Contractualist In/Determinacy and the Alien Solution of Probability

Contractualist ethical decision making must reconcile with the difficult problem of *in/determinacy*: although the competing balance of personal reasons from relevant parties will always be indeterminate (multiple), the decision itself must be determinate (singular). The essence of this problem is typified in what Derek Parfit terms "same type, different number" (STDN) scenarios: let group A have a people and group B have b people, where $a < b$; we must choose which group will live, leaving the other for death. Intuitively, we feel the significance of the indeterminacy in this scenario: all individuals in group A and B have an undeniable claim to life, it is difficult for us to make any decision which will deny that claim for one group. Here, determinacy – that we must make a determinate decision in the end – does not negate the existence of a fundamental *indeterminacy*; in/determinacy centers around this tension. Utilitarians are quick to dispense with the moral relevance of indeterminacy, even if they acknowledge it as 'unfortunate' or 'regrettable': since utilitarianism is not structurally concerned with personal reasons but rather with the deterministic process of maximizing utility, a utilitarian will save group B. By 'structural', I mean 'necessary' – a property is structural to a theory if its removal fundamentally changes the nature of that theory. Contractualism, however, is principally committed to respecting the balance of personal reasons; it is precisely this structural dedication to respecting indeterminacy which renders it vulnerable to the problem of in/determinacy. I call the perspective that this undiluted commitment is structural to contractualism the "strong view". Even though contractualists have attempted to defend a principle requiring one to save the highest number of lives (H#L) in STDN scenarios, I argue that determinate principles can never actively respect the indeterminate balance of reasons because of their thresholded nature. I will then claim that probabilistic principles – a solution to in/determinacy proposed (but ultimately dismissed) by Scanlon himself – is alien to the

goals of contractualism to begin with. Together, these two claims leave contractualism remaining at odds with the problem of in/determinacy.

Under the strong view, I claim that individuals in group A can reject H#L on the basis that it fails to actively respect their claims to life. By 'actively respect', I mean that a principle considers reasons both *substantively* (the reason's presence makes a difference in the decision-making) and *fairly* (this difference is equal across individuals with equal reasons)[1]. Consider an STDN problem with $a = 999$ and $b = 1000$. Take any individual in group A: regardless of their existence, the decision would be made exactly in the same way (in favor of group B), because $999 - 1 < 1000$. Their presence, and therefore their claim to life, is not substantively registered by the principle. A theoretical acknowledgement such as 'group A would have been one person closer to being saved' is not substantive; the decision is not actually *made* any differently at all. H#L also enables unfair respect: each group B person's presence counts positively and necessarily towards the decision, but each group A person's presence makes no difference. For an intuition on the trouble with H#L, consider that it is unambiguous that we must save group B because $b > a$. This should give us pause: the difference between the two populations is very small to the point where following H#L seems dogmatic and arbitrary; surely a moral principle deciding which group to save should structurally take account of the fact that it is certainly a more difficult decision to make than, say, between $a = 1$ and $b = 1000$. Deterministic principles in STDN scenarios cannot account for each individual's claim to life in a strictly substantive and fair way because their thresholded nature requires the decision to remain unchanged until a threshold has been satisfied. This is the problem of in/determinacy: no determinate principle can actively respect indeterminacy. One could interpret this as an unimportant and pedantic point: perhaps active respect is too strict and unuseful

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[1] Note that this can be different from being fair *per se*, independent of a decision process.

of a requirement, and that I have simply set a high bar and proclaimed that nothing can rise above it. We must be careful here, though, to clearly delineate contractualism's ideals from its presented actualizations; ideals can still be worth striving for, even if doing so in practice is unlikely or even impossible. We should resist the impulse to dilute ideals such that they may appear more attainable and to shield principles from criticism by instinctively dismissing certain objections as 'unreasonable' ("ideals dilution"). Active respect, I hope it is uncontroversial to assert, is an ideal of (or 'is ideal for') contractualism: substantive acknowledgement better lives up to the contractualist ethos than theoretical consideration, and likewise with strict fairness over its absence. While deterministic principles cannot actively respect the indeterminate balance of reasons, this does not necessarily mean that active respect is impossible, but rather that perhaps we need to find an alternative principle.

One such alternative is a 'weighted lottery' (WL) probabilistic principle in which group A is saved with probability $\frac{a}{a+b}$ and group B with probability $\frac{b}{a+b}$. WL registers each individual's claim to life both *substantially*, in that each individual's presence is acknowledged with a substantive positive probability of living and changes the decision process, and that this acknowledgement is *fair* – all individuals change the decision by $\frac{1}{a+b}$ probability, regardless of if they are in group A or group B. Therefore, it solves the problem of in/determinacy by functioning through an indeterminate apparatus (probability) while producing a determinate outcome. Scanlon entertains WL as an alternative to H#L but ultimately dismisses it as a redundant "reshuffle[ing] of the moral deck" (Scanlon 234): "Whichever of these principles is followed, the ultimate stakes for the people affected are the same: some will suffer severe harm, the others will be saved" (Scanlon 233). Scanlon's reasoning here begins to smell like the consequentialist view on in/determinacy – that indeterminacy is good to consider but ultimately morally irrelevant. The

argument suggests that principle in a STDN scenario can be essentialized into its 'stakes', or the set of final determinate outcomes which the scenario may resolve into. Even though WL considers the indeterminate balance of reasons more structurally and therefore actively respects each individual's reasons more than H#L, the former is just a morally insignificant "reshuffling" of the latter if the possible determinations are the same. All of this is to say that I fundamentally depart from Scanlon in taking the strong view of contractualism's commitment towards indeterminacy (active respect), which is why I recognize WL as a principle which uniquely solves in/determinacy but Scanlon does not.

I hope that from my previous arguments, WL seems like a promising solution to the problem of in/determinacy in STDN problems than H#L if we accept the strong view. However, I will argue that probabilistic principles are incongruent with contractualism's focus on *personal* decision-making. Let us begin by developing a more rigorous conception of what probability means in this domain. Probability is commonly interpreted as a frequency: the probability that a die will land on any one side is $\frac{1}{6}$ because we will expect a dice thrown n times to approach $\frac{1}{6}$ as n tends towards infinity. However, this does not make sense in STDN problems: if group A is saved with probability $\frac{a}{a+b}$, this does not mean that we have saved or will save group A a out of $a+b$ times. From this, we can conclude that probability here cannot refer to anything empirical, because this implies repetition whereas the decision here is singular. Instead, probability is reflective to the symmetrical constitution of the problem. The probability a standard die will land on any of its faces is $\frac{1}{6}$ because there are six and only six structurally identical states it can rest in – these states are symmetric, and probability is a statement of this symmetry. Likewise, we save group A with probability $\frac{a}{a+b}$ and group B with probability $\frac{b}{a+b}$ because contractualism holds as a basic axiom

that each individual person's claim to consideration in the decision – in this case, in this case, $\frac{1}{a+b}$ – is constitutively identical. However, in order to produce an asymmetric (determinate) outcome from a structurally symmetric (indeterminate) system, there must be an asymmetric input to the system, in that there is a set of environmental states which will, through the system, favor a particular state and therefore which are not symmetric. For example, my throwing a die particularly hard in one direction, combined with the die's initial position, the height of the hand from the table, and other factors, determines a specific outcome, even though the die is symmetric. Any actual determinate decision between group A and group B with WL, therefore, is really 'made' by an externally introduced asymmetry.

It is precisely this property of probabilistic principles which render them informulable under contractualism: probability displaces the responsibility and act of decision-making from the personal to the impersonal. Let us consider a more general class of resolutions to ethical problems, which we will call *arbitration*. In arbitration, two (or more) parties settle a conflict by presenting their cases to an arbiter, an external entity or environmental state which registers each of the parties' reasons and produces a decision which both parties will follow. Here, the arbiter's mental processes and intentionality are irrelevant; I am solely interested in its formal structure: an arbiter 'maps' indeterminacy to determinacy, and is independent of any involved parties. I assert that probabilistic principles are instances of arbitration. Parties agree to relocate the responsibility for decision making from between themselves to an arbiter (chance). Although the arbiter considers and is influenced by the parties' competing reasons, and may favor one over the other depending on their varying strengths (in this case by modifying probabilities), ultimately it – whatever 'it' is – makes the determinate decision. Arbitration, however, is not acceptable under contractualism. Contractualism requires that only personal reasons from individuals relevant to the problem are considered in the formation of a decision. The arbiter is by definition an external neutral entity,

and therefore cannot be involved in this formation. Intuitively, probabilistic principles are not formulable under contractualism because decisions concerning "what we owe each other" need to be settled among relevant parties ("each other") determinately rather than outsourced to chance[2].

It may be argued, however, that what matters under contractualism is just that all parties do not reject a probabilistic principle. Arbitration, under this perspective, is a valid method of resolving ethical conflicts if "we" all believe that "what we owe each other" should be settled by an arbiter. Indeed, contractualism's structural dedication to the unrejectability of good principles allows it to flexibly adapt to different approaches to resolving ethical conflicts. However, this is not a license to manufacture and legitimize principles arbitrarily with universal unrejectability: the motivation for this dedication is that "our concern with right and wrong is based on a concern that *our actions be justifiable to others* on grounds that they could not reasonably reject insofar as they share this concern" (Scanlon 202, my italics). That is, the purpose of the commitment is not a pragmatist "let's all not disagree and move on" nor an egalitarian "no one is left unhappy" but rather the more strict view that the goodness of an action can only be morally settled with *direct acknowledgement* by all relevant others that it is justified in comparison to their own reasons. Probabilistic principles are not settled – they remain open as balances of reasons without effort at direct cross-acknowledgement and engagement; an arbiter makes the settling, and the determined action remains unjustified. Such principles are equivalent to a resigned "let's agree to disagree".

It appears, therefore, that the problem of in/determinacy may be endemic to contractualism, at least in STDN scenarios. Deterministic principles fail to actively respect indeterminacy, and probabilistic principles do so but are not formulable under contractualism due to their reliance

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[2] It should be noted that Scanlon employs notions of probability casually in other contexts of his analysis, such as for impartial responsibility distribution (Scanlon 212), and that this criticism applies in these contexts too.

upon an external arbiter. Is there a faithfully contractualist solution to in/determinacy? If not, and it seems so, it may be that two ideal values of contractualism – active respect for every relevant individual's personal reasons (the strong view) and the settling of conflicts personally – are fundamentally in conflict with each other. Of course, this article considered only strict forms of these values, and perhaps it is that contractualism can approximate them satisfactorily. But perhaps it is still of significance that this approximation is the 'best' that contractualism can do for us.

Works Cited

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