being reasonable implies a willingness to propose and honor fair terms of cooperation, as well as accepting the need to understand and work through the disagreements that occur among a diverse group of citizens (*PL* 48-58).

The parties to the agreement are members of a *well-ordered society* whose citizens recognize certain rules of conduct and whose society is regulated by a public conception of justice. The goal or ideal is that everyone accepts the *same* principles of justice; basic institutions satisfy these principles; and everyone acts justly. Such citizens are interested in the principles of justice because they not only want to further their vision of the good life, but they also want to do what is right, and they recognize these principles will have a positive effect on the quality of their lives (*TJ* 4-8).

2.3. The Constructivist Procedure: Rawls's theory is based on what he calls pure procedural justice, i.e., what is right is determined solely by the procedure and not by any pre-existing independent criteria. For example, if several persons engage in a series of fair bets, the distribution of cash after the last bet is considered fair, however lopsided that distribution may be. This assumes the conditions of the procedure are fair, e.g., the bets are not coerced and do not favor any party. Thus background circumstances dictate a fair procedure.

In justice as fairness, the *original position*, or initial bargaining situation, ensures the agreements are fair by employing a *veil of ignorance* to eliminate any specific knowledge that would allow the parties to select principles that are to their advantage. The parties do not know

particulars: their place in society, their race, gender, the natural assets and abilities they possess, their conception of the good and its associated life plan, and the specific circumstances of their society. These, Rawls argues, are irrelevant to the moral task at hand. The parties do know certain general truths so they are able to select a conception of justice that is appropriate for the society in which they live (*TJ* 118-123).

The parties choose the best alternative from among a number of specified alternative conceptions of justice which include the proposed principles of justice as fairness, a short list of traditional conceptions of justice (such as the principle of average utility and the principle of perfection), and several others (*TJ* 105-108). As is well known, Rawls argues that a rational decision-maker facing the uncertainties embodied in the original position would follow the “maximin” rule of choice. This rule avoids serious downside surprises by choosing the alternative whose worst outcome still guarantees the decision-maker will be better off than the worst outcome attached to the other alternatives: in other words, the best worst case. Following this rule of choice leads to the adoption of Rawls’s two basic principles of justice:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
2. Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity (*TJ* 266).

These principles are ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty. Also the principle of fair opportunity is prior to the difference principle.¹³

Rawls does not claim that the proposed principles of justice are necessary truths or that they are derivable from such truths. Their justification is a matter of the mutual support of many

¹³ Rawls revises slightly the wording of these principles in Rawls, *Political Liberalism*, 5-6, but the nature of the principles remains the same.

considerations that fit into one coherent view. Nonetheless, he does consider these principles to be sufficiently objective for the purpose at hand in that reasonable persons possessing appropriate knowledge would reach the same (or similar) conclusions on the principles of justice, and they would be willing to be guided by them (*TJ* 19, 453; *PL* 112).

2.4. Justification: The individual citizens of Rawls's society must be able to justify the principles of justice as fairness to themselves and each other because the goal, he argues, is a society in which everyone accepts a single conception (or at least overlapping conceptions) of justice. Both the conditions of the original position and the resulting principles are checked against the citizens' *considered moral judgments* using the process of *reflective equilibrium*.¹⁴ Considered judgments are ones made in circumstances that result in high confidence that the moral conclusions drawn are correct; these judgments provide "data points" against which a moral theory can be tested. Ideally the judgments made in specifying the original position (e.g., the importance of not knowing one's position in society) and the principles generated by the constructivist procedure (e.g., the difference principle and its various implications) should match exactly the citizens' considered judgments. If they do not, one needs to ask why and revise either the theory or the considered judgments until they are aligned, at which point they are considered to be in reflective equilibrium. In reaching equilibrium, one needs to test a wide range of conceptions of justice and the associated arguments for each to permit the possibility of making a radical shift in the original judgments. Reaching equilibrium under this type of challenge is considered 'wide reflective equilibrium' (*TJ* 40-6). In this way, the conditions of the original position are checked against individual's conceptions of what constitutes a fair moral bargaining

¹⁴ In its general usage, reflective equilibrium is a coherence method for justifying evaluative principles and theories that was first described by Nelson Goodman. (See Nelson Goodman, *Fact, Fiction, and Forecast* (Cambridge, Mass., Harvard University Press, 1955), 65-68.)

process. Moreover, the resulting principles and their implications are checked to see if they match the considered convictions of justice or extend them in an acceptable way (*TJ* 15-19).

In *A Theory of Justice*, Rawls assumes that all the citizens of a well-ordered society use this method to endorse justice as fairness as the sole political conception of justice for society (*PL* xvi). However, several decades later in *Political Liberalism*, Rawls concludes that the idea of a well-ordered society in which all citizens endorse justice as fairness is too demanding; it is problematic because a modern democratic society is characterized by a plurality of different, even incompatible, religious, philosophical, and moral doctrines (*PL*, xvi). Accordingly, Rawls switches to a method he terms *political constructivism* to transform the doctrine of justice as fairness into a freestanding political conception of justice in which ideas are expressed in terms that are implicit in the public political culture of a democratic society (*PL* 11-14). The method of political constructivism continues to use the framework of the original position to develop the same principles of justice as those of justice as fairness; however, now the conception of a person and the elements of the original positions are more explicitly derived from the nature of a liberal political society rather than from any particular comprehensive doctrine (*PL* 19-20).

Such a society is marked by the fact of reasonable pluralism. Although its citizens hold a diversity of religious, philosophical, and moral comprehensive doctrines, they are at least willing to propose fair terms of cooperation and abide by them provided that others also do so—they are capable, that is, of being what Rawls calls ‘reasonable.’ When fundamental political questions are at stake, the parties ideally argue from publicly accepted facts and beliefs, and not from the point of view of their own particular doctrine. The idea of a society governed by a political conception of justice leads directly to Rawls’s idea of *public reason*, or the collective reason of the citizens in a democratic society. Its use ensures that political issues will be debated and

resolved on grounds that can be accepted by all citizens (*PL* 48-61, 212-219). A necessary condition for stability in such a society is that all (or at least a sufficient portion of its) citizens are part of an *overlapping consensus* that endorses a single conception of justice (ideally for Rawls's his justice as fairness), or at least a class of similar conceptions within a narrow range of differences. In this way, the well-ordered society shares a more or less common vision of what justice entails and does not reflect a *modus vivendi* where participants merely coexist in pursuing their self-interest for lack of a better alternative (*PL* 38-39, Lecture IV).

2.5. Observations: Although the scope of Rawls's justice as fairness is political, his constructivist approach has had significant implications for moral philosophy in general. Simply put, Rawls made constructivism a viable alternative to other forms of moral theories. Two key characteristics that distinguish constructivist theories are their emphasis on the practical nature of ethics and the use of hypothetical procedures.¹⁵ According to this view, philosophy as applied to moral problems is not a matter of finding knowledge to apply in practice; rather, it involves using reason to solve practical problems. In Rawls's case, the problem is how to structure the basic institutions of society, and the solution is to structure them according to the principles of justice as fairness. Finding the solution requires identifying a procedure appropriate to the task at hand. One cannot simply accept the way societies have evolved because today's institutions reflect various human weaknesses and past injustices; thus, there is a need to create a hypothetical procedure for developing principles. Such a procedure must reflect intuitive notions about the key elements that lead to a just solution, something Rawls does through his conception of free and equal persons placed in a fairly-defined bargaining situation. The adoption of

¹⁵ Two papers that contrast constructivism with other types of theories are Stephen Darwall, Allan Gibbard, and Peter Railton, "Toward Fin De Siècle Ethics: Some Trends," *The Philosophical Review* 101, no. 1 (1992); Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy."

procedure-based principles promises sufficient objectivity, but only for the problem and the persons on which the procedure is based. While Rawls focuses political problems, other philosophers, like Scanlon, have applied this constructivist approach to broader moral domains, as we will see shortly.

Considering specifically justice as fairness, its domain is the most focused of the three theories. Rawls bases the nature of the theory's agents and the justifications for the theory on ideas he believes are already (to a large degree) inherent in the public reason of a liberal democratic society. Thus the theory's applicability is limited to both the political segment of morality and societies that share liberal democratic beliefs.

I would argue, however, that even within a liberal democratic society, it is questionable whether Rawls's political constructivist approach will always lead to an overlapping consensus that affirms a sufficiently common set of political principles. Simply put, the more diverse the society is, the less likely it is that all factions will agree on a common-enough set of principles. Exploring the validity of this concern is a complicated question that is beyond this review.

In summary, Rawls's theory has had considerable impact on moral philosophy and is a well-respected theory for the political domain. However, its scope is too limited for the purpose of investigating whether a constructivist theory can provide a convincing account of general morality.

3. Korsgaard's Procedural Realism

Christine Korsgaard proposes a form of Kantian constructivism which parallels Kant's view that humans are required by their nature to act according to self-legislated universal principles. She accepts the Kantian categorical imperative as the basis for morality but grounds acceptance in her interpretation of each person's need to develop an identity and what is required to do this successfully.

3.1. Scope: Korsgaard's goal is to show that human rationality is the source of all practical reasons for action, including moral reasons. In *The Sources of Normativity*, she argues that we must value ourselves as human to have reasons for acting (SN 100-13) and that this constitutes a moral identity because valuing humanity in one's self rationally requires valuing it in others (SN 121). Later, in *Self-Constitution: Agency, Identity, and Integrity*, Korsgaard argues that, as rational agents, we must constitute our identities by acting according to Kant's categorical and hypothetical imperatives. That is, we must act autonomously by following maxims we can will to be universal laws, and we must act effectively by trying to bring about the means to the ends we choose (SC 1, 18). The categorical imperative is the source of morality because, unlike the hypothetical imperative, it is binding regardless of the specific ends chosen by individual agents (SC xii). In this review, I examine Korsgaard's later claim that self-constitution is the basis for complying with these imperatives.

3.2. The Nature of Agents: According to Korsgaard, rationality is the distinctive feature of humans. This capacity requires people to take control of their beliefs and actions by determining what count as reasons and finding normative principles to govern what they do. When we choose an action, we constitute ourselves as the author of that action, and so decide who we are. Thus the function of action is self-constitution because the agent's identity is not

determined except through her actions—something Korsgaard calls “the paradox of self-constitution” (SC 20).

A successful person “unifies herself” by choosing actions that are an expression of her whole self, rather than letting outside incentives (like impulses or desires) dictate her behavior. Doing this requires choosing certain roles in life and integrating these roles into a single identity that allows for a coherent and good life. This requires, in turn, that a person not only act autonomously but also effectively to satisfy the roles she has chosen. According to Korsgaard, acting autonomously and effectively requires acting according to the categorical and hypothetical imperatives—these imperatives are constitutive principles of action (SC xi-xii, 18-19).

To act autonomously, an agent cannot blindly follow various desires or impulses. She must select (or will) a maxim for her action: she must decide “I will do act-A in order to promote end-E.” Furthermore, Korsgaard argues, an agent must will her maxim be a universal law which means she is acting according to the categorical imperative. Universal willing is required because it is not possible for an agent to will a maxim for one occasion only. The reflective choice involved in a true act of willing implies that the agent would make the same choice if she again faced the same circumstances *ceteris paribus*.¹⁶

To act effectively, an agent must achieve the end she has chosen—at least in most cases. Thus if she wills an end, she must also will and pursue the means to that end; otherwise, she is not *really* willing the end. This is, by definition, acting according to the hypothetical imperative: if one wills an end, one must will the means to that end (SC 68-80, 82-3, 213). Hence, Korsgaard argues that the hypothetical and categorical imperatives are normative because, having to act,

¹⁶ This does not mean that the agent cannot change her maxim at a future time; but, at the time she wills the maxim, she must regard the principle as applying to identical future situations.

individuals must constitute themselves as unified, and following these imperatives is necessary for unification.

Finally, what is it that compels adherence to these principles of practical reason in the face of conflicting demands? According to Korsgaard, the normativity of obligation is a psychological force she calls necessitation (a term borrowed from Kant). Necessitation is the direct result of the need to act and to constitute ourselves as unified agents. She compares this explanation to Hume's account of why the good person conforms to the standard of virtue and the dogmatic rationalists' account of why human reason conforms to the standards of reason. In these cases, it is difficult to seek further explanation because acting in such a way is just part of being a certain kind of person (*SC* 3-7).

3.3. The Constructivist Procedure: In procedural realism, moral obligations are determined by people using Kant's categorical imperative while considering themselves citizens of the Kingdom of Ends. Korsgaard distinguishes "the categorical imperative" from what she calls "the moral law." The categorical imperative is the law of free will that requires acting only on maxims the agent can will to be universal laws; whereas, the moral law is the law of acting only on maxims that *all* rational beings could act on together to create a workable cooperative system, the Kingdom of Ends (*SN* 98-100). The inclusion of all rational beings eliminates certain maxims that might be acceptable from an individual perspective but that are objectionable when all individuals are considered as a group.

The categorical imperative test asks whether the maxim of a particular action has the form of a universal law; i.e., could the agent will that the maxim be a universal law without contradiction (*SC* 11-16). According to Korsgaard, an unwillable maxim would become self-

defeating if universalized: your maxim would fail in its purpose if everyone tried to use it.¹⁷

Kant's case of false promising is an example of contradiction in conception in that the agent's end (getting money) cannot be achieved by her means (making a false promise) in a world of the universalized maxim where everyone makes false promises and hence a promise has no value.

By contrast, a contradiction of the will occurs when some essential purpose of the will is thwarted because the means of achieving this purpose is unavailable. For example, a maxim that denies mutual aid or the refusal to accept help under any condition cannot be willed on the grounds that the will's effectiveness in pursuit of certain ends would be thwarted because human agents often need and want help for survival.

The categorical imperative test works particularly well with respect to wrong actions that are conventional (like breaking promises) because the effectiveness of the practice depends on (most) everyone's adherence. It is less effective in certain cases of natural violence (such as wanting physical revenge when one has been wronged) because the universal practice of selective acts of violence is unlikely to create the contradiction required to disallow the proposed maxim.¹⁸ However, an additional requirement permitting only maxims all can adopt (as is the case given the Kingdom of Ends stipulation) would forbid an action based on victimizing others.¹⁹ For example, the practice of limited acts of revenge might pass a contradiction of the will test, but it would certainly not meet the requirement that the practice be part of a universal system of cooperation. Thus, the moral law as defined by Korsgaard will restrict actions even more than the categorical imperative test alone. Nonetheless, considerable judgment is still

¹⁷ Christine Korsgaard, "Kant's Formula of the Universal Law," *Pacific Philosophical Quarterly* 66 (1985).

¹⁸ *Ibid.*, 26-30.

¹⁹ Onora O'Neill, "Universal Laws and Ends-in-Themselves," *The Monist* 72, no. 3 (1989): 347-56.

required in determining which maxims contradict the will's essential purposes, and the resulting moral principles will be dependent on a particular agent's views about human nature.

Korsgaard concludes that the categorical imperative test yields at least some moral content, but that it does not completely determine the content of the moral law. Nonetheless, she believes the requirement that maxims qualify as laws for the Kingdom of Ends is still a substantive commitment as long as there are other ways to generate the missing laws, and she refers to Rawls's constructivist methodology as one of several ways this might be done (SN 99-100). A reasonable conclusion is that the Korsgaard's procedure will give some but not all the laws required for a comprehensive moral system.

3.4. Justification: Korsgaard uses a two-part argument to justify her theory that the moral law binds all rational beings. First, an agent's rational nature requires that she conform to the principles of the categorical and hypothetical imperatives in order to constitute herself as a unified agent. Second, the laws each agent enacts for herself in following the categorical imperative are also binding on all rational beings (SC 80).

The first part of Korsgaard's argument has already been summarized in Section 3.2 on the nature of agents. The second part of her argument is based on the idea that the reasons used to legislate must be public reasons. According to the public conception of reasons, one commits to the view that if I have reason to do action-A in circumstances-C, I must be able to will that you should do action-A in circumstance-C because your reasons are normative for me.

Korsgaard provides two arguments for why all reasons must be public.

First, agents need to be able to share reasons in order to interact successfully; unless we adopt each other's reasons, we are unable to work out mutually beneficial agreements.

Admittedly, it is possible to have relationships based on negotiating and fencing rather than on

sharing ends; but, according to Korsgaard, these relationships will be subject to force or trickery when one party has the upper hand. Thus, compromises reached under such conditions are not stable. Second, in response to critics who reject the argument that agents need to share reasons, Korsgaard argues that in the process of constituting our identities and determining what reasons we have for acting, we are quite literally interacting with ourselves. The law we made for ourselves now must be a law that can be willed again later unless there's a good reason to change it. That a single person interacts with the same law for the same reasons at two different times requires the same kind of sharing of reasons required to interact with others. Thus, for the laws made to bind ourselves at all possible times and in all situations, our reasons must be public ones.²⁰ Based on either of these arguments, the laws we enact for ourselves are also laws for every rational being, laws whose normative force can be shared (SC 191-94, 202-06, 212-14).

3.5. Observations: A frequent criticism of Kant's categorical imperative is that it is an empty formalism that identifies no substantive principles of duty.²¹ This is inaccurate because, as discussed above, this imperative certainly identifies some duties. Accordingly, Korsgaard's moral law (which combines the categorical imperative with the Kingdom of Ends stipulation that the law must be willed by all) will not completely determine the content of morality. Korsgaard herself admits this when she concludes that the categorical imperative test yields at least some moral content, but that it does not completely determine the content of the moral law (SN 99-100). One can also construct situations where the imperative does not provide a way to make tradeoffs in moral situations where maxims conflict. Consider a case where an agent can prevent

²⁰ According to Korsgaard, there is a similarity between her argument for the public normativity of reasons and Wittgenstein's argument that a private language is inconsistent with the normativity of meaning. See Korsgaard and O'Neill, 136-38.

²¹ Onora O'Neill, "Kantian Ethics," in *A Companion to Ethics*, ed. Peter Singer (Oxford, UK; Cambridge, Mass., USA: Blackwell Reference, 1991).

the murder of someone by lying about the fact she is hiding in the next room. Although lying is generally viewed as prohibited by the categorical imperative, in this case many would view the practice as permissible, particularly if the lie does not cause some unspecified injury to others. However, this conclusion cannot be justified using the categorical imperative. If a maxim that required lying in such circumstances were universally adopted, then the lie would not be convincing and its purpose would be defeated. So, the practice could not be willed to be a universal law even though it is clearly the right thing to do. Thus, it is reasonable to conclude that the categorical imperative can determine some moral laws but that it will not be able to prescribe moral principles in many situations.

Even more significant are concerns critics raise about whether the need for self-constitution is sufficient to guarantee the normativity of the categorical imperative, as well as whether all practical reasons must be public ones as required to extend the laws each person adopts to others so that they form a moral code. Here I will focus on the question of self-constitution which is the heart of Korsgaard's argument.²²

Critics make several arguments that the need for self-constitution is not sufficient to require that persons always act according to the categorical imperative. First, although critics agree that acting immorally at times is "defective" in the sense that a person's agency will not be functioning as well as possible, they still question whether this has a significant impact on the agent's identity. The agent may get what she wants by acting immorally on occasion, and she could care more about this particular outcome than about "well-functioning agency." Second, critics also point out that such an agent acts badly only occasionally (when there is a great deal to be gained) so it seems unlikely that such a pattern will truly make the agent's identity "fall apart"

²² An argument against the public nature of reasons can be found in S. Tenenbaum, "Christine M. Korsgaard, Self-Constitution: Agency, Identity, and Integrity," *Ethics* 121, no. 2 (2011).

as Korsgaard maintains. The agent is simply committed to constituting herself well enough to be an agent but not well enough to be a truly good one. Finally, critics note that there is no clear upper limit for the amount of evil a person can perpetrate while still being recognized as an agent. We continue to hold someone responsible for her actions regardless of the magnitude or number of immoral acts she commits—at least as long as we continue to deem her rational and not insane. We regard persons as agents independently of their actions when, for instance, we consider a lazy person who fails to achieve her goals as reproachable even though she fails to act in a way that gives her “agent status” according to Korsgaard’s theory.²³

On balance, I would argue that the critics have a point. According to Korsgaard, what requires agents to act in harmony with the categorical imperative is the need to constitute themselves as unified persons, ones who rise above their various impulses and select actions according to universal principles. Indeed, not acting this way all the time results in a serious “loss of identity.” However, it is hard to believe that a single failure represents such a significant threat to a person’s identity that it ensures the imperative’s normativity for each incremental action a person chooses. It does not seem reasonable to argue that an agent is a significantly different person based on one (or even a small number) of non-compliant actions. And, if a single action is not significant to a person’s unification, one cannot argue that the imperative is normative for every individual action. Thus the need for personal unification does not seem strong enough to support the normativity Korsgaard claims.

²³ These various arguments are put forth in the following papers: Ana Barandalla and Michael Ridge, "Function and Self-Constitution: How to Make Something of Yourself without Being All That You Can Be: A Commentary on Christine Korsgaard's 'the Constitution of Agency and Self-Constitution'," *Analysis* 71, no. 2 (2011); Markus Schlosser, "Self-Constitution: Agency, Identity, and Integrity - Christine M. Korsgaard," *The Philosophical Quarterly* 61, no. 242 (2011); Tenenbaum.

4. Scanlon's Contractualism

Thomas Scanlon's contractualism gives an account of our obligations to other persons. Although Scanlon refers to his theory as contractualist, the justification of principles is not based on an agreement among parties. Rather, principles are generated by a reasons-based procedure involving the concept of 'reasonable rejection,' so the theory can more properly be characterized as constructivist in nature.

4.1. Scope: Scanlon's theory provides an account of the domain of morality that prescribes duties to other people including, for example, requirements to aid them and prohibitions against harm and deception. He refers to this domain alternatively as "the morality of right and wrong" or "what we owe to each other." This domain is an important subset of morality in general; but it does not include moral values like, for example, ideals of personal honor, duties to one's family, and ways of providing for children and the elderly. These broader values may be constrained by "what we owe to each other," but their complete content cannot be derived from Scanlon's theory (*WWO* 6-7, 342-49).

4.2. The Nature of Agents: In Scanlon's view, the distinctiveness of humans is based on their capacity to assess reasons and justifications, choose a life plan from the possible alternatives, and actively govern their lives. Appreciating the value of human life requires recognizing and respecting these distinctive capacities. The best way to do this, according to Scanlon's theory, is to live according to principles that others could not reasonably reject (*WWO* 105-6).

Scanlon argues that judgments about reasons alone are sufficient to explain actions. A rational person who judges there is sufficient reason for believing something generally embraces that belief, and this judgment is generally sufficient explanation. There is no need to appeal to

some further source of motivation such as “wanting to believe.” Similarly, a rational person who judges there is good reason to do something generally forms the intention to do it, and this judgment is sufficient explanation of that intention and the subsequent action. No additional form of motivation is needed beyond the judgment and the reasons it involves. Scanlon accepts that there is a distinction between a person’s recognizing something as a reason and the effect on her thoughts and actions—changes in circumstances can alter the effect. However, he does not agree that some further motivating element, a desire, is needed for action.

On the contrary, when I examine these cases it seems to me that in all of them the only source of motivation lies in my taking certain considerations—such as the pleasures of drinking, of eating, of hearing from a friend—as reasons. The strength of this motivation varies depending on what happens—for example, on the degree to which I attend to a given consideration, focus on it, and ignore others—but these reasons remain the only motivating factors. Just as in the case of belief, there is not need to appeal to a further source of motivation to explain how a rational creature can be led to act (*WWO* 35).

Scanlon presents a comprehensive defense of this view, but my goal here is not to justify his theory. Rather it is to introduce the reasons-based theory of action that underlies his position that reasons-based moral principles are action determining.²⁴

Scanlon interprets the *rationality* and *reasonableness* of agents as follows: Irrationality involves holding conflicting judgments by making incompatible claims about the same subject; however, it is not irrational to fail to accept certain considerations as reasons, and ‘irrational’ does not mean “open to rational criticism.” What we have most reason to do, or what we would do if we were “ideally rational,” is a separate concept that refers to “the course of action that is best supported by all the relevant reasons given a full and accurate account of the agent’s actual situation” (*WWO* 26-32). What is reasonable in a certain situation is a judgment about what is justified by the available information and the applicable reasons. In the context of collective

²⁴ A more complete summary of Scanlon's views can be found in Scanlon, *What We Owe to Each Other*, 33-41; and *Being Realistic About Reasons*, 53-6.

decision-making, unreasonable usually means failing to take others' interests into account given the aim of reaching an agreement (*WWO* 32-33).

4.3 The Constructivist Procedure: According to Scanlon, an action is moral if, and only if, the proposed principle that permits it is one that could not be reasonably rejected by those who might be affected by the action. Thus judgments of right and wrong are claims about the adequacy of reasons for accepting or rejecting principles under certain conditions (*WWO* 3).

To determine whether an action is wrong, one must consider whether any principle that permitted the action could be reasonably rejected. This is done by comparing the reasons for objecting to a principle that permits the action with the reasons for objecting to a principle that prohibits the action. Relevant reasons for consideration involve the burdens on parties that would be affected by the act. Scanlon calls these reasons “the objections to permission and prohibition.” According to contractualism, if the objections to permission are more significant than the objections to prohibition for every principle that permitted the action, then it would be reasonable to reject each of these principles, and the action would be wrong (*WWO* 195).

The idea of reasonable rejectability provides a framework to consider the moral significance of diverse considerations, including not only factors contributing to people's welfare, but also fairness, choice, and responsibility. According to Scanlon's theory, reasons for rejection need to be *personal* reasons having to do with the claims and status of individuals. Because of the theory's focus on interpersonal obligations, impersonal reasons—like the value of preserving the environment—are not admissible in their own right; however, they can be relevant through their role in the reasons ascribed to individuals (*WWO* 217-21). In addition, Scanlon takes a broad view of the “others” to whom actions must be justifiable. An assessment of the rejectability of a principle must take into account the implications of its acceptance in general,

not just in the situation in question; thus it must rely on universal generic reasons that consist of commonly available information about what people have reason to want (*WWO* 202-206).

Like Korsgaard, Scanlon denies the existence of independent moral facts. Whether principles can be reasonably rejected is not determined by facts about right or wrong in a deeper, independent sense. Rather, it is the other way around. Thinking about what is right and wrong means thinking about what could be justified to others (*WWO* 5). In contrast to Korsgaard, however, Scanlon does hold the idea of a reason as primitive and he is a realist about reasons.²⁵ At the same time, Scanlon views the claims he is making about value and morality as being “compatible with any deeper account of reasons which left the contours of our ordinary notions of reasons and rationality undisturbed” (*WWO* 17).

4.4. Justification: Scanlon believes that “the special value of human, or rational, life lies in our having reason to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject.”²⁶ Humans have the ability to identify reasons and make choices about their beliefs and actions. They are able to consider different possibilities for how to live, to choose a plan, and to govern their lives accordingly. Appreciating the value of human life requires recognizing and respecting these capabilities; however, it is impossible to understand directly and support the myriad reasons behind others’ actions because there are just too many possibilities. Thus the best way to respect others is to treat them according to principles they could not reasonably reject (*WWO* 105-6). Acting this way enables one to develop a relationship that Scanlon refers to as “mutual recognition,” and achieving this relationship has great value

²⁵ *What We Owe to Each Other*, 17-18; *Being Realistic About Reasons*. It is important to note the difference between Scanlon's being a realist about reasons and his being a constructivist about moral principles. For Scanlon, moral principles are not independent "entities." They are constructed from reasons and other facts using the contractualist procedure.

²⁶ "Précis of "What We Owe to Each Other", " *Philosophy and Phenomenological Research* 66, no. 1 (2003).

because of the need to live in harmony with others (*WWO* 162, 168). This value also explains why failure to be moved by moral considerations is viewed as an especially significant shortcoming, one which is different from cases in which people simply do not share others' interests. Lack of moral concern is a failure to see the need to justify one's behavior to those affected, and this is equivalent to a failure to recognize others' value as persons (*WWO* 104-106, 158-59).

Scanlon further argues that when moral wrongness is characterized in this way, it bears the appropriate relationship to people's first-order moral beliefs because actions that they believe to be intuitively wrong are also wrong according to this account. He points out that, at the same time, this characterization of wrongness is sufficiently removed from these beliefs, thus allowing the possibility that some of our beliefs are in error. Finally, this account describes judgments of right and wrong as judgments about reasons that can be correct or incorrect and that can be assessed through familiar forms of thought. In summary, Scanlon argues his account best addresses questions about how moral judgments are made and why people respect them and act accordingly (*WWO* 3-4).

4.5. Observations: My purpose in reviewing these three constructivist theories is both to describe the nature of constructivism and to select a constructivist theory for a detailed investigation to determine if such theories can deliver their promised effectiveness. Such a project requires a theory that has broad scope, a strong justification story, and delivers credible moral principles for its intended domain. I believe Scanlon's theory best suits this purpose.

The attractiveness of Scanlon's theory lies in its use of the concept of reasonable rejection. The quality of human lives depends, in large part, on relationships with others; and a central concern of morality is the nature of these relationships. The idea of reasonable rejection

provides a way to recognize the importance of others by determining if proposed actions are acceptable to them. At the same time, it provides an overarching reason to live according to principles identified using this concept.

Scanlon's theory also compares favorably with the other contractualist theories. Regarding scope, it addresses morality as applied to our interactions with others. This scope lies between those of Rawls's and Korsgaard's theories. On the narrow end, Rawls focuses on the basic principles for a political society; on the wide end, Korsgaard intends to illuminate all practical reasons. Although his scope is narrower than Korsgaard's, Scanlon's morality of "what we owe each other" deals with an extremely important, large, and complex part of morality which covers the interactions that lie at the core of morality. Investigating whether his theory makes intelligible the nature of moral judgments, generates moral principles objective enough to provide guidance, and explains the way moral judgments influence actions will confirm whether a constructivist moral theory can be efficacious.

In the realm of justification, I contend that Scanlon's arguments are more convincing than those made by Korsgaard. A crucial part of Scanlon's justification is that people have reason to appreciate the value of human life and that they demonstrate that appreciation by being aware of the interests of others in treating them in ways they could not reasonably reject. Basing morality on this kind of value seems more in line with most people's understanding about their reasons for acting morally than does Korsgaard's view that people need to constitute themselves as unified individuals.

Finally, I believe that the procedure outlined by Scanlon can provide a more comprehensive set of moral principles than Korsgaard's theory that relies on Kant's categorical imperative procedure. According to Scanlon, moral judgments are based on multiple

considerations including welfare, fairness, choice, and responsibility. The procedure of reasonable rejection allows one to consider which of these reasons are applicable and their level of importance to the interests of the relevant parties. Such a procedure mirrors the way moral decisions are made, and it promises to provide a better way of making tradeoffs than does a theory based on the categorical imperative.

At the same time, it must be recognized that critics have identified concerns about Scanlon's theory. The first is whether the criterion of reasonable rejection when used to provide justification to others can specify moral principles as the theory intends. The most fundamental criticism is that it is unnecessary because justifiability does not, in fact, represent the underlying reason that certain actions are immoral. Rightness or wrongness is caused by certain properties of the actions themselves; thus, the procedure adds nothing. Next, even if one grants that the concept of justification to others is meaningful, one must still address criticisms that the procedure cannot deliver substantive moral principles in all relevant situations. Two of these situations involve the aggregation of benefits across individuals—the aggregation problem—and certain cases in which different groups subjectively assess reasons—the relativism problem.

A second concern is whether contractualism provides the normativity expected from a sound moral theory—whether everyone ought to act according to the principles the theory determines. For contractualists, who are motivated to act morally, the issue is whether contractualist principles provide strong enough reasons for action when the contractualist is faced with conflicting demands from other important values such as one's own welfare or the welfare of one's family. For those who are not motivated to act morally, the issue is what, if any, standing contractualist principles have. And, finally, there are questions about the relationship between contractualists and those who subscribe to different moral theories.

Concerns about the effectiveness of Scanlon's procedure are considered in Chapter 3 while concerns about normativity are covered in Chapter 4. Chapter 5 then provides a summary assessment of the theory's effectiveness.

Chapter 3

The Contractualist Procedure for Determining Moral Principles

The concept of ‘justifiability to others’ based on ‘reasonable rejection’ is critical to Scanlon’s theory. It is responsible for both the content of moral principles and the reason why agents should act according to these principles. Whether this concept can, in fact, fulfill both of these roles is the key to contractualism’s success as a moral theory. In this chapter, I examine the first of these roles in which moral principles are determined by agents making judgments about whether a proposed principle could be reasonably rejected by the parties it affects.

This analysis will assess three major criticisms of Scanlon’s contractualist procedure. The most general criticism is that basing principles on justifiability to others is redundant and adds little or nothing to our understanding of morality. Certain properties of actions themselves such as unfairness, cruelty, or dishonesty are what make actions moral or immoral; judgments about which principles are reasonable merely rely on preexisting intuitions about these properties. My argument is that the concept of justifiability is not redundant because it determines which characteristics of an action are valid reasons for assessing its moral status; it plays a critical role as a source of moral motivation; it provides a “back-stopping” reason for acting morally in certain cases; and the procedure does not simply rely on previous moral intuitions. Thus, the concept does determine moral principles in a meaningful way.

However, even if this general criticism can be countered, one must also respond to charges that contractualism cannot generate the required moral principles in cases where the aggregation of benefits or harms across individuals is important—the *aggregation problem*—and cases in which reasons and the importance accorded to them vary by agent—the *relativism problem*. I agree with many critics and argue that situations involving aggregation pose a

dilemma for contractualism. The theory's emphasis on an *individual's* objections to principles prevents inappropriate aggregation where small benefits to many should not outweigh major harms to a few; however, contractualism is unable to specify acceptable principles in the kinds of cases where aggregation is appropriate. I also argue that contractualism is susceptible to objectionable relativism in certain complex situations. Here, contractualism still provides a useful framework for identifying the reasons that are relevant and the conflicts among them that must be considered in making moral judgments. However, conversely, agents will not necessarily agree on the nature and weighting of the reasons involved, and thus the procedure will not yield objective moral principles in certain situations where Scanlon argues that it does.

This chapter is divided into four sections: 1) The contractualist procedure for justifying principles, 2) Is the concept of justifiability redundant? 3) The problem of aggregation, and 4) The problem of relativism.

1. The Contractualist Procedure for Justifying Principles

Scanlon's goal for contractualism is to provide an account of one's obligations to others, a domain he refers to as "the morality of right and wrong" or "what we owe to each other" (*WVO* 6-7). This domain includes, for example, requirements to aid others and prohibitions against harming, killing, coercing, and deceiving. According to Scanlon, judgments about right and wrong are "judgments about what would be permitted by principles that could not reasonably be rejected by people who were moved to find principles for the general regulation of behavior that others, similarly motivated, could not reasonably reject" (*WVO* 4).¹

The contractualist procedure for making such judgments involves many factors. Understanding it requires examining Scanlon's views on reasons, how judgments of reasonable rejection are made, and several key characteristics of the system that shape and constrain these judgments.

1.1. Reasons and judgments of reasonableness: According to Scanlon, a reason is "a consideration that counts in favor of" a judgment-sensitive attitude. Examples of judgment-sensitive attitudes are beliefs, anger, admiration, respect, and other evaluative attitudes. The judgment that there is (or is not) reason to reject a proposed moral principle is an example of a judgment-sensitive attitude. When a person makes a conscious judgment that a certain attitude is warranted, she generally comes to hold this attitude. When she judges that reasons count against a certain attitude, she generally does not adopt that attitude. And, although persons can form attitudes unreflectively, the attitudes they form this way are generally constrained by standing

¹ Scanlon explains his choice of a criterion of 'reasonable rejection' over one of 'reasonable acceptance' as follows: There may be cases where certain self-sacrificing people feel it is "reasonable" to accept burdens for "the good of all" even when there are alternative principles under which no one would have to accept such burdens. At the same time, it wouldn't be "unreasonable" for them to refuse, so the principle is called into doubt. Thus reasonableness of rejection is the better criterion for morality. See Scanlon's "Contractualism and Utilitarianism," *Oxford readings in philosophy* (1998).

judgments about the adequacy of reasons. For example, if an individual holds that certain kinds of evidence are not good grounds for forming beliefs, she generally does not unreflectively form beliefs on the basis of that evidence (*WWO* 18-24).

Scanlon considers his idea of reasonableness to be aligned with common notions of this concept. What is or is not reasonable is relative to a specified body of information and a specified range of reasons, both of which may be incomplete. The reasonableness of a belief or action is assessed relative to an agent's beliefs at the time and the reasons she sees as relevant, and Scanlon gives several familiar examples of ways in which an agent's judgment that something is reasonable can be challenged. For example, one may object that a careful person would have noticed certain missing information or that it was obvious that she should have searched more diligently for further data. One might also object to the way a person draws conclusions from certain information or to the information she judges to be relevant. In the context of collective decision-making, unreasonable usually means failing to take others' interests into account given the aim of reaching an agreement, and this type of judgment is particularly relevant to the moral judgments that define contractualism (*WWO* 32-33).

Scanlon believes judgments about what reasons are relevant to a given type of judgment are consistent across different individuals. This uniformity depends on two factors: the existence of an objective method for determining reasons and the fact that reasons judgments are universal. He characterizes the process of identifying reasons as "one of bringing one's particular judgments about reasons and one's general principles about when something is a reason into reflective equilibrium."² Reflective equilibrium is a coherence method for justifying evaluative principles and theories; it is the method Rawls uses in justice as fairness to validate the

² *Being Realistic About Reasons*, 102. This method for determining reasons is also discussed in *WWO* 64-72.

conditions of the original position and the resulting principles of justice (*TJ* 41-45). According to Scanlon, one determines what reasons one has through a “process of careful reflection” that includes thinking about what appear to be good reasons, identifying the general principles that explain them, considering the implications of these principles, and assessing the plausibility of these implications. This process is related to the type of judgment-sensitive attitude an agent is considering making, and the content of that attitude provides a starting point in identifying the kinds of considerations that could count in its favor.

Scanlon uses the example of a person who thinks the only reasons to preserve natural objects such as forests and canyons are ones related to the enjoyment and benefits they bring to people. In considering whether this position is correct, the person notes that many disagree with this view and asks herself whether she is considering natural objects in the proper way. To do this, she identifies the reasons others have and explores how these differ from her own and whether the grounds for these reasons are sound. For example, she observes that some persons value nature because it is God’s creation, but she rejects this as a valid reason because she cannot justify the religious belief on which it rests. The person also investigates reasons associated with specific cases. For instance, it seems objectionable to cut down a specimen tree for no other reason than the enjoyment of using a chain saw. This kind of observation raises questions about the specific considerations that count against defacing nature and whether these new considerations can be reconciled with the person’s original views. If they cannot, the person might then modify her original way of characterizing the value of natural objects. Ideally, these kinds of explorations will result in the identification of the most coherent and complete account of what reasons there are for the situation in question.

Turning to cases involving moral judgments, contractualism's goal of finding principles that others could not reasonably reject brings into play reasons such as considering the interests of those who might be affected by the resulting actions. One can then examine these reasons from different perspectives. For example, if it seems a principle should be rejected because it treats some people arbitrarily, one might consider the specific characteristics of the situation that lead to this conclusion, how these conditions compare to those in other "arbitrary" situations, one's general views about what constitutes "arbitrariness," and why it is an undesirable element in a moral principle.

Scanlon admits that this account of how reasons are known lacks the precision and clarity of mathematical reasoning. But he argues that, after diligently applying this process and correcting perceived errors, the judgments that result are generally stable. He further notes that there is also considerable consensus about what constitutes good reasons in different situations. Thus, he claims that judgments about reasons can be correct or incorrect (*WVO* 67-8).

The second factor in the consistency of reasons judgments is what Scanlon terms "the universality of reason judgments." According to this principle, any judgment an agent makes about her own reasons entails claims about the reasons that others have under relevantly similar circumstances. Scanlon uses the example of Jane who sees her neighbor shoveling the snow from his driveway. He is already tiring and has a lot more shoveling to do. Jane takes his need for assistance as a reason for her to go out and help him. Even if they are not explicit to Jane, there are certain features of her neighbor's situation and her own that cause Jane to conclude she has a reason to help. Let G be this set of factors. Because Jane accepts the judgment that, given G, she has reason to help her neighbor, she is committed to the view that another person who stands in relationship G to someone needing help has reason to provide it. This principle of universality is

not a moral principle, and it leaves open which kinds of considerations count. For example, if reasons are based on subjective conditions like desires (a claim that Scanlon denies), then these conditions are simply part of G. “The universality of reason judgments is a formal consequence of the fact that taking something to be a reason for acting is not a mere pro-attitude toward some action, but rather a judgment that takes certain considerations as sufficient grounds for its conclusion” (*WWO* 74).

Thus, according to Scanlon, there is a generally objective process for determining what reasons an agent has and judgments that an agent makes about her own reasons apply to other agents facing the same considerations. These two factors generally ensure that different agents agree on the reasons that apply in a given situation. Agents can then use these reasons to make judgments about which moral principles cannot be reasonably rejected, as will be described next.

1.2. Judgments of reasonable rejection: Under contractualism, valid moral principles are ones that cannot be reasonably rejected. To determine whether it is “wrong to do act-X in circumstance-C,” one must consider whether *any* principle that permitted X could be reasonably rejected. This is done by comparing the objections to *permission* with the objections to *prohibition*. Objections are based on the reasons that affected parties have for rejecting a principle that permits X in C; and, conversely, the opposing principle that forbids X. If the objections to permission are stronger than the objections to prohibition for any principle that permitted X, then it would be reasonable to reject those principles permitting X, and the action X would be wrong. Alternatively, if there were a principle that permitted X that it would not be reasonable to reject, then doing X would not be wrong (*WWO* 195).

Scanlon’s “Rescue Principle” provides an example of how this process works. It states: “if you are presented with a situation in which you can prevent something very bad from

happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so" (*WWO* 224). This principle cannot be reasonably rejected because the burden on the rescuer of the principle requiring rescue is lighter than the burden on the person being rescued if one considers an opposing principle under which rescue is optional. In order to make the respective burdens align in this way, the Rescue Principle must assume that the threshold of sacrifice considers previous contributions to avoid requiring unlimited sacrifice that occurs in small increments. In contrast, a principle requiring rescue could be reasonably rejected if it were less narrowly drawn so that the sacrifices required were unlimited. For example, someone reasonably has an obligation to help a driver who accidentally crashes into a tree on her property. However, if that person lives next to a dangerous blind curve and crashes occurred every day, she cannot be expected to assume total responsibility for rescue efforts. The state should assume some of the responsibility, and it has an obligation to warn drivers and install safety rails to prevent recurring crashes.

Along the same lines, it would also be reasonable to reject a principle that required an agent, in every decision she makes, to give no more consideration to her own interests than to others' interests because such a principle would be intolerably intrusive from the agent's standpoint. This conclusion is not reached by giving special weight to a single agent's interests; rather, it is based on the generic reason that no one in the position of an agent should be bound, in general, by such a strict requirement. Thus, impartial reasoning about the rejectability of principles leads to the conclusion that agents are not required to be impartial in each actual decision they make (*WWO* 224-25).

These examples illustrate Scanlon's view that principles are general conclusions about the status of various kinds of reasons for action. Sometimes principles rule out certain actions

directly, but they often leave wide room for interpretation (*WVO* 199). In applying the Rescue Principle, judgment is needed to determine whether the sacrifice required is, in fact, moderate relative to the harm avoided by the rescue. Just how much sacrifice is reasonable to expect is a controversial issue. For example, Elizabeth Ashford argues that under contractualism it would be reasonable to make a great sacrifice to prevent something very bad from happening to someone. She points to the number of destitute people in the world as evidence that this sacrifice could include “giving most of our income to aid agencies and spending a lot of our spare time on campaigning and fund raising.”³ Clearly, Ashford believes a much higher level of sacrifice can be warranted than Scanlon does; nonetheless, both are making judgments that they consider reasonable. Also, both of these judgments appear to comply with Scanlon’s definition of a reasonable judgment; both philosophers presumably have similar views of the burdens involved for the various parties and neither’s judgment is “unreasonable” in the sense that it is irrational or based on obviously incomplete information. This kind of situation raises questions about whether different agents do, in fact, reach similar conclusions about what principles are justified, a topic that is examined in Section 4 of this chapter.

Despite what is “reasonable” being open to some interpretation and the fact that the idea of “reasonableness” seems more obscure than the idea of “rationality,” Scanlon argues that reasonableness is a more appropriate criterion for moral judgments based on the implications of these two terms. He notes that “the (most) rational thing to do” is commonly taken to mean “what most conduces to the fulfillment of the agent’s aims.” In contrast, what is reasonable for a person to do presupposes an overall context for the judgment, certain information, and certain relevant reasons in order to make a claim about what these reasons support. For example, the

³ Elizabeth Ashford, “The Demandingness of Scanlon’s Contractualism,” *Ethics* 113 (2003): 287.

goal of Scanlon's theory is to find principles that others could not reasonably reject. This goal brings further reasons into play, such as considering the interests of those who might be affected by one's actions, which finally leads to questions about the best way to respond these varying interests (*WWO* 192).

Scanlon maintains that the difference between what is reasonable and what is rational is a familiar distinction in ordinary language. He illustrates this with an example involving a negotiation about water rights in an area where one large landowner already controls most of the water. The landowner does not need to cooperate and what he does will largely determine the outcome of the negotiation. It would not be unreasonable to maintain that each person is entitled to at least a minimum supply of water and to reject any principle of allocation that does not provide this. However, it might not be rational to propose this allocation if the landowner is irritable and one knows such a demand will cause him to act negatively. Similarly, it is common to say that the landowner would be unreasonable to reject the request for the guarantee of a minimum water supply to the other parties. However, what it would be rational for him to do depends on what his aims are. Given this distinction, Scanlon believes it is appropriate to base contractualist moral principles on whether objections would be reasonable rather than on whether they are rational. In the water case, this is a judgment about the merits of the claims of the small landowners for a minimum amount of water, which is a judgment about the suitability of certain principles to serve as the basis of mutual recognition and accommodation. It is not a judgment about what would advance their interests or produce an agreement in either an actual or idealized situation (*WWO* 192-94).

1.3. Other key characteristics of contractualism: Finally, it is important to consider several other characteristics of contractualism that guide the way moral judgments are made. It

has already been noted that *principles* are general conclusions about various kinds of reasons for actions that may rule out some actions directly but often leave wide room for interpretation and judgment. In determining principles, Scanlon takes a broad view of the “others” to whom actions must be justifiable. One must consider not only the impact of the specific action in question but also the consequences of the general adoption of the principle being considered. Thus, an agent needs to consider possible objections to principles of all parties potentially affected by the type of action in question. Because the specific individuals who may be affected are not known, these objections must be based on *generic reasons* which consist of commonly available information about what people have reason to want (*WVO* 202-4). Identifying all the affected parties and their reasons may appear to be a daunting task; however, because reasonable rejection is determined by comparing only the parties who have the strongest objections, there is usually little difficulty in identifying which objections need to be considered.

Unlike many consequentialist theories, the types of reasons on which principles are based *go beyond well-being* and include reasons like not wanting to be treated arbitrarily or the responsibility that a person has for the outcome. An individual can object to a process that makes distinctions for which no justification can be given because she does not want to be subject to arbitrary treatment.⁴ For example, it would be arbitrary to grant financial benefits based solely on personal relationships. By contrast, it is not arbitrary to aid someone with special needs or to ask a person to perform a dangerous but necessary task because she has the unique skills required. Or, considering responsibility, someone who has been warned not to perform a dangerous action but does so anyway may lose her standing to object to the harm she suffers, assuming the nature of the warning was appropriate to the danger involved.

⁴ T. M. Scanlon, "Reply to Gauthier and Gibbard," *Philosophy and Phenomenological Research* 66, no. 1 (2003): 183.

Finally, because contractualism is based on the idea of justifying one's actions to other individuals, Scanlon specifies that the reasons involved in objecting to principles must be *personal* and *non-aggregative*. The reasons must be personal because they reflect the claims of individuals in certain positions. These claims cannot be based on impersonal reasons alone, like the general value of preserving nature. Scanlon argues for this restriction because contractualism is focused on the domain of morality that involves "what we owe to each other," and impersonal reasons do not represent a concern about other people. Nonetheless, these kinds of reasons can provide grounds for reasonable rejection based on, for example, the benefits enjoying nature provides to specific individuals (*WVO* 219). Similarly, because contractualism focuses on relationships among individuals, the grounds for reasonable rejection are limited to objections that can be made by single individuals, and benefits or harms accruing to multiple individuals cannot be aggregated to increase the weight of an objection. Because there are situations where common moral intuitions support the aggregation of benefits, this is a controversial topic which is analyzed later in this chapter.

At this point, having examined how moral principles are determined under contractualism, I next consider the critics' main objections about the effectiveness of the contractualist procedure.

2. Is the Concept of Justifiability Redundant?

A central objection to Scanlon's use of justifiability to others to determine moral principles is that the concept is redundant. Critics claim that the properties of actions used to argue for and against proposed principles determine whether an action is right or wrong independent of the concept of justifiability. Further, in making judgments about which principles it is reasonable to reject, agents must rely on previously-held moral intuitions of right and wrong. After elaborating these objections, I will argue that, when understood correctly, Scanlon's use of justifiability to others to determine moral principles is not redundant.

2.1. Objections elaborated: According to critics, a fundamental weakness of Scanlon's contractualism is that justifiability to others does not, in fact, represent the underlying reason that certain actions are immoral. Rather, rightness or wrongness is determined by certain properties of actions themselves. For instance, Philip Pettit writes:

He [Scanlon] starts from the assumption that we can and often do identify right actions by identifying actions that we can justify in his sense to others. He moves then to the claim that rightness is nothing more or less than justifiability of this kind. But in making this claim, he neglects the fact that when we try to justify certain actions to others we do not try to establish that they are ...well, actions that we can justify to others. We try to establish that the actions are right in some independent sense of right and that, for precisely that reason, they are justifiable. Specifically, we try to establish that they are right by showing that they are fair or kind or for the general good, or whatever. The very linkage between justifiability and rightness suggests...that rightness must be characterized in a justifiability-independent manner.⁵

In effect, Pettit's critique holds that using moral properties like cruelty or unfairness to determine what principles can be justified adds little to an understanding of morality. Thus, the concept of justifiability is unnecessary or redundant.⁶

⁵ Philip Pettit, "Doing Unto Others," *Times Literary Supplement*, June 25, 1999, 8.

⁶ For other accounts of this kind of criticism, see "Two Construals of Scanlon's Contractualism," *Journal of Philosophy* 97 (2000). Gerald Dworkin, "Contractualism and the Normativity of Principles," *Ethics* 112, no. 3 (2002); David Gauthier, "Are We Moral Debtors?," *Philosophy and Phenomenological Research* 66, no. 1 (2003); Allan Gibbard, "Reasons to Reject Allowing," *ibid.*; Colin McGinn, "Reasons and Unreasons--What We Owe to Each Other," *The New Republic*. (1999); Joseph Raz, "Numbers, with and without Contractualism," *Ratio* 16, no. 4 (2003).

Additionally, some critics charge that Scanlon does not provide sufficient guidance on how to make a judgment of reasonable rejection. Scanlon's notion of reasonableness is not based on any type of non-moral criterion; rather, the reasonableness of a principle is a judgment about the moral relevance and importance of the reasons for and against that principle. According to these critics, what is moral should depend on a non-moral judgment—such as the utilitarian criterion of maximizing overall welfare. In the absence of non-moral criteria, an agent's judgment will depend upon or be influenced by previous moral intuitions. According to Brad Hooker,

At least in Rawls's system, it was clear that the parties in the original position do not *themselves* appeal to moral intuitions when choosing principles. The charge against Scanlon is that we can make his contractualist principle come out with the intuitively right conclusion only if, when we try to operate his contractualist test, we fall back on moral intuitions that have not yet been validated by that test. Scanlon's views about reasonable rejection must *not* presume the very thing they are being invoked to explain (namely, conclusions about right and wrong).⁷

Here Scanlon's test is viewed as presupposing what it tries to explain.

In response to these kinds of objections, I believe Scanlon's procedure can be defended on three grounds: 1) The procedure shapes moral thinking and picks out the properties that make actions wrong; 2) justifiability can explain why the contractualist is motivated to act morally and also acts as a "backstop" reason in certain situations; and 3) the procedure for making a judgment of reasonable rejection adds to moral understanding and does not simply rely on previous moral intuitions.

2.2. Ground One: Shapes moral thinking: Scanlon can acknowledge that agents often determine the morality of actions from first-order properties while still arguing that the notion of

⁷ Brad Hooker, "Contractualism, Spare Wheel, Aggregation," in *Scanlon and Contractualism*, ed. Matt Matravers (London; Portland, Or.: Frank Cass, 2003), 58.

wrongness, defined as justifiability to others, plays an important role in moral thinking.⁸ In many complicated cases, the idea of wrongness described by justifiability often shapes the way an agent thinks about morality and determines which considerations should be taken as valid reasons for accepting or rejecting principles.

Scanlon uses as an example the moral principle “if I could easily prevent someone standing nearby from being injured, I should do so,” and the case of a guard who has been hired for protection. While guarding his client, he sees a third person in danger of being injured by a criminal. Normally, the right thing to do would be to help the person who is being attacked; but, in this case, it might be wrong for the guard to aid the third person because he would be leaving his own client exposed. The idea of “justifiability to the client” makes it the case that injury to the other person is not a conclusive reason for action in the way it would be absent the client’s presence. At the same time, the guard must still consider “justifiability to the third person” to determine what is, in fact, the right action given the risk of harm to each. The consideration of how his action would be justifiable to each of the affected parties and which party would have a stronger reason to reject his proposed action provides a way for the guard to determine the correct action. Many moral situations involve this kind of assessment of competing reasons, and the concept of justifiability provides a way to make such judgments.

Furthermore, characteristics like ‘harm’ do not automatically make actions wrong; they must be put in the context justifiability provides. For example, everyone agrees that avoiding death and injury is a good thing; however, not every action that leads to someone’s death or injury is wrong. What is often at issue is the right way to act and the amount of care required to

⁸ Scanlon discusses the relationship of justifiability to first-order reasons like cruelty in T. M. Scanlon, “Wrongness and Reasons: A Reexamination,” in *Oxford Studies in Metaethics, Volume 2.*, ed. Russ Shafer-Landau (Oxford, GBR: Oxford University Press, UK, 2007). There is also a discussion of this relationship in *What We Owe to Each Other*, 155-58.

avoid injury in situations that inherently involve risk. Consider the example of an individual who needs to remove hazardous material from her property. Working with the authorities, she fences off the property, installs warning signs, and mails notifications to nearby residents about the timing and danger of the removal process.⁹ If someone is still unaware of these precautions, wanders onto the property, and is injured, the owner has done nothing wrong if the precautions are appropriate for the situation. The greater the danger, the more comprehensive the precautions need to be. The test of justifiability to others can be used to determine what level of care is appropriate. It provides a framework to compare the potential harms to different parties and to determine what level of risk is reasonable for the various parties to bear.¹⁰

Consistent with this role, contractualism provides a two-level account of wrongness. On the surface, there are the observed properties of specific actions that count for or against their moral permissibility, such as the harm or benefit the action causes others. But contractualism then offers another, deeper level explanation of *why* these properties count in favor of, or against, moral rightness based on the various reasons for which the action can, or cannot, be reasonably rejected.¹¹ Furthermore, in cases where the morality of an action is not obvious from its characteristics, the contractualist procedure can be used to determine the action's moral status.

The concept of justification is also what gives actions their moral character. The reasons used in making judgments of reasonable rejection are generally based on an action's effects which, by themselves, do not necessarily have moral force. This force is explained rather by the fact that someone affected negatively has the strongest reason to object to the action. For example, cruel acts cause physical or psychological damage, and this harm provides the reason

⁹ This example is based on Scanlon's more complicated example in *WVO* 256-58.

¹⁰ Scanlon, "Reply to Gauthier and Gibbard," 184.

¹¹ Hooker, 60-61.

for people to object. The success of this objection is what gives the action its moral character, rendering it a 'cruel' one. In contrast, amputating someone's leg causes considerable physical damage, but one cannot object if its aim is to save the person's life. Because the reason for objection (harm) is not intrinsically moral, the procedure is not redundantly using moral inputs.¹² One might make a rough analogy to Hume's view that it is an observer's response of approval or disapproval to an action that gives the action a virtuous or vicious character. Lacking the observer's reaction, it is impossible to determine the moral status of the action. In contractualism, it is the fact that an action can be reasonably rejected that makes it wrong—the concrete properties of the action alone are not sufficient. Hume points to a subjective factor to explain moral status whereas contractualism points to a person's reasons for objecting, a more objective criterion.

2.3. Ground Two: Better explains normativity and provides backstop reason:

Justifiability is also needed to explain normativity because first-order properties alone cannot account for why morality is accorded such a high priority in determining actions. Christine Korsgaard makes this point when she writes:

For even if we know what makes an action good, so long as that is just a piece of knowledge, that knowledge has to be applied in action by way of another sort of norm of action, something like an obligation to do those actions which we know to be good. And there is no way to derive such an obligation from a piece of knowledge that a certain action is good. A utilitarian thinks an action is good because it maximizes good consequences.... But how is it supposed to follow that it is to be done?¹³

Said differently, just knowing that an action is 'good' does not explain why we have a duty to perform it. Justifiability, however, can explain the source of this obligation. Scanlon argues that living according to principles that could not be reasonably rejected is the best way to respect the

¹² Jussi Suikkanen, "Contractualist Replies to the Redundancy Objections," *Theoria* 71, no. 1 (2005): 44-46.

¹³ Korsgaard, "Realism and Constructivism in Twentieth-Century Moral Philosophy," 111.

value of human life. Appreciating this value involves recognizing the human's capacity to assess reasons and to govern her own life. Since it is impossible to respond to all the choices people make, the best way to deal with this problem is to treat others according to principles they could not reasonably reject. Acting in this manner allows people to develop relationships of "mutual recognition"—relationships that are worth seeking because people need and receive value from social interactions (*WWO* 104-6, 162). (This is a brief summary of Scanlon's argument for the normativity of contractualism; it is examined in detail in Chapter 4.)

The desire to develop relationships of mutual recognition also enables justifiability to play a "backstop role" by providing a direct reason not to perform an action when the individual characteristics of that action are insufficient to provide reason to act morally. For example, Susan can hire either Ann, a talented and well-recommended stranger, or her friend who is an acceptable but less qualified candidate. Susan believes that the right thing to do is to hire Ann because friendship is not relevant to performing the job and a decision to hire her friend could not be justified to Ann. Nonetheless, the desire to help her friend is a strong personal reason for Susan to act against this judgment. In this case, the idea that hiring her friend would be wrong provides Susan an additional reason to hire Ann because she wants to live up to the ideal of acting morally.¹⁴ In cases like this, an agent has reached the conclusion that an action would be wrong but is tempted to pursue it anyway. The agent must ask how much weight should be given to the fact that this action would be wrong, and this question itself becomes a reason that counts against the action (*WWO* 157).¹⁵

¹⁴ The conflict between the demands of impartial morality and those of personal relationships will be examined in detail in Section 1 of Chapter 4.

¹⁵ See also: Scanlon, "Wrongness and Reasons: A Reexamination."

Finally, justifiability is sometimes needed to make another person's reasons the agent's own reason for acting or not acting. Michael Ridge makes this point using the example of a person whose project is to be a world-class chess player and an agent who is considering taking the chess player out for drinks even though she knows the player is a recovering alcoholic. The chess player has an agent-relative reason to object to this action on the grounds that it would frustrate her efforts to excel at chess. However, without some further linkage, this reason is not a reason for the agent because it has no effect on the agent's own projects. This link is provided by the agent's need to justify her actions to others which makes the chess player's reason for objecting one that the agent must consider. The reason by itself (the fact that going drinking will block the chess player's project) does not explain why the agent's action is immoral. It is the combination of this reason plus the agent's need to justify her actions that leads to the moral judgment that this action would be wrong. Thus, justifiability provides a way to consider other people's agent-relative reasons when making moral judgments.¹⁶

2.4. Ground Three: Does not merely rely on previous intuitions: Critics, as we have seen, are also concerned that contractualism does not provide enough practical guidance on how judgments of reasonable rejection should be made. Thus, these judgments are overly reliant on previously formed moral intuitions which makes contractualism a form of intuitionism. In responding to this concern, Scanlon argues that moral judgments are too diverse and complex to identify a small number of moral criteria and specify how they should be applied in a way that would cover all cases. He recognizes that a judgment of what is reasonably rejectable is a moral judgment because it presupposes certain reasons and their weightings are morally relevant.

¹⁶ This aspect of contractualism is discussed in detail in Michael Ridge, "Saving Scanlon: Contractualism and Agent-Relativity," *JOPP Journal of Political Philosophy* 9, no. 4 (2001).

However, he argues that contractualism provides sufficient guidance while respecting the complexity of moral judgments.¹⁷

This guidance is provided in several ways. First, the contractualist procedure places certain limits on the types of considerations permitted as grounds for reasonable rejection. As discussed in Section 1 of this chapter, Scanlon specifies that reasons must be personal, generic, and non-aggregative. They must be personal because the contractualist idea of justification implies that relevant reasons depend on how principles directly affect other people. They must be generic because conclusions about principles apply to a class of situations rather than a single case. And they must be non-aggregative because contractualism is designed to protect the rights of individuals. Scanlon does this by specifying that judgments of reasonable rejection must be made by comparing the objections of the various individuals affected by the proposed principle; objections cannot include the aggregation of benefits or harms across multiple individuals.¹⁸ Additionally, relevant considerations are not limited to well-being but include such factors as the desire for outcomes to depend on one's choices, the objection to being treated arbitrarily, and the feeling that one's central interests are being taken into account. These types of considerations shape our moral judgments and place limits on the role of mere intuition.

In replying to the charge that judgments of reasonable rejection rely too much on intuition, it is important to appreciate the distinction between the judgments Scanlon makes in specifying how the overall contractualist procedure is to be applied and the judgments agents make within the theory about whether proposed principles can be reasonably rejected. The acceptance of theory-level specifications like the requirements that relevant reasons are not

¹⁷ Scanlon, "Reply to Gauthier and Gibbard," 180-81.

¹⁸ Moral judgments involving the aggregation of benefits or harms are examined in detail in the next section.

limited to welfare-related ones and that reasons cannot be aggregated is based on an agent's judgment that contractualism, as a whole, is the most best moral theory for her purposes. This judgment clearly has moral content as does the judgment to accept any moral theory. The key question is how much intuition is subsequently involved in making moral judgments within the theory once these theory-level judgments are accepted. Here Scanlon argues that the theory provides a sufficient level of guidance to distinguish judgments within the theory from previously held intuitions even though these judgments admittedly involve some moral content.

Second, it can be argued that the contractualist procedure for selecting and comparing reasons provides meaningful standards for making moral judgments because comparisons among reasons are criticizable and thus are not simply based on intuitions.¹⁹ An agent must have sufficient information about the effect of proposed principles. Reflection is required to identify all who will be affected and what harms or benefits will result if the principle is approved. Such judgments are not based on intuition and thus they can be criticized on an informational basis. For example, under the Rescue Principle described previously, consider a situation where frequent high-cost rescues are required due to irresponsible behavior of the persons needing rescue. The burdens on the rescuer may be so intrusive that they would conflict with her ability to make decisions about her own life, and this would permit her to make a reasonable objection to a version of the Rescue Principle that allowed this to happen. An agent who did not consider these kinds of consequences in making a judgment about a principle could be criticized. Simply put, there are standards that an agent must meet in making a valid judgment of reasonable rejection.

¹⁹ Suikkanen, 47-50.

Furthermore, the framework of Scanlon's theory of practical reason is more complicated than many critics acknowledge. The process of comparing reasons is not simply a matter of applying weights to each reason and generating a psychological weighting among the given objections. Rather, in certain situations, one reason may "silence" others to the point where they are no longer relevant. Consider Scanlon's case of someone thinking of throwing a party for her friends to "have fun," but just before the party one of the friends is injured in a serious accident. Determining the right thing to do here is not simply a matter of weighing the fun of having the party against the hurt of the accident. Having fun may no longer be a relevant reason. The accident has "silenced" it to the point where it carries no weight at all. This example illustrates that moral reasons can come in holistic frameworks that are by their nature hierarchical. In considering reasonable rejection, one must justify why each party's objections should count as reasons, and consider whether what at first might appear to be good reasons are in fact silenced or modified by other considerations. Once this picture of reasons and objections is constructed, it is still subject to criticism. For instance, one might challenge the strength of the grounds for certain objections or compare them to objections that are raised in similar situations. Like the previous requirement for correct and sufficient information, this requirement for consistency in the framework demonstrates that the contractualist procedure is not simply a matter of applying intuitions about what is right or wrong. Proper application involves a disciplined process that improves the quality of moral judgments (*WWO* 50-55).

Finally, consider a judgment based on the intuition of 'fairness,' which is often cited as the culprit in bringing prior moral intuitions into the contractualist procedure. Scanlon believes this criticism is unwarranted because unfair procedures make distinctions for which no justification can be given. For example, favoring one person simply because of her relationship

to the agent is arbitrary without further grounds. By contrast, giving medicine to a person whose need is greater than another's or assigning someone to a dangerous mission because of her unique capabilities are choices that can be justified. People have reason to object to principles that are unfair not because unfairness is intuitively wrong, but because they do not want to be subject to arbitrary treatment.²⁰ This explanation provides a non-moral criterion for distinguishing what kinds of procedures are unfair, and thus allows Scanlon to argue that the charge of circularity or redundancy in the case of 'fairness' is mistaken.

In summary, this section has argued that judgments about moral principles made by contractualism provide a reasons-based justification for adopting or rejecting principles which goes beyond previous intuitions about what is right and wrong, regardless of whether the judgments align with those intuitions in many situations. The concept of justifiability to others is a substantive one even though the specific properties of actions play a key role in determining what is right or wrong. The concept can thus be said to determine moral principles and it is not redundant. This is an important conclusion in favor of Scanlon's contractualism. However, it is still necessary to investigate the procedure's limits. I will do this by analyzing two problematic situations: the aggregation of harms and agent-based relativism.

²⁰ Scanlon, "Reply to Gauthier and Gibbard," 183.

3. The Problem of Aggregation

The aggregation of benefits or harms across individuals poses a dilemma for contractualism. On the one hand, the theory is designed to reflect the importance of individual rights, and those rights can take precedence over the greater good. Scanlon protects these rights with his *Individualist Restriction*. This restriction limits the grounds for rejecting a principle to its effects on individuals, thus ignoring benefits or harms summed across groups of people. On the other hand, there are situations where moral intuitions strongly place the overall welfare above that of an individual. A favorite philosophical example is a rescue situation in which one must choose between saving one or several persons. The question is whether contractualism can justify saving the many without giving up its basic emphasis on the individual, and whether it can deal with other cases involving similar tradeoffs between group and individual welfare.

Scanlon argues that contractualism can resolve this dilemma to a large extent. But critics doubt that it can, and I argue they are right.²¹ My contention is that a *consistent* application of Scanlon's contractualist procedure rules out principles that allow for the aggregation of benefits or harms, even in cases where aggregation is needed to match generally held moral intuitions. This is not a debate about when the aggregation of benefits is appropriate; rather, it is one about what principles can be justified under the procedure that Scanlon has specified for contractualism.

3.1. The Individualist Restriction: One of contractualism's most attractive characteristics is that it disallows forms of aggregation in which small benefits accruing to many people are claimed to outweigh significant harms suffered by a smaller number by restricting relevant

²¹ See, for example, Derek Parfit, "Justifiability to Each Person," *Ratio* 16, no. 4 (2003); Alastair Norcross, "Contractualism and Aggregation," *Social Theory and Practice* 28, no. 2 (2002); Michael Otsuka, "Scanlon and the Claims of the Many Versus the One," *Analysis* 60, no. 3 (2000).

reasons for accepting or rejecting moral principles to the personal reasons of single individuals. This feature distinguishes contractualism from utilitarianism and other forms of consequentialism. These theories are appealing because they promote attractive values like overall happiness or welfare; however, they sometimes have highly unattractive implications given their goal of maximizing the values they support. In such theories, significant harms to a few can be justified if the total benefits to others are great enough. When the number of others is very large, the benefits to each can be quite small; thus, one individual might face death in return for many others avoiding minor inconveniences.

Scanlon describes how contractualism eliminates this problem:

All the grounds for rejecting a principle that I have so far considered arise from generic reasons that an individual would have who occupied a certain position in the situations to which that principle applies. This suggests what Parfit has called the Complaint Model. On this interpretation of contractualism, 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 (*WWO* 229). [Italics added]

Scanlon notes that he deviates from the Complaint Model in two ways: (1) by allowing a person to reject a principle for reasons beyond well-being²² and (2) by maintaining that grounds for rejection are also shaped by background principles that must be held constant during the evaluation of a new principle. He continues:

These departures aside, the Complaint Model calls attention to a central feature of contractualism that I would not want to give up: its insistence that the justifiability of a moral principle depend only on various *individuals'* reasons for objecting to that principle and alternatives to it. This feature is central to the guiding idea of contractualism, and is also what enables it to provide a clear alternative to utilitarianism and other forms of consequentialism (*WWO* 229).

Thus, contractualism distinguishes itself from consequentialist theories by focusing on the dignity and importance of the individual rather than the overall welfare of society.

Individuals cannot be used as the means to others' ends, and harms to individuals cannot be

²² Calling this a "deviation" assumes that one interprets the Complaint Model as being limited to objections affecting well-being which may not be Parfit's intent.

offset by the aggregation of benefits to many. Scanlon accomplishes this goal by restricting the grounds for rejecting a principle to the effects the principle has on particular individuals; aggregated benefits across individuals do not count as grounds for rejection. Derek Parfit calls this constraint the Individualist Restriction because, “we must appeal to this principle’s implications only for ourselves, or for any other *single* person.”²³ Scanlon characterizes its effect as “allowing the intuitively compelling complaints of those who are severely burdened to be heard, while...the sum of the smaller benefits to others has no justificatory weight, since there is *no individual who enjoys these benefits...*” (*WWO* 230) [italics added].

Consider the case of Jones offered by Scanlon. Jones has an accident in the transmitter room of a television station and is consequently receiving extremely painful electric shocks. A World Cup match is in progress with an audience of millions of people. Should one rescue Jones causing millions of viewers to lose the pleasure of watching the match? Not surprisingly, Scanlon concludes that Jones should be saved, and he proposes what might be called the ‘Minor Harms Principle.’

If one can save a person from serious pain and injury at the cost of inconveniencing others or interfering with their amusement, then one must do so no matter how numerous these others may be (*WWO* 235).

In determining whether this principle can be reasonably rejected, the Individualist Restriction requires a comparison of the harm that Jones suffers with the potential harm incurred by any single member of the larger group. Clearly, this principle cannot be reasonably rejected because no one person in the larger group can claim that the harm of his or her inconvenience outweighs (or even comes close to) the harm that Jones is suffering. In this kind of case, the Individualist

²³ Parfit, 372.

Restriction prevents aggregation—and rightly so. The resulting principle, which requires one to save Jones, also seems to match common moral intuitions.

3.2. The Tiebreaker Principle: The issue for contractualism, however, is how to maintain the Individualist Restriction while still allowing aggregation in cases where it appears to be fully appropriate. To do this Scanlon proposes the Tiebreaker Principle:

Where one has a duty to provide aid and has a choice of preventing *harms of comparable moral importance* to a larger or smaller group of people, one should provide aid to the larger number (*WWO* 238). [Italics added]

Suppose that a rescuer has a choice of saving either one person (referred to as A) or a group of two persons (referred to as B plus C), but cannot save everyone. Also, the fates of B and C are linked; both are saved or lost together. It seems obvious to most²⁴ that the morally correct action is to save B plus C, which is what the Tiebreaker Principle requires. But the question is whether such a principle involving aggregation can be justified in a way that is consistent with the Individualist Restriction. Scanlon agrees that this is a serious challenge and that contractualism “appears to go too far in the opposite direction” (*WWO* 230). But he believes it is still possible to make a case for the Tiebreaker Principle.

The argument leading to the conclusion that aggregation presents an acute problem for contractualism relies on the assumption that the strength of individuals’ complaints against a principle are a function solely of the cost to them of that principle’s being accepted. But, as indicated at the outset of this section, I have already departed from the Complaint Model in this respect, by allowing that individuals’ reasons for rejecting a principle can depend on factors other than effects on their well-being. We should see, then, whether this divergence provides room for an explanation of how what is right can sometimes depend on aggregative considerations (*WWO* 231).

Here, Scanlon points out that the argument against aggregation is based on comparing the costs of adopting a principle to the various individuals who are affected. However, it is also appropriate under contractualism to consider factors other than a principle’s effect on well-being,

²⁴ But not everyone agrees. See, for example, J. M. Taurek, “Should the Numbers Count?,” *Philosophy & Public Affairs* 6, no. 4 (1977).

and Scanlon argues that consideration of these other factors allows for aggregation in certain situations.

Returning to the question of a rescuer's dilemma to save either the single individual (A) or the group (B plus C), Scanlon argues that a member of the group (say C) could reasonably object to a principle that opposes the Tiebreaker Principle because it would allow the rescuer to choose between saving either A or the group (B plus C). That is, C could complain that this principle, by giving the rescuer a choice, does not take account of the value of saving C's life because the principle permits the agent to act *as if* C were not present, in which case the rescuer has a choice to save either A or B. Put another way, the fate of A is obviously given positive weight because the rescuer has a choice of whether to save A or the group (B plus C). The fact that there is one other person, B, who can be saved if and only if A is not saved, is also given positive weight to balance the saving of A. The presence of C, however, makes no difference to what the agent should do.

Scanlon points out that C might object "since his life should be given the same *moral significance* as anyone else's in this situation" [italics added] (*WWO* 232). He goes on to argue, "A principle that did not recognize the presence of the second person [C]... as making a moral difference... could reasonably be rejected" (*WWO* 234). In contrast, A could not make a similar objection to the Tiebreaker Principle which requires that both B plus C be saved. He cannot claim that his life is not taken equally into account because the harm he would incur is offset by the same harm incurred by B. Thus, Scanlon argues that the lives of A and B balance out in the Tiebreaker Principle. And, he concludes that the fact that the life of C has "the same moral significance as anyone else's" makes it reasonable to reject the opposing principle which allows the rescuer to make a choice (*WWO* 233).

In summarizing why he finds this argument for the Tiebreaker Principle compelling, Scanlon writes:

...any principle dealing with cases of this kind would be reasonably rejectable if it did not require agents to treat the claims of each person who could be saved *as having the same moral force*. Since there is, we are supposing, a positive duty to save in cases in which only one person is present, this means that any nonrejectable principle must direct an agent *to recognize a positive reason for saving each person*. Since a second reason of this kind can balance the first—turning a situation in which one must save one into one in which it is permissible to save either of two people—*the reason presented by the needs of a second person in one of these two groups must at least have the power to break this tie*. The principle stated above [which permits the rescuer to choose between saving either the smaller or larger group] fails to meet these requirements and is reasonably rejectable (232). [Italics added]

Let us step back to consider the key elements of the situation: The harm faced by the single person (A) is equal to the harm faced by either of the other two persons (B or C). According to the Individualist Restriction, this comparison results in a tie because only the harms done to single individuals are relevant—the harms of the two persons in the group (B plus C) cannot be added together. At the same time, the “moral significance” or the “positive reason for saving each person’s life” is the same for the single individual as it is for each of the two persons in the group. But from Scanlon’s perspective, the moral significance associated with the second person in the group (C) breaks the tie because “an agent must recognize a positive reason for saving each person.” On this basis, the Tiebreaker Principle cannot be reasonably rejected. Thus, it appears that Scanlon has two contradictory interpretations of how the contractualist procedure should be applied: according to the Individualist Restriction, the harms incurred by B and C cannot be considered at the same time; whereas, for an agent to recognize a reason for saving the second person (C), the moral significance of both B and C must be considered in some way. Which is the correct interpretation?

My view is that Scanlon violates the contractualist procedure and the Individualist Restriction in making his argument for the Tiebreaker. First, his argument requires that one consider the moral significance of the lives of B and C as a “non-welfare-related reason” separate from the harms they would suffer from the loss of their lives. The separate moral significance of C’s life is needed because Scanlon argues that this significance requires the agent to consider the claims of both B and C at the same time. I would argue that the moral significance of a life and the harm caused by the loss of that life are linked together in a way that other non-welfare-related reasons (like arbitrariness or unfairness) and harm are not. To consider the loss of life as a reason for rejecting a principle, there must already be a judgment that the life has some moral significance (as does the loss); otherwise harm would not qualify as a reason that affects a moral judgment. Thus, my first point is that the harm done by the loss of life and the moral significance of the life cannot be separated and should be considered together. If this is right, then Scanlon cannot justify the Tiebreaker Principle by considering moral significance as a separate non-welfare-related reason.

Second, I would argue that even if one agrees that moral significance and harm are separate reasons relevant to the comparison of the various party’s objections, these objections should be considered according to the general contractualist procedure that Scanlon has already prescribed.²⁵ As noted at the beginning of this section, Scanlon points to “generic reasons that an individual would have” in considering grounds for rejection. Moral significance and harm are simply two types of generic reasons. One should compare A’s reasons to object to the Tiebreaker

²⁵ Note that in the descriptions of the Complaint Model previously quoted, Scanlon and Parfit say a complaint must be based on “a principle’s effects on him or her,” “individuals’ reasons for objecting,” and “the principle’s implications.” They do not seem to make any distinction between ‘harm’ and other reasons for objecting. Thus, in applying the contractualist procedure, one should compare all the reasons affecting one individual with those affecting other individuals.

Principle (the harm done to A plus the moral significance of A's life) to B's reasons to object to the opposing principle (the harm done to B plus the moral significance of B's life). This results in a tie. One then compares A's reasons to C's, resulting in another tie. Because no single individual has a stronger reason to reject under these individual-to-individual comparisons, the agent can choose to save either A or the group (B plus C). In following this approach, the agent is certainly giving moral significance to C's life by comparing it with A's, just as she is giving moral significance to B's life. As discussed, Scanlon rejects this approach by concluding that C's life is not being given equal significance if the result is a tie. But C's life is, in fact, being given significance if one considers the *procedure* used for comparison rather than the *result*. C's life is being given significance because it is being compared to A's life in the same way as B's life is.

Finally, I would argue that using the moral significance of C's life as a tiebreaker is a form of aggregation even if Scanlon does not explicitly add together the moral significances of B's and C's lives. To make his objection, C must point to the existence of B, and C's claim could not break the tie unless one considered B's claim at the same time. Such a claim certainly seems to be a "group" claim as opposed to an individual one because it is a case in which "the claims of individuals are considered together or in combination rather than one by one."²⁶ Scanlon's approach in arguing for the Tiebreaker Principle implicitly aggregates across individuals, something that he agrees is prohibited by the Individualist Restriction. Parfit supports the conclusion that there is a conflict when he writes, "As Scanlon's Tiebreaker View implies, we ought to save the [larger number]. To defend this view, I believe, Scanlon must give up his Individualist Restriction."²⁷

²⁶ Otsuka makes this argument in Otsuka. Quotation is from Otsuka, 292.

²⁷ Parfit, 378.

A defender of contractualism might respond that the tiebreaker argument does not actually require aggregation of benefits. Rather, one should view the claims of A and B as neutralizing each other as they would in the case where C is not present. Then, when C is present, her claim is the only one available to consider, and it is obvious that she must be saved. Saving B is merely a by-product of saving C so the claims of B and C are not, in fact, added together, and the Individualist Restriction is not violated.²⁸ This is unpersuasive. The procedure it uses deviates from comparing the reasons each of the individuals involved has for objecting to the proposed principles. More importantly, from a commonsense perspective, if only A and B are present, the rescuer can choose which one to save because there is an absence of reasons pointing in either direction. If C joins B, the rescuer must save B plus C, and abandon A. Clearly the combined objections of both B and C are being considered in some way in justifying this result, and the principle that is being applied no longer rests on the principle's implications for "any other single person" as the Individualist Restriction requires.

Another possible response is that the justification for aggregation precedes the theory. Saving two instead of one is consistent with what agents have reason to do regardless of their preferred moral theory.²⁹ While this is probably true, the problem for contractualism is that the Individualist Restriction was included in the theory specifically to counter pre-theoretical thinking involving the aggregation of harms or benefits across groups of individuals. In the absence of the Individualist Restriction, there would be no need for the Tiebreaker Principle, but Scanlon's specification that principles should be determined based solely on a comparison of the

²⁸ Frances Myrna Kamm, "Owing, Justifying, and Rejecting," *Mind: A Quarterly Review of Philosophy* 111, no. 442 (2002): 346-48; Rahul Kumar, "Contractualism on Saving the Many," *Analysis* 61, no. 2 (2001): 167-68.

²⁹ See, for example, Raz.

burdens placed on individuals requires a way to reconcile these two types of intuitions within the same theory. I agree with the critics that this cannot be done.

Finally, for greater completeness, it is worth considering the argument that the rescuer should use a lottery procedure that gives each of A, B, and C at least some chance to be saved.³⁰ The idea is that A would have less reason to reject such a principle than she would a Tiebreaker Principle that guarantees her death. Moreover, if the odds are properly adjusted, B and C could not reject a principle that gives each person the appropriate chance of being saved.³¹ Scanlon argues that it is improper to introduce a lottery because the Tiebreaker Principle already considers the importance of saving A (*WVO* 234). Also, he argues it is not right to consider the “chance of being saved” as a benefit when the situation is one where the person either will or won’t be saved depending on the rescuer’s decision.³² From my perspective this is an interesting but unimportant debate as neither solution resolves the aggregation problem. I have already argued why the Tiebreaker Principle cannot be justified under Scanlon’s contractualism. And, even if one assumes the lottery principle is the best contractualist principle, it still leaves the theory with the problem that using a lottery to determine whom to save is intuitively wrong when one could with certainty save both B plus C.

In summary, I agree with Scanlon that the Tiebreaker Principle should be valid, but I do not see how it can be justified in a way that is consistent with the Individualist Restriction. The argument for the Tiebreaker Principle seems more designed to produce the desired result (save the many) of prior moral intuitions than to be faithful to the theory’s claim that only an

³⁰ A typical suggestion is to weight the lottery based on the number of persons in each group. In the case being discussed, A would have a 33 percent chance of being saved.

³¹ Parfit, 376; Jussi Suikkanen, "What We Owe to Many," *Social Theory and Practice* 30, no. 4 (2004): 490-91.

³² T. M. Scanlon, "Replies," *Ratio* 16, no. 4 (2003): 431-32.

individual's generic reasons should determine which principles to adopt. And, moving on, aggregation becomes even more difficult when one considers unequal but morally relevant harms.

3.3. Unequal but morally relevant harms: There are certainly cases in which it would be wrong to save a small number of people from very serious harm instead of saving a larger number of people from less serious—but still significant—harm. As Scanlon observes, “it could be wrong to save one person's life when we could have prevented a million people from going blind or becoming paralyzed” (*WWO* 240). To address these types of cases, he proposes a principle that considers the “moral relevance” of the harms involved.

If one harm, though not as serious as another, is nonetheless serious enough to be morally “relevant” to it, then it is appropriate, in deciding whether to prevent more serious harms at the cost of not being able to prevent a greater number of less serious ones, to take into account the number of harms involved on each side. But if one harm is not only less serious than, but not even “relevant to,” some greater one, then we do not need to take the number of people who would suffer these two harms into account (*WWO* 239-40).

But can such a principle be justified within contractualism? The harms are certainly not equal, even though the less serious harm is still very bad, so the Tiebreaker principle for equal harms does not apply (assuming it is sound in the first place). Scanlon suggests that an Extended Tiebreaker Principle might include relevance.

It might be claimed that... a principle requiring (or perhaps even permitting) one always to prevent the more serious harms in such a case could reasonably be rejected from the point of view of someone in the other group on the ground that it did not give proper consideration to his admittedly less serious, but still morally relevant, loss. One might then argue that such an individual's claim to have his or her harm taken into account can be met only by a principle that is sensitive to the number of people involved on each side. I am not certain how such an argument would go, but it does not seem to me to be excluded in advance by the general idea of contractualism (*WWO* 240-41).

I have argued that it is not possible to justify such a principle when the harms are equal and still respect a reasonable interpretation of the Individualist Restriction. The unequal nature of the harms makes it even less likely that such a principle could be justified. Scanlon seems to agree when he says he is uncertain how to make the argument. If such a principle could be justified, it

would be under a contractualism that is not equivalent to the one currently being examined, and Scanlon concurs when he writes that “a less tightly constrained version of contractualism... might yield aggregative principles that would apply to a wider range of cases, in which the harms on each side were not equally serious” (*WWO* 241).

From a different perspective, Joseph Raz also argues that contractualism will not help in resolving cases involving unequal but morally relevant harms. He notes that when considering a principle dealing with unequal harms, a person can object to the principle if it does not give her harm the significance it deserves because it disallows the needed aggregation. But to make such an objection, the problem of aggregation must be solved first so that the person knows her objection is sound. Contractualism itself, Raz argues, adds nothing to the solution.³³ Thus, the previous set of observations makes it unlikely that contractualism can deal with unequal but morally relevant harms.

Furthermore, even if an Extended Tiebreaker Principle could be developed to address the kinds of cases just discussed, there is an additional and serious concern that a principle based on moral relevance would unintentionally allow aggregation in situations that cannot be justified. For example, under the reasonable assumption that the relationship of “relevant harm” is a transitive one, consider Scanlon’s transmitter case where the harms in question are the painful electric shocks Jones receives and the annoyance of the interruption of the World Cup for millions of viewers. One could construct a ladder of finitely many harms of descending severity between the electric shocks and the loss of viewing where the difference in seriousness between any two adjacent harms is small enough that the lesser harm can be considered morally relevant to the greater one. For each pair of adjacent harms, some number of persons suffering the lesser

³³ Joseph Raz, “Numbers, with and without Contractualism,” *ibid.*: 365-66.

harm is considered equivalent to one person suffering the greater one. One can then calculate how many persons missing the World Cup are equivalent to Jones's painful shocks by multiplying the ratio of persons in each step of the chain. The Extended Tiebreaker Principle applied to morally relevant harms would require that Jones's shocks be allowed to continue if the affected World Cup audience is greater than that number. Thus, this principle could be used to justify the consequentialist outcome that contractualism is designed to avoid.³⁴

The contractualist could prevent this problem by arguing that there is not a continuum of harms; rather, there are clear cutoff points that determine which harms are considered morally relevant. But the cutoff points would be arbitrary, and there is no sound rationale for adding this feature to contractualism. Alternatively, one could argue that the only relevant points are the actual harms being considered so that the only comparison possible is between the shocks and the disappointed audience. But this solution is also ad hoc because it is fair to ask what would happen if some intermediate harm occurred.³⁵ So, even if an Extended Tiebreaker Principle for morally relevant harms could be justified, it would most likely undermine contractualism's goal of avoiding inappropriate aggregation.

Stepping back, it may be unreasonable to expect a procedure, like the one used by contractualism, to specify principles that cover all possible cases involving tradeoffs between the rights of individuals and groups. As the cases increase in complexity, some appeal to moral intuitions may be needed. Perhaps, the most one should expect is that the theory helps clarify the competing reasons that need to be assessed. To this end, contractualism is still valuable as a framework. For example, asking whether someone in either group could reasonably reject whatever conclusion is reached gives rise to the question of whether there are circumstances

³⁴ Suikkanen, "What We Owe to Many," 499-500.

³⁵ Ibid., 500-01.

other than the specific harms that must be considered, such as whether the age and current health of the persons in question are relevant considerations, or whether they bear some responsibility for having placed themselves in the situation leading to the potential harm. Also, the seriousness of contractualism's problems with aggregation should be considered in light of the fact that consequentialist theories cannot address certain types of harm prevention problems due to their inability to avoid unwarranted aggregation, the mirror image of the issue for contractualism. For example, a utilitarian theory easily explains why it is right to save the group of two rather than the single individual, but struggles to explain why it is wrong to cause one person to suffer serious harm to alleviate or prevent many minor harms. Nonetheless, even if it is unreasonable to expect contractualism to specify principles for all the various kinds of aggregative cases, I believe it is reasonable to expect theory to address the most basic type such as the decision to rescue one or several persons—something which it cannot do.

In summary, this section argues that contractualism is unable to deal with situations involving aggregation because the theory is caught in a dilemma between the way the Individualist Restriction protects individual's rights and the fact that it is sometimes morally acceptable for these rights to be superseded by the welfare of the group. In my view, Scanlon's justification for the Tiebreaker Principle fails because it is not faithful to the contractualist procedure and is based on implied aggregation. Also, even if the Tiebreaker were valid, one needs a principle dealing with morally relevant but unequal harms. Such a principle is unlikely to be justifiable; and, even if it could, its application leads to unwanted consequentialist conclusions. Thus, I consider determining principles for cases involving aggregation to be a significant weakness in Scanlon's theory.

4. The Problem of Relativism

Scanlon believes that contractualism is not vulnerable to the objection of moral relativism. He argues that the theory can address concerns raised by the existence of dissimilar—even contradictory—moral principles held by different groups without itself being relativistic. I argue that he is right only up to a point; relativism does pose a significant problem. Given the constructivist nature of contractualism, the objectivity of moral principles is dependent on the *convergence* of different agents' judgments due to the fact that there is no agent-independent notion of right and wrong.³⁶ When distinct groups of agents reach different, but stable, judgments about principles, this can lead to a form of relativism that is at odds with Scanlon's view of his theory. My argument is based on the idea that variations in experiences, interests and sensibilities can lead agents—who are not intended to be idealized under contractualism—to reach conflicting moral judgments when comparisons of the strength of competing reasons are difficult, even if one accepts the view that agents in morally identical circumstances have the same reasons. To examine these issues, this section describes why relativism is considered a problem, explains why contractualism appears to be subject to relativism, and then supports this claim with two kinds of examples.

4.1. Moral relativism: Moral relativism is the thesis that there is no single ultimate moral standard for the appraisal of actions that is appropriate for all agents in all circumstances; rather, there are multiple standards which can conflict. This discussion focuses on what Scanlon terms 'benign relativism,' in which the standards of morality vary in a way that does not detract from morality's seriousness. Benign relativists are distinguished from skeptics who use relativism to argue that morality is a "mere" social convention that lacks any real authority.

³⁶ See Section 1 of Chapter 2 for a discussion of the constructivist view that moral claims do not exist independently of a given theory's procedure for constructing moral principles.

According to relativism, appraisals must be understood as judgments about what is right or wrong given standards applicable to a particular context; such standards are usually viewed as the traditions, convictions or practices of a group of people. Scanlon contrasts relativism with what he calls “parametric universalism” in which a fixed set of substantive moral principles remain valid but are applied to the particular circumstances at hand. These universal principles allow an action to be right in one situation and wrong in another by focusing on the differences in the circumstances to which the principles are applied rather than on the ultimate standards. For example, the applicability of the previously described Rescue Principle varies depending on the potential harm to the rescuee and the potential burden placed on the rescuer. If the harm is too small or the burden too great, the obligation to rescue does not apply (*WWO* 329).

In Scanlon’s estimation, there are three reasons to view relativism as a threat to morality. First, the claim that generally accepted moral standards might not apply in some cases undermines the potential motivating power of judgments because it suggests that some agents may lack sufficient reason to accept even the most basic moral principles. Second, he argues that the existence of multiple standards can undermine confidence in a judgment of “wrongness” which, in turn, limits both the ability to condemn agents and the belief that the targets of these actions have been mistreated. Finally, relativism can detract from the authority of moral judgments to provide guidance because the existence of multiple standards supports the idea that morality is merely a matter of social convention rather than a serious obligation (*WWO* 329-332).

Scanlon views these three reasons as a challenge for relativists who defend a form of benign relativism. A key question for benign relativists is how people could have good reason to regard different standards in a way that allows each standard to possess the special kind of significance enjoyed by morality. One proposed solution is what may be called “way of life”

relativism: people have reason to accept a standard as having overriding importance if it has a special status in their shared way of life, assuming it is a way of life they value and want to continue. This solution can account for the motivating force of morality in a more compelling way than the idea of universal abstract moral principles. It also allows for the existence of a wider range of values and principles with moral force than is recognized by strict “universalists.” At the same time, those espousing way of life relativism do not claim that just any set of widely accepted norms has the force of morality. They exclude social practices that treat people in unacceptable ways. Here, supporters argue that any moral view likely to command wide acceptance over a long period must, in some way, recognize the basic interests of all members of a society (*WVO* 335-38).

4.2. Scanlon’s views on contractualism and relativism: According to Scanlon, contractualism allows moral standards to vary in content in many of the ways that relativists favor without itself being a relativistic account. His explanation includes three main points: 1) The idea of justifiability to others and its associated procedure provide a unified method for determining moral principles that allows for a wider range of moral standards than might be expected. 2) While allowing for these variations, the method is still able to prevent the adoption of principles that permit objectionable practices. And, 3) disagreement among contractualists about a moral issue does not mean that there is not a correct moral choice.

The contractualist procedure allows for a wide range of moral standards because people facing different social conditions have different reasons for rejecting proposed principles. Scanlon describes two classes of cases in which an action that would be wrong in one context might be morally acceptable in another. The first, which I’ll call Cases of Multiple Applicable Principles, involves situations in which multiple principles govern the activity in question. Here,

none of the principles can be reasonably rejected and one of the principles is generally (though not necessarily unanimously) accepted by a society. In such situations, Scanlon appeals to a Principle of Established Practices which states that it is wrong to violate the accepted practice “simply because it suits one’s convenience” (*WVO* 339-40).

Scanlon uses the example of the need for personal privacy. People want to be protected from the observation of others in some parts of their lives, and they also need ways to communicate privately. In any society, there are many possible ways to differentiate what is private from what is public and to define what forms of communications should be protected from others unless consent has been given. When a society generally accepts certain rules of privacy that could not be reasonably rejected, it becomes wrong to intrude on people’s lives in ways these rules forbid. These rules are binding even if there are dissenters who believe that other rules would be better or who, perhaps, reject the idea of privacy in general. In Scanlon’s account, the Principle of Established Practices explains how a practice that is not universally accepted can be morally binding and how different societies could adopt different practices for the same purpose. These kinds of cases are not examples of relativism; rather, they are examples of parametric universalism because the moral force of these practices is explained by appeal to the single Principle of Established Practices.

Scanlon argues that no one could reasonably reject the Principle of Established Practices given the need for some principle to govern the activities in question. Conversely, it would be reasonable to reject a principle that permitted people to violate one of these established practices whenever they wished because, using the example of privacy above, people need assurance that certain aspects of their lives will be protected except under extraordinary circumstances. This argument seems sound, but Thomas Pogge asks whether there might be nonrejectable alternative

principles that allow for a violation of this principle for reasons other than “simply suiting one’s convenience.”³⁷ Pogge does not provide examples, but one can assume he is referring to reasons that would be harder to reject than “convenience.” While one cannot consider all possible principles of this type, it seems plausible to conclude that such a principle would be nonrejectable only if the reasons for violating the established practices were stronger than the reasons for following them. Such a principle would not undermine Scanlon’s position because the thrust of his argument is that one should not violate established practices for trivial reasons, not that there will never be a justifiable reason to do so. Thus, the Principle of Established Practices explains the existence of differing standards in Cases of Multiple Applicable Principles.

The second class, Cases of Societal Variations, occurs when reasons for rejection vary because of social conditions. Again, considering privacy, different societies can have conflicting ideas of personal dignity, and these variations supply good reasons to want certain society-specific forms of protection. Thus, some societies will adopt different moral principles. For example, variations in ideas about personal dignity lead to differences in the type of clothing one is permitted to wear in public places. These disparities in practices might be considered a form of relativism because they involve dissimilar practices adopted for similar moral purposes, but Scanlon disagrees. Reasons based on social factors do not alone determine what is right and wrong. Instead, the moral force of principles comes from placing these reasons in the contractualist framework to assess which principles cannot be reasonably rejected. Scanlon argues that this is not a relativist view; rather, people in positions that the principle describes

³⁷ The concerns about the Principle of Established Practices discussed here are raised in Thomas W. Pogge, “What We Can Reasonably Reject,” *Philosophical Issues* v.11 (2001): 137-8.

have good reason to want a certain form of protection, but these generic reasons—and thus the protections they justify—differ by society (*WWO* 340).

Scanlon's second main point about relativism is that, although contractualism is “responsive” to local reasons, it nonetheless limits what can be considered a valid reason and thus avoids supporting practices Scanlon considers objectionable but which might be accepted as normal by certain societies.

This emphasis on the reasons people have differentiates the view I am defending from objectionable forms of relativism, which claim that it is permissible for people in other societies to be treated in ways that we would not accept because they do not value privacy, or individual liberty, or even life, in the way that we do. [...] Whatever “they,” or some of them, may actually think (they may have become accustomed to harsh treatment, for example, and think it inevitable), they in fact have the same reason that we do for wanting not to be treated in these ways. [...] The view I am defending [...] takes as fundamental not what people actually think or want, but what they have reason to want (*WWO* 340-41).

Scanlon recognizes that what people have reason to want depends on the conditions around them which include what other people want, believe, and expect. For example, differences in methods of commerce and ideas of personal dignity lead to the adoption of different, but valid, moral principles as discussed above. At the same time, certain beliefs or wants do not constitute valid reasons for justifying moral principles. For example, a person might believe that a certain class of people is not entitled to equal rights because this view has historically been accepted by her society. However, this kind of belief goes against generally accepted views about how people should be treated and should not be used to justify moral principles. Thus, to avoid accepting “objectionable practices,” it is important to be able to distinguish situations where what people “actually think or want” is different from what they have “reason to want.” Whether this can actually be done is considered later in this chapter.

The third main point in Scanlon's explanation is that disagreement does not imply there is not a correct moral principle. He recognizes that agents who accept the contractualist theory

could still disagree on moral principles. Some disagreements on issues may, in part, reflect a difference of opinion about the range of cases for which one should be constrained by justifiability to others. For example, considering abortion, one who regards the fetus as having the rights of a person could argue that abortion falls into the domain of justifiability; therefore, an objection to a principle permitting abortion can be made on behalf of the fetus. Conversely, one who disagrees the fetus has rights could argue that the morality of abortion is not covered by the idea of justifiability so that a decision about abortion rests entirely with the woman; no one can object to her choice.

Other disagreements may reflect differing assessments about the strength of various generic reasons for and against the relevant principles. For instance, considering abortion again, two persons who agree that abortion falls into the domain of justifiability could still disagree whether the objections to a principle allowing abortion are stronger than those to a principle forbidding the practice. In general, such disagreements may be due to the difficulty of sorting out which reasons are morally significant and assessing the relative strength of this significance. They can also be caused by a lack of clarity about how people in different positions are affected by the actions allowed by various moral principles; in some cases, this is the result of the agent's tendency to exaggerate her burdens and underestimate those of others. Whatever their cause, Scanlon does not view such moral disagreements among contractualists as support for the conclusion there is no objective right answer to difficult moral problems.

So, for example, contractualists may disagree about the relative force of different reasons for rejection and hence about which principles it is reasonable to reject, and which actions are morally wrong. Again, it does not follow from the fact that people disagree in this way that there is no answer to the question which of them is correct. If we were to conclude in some case that there was no single correct answer, the result would be an instance of moral indeterminacy, not relativism.³⁸

³⁸ T. M. Scanlon, "Replies," *Social Theory and Practice* 28, no. 2 (2002): 439. See also WWO 354-60.

Thus, from the characteristics of contractualism just reviewed, Scanlon's argument can be interpreted to mean that there is some "right way" to assess the relevant reasons and their respective significance so that agents who are making informed and well-reasoned judgments should converge on the single correct answer when considering which principles are valid. Admittedly, this common assessment might not be possible at a given point in time, but Scanlon's assumption seems to be that more knowledge about the effects of proposed principles, or about other missing factors, will eventually cause agents' judgments to converge on one answer.

4.3. Why Contractualism is Subject to Relativism: In contrast to Scanlon's view, I believe that contractualism's constructivist nature exposes it to problems of relativism because moral principles are determined solely by agents' judgments as opposed to being dependent, for example, on realist moral properties or on ontological grounds. As a result, there is no agent-independent way to identify the "correct" principle when there are conflicting judgments because principles do not exist separately from these judgments. When considering agreement among agents, it is important to note that under contractualism moral principles are determined in the end by an individual agent, not by a group consensus or negotiation. Scanlon writes:

In my view, while interaction with others plays a crucial role in arriving at well-founded moral opinions [...], reaching a conclusion about right and wrong requires making a judgment about what others could or could not reasonably reject. This is a judgment that each of us must make for him- or herself. The agreement of others, reached through actual discourse, is not required, and when it occurs does not settle the matter (*WWO* 393-94, fn 5).

Group agreement is neither necessary nor sufficient. Individual agents determine principles for themselves. Also, under contractualism, these agents are real individuals, not hypothetical ideal observers. Thus, the objectivity of principles depends on whether real agents do, in fact, make the same judgment about what principles can be reasonably rejected.

Scanlon believes that agents facing identical situations will generally make the same judgment about what moral principles can be rejected; and he relies, in large part, on the universality of reason judgments to support this conclusion. According to this claim, what is a reason for one person is also a reason for someone else in the same situation. For example, if Kathy judges correctly that she has a reason to aid a child who appears lost, the universality of reason judgments implies that anyone else in the identical situation also has a reason to help. The specific considerations that give Kathy a reason also give anyone facing the same circumstances a reason. This claim is not based on any particular view of what the relevant considerations are, and it leaves open the question of what constitutes “the same situation.” For example, if one believes reasons have subjective conditions, the existence of these subjective conditions is required for two situations to be deemed identical. Thus, reason judgments, properly interpreted, are applicable to others in the same situation, and this fact is an important part of Scanlon’s view that judgments can be consistent across agents (*WWO* 73-4).³⁹

However, even if one accepts the universality of reason judgments, the possibility that agents disagree on judgments about principles still exists when one further considers how agents’ sensibilities affect their assessments about the importance and weight of the competing reasons involved. According to Steven Ross, sensibility refers to “caring more about some things rather than others...where this caring, this preference, this weighting, is simply *not* the one some other

³⁹ The universality of reasons judgments is first discussed in Section 1.1 of Chapter 3. Separately, Scanlon supports the externalist view that the applicability of reasons is not dependent on a person being motivated by the reason in question. According to this view, certain types of subjective conditions are not relevant to determining “the same situation” in universality of reason judgments. The internalist perspective that motivation is a relevant factor is considered in Chapter 4 where I examine the whether contractualist reasons apply to amoralists. This distinction is not important for the examples in this section.

moral culture prefers to have.”⁴⁰ For example, some groups are gripped strongly by “what a fetus could become,” while what “animals raised for food must endure” grip others. A somewhat different portrayal of sensibility involves a situation described by Mark Timmons in which two philosophers disagree on the morality of welfare spending.

Here we have a case in which two philosophers have thought through the various implications of their own moral outlooks, have gotten clear about the morally relevant details of the case, and have, on the basis of reflecting about the relevance and weight of generic personal reasons representing various individual standpoints, come to conflicting moral judgments over the issue of welfare spending.⁴¹

Clearly, moral sensibilities affect how agents determine whether they could reasonably reject proposed moral principles. Furthermore, the nature of these judgments is such that Scanlon is unable to give a detailed roadmap on how to assess competing reasons, and this increases the likelihood of variability in judgments among agents.⁴²

These considerations lead me to conclude that it is likely that agents will make different judgments about reasons in difficult moral situations. Furthermore, it is not inevitable that these judgments will converge at some point in time. Convergence requires that the moral sensibilities of agents become sufficiently aligned so that agents from different backgrounds and experiences

⁴⁰ This quotation and subsequent examples are taken from a communication between Steven Ross of CUNY Graduate Center and his Moral Realism class of Spring 2015. Ross raised concerns about the impact of sensibilities on judgments of reasonable rejection. Other concerns about sensibilities and relativism are raised in Timmons. For the subjective nature of practical reasoning see also Sarah Marshall, "Scanlon and Reasons," in *Scanlon and contractualism*, ed. Matt Matravers (London; Portland, Or.: Frank Cass, 2003); and R. Jay Wallace, "Scanlon's Contractualism," *Ethics* 112, no. 3 (2002).

⁴¹ Timmons, 414. Timmons argues that Scanlon's contractualism is relativistic in comparison with other contractualist or constructivist moral theories because it bases justifiability on “nonwelfarist, nonaggregative” reasons. Other theories will build different assumptions about the nature of morality into their procedures for determining what is moral, and there is no non-question-begging feature to determine which theory is correct. My interpretation is that Timmon's quotation reflects the deliberations of two philosophers who ascribe to different constructivist moral theories, and this is the primary source of their disagreement. By contrast, I argue that Scanlon's contractualism faces problems with relativism *even when* the agents involved all accept contractualism as their moral theory. Thus, my argument addresses the issue of relativism within Scanlon's contractualism while Timmons is primarily concerned with relativism across different constructivist theories.

⁴² See Section 2.4 of this chapter for a discussion of the guidance Scanlon does give.

make the same judgments. Convergence of these kinds of moral judgments can be contrasted with the convergence of scientific views that involve independent facts about the world. In the case of contractualist judgments, there are no independent moral facts about correct principles. While the views of different societies about moral topics can converge over time, there is no guarantee that they will do so.

Thus, there are cases in which groups of agents reach different judgments on morally similar situations, all based on sincerely held beliefs that are strong enough to motivate behavior. Such judgments are stable over long periods of time, and, in many cases at least, it seems unlikely that all groups will converge on one common judgment. My argument is that such judgments represent a form of relativism that is at odds with Scanlon's view that there is one correct answer to most moral problems.

There are two kinds of examples that support my view. The first, which I call "excluding objectionable practices," consists of instances where Scanlon argues that contractualism can prohibit objectionable practices by distinguishing valid reasons from impermissible ones, or as Scanlon says, what people "have reason to want" from what they "actually think or want." I will use the case of slavery in the antebellum South to argue that the contractualist procedure, when applied at the time in question, cannot distinguish that slavery is objectionable. By analogy, contractualism faces the same problem with many of today's objectionable practices, such as the way certain societies treat women and minorities.

The second kind of case, which I call "susceptibility to differing sensibilities," involves difficult moral problems where different societies or groups hold stable judgments that justify conflicting principles in morally identical situations. Examples include voluntary euthanasia, the legalization of certain drugs, and abortion. In these cases, agents in different societies generally

have similar reasons but make conflicting judgments about what is moral due to variations in their moral sensibilities. Given this background, we can now turn to an examination of these two types of cases.

4.4. Excluding “Objectionable” Practices: Scanlon believes contractualism can be distinguished from forms of relativism that include practices Scanlon considers objectionable by way of the notion that what is relevant to morality is not what people actually think or want, but what they have reason to want. Beliefs or wants must be translatable into reasons that stand up to questioning, and reasons that do not stand up cannot be used to determine valid principles. This restriction raises obvious concerns about how to determine which reasons are, indeed, sound.

Antebellum slavery in the U.S. provides an example of this problem by demonstrating how an objectionable practice could be justified by an agent having the knowledge and sensibilities of the time in question. While slavery is generally viewed as immoral today, it was morally acceptable at certain times and certain places such as ancient Greece, medieval Europe, and early America; and it is still viewed as acceptable in certain societies. My analysis examines how today’s contractualist assesses slavery, how such an assessment would have been made during the antebellum period, and why the antebellum assessment is valid for its time. I then consider the implications of this result for contractualism’s ability to eliminate today’s objectionable practices.

To determine whether antebellum slavery would be moral under today’s contractualism, one compares the principle “slavery is permitted” with the opposing principle “slavery is forbidden.” The Individualist Restriction requires a comparison of reasons among single individuals. This guides the assessment of slavery by focusing attention on those with the

strongest reasons for and against the practice, such as mistreated slaves, slave owners and non-slave owning members of Southern society.⁴³

The person who is most affected by, and has the strongest reason to object to slavery, is a slave who is being mistreated. Under contractualism, her reasons include not only suffering, but the fact that she has been robbed of her self-determination. Her position as a slave involves an arbitrary loss of freedom, and there is no good reason for her to be placed in this position. The person who is most affected by, and has the strongest reason to object to abolition is a slave owner. Her reasons include unfair seizure of property and the risk to her person from bloodshed and chaos during the transition period away from slavery. One might also argue that a slave who is well-treated has reason to object because abolition will deprive him of a secure, comfortable position and, if he lacks requisite skills, will arbitrarily place him in poverty.

The harm done to a mistreated slave, both physically and to her self-determination, is clearly greater than the harm that the slave-owner would suffer under abolition because the slave's life will be significantly better than it was under slavery.⁴⁴ Thus, after comparing and weighing reasons, it's reasonable to conclude that the slave's reasons to reject a principle permitting slavery are stronger than the slave owner's reasons to reject an opposing principle forbidding slavery. Thus, slavery is forbidden.

⁴³ Sources that summarize ante-bellum reasons for and against slavery include Robert Higgs, "Ten Reasons Not to Abolish Slavery," Foundation for Economic Education, <https://fee.org/articles/ten-reasons-not-to-abolish-slavery>; "Arguments and Justifications: The Abolition of Slavery Project," http://abolition.e2bn.org/slavery_112.html; U.S. History, "The Southern Argument for Slavery," www.ushistory.org/us/27f.asp; The Inkwell Musings, "Five Arguments Against Slavery," <http://inkwellmusings.blogspot.com/2009/11/five-arguments-against-slavery.html>. *A House Divided*, edited by Mason I. Lowance, Jr, (Princeton University Press: Princeton, New Jersey, 2003.)

⁴⁴ Note the relevant comparison is the burdens on the slave under slavery against the burdens a slave owner faces in a counterfactual world without slavery. The difference between the slave owners old and new lives is not part of the comparison.

Next, consider how this assessment would be done during the antebellum period. This period encompassed two distinct cultures: The South was rural, its economy was based on slave labor, and its perspective was anti-modern. The North was industrial, its economy was based on free labor, and its perspective was forward-looking. In this circumstance, the contractualist procedure would be applied differently by Southerners and Northerners. A Southern slave owner who holds the contractualist view about moral principles can still reasonably reject the slave's objections to slavery. Given the available information at the time, a condition that meets Scanlon's terms for making a judgment of reasonableness, a slave was thought to be an inferior type of human, one who lacked the full capacity to reason.⁴⁵ Thus, the slave owner could argue that a slave is not entitled to self-determination, and placing a slave in a command-and-control environment is not arbitrary oppression but a way to give that slave an opportunity to live a life suitable to his or her capabilities.⁴⁶

As discussed, a judgment about a moral principle is one that each agent must make for herself. The slave owner must make her best judgment based on the information available to her at that time. The slave owner's reasons for rejection of a principle forbidding slavery fit Scanlon's requirements that reasons be "generic, personal and non-aggregative." The slave owner considers these reasons as generally applying to slaves given her knowledge of the situation. These reasons are also in harmony with Scanlon's idea that what is relevant to morality is not what people actually think they want but what they have reason to want. The slave owner's

⁴⁵ Scanlon recognizes that an agent may not have perfect information in making a moral judgment; however, the agent can be faulted for not seeking readily available information. Information that is not available at the time of the agent's judgment is clearly not in this category.

⁴⁶ Thomas Jefferson, who believed in emancipation, also believed that "nature has been less bountiful to them [slaves] in endowments of the head" and that slaves "were inferior in reason." (Notes of the State of Virginia p 137.) Moreover, in the 1840s, a group of highly respected scientists published research studies demonstrating the intellectual superiority of whites. The most prominent scientists were Josiah Clark Nott, George Gliddon, and George Morton. (House Divided, 311-326.)

reasons are not simply due to habituation but can be justified with the best reasons available—such as the scientific evidence of the 1840s. Although this evidence has been proven wrong, it could stand up to questioning at the time.

Thus, a slave owner could consider the reasons for rejection of all the parties involved (slaves, slave owners, and non-slave-owning people) and, based on reasons that are valid according to Scanlon's procedure, conscientiously conclude that the reasons for rejecting a principle forbidding slavery are stronger than those for rejecting one permitting the practice. Other Southerners who share the slave owner's views could make the same judgment. A Northern abolitionist could apply the same procedure and conclude conversely that a principle permitting slavery should be rejected.⁴⁷ In this situation, then, contractualism does not avoid relativism because there was no principled way at the time to choose between two conflicting views. Both judgments are made by agents who use the information available to them to make what can be considered reasonable judgments given the agents' differing perspectives.

A contractualist today and an antebellum slave owner both make valid, but conflicting, moral judgments using the contractualist procedure. To eliminate this objectionable practice, one must accept the judgment of today's contractualist. This raises the question whether it is appropriate to apply all of the liberal values of Scanlon's contractualism to moral problems in societies where the context is different. One who accepts the view that contractualism only supports this set of values could object that the slave owners are not properly using the contractualist procedure. The counter would be that an agent making a judgment can only use the reasons and moral sensibilities that apply at the time and place of her judgment, and that the

⁴⁷ I will not go through the details of the abolitionist's reasoning. A key difference is that he would not accept the slave owner's assessment of a slave's nature and capabilities.

reasons and sensibilities applying to an antebellum contractualist are simply not the same as those of today's contractualist.

One might object that the example of slavery is too extreme because slavery is such an offensive practice and, over time, most societies have accepted this judgment. I would counter that the example is still important because it demonstrates how application of the contractualist procedure in different societies can lead to the acceptance of practices that are considered objectionable by liberal contractualists, and it shows that eliminating such practices depends on adopting a liberal perspective. The example highlights a dilemma contractualism faces involving a conflict between the goal of ruling out objectionable practices and the recognition that agents and their reasons can vary by society.

On the one hand, Scanlon distinguishes contractualism from forms of relativism by insisting that the contractualist procedure rules out objectionable practices in other societies. However, the perspective from which Scanlon identifies objectionable practices appears to be that of an "enlightened liberal Western democratic." Accepting this view privileges these liberal values and leaves contractualism open to the charge that it cannot be applied in a way that properly reflects the values of other societies. One is effectively limiting the scope of contractualism to societies whose values are those of liberal democracies.

On the other hand, Scanlon accepts that what people have reason to want can depend on the society in which they live and on what other people in that society believe and want. Moral judgments are made by agents whose experiences and sensibilities are shaped by their society. Some societies have very different attitudes about the proper role and conduct for certain groups, such as women and minorities; the role of religion in daily life; and appropriate sexual behavior. Agents in those societies have reasons that support their moral views, but these reasons will

differ from those supported by liberal contractualist societies. Acceptance of this perspective leads to objectionable relativism because contractualism cannot eliminate all objectionable practices.

Regarding convergence over time, assessments of slavery have converged to a great extent; however, that does not mean that views on all practices that might be deemed objectionable will converge. The experiences and sensibilities of societies vary greatly and are difficult to change. These differences have led to the moral acceptance of many practices for long periods of time. When such judgments can be justified under the contractualist procedure, they must be recognized as valid moral judgments. In summary, the fact that the contractualist procedure can, in some cases, justify objectionable practices represents a problem of relativism that is counter to Scanlon's position.

4.5. Susceptibility to Differing Sensibilities: The second problematic type of situation involves the fact that the way agents weigh reasons plays a significant role in assessing which principles can be reasonably rejected. Consider the case of *voluntary, active euthanasia* in which a competent patient requests euthanasia and a physician aids in the patient's death.⁴⁸ According to current medical ethicists, the strongest argument for active voluntary euthanasia derives from the widely accepted principle of autonomy—the notion that people have the right of self-determination.⁴⁹ People have intrinsic worth or dignity because they have the power to make rational decisions and moral choices: they must thus be treated with respect and allowed to make their own choices on important issues facing them. This includes the choice to end their lives,

⁴⁸ Ethicists distinguish between *active* euthanasia, which involves performing an action that directly causes someone to die, and *passive* euthanasia, which allows someone to die by not doing something to prolong life. Many believe that deliberately and directly killing a patient is always wrong whereas letting someone die can be morally acceptable.

⁴⁹ The reasons for and against euthanasia expressed here are based on Lewis Vaughn, *Contemporary Moral Arguments : Readings in Ethical Issues* (New York: Oxford University Press, 2013), Chapter 5.

particularly in cases where there is little or no chance of recovery and in cases that involve a great deal of suffering. These persons and their families may also have economic concerns (as may other members of society) because the cost of medical care can have a significantly adverse effect on family members' lives.

Opponents argue that deliberately killing a person is wrong because it is inconsistent with the goal of preserving life. Further, a person's right of self-determination does not morally justify someone else killing that person, even for mercy's sake, because the right to kill oneself cannot be transferred. Opponents charge that acceptance of euthanasia could ultimately lead to dangerous extensions such as involuntary forms of killing, pushing families towards accepting euthanasia, and discrimination against elderly, mentally ill, uninsured, or other disadvantaged groups. Finally, opponents are wary of potential negative consequences for the physician/patient relationship, arguing that permission will undermine the trust patients must have in the physician's motives.

Applying the contractualist procedure, one considers two opposing principles: euthanasia is permissible and the practice is forbidden. The parties most affected by these principles are the person requesting euthanasia, her immediate family, and members of society like physicians, who are affected in various ways by the practice. A person facing a long painful death has the strongest reasons to object to a principle forbidding euthanasia, either due to the suffering she will incur or the violation of her right of self-determination. A person with the strongest reasons against allowing euthanasia include an elderly, disabled, mentally ill, or sick uninsured person. They can point to the concern that once the practice of euthanasia is established it could be extended in a way that undermines respect for the value of their own lives and their right to self-determination.

In determining which principle can be reasonably rejected, it is difficult to weigh such diverse factors. The relevant comparison of the strongest personal reasons for allowing or forbidding euthanasia is between the suffering and loss of self-determination of the person desiring euthanasia and the potential harm and lack of respect for an individual who might be coerced into ending his life because the practice of euthanasia has expanded over time. In considering these two sets of reasons, some agents will be drawn to the immediate suffering of the patient and her right to self-determination. They will place little or no weight on the possibility that allowing voluntary euthanasia could have unintended consequences. Other agents will be drawn to the fears of the elderly, disabled, mentally ill, or uninsured and the importance of protecting human life, even if the circumstances of concern may exist only in the future. These two groups will reach different conclusions about which reasons are stronger—those of the current patient or the potentially coerced individual. Thus, the contractualist procedure can again lead to relativism because different groups adopt opposing principles and do so in a way that is strongly held and stable over time. They do this because, although they consider the same reasons relevant, the level of significance they accord to the individual reasons varies. This conclusion is supported by the fact that certain countries and states accept euthanasia as a legal practice while others do not.

My view, in general, is that agents' judgments are sometimes unable to converge on a single principle because the objections of the affected parties are based on different types of reasons, uncertain outcomes, and lengthy time frames. These factors make it difficult to compare the strength of the various parties' objections. For example, when the acceptance or rejection of a principle depends on immediate physical harms, the possibility of convergence is high. As the comparison becomes less straightforward, the possibility of convergence decreases because there

is greater opportunity for agents to make different judgments about the way the parties are affected and for the agents' sensibilities to influence judgments about the weight that the reasons for each party's objections should be given. Euthanasia is complicated because it compares reasons of immediate physical harm and the value of a specific person's self-determination with the more abstract notion of the human need to live and possible harm done to unknown parties at a future date. Thus, I consider the likelihood that agents' judgments will converge to be low.⁵⁰

My hypothesis regarding relativism is that in moral situations where the reasons to be considered are not directly comparable or where difficult estimates of probability and different time frames are relevant, a judgment will often be dependent on the moral sensibilities of the agent. Other examples include the permissibility of drug usage where different assessments of the potential harms caused by drugs and the agent's sensibility to these harms conflicts with the user's rights to live as she wants, or the practice of abortion where the sensibility of some agents to what the fetus could become (ignoring the debate of what it is now) conflicts with the pregnant woman's right to self-determination. In these types of situations, the contractualist procedure can lead to the adoption of contradictory principles due to differences in agents' estimates of the effect of practices and their sensibilities to these effects. These are not cases, like the questions of privacy discussed previously, where reasons vary by society. Reasons to accept or reject principles are similar across societies, but the way these reasons are assessed differs. Thus, the judgment to permit or forbid euthanasia is not analogous to adopting different views on

⁵⁰ Nonetheless, societies might converge on a common principle if sensibilities gradually change, say, as the practice of voluntary euthanasia spreads and a new generation finds it more acceptable. This does not mean, however, that there was always a "correct" moral answer under contractualism. The correct answer is undetermined until convergence occurs. Alternatively, a number of well publicized cases where the practice is abused could prevent this convergence. At this point, it is difficult to know whether different societies' views will, in fact, converge and, if so, for what reasons.

the appropriate dress to maintain one's dignity; it is comparable to judgments about the kinds of principles that Scanlon maintains should be universally objective.

In summary, I have argued that, contrary to Scanlon's view, contractualism's procedure for determining moral principles appears to lead to relativism in certain circumstances. Under contractualism, each agent determines which principles can be justified, and the objectivity of those principles depends on the convergence of agents' judgments. The experiences and sensibilities of different agents, who are not idealized under contractualism, can cause them to make different estimates of the importance and strength of the reasons involved, and thus to end with different moral judgments. When different groups of agents maintain different, but stable, moral judgments based on strongly held beliefs in the same kinds of cases, this is a form of relativism.

Scanlon argues that contractualism can eliminate "objectionable" practices that are accepted by certain societies. This claim creates a dilemma. Contractualism can only reject these practices by appealing to reasons that are based on the values of secular liberal societies; but, at the same time, Scanlon recognizes that values and reasons can vary by society. Applying contractualism in a way that recognizes these societal differences leaves it open to relativism.

Scanlon also recognizes that contractualists can disagree about principles in difficult moral situations, but he argues that these disagreements do not indicate there is no correct moral answer. This conclusion implies that agents' judgments must converge at some point because there are no agent-independent moral principles in a constructivist theory like Scanlon's. Here, I argue that this convergence is not certain given the complexity of certain moral problems and the difficulty of eliminating differences in agents' experiences and moral sensibilities. While I recognize that it is not reasonable to require contractualism to provide a single answer for every

moral situation, it is also not reasonable to expect that every disagreement will resolve itself over time. Thus, contractualism faces a problem with relativism.

* * *

In this chapter, I have examined how the concept of “reasonable rejection” as used to provide “justification to others” specifies moral principles. I have argued that this contractualist procedure meets the fundamental test of providing a meaningful way to determine moral principles in many situations; however, I have also argued that there are situations where the concept fails.

It is difficult to describe precise boundaries that delineate contractualism’s effectiveness, but some generalizations are possible. Contractualism provides objective principles for a large part of interpersonal morality where there is generally agreement about what is moral. These include actions like murder, deliberately harming others, deceiving others, stealing, and so on. At the same time, there are two non-controversial moral situations where the procedure fails: cases where the aggregation of harms is appropriate, like the choice to rescue one or many, and cases of “objectionable” practices that are accepted by certain societies.

When one considers more controversial cases where there is disagreement about what is right or wrong, contractualism continues to provide a useful framework for identifying reasons that are morally relevant and the conflicts among these reasons. But, in difficult situations where reasons are not easily comparable, agents can fail to agree on principles due to differences in their experiences and moral sensibilities. This leaves contractualism open to the charge of relativism because agents in different societies can justify conflicting principles, and there is no independent way to assess which principle is correct. These are instances of genuine relativism that Scanlon would find unacceptable in a moral theory.

Chapter 4

The Normativity of Contractualist Principles

In contractualism, the concept of justifiability to others based on ‘reasonable rejection’ plays a two-part role: it is responsible for both the content of moral principles and for the reasons why agents should act according to these principles. This tight relationship between principles and their normativity is a distinctive aspect of contractualism. In previous chapters, I argued that Scanlon’s contractualist procedure based on reasonable rejection can determine the content of moral principles. More specifically, the procedure is not redundant because it enables an agent to assess how an action’s specific characteristics affect its moral status. However, the procedure does not yield a complete set of principles because it fails to provide guidance in cases where the aggregation of benefits or harms across individuals is appropriate, as well as in those cases where differing experiences and sensibilities cause agents’ judgments to vary about what principles can be reasonably rejected. In this chapter, I examine justifiability’s second role and argue that it provides sufficient reason for agents to be bound by moral principles in many—but not all—cases.

In considering the normativity of contractualist principles, by far the most important question is whether reasons based on justifiability are sufficiently strong to cause agents to act morally (the “priority” issue). Scanlon’s case for the priority of morality is based on the high value he places on the relationship of mutual recognition which results from living by principles that others could not reasonably reject. In contrast to Scanlon, I argue that mutual recognition is not a sufficient reason to ensure that agents will act morally in situations of extreme personal conflict. A second question to consider is whether those who are not motivated to act morally have reason to abide by contractualist principles. Here I explain why they have reason to do so

because acting in a way that supports good relationships has value independently of its moral implications. Finally, given Scanlon's conclusion that contractualist reasons apply to everyone, whether motivated or not, I consider the relationship of contractualism to those who have chosen to act morally but who follow a different form of morality, such as utilitarianism or a religiously based one. Here I argue that contractualism can coexist with other doctrines without significant conflict if these doctrines respect others' beliefs. I also propose that contractualism should respond to certain reasons based on religious or cultural beliefs in determining which principles can be reasonably rejected—even if the doctrines maintaining these beliefs also support principles that are incompatible with contractualism.

1. The Priority of Moral Reasons

The question of priority asks if reasons for acting morally take precedence when there are conflicts with other values. I will argue that Scanlon successfully explains why agents are bound by morality in many cases; however, his argument fails in cases where the agent has strong personal reasons to act immorally. I go on to point out, however, that this condition appears to be a limit for any moral theory and suggest that Scanlon's theory could be reconciled with this limit by modifying its views on the nature of personal relationships.

1.1. The problem of priority: Scanlon describes the problem of priority as follows:

The fact that an action would be wrong constitutes sufficient reason not to do it (almost?) no matter what other considerations there might be in its favor. If there are circumstances in which an agent could have sufficient reason to do something that he or she knew to be wrong, these are at best very rare. But if right and wrong always or even almost always take precedence over other values, this is something that requires explanation. How can it make sense, if we recognize values other than right and wrong and take them seriously, to claim that reasons of this one kind have priority over all the rest? I will refer to this as the problem of the *priority* of right and wrong over other values (*WWO* 148).

In discussing the potential conflict between moral and other non-moral values, Scanlon refers to the well-known objection raised by Bernard Williams about impartialist moralities. Williams asks whether considerations of impartiality mean that it would be wrong to favor someone because of a special tie (like marriage or friendship), even in the extreme situation where an agent must make a choice between saving a loved one and a stranger. If the answer is yes, moral impartiality would rule out love and friendship because such relationships require favoring certain persons over others. Williams observes that morality must find a way to accommodate such relationships to avoid being unacceptable to most people.¹

Susan Wolf describes the conflict between moral and personal values as follows:

Recently, however, many have called attention to the fact that relationships of friendship and love seem to call for the very opposite of an impartial perspective. Since such relationships unquestionably rank among the greatest goods of life, a conception of morality that is in tension with their maintenance and promotion is unacceptable. Thus a debate has arisen between...the impartialists and partialists.... Rather than allow our personal affections to compromise our commitments to justice and equality, [impartialists] argue, we must shape our ideals of friendship and love to fit the demands of impartial morality. The partialists reply that this denigrates the value of special relationships to friends and loved ones, at best according them the status of acceptable extracurricular activities and at worst regarding them as a consequence of human nature to be warily tolerated.²

So, the problem for contractualism—or any moral theory—is to demonstrate how it can allow and respect values related to personal needs while still ensuring that acting morally has priority.

1.2. Contractualism's approach to the priority of moral values: In order to understand Scanlon's approach to priority, one first must recognize the value associated with acting morally. As discussed in Section 1 of Chapter 3, contractualist judgments about right and wrong are "judgments about what would be permitted by principles that could not reasonably be rejected, by people who were moved to find principles for the general regulation of behavior that others,

¹ Bernard Williams, "Persons, Character, and Morality," in *Moral luck : philosophical papers, 1973-1980* (Cambridge; New York: Cambridge University Press, 1981), 15-19, as referred to in Scanlon, *WWO* 160.

² Susan Wolf, *Morality and Partiality* (Oxford University Press, 2015), 2.

similarly motivated, could not reasonably reject” (*WWO* 4). Scanlon argues that living according to such principles is the proper way to respect the value of human life. What is distinctive about humans is their capacity to assess reasons and justifications and govern their lives by choosing a particular path from many potentially justifiable ones. Appreciating the value of human life involves recognizing these capacities; nevertheless, it is impossible to respond to all the reasons each human has for choosing how to live. Scanlon argues that the best way to deal with this problem is to treat others according to principles they could not reasonably reject (*WWO* 104-6). This allows people to develop relationships of “mutual recognition,” and this is something worth seeking because humans need and receive substantial value from social interactions (*WWO* 162). Thus, according to contractualism, the primary reason for acting morally is the great value inherent in the relationships people have with others when they live this way.

Scanlon offers three reasons for accepting the contractualist account of morality. First, it is phenomenologically accurate. The best description of the reason for avoiding immoral acts involves their impact on others and the idea that others could reasonably object to such actions. Second, this account describes an ideal of relations that is closely connected to the content of morality while still possessing a strong appeal when viewed apart from moral requirements. The contractualist ideal of acting according to principles that others could not reasonably reject defines morality because it is the right way to respect other humans. At the same time, living this way supports relationships with others that are appealing and worth seeking for their own sake, independent of their relationship to morality. And finally, the ideal of justifiability accounts for the fact that people are generally motivated to be moral both to avoid “doing wrong” and for direct reasons like “she needs my help” or “doing that would hurt someone.” Justifiability is a

higher-order reason that shapes practical thinking and identifies the other reasons that are relevant for guiding an agent's actions (*WWO* 155, 161-62).³

According to Scanlon, the priority of morality is based in large part on the special *importance* contractualists ascribe to acting morally. They view the failure to see the reason-giving force of moral judgments as a special type of fault. This can be appreciated by considering their views on amoralists who understand the difference between right and wrong but do not feel they have any reason to care about it. Contractualists believe the moral reasons that apply to them also apply to amoralists unless their situation differs in morally relevant ways.⁴ In general, the reasons another person recognizes are important because they indicate whether that person respects others and thus affect her relationships. The amoralist's indifference to morality reflects her attitude towards other people. This attitude implies a failure to see why the justifiability of her actions to others should be of any importance, and it demonstrates that she places little or no value on others. This creates a significant alienation between the amoralist and others, thus explaining why contractualists attach special importance to recognizing the force of moral considerations (*WWO* 158-60).

The importance of morality explains why there are good reasons to act morally. But it does not yet explain how morality accommodates personal values while maintaining priority. Scanlon addresses this question of priority with a two-part strategy. First, he argues that morality does not require abandoning personal values because there are other, non-moral, aspects of our lives we have reason to pursue. Reasons associated with these aspects can be used to reject

³A more detailed discussion of how justifiability plays this higher-order shaping role is considered in Section 2 of Chapter 3.

⁴ Per Scanlon, this is required by the universality of reason judgments, which is discussed in Section 3 of Chapter 2. Certain philosophers disagree about what constitutes a "morally relevant" difference in circumstances, and this disagreement is considered in Section 2 of this chapter.

principles that would restrict personal relationships and other personal projects inappropriately. For example, under a Rescue Principle, it would be unreasonable not to give aid to someone facing significant distress as long as the rescuer faces only slight or moderate sacrifice. However, such a principle must consider the rescuer's past efforts so that it does not, in effect, demand unlimited sacrifice and thus prevent the rescuer from having the opportunity to pursue her own goals. Similarly, it would be reasonable to reject a principle that required an agent to give no more weight to her own interests than she does to those of others in every decision she makes. This rejection is based on impartial reasoning about generic reasons that all agents have for not wanting to be bound by such a strict requirement. Thus, there is room within morality for personal values. This reduces, but does not eliminate, the potential for conflict between the personal and the moral.

The second part of Scanlon's strategy explains why morality takes precedence when its demands conflict with the pursuit of personal goals. When properly understood, the demands of personal relationships and other personal projects have a built-in sensitivity to the demands of right and wrong so there are limits to the way that these relationships and activities should be pursued. As a result, one can generally act morally without compromising one's personal relationships. However, when there is a conflict, morality has priority over the personal based on the importance of justifiability to others and the value of relationships of mutual recognition. Thus, when the demands of morality place limits on our personal relationships or projects, there is good reason to give priority to these demands (*WWO* 161, 166, 224-25).

Scanlon uses an illustration dealing with friendship. Friendship may conflict with the demands of impartial morality because friends owe more to each other than they do to strangers. Successful friendships require loyalty and the support of each other's needs and projects, and this

support can clash with morality's demand for impartiality. Yet, according to Scanlon, friendship also involves recognizing the friend as a separate person—one with moral standing in her own right. Moral standing based solely on the contingent fact of friendship would not reflect proper recognition of the friend's status as a person. Furthermore, if one accords moral standing to friends based on their status as persons, one must accord the same moral standing to strangers who are also, by definition, persons. This standing places limits on treating strangers immorally to help friends. Scanlon acknowledges there may be other, less "moralized," forms of friendship, but he argues that the existence of this moralized form addresses the objection that an impartial morality does not leave room for special relationships. Because people must recognize the moral claims of both friends and strangers, there is no sacrifice of friendship involved in refusing to violate the rights of strangers to help a friend. Simply put, compatibility with the demands of impersonal morality should be built into the value of friendship itself—at least if one is to practice the form of friendship Scanlon espouses (*WWO* 164-65).

Scanlon believes this argument holds for other personal relationships such as marriage and that similar arguments can be made for other personal values that might conflict with the demands of morality, for example, the value involved in pursuing excellence in scientific work. Since these kinds of pursuits generally involve working with others, they are sensitive to the requirements of justifiability to others, and the reasons for pursuing them will not take priority over what is owed to other people (*WWO* 166-67). Based on these kinds of arguments, Scanlon believes moral demands can be shown to have the required priority in conflict situations.

Commenting on Scanlon's strategy, R. Jay Wallace acknowledges that contractualism makes room for the importance of friends and individual projects; however, he doubts whether the importance of moral values can stand up to competing reasons and values from the point of

view of an agent who must determine what she has most reason to do in a conflict situation.

Wallace raises concerns that the value of mutual recognition may not be strong enough to cause the agent to accord it the kind of deliberative priority that Scanlon's strategy requires. He argues:

The problem is not to explain how morality can be valuable in its own terms, but whether and how it can attain the kind of importance exhibited by friendships, professional ambitions, and other personal projects. Only if morality is important in something like this way, it may be thought, will it be capable of standing up rationally in competition with our projects (when, for instance, the demands of honesty or fairness place constraints on our relationships and pursuits).⁵

Thus, when faced with the challenge of the tangible benefits of friendship and other personal needs, the idealized value of mutual recognition might be outweighed by these considerations.

However, Wallace goes on to suggest that the priority problem might be resolved by looking more closely at two different aspects of the idea of justifiability to others, one outward-focused and the other inward-focused. First, one must look outward and consider the effects one's actions have on others. Reflecting on, for example, an action's cruelty is a justifiable reason to object and provides a concrete reason for acting morally. Additionally, the inward-focused aspect of justifiability to others concentrates attention on the positive value of being a person who is able to relate to others on terms of mutual recognition. This is a specific, and positive, way in which acting morally can make one's own life better. Wallace argues that this two-part explanation of the value of acting in concert with others provides a more concrete reason to act morally when morality conflicts with the goals of one's own relationships and projects.⁶

Scanlon's account of the reasons for acting morally, when augmented by Wallace's comments, provides a sound argument in favor of people having reason to act according to

⁵ Wallace, 454.

⁶ Scanlon endorses this account in T. M. Scanlon, "Reasons, Responsibility, and Reliance: Replies to Wallace, Dworkin, and Deigh," *ibid.*: 513.

contractualist moral principles. And it explains why agents are bound by principles based on the concept of justifiability to others in many situations. However, I believe contractualist reasons can still be insufficient to motivate an agent who has strong personal reasons to act differently. I examine this objection by reviewing how a contractualist interprets several examples in favor of acting morally and then demonstrating how this interpretation can fail.

1.3. The contractualist interpretation of two examples: In his examination of the relationship between contractualist morality and other values, Changwon Sung provides a contractualist interpretation of the priority of the moral by considering two examples.⁷ Sung's interpretation provides a good baseline to argue how personal, rather than moral, reasons can have priority in certain situations. His first example comes from Scanlon:

There would be something unnerving about a "friend" who would steal a kidney for you if you needed one. This is not just because you would feel guilty toward the person whose kidney was stolen, but because of what it implies about the "friend's" view of your right to your own body parts: he wouldn't steal them, but that is only because he happens to like you (*WWO* 164-5).

Scanlon uses this extreme example to argue that friendship requires us to recognize our friends' independent standing as moral persons and that this recognition places limits on acceptable behavior towards a friend. A friend who is willing to steal a kidney has no respect for people in general and would also have no respect for our own rights if he ceased liking us. Thus, there is no conflict between morality and friendship in this case because one would not be expected to steal a kidney (or perform other such actions) to help a friend. Sung agrees with Scanlon that this example supports the conclusion that a form of friendship which recognizes a friend (and hence, strangers) as having independent moral standing is more plausible than one in which someone would violate the rights of others in the name of friendship. This moralized form of friendship

⁷ Changwon Sung, "Morality and Other Values: A Contractualist Perspective" (PhD Dissertation, Harvard University, 2010).

builds moral compatibility, with its demands of interpersonal morality, into the nature of friendship. Sung adds that by adopting moralized friendship, the friend avoids feeling either resentful about being asked to harm someone or guilty for having harmed another in the name of friendship.⁸

Sung's second example comes from Marcia Baron:

Among the many people who live in countries where there are very long waiting periods for medical attention, some may be able to pull strings to schedule (e.g.) surgery the very next week for a son with cancer rather than wait two or three months until his turn comes up. What should we say about the ethics of pulling strings in such a situation? (Let us imagine that very few people would be in a position to pull strings.) On the one hand, it seems patently unfair to pull strings: if the others are in more or less equally dire straits, why should one's son be treated as somehow more special? Yet how can one, in such a situation, weight the considerations and decide, "Yes; it will greatly decrease his chances of survival if he isn't operated on for two or three months, but although I could arrange to get him surgery much sooner, that would be wrong. He has to wait his turn—even if it costs him his life."⁹

Baron points out that one can rationalize pulling strings by noting that although the son's surgery will be advanced by several months, a significant amount of time for the son, it will probably delay the next person's surgery by only a day, and is unlikely to make a difference. But, she notes, this response is clearly unsatisfactory to anyone concerned about fairness. Baron goes on to observe that we expect people to want to pull strings in such a situation and think well of them for this desire. We would disapprove of a mother who was not tempted and immediately ruled out providing her son with extra help. At the same time, we see the unfairness, and that is why we want rules to prevent people from acting this way. So, we want people to be partial to their loved ones even though we believe they should not be allowed to act on that feeling.

In comparing Baron's example to Scanlon's, Sung notes that the action of pulling strings might be considered less offensive than "stealing a kidney." First, whatever indirect harm is

⁸ Ibid., 126-28.

⁹ Marcia Baron, "Impartiality and Friendship," *Ethics* 101, no. 4 (1991): 855-56. Sung changes the protagonist in Baron's example, but this does not affect my later comparison with his interpretation.

caused by pulling strings is less significant than the direct harm caused by stealing a kidney. Second, the act of pulling strings is not “unnerving” in the way that stealing a kidney would be, although it still might call into question the mother’s view of the value of others. However, Sung goes on to argue that pulling strings is clearly wrong according to contractualism (it cannot be justified to others) and it therefore amounts to disregarding the wronged person as a human being. Thus, it is not clear why harming someone (in the kidney example) is a particularly grave moral failure but treating someone less fairly (in the pulling strings example) is not. Once this difference is removed, it is also no longer clear why the mother who pulls strings should not be regarded in the same “unnerving” way as the friend who steals a kidney. And, if one considers a modified scenario in which the operation in question is a kidney transplant, the mother would effectively be “stealing” a kidney from another patient. Thus, while the *actual* actions involved in the two cases are different, Sung observes that “the difference...does not constitute a significant moral difference.”¹⁰ He concludes that Scanlon’s strategy for priority based on a moralized conception of friendship (or other personal values) still works in less extreme cases than stealing a kidney.

As these examples illustrate, Sung summarizes Scanlon’s strategy for a conflict situation as first involving an appeal to the extent to which personal values have a built-in sensitivity to the demands of morality. Then, if this does not resolve the conflict, one can appeal to the great importance of the value associated with living in a way that can be justified to others. These two parts of the strategy are treated as unified. When there appears to be a conflict, contractualists should ask whether their conception of friendship (or whatever value is at stake) properly reflects the importance of morality, with the implicit understanding that adopting the proper conception

¹⁰ Sung, 135-37.

will eliminate the potential conflict. This strategy will be successful, in large part, because it appeals to the fact that the agent is already inclined to act morally by virtue of her acceptance of contractualism and the ideal of justifiability.¹¹

I agree that Sung's approach demonstrates that the proposed actions in both cases would be considered wrong under contractualism; however, I do not agree it also demonstrates that the agent has sufficient reason to act morally.

1.4. How contractualist moral priority can fail: In examining how the priority of the moral can fail, I will be using Scanlon's view that a person is generally motivated to do what she judges she has most reason to do.

A rational person who judges there to be compelling reason to do A normally forms the intention to do A, and this judgment is sufficient explanation of that intention and the agent's acting on it (since this action is part of what such an intention involves). There is no need to invoke an additional form of motivation beyond the judgment and the reason it recognizes, some further force to, as it were, get the limbs in motion (*WVO* 33-34).

Consistent with this view, I will focus on what an agent has most reason to do and assume that she will be motivated to act accordingly. Scanlon argues that an agent has more reason to act according to contractualist morality in conflicts with personal demands while I argue that there are cases in which she has more reason to act in a way that contractualism considers immoral.

The contractualist interpretation of moral priority can fail for two reasons: First, the judgment of whether a proposed moral principle can be reasonably rejected and the agent's judgment of which action she has most reason to do are two different types even though both involve determining what an agent has most reason to do. Second, the contractualist strategy relies on an overly moralized version of personal relationships and projects that understates the conflict between moral and personal values.

¹¹ Ibid., 131-32.

An agent can agree a proposed action is wrong but still believe she has sufficient reason to perform it anyway. This means that the agent must hold two different judgments about reasons for action at the same time. Under contractualism, she must judge that the reasons for rejecting principles allowing the action are more robust than reasons for permitting it. And, she must judge that her personal reasons for performing the action are stronger than her reasons for acting morally.¹²

On the one hand, according to Scanlon, moral principles are general conclusions about the status of various kinds of reasons for action. An assessment of rejectability must consider the consequences for all affected people of acceptance in general, not simply for a particular case. Since we cannot know which individuals will be affected, an assessment cannot be based on the aims, preferences, or characteristics of specific individuals. Instead the assessment relies on “generic reasons” which are based on commonly available information about what people have reason to want and are not attributed to specific individuals (*WWO* 204-5). Whether to reject a proposed principle is a judgment about a general situation based on an assessment of the reasons that people typically have. It should be made from an *impartial viewpoint* because the agent is charged with considering and weighing the reasons of all affected individuals, including herself. Thus, in making an impartial judgment, the mother should reject a principle that permitted a “generic” person to pull strings at the expense of another.

On the other hand, I argue that the mother’s judgment of whether to pull strings to advance her son’s surgery is a personal judgment made from the *perspective of an agent* who must weigh her reasons for acting morally against her reasons for protecting her son. This change in perspective makes the judgment personal rather than impartial, and the mother’s sensibilities

¹² This section examines these kinds of judgments from the point of view of a contractualist. Later I will consider the fact that they can also conflict under other moral theories.

come into play as she determines how to value and weigh the competing reasons.¹³ Thus the mother could judge she has more reason to pull strings than to act morally because her child's importance to her and her love for him are stronger reasons than the recognition that doing so is wrong and thus affects her standing with strangers. In making this judgment, she would be acting according to what she has most reason to do because the generic reasons in the judgment about morality do not include her personal reasons in the judgment about what action to take.

The observation that two different kinds of judgments are involved is somewhat analogous to the "two level" solution to the problem of impartiality in morality which argues that there are two distinct questions that need to be addressed: "What morality ought there to be?" and "What ought I to do?"¹⁴ Impartialism is an appropriate answer to the first question but not necessarily to the second. It is possible to insist that moral principles be impartial without being committed to the idea that every decision must be governed by completely impartialist considerations. This approach allows the principles of morality to be impartial while denying those principles should be so strict that they remove room for personal values and commitments. Similarly, my argument points to the difference between determining moral principles and determining what an agent has most reason to do in a specific—and granted extreme—situation. At the same time, it should be noted that contractualist principles are not completely impartialist because contractualism does allow for some consideration of personal reasons in determining principles as discussed in Section 1.2 of this chapter.

¹³ See Section 4 of Chapter 3 for a discussion of how sensibility affects judgments and how this can lead to differences in judgments even when the same reasons are involved.

¹⁴ This description of the solution is from Susan Mendus, "The Magic in the Pronoun 'My'," *Critical Review of International Social and Political Philosophy* 5, no. 2 (2002): 36-37. The same solution is also proposed by Marica Baron in Baron, 842, 57.

The second reason Scanlon's argument can fail is that his version of personal relationships appears to be overly moralized to the degree that there cannot be any true conflict with morality. He downplays certain aspects of personal relationships and ignores the phenomenology of conflicts that can exist between morality and these relationships. Support for this observation is found in Susan Mendus's critique of Scanlon's notion of friendship and in Wolf's writings on partiality.

Mendus argues that Scanlon ultimately misrepresents the relationship between values, such as love and friendship, and impartial morality. She characterizes Scanlon's account as a "reductivist response" which argues that although there may appear to be conflict between the reasons of morality and the reasons offered by other values, the appearance is illusory because the reasons offered by other values are themselves grounded in reasons of morality.¹⁵ As evidence, she points to Scanlon's observation:

The conception of friendship that we understand and have reason to value involves recognizing the moral value of friends qua persons, hence the moral claims of nonfriends as well. 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 (*WFO* 165).

Thus, according to this passage, Scanlon's view of friendship is, by definition, compatible with reasons of morality because it is grounded in morality; however, Mendus plausibly argues that this is not the only account of friendship deserving consideration. Competing accounts that are not grounded in morality undermine a significant part of Scanlon's strategy for resolving the priority conflict because he depends, in large part, on the avoidance of actual conflicts between morality and values like friendship. Under such accounts, conflicts will be more frequent, and

¹⁵ Mendus.

their resolution will depend on the agent's assessment of the strength of her reasons for acting morally against legitimate reasons for supporting her friends or loved ones.

Mendus also argues that the dissolution of conflict required by Scanlon's version of friendship is not phenomenologically accurate. When she considers cases like the one described by Baron, she concludes what is owed to strangers may have far less motivational force than what is owed to friends. Thus, in difficult cases, Scanlon's approach cannot show that the reasons for acting morally are stronger than the reasons for acting according to friendship in a way that *addresses the agent's own position*. The agent may concede that genuine friendship must acknowledge the claims of impartial morality, yet still question whether these claims should matter more than those of a particular friendship. Accordingly, it begs the question to hold that a person stops being a real friend if she refuses to do what is required by morality.

Looking at moral conflict from a different perspective, Wolf uses the following example to argue that friendship is not completely constrained by considerations of morality:

Consider the case of a woman whose son has committed a crime and who must decide whether to hide him from the police. He will suffer gravely should he be caught, but unless he is caught, another innocent man will be wrongly convicted for the crime and imprisoned. I shall take it as needing no argument that impartial morality forbids protecting one's son at the expense of another innocent man's suffering. Impartial morality forbids it—but we are talking about a woman and her son.¹⁶

Wolf recognizes that for many people this case is problematic: They feel enormous sympathy for the woman but believe she should turn in her son. But, Wolf continues, others view the woman who protects her son positively. There is something “positively reasonable (and not just understandable)” about the woman who wonders if she should act morally at the expense of her son. Thus, Wolf asks, “why should the dictates of impartial morality be regarded as decisive?”¹⁷

¹⁶ Wolf, 14-15.

¹⁷ *Ibid.*, 15.

Wolf maintains that the mother has good reasons for acting to protect her son. At the same time, she is not claiming that the “reasonableness” of the woman’s position makes it a moral one. Rather, this case demonstrates the conflict *between* the demands of morality and love. According to Wolf, the mother is not weighing different moral concerns. She faces a problem of whether “to attend ultimately to moral concerns at all. In this sense, it is a problem of radical choice.”¹⁸ Wolf argues that, in certain special situations, a willingness to act immorally is compatible with the possession of a character worthy of respect and admiration. Thus, it is possible for people to deliberately act immorally in these kinds of cases based on a judgment that they have good reasons to do so.

Based on the kinds of considerations just discussed, I believe Scanlon fails to prove that friendship or other interpersonal values are such that there is no conflict between them when understood properly and morality. There are personal relationships that recognize morality and, at the same time, situations that create conflicts that cannot be resolved by appeal to the fundamental importance of morality. Going beyond relationships, Scanlon makes an analogy between the nature of friendship and personal pursuits like scientific and artistic excellence. He maintains that these pursuits involve interactions with others and are thus subject to the same strategy for demonstrating moral priority. Using an example from business, I would counter that these types of cases present the identical problem for contractualist priority.

Assume Jane is running a small public technology business. She has reason to try to increase sales and earnings each quarter because it’s good for both her shareholders and her employees. The shareholders make money as the stock price increases; and, if the company continues to grow, there is the possibility that it will be purchased by a larger company at a

¹⁸ Ibid., 16.

significant premium. The employees are treated well and thus want the company to continue to prosper. Also, they have been given stock in the company so they too benefit from good financial performance. Jane is a large shareholder so she is committed to grow the company both as a point of personal pride and for financial gain. Jane is known for setting and achieving difficult goals; and, when she does, it increases the value of the company and her reputation as a leader in her industry.

Although the company is managed effectively, it has difficulty meeting quarterly sales and earnings targets. Thus, at the end of each quarter, the company often takes aggressive steps to reach its targets. For example, sales reps ask customers to buy products they don't yet need; some orders are shipped a few days early; expenditures are delayed; and certain favorable accounting judgments are made. These actions allow the company to report higher sales and earnings. The company is thus able to meet its targets, and its stock price continues to increase. Jane approves these actions and could stop them if she chose to. Is Jane acting immorally, and does she have reason to do so?¹⁹

Jane's actions are not moral because the company owes its shareholders and others a true picture of its performance. In contractualist terms, one would reject a principle that permits a company's president to misstate results based on actions that are not part of normal business practices. Jane would agree, no doubt, with this conclusion based on an impartial assessment. However, when faced with the actual decision of whether to approve the required actions, Jane has strong reasons to do so based on the positive impact good performance has for her

¹⁹ Although Jane's actions may seem inconsequential to some, they are probably in violation of SEC reporting standards. Also, the gap between the company's reported and actual performance can lead to the need for more extreme actions to meet targets in subsequent quarters, and eventually to the need for a significant correction when it is no longer possible to mask the actual state of the company's performance. This can be harmful to shareholders and employees in a number of ways.

shareholders, her employees, and herself. It is also difficult to identify which, if any, individuals are hurt by her actions. It may be argued that Jane is short-sighted because she is making it more difficult to perform well in the next quarter, but maybe she is aware of several partially completed projects that should improve next quarter's results or maybe she is optimistic for other reasons. In any case, the contractualist value of living in the right relationship with others does not have sufficient immediacy or importance for Jane to overcome her pragmatic reasons to go ahead. Thus, it seems appropriate to conclude that Jane has stronger reasons to take these actions to protect her shareholders and employees than she does to be moral, even though she recognizes she is doing something wrong.

In summary, the purpose of this exercise is to investigate whether contractualist moral reasons are always sufficient to have priority over competing reasons based on personal relationships and projects. One viewpoint, represented by Sung's argument, is that they always do; however, I have described specific situations in which contractualist reasons can fail to have priority. Thus, I am arguing the examples above demonstrate that contractualist reasons for acting morally are not always sufficient for an agent to have greater reason to act morally than she does to aid a friend or pursue a personal project. The specific contractualist reasons for acting morally (the value of being in a relationship of mutual recognition with others *plus* the specific reasons for not taking the action in question) are not sufficient in situations like the ones just discussed to overcome the specific reasons in favor of the immoral action *when considered from the agent's point of view*.

It is also important to note that the situations described differ from typical cases of *akrasia* in which someone acts against her better judgment due to weakness of the will. In such cases, the agent acts counter to the way she judges she has *most* reason to act. For example, one

might decide to do something because it would be fun, even though one knows there are compelling reasons not to do it. In other words, a person fails to give these reasons the normative force she believes they should have.²⁰ In the cases I have explored, however, the agents sincerely considered all the competing reasons and judged that they had most reason to act immorally; thus, they are not exhibiting a weakness of the will. Therefore, these insights demonstrate the limits of contractualism's normativity and show that these limits are reached more frequently than Scanlon maintains.

1.5. Significance and possible resolution: A good case can be made that the limits just described for contractualism are, in fact, limits for all moral theories.²¹ If so, the real problem lies not in the limitations just described on the normativity of contractualism's principles but rather in its moralized view of personal relationships and projects which leads to the mistaken claim that such limits do not exist. Adopting a less restrictive view of these relationships could better align the theory's claims about normativity with the types of views about the nature of personal relationships just examined without unintentionally weakening the theory in other ways.

The previous section highlighted the difference between an agent's judgment of what is morally acceptable and her judgment about what she has most reason to do in specific situations, and it showed that these judgments can diverge under contractualism. A similar divergence can be found in most (and perhaps all) moral theories. Wolf's views about the conflict between the demands of morality and those of personal relationships are theory neutral and support this conclusion, as does an examination of the specifics of common moral theories. For example, a utilitarian's reason to act morally is based on her reasons to help "achieve the greatest good" or some similar state. In conflict situations like the ones just discussed, a utilitarian could make a

²⁰ See Scanlon, "Reasons, Responsibility, and Reliance: Replies to Wallace, Dworkin, and Deigh," 509.

²¹ This point, its implications, and the suggested solution were brought to my attention by Steven Ross.

judgment that achieving the greatest good requires impartiality while still judging that she has stronger reasons to help a friend or loved one. Thus, utilitarianism is here similar to contractualism. Likewise, a proponent of virtue ethics could consider Wolf's example and conclude that a virtuous person would turn in her son while also judging that, when faced with the same situation, she (the proponent) has more reason not to act virtuously. A divine command theory of morality differs somewhat in that God determines what is moral, and many followers of such theories believe that their purpose in life is to abide by these commands. However, it is still likely that there are situations in which the follower makes a conscious judgment that she has good reason not to act morally.

While contractualism cannot be criticized for a limitation that is common to moral theories in general, it can be faulted for claiming it is able to avoid these limits. A primary element of this claim is Scanlon's moralized version of personal relationships and projects which, it has been argued, understates potential conflicts with the demands of morality. Adopting a less moralized view of these relationships would better align the theory with actual experiences without altering the effectiveness of the theory. Judgments about moral principles in the conflict situations under discussion would not be affected because the analysis just presented recognizes that agents can make judgments upholding the impartiality of morality. And the normativity of these principles will more accurately reflect experience because the adoption of a less moralized version of personal relationships more clearly recognizes the tension between the demands of morality and the demands of these relationships.

2. Do Contractualist Principles Apply to the Unmotivated?

According to Scanlon, everyone is subject to moral reasons whether or not she is moved by morality. As discussed in Section 1.2, he argues that being “left cold” by moral reasons is a much more significant fault than failing to see the force of other kinds of reasons. Someone who fails to be moved by moral considerations is declaring that she values herself (and perhaps those with whom she has special relationships) above all others. This perspective creates a significant distance from others and explains why contractualists attach special importance to recognizing the force of moral considerations.²² Critics like Gerald Dworkin, however, question whether contractualist moral reasons obtain for all persons.²³ I argue that Scanlon’s position is correct.

2.1. The contractualist argument: Scanlon defines judgments about right and wrong to be “judgments about what would be permitted by principles that could not reasonably be rejected, by people who were moved to find principles for the general regulation of behavior that others, similarly motivated, could not reasonably reject” (*WWO* 4, my italics). Amoralists (and many others) can understand the difference between right and wrong but do not see this difference as something they have reason to care about. Similarly, the “disaffected” can accept moral principles but apply them to a narrow range of persons like friends and relatives.²⁴ Both groups are clearly not interested in principles for the *general* regulation of behavior that others could not

²² It is interesting to note that in an earlier paper Scanlon attributed the reason-giving force of moral considerations to the *desire* to act in a way that can be justified to others. This view left open whether persons lacking this desire had reason to act morally. Scanlon subsequently reassessed his view. In Chapter 1 of *What We Owe to Each Other*, he presents the theory that reasons are basic and actions can be motivated without relying on pre-existing desires. For this earlier paper, see T. M. Scanlon, “Contractualism and Utilitarianism,” in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge; New York: Cambridge University Press, 1982).

²³ Dworkin.

²⁴ The term “disaffected” is used by Dworkin. I will use “amoralist” with the understanding that it could also apply to the disaffected.

reasonably reject. The question is whether this lack of actual motivation undermines the applicability of moral reasons to these groups.

As discussed in Section 1.4 of this chapter, Scanlon argues that actions can be motivated by reasons without relying on pre-existing desires. Thus, the task of explaining the importance of morality depends on the reasons people have for pursuing the value that justifiability to others represents. The challenge for contractualism is to show that the reasons for acting morally apply to the amoralist even if she does not recognize or is not motivated by them. It is not to convince the amoralist that she is wrong—a goal that would be unattainable given her nature.²⁵

The argument that moral reasons apply to everyone is based on the universality of reason judgments and the conclusion that the amoralist's lack of motivation to seek general agreement is not a condition that affects the applicability of this principle. Scanlon writes:

Unless their situation differs from ours in ways that are morally relevant, we must say that the moral reasons that apply to us apply to these people as well. This much is required by what I called...the generality of reason judgments.... Their case is quite different from that of people who "have different tastes." ... In these cases, the main point of the activities in question is a certain kind of enjoyment; so people who do not get this enjoyment from the activities lack reasons to engage in them. But morality is not aimed at enjoyment, so the reasons to give it a place in one's life are not conditional in this way (*WVO* 158).

In response to the concern that his argument is too narrow because it does not examine whether reasons for acting morally are conditional on "wanting to live in a certain relationship with others," Scanlon broadens his discussion.²⁶ He notes that reasons for acting morally are usually based on objective facts, like the harm done to others, and these reasons are not dependent on

²⁵ Scanlon's view of reasons is an externalist one, and this section examines whether there is an externalist argument that moral reasons are reasons for the amoralist. I will comment on the internalist view in the next section.

²⁶ Dworkin, 479-80; T. M. Scanlon, "Reasons, Responsibility, and Reliance: Replies to Wallace, Dworkin, and Deigh," *ibid.*: 520.

subjective facts about the agent. He also argues that the reasons for accepting the overall contractualist view of morality are also independent of a specific agent.

But it seems to me just as clear that our reasons for being concerned with morality at all (for caring about the justifiability of our actions to others) are not conditional on our happening to care about this and to be moved by it. These reasons are not themselves moral reasons (that is to say, it is not that we have reason to care about the justifiability of our actions because it would be morally wrong, or morally bad, not to do so).²⁷

In other words, Scanlon argues that the *reason* for caring about the justifiability of actions to others is not conditional on *happening to care about* the justifiability of actions (or, said differently, caring about the morality of these actions). Rather, caring about justifiability is based on the value of developing a relationship of “mutual recognition” with others. He writes:

Standing in this relation to others is appealing in itself—worth seeking for its own sake. A moral person will refrain from lying to others, cheating, harming, or exploiting them, “because these things are wrong.” But for such a person these requirements are not just formal imperatives; they are aspects of the positive value of a way of living with others (*WVO* 162).

Given human nature, people cannot live in isolation, and thus contractualists find great value in behavior that fosters a positive relation with others. Because caring about justifiability and morality *per se* is not a subjective condition for the reasons anyone has to be moral, it is not a subjective condition for *others’* reasons; thus, reasons to be moral apply to the amoralist as well.

I find this argument convincing because it rests on the fact that one cannot live without establishing relationships with others, and that the nature of these relationships has a meaningful impact on the quality of one’s life. I also recognize it assumes one accepts Scanlon’s externalist view about reasons. Internalists do not accept this view, and I discuss their position next.

2.2 A note on internalism: Internalists do not agree that moral reasons apply to the amoralist. My goal in this section is to highlight how the externalist and internalist views differ

²⁷ "Reasons, Responsibility, and Reliance: Replies to Wallace, Dworkin, and Deigh," 520.

rather than to resolve their disagreement. In his own assessment of the issue, Scanlon concludes “... I do not think that there is any argument that would force a person who was drawn to one of these alternatives to accept the other instead.”²⁸

Many internalists echo Bernard Williams who claims all reasons for action have subjective conditions and “all external reasons claims are false.”²⁹ He holds that a claim that an agent has reason to do X can be true only if there is a “sound deliberative route” leading from elements in the agent’s subjective motivational set to the conclusion that she has some reason to do X. The subjective motivational set refers to a person’s desires in a broad sense including such things as “dispositions of evaluation, patterns of emotional reaction, personal loyalties, and various projects...embodying commitments of the agent.”³⁰ Further, a sound deliberative route can go beyond purely causal instrumental reasoning and may include such things as recognizing ways an action would be related to something one already cares about, thinking about how to combine the pursuit of multiple concerns, considering which of several conflicting aims to pursue, and so forth. A lack of a deliberative route could be due to the absence of some critical element in the agent’s motivational set or something about the way the agent deliberates that prevents certain connections from being made.

Consider someone who has always regarded the idea of personal honor as silly and old-fashioned.³¹ Nonetheless she comes to admire someone who takes this idea seriously. Over time, she sees how this person values acting in certain ways and comes to believe that honor is something worth caring about. An externalist would explain the change in her perspective by

²⁸ Scanlon discusses internalism in the Appendix of *What We Owe to Each Other*. The quote is on 373.

²⁹ Bernard Williams, "Internal and External Reasons," in *Moral luck : philosophical papers, 1973-1980* (Cambridge; New York: Cambridge University Press, 1981), 113.

³⁰ *Ibid.*, 105.

³¹ This example is taken from the Appendix of Scanlon, *What We Owe to Each Other*.

saying she came to believe something that was true all along—she had reason to esteem honor and to avoid dishonorable conduct. An internalist, however, would argue that the agent must have deliberated in some rational way and that the deliberation started from her original motivational set. The new motivation is appropriately connected to her original motivational set; otherwise, she could not have acquired it.

The internalist is comfortable with the fact that the account of what deliberation might involve is somewhat vague and, despite this vagueness, finds a clear distinction between the two positions. The internalist adopts the perspective of the agent and argues that what might be reasons for others are not reasons for that agent unless she is appropriately connected to them. It is pointless to maintain an agent has a reason if she is incapable of acting on it or even recognizing it. Accordingly, the internalist argues that contractualist moral principles do not apply to the amoralist who is not moved to find principles for the general regulation of behavior. The externalist, on the other hand, focuses on reasons and the justification story for an action from the perspective of a third party regardless of the agent's ability to recognize or be motivated by these considerations. Given Scanlon's views on reasons, he makes a convincing case that contractualist moral reasons apply to the amoralist. However, one must note that his argument will not convince the dedicated internalist, and also that this is irrelevant from the point of view of his theory.

3. Contractualism and Other Moral Systems

So far, I have examined the reasons moral principles have priority for contractualists along with some limitations on this priority. I've also argued that contractualists are justified in believing their moral principles apply to those who do not care about morality. If contractualist

reasons apply to amoralists, they also apply to those who care about morality but choose to follow a different doctrine than contractualism. How, then, should contractualists view and interact with these latter people, and how should they take others' reasons into account in determining moral principles? This is an important question that is not explicitly addressed by Scanlon. I maintain that contractualism and other doctrines can coexist without significant conflict if the other doctrines are reasonable ones. In such cases, contractualists should consider certain religious or cultural reasons as grounds for the reasonable rejection of proposed principles if the reasons are part of the non-contractualist's core values and considering them does not infringe on other contractualist principles.

3.1. Relationship to other moral systems: As discussed, both the content and the authority of contractualism are based on a recognition of the capacity for rational self-governance. Living by principles that others cannot reasonably reject recognizes their value as independent and equal individuals by acting in ways that respect this unique capability. Abiding by contractualist principles says little about the "right kind" of life to live because this is not at issue. Contractualists accept others' life choices if they too follow a similar path of non-interference. Thus, the underlying tenets of contractualism are a recognition of each person's value and a willingness to allow each person to choose how she lives if she also respects others.

Contractualism's relationship to other moral systems varies depending on the extent to which the other beliefs are consistent with contractualism's basic tenets regarding human equality and self-determination. When these basic views are shared, contractualists should be able to live in harmony with those who ascribe to other moral theories. This seems likely for followers of other secular moralities, like various forms of consequentialism and virtue ethics, because these theories view persons as equal individuals and generally respect their rights as

such.³² This will also be true for those who recognize a morality based on religion or culture if their beliefs form what Rawls terms a “reasonable comprehensive doctrine.” Rawls uses this term when considering what kinds of doctrines people in a liberal democratic society can affirm while still being able to tolerate and interact with others. A comprehensive doctrine covers major religious, philosophical, and moral aspects of life in a consistent and coherent manner.

According to Rawls, doctrines are distinguished by the primacy and weight they give to certain values; and, in doing this, they provide specific guidance to their adherents on how to live.

Reasonable persons recognize that others may affirm different comprehensive doctrines and that there is nothing wrong in doing so. Thus, they do not propose the use of political power or other means to repress views that differ from their own (*PL* 58-66).

In considering relationships between contractualism and other moral systems, it is useful to remember that contractualism focuses on the domain of “what we owe to each other.” This domain contains judgments of right and wrong based on principles that cannot be reasonably rejected. Some of these principles are universal (like judgments that it is wrong to murder or torture) while others depend on reasons that people have only under certain social conditions (like principles about what constitutes an invasion of privacy), but both universal and socially-dependent principles are based on the same type of contractualist reasoning. There are, of course, other moral values outside the domain of contractualism. Scanlon believes there are a plurality of values within this broader domain that are worthy of respect even though they may be mutually incompatible in the demands they place on their adherents. Examples here include different conceptions of patriotism, honor, and family loyalty. For instance, someone might view an ideal of patriotism as a moral standard that goes beyond contractualism’s narrower requirements of

³² That is not to say there will not be differences about certain moral principles, as in the distinction between contractualism and utilitarianism on certain cases involving aggregation.

what one owes to her fellow citizens. Such a person might believe that patriotism requires an extreme level of sacrifice for one's country and view herself as failing morally if she does not respond to this demand. Alternatively, some conceptions of honor require that a person keeps her word even when unexpected circumstances provide good reasons to release her. Or, different conceptions of family ties may require varying degrees of sacrifice of one's personal goals to help family members and conflicting views on how close a relative must be to deserve such considerations (*WWO* 342-49).

Doctrines that recognize the value of individuals are likely to agree on many of the principles within contractualism's domain of what we owe each other. This is not surprising given that the idea of "treating others according to principles that cannot be reasonably rejected" is not all that different from the Golden Rule of doing unto others as you would have them do unto you. It seems difficult for a doctrine to proclaim the value of individuals if its view of morality is not roughly in line with these concepts. Variations in values among doctrines are more likely to exist in the broader domain of morality which is outside of what we owe to each other strictly speaking. However, if adherents of these doctrines are reasonable in the sense that they respect other doctrines and do not try to force their values on others, there will likely be little conflict among doctrines. Of course, there are also "unreasonable" doctrines that do not recognize individual equality, treat others in ways that ignore their personal rights, or hold it is right to force non-believers to adopt their beliefs. In these cases, contractualists cannot avoid conflict.

Even if there is considerable agreement on principles among doctrines, it is important to recognize that the source of morality is different for each. For example, in contractualism, morality is based on the value of living in a relationship of mutual recognition with others. In

utilitarianism, it is based on pursuing actions that achieve the greatest good. In many religions, morality is based on following divinely-given principles that guide people in living the right kind of lives. These differences are ultimately the source of disagreements when contractualism and other moral systems come into conflict.

3.2. The impact of other doctrines on contractualist principles: Finally, an important question from the contractualist perspective is whether the process of reasonable rejection should consider non-contractualist reasons based on religious or cultural beliefs. The problem arises from contractualism's basis in principles that cannot be rejected by others "who are similarly motivated to find principles for the general regulation of behavior." Because other moralists do not share this motivation, a strict interpretation of contractualism would mean these other moralists do not have standing to reject proposed principles.³³ But this interpretation seems too restrictive given the fact that contractualist morality is designed to establish meaningful relationships. Contractualists live in heterogeneous societies which encompass people with different moral motivations, so it is incumbent upon them to see if they can incorporate (at least some) religious or culturally-related reasons into the process of determining moral principles.

Scanlon gives no specific guidance on how one might do this. On the one hand, he states that principles should be based on generic reasons that represent commonly available information about what people generally have reason to want. This formulation could be used to argue against religious or cultural reasons if they do not fit this general criterion. On the other hand, Scanlon recognizes that reasons related to personal relationships and projects can be used in a limited way to reject principles. An example of this is Scanlon's Rescue Principle, which includes a qualification that limits the obligation to rescue in order to prevent inappropriate

³³ This point is made in regard to all non-contractualists in Pogge, 123. He views this as an easily correctible problem.

intrusions into the rescuer's life.³⁴ The recognition of personal projects as relevant reasons could also be used to include religious and culturally-based reasons in determining moral principles.

One way to decide on which reasons are acceptable is to rely on the contractualist's goal of mutual recognition to argue a reason should be deemed morally relevant if it meets the following criterion: "Can this kind of consideration be considered to be important for being able to live a rationally self-governed, meaningful life?"³⁵ Such a criterion requires religious and culturally based (and all other) reasons which involve matters of importance to be included in determining principles. At the same time, the proposed reasons could not conflict with the non-religious contractualist's ability to live a self-governed, meaningful life. Thus, if the above view is correct, a contractualist should recognize religious or cultural reasons if they are sufficiently significant to the religious moralist's way of life and, at the same time, do not prevent the recognition of other contractualists' similarly significant reasons.

I conclude this section with a somewhat simplified example. Consider the case of a religious moralist who is potentially barred from serving in the police force or military because of dress or grooming restrictions.³⁶ Perhaps he believes that a certain style of facial hair is a sign of respect for God, or she covers her hair for the same reason. These beliefs are sincerely held convictions about living according to God's will rather than mere conformance to group fashion. The religious moralist also believes that being a member of one of these services is an attractive way to pursue a career that serves the community while providing compensation to support a comfortable life. With equal conviction, leaders in the police and military believe that a

³⁴ See discussion of this principle in Chapter 2, Section 1.1 and in Section 1.2 of this chapter.

³⁵ Rahul Kumar, "Reasonable Reasons in Contractualist Moral Argument," *Ethics* 114, no. 1 (2003): 17. In this paper, Kumar considers what kinds of reasons are valid, including a discussion of how reasons based on religious commitments might be treated in contractualism.

³⁶ *Ibid.*, 20-8.

common dress code is crucial to establishing a sense of unity and equality among officers who must be ready to support each other under difficult and often life-threatening circumstances. They maintain that the code also ensures a professional image to the outside community, thus supporting the organization's mission.

Should a contractualist support prohibitions on non-conformist persons from serving in the police or military? The key question is whether this person's belief about dress or grooming qualifies as a moral reason that should be considered in determining the rejectability of such a principle. I would argue it does given these beliefs are sincerely held expressions of a faith that is central to the religious moralist's life. As such, this reason needs to be weighed against the objector's reasons (like the risk of harm to fellow officers caused by dissension or reduced unity) to determine if the religious moralist's objection to being excluded is a reasonable one. Although I believe the moralist's objection is reasonable in this case, one could undoubtedly create scenarios in which it is not. For example, suppose a religion prohibited its members from speaking with non-related members of the opposite sex. Such a person could reasonably be prohibited from serving in a police force because observing this restriction would clearly affect his or her job performance. In considering various situations, then, one must recognize that not all religious or culturally-related reasons will qualify as moral reasons; and, even if they do, they could still be outweighed by other reasons. While this solution is unlikely to meet all the religious moralist's perceived needs, it is the best contractualism can do within its system. Moreover, this approach would allow the contractualist to respond to the person's way of life and to her status as a person, thus enhancing the contractualist's ability to support the other members of a heterogeneous society.

Conversely, there is no parallel question asking how the religious moralist should incorporate contractualist reasons into her deliberations because her moral beliefs are dictated by her religion rather than through a contractualist-like procedure. However, it is worth considering whether the contractualist procedure might still be useful to the non-contractualist as a framework for analyzing complicated moral situations. As previously noted, the parallels between contractualism and the Golden Rule make it likely that contractualist principles will be consistent with those of any doctrine that recognizes the value of all persons. And the procedure itself forces an agent to consider in detail how her actions impact others. In such a case, the contractualist procedure would help illuminate moral principles or positions that already exist as prescribed by the doctrine, rather than the procedure being the basis of the principles (as is the case for contractualism).

In summary, although contractualism and comprehensive religious or cultural moral systems are clearly incompatible, the contractualist can and should respond to reasons based on the religious or cultural moralist's beliefs when determining moral principles, even though these beliefs prevent this moralist from recognizing the authority of contractualism. Given the heterogeneous nature of democratic societies, including these reasons would close a significant gap created by the contractualist procedure. Moreover, it would fill that gap without requiring the contractualist to affirm any reasons in ways that conflict with contractualism's own principles.

Chapter 5

An Assessment of Contractualism

Contractualism focuses on two key issues that a moral theory must address: how moral judgments are made and why agents are motivated to act on these judgments. Scanlon proposes a theory based on the ideas of “justifiability to others” and “reasonable rejection” that insightfully links moral judgments and agents’ motivation using a reasons-based constructivist approach. However, as I’ve come to understand contractualism and analyze the way it works, my initial enthusiasm has been tempered by a realization that the theory is simply incapable of specifying principles for its entire target domain of interpersonal relationships. Furthermore, an examination of the underlying causes of these failures indicates the theory cannot be modified to resolve these issues. Thus, while contractualism provides many useful insights into the nature of morality, it ultimately disappoints potential proponents. This chapter summarizes my assessment.

1. An Insightful Account of Morality

Most people would agree that a primary purpose of morality is to provide guidance on how to treat other people and that these relationships should be based on respect for others and an understanding of the way they would like to be treated. These thoughts are at the heart of contractualism’s premise that acting morally is to act in ways that others could not reasonably reject. Scanlon successfully demonstrates how the idea of justifying one’s actions to others can be used to explain both the way moral judgments are made and why agents are motivated to act according to these judgments.

1.1. Making moral judgments: According to contractualism, moral principles are determined by agents who judge whether the persons most affected by a proposed action could

reasonably reject a principle that permitted it. To do this, the agent must identify opposite principles that permit and prohibit the action in question. She must then consider who has significant objections to each, compare these objections, and judge which complaints are stronger—those that permit the action or those that forbid it. Judgments like these determine what is right and wrong in a way that respects others' needs, and treating others properly is a key aspect of morality according to most people.

Contractualism is well aligned with common views in another way because many people also believe morality should be based on reasons and justifications. In moral disagreements, one generally identifies the reasons that support one's preferred moral position and then argues why these reasons are relevant and why they should be given greater weight than those which support the opposing position. Contractualism formalizes this process by specifying what kinds of reasons are relevant and providing guidance on the way these reasons should be evaluated. It is easy to understand the theory's account of what makes an action right or wrong—at least in a general way. No difficult philosophical interpretations are needed. Interactions should be based on principles that cannot be rejected after considering the reasons for and against adopting individual principles. This is a simple, but powerful, explanation of what constitutes a moral judgment.

A common objection to contractualism is based on the fact that determining moral principles requires assessing the validity and strength of reasons, and such judgments admittedly have moral content. They are not like a utilitarian assessment of which action produces the greatest welfare—a judgment about a non-moral attribute that is claimed to create a moral imperative. Nonetheless, contractualism does withstand the criticism that its judgments depend entirely on already held moral intuitions about the rightness of actions, and thus, that they add

nothing to our understanding of morality. As discussed in Chapter 3, the concept of justifiability is not redundant because it determines which characteristics of an action are valid reasons for assessing its moral status, and the judgment that an action is wrong provides a “back-stopping” reason for not performing it. The contractualist procedure also gives considerable guidance on how to make judgments, thus going beyond unrestricted intuitions. And, finally, justification plays a critical role in moral motivation by providing the link between knowing an action is good and having a reason to perform that action.

1.2. Link to moral motivation: Providing the link to moral motivation is the second role that justifiability to others plays, and it does this in a way that is also consistent with common views about morality. In Scanlon’s account, acting according to reasons that cannot be rejected shows respect for others and supports relationships of mutual recognition. These relationships are important independently of their moral implications because people need the help of others simply to survive and, more positively, to lead fulfilling lives. In line with this view, most people act morally because they want to be able to defend their actions to those affected. If someone is asked why she made a difficult choice that disappointed a friend, she will generally cite the reasons behind the choice to make it clear why her action better balances the various considerations than the one she avoided. Similarly, when someone acts immorally, she feels bad because she has let someone (including herself) down, and she cannot provide good reason why she acted that way. Thus, justifiability to others provides an account of why agents have reason to act morally in a way that matches familiar attitudes about morality.

One concern, as discussed in Chapter 4, is that Scanlon’s account exaggerates the motivational pull of morality by proposing an overly moralized view of friendship and other personal relationships. This view minimizes the potential conflict between the demands of

morality and those of personal needs, and does not recognize that there are situations of intense personal conflict where agents have greater reason to act immorally even though they recognize what they are doing is wrong. However, this inconsistency is not a significant weakness because it is a problem for most, if not all, moral theories. A less restrictive view of the nature of personal relationships could be adopted without weakening contractualism's other elements.

1.3. Importance of individuals: Finally, most people think of morality as a subject that involves individuals, who make judgments about what is required to act morally and, in doing so, take into account the needs and rights of other individuals. Contractualism is clearly designed with the individual in mind. From the agent's point of view, a judgment of reasonable rejection is made by a single person—the agreement of others is not required. These individuals are not idealized agents; they are persons whose capabilities and experiences are not limited in any way. The fact that moral principles are developed under the unaltered conditions real people face helps validate the theory's authenticity.

From the viewpoint of the parties affected by an agent's actions, the contractualist procedure is designed to ensure that principles respect the rights of individuals and that individuals cannot be used as a means for others' ends. To do this, Scanlon requires that judgments be based on a principle's effects on single individuals rather than groups. This requirement forces agents to reject, for example, principles that would allow someone to suffer significant harm to shield many people from lesser sufferings. This emphasis of individual rights is one of Scanlon's main goals in designing contractualism. It distinguishes his theory from consequentialist ones and does so in a way that matches many moral intuitions.

If this were the entire story, contractualism would be a strongly convincing moral theory. Its core tenet of justification to others explains how moral judgments are made and why agents

are motivated to follow them in a way that matches most people's ideas about morality. And, it focuses on the individual's role in morality, both as an agent and as the potential victim of immoral actions. But this is not the end of the story. Although the theory claims to specify moral principles that cover the entire domain of interpersonal interactions, it leaves two important gaps: the problem of aggregation and the problem of relativism.

2. Incapable of Specifying Principles in Certain Cases

Contractualism has two serious problems in the way it determines moral principles. Ironically, the sources of the theory's strength, its emphasis on 'reasonable rejection' and the role of individuals in morality, are also the cause of its weaknesses. These problems are reviewed in this section.

2.1. Problem of aggregation: Contractualism's focus on the individual and the corresponding Individualist Restriction, which requires that judgments be based on a principle's effects on single individuals rather than groups, create a dilemma for contractualism in cases involving aggregation. On the one hand, this constraint correctly prevents the aggregation of small benefits for many from outweighing large harms to a few. On the other hand, it also prevents aggregation in situations where it seems right to do so; for example, where harms to individuals are equal and many can be helped at the expense of a few, like the choice to rescue several people or one.¹ Furthermore, there are cases in which harms are unequal but still close enough to be relevant and where it is clearly moral to allow a smaller number of individuals to

¹ Scanlon disagrees and argues that contractualism can support both the Individualist Restriction and a Tiebreaker Principle that requires preventing harms to the larger number when harms are of equal magnitude. My argument for why this position is inconsistent is presented in Section 3 of Chapter 3. Scanlon also proposes an Extended Tiebreaker Principle to address unequal but "morally relevant" harms; however, he is unable to present a justification for this principle in the version of contractualism under consideration here. A discussion of this type of situation is also presented in the same section.

suffer the greater harm so that many can avoid the lesser one. (Scanlon uses the example of saving one person's life to prevent a large number from going blind or becoming paralyzed.) Such a judgment is also contrary to the Individualist Restriction.

Thus, aggregation is a dilemma caused by contractualism's emphasis on individuals. One cannot eliminate the issue by arguing that contractualism shows why generally accepted views about aggregative morality are mistaken—intuitions about saving multiple people instead of a single individual are quite strong. However, there are two somewhat mitigating factors. First, contractualism's framework is still useful for analyzing these kinds of situations because it helps clarify what reasons are relevant beyond the specific harms involved. For example, if one of the persons needing rescue is responsible for creating the rescue situation through her own carelessness, that factor could legitimately affect the rescuer's choice of whom to save, and the idea of reasonable rejection provides a way to assess the factor's significance. Second, consequentialist theories have the opposite problem in that they cannot avoid inappropriate aggregation that leads to the conclusion that one should allow an individual to suffer serious harm to avoid small harms to many. Nonetheless, despite these extenuating circumstances, aggregation is a serious problem for the theory.

2.2. Problem of relativism: Contractualism's practice of basing principles on the judgments of an individual agent combined with its standard of reasonable rejection leads to undesirable relativism. As discussed in Chapter 3, the objectivity of moral principles as determined by the Scanlon's theory depends on the convergence of many individuals' moral judgments. However, because these are non-ideal agents with different experiences, interests and sensibilities, and because what can be reasonably rejected is therefore somewhat dependent on the person making the judgment, there is no guarantee that the judgments of various agents will

converge. When the judgments of persons in different groups converge on conflicting moral principles in a way that is stable, there is a relativism because principles depend on the context in which each group is making its judgment and there is no principled way to choose between the two views. Sometimes this is benign and sometimes problematic. Scanlon, however, does not believe that contractualism is vulnerable to a charge of relativism. He argues that the theory explains how societies can support different principles, say for protecting people's privacy, by pointing to differences in reasons based on variations in social practices. At the same time, he argues that judgments will converge in cases like those involving killing, enslavement, or harming others.

I have identified two problematic situations. First, Scanlon argues that contractualism can exclude morally objectionable practices by distinguishing what people "have reason to want" from what people "actually think or want" due to cultural acclimation. However, in practice, there is no neutral way to make this distinction as shown by the example of antebellum slavery in the U.S. The same problem of distinguishing objectionable practices exists when considering differences in moral codes across cultures regarding, for example, treatment of women and minorities. While it is easy from a liberal perspective to conclude that discriminatory practices are wrong, it is impossible to justify this conclusion using the contractualist procedure. When other cultures' perspectives are based on reasons they find defensible given the information available to them, one cannot step back from both points of view to identify the more valid one. Thus, in situations having relevantly similar characteristics, contractualism supports conflicting actions.

Second, agents are unlikely to converge on a single moral judgment in difficult cases where reasons are hard to compare, outcomes are affected by uncertainty, different time frames

are involved, and so on, as was illustrated by the analysis of voluntary euthanasia.

Determinations about the morality in other cases like abortion and drug usage are subject to similar issues. In cases such as these, different groups or societies can and do converge on different moral principles as evidenced by the acceptance of voluntary euthanasia by certain countries and states. In these situations, the relevant reasons for determining principles do not vary; rather, it is the way agents evaluate these reasons that differs. Thus, contractualism cannot avoid justifying conflicting actions in situations with morally similar characteristics.

In making the charge of relativism, I recognize it is unreasonable to expect any theory to provide a single answer for every moral situation. A good counter, for example, is to claim that the cases in question are simply examples of moral disagreement or moral indeterminism. However, raising these possibilities does not eliminate concerns that relativism is a significant problem for contractualism.

Consider moral disagreement. Because contractualism is a constructivist theory, there is no right answer to be discovered that is independent of the judgments of the various agents. To say that there is a “right answer” or that “the answer” will be discovered over time is to say that the judgments of all the agents will converge. This certainly could happen in some cases, but one cannot count on this outcome. Next, consider indeterminacy. This term refers to cases where the outcomes are equally bad or where it is impossible to make a valid comparison among choices.² While there are undoubtedly some indeterminate situations of the “Sophie’s choice” variety, these are relatively rare, and the criterion of reasonable rejection is broad enough to allow comparison among different kinds of reasons. The problem is not one of indeterminacy in that agents cannot make judgments; rather, it is that they reach different judgments due to their

² Moral indeterminacy is discussed in Russ Shafer-Landau, "Ethical Disagreement, Ethical Objectivism and Moral Indeterminacy," *Philosophy and Phenomenological Research* 54, no. 2 (1994).

culture, experiences, and sensibilities. Furthermore, in such situations, the opposing sides are often quite certain that their judgments are correct.

Considerations about disagreement and indeterminacy notwithstanding, I recognize that there will be differences of opinion on whether to consider certain difficult cases as evidence of undesirable relativism. However, my argument is that, whatever one thinks about specific examples, the structure of contractualism is such that individuals' moral judgments will not always converge in a way that supports Scanlon's claims about the objectivity of principles.

2.3. Significance of these problems: So far, I've argued that contractualism provides an attractive explanation of how moral judgments are made and why that are motivating; however, I have also argued that the theory has significant problems determining moral principles. Although it is unreasonable to expect a moral theory to specify principles for every imaginable moral situation, these problems are significant for two reasons.

First, they demonstrate the theory cannot determine principles in the way Scanlon claims. Scanlon argues that the theory can accommodate both the Individualist Restriction that prevents inappropriate aggregation and a principle that allows aggregation when harms are equal; however, as has been shown, contractualism cannot have it both ways. One must either give up the Individualist Restriction or recognize that the contractualist procedure does not specify the right moral action in aggregative cases like the choice of saving either one or many persons. Since the theory fails to deal with the most basic kind of aggregation, the question of whether it should be able to handle more difficult cases does not need to be answered. Similarly, Scanlon argues that contractualism is not subject to the charge of relativism. Although it allows for variations in moral practices due to differences in social practices, the theory claims at the same time to avoid conflicting judgments when they are objectionable. However, I have argued that

there is no neutral way to choose between the moral practices of different societies when using the contractualist procedure. Also, there are cases where different agents reach contradictory judgments about which principles are reasonable in difficult moral cases. Thus, contractualism's ability to determine principles does not live up to Scanlon's claims in these two important areas.

A second reason that these are serious concerns is that these kinds of problematic cases often fall into what might be termed the "core" of morality.³ This core consists of cases where there is no disagreement about the right thing to do—decisions on torture, murder, and so on. Cases of aggregation for equal harms and cases in which certain societies adopt principles permitting practices that are against generally accepted moral intuitions fall into this core, and it is of great concern that contractualism is unable to determine the principles for such non-controversial situations. Also, the fact that other cases involving objectionable relativism lie outside this core does not, in my view, diminish their importance. This kind of relativism is unacceptable for objectivists, like Scanlon, who recognize disagreement but not the view that there can be competing principles with equal standing.

3. A Modified Contractualism?

It has already been noted that Scanlon's moralized account of friendship and other personal relationships could be relaxed to better recognize the types of conflicts that exist between the demands of these relationships and those of morality. The question at hand is whether there is an equally effective way to address the problems of aggregation and relativism.

³ Several philosophers describe what can be considered a "core" of morality. For example, Foot concludes that some moral judgments (like Nazism was evil) are definitely objective and that the concept of morality supplies criteria independent of local standards in Philippa Foot, *Morality and Art* (London: Oxford U.P., 1972). Also, Ross describes what he terms "modest moral realism" in which certain states of affairs (like torture and slavery) are judged identically under all credible theories in Steven Ross, "Real, Modest Moral Realism," *The Philosophical Forum* 35, no. 4 (2004).

3.1. Aggregation: In his critique of Scanlon's approach to aggregation, Derek Parfit suggests that contractualism would be a stronger and more plausible theory if Scanlon eliminated the Individualist Restriction which prohibits the summation of benefits to different people.⁴ Parfit is concerned that this restriction prevents contractualism from developing principles that properly reflect the complexities of cases involving the aggregation of benefits. In his most simple example, Parfit points to the choice of rescuing one person or five. He argues that the right action is to save the five, and then concludes that Scanlon must give up the Individualist Restriction to do so. This allows the five to argue that their reasons *together* outweigh the reasons the single person has for being saved.

Using a series of more complicated examples involving different numbers of individuals and types of harms, Parfit also argues that Scanlon is ignoring an important issue in his treatment of aggregation—distributive justice—which requires consideration of not only the net sum of benefits and burdens but also of the way those benefits and burdens are distributed over the persons involved.⁵ Admittedly, there are differing points of view on just what distributive justice requires; for example one stance emphasizes equality of distribution while another gives priority to those who are worse off. However, once the larger problem is acknowledged, it is not possible for a single formula, like one based on Scanlon's Individualist Restriction or the utilitarian maximization of benefits, to determine the right moral choice in all possible scenarios.

⁴ Parfit.

⁵ Parfit's examples are designed to show that, in problems involving aggregation, one cannot simply consider the gains or losses of the different parties. One must also consider the parties' relative overall welfare, both before and after the proposed actions. The specific details of the examples are not critical for this discussion of Parfit's proposed modification to Scanlon's theory. The key point is that Parfit's proposal is needed to handle even the simplest cases of aggregation that are currently blocked by the Individualist Restriction.

The solution for contractualism, Parfit suggests, is to retain Scanlon's guiding idea of justifiability to each person. But, rather than limiting the grounds for rejecting principles to the burdens imposed on a single individual, the grounds could include the burdens on multiple people. For example, in the situation of saving one person or five, the single individual could agree that, given everyone's life has equal value, it is right to save the five because she could recognize that the value of five lives outweighs that of her own. Or, in cases of unequal harms, a single individual facing great harm might still conclude that her objections are outweighed by the avoidance of lesser harms to many people. In this way, the revised contractualist procedure could justify principles that match moral intuitions even though they cannot currently be justified under the current Individualist Restriction.

How would Parfit's suggestion affect contractualism? First, one basis of the theory's attractiveness—the role 'justification to others' plays in determining principles and explaining moral motivation—is unchanged. In judgments about principles, the idea of justification continues to be the lens through which an agent determines the reasons and factors that are morally relevant; and, for this purpose, the contractualist procedure continues to be relevant and non-redundant as argued previously.⁶ Justification also continues to support relationships of mutual respect with others, thus providing the agent with the same reasons to act morally. Therefore, the arguments for the appeal of the theory presented in the first section of this chapter remain sound.

Second, the revised theory improves contractualism's treatment of situations involving aggregation. One could defend Scanlon's two most basic principles: that aggregation is not permitted when the harm to one group of parties is very minor and that aggregation is

⁶ Section 2 of Chapter 3 presents the arguments for the various ways the contractualist procedure adds value to moral judgments, and these would still be relevant.

appropriate when harms are morally equivalent. The theory would then, correctly, need to rely on the moral intuitions of the agent for cases that fall outside the scope of these simple principles. This provides contractualism with a better approach to aggregation given that aggregation cannot be justified, even when obviously required, under the original theory. While it is unlikely that the intuitions of different agents would agree in all cases, particularly when complicated distributional questions are involved, this problem would be no different than that under the original theory. Also, allowing an individual to consider others' burdens in determining her own grounds for objecting that a principle should be rejected seems more aligned with normal moral argument.

Third, on the negative side, judgments about reasonable rejection would be more dependent on the intuitions of individual agents, providing additional support to those who argue that the theory is already too heavily influenced by previously held moral intuitions. The modified theory eliminates the Individualist Restriction which Scanlon considers one of contractualism's most attractive characteristics, and its loss has two negative effects. It weakens the theory's clarity on forbidding the form of aggregation in which small benefits accruing to many people are claimed to outweigh significant harms suffered by a smaller number. In the original theory, this is a theory-level constraint so that individual agents have no choice but to accept it, and this positioning reinforces Scanlon's emphasis on the protection of individual rights and distinguishes it from consequentialist theories. In the revised theory, the judgment that this type of aggregation is wrong is made by individual agents. While it is likely most agents consider this to be a reasonable judgment, it is possible that some will not. Thus, the theory loses some of its emphasis on the protection of individuals. Furthermore, eliminating the Individual Restriction changes the process for evaluating objections in many cases that are not obviously

aggregative. The original theory specified that an agent must compare the strongest objections of *single individuals*. In the modified theory, the agent needs to consider combinations of objections from different individuals even if the objections are of different types. For example, if an agent is evaluating a principle where A benefits, but B and C both have objections, Scanlon's procedure requires that the agent sequentially compare A's objection to B's objection, and then to C's. Under Parfit's modification, the agent could choose to compare A's objection to a combination of both B's and C's. In many ways, considering all of the objections at once comes closer to matching common ideas about the way moral arguments are conducted. However, it also leaves moral judgments more dependent on agents' intuitions by giving them more flexibility in the way they group objections and evaluate their strengths.

My assessment is that Parfit's modification might offer a better approach, primarily because it removes a barrier that prevents aggregation in cases where harms are equal. But, the change is not cost free. Eliminating the Individualist Restriction removes one of contractualism's most distinguishing features, lessens its emphasis on the individual, and makes judgments more dependent on agents' intuitions. The theory loses a key component of its distinctiveness if this restriction is removed.

3.2. Relativism: In contrast to the conclusion on aggregation, there does not appear to be a solution to the problem of relativism. One of the attractive features of contractualism is that judgments are made by real individuals who have different experiences, capabilities, and sensibilities. This mirrors the complexities a person faces as she chooses how to lead a moral life, but it also can lead to a problematic variability in moral judgments. There are two potential ways to eliminate this variability: change the role of single individuals in making judgments or

idealize the process for moral judgments in a way that ensures individuals' judgments are identical. I argue that neither of these will be successful.

To eliminate the role of the individual, one could appeal to moral theories where principles are determined by the outcome of a group negotiation or consensus. Scanlon emphasizes that a distinction of his theory is that the parties involved are not seeking some kind of advantage; rather, they are trying to find principles to govern behavior that others, who are similarly motivated, could not reasonably reject. Assume that one keeps this objective but stipulates that a principle is not valid unless all the parties agree to its reasonableness, and that the composition of the parties represents all relevant viewpoints. This approach seems sensible but, unfortunately, it ends up mirroring the relativism problem it is intended to solve. On the one hand, if the relevant parties are considered to be ones with similar backgrounds, perhaps because those are the parties most directly affected by each other's actions, then the parties are more likely to agree on what judgment is reasonable. However, the principle determined only applies to people who share this group's characteristics. On the other hand, if one believes the relevant parties should include all possible viewpoints from dissimilar cultures, then the likelihood of agreement is diminished, and there is no way to adjudicate a disagreement about what is reasonable. As shown in the analysis of relativism in Chapter 3, disagreements about what is reasonable can occur based on the parties' different sensibilities, even if they accept a common set of facts. One would need to change the parties' experiences to gain consensus—something that cannot be done. In summary, a more homogeneous group reaches a common judgment about what is a reasonable principle while a heterogeneous group cannot. This is simply a description of the original problem where people in different cultures or with varying experiences reach conflicting judgments about what principle is reasonable for a given case. Therefore, proposing

that judgments be made by groups, rather than individuals, without changing the nature of the individuals involved, does not solve the relativism problem.

The second approach is to idealize the process of making a judgment of reasonable rejection. There are two important variables in this process: the completeness of the information available and the sensibilities of the individuals who are making the judgments. One could specify that a judgment of reasonable rejection requires complete information. In some cases, this would improve the consistency of judgments, and Scanlon has noted that an agent's judgment can be criticized if she ignores information that is readily available or she interprets the available information in the wrong way. But, there is still the question of time. It is impractical for complete information to include information that becomes available at a later time, either because the agent is unaware of it or because the information has not yet been discovered. And, as was seen in the example of slavery, the point in time when a judgment is made can be a significant factor.

But, more importantly, conflicting judgments are often caused by variations in agents' sensibilities rather than by differences in the information they have. More complete information about the effects of controversial ethical dilemmas like abortion and euthanasia is unlikely to change the fact that variations in agents' experiences lead them to conflicting judgments about which principles are reasonable. Resolving the issue of sensibilities requires the specification of an idealized agent with a given set of sensibilities. But, of course, this raises the question of how to determine which sensibilities are appropriate. Making such a choice would involve a moral judgment that certain sensibilities are "morally legitimate" whereas others are not. This approach would change the key judgement from one about which principles are reasonable to one about which sensibilities are reasonable. But, just as there is no neutral criterion for choosing between

judgments about principles made by agents with different sensibilities, there is no neutral criterion for determining which sensibilities are legitimate and which are not. The difficulty has simply been elevated from a judgment about principles to one about the nature of agents. Additionally, any move to idealize the procedure or the agents involved would also go against one of contractualism's key attractions: the theory involves agents making moral judgments under the conditions that people actually face in trying to decide how to lead moral lives. Thus, my assessment is that idealization cannot be used to solve the problem of relativism.

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In summary, on the positive side, contractualism's premise of justification to others provides a compelling explanation of the way moral judgments are made and why agents have reason to comply with these judgments. However, there are two significant classes of judgments for which the theory cannot determine appropriate principles: cases of aggregation and complex cases where differences in agents' moral sensibilities lead to objectionable relativism. A modified theory would not resolve the problem of relativism, but it could minimize the problem of aggregation; however, doing this would eliminate one of contractualism's most distinctive features and make it more intuitive. Thus, in my estimation, contractualism remains "an intriguing but flawed" moral theory. It provides many useful insights into the nature of morality, but ultimately disappoints potential proponents who look for a complete moral theory.

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