

What We Owe to Many

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ABSTRACT: This article is an attempt to defend Scanlon's contractualism against the so-called aggregation problems. Scanlon's contractualism attempts to make sense of right and wrong in terms of principles which no one could reasonably reject. These principles are a function of what kind personal objections persons can make to alternative sets of moral principles. Because of this, it has been argued that contractualism is unable to account for how groups of different sizes are to be treated. In this article, I argue that contractualism, even if with its focus on personal burdens, can come to plausible conclusions in the group cases.

1. Introduction

One possibility to interpret contractualism¹ is to understand it as a normative theory of ethics – as a moral decision theory that can normatively guide us in situations, where we are uncertain what we ought to do if we want to act morally. It can thus be understood to provide a welcome alternative for the long prevailing consequentialist normative theories. Indeed, contractualism can be taken to be designed to cope especially with those situations in which consequentialist theories lead to unintuitive moral demands. In the first section of this inquiry, I will discuss these situations, the problems they present for the consequentialist theories and the contractualist understanding of the deontological constraints that are typical for our pre-theoretical moral reasoning in these situations.

Contractualism's individualistic approach may resolve the problems consequentialist theories have in such circumstances, but in the same time it is just this feature of the contractualist theory that leads it into difficult problems in different situations. Within its own theoretical framework,

¹ By “contractualism” I refer to all moral theories that are reminiscent to the one T.M. Scanlon formulates in his *What We Owe to Each Other* (Cambridge, Ma: Belknap Press, 1998). I will present the relevant characteristics of the theory in the course of this article.

contractualism too would have to be able to provide a solid grounding for our basic and strong intuitions about the relevance of numbers in certain moral choices. I will discuss the kind of lifesaving incidents where this problem becomes evident in the second section. I will follow the critics in accepting the conclusion that the so-called tie-break argument, which was supposed to provide a contractualist account of these situations, fails.

In the third section, I will argue that with the help of more thorough understanding of contractualism we will be able to provide support for our moral intuitions about the relevance of numbers within the contractualist framework. Contrary to what the critics claim, there is a pure contractualist argument to be offered for our common moral intuitions about these situations. In the fourth and final section, I will take closer look at the most difficult types of cases, which have been presented to challenge the contractualist framework and its normative guidance. The contractualist accounts presented so far of these cases have failed, but this is not so much due to any faults in the contractualist framework as it is due to failures in applying it to these cases, or so I will argue.

2. Contractualism and Deontological Constraints

I shall begin by introducing the types of situations where consequentialism seems to lead to unintuitive moral demands and the way in which contractualism tries to argue for the more widely accepted requirements. Consider the classic case Scanlon has brought up.² Jones is an engineer, who is responsible for the television transmission of the world cup final, which is followed by billions. Just as he is inspecting the main transmitter a freak accident occurs, and the transmitter falls on him. As a consequence of this Jones is stuck under the transmitter, which is giving him constant, painful electric shocks. The transmission of the match still manages to continue. The only way to save Jones from the electric shocks is to cut the wires, but this would also cut off the transmission for the next 30 minutes and deny the joy of billions of television viewers. What would we be morally required to do in this situation?

² Scanlon 1998, p. 235.

I understand consequentialist moral theories to consist of those theories that tell us that if we are going to act morally, we ought to choose to do the act, which leads to the most valuable outcome. How valuable are the possible outcomes in this example? First, consider the option of letting the transmission to continue. Each individual values the ability to watch the exciting world cup final. This value for an individual viewer can be multiplied by the total amount of viewers (billions). From this sum we have to minus the negative value of Jones's half an hour experience of painful electric shocks. Overall, it is quite convincing to claim that this is a very valuable outcome, especially when compared with the other option. Imagine the disappointment, the negative value that each of the billions of television viewers attaches to the outcome of not being able to follow the match. Jones's relief of not having to experience the shocks seems insignificant when compared to the sum of this negative value. So, the continued transmission is what we ought to opt for, if we are to maximize the value of the outcome. This conclusion seems unacceptable to many of us. We have a strong intuition that there are constraints for what can be done to an individual in order to secure small benefits for many.³ It is this deontological intuition that can be seen to constitute the very essence of contractualism.

Jones is of course an individual person, similar in many perspectives with those, who are watching the match. He does not want to feel the painful electric shocks, and quite probably no-one else would either. From his point of view it is a reasonable demand that we ought to try to avoid the electric shock involving option. It seems clear that this is just the kind of experience that needs to be justified if it were to befall on someone as a consequence of our own choices. How could we justify to Jones his unfortunate fate? For the consequentialist the justification follows directly from the most valuable outcome. In fact, the most valuable outcome is what constitutes any possible justification within the consequentialist framework. Contractualists, on the other hand, follow the tradition of denying the basic metaphysical assumptions this justification rests on.⁴ Consequentialists assume that the valuations of each individual affected by the choice can be aggregated to produce the overall value of the outcome as seen from a godlike, impartial point of view. Contractualists deny this kind of aggregative justification by denying the existence of the

³ Scanlon 2002, p. 355.

⁴ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 32–33; Scanlon 1998, p. 230.

general point of view. There is no-one experiencing the joy of billions of television viewers added together and therefore there is no-one to tell Jones how disappointing it would be to forgo this experience. And, this is just what Jones would have needed to hear for being able to assess this justification and then for accepting his fate of having to go through the electric shocks as reasonable.⁵

This train of thought creates one of the essential characteristics of contractualism; *The Individualist Restriction* on the possible moral justifications for those of our actions that give rise to complaints on the behalf of the persons negatively affected.⁶ By taking this restriction into account, we can now see how contractualism creates a moral demand to cut off the transmission and save Jones from the pain. What any other person could bring forward to justify the demand for the other choice would be her own inconvenience of not being able to follow the world cup final. This is almost nothing compared to what Jones would have to go through during that half an hour of excitement. So, if we are to behave in the way that can be plausibly justified to everyone, including Jones, we cannot reasonably demand this sacrifice from Jones, and therefore we ought to cut off the transmission. More generally, this illustrates how contractualism brings about deontological constraints on how persons can be treated from the comparisons of individualistic reasons for wanting to avoid the alternative courses of actions. This is the very core of contractualist ethics, but it too has its own problem cases as it will become evident in the following section.

3. Contractualism and Life-Saving Cases

The Individualist Restriction seems to make contractualism unable to cope with the very basic and well-discussed lifesaving cases.⁷ Imagine that you were in a situation where two boats were quickly about to sink. On board of the other boat there is just one person, A, and in the other boat there

⁵ Michael Ridge, "Saving Scanlon: Contractualism and Agent Relativity," *Journal of Political Philosophy* 9 (2001): pp. 478–479. This is what Derek Parfit calls *The Greater Burden Principle*: "We are permitted to impose a burden on someone if that is our only way of saving someone else from a much greater burden (Derek Parfit, "Justifiability to Each Person," *Ratio* 16 (2003): p. 369)."

⁶ This condition has created lively debate. See Rahul Kumar, "Defending the Moral Moderate," *Philosophy & Public Affairs* 28 (2000): pp. 281–282; Rahul Kumar, "Reasonable Reasons in Contractualist Moral Argument," *Ethics* 114 (2003): pp. 6–37; Parfit 2003; Ridge 2001; Michael Ridge, "Contractualism and the New and Improved Redundancy Objection," *Analysis* 63 (2003): pp. 337–342 and Scanlon's original formulation in Scanlon 1998, p. 219 and pp. 229–230.

⁷ Michael Otsuka, "Scanlon and the Claims of the Many versus the One," *Analysis* 60 (2000): pp. 288–293; Alastair Norcross, "Contractualism and Aggregation," *Social Theory & Practice* 28 (2002): pp. 303–314.

are two persons, B and C. You are certain (and correctly so) that you will be unable to make both saves; as soon as you have saved either A or B and C from one boat, the other boat would have already sank. It is time for a quick moral decision about who you should save. Again, we will see a clear difference between consequentialism and contractualism and this time not for the benefit of the latter.

Consequentialism directs us to produce the most valuable outcome. In this case, it is easy to determine which of the options is more valuable. When compared to the negative value of two deaths and the positive value of one survival, the other option – two survivals and one death – is surely more valuable, and therefore we ought to save B and C. This fits perfectly to our moral intuitions. We have a strong tendency to think that we are required to save as many as we can in this kind of situations.⁸ Let us call this the “save many” principle. Contractualism seems to be unable to reach this conclusion with its *Individualist Restriction* for the moral justification. In the case that we saved A, the biggest complaint against this which either B or C could present, would equal A’s complaint against the decision to save B and C. So it looks like both options, morally speaking, are on equal standing. Therefore, there are no definite obligations to do anything but to save either A or B and C.⁹ This is a very unintuitive result and speaks against accepting the normative guidance that contractualism would seem to be offering.¹⁰

To counter this objection, contractualists often introduce the so-called tie-break argument, originally invented by Frances Kamm and then incorporated to contractualism by Thomas Scanlon.¹¹ This argument begins from an alternative imagined situation, where C is not in the other boat. In that case, we would be indifferent between the two possible choices of whom to save. It

⁸ For evidence that this intuition is widespread see Brad Hooker, “Scanlon’s Contractualism, the Spare Wheel Objection, and Aggregation,” in Matravers (ed): *Scanlon and Contractualism* (London: Frank Cass, 2003): p. 71; Rahul Kumar, “Contractualism on Saving Many,” *Analysis* 61 (2001): p. 165; Richard Miller, “Moral Contractualism and Moral Sensitivity,” *Social Theory and Practice* 26 (2002): p. 197; Norcross 2002, p. 304; Joseph Raz, “Numbers, with and without Contractualism,” *Ratio* 16 (2003): p. 346; Sophia Reibetanz, “Contractualism and Aggregation,” *Ethics* 108 (1998): p. 296; Scanlon 2002, p. 356.

⁹ Norcross 2002, p. 304.

¹⁰ Joseph Raz argues that Scanlon does not offer an argument that would generate reasons to save lives in the first place. In Raz’s opinion, Scanlon merely assumes that such reasons exist. This leads Scanlon to problems with aggregates that would have not existed if Scanlon had correct understanding of these reasons. Therefore, a contractualist account for aggregative principles is redundant (Raz 2003, pp. 359–367). For Scanlon’s contractualist argument for reasons to save lives see Scanlon 1998, p. 224.

¹¹ Frances Kamm, “Equal Treatment and Equal Chances,” *Philosophy & Public Affairs* 6 (1977): p. 181; Frances Kamm, *Morality, Mortality Vol. 1* (Oxford: Oxford University Press, 1993): chap. 6; Frances Kamm, “Owing, Justifying, and Rejecting,” *Mind* 111 (2002): p. 347; Scanlon 1998, p. 232.

would not seem to make any difference, whether one saved A or B. In the original case, the individual complaints of A, B, and C against the alternative courses of action lead within the contractualist framework to this very same result. However, from C's point of view one can now complain that her presence and her complaint (based on her death) against the option that allows one to save A does not make any moral difference in what the lifesaver ought to do. This complaint is then used to break the apparent tie between the conflicting claims. We can only give significance for her equal moral standing by issuing a requirement to save B and C. Therefore, the contractualist framework leads to the same intuitive demands as consequentialism in these particular incidents.

This argument has faced two distinct criticisms, of which only the other one is effective. First, it has been suggested that the tie-break argument can only be applied by abandoning *The Individualist Restriction*. According to this criticism, C's moral standing can be respected, i.e. made to make a difference on the required course of action, only by adding C's claim to be saved to B's claim so that their claims together outweigh A's claim.¹² It was just this kind of aggregation that *The Individualist Restriction* was meant to block off. This criticism, however, is not valid, because the tie-break argument does not require us to aggregate the individual claims.¹³ The correct way to understand this argument is to first think that, in a way, A's and B's claims neutralize each other. This is illustrated by the alternative scenario in which C is not present. In this situation, there are no moral requirements to save especially either one of the persons. In the original case, where C is present, her individual claim to be saved and given an equal moral status is then the only relevant moral claim present. This leads to the requirement to save her. Once one sets out to do this, to save C, one must also save B, but it is only matter of B's luck of being in the same boat with C that she too gets saved. It could have just as well been A. It is this fact that is given as justification to A for not saving her. No claims are aggregated, and therefore this argument is faithful for the individualistic spirit of contractualism.

The second criticism against this argument turns out to be more destructive. Contractualism relies on a requirement to be reasonable. This is based on a view of each of us having an equal moral standing due to our shared capacity to assess and to act on reasons. This requirement for

¹² Otsuka 2000, p. 289; Parfit 2003, p. 375.

¹³ Iwao Hirose, "Saving the Greater Number without Combining Claims," *Analysis* 61 (2001): pp. 341–342; Kamm 1977, pp. 341–342; Kumar 2001, pp. 167–168.

acting reasonably directs us to act in a way that, relative to acts available to us in the situation, receives the smallest individual most serious complaint from those that are affected by our actions, including ourselves. In the situation where this decision is made about who gets saved from the two sinking boats, it seems inevitable that the course of action, which receives the smallest possible complaint, still receives a complaint based on the death of some of the individuals involved in the situation. This is because whatever we do someone is going to die. A's complaint against the decision to save B and C is based on her certain death, even if this complaint is legitimately overlooked or neutralized – like the tie-break argument would have it.

John Taurek and few others have argued that there is an alternative course of action that does not have a consequence of anyone dying certainly and therefore this option receives a smaller most serious individual complaint than the alternatives considered so far.¹⁴ What we ought to do in this situation would be to “toss coin” between whether to save A or B and C.¹⁵ This procedure would give all three a fair 50% chance of getting saved. From A's point of view it is surely better to get this chance than to face certain death and from the point of view of B and C giving this chance to A cannot be unreasonable or unfair as they both too get the same 50% possibility as A.

John Taurek wrote his classic “Should the Numbers Count?” few years before modern contractualism was born.¹⁶ In that paper, Taurek argues that tossing coin is really the correct thing to do in the lifesaving incident. This means that he would surely have taken it for the credit of contractualism that it leads to this same conclusion. Others argue that the fact that contractualism leads to a requirement for tossing coin is a reason to abandon contractualism in its purest form, and to incorporate consequentialist elements to contractualism, namely by abandoning *The Individualist Restriction*.¹⁷ My own opinion rests only partly on the side of the latter. To toss coin in the lifesaving incident is so strongly and intuitively wrong – one really needs to save B and C – that

¹⁴ Taurek 1977; Otsuka 2000; Parfit 2003, p. 376; Jens Timmerman, “The Individualist Lottery: How People Count, but not Their Numbers,” *Analysis* 64 (2004).

¹⁵ Well, Jens Timmerman argues that we should in fact determine the primary target of the save by spinning a wheel of fortune with three slots in it. This would give everyone a fair 33% of getting saved. If B or C gets chosen then there is an obligation also to save also the other one of them from the same boat (Timmerman 2004). Therefore their chance of getting saved is in fact 66% but still fair in relation to A's chance. My objection against this procedure is same as against the coin toss – it is against our strong moral intuitions about what to do in the situation. I will argue later on that there is a good contractualist argument for the more intuitive line of action of saving many.

¹⁶ Taurek 1977; T.M. Scanlon, “Contractualism and Utilitarianism” in *Utilitarianism and Beyond*, ed. Amartya Sen & Bernard Williams (Cambridge: Cambridge University Press, 1982): pp. 103–128.

¹⁷ Miller 2002; Parfit 2003, 378.

it can function as an absurd conclusion to undermine contractualist's case. However, for me this is not really a reason to move on to incorporating consequentialism into contractualism, but a reason to ask whether contractualism in fact leads to this odd conclusion. So far, I have formulated the contractualist account of these cases somewhat vaguely due to the fact that this is the way in which even contractualists themselves have formulated their arguments in these particular cases.¹⁸ Next, I will assess whether more sophisticated and precise reading of contractualism could provide a contractualist argument for the "save many" principle.¹⁹

4. A New Contractualist Argument for the "Save Many" Principle

In the kind of contractualist accounts of the lifesaving cases discussed above, wrongness of an act seemed to follow directly from the harm caused to someone involved in the situation and from the fact that this harm was unnecessary. There would have been an open course of action that would not have caused similar harm to anyone, and therefore this particular course of action would have been unjustifiable and wrong. However, in approaching the contractualist account of wrongness, one should not begin from the harms that fall on someone as a consequence of our particular action tokens, but from the idea that there is a close, possibly a necessary connection between wrongness of an act and *wronging someone*. We need to understand what is involved in the latter to be able to understand the real nature of wrongness. In understanding the idea of wronging someone, the primary importance is not on the unfortunate state or the harms that someone will have to experience. Similar fates can fall on one due to natural accidents without it being the case that one is being wronged.

If wronging someone is not primarily to be understood in terms of the harmful outcome, then what is it about? According to the contractualist account, the most important factor in wronging someone is a certain kind of failure of the agent in her practical reasoning.²⁰ Instead of characterising the harmful situation of the victim, we need to turn our attention to the other agent,

¹⁸ Scanlon 1998, p. 232.

¹⁹ I aim to show that contractualism does not rule out plausible aggregative arguments as Scanlon formulates the challenge (Thomas Scanlon, "Replies," *Ratio* 16 (2003): p. 431).

²⁰ Rahul Kumar, "Who Can Be Wronged?," *Philosophy & Public Affairs* 31 (2003): pp. 153–158; Scanlon 1998, pp. 153–158.

her reasoning, and how this reasoning looks from the perspective of the victim and others. We, the humans who can experience harm, are of course conscious of the harm when we experience it, but we can also be conscious of the fact that we are intentionally treated badly. This is because we not only can feel the mere harm from our own perspective, but also we can view the situation from the wrongdoer's point of view. From this perspective we can become aware of the fact that we are not given the kind of appropriate respect we deserve as moral agents, the respect we would be willing to give to others in our own decisions. Therefore, we can experience "second-order evil" of not just being badly off but of being so as a consequence of someone's intentional actions, in which the wrongdoer can surely notice and relate to the harms that fall on us and yet choose to overlook these.²¹ This kind of evaluative judgment of disrespect, which is expressed by some acts, is at the heart of our resenting moral attitudes. If this disrespect is what is central in both being wronged and in wrongdoing, then what are we to do in the lifesaving incident to avoid it? How can we respect others as moral agents in that particular case?

In order to approach this question we must to begin from the shared intuitive expectations of how we think we should be treated.²² First, we expect that we would be treated in a way that follows the basic moral principles we share. As I already tried to indicate, we strongly expect that in this situation the agent would try to save as many as she could i.e. B and C in the case under discussion. Are these expectations somehow illegitimate? According to contractualism, these expectations are legitimate only if the principle governing behaviour in that situation is a kind of principle everyone would have antecedently reason to accept or, as Scanlon likes to formulate it, the kind of principle no-one would have reason to reject for the basis of our co-living.²³ The question then is what kind of principle would we (each of us) have reason to accept; the one that requires using the coin toss

²¹ Philippa Foot, "Rationality and Virtue," in *Norms, Values, and Society*, ed. Herlinde Pauer-Studer (Dordrecht: Kluwer, 1994): pp. 210–211.

²² Kumar 2003, pp. 105–106.

²³ Scanlon 1982, p. 110–112. I will use these terms 'reasonably acceptable' and 'not being reasonably rejectable' interchangeable hereafter. Scanlon does not. He, for some reason that I cannot grasp, understands what is 'reasonably acceptable' to depend more on which principles everyone would be actually willing to commit themselves to, whereas for him 'not being reasonably rejectable' is more connected to the idea that some principles are such that they do not have alternatives that would impose only smaller burdens on everyone. Because I do not see the same difference between these notions as Scanlon, this latter idea is what I will refer to by 'reasonably acceptable' too. I think that Scanlon complicates the issue here for no good reason.

procedure that will give everyone 50% chance of survival or the one that requires saving as many as one can?

The important thing to notice is that when we are debating about these moral principles that would guide our legitimate expectations, we do not yet know if we are going to meet, in our individual lives, the relevant circumstances to apply these principles.²⁴ Neither do we know whether we are going to be the ones giving help, or the ones expecting it from others. We also have no idea which boat we will be in. What then could be the relevant things to be taken into account in choosing the reasonably acceptable norms? We must observe that we all have a very strong reason to be worried about the continuation of our lives in the kind of lifesaving incidents this principle is going to govern. This must be the most important consideration, which could be brought forward. Its effect of creating obligations can maybe be only limited by our will of living individual lives of pursuing our own worthy personal projects.²⁵ As long as it does not seem likely that we would face lifesaving incidents often we can now put this limitation aside. So, if we take it that we all would be concerned about our own survival once being put into the actual circumstances where the principle will be applied²⁶, this leads quite straight-forwardly to the idea that we all have reason to accept the kind of principle that would give us each the best chances of surviving this kind of incidents – any other principles would impose unreasonable burdens on us in the form of worsened prospects of being able continue our lives in the future.²⁷

²⁴ Reibetanz 1998, p. 301; Scanlon 1998, p. 204. As Jeffrey Brandt-Ballard puts it, the non-rejectable principles for giving justification must be chosen from *ex ante* perspective (Jeffrey Brandt-Ballard, “Contractualism and Deontic Restrictions,” *Ethics* forthcoming). This characterisation of the situation for choosing the correct principles for the purpose of giving justification has its background in John Rawls’s theory of justice (John Rawls, *A Theory of Justice* (Cambridge, Ma, Harvard University Press, 1971)). In the situation of choosing the principles, we are behind ‘a veil of ignorance’ that guarantees that non-biased principles will be chosen (ibid., p. 12, pp. 136–142). Rawls used this technical device in a more complete form to argue for his general principles of justice that would govern the basic institutions of our society (ibid., pp. 54–56). In addition to this, he also used it for the selection of our ‘natural duties’ – such as the duty to help others that we are currently discussing. He did not take explicit stand on what specific content the chosen principle would have (except that it would conform to the principles of justice) (ibid., pp. 114–117). I will return to this issue in the footnote 27.

²⁵ Scanlon 1998, p. 225.

²⁶ Things get more complicated once we start to debate about the principles that would govern those incidents, where there are special ties between the people involved. I will not even attempt to discuss those principles here.

²⁷ Rawls argued that we would rationally select the ‘difference principle’ as one of our basic principles of justice (Rawls 1971, p. 60). According to this principle, it is just to make the position of the worst-off as good as possible, because once the ‘veil of ignorance’ is lifted we can find ourselves from that position (ibid. p. 75). As I see it, this is the same idea that is behind Scanlon’s idea of ‘reasonable rejection’. So, this whole discussion could have been put on Rawlsian language without any substantial differences. We need to identify the duty to help others that gives for those who are most liable for accidents the best chances of survival – the principle that maximizes the quality of the worst-off position – and this is the ‘save many’ principle.

This fact then strongly supports the idea that we would be reasonable in choosing the “save many” principle instead of the principle that gives everyone in the particular circumstances the same chance of surviving. If we think about a norm that would just govern the particular type of situations we have been discussing, we can illustrate the reasonableness of the “save B and C” norm by comparing the 66% chance of survival this norm would create to the 50% chance given by the coin toss procedure. It is not sensible to present a demand for the coin toss procedure based on the idea that it would give everyone equal chances in the particular circumstances. The value of equal chances of survival is based straightforwardly on the value of one’s own possible survival and demanding the equal chances principle would be a less effective way of pursuing this value from the perspective of choosing principles for the purpose of giving justification on reasonable grounds. So, it seems as if the “save many” principle is the one no-one could reasonably reject. If this is true, then there is good reason to assume that by following it we can respect everyone’s equal moral status as persons, who can assess reasons. It is unfortunate that this norm leads to A’s death, but the idea is that even A would in rational reflection admit that we all have a reason to act in accordance to non-rejectable moral norms. We do not wrong her in the same way that we would wrong B and C if we failed to save them, because we could not justify that choice to them on reasonable grounds.

At this point, it could be objected that I have proceeded way too quickly and that the argument which I have provided fails to match the bright moral ideals that contractualism attempts to describe and make concrete.²⁸ According to this objection, it may be true that from the *ex ante* perspective each of us would have reason to accept those moral principles that gave each of us the best chances for surviving the possible real life accidents relevant for these principles. Despite this, it could be claimed that the fact that our lifesaver’s act of saving many in any one of these situations conforms to such a reasonably acceptable principle does not justify her act to that particular single person, who does not get saved in the same situation. The person making this objection is likely to say that the principle that only looks at the safe future of each one of us as such does not recognise the real significance of the separateness of persons. People guided by this principle do not give a proper place in their reasoning for the awful situation of the actual claimant who is not getting

²⁸ I thank an anonymous referee of the *Social Theory and Practice* for bringing out this objection.

saved, and thus she does not get the respect as a person that anyone, including the lifesaver, would owe to her.

Even though I think that there is something appealing in this objection, I do not believe that it is a fair criticism against the view, which I am advocating here. In order to be able to see this, we need to approach this contractualist argument for the “save many” principle from another angle. Let us start from A’s (remember that she too is a particular person albeit an imagined one) complaint that in saving B’s and C’s lives we would be doing the wrong thing, because we are not giving her a fair chance of surviving, and thus we overlook the seriousness of her real situation. In assessing this complaint contractualism asks us to consider the adoption of a moral principle that would not give rise to this complaint, namely the coin toss principle. This is the principle A would use in trying to reasonably reject the “save many” principle. (Remember that some better alternative principle is required for reasonably rejecting any principle. This is because we need some moral principles to tell us what to do in these situations).

A’s complaint based on her certain death is unwarranted if life under the coin toss principle creates for someone a reason to complain (that conforms to *The Individualist Restriction*), which is stronger than A’s reason to complain against the “save many” principle. If this was not true, then we could respect the moral status of A only by not respecting the equal status of some other persons, and this would be absurd. Here we then have to go through a thought experiment.²⁹ What would happen in the two otherwise similar possible worlds, where these two alternative norms were adopted? What kind of individual points of views would these norms create for the persons living under these norms? In both worlds some people would most certainly die in these situations as we would be unable to save both boats in each incident. And, those people who would have died would have complained because of their death against the norm that contributed to their fate.

It is at this point, where the already dismissed tie-break argument should be brought back into consideration.³⁰ Suppose that in the histories of both worlds 1000 lifesaving incidents of the considered type occur (the incident involving A, B and C being one of them). This means that if

²⁹ Scanlon 1998, pp. 202–205 and 229.

³⁰ In assessing the whole world histories the previous objection against the tie-break argument according to which there is a principle that does not leave anyone in as bad situation as certain death (the “coin toss” or equal chance principle) is no-longer valid. In whole histories of the worlds all indeterministic events have taken place – all coins have been tossed and we know everything that has happened.

the lifesavers in these incidents would adopt the coin toss procedure, 50% of the total of 3000 persons under threat would be saved that is roughly 1500 persons (including A if she got lucky). Alternatively, by adopting the “save many” principle 66% of the 3000 persons i.e. 2000 persons would be saved (including surely B and C).³¹ We can now understand that if we accept A’s complaint against not giving her a fair chance of survival, we could do this only by adopting a principle, which would lead to a situation in which the death of about 500 extra individual persons (and the individual complaints of each of them) does not make any difference to what we ought to do in the situation we are facing. This is something A cannot reasonably demand from us based on her individual complaints – that would be demanding from us that we do not respect the equal moral status of others but quite randomly respect her now unequal moral status. Her objection is countered by someone else’s individual objection in the alternative possible world where the principle A demands was adopted, but her objection would still leave many similar individual complaints unmatched.

Could A still claim that by following this principle and by not rescuing her we do not take her complaint against her death as seriously as we should and thus fail to respect her as a distinct individual person? I can not see how this could be the case. We take her death into consideration just as seriously as we take all the deaths that will happen in the two possible worlds in which these alternative norms are accepted. We compare these deaths by individually matching them against each other. We do not aggregate them. And, we can see that if we adopted the coin toss principle, this would leave a number of individual complaints unjustifiably unanswered. On the other hand, if adopted the “save many” principle this would not happen. This means that by following the “save many” principle we are fulfilling the legitimate expectations of all reasonable persons, and thus we are respecting all of them as separate persons, who have an equal moral standing. By not following it we would be wronging B and C, because we would not be following the correct moral principle, which no-one could reasonably reject. Would it happen that we would toss coin and it would favor A, the consequences of this, deaths of B and C, would not be the actual root of our wrongdoing as much as the fact that we would be following a principle of action against which

³¹ If Jens Timmerman’s “wheel of fortune” procedure (see footnote 16) was adopted roughly 56% would get saved in 1000 cases i.e. about 1667 persons.

these unnecessary deaths (and a large number of other similar deaths) would create strong complaints. B and C can justifiably demand that we do no such thing. Overlooking these demands would constitute a failure in respecting everyone as separate, equally valuable persons.

5. The Hard Cases

It is time to turn into the hardest cases in which it definitely seems as if the contractualist framework leads to unintuitive moral demands, and the contractualist arguments for the more intuitive conclusions fail. In the beginning of this section, I will briefly introduce these situations. Then, I will show how the present contractualist accounts of these situations have been proved to fail. Last, I will try to inquire whether the more subtle contractualist framework formulated above could prove to be helpful also in these situations.

Of the type of cases I have primarily in my mind, two examples have been used in the recent literature. Although the details of these cases differ in certain respects, they all introduce the same problem for contractualism. First, there has been debate about a kind of lifesaving incidents, where one must make a decision between saving either one person's life or a group of people (say of ten people) from "slightly not as bad as death" like fate such as total paralysis and blindness for instance.³² Second, Derek Parfit has introduced a case where we could either save a person, Blue, with our limited medical resources from his forthcoming 100 week period of pain or we could use the same resources to alleviate the first 10 weeks of the 100 weeks of pain that every member of a larger group (say 100 persons) will come to experience.³³ This choice would leave Blue to experience his whole 100 weeks of pain and others of course their 90 weeks. If one prefers to remain in the lifesaving cases, this example would match a decision between saving the life of one unharmed person and saving the life of 100 persons, who would still experience "slightly not as bad as death" injuries. The reason I will use this latter case is that it brings forward more clearly our moral intuitions related to the significance of numbers. In the case of medical resources and pains there are other relevant factors present like property rights, personal relationships, principles of fair co-operation schemes etc. that would unnecessarily complicate the discussion.³⁴

³² Norcross 2002, p. 306; Reibetanz 1998, p. 305; Scanlon 1998, p. 239.

³³ Parfit 2003, p. 381. By the way, the diagram on this page does not fit the text – I refer to the example in the text.

³⁴ Miller 2002, p. 198, fn. 8; Taurek 1977.

The problems these examples both refer to are the unintuitive consequences of *The Individualist Restriction*. We are asked to make our decision about what we ought to do by comparing the kind of complaints that different individuals could give against the alternative courses of actions based on their personal experiences. The complaint of the one individual not getting saved from death seems to outweigh all other individual complaints that the persons in the other groups could make; they would not be saved from death but only from severe harm or they could not be saved from harm altogether. Therefore, they seem to have a weaker claim for the aid. If we then are going to be reasonable, we ought to help the dying individual, because *The Individualist Restriction* denies the possibility of aggregating the complaints within the groups to match that single complaint. Many are willing to argue that this is an unwelcome result. They claim that our strong intuitions tell us that we should save the groups also in these cases³⁵. The slightly stronger claim of one individual must be overshadowed by the fact that we can help so many persons to avoid either very severe harms or death, if only not unharmed. This would give us again reason to abandon *The Individualist Restriction* and to incorporate consequentialist elements to contractualism.³⁶

Contractualists do not usually want to go as far as to abandon *The Individualist Restriction*, which is from their perspective a defining feature of contractualism. Abandoning it would also mean abandoning most of the explanatory force contractualism can have in certain other matters.³⁷ For this reason Scanlon has introduced the idea of “distinctions between broad categories of moral seriousness” to avoid the unintuitive consequences that seem to follow from contractualist reasoning in these cases.³⁸ The correct way to test whether two harms belong to the same category of moral seriousness is to consider whether we would be indifferent between the decisions to save either one of two persons experiencing the two different harms.³⁹ By this standard, it is likely that total paralysis is relevant when compared with death, but missing half an hour of world cup match is not relevant when compared with the same time of electric shocks. What Scanlon seems to be implying is that when the uneven harms are close enough in moral seriousness, when they belong

³⁵ Even Scanlon has this intuition. See Scanlon 1998, p. 238.

³⁶ Miller 2002, pp. 198–199; Parfit 2003, p. 388.

³⁷ Kumar 2000, p. 282; Parfit 2003, p. 374; Ridge 2001 and 2003; Jay Wallace, “Scanlon’s Contractualism,” *Ethics* 112 (2002): p. 469.

³⁸ Scanlon 1998, pp. 238–240; Scanlon 2002, p. 356.

³⁹ Kamm 2002, p. 351.

to the same category, we can then apply the already discussed tie-break argument also in these cases.

Scanlon's contractualist argument in these "hard cases" goes as follows. In the first example, we would be indifferent between saving one person from death and saving other one from total paralysis and blindness. In the second case, the fact that the other person can be saved unharmed is not relevant when compared with the fact that other person would be severely harmed but still saved. Again we would be indifferent in this choice. So, in both cases, these two claims of the individual persons neutralize each other. If this is true, we cannot then be indifferent to the claims of the other persons who would also suffer the slightly less bad, but still morally relevant consequences, and thus there is a requirement to save the group. This moral requirement to save the group seems to rise out of a contractualist framework that remains without consequentialist, aggregative elements.

Of course the critics have jumped at this argument, which, to be honest, is weak.⁴⁰ First, it creates certain inconsistency to contractualism as so far the strongest objection has been what determines the reasonableness of different options, and this does not now seem to be the case within these categories of moral seriousness.⁴¹ The second, and even worse, consequence of the argument is that it seems to lead, for instance, in the television transmitter case to the very same, consequentialist and unwanted conclusions that were the main reason for beginning the contractualist enterprise in the first place. This can be observed by returning to Jones's harm of half an hour of electric shocks. Let us imagine a continuum of harms from these electric shocks to the annoyance of missing part of the world cup final. We can then pick eight different harms from this continuum that are separated by equal distances from each other. For example, the next less bad harm from the half an hour of electric shocks could be a severe beating, one less bad from that could be a fractured arm, and so on all the way down to headaches and annoyance of not seeing the match. In this situation, it is quite convincing to claim that each of these harms is within the same category of moral seriousness with the closest ones of the other harms.

⁴⁰ Hooker 2003, pp. 73–75; Norcross 2002, pp. 306–309; Reibetanz 1998, pp. 308–311.

⁴¹ Hooker 2003, p. 73.

At this point, one can argue that the tie-break argument tells us that that one ought to save ten persons from severe beatings rather than one person from continued electric shocks and ten persons from fractured arms rather than one person from a severe beating. When these two conclusions are added together this surely means that we ought to save hundred from fractured arms rather than one person from half an hour of electric shocks, and eventually with similar reasoning billion from annoyance of missing the world cup final rather than one person from electric shocks. And so, we have provided a contractualist argument for the consequentialist conclusion, which contractualism so much wished to avoid.

This contractualist argument would rely on a procedure in which the results from each tie-break argument can be added together and therefore the relation “ought to save x rather than y” used transitively. To stop this slide the contractualist could deny that there is a continuum of harms from very unpleasant death to minor inconveniences and defend various clear cut-off points in between these endpoints. This would mean that no amount of harms below (and no matter how little they are below) a cut-off point could justify a single harm above that point. This addition to contractualism would be ad-hoc and little can be offered in its defence.⁴² Another attempt to stop this slide is to claim that only the options and the harms that are involved in the actual situations we are dealing with are relevant considerations that can be assessed by these categories of moral seriousness.⁴³ So, in the case we are considering now, we have only a choice between avoiding half an hour of electric shocks and having to miss part of the world cup final. The latter is not in the same category with the shocks and therefore the tie-break argument cannot be applied transitively across the board. The intermediate steps are not present in this situation and so cannot be part of the decision-making procedure.

One problem with this suggestion is that we can always ask what we ought to do if these choices were present. What if we had to choose between saving one person from half an hour of electric shocks, saving ten persons from severe beatings, saving hundred persons from getting fractured arms, ..., and saving billion persons from the annoyance of missing the world cup match? In that case, the categories of moral seriousness would seem to either lead back to the

⁴² Norcross 2002, p. 307; Parfit 2003, pp. 385–388; Raz 2003, pp. 364–365.

⁴³ Kamm 2002, p. 353; Scanlon 2002, p. 356.

consequentialist conclusion or they could be argued to lead to a requirement to save ten from severe beatings as this is the only harm in the same category with electric shocks and therefore the only option to which the tie-break argument can be applied to.⁴⁴ The other less serious options would not be in the same category of seriousness with the most serious harm. Neither of these conclusions fit to our moral intuitions, and so contractualism seems to still fail in producing acceptable normative conclusions in all cases.

Before inquiring how the more refined form of contractualism could understand these cases, I believe we have to stop and take a closer look at the situations we are discussing. Many of the writers discussing these cases including small inequalities of harm refer to widespread and strong intuitions that support the requirement to save a group of people from very severe harms such as total paralysis, blindness etc. rather than one person from dying.⁴⁵ The point about this intuition I want to make is that there is a difference between pre-reflective thought present in discussing the relevant examples for ethical theories and the strong moral attitudes and emotions present in the real life situations. In many cases we can use the latter as material for the first. For example, many of us have actually felt bad while lying to someone. However, not many of us have been actually present in those very rare occasions, where one must make this kind of decisions about who to save. Just how do we know what course of action would *feel* desirable in those tragic circumstances? My most pressing concern here is that one would feel morally guilty no matter what one chose to do. We would feel bad for those we could not help even though we were able to help others.

The moral theory that tries to understand these situations ought to reflect this kind of complexity. This is something that some of the consequentialist and contractualist theories seem unable to do, because these theories would lead to a straightforward conclusion about the correct course of action.⁴⁶ If anything what I described above comes anywhere near the actual moral experience, then one would be more inclined to say that there exists two separate obligations in this situation for us; to save the individual from death and to save the group from the severe harms. These principles could then perhaps be thought of as something that belongs to our “moral

⁴⁴ Kamm 2002, p. 353.

⁴⁵ Hooker 2003, p. 72; Norcross 2003, p. 306; Reibetanz 1998, p. 296; Scanlon 1998, p. 239.

⁴⁶ Bernard Williams, “Ethical Consistency,” in *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge: Cambridge University Press, 1973): pp. 166–186.

toolbox”, which we have internalized in our moral education. Perhaps they are also both not reasonably rejectable principles in contractualist terms. In this situation, we may lack an overall principle that would help us to make practical judgments in particular situations where these two principles point to different directions, and therefore there may not always be one correct way to proceed. This is what really is tragic in those circumstances.

With these reservations in mind, I still want to inquire whether the already introduced, more refined reading of contractualism could support the requirement to save the group from the very severe harms instead of one person from death. The shift to this more theoretical approach is done by moving our attention from the harmful outcomes that come about as consequences of our particular actions to the moral principles that we could legitimately be required to use in our decision-making. The perspective for choosing these principles is *ex ante*, from before the actual situation in which we are then required to apply them. In these hypothetical negotiations, where the reasonable principles are chosen, we are unaware if we will have to apply these principles ourselves or if we will be among the persons, who will be affected by someone else’s action that are done in order to follow these principles. We also do not know whether we will be the one individual about to die or amongst the group about to get severely injured.

Now, the question stands, what kind of principles would we have most reason to choose for giving us guidance in these difficult lifesaving incidents. Think for example of the situation where one must choose between saving one person’s life and saving ten persons from total paralysis, blindness, and so on. In the antecedent negotiations for reasonable norms, the choice of principle to govern this decision would mean a choice between getting a 91% possibility of being severely injured with a 0% possibility of dying and getting a 0% possibility of being severely injured with a 9% chance of dying for each of this kind of incidents. When the question is put in this way, it does not seem inconceivable that we, as individuals, would all want with good reasons to have the norm, which requires saving the group from severe injuries. That would give us a better set of chances. Of course, this depends on how bad we see these serious injuries in comparison to death. If this is the case, the one individual, who dies in the particular incident, can not complain that we wrong him by following such a principle, which even she could not reasonably reject in the antecedent negotiations.

Same kind of reasoning, I believe, can be used in the other case, which was analogical to the problem Derek Parfit introduced. This example consisted of a choice between saving the life of one person, who could walk away from the incident unharmed and saving the life of hundred persons, who will still experience severe injuries. In the antecedent negotiations this is a choice of getting either close to 1% chance of surviving unharmed with slightly over 99% chance of dying or 1% chance of dying with 99% chance of surviving severely injured. Again, I would be inclined to choose the latter and hence accept the principle, which requires aiding the members of the large group, as the correct, reasonable moral principle we all would be required to follow.

We must notice that this argument for the aggregate sensitive moral principles does not rely either on consequentialist, value aggregative grounds for choosing the principles or on the suspect notion of categories of moral seriousness. It merely relies on a contextual veil of ignorance. When we debate about these principles we do not know exactly where we will end up in the actual situations, and therefore we must take into account the sizes of the groups in our individual deliberation. This is because it is the proportions between the different sized groups that determine the compared likelihoods of what will happen to us, when someone applies these principles.

However, again, there is a complication to the matter. It echoes the objection that was made against my argument already in the easier cases. Consider the case from the point of view of that person, who realizes that her life will not be saved, because the group gets saved from slightly less serious harms. Most likely she will not accept our claim that even she would have chosen the moral principle, which required the lifesaver to save the group, as a justification for her fate. Maybe she will claim that counting probabilities just does not quite add up for a justification to her actual death, nor does anyone's slightly less serious harms in that other group.⁴⁷ And, because of this claim, we really should have adopted a principle that would have required helping her instead.

For truly acknowledging this complaint, we must return to the basic contractualist idea of the possible worlds where the alternative norms are effectively complied with. Then we must ask what kind of positions different individuals would have in these worlds and what kind of complaints against the norm they could make as a consequence of the quality of their personal lives. In our

⁴⁷ Reibetanz 1998, p. 302–304.

example, we are assessing whether a norm requiring to save a life of one person would be more reasonable than a norm that requires rather to save a group of ten persons from very severe, permanent injuries. The norm which no-one (not even the actual person we are now replying to) could not reasonably reject is one that receives the smallest possible most serious complaint. Let us again imagine two otherwise exactly similar possible worlds. The only difference between these worlds is which one of these two norms stands as the common practice. What kind of standpoints would these norms create?

First, the norm that requires saving the life of the one person would not lead to anyone's death, but would instead, in each incident, lead to ten people living the rest of their lives very severely injured. In the alternative world, where the other norm has been adopted, there would be the same amount of people as there were injured in the other world walking away these situations unharmed, but one person would die every time. Amongst these persons we can imagine the particular person to whom we are now trying to justify her unfortunate fate. Now, it seems that each of these persons in this world can present a complaint (death) against this norm which is stronger than the complaints (severe, permanent harms such as paralysis, blindness etc.) anyone could present in the other world against the norm requiring saving the life of the individual. Thus, it seems that this norm, which requires saving the life of the one person, is the one no-one could reasonably reject. It does not have an alternative that would receive a smaller most serious individual complaint.

Again, it appears that in order to overcome this unwanted conclusion one ought to give up on insisting to include *The Individualist Restriction* into contractualism.⁴⁸ If the complaints of everyone severely injured could be added together they would outweigh the complaints of those who would die in the other possible world. For each complaint based on death there would be an aggregative complaint based on a number of severe injuries. Surely death is not ten times worse than injuries of that seriousness. However, I believe that there is an alternative way of going around this problem, which is more faithful to the original, individualistic spirit of contractualism. There is one type of aggregation that does not break *The Individualist Restriction*; intrapersonal aggregation.⁴⁹ The complaints that individuals can present against the moral norms they are living under can be based

⁴⁸ Hooker 2003, p. 74; Parfit 2003, p. 388; Raz 2003, p. 359; Scanlon 1998, p. 241; Scanlon 2002, p. 356.

⁴⁹ Scanlon 1998, p. 237.

on what happens to them during their whole lives.⁵⁰ In this way harms and complaints can be added together. This is allowed when the harms in question are harms that fall on the same person. Now, we have to think whether there would be anything in the lives of those who are only severely harmed in the one possible world that would add to their severe injuries and would thereby raise their complaint to same level with the complaints based on death, which the others can present in the other world.

It might be farfetched to claim that some persons would get very severely injured twice and this would give them a reason for a stronger complaint than death. Instead, my own suggestion is that one, worthy candidate to add to these severe injuries is the knowledge of great insecurity and the psychological stress this knowledge would produce for a number of agents in this world. This suggestion is based on the idea that already a creation of a risk gives someone a reason to complain.⁵¹ In the possible world, where the shared moral norm requires everyone to save one person from death instead of saving the group of ten from serious but slightly less bad than death injuries, and where there exists several similar norms for groups and harms of different sizes, one will know that one will not get help in accidents in the likely case that one is not the person most seriously hurt. Even very serious injuries will not count for anything if someone is slightly more seriously injured. Of course, in the group accidents, this is the case for the majority. In those circumstances one would be very afraid of getting into any accidents – most probably one would not be helped.

I believe that this consideration can be a fair part of the objection against the relevant moral norm, which those, who will be very severely injured, can present. And, it is not inconceivable that this interpersonally aggregated complaint would match the complaints of those who in the alternative possible world die in these circumstances, but live safely knowing that when they are very seriously injured they can be helped even though there might be someone who could be saved from death. Notice that this lifelong uncertainty and the stress it causes does not have to *add much* to the complaints. We are discussing cases where we are comparing the complaints of those who die (that's a pretty bad outcome) but live in safety to complaints of those who get serious lifelong

⁵⁰ Reibetanz 1998, p. 300.

⁵¹ Kumar 2003, p. 103.

injuries such as total paralysis and blindness (pretty bad as well – almost as bad as death remember) *and* live being conscious of the risky circumstance (maybe not *that* bad but still bad). For me the weights of these considerations on both sides seem quite evenly matched.

If this match is acceptable, then contractualism will lead to an obligation to save the group. In the other world there will be more individuals, who can make this complaint for both their severe injuries and the lifelong uncertainty, than there are individuals in the second world who can complain their death. And there is sensitivity in this argument that matches the sensitivity of our moral intuitions.⁵² We may have an intuition according to which the closer to each other the uneven harms are in the different sized groups the less there has to be difference in the sizes of the groups in order for it to be required to save the larger group. The argument above can be useful in explaining this kind of intuitions. When the size of the group that is not required to be helped, because someone is more seriously hurt, grows, the more likely it is that you will not be helped in those accidents and the more insecure you will feel. For this reason you have more reason to complain against a norm that does not require helping the larger group. In addition, when the possible harms drop below a certain level, we will not feel afraid even if this harm would fall on many who won't be helped, if we can, by accepting this chance, create a solid safeguard for ourselves against the very serious harms.

6. Conclusion

I started this inquiry with a quote from T.M. Scanlon, who very much is responsible for the current type of contractualist theory of ethics. He was unsatisfied with the part of the theory that dealt with aggregates and has admitted that he does not have a definitive solution for this problem.⁵³ It seems that the contractualist way of understanding ethics has features that cannot fit to our moral intuitions about the significance of numbers. This makes contractualism a poor candidate for an acceptable theory of normative ethics. I have argued that there is a way for contractualism to support these intuitions, if one begins the contractualist arguments from the moral principles which no-one can reasonably reject and not from the harms that are present in certain particular incidents.

⁵² Reibetanz 1998, p. 309.

⁵³ Scanlon 2002, p. 354.

To understand the moral intuitions about numbers within contractualism, one must keep in mind the basic contractualist idea that behind the concept of wrongness is the notion of wronging someone by not following the principles to which others can base their legitimate expectations. It is by not following such principles that we mainly fail to recognise the equal and separate moral standing of other persons. Only then do we wrong others.⁵⁴

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