

Ex ante and ex post contractualism

Suikkanen, Jussi

DOI:

[10.1007/s10892-019-09282-6](https://doi.org/10.1007/s10892-019-09282-6)

License:

None: All rights reserved

Document Version

Peer reviewed version

Citation for published version (Harvard):

Suikkanen, J 2019, 'Ex ante and ex post contractualism: a synthesis', *The Journal of Ethics*, vol. 23, no. 1, pp. 77-98. <https://doi.org/10.1007/s10892-019-09282-6>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Checked for eligibility: 28/03/2019

This is a post-peer-review, pre-copyedit version of an article published in *Journal of Ethics*. The final authenticated version is available online at: <http://dx.doi.org/10.1007/s10892-019-09282-6>

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Ex Ante and Ex Post Contractualism – a Synthesis

Jussi Suikkanen

Final Author copy; to be published in the *Journal of Ethics*

Abstract:

According to contractualist theories in ethics, whether an action is wrong is determined by whether it could be justified to others on grounds no one could reasonably reject. Contractualists then think that reasonable rejectability of principles depends on the strength of the personal objections individuals can make to them. There is, however, a deep disagreement between contractualists concerning from which temporal perspective the relevant objections to different principles are to be made. Are they to be made on the basis of the prospects the principles give to different individuals *ex ante* or on the basis of the outcomes of the principles *ex post*? Both answers have been found to be problematic. The *ex ante* views make irrelevant information about personal identity morally significant and lead to objectionable *ex ante* rules, whereas *ex post* views lead to counterintuitive results in the so-called different harm and social risk imposition cases. The aim of this article is to provide a new synthesis of these views that can avoid the problems of the previous alternatives. I call the proposal 'risk-acknowledging' *ex post* contractualism. The crux of the view is to take into account in the comparisons of different objections both the realized harms and the risks under which individuals have to live.

Key words: contractualism; social risk imposition; normative ethics; aggregation; *ex ante*; *ex post*; Scanlon

1. Introduction

When T.M. Scanlon formulated a new contractualist ethical theory in *What We Owe to Each Other*¹, some elements of that theory were *constitutive* features of the *kind of*

¹ See Scanlon (1998). Hereafter all unattributed references are to this work.

contractualism he had in mind. Scanlon argued that we should understand right actions in terms of what could be justified to others on grounds they could not reasonably reject (153–155). He then claimed that, in order to determine which actions are like that, we must first compare different moral principles we could all adopt together (195). He assumed that the adoption of different principles would create different kind of standpoints to individuals (203–204). What can be justified to others on grounds they could not reasonably reject is then a function of what kind of objections individuals can make to the principles from those standpoints (195).

Scanlon stipulated that the relevant objections, which individuals can make to different moral principles, must be *individual* complaints (219).² Any individual can object to the general adoption of a principle only on the basis of how the principle affects her personally. She cannot object to it on the basis of how the principle affects many different individuals simultaneously or on the basis of any impersonal values. This *individualist restriction* on the relevant objections makes Scanlon's contractualism *antiaggregative*. It is motivated by the conviction that morality should protect us as individuals from being sacrificed for the sake of the utilitarian pursuit of the general good (235).

This leads to another essential element of Scanlon's view, the so-called *Greater Burden Principle*. According to it, '[i]t would be unreasonable...to reject a principle because it imposed a burden on you when every alternative would impose much

² For a discussion, see, e.g., Ridge (2001) and Parfit (2003).

greater burdens on others (Scanlon 1982, 111).’ The consequence of this principle is that the non-rejectable principles are such that there are more serious personal objections to all other alternatives. According to Scanlon’s contractualism then, an action is wrong if and only if it is forbidden by the non-rejectable principles, and right if and only if it is authorised by those principles.

The previous outline captures the main essential features of Scanlonian contractualism. Yet, when Scanlon described the view, he also specified many other details of his own position. In the discussions that have followed, it has become evident that, if we change these details, the resulting views are still recognisably contractualist and Scanlonian even if they are different from Scanlon’s own view.

One important current contractualist debate concerns the question of *from which temporal perspective* individuals are to make their objections to the moral principles which could be adopted to govern a given domain of behaviour. There are two answers to this question corresponding to ‘*ex post*’ and ‘*ex ante*’ contractualism.

Scanlon himself originally explicitly formulated and defended a version of *ex post* contractualism (208–209; see also Scanlon (1982, 122–123)).³ On this view, when we compare principles, we focus on ‘the foreseeable distribution of outcomes across individuals’, which they produce as a consequence of their adoption (Frick 2015, 185). We imagine a set of worlds that are otherwise identical to the actual world except that

³ Other defenders of *ex post* contractualism include, e.g., Sophia Reibetanz Moreau (1998), Michael Otsuka (2015), Sune Holm (2018), and Korbinian Rürger (2018).

different moral principles have been adopted in them. As a result, individuals come to act in different ways in these worlds and this affects the lives they come to live. Individuals can then make objections to the principles under which they live on the basis of the personal burdens for which those principles have been causally responsible.

Ex ante contractualists, in contrast, argue that individuals are to make the relevant objections from a perspective that, in temporal terms, looks at the relevant principles from a point in time before they have been adopted.⁴ From this perspective, individuals are to object to the principles on the basis of the *prospects* the adoption of those principles will give to them. Here, the objecting individuals do not know what the consequences of the relevant principles will be for them. The compared principles could, after all, harm or benefit any given individual in different ways depending on how things turn out. The resulting natural ignorance means that, when the contractors are putting forward their objections, they can discount both the potential harms and benefits resulting from a given principle by their improbability.

This understanding of the relevant objections makes them similar to single-person decisions under risk. For any principle, an individual can calculate the burdensomeness expectation of the adoption of that principle. The individual can first multiply the potential personal burdens by their likelihoods and then sum these

⁴ For defences, see, e.g., Rahul Kumar (1999), Aaron James (2012), and Johann Frick (2015). Scanlon (2013) himself has also more recently endorsed the view.

products up. If the resulting burdensomeness expectation for the individual is high and there are alternative principles that do not give an equally high expectation for anyone, then the individual can reasonably reject the principle in question.

The question of which form of contractualism we should accept continues to divide opinions. Sections §2 and §3 explain why this is the case. §2 begins from two main arguments which the *ex post* contractualists have used both as objections to *ex ante* contractualism and as support for their own view. These are the *Argument from Irrelevant Information* and the *Problem of Ex Ante Rules*. §3 then introduces the key problem of the *ex post* views. This argument suggests that the *ex post* versions of contractualism have objectionable moral consequences in aggregation and social risk imposition cases.

The rest of this article then outlines a new form of contractualism that (i) borrows elements from both *ex post* and *ex ante* contractualism and (ii) avoids the main objections to those views. I call this view *risk-acknowledging ex post contractualism*. This view agrees with the *ex post* contractualists that individuals are to make their objections to different principles on the basis of how those principles have affected them. Yet, it also agrees with the *ex ante* contractualists that individuals can object to the principles under which they live on the basis of the risks, which those principles impose on them. After outlining this proposal, §4 argues that this view is immune to the *ex ante* contractualists objections to *ex post* contractualism. It also explains how the

view still has the same theoretical virtues as the more traditional forms of *ex post* contractualism.

Finally, §5 discusses ‘mixed’ social risk imposition cases, which Johann Frick (2014, §7–§9) argues remain a problem for *ex ante* forms of contractualism. Frick suggests that these cases show that contractualism cannot capture what it is for actions to be right and so the view should rather be understood as a view of one particular type of right-makers. I will argue that the new risk-acknowledging *ex post* contractualism can support our intuitions in these cases too and so at least these cases do not force the contractualists to seek a less unified understanding of right and wrong.

2. The Arguments for *Ex Post* Contractualism and against *Ex Ante* Contractualism

In order to outline the Argument from Irrelevant Information, I will borrow a case from Sophia Reibetanz Moreau. She asks us to consider the following case (Reibetanz Moreau 1998, 302):

The Unexploded Mine. – You are in small in a small village just after the end of a war, when you hear that a certain field near the village is known to contain an unexploded mine, though it is not known where in the field the mine is. One hundred laborers from the village are about to begin tilling the field. They will work at enough distance from each other that if one encounters the mine, he

alone will be injured; but one of them is certain to encounter the mine at some time if it is not removed, and that one will be seriously injured. You have a special device that enables you to detect and remove mines without sustaining any injury. But weather conditions are bad; and you are weak. So you know that if you go out into the field with the mine-detection device, you will come down with pneumonia. Unfortunately, no one else in the area has the knowledge necessary to operate the device.

Reibetanz stipulates that the damage caused to the one laborer who encounters the mine is ten times as great as the harm caused to you by pneumonia (ibid.). Let us then consider this case through the lenses of *ex ante* contractualism.

We must first locate the objections which you and the laborers can make to the 'Use the device!' and 'Stay in bed!' principles. Your objection to the former principle is that it will give a fully certain prospect of pneumonia and the harm it causes. Yet, according to *ex ante* contractualism, the laborers could not make equally serious personal objections to the 'Stay in bed!' principle from the *ex ante* perspective. One of the laborers will come to bear the ten-fold burden caused by the exploding mine but even he or she has to discount this burden by its antecedent improbability of 1%. Given the Greater Burden Principle, *ex ante* contractualism then makes it counterintuitively impossible for anyone to reasonably reject the 'Stay in Bed!' principle given that the only alternative to it would be responsible for even worse personal prospects for one individual.

According to the Argument from Irrelevant Information, the previous reasoning fails to acknowledge that we *know* from the beginning that one individual *will be* harmed by the mine. We know that there is a *luckless* individual – it's just that we do not yet know the identity of that person. Sophia Reibetanz Moreau (1999, 304) then argues that, as long as we know that there is a luckless individual who will be harmed by a given principle, this person's objection to the principle has to be based on the full magnitude of the harm it will cause to her. This is because the identity of this person is ethically *irrelevant information* – not knowing this identity is no reason to discount the objection of this person by the relevant *ex ante* improbability.⁵

There is also a more general theoretical concern behind this objection to *ex ante* contractualism. This is the worry that understanding the relevant objections in terms of individuals making choices under risk behind a hypothetical veil of ignorance imposed by the *ex ante* perspective 'fails to give each person the separate and individual concern that she is due' (Frick 2015, 190). In order to arrive at genuine moral principles, the argument goes, we must be able to justify our actions to each agent from her own point of view, 'without any artificial informational restrictions' (ibid.).

Scanlon himself rejected *ex ante* contractualism for a different reason, which can be called the Problem of *Ex Ante* Rules (208–209).⁶ *Ex ante* rules are, by definition, rules

⁵ In addition to Reibetanz Moreau (1999, 304), for explanations of this argument see also Frick (2015, 184–185), Fleurbaey and Voorhoeve (2013), Holm (2018, 233–234), and Otsuka (2015).

⁶ For discussions of this problem, see also, e.g., Ashford (2003, §4), Frick (2015, 201–203), and Kumar (2015, §3).

the adoption of which is initially in everyone's interests even if these rules will after the adoption benefit some people but greatly burden others. One example of such a rule would require us to choose at random a tiny minority of people to become involuntary subjects of painful and dangerous medical experiments. The adoption of this rule could significantly advance medical knowledge and, as a result, the rule could come to benefit us all. The problem is that the *ex ante* versions of contractualism seem to make this type of objectionable rules not reasonably rejectable.

To see this, consider the adoption of the previous rule from an *ex ante* perspective. From this perspective, it's not clear that you would have reason to object to the rule. After all, if that rule were adopted, your well-being expectation would be good. You would be likely to benefit from the advances in medical knowledge and you probably would not need to suffer the harms of the experimentation yourself. You would therefore be able to discount those harms by their improbability, which would leave you with no reason to object to the rule in question. The defenders of *ex post* contractualism, however, argue that this is the wrong result. After all, we do not think that making medical experiments on an unwilling minority is the right thing to do.⁷

⁷ There are also other objections to *ex ante* contractualism. For example, it can be argued that the view makes the distinction between unidentified doomed children and identified doomed children morally significant in an objectionable way. See Ruger (2018, 245–251).

3. The Argument for *Ex Ante* Contractualism and against *Ex Post* Contractualism

The arguments of the previous section appeared to support the *ex post* view. However, that view too has its problems. Most problematically, *ex post* contractualism leads to wrong conclusions regarding which actions are right and wrong. Here I will focus only on the so-called the *different harm cases* and the *social risk imposition cases*.⁸

In the former cases, we must choose between saving one individual from an extremely serious burden (e.g., death) and saving a group of people (e.g., hundred) from a slightly less serious burden (e.g., the loss of a limb, blindness, or paralysis) (239). *Ex post* contractualism seems to entail counter-intuitively that we should save the one person because she has a stronger objection to the ‘Save many!’ principle than any one of the group members have to the ‘Save the one!’ principle.⁹ *Ex ante* contractualists can, in contrast, argue that, no one could reasonably reject the ‘Save many!’ principle given its general adoption gives a lower burdensomeness expectation for every individual. From the *ex ante* perspective, it is unlikely that you

⁸ I set the previously much-discussed *same harm* cases in which we need to decide between saving one and saving many aside for reasons of space. Scanlon (1998, 232) originally tried to deal with these cases with the ‘tie break argument’ according to which each member of the group has an additional personal objection based on the fact, if the group is not saved, their presence makes no moral difference. This response has been both criticised (Otsuka 2000) and defended (Hirose 2001). The risk-acknowledging version of *ex post* contractualism introduced below can deal with the same harm cases in the same way as the different harm cases without needing to rely on the tie break argument.

⁹ For discussions, see e.g., Norcross (2002), Parfit (2003, §3) and Hooker (2003, 72–75),

end up being the one person in this type of a case rather than a member of the larger group.

The social risk imposition cases ground a similar objection to *ex post* contractualism. Consider the following case from Johann Frick (2015, 181):

Mass Vaccination (Unknown Victims): One million young children are threatened by a terrible virus, which is certain to kill all of them if we do nothing. We must choose between producing one of the two vaccines (capacity constraints prevent us from producing both):

- Vaccine 1 is certain to save every child's life, However, the vaccine will not provide complete protection against the virus. If a child receives vaccine 1, the virus is certain to paralyze one of the child's legs, so that he or she will walk on crutches for the rest of his or her life.
- Vaccine 2 is risky. It gives every child a 999/1000 chance of surviving the virus completely unharmed. However, for every child there is a 1/1000 chance that the Vaccine 2 will be completely ineffective and the child will be killed by the virus. (Assume that the outcomes for different children are probabilistically independent.) Call the children who end up dying luckless children.

Whichever of the two vaccines we choose to produce will be administered to all one million children.

Intuitively, we ought to produce the Vaccine 2. After all, it is morally acceptable to immunize children against serious non-fatal diseases even when there is a known chance of fatal side effects to some children from the immunisation itself.

Yet, *ex post* contractualism seems to lead to the wrong conclusion here.¹⁰ Again, we must compare the objections that different individuals can make to Vaccine 1 and Vaccine 2 from a perspective from which the consequences of those policies have become evident. This means that the personal objections of the *luckless* children to Vaccine 2 (death) will be more serious than the personal objections to Vaccine 1 (paralysis of one leg). This makes the principle requiring the production of Vaccine 1 non-rejectable and so *ex post* contractualism seems to require counterintuitively us to produce Vaccine 1.¹¹

Ex ante contractualism can, however, avoid the previous objectionable conclusion. From the *ex ante* perspective, no child has a reason to object to the production of the Vaccine 2 given that 'escaping certain paralysis in one leg for the rest of her life is worth a 1/1000 risk of death' (Frick 2015, 187). Hence both the different

¹⁰ Before Frick, many others too had argued that *ex post* contractualism threatens to be too confining by not permitting many intuitively permissible socially productive activities such as aviation and bridge building (Ashford 2003, 298–300; Fried 2012; James 2012, §2; Kumar 2015, §4; Lenman 2008, §12). The examples used and the problems they pose are structurally identical to Frick's case and so I won't discuss these arguments separately. Scanlon himself tried to deal with those case by relying on the idea of reasonable level of precautions (209; for a critical discussion, see Ashford (2003, 299) and Lenman (2008, 114)). The versions of risk-acknowledging *ex post* contractualism introduced below can deal with those cases exactly in the same way as with Frick's case (see fn. 20 below).

¹¹ Frick also argues that *ex post* contractualism cannot distinguish between the objections, which the luckless children have in the previous case, and the objections which the doomed children have in the cases in certain identified group of children will die because the relevant vaccine is not effective for them (Frick 2015, 200; see also Rürger (2018, 241–242)). The problem is that the latter children have intuitively a more serious complaint to the policies that will disadvantage them.

harm and the social risk imposition suggest that we should accept *ex ante* contractualism instead of *ex post* contractualism.

4. Risk-acknowledging *Ex Post* Contractualism

4.1 What Then? Two Alternatives

Contractualists then face a dilemma. They must choose between *ex post* and *ex ante* contractualism and yet both views are problematic (James 2012, 265). This means that contractualists must choose between two strategies (Fried 2012, 46).¹² The first is to insist that the previous problems of *ex post* contractualism really are a sufficient reason to accept an *ex ante* view. After this, these contractualists must try to provide a response to the Argument from Irrelevant Information and the Problem of *Ex Ante* Rules (see §2 above). This is Johann Frick's (2015) strategy.

Frick first challenges the main arguments for the key controversial premise in the Argument from Irrelevant Information according to which the 'fact that we cannot know the identities of the luckless children is irrelevant to the question of whether selecting the Vaccine 2 is justifiable to each person' (Frick 2015, 194). According to Frick, the key motivation for this premise can be called the Argument from Certain Loss. This argument claims that we must take the unlucky child's objection to Vaccine

¹² There are also a number of mixed strategies according to which justifiability to each person is a function of both *ex ante* and *ex post* objections which individuals can make. For different versions of these hybrid views and their problems, see Fried (2012, §3).

2 into account in its full magnitude because it can be 'augmented by the fact that it was certain that someone would be burdened' (Frick 2015, 195).

Frick's concern is that motivating the central premise of the Argument from Irrelevant Information in this way would imply an odd asymmetry between social risk-imposition cases like Mass Vaccination (Unknown Victims) and single-person gambles. Consider a child, Clara, who must choose between Vaccine 1 which is certain to save her life at the cost of one of her legs becoming paralyzed and Vaccine 2 which will give a 999/1000 chance of surviving unharmed and 1/1000 chance of being killed. Here, it would make sense for Clara to choose Vaccine 2. Even if she were unlucky, she would have no reason to complain.

Ex post contractualists are then forced to claim that, even if Clara cannot object to having chosen the Vaccine 2 when she is unlucky, the unlucky child in the social risk case will have a legitimate complaint to Vaccine 2 because, even if she hadn't been unlucky, someone else would have died. According to Frick, not only is this oddly asymmetric, but it also threatens to violate the contractualist individualist restriction (2014, 196). Even if we are not aggregating the objections of different individuals in the same world, we are aggregating them across different worlds. This is why Frick thinks that the central premise of the Argument from Irrelevant Information fails and so that argument against *ex ante* contractualism has no force.¹³

¹³ For a response defending the Argument from Certain Loss, see Otsuka (2015) and Holm (2018, §4–§5).

Frick's (2015, §4, see also Lenman (2008, §7 and §9) and Kumar (2015, §3)) response to the Problem of *Ex Ante* Rules argues that all contractualists should endorse a 'decomposition test'. When we consider a principle that governs complex activities that consist of going through different stages of many voluntary actions, the rule can be non-rejectable only if the relevant voluntary actions at every stage are justifiable to each person *at that time*. Frick then argues that the intuitively objectionable *ex ante* rules will not pass this test. For example, the human experiment principle of §3 certainly includes a stage – conducting painful medical experiments on unwilling subjects – that cannot be justified to everyone at the time when those actions are done.

Unfortunately, here, I have no space to investigate whether the previous *ex ante* contractualist responses to the Argument from Irrelevant Information and the Problem of *Ex Ante* Rules are successful. Instead, I will focus on the second potential strategy of responding to the dilemma described above. This second alternative begins from accepting the basic crux of *ex post* contractualism. It then tries to develop a form of *ex post* contractualism that could avoid the extensional objections to *ex post* contractualism discussed in §3. It is this line of argument that I will pursue next. After this, in §5, I will return to the question of which of the two strategies is more successful.¹⁴

¹⁴ Broadly speaking, in addition to Frick, the first strategy has been pursued by James (2012) and Kumar (2015). Likewise, the second strategy has been pursued in different ways by Otsuka (2015) and Holm (2008).

4.2 The Proposal

We can begin from the thought that, in the contractualist framework, what is right and wrong is a function of on what grounds individuals can object to different moral principles and how good objections those objections are taken to be. Therefore, if you as a contractualist change your view of those considerations and the strengths of the objections they ground, you will come to different conclusions about which actions are right and wrong.

§1 above drew a distinction between the essential features of Scanlonian contractualism and the other details of Scanlon's own position. Scanlon himself outlined a theory of which considerations count as personal objections to different principles and the examples he uses also give a good idea of how strong objections those considerations are taken to support (213–241). Yet, if we make changes to this theory, we will get a different theory of which actions are right and wrong. The resulting view will be contractualist and Scanlonian in spirit but just not Scanlon's own view.

According to Scanlon's own view, the considerations that ground objections to different moral principles must be 'generic reasons' to make those objections (219).¹⁵ These reasons cannot be based on the idiosyncratic interests or features of actual individuals but, rather, they must be based on what reasons *anyone* occupying a

¹⁵ For explanations of Scanlon's view of the relevant objections, see, e.g., Ashford (2003, 277–279), James (2012, 267) and Kumar (2015, 41–42).

particular position would have 'in virtue of their situation, characterized in general terms' (204). As examples of generic reasons, Scanlon lists bodily injury, inability to rely on the assurances of others, and not having control over one's own body (204).

Let me make two observations of this theory of the relevant objections. Firstly, many of the previous considerations are tied to an individual's level of well-being and so Scanlon recognises that the way in which a given principle lowers someone's well-being often gives that person a legitimate ground for objecting to that principle. Scanlon, however, accepts that there are also other grounds for making legitimate objections and he argues that well-being does not provide a master currency for evaluating the strength of different objections (214–215).

Secondly, the *ex ante* contractualists' objections to *ex post* contractualism (§3) are based on Scanlon's own view of the considerations on the basis of which individuals can object to the compared principles. This is because the assumed generic reasons to object to different principles from the *ex post* perspective are in the relevant examples considerations such as that the principles leads to someone's death or to the paralysis of a child's leg.

Here I then want to outline a version of *ex post* contractualism that makes only *one addition* to Scanlon's account of the potential objections to different moral principles. My proposal therefore recognises all the considerations that Scanlon acknowledged: all the same generic reasons that can ground the relevant objections.

Yet, in addition, it also recognises just one new set of generic reasons on the basis of which individuals can also make objections to different moral principles.

I borrow this new set of potential objections from the *ex ante* contractualists. They, after all, stipulate that individuals can, from the *ex ante* perspective, object to different moral principles on the grounds that those principles impose a significant *risk* on them. My suggestion is that the *ex post* contractualists too should accept that individuals can object to moral principles on the grounds that those principles require them to live in circumstances in which significant risks are imposed on them.¹⁶ The only difference is that, according to this proposal, individuals can object to the moral principles they have lived under on the basis of risks from their *ex post* perspective from which the consequences of those principles are evident. Let me borrow James Lenman's (2008, §11) simple example to illustrate this thought.

Imagine that Jones plays Russian roulette on Smith. He puts in a bullet, spins the chamber and pulls the trigger whilst aiming at Smith. If the gun does not fire, what kind of a moral complaint can Smith make to what Jones did from the *ex post* perspective? He cannot complain about the fact that Jones shot him – that never

¹⁶ Lenman (2008, §13) suggests a different synthesis of *ex ante* and *ex post* contractualism. Lenman's proposal is that, even if objections are to be evaluated from *ex post* perspective, even from this perspective we are to consider whether you can object to what someone did to you when that action is understood from the agent's *ex ante* epistemic perspective. Understood in this way, we can discount many resulting harms as objections by their improbability. This differs the view outlined below as that proposal does not discount any realized harms by their improbability, but rather it considers living under a risk as a ground for additional objection *ex post*.

happened. Rather, Smith has a legitimate complaint to Jones's action on the grounds that it *imposed a serious risk on him*.

Consider then a case in which the gun fires and Smith dies. Here it seems that Smith can complain on two grounds. He can both object to the fact that Jones shot him and, yet, he can also complain on the same basis as in the previous scenario. He can object to the fact such a serious risk was imposed on him. This objection does not go away merely because the risk is realized in this case. Of course, we might think that Smith's risk-based objection is much weaker than the one based on his death, but it is a legitimate complaint nonetheless. And, even if the previous example is stylized, there are corresponding real life cases. For example, the main objection to drunk driving from the *ex post* perspective is that, even when no one was harmed, the driver imposed a serious risk on others.

The more serious risk is imposed on someone, the more strongly that person can then object to it.¹⁷ I assume that the seriousness of a risk depends on the seriousness of the relevant harms that can result from the risk and their likelihoods. The more serious risks then ground stronger objections to the principles that would allow imposing those risks. Risk-acknowledging *ex post* contractualism is then the view which (i) compares the personal objections to different moral principles from the

¹⁷ It could be argued that this makes it ever so slightly more wrong to shoot someone at point blank compared to playing Russian roulette on them when this leads to death. The main objection both victims can make is that they have been killed. However, both can also object to the fact that they were put under a serious risk. In the case of shooting someone at point blank, this risk is more serious given that the likelihood of the other person dying is higher than in the Russian roulette case.

ex post perspective, (ii) accepts all of Scanlon's the generic reasons to object to different principles, and (iii) adds that individuals can also object to the principles they have lived under on the basis of the risks those principles have imposed on them. In the next sub-section I will then attempt to show how this view can deal with some of the objections to the previous forms of *ex post* contractualism.

4.3 Risk-Acknowledging *Ex Post* Contractualism and the problems of the previous alternatives

This final sub-section first attempts to show that many versions of previous proposal can come to exactly the same conclusions about the different harm and social risk imposition cases as *ex ante* contractualism (§3). If correct, this would mean that risk-acknowledging *ex post* contractualism is immune to the *ex ante* contractualists' objections to *ex post* views. The rest of this section then argues that risk-acknowledging *ex post* contractualism also retains the alleged advantages of the traditional forms of *ex post* contractualism (§2).

Let us first recall two important elements of Scanlon's contractualism. Firstly, even if Scanlon's contractualism is *antiaggregative* and so does not allow combining personal objections to even stronger interpersonal aggregate objections, Scanlon's view allows *intrapersonal* aggregation of different personal objections (237).¹⁸ An individual can object to a principle on many different grounds – on the basis of

¹⁸ See also Lenman (2008, 108), Fried (2012, 58) and James (2012, 282).

different burdens, which the principle imposes on her. When the agent is in this position, her objections combine into an even stronger *intrapersonal* aggregate objection.

Secondly, the principles evaluated in Scanlon's framework do not govern just individual situations. Rather, each principle is supposed to govern a whole range of cases – they are to guide agents in a given domain of behaviour more generally (202–203).¹⁹ Thus, whatever the principles are that determine what we are to do in Unexploded Mine and Mass Vaccination (Unknown Victims), these principles also govern many other situations in which the claims of individuals and groups conflict. One reason for insisting on this generality is that it allows us to consider also the wider consequences of the general adoption of different principles, for example the so-called expectation effects (203). Due to the general adoption of the relevant general principles, not only do individuals act in different ways in specific situations, but people also come to take different precautions, which affects the kinds of lives they will live.

Here is then how I will proceed. I will first outline how risk-acknowledging *ex post* contractualism can deal with one paradigmatic different harm case and one paradigmatic social risk imposition case. I will then explain how we can formulate different versions of the view some of which will be co-extensive to whatever the right principles governing all these kinds of cases are. If this is right, then the outlined view

¹⁹ See also Ashford (2003, 278), Lenman (2008, 108 and §14), Fried (2012, 58) and Kumar (2015, 40–41).

can avoid the existing objections to *ex post* contractualism (§3). I will then conclude this section by returning to the advantages of *ex post* contractualism discussed in §2.

So, return to the case in which you can save either one individual from death or a large group of people from paralysis.²⁰ To govern cases like this, we could adopt either the ‘Save the one!’ principle or the ‘Save the many!’ principle. Because we are considering the consequences of these principles *ex post*, we can assume that we know the identities of the individuals who will be affected by these principle in different ways. So, let me call the individual who will die if the group is saved ‘Alex’ and one of the individuals who is paralyzed if Alex is saved ‘George’.

We can then represent the consequences of the general adoption of these principles with the following table:

Principle adopted:	Alex	George
Save the one!	<ul style="list-style-type: none"> • No harm. • Risk n. 	<ul style="list-style-type: none"> • Paralysis • Risk n.
Save the many!	<ul style="list-style-type: none"> • Death. • Risk m. 	<ul style="list-style-type: none"> • No harm. • Risk m.

²⁰ Note that this case is the one described by Scanlon (239) and discussed in the very beginning of section 3 on page 9. This case has two important features. Firstly, the consequences of both actions in the relevant situation are fully known and, secondly, if we save the one individual from death then no harm is caused to the members of the group whereas if we save the group then no harm is caused to the one individual. The social risk imposition case Mass Vaccination (Unknown Victims) (see sec. 3 above) differs from this case in these two respects. For a discussion of that case, see below.

Here is how to read this table. The rows ‘Save the one!’ and ‘Save the many!’ correspond to two distinct scenarios: to one in which the ‘Save the one!’ principle has been adopted (the first row) and to one in which the ‘Save the many!’ principle has been adopted (the second row). The columns ‘Alex’ and ‘George’ then indicate what happens to Alex and George in those scenarios. In the circumstances in which the ‘Save the one!’ principle has been universally adopted, Alex gets saved (and so he is not harmed at all) whereas George ends up fully paralysed as a member of the larger group. In contrast, in the circumstances in which the ‘Save the many!’ principle has been adopted Alex dies whereas George and the other members of the group are not harmed at all.

In this case, I also assume that both Alex and George face the same risk n when they live under the ‘Save the one!’ principle (I’ll return to this risk shortly). Likewise, the same risk m is imposed on both when they live under the ‘Save the many!’ principle. This means that George has the most serious *intrapersonally* aggregated personal objection to ‘Save the one!’ based on both his paralysis and the risk n that was imposed on him by that principle throughout his life-time, whereas Alex has the most serious objection to ‘Save the many!’ based on his death and the risk m , which was imposed on him. After all, Alex can object to ‘Save the one!’ only on the basis of risk n and George to ‘Save the many!’ on the basis of risk m .

How are we then to understand risks n and m ? I first assume that every individual who lives under the previous principles have exactly the same chance of

getting into a situation governed by those principles. These are the cases in which we must weigh the claims of individuals and different sized groups against one another. For example, one example of such cases is the health care context given that providers must often decide between whether to use their resources for saving the lives of few individuals with costly treatments and improving the health of the vast majority of people with less expensive means. Given that this probability is the same for each individual under both principles and presumably quite high overall, I will ignore it in the following.

Risk m and n can then be understood to have two components that determine how serious those risks are.²¹ Firstly, there is the relevant harm. Under the ‘Save the many!’ principle this harm element of risk m is either an individual’s death or some other very serious harm. Under ‘Save the one!’, the harm element of risk n is, in contrast, a set of slightly lesser harms (such as paralysis in the case above) from which the members of the group will not be saved in the relevant cases.

²¹ Here I follow Kumar (2015, 43–44). Below, I consider only the base-line risks which we all have qua members of the general population. As Kumar points out (*ibid.*, especially fn. 27), different individuals can, of course, also have additional risks qua members of more specific reference classes. Yet, taking these additional risks into account would not change the conclusions below substantially (but see Kumar (2015, 45–47) for a discussion. This additional feature of the risk-acknowledging forms of *ex post* contractualism also enables these views to recognise the difference between the luckless children in Mass Vaccination (Unknown Victims) and the doomed children in the slightly modified version in which certain identified group of children will die because the Vaccine 2 is not effective for them (see Frick (2015, 200), Rürger (2018, 241–242) and fn. 11 above). The defenders of these views can claim that, even if both children die in the corresponding cases, a more serious risk is imposed on the latter and so intrapersonally aggregated objections which the doomed children have to Vaccine 2 are stronger than the corresponding objections of the luckless children.

The second element of m and n is a probability measure, which I understand in terms of a frequency of how often any individual is, on average, either the lone individual (or a member of the smaller group) or a member of the larger group threatened by the slightly less serious harm.²² Given the numbers involved, it is always *vastly* more probable that a given individual ends up being a member of the larger group in this type of a case rather than the one individual or a member of the much smaller group.

We are then in a position to characterize the risks m and n . Risk m under which everyone lives under the ‘Save the one!’ principle consists of a very high probability of ending up being a member of a larger group who will come to suffer a slightly less serious harm than from which the individual (or a small group) is saved as a result of that principle. In contrast, risk n under which everyone lives under the ‘Save the many!’ principle consists of a very small probability of ending up being the one individual (or a member of a small group) who will not be saved from the more serious harm. Risk m thus consists of a much higher probability of suffering almost as serious harm whereas risk n consists of a considerably lower probability of suffering a slightly more serious harm. As a result, we must conclude that m is a more serious risk than n . Because of this, from the *ex post* perspective individuals have a

²² Others who have accepted the relevant probabilities in terms of a frequency measure in this debate include Fried (2012, 50) and Kumar (2015, 43–44, including fn. 26 on other alternatives).

significantly stronger objection to risk m being imposed on them than they have to the imposition of the less serious risk n .

We can then intrapersonally aggregate George's different personal objections to 'Save the one!' principle and likewise Alex's personal objections to 'Save the many!' principle. George's objection to the former principle consists of both paralysis and the imposition of the serious risk m , whereas Alex's objection to the latter principle consists of death and a much less serious risk n . Let us then assume that there is some measure of how much more serious objection to a principle death grounds compared to the objection based on paralysis. Let this difference between the two objections be x units of 'objection strength'.

Consider then the versions of risk-acknowledging *ex post* contractualism according to which individuals can make strong objections to principles on the basis of the serious risks those principles impose on them. Such views can argue that George's objection to 'Save the one!' based on risk n is so much stronger than Alex's risk m -based objection to 'Save the many!' that the difference between these objections is greater than x units of objection strength. As result, these views will entail that George's intrapersonally aggregated objection (paralysis and risk m) to the principles that require saving Alex is stronger than Alex's objection to saving the group (death and risk n). These versions of risk-acknowledging *ex post* contractualism can thus agree with the defenders of *ex ante* contractualism about what ought to be done in the previous case.

Similar things can be said about Mass Vaccination (Unknown Victims). From the *ex post* perspective, let us call 'Ben' one of the children whose leg is paralysed by Vaccine 1 but who will survive fully unharmed if he is given the Vaccine 2. Likewise, let us call one of the luckless children who dies in the Vaccine 2 scenario 'Stephen' (note that Stephen survives if he takes the Vaccine 1 but his leg too will be paralysed in that case). We can then again represent the outcomes of the two principles in this way:

	Ben	Stephen
Vaccine 1	<ul style="list-style-type: none"> • Paralysed leg • Risk p 	<ul style="list-style-type: none"> • Paralysed leg • Risk p
Vaccine 2	<ul style="list-style-type: none"> • No harm • Risk q 	<ul style="list-style-type: none"> • Death • Risk q

The columns again here specify two circumstances in which two different moral principles governing the same situation have been adopted. Under the Vaccine 1 principle, Vaccine 1, which paralyzes every child who takes it, is produced and so under this principle both Ben and Stephen have to suffer the harm of one of their legs ending up being paralysed. In contrast, when the Vaccine 2 is produced under the Vaccine 2 principle, Ben is one of the majority of children who survives the virus

completely unharmed whereas Stephen is one of the unlucky children who dies as a result of taking the Vaccine 2.

Risks p and q are then imposed on individuals by the adoption of the general principles that would require the production of Vaccine 1 and Vaccine 2 respectively. These risks again have two elements that determine how serious they are: a probability element and a harm element. We know how the harm elements compare. The harm element is more serious in risk q . The adoption of a principle that requires Vaccine 2 to be produced entails that some children will die whereas the adoption of a Vaccine 1 principle leads to every child having a paralysed leg. We also, however, know that the probability of harm is much, much higher when you live under the Vaccine 1 principles. After all, these principles mean that the likelihood, for any one individual, of suffering the slightly less serious harm is 1 – i.e., full certainty. In contrast, for any one individual, including Ben, the probability (understood again as a frequency measure) that he or she will experience the more serious harm (death, in this case) under the Vaccine 2 principles is much smaller. In the case described by Frick, this probability is 0.001.

This means that risk p under which all individuals live under the Vaccine 1 principles ($p=1$, harm=paralysis of a leg) is a much more serious risk than the risk q under which all individuals live under the Vaccine 2 principles ($p=0.001$, harm=death). Let the difference between how strong objections death and paralysis of a leg ground be in this case y units of objection strength. We can then compare the intrapersonally

aggregated objections that Ben and Stephen have to the Vaccine 1 and Vaccine 2 principles respectively.

Let us focus on the versions of risk-acknowledging *ex post* contractualism according to which individuals have strong objections to the principles under which they live when those principles impose serious risks on them. On such views, Ben's combined objection based on the paralysis of his leg and the much more serious risk p will be a stronger objection to Vaccine 1 than Stephen's objection to Vaccine 2 based on his death and having to live under the minute risk q .²³ This is because, on these views, the difference between the risk-based objections is greater than y units of objection strength and so paralysis of a leg and the much more serious risk p combine to a stronger objection than death and the small risk q . This means that these versions of *ex post* contractualism can agree with the defenders of the *ex ante* views concerning what we ought to do in Mass Vaccination (Unknown Victims).

I have then shown that there are versions of risk-acknowledging *ex post* contractualism that can lead to the intuitively correct moral conclusions at least in the individual different harm and social risk imposition cases discussed above. Are there also versions that will have plausible consequences in all similar cases? Here I want to suggest that there are no matter what those plausible consequences turn out to be.

²³ In fact, as the table above shows, Stephen himself has the same objection to Vaccine 1 as Ben given that both suffer the same harm of paralysis of a leg and risk p under that principle. This means that Stephen's own objection to Vaccine 1 is stronger on this view than his own objection to Vaccine 2.

We must first recognise that there are a range of plausible first-order ethical plausible views in this context. For reasons of simplicity, I will focus only on the different harm cases (even if exactly the same considerations will apply also to the social risk imposition cases). Some people think that, in the different harm cases, we should save the larger group *only if* the group has very many members (thousands, millions, ...) and the members of the group are threatened by almost exactly as serious harm as the one individual. Others think that we should save the group even if it only has few members and they are threatened by a significantly less serious harm. And, of course, there is a whole spectrum of different views between these two extremes, depending on how aggregative or antiaggregative your moral convictions are.

Yet, whatever view we take from the previous spectrum, there *will* exist a version of risk-acknowledging *ex post* contractualism that will be extensionally equivalent to it. This is because we can create different versions of that position by making different stipulations of how strong objections to a moral principle different risks ground. If we take a view according to which even the most serious risks do not ground very strong objections, we end up with risk-acknowledging *ex post* contractualism that is co-extensive with the view that requires an extremely large group and almost as serious harm for the larger group to be favoured. In contrast, a view according to which even less serious risks ground significant objections entail that the groups that ought to be saved can be relatively small and the harms that threaten them significantly less serious. And, again, there will be a whole spectrum of

views of how strong objections risks ground between the previous two extremes. This spectrum of views of how strong objections risks ground and the versions of risk-acknowledging *ex post* contractualism they ground will match exactly the extension of the previous spectrum of moral convictions concerning when we are to favour the larger groups.

This means that the *ex ante* contractualists cannot object to risk-acknowledging *ex post* contractualism on the same grounds as they objected to the previous forms of *ex post* contractualism.²⁴ Whatever they think the right principles to govern the different harm and social risk imposition cases are, there will be versions of risk-acknowledging *ex post* contractualism that can justify those very principles. As a result, the objections to *ex post* contractualism described in §3 no longer apply.

Despite this difference, the outlined risk-acknowledging versions of *ex post* contractualism still retain the advantages of the previous *ex post* views (see §2). Every individual's objections to the principles he or she lives under are taken into account in full magnitude from the *ex post* perspective and so no objection is discounted by its antecedent improbability. This is why the outlined proposal can agree that such discounting would let irrelevant information about the identity of the relevant

²⁴ The objection to *ex post* contractualism according to which the view is too confining by ruling out socially productive activities such as aviation can be responded to in the same way (see fn. 9 above). First, it can be argued that these activities too save lives and prevent other serious burdens (Holm 2018, 241; James 2012, 272). It can then be argued that living under principles that forbid these activities both causes those very harms to some individuals and also imposes a more serious risk of harms to them too. Given that the rules that permit these activities cause similar burdens but not as serious risks to anyone (Kumar 2015, 48), these principles cannot be reasonably rejected.

individuals have too significant moral consequences. The proposed view thus is able to give each real individual the genuine concern he or she is due.

Likewise, the proposed view will not support the implausible *ex ante* rules. Take the rule discussed in §2 according to which we should conduct medical experiments on randomly chosen subjects to advance medical knowledge. In a scenario in which this principle has not been adopted, some individuals can object to the fact they were not saved from being killed by a certain medical condition because the relevant advances in medical knowledge based on involuntary human experiments had not been made. These individuals can also object to the fact that they lived under a small risk that they would have to suffer this particular avoidable harm.

In contrast, in the circumstances in which the previous rule has been adopted, the involuntary subjects of the painful medical experiments have the strongest personal objections to the principle under which they live. They can object to the harm and pain caused to them by the relevant experiments, the violation of their autonomy, and also to the risk imposed on them by the whole system.²⁵ As long as the risk-acknowledging *ex post* contractualists acknowledge that this second set of objections is stronger than the previous one, these views will not support the objectionable *ex ante* rules.

²⁵ Here my response follows Kumar (2015, 36–37).

We can then return to the main dialectic. I have argued in this section that the risk-acknowledging versions of *ex post* contractualism are more plausible than the previous *ex post* views. All these versions of contractualism share the same advantages of *ex post* contractualism but only the risk-acknowledging versions can avoid the implausible conclusions in the different harm and social risk imposition cases.

How do the risk-acknowledging *ex post* views then compare to *ex ante* contractualism? At this point, both views seem equally plausible because both views are extensionally equivalent in the discussed different harm cases and social risk imposition cases.²⁶ I have just argued that risk-acknowledging *ex post* contractualism can avoid the Argument from Irrelevant Information and the Problem of *Ex Ante* Rules. However, I also mentioned in §4.1 that Frick too has argued that his version of *ex ante* contractualism can avoid those objections too. Given that I have not criticised his responses to those objections, it seems like the conclusion should be that *ex ante* contractualism and risk-acknowledging *ex post* contractualism are just as plausible.

However, Frick (2014, §7–§9) himself introduced a type of cases that pose a serious challenge even for his own version of *ex ante* contractualism. The next section suggests that, in these cases, risk-acknowledging *ex post* contractualism can do better

²⁶ In Lenman's (2008, 116) words, at this point we might then 'think of these approaches as complementary rather than necessarily competing'. However, the next section argues that the two approaches in fact lead to different conclusions in some cases.

than *ex ante* contractualism and so these cases provide us with at least some reason to prefer the outlined new proposal.

5. Identified vs. Statistical Lives

Let us then finally consider the following case from Frick (2015, 212):

Miners (1vs. 100): Gareth, a miner, is trapped in a collapsed shaft. If we do not save him, he is virtually certain to die within days. However, a rescue will be costly. Suppose we have to choose between the following two options:

- *Rescue*: Spend all our available funds to rescue Gareth.
- *Prevention*: Spend our available funds to improve the safety at this point, reducing the risk of future accidents. If we choose this option, the risk of death for each of the other 100 people working at this mine of dying in a future accident will be reduced from 3 percent to 1 percent. We expect that this will save two lives (though we cannot know which). However, Gareth will die.

Frick argues that this type of an identified vs. statistical lives case poses a serious challenge for *ex ante* contractualism.

We can start by comparing Gareth's objection to Prevention to one of the other miner's objection to Rescue. Frick assumes that, even from the *ex ante* perspective, Gareth can object to Prevention on the basis of his own death. As Frick puts it, the

natural veil of ignorance imposed by the *ex ante* perspective does not cover the outcome of Prevention for Gareth in this case (Frick 2015, 213–214). In comparison, each one of the miners can make only a much weaker objection to Rescue from the *ex ante* perspective. From this perspective, they can only object to the relevant rescue raising their chance of being killed from 1% to 3%. Because this objection is much weaker than Gareth’s objection to Prevention based on his own death, Rescue is the non-rejectable policy here for *ex ante* contractualism.

The problem, however, is that, if we add more miners to the case, *ex ante* contractualism still entails the same conclusion (Frick 2015, §8). So, consider Miners (1 vs. 1.000.000) case, which is exactly like the previous one except expect now there are million miners. In this case, lowering the risk from 3% to 1% by taking the relevant preventive measures saves 20.000 lives. This makes it harder to conclude that we should choose Prevention instead of Rescue. Yet, *ex ante* contractualism entails that very conclusion: it again compares Gareth’s death to the slightly higher risk of death for one miner and concludes that Gareth has a more serious objection. Because of this, Frick concluded that *ex ante* contractualists must recognise also other right-making qualities of actions such as the ones grounded in the well-being of others (Frick 2015, §9). According to the resulting view, even if we owe it to Gareth that we save him because we should be able to justify our actions to him on grounds he could not reasonably reject, we should not rescue him in Miners (1 vs. 1.000.000) all things considered because of how many lives would be otherwise lost.

Frick argues that *ex post* contractualism has the opposite problem (2015, 214). It can explain why we should choose Prevention in Miners (1 vs. 1.000.000) but not why we should choose Rescue in Miners (1 vs. 100). In both cases, from the *ex post* perspective, Gareth's death-based objection to Prevention matches exactly the personal objections that the unlucky miners have to Prevention. In this situation where the strongest objections to both alternatives are equally strong, Scanlon relied on the so-called Tie Break Argument to argue that the non-rejectable principle is the one to which the smallest possible number of individuals can make the most serious objection (232). This would make Prevention the non-rejectable principle in both cases.²⁷

Let me finish by outlining how the defenders of risk-acknowledging *ex post* contractualism could argue that, even if Rescue is the right policy in Miners (1 vs. 100), Prevention is the correct one in Miners (1 vs. 1.000.000). Let us begin from the observation that there is one generic reason, which Frick's discussion of *ex post* contractualism seems to have ignored in this context.

According to Scanlon (204), individuals can object to a principle on the grounds that living under that principle makes it impossible for them *to rely on the assurances of*

²⁷ As R ger (2018, 255–256) correctly points out, Frick is wrong to think that *ex post* contractualism is any worse off at this point than his own *ex ante* view. Frick thinks that *ex ante* contractualists can avoid the problem here by relying on other wrong-making features of actions than the ones based on what we owe to others. Yet, if the *ex ante* contractualists are allowed to do this, then surely *ex post* contractualists too can rely on a similar pluralist strategy in the Miners (1 vs. 100) to explain why the identified individual should be saved in them.

others. It is then important to notice that one important assurance we give to others is that we will help them when they urgently need help – that ‘they have our back’. We often give this type of reciprocal assurances to each other both explicitly and implicitly. After all, the bonds that these particular fundamental assurances create between us are what binds our communities and relationships together. It is not even difficult to imagine how the natural inclination for offering and asking for these sorts of assurances might have an evolutionary origin.

Yet, under Prevention, individuals cannot rely on the assurances of others. Instead of rescuing the identified individuals who urgently need help, others will simply use the required resources for preventing accidents in the future. This is why, from Gareth’s own *ex post* perspective, Gareth can object, not merely on the basis of his own death, but also on the basis of not being able to rely on the assurances of others. He has to suffer an additional burden of just being left to die when others could have helped him as they have assured him they would do. In contrast, the unlucky individuals who die because certain preventive measures were not adopted in the past do not have a corresponding objection – they die merely as a result of an accident.²⁸ Thus, if in *Miners* (1 vs. 100) we intrapersonally aggregate Gareth’s objection based on his own death and his inability to rely on the assurances of others, Gareth’s personal objection to Prevention will be stronger than the personal objections of the hundred miners to Rescue that are based only on their death.

²⁸ On this point, see (236).

Ex post contractualism thus leads to exactly the same conclusion as *ex ante* contractualism in Miners (1 vs. 100). It may also look like *ex post* contractualism suffers from the same problem as that view – it seems to vindicate Rescue in Miners (1 vs. 1.000.000) too. In that case, it could be argued that, whereas from the *ex post* perspective Gareth can object to both his own death and his inability to rely on the assurances of others, the 20.000 miners who die under Rescue can only object to their own accidental death.

However, the *risk-acknowledging* element of the proposal outlined above seems to enable *ex post* contractualism to do better here. Consider the more general principles that would require Prevention in Miners (1 vs. 1.000.000). According to such principles, we should always use our resources to save identified individuals even when the cost of doing is so high that tens of thousands of people die accidentally because we cannot afford to take any precautions. Under these principles then, individuals are sometimes saved in a very costly way from death even when many, many more people will die accidentally. It then seems like a significant risk is imposed on every individual living under these principles.

Consider then, from an *ex post* perspective, one of the 20.000 miners who die because Rescue is adopted to govern cases like Miners (1 vs. 1.000.000). This individual can object, not only on the basis of his or her own accidental death, but also because such a serious risk of accidental death was imposed on him or her throughout his or

her life.²⁹ Risk-acknowledging *ex post* contractualists can then argue that this combined objection based on death and the imposition of a serious risk outweighs Gareth's objection based on both his death and inability to rely on the assurances of others.

This view could still continue to support the intuitive conclusion that we should rescue Gareth in Miners (1 vs. 100). This is because the general principle that supports Rescue when the number of people under the threat of accidental future death is small does not significantly increase the risks that are imposed on you. After all, that particular type of a limited Rescue principle only leads to few extra deaths in only the few rare cases in which you have to choose between saving an identified individual and taking precautions that would save just a couple of lives. Living under that Rescue principle cannot be very dangerous for anyone. As a result, in Miners (1 vs. 100) Gareth's objection to Prevention based on his death and inability to rely on the assurances of others can outweigh the personal objections of the 2 miners who die under Rescue (based on their death and the slightly increased risk that they have had to live under).

²⁹ Here we need to recall that the principle that is to govern this case is to govern also all other cases in which we must compare whether to save an identified individual in a costly way or use the resources to take preventive measures that will save a large number of lives in the future. As Frick (2015, 178–179) points out, we cannot assume that any individual would be a victim of the relevant future accidents many times. Yet, living under the principles that use all resources to saving identified victims rather than taking any preventive measures will be risky because the risks imposed by all choices of this type will aggregative intrapersonally. Under these principles, any individual will face many situations that are dangerous because it's never the case that the society takes the required steps to prevent accidents. For a discussion, see Rürger (2018, 254).

This means that there is a version of risk-acknowledging *ex post* contractualism that can come to the right conclusions in both Miners (1 vs. 100) and Miners (1 vs. 1.000.000). In the former case, this view relies on Gareth's inability to rely on the assurances of others as a tie-breaker between the relevant death-based objections whereas in the latter case it recognises that death and the serious risks imposed by too extensive Rescue principles together outweigh even the previous combined objection. Unlike the defenders of Frick's *ex ante* contractualism, the defenders of this view need not rely on any other non-contractualist right-making features to give an account of these cases. This is why, other things being equal, risk-acknowledging *ex post* contractualism seems a more promising approach.

6. Conclusion

Let me then summarise. All contractualist views determine what is right and wrong by comparing personal objections to the moral principles which we could adopt together. Yet, there is a serious disagreement over from which temporal perspective these objections are to be made: are they made on the basis of the *prospects* the principles give to different individuals or on the basis of what kind of lives different individuals eventually come to live under them?

Both alternatives have their problems. The *ex ante* views are threatened by the Argument from Irrelevant Information and the Problem of *Ex Ante* Rules, whereas the *ex post* views seem to have counterintuitive consequences in the different harm and

social risk imposition cases. In this article, I have outlined a synthesis of the two views called 'risk-acknowledging *ex post* contractualism'. I have argued that this view avoids the objections to the previous contractualist views in this context and it can also do even better than Frick's *ex ante* contractualism in his own identified vs. statistical lives cases. This is why I believe that my proposal is the most promising form of contractualism in this debate.

References

- Ashford, Elizabeth. 2004. Demandingness of Scanlon's contractualism'. *Ethics* 113: 273–302.
- Fleurbaey, Marc, and Voorhoeve, Alex. 2013. Decide as you would with full information! An argument against *ex ante* Pareto. In *Inequalities in health: concepts, measures and ethics*, eds. Nir Eyal, Samia Hurst, Ole Norheim and Dan Wikler, 113–138. Oxford: Oxford University Press.
- Frick, Johann. 2015. Contractualism and social risk. *Philosophy and Public Affairs* 43: 176–223.
- Hirose, Iwao. 2001. Saving the greater number without combining the claims. *Analysis* 61: 341–342.
- Holm, Sune. 2018. The luckless and the doomed. contractualism and justified risk-imposition. *Ethical Theory and Moral Practice* 21: 231–244.

- Hooker, Brad. 2003. Contractualism, spare wheel, aggregation. In *Scanlon and contractualism*, ed., Matt Matravers, 53–76. London: Frank Cass.
- James, Aaron. 2012. Contractualism's (not so) slippery slope. *Legal Theory* 18: 263–292.
- Kumar, Rahul. 2015. Risking and wrongdoing. *Philosophy and Public Affairs* 43: 27–49.
- Norcross, Alastair. 2002. Contractualism and aggregation'. *Social Theory and Practice* 28: 303–314.
- Otsuka, Michael. 2001. Scanlon and the claims of the many versus the one. *Analysis* 60: 288–293.
- Otsuka, Michael. 2015. Risking life and limb. In *Identified versus statistical lives: an interdisciplinary perspective*, eds. Glenn Cohen, Norman Daniels and Nir Eyal, 77–93. New York: Oxford University Press.
- Parfit, Derek. 2003. Justifiability to each person. *Ratio* 16: 368–390.
- Reibetanz Moreau, Sophia. 1998. Contractualism and aggregation. *Ethics* 108: 296–311.
- Ridge, Michael. 2001. Saving Scanlon: contractualism and agent-relativity. *The Journal of Political Philosophy* 9: 472–481.
- Rüger, Korbinian. 2018. On *ex ante* contractualism. *Journal of Ethics and Social Philosophy* 13: 240–258.

Scanlon, T.M. 1982. Contractualism and utilitarianism. In *Utilitarianism and beyond*, eds., Amartya Sen and Bernard Williams, 103–128. Cambridge: Cambridge University Press.

Scanlon, T.M. 1998. *What we owe to each other*. Cambridge, Ma: Harvard University Press.

Scanlon, T.M. 2013. Reply to Zofia Stemplowska. *Journal of Moral Philosophy* 10: 508–514.