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On the Possibility of Act Contractualism

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ABSTRACT

A well-known debate in normative ethics is that between proponents of Act Consequentialism and Rule Consequentialism. Given the structural similarities between Rule Consequentialism and existing forms of Contractualism, one might expect a similar debate to arise among contractualists. However, this is not the case. Some, following T. M. Scanlon, even argue that this question is 'misconceived'—that there is something deeply mistaken about considering the possibility of an act-based form of contractualism. In this paper, I challenge this claim. I start by showing that the structural similarities between existing contractualist views and Rule Consequentialism suggest that one could formulate an act-based version of Contractualism. This view—Act Contractualism—has received almost no attention so far. Part of the explanation why rests on the thought that justification must involve rules or principles. The idea is that, since justification involves the use of reasons, and since reasons are best expressed through general principles, there is something conceptually mistaken in thinking that a contractualist theory can do without principles. However, I contend that, even if we accept that one cannot talk about reasons without talking about principles, we can meaningfully formulate an act-based contractualist view that takes the role of principles into account. I show that this view is not extensionally equivalent to Rule Contractualism, and that it is better supported by the contractualist rationale. I conclude by calling for more work to be done on Act Contractualism.

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> Note that whereas consequentialists have on the whole embraced the single-level act consequentialism at the expense of the two-level rule consequentialism, contractualists have been virtually unanimous in their preference for two-level versions of contractualism; indeed, single-level contractualism is virtually unheard of. It is an interesting historical question why this should be so. One consequence of it is that, whereas rule consequentialists have been forced to carefully formulate and defend rule consequentialism, the two-level character of contractualism has received little in the way of critical scrutiny. (Southwood, 2010: 102, n. 33)

1. Introduction

A well-known debate in normative ethics is that between proponents of Act Consequentialism and Rule Consequentialism.[1] Given the structural similarities between

[1] See Portmore 2011 and Hooker 2002 for thorough defences of these views and helpful discussions of the controversies surrounding them.

Rule Consequentialism and Scanlonian Contractualism, one might expect there to be a parallel examination of rule and act-based theorising among contractualists. However, this is not the case. Some, following T. M. Scanlon, even argue that the idea of an act-based form of contractualism is 'misconceived' (Scanlon 1998: 197). As a result, the rule-based structure of existing forms of contractualism has gone mostly unquestioned, and it is generally assumed that rule-based contractualism is the only game in town.[2]

In this paper, I challenge Scanlon's dismissal of an act-based version of contractualism and argue that Act Contractualism deserves attention in its own right. I start in section 1 by introducing Rule Contractualism—of which Scanlonian Contractualism is an example—in more detail. I look at examples of this view in the literature and describe its structure. We will see that the structural similarities between Rule Contractualism and Rule Consequentialism suggest that one could formulate an act-based version of contractualism which would stand in relation to Rule Contractualism much in the same way Act Consequentialism stands in relation to Rule Consequentialism.

In the next two sections, I reconstruct and answer Scanlon's objection to the possibility of Act Contractualism. In section 3, I consider the challenge that a contractualist theory must refer to principles because justification relies on reasons, and reasons are best formulated in terms of general principles. I grant that reasons work by way of principles and show that this is not inconsistent with the existence of Act Contractualism.

In section 4, I address the worry that, once we acknowledge the role of principles in talk about reasons, Act Contractualism just becomes Rule Contractualism. I build on a challenge often raised against Rule Consequentialism—the ideal World Objection—to show that, since rule contractualists maintain that real-world non-compliance has a limited influence on the prescriptions made by their view, Rule Contractualism and Act Contractualism are not extensionally equivalent.

In section 5, I suggest that the difference between Act Contractualism and Rule Contractualism is not merely extensional; these two views also rely on different accounts of justifiability. Since the ideal of justifiability to others is central to the contractualist rationale, this has implications for how well Act Contractualism and Rule Contractualism are supported by this rationale. I argue that the contractualist rationale lends more support to Act Contractualism than Rule Contractualism.

I conclude that we have good reason to take Act Contractualism seriously. More work should be conducted to formulate the most plausible version of this view, in order to weigh it more thoroughly against Rule Contractualism and to assess its overall plausibility in contrast with other moral theories.

2. Rule Contractualism

2.1 Rule Contractualism in the Literature

According to

Rule Contractualism an act is permissible if and only if it is allowed by a set of rules the general acceptance of which is appropriately justifiable to everyone.

[2] A notable exception is Sheinman 2011. See also Suikkanen 2020: 35, Southwood 2010: ft 33, 102, and Kagan 1998: 243 for (very) brief mentions of the possibility of an act-based version of contractualism.

Rule Contractualism is familiar in the moral theory literature. Perhaps the most well-known version of this view is the one defended by T.M. Scanlon (1998). According to

Scanlonian Contractualism An act is wrong 'if its performance would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced general agreement'. (Scanlon 1998: 153)

Here, Scanlon is proposing a specific account of what constitutes 'appropriate justifiability': a set of principles (or what we might more standardly call a set of rules) is appropriately justifiable to everyone if and only if 'no one could reasonably reject [them] as a basis for informed, unforced general agreement'.[3] As we will see below, other contractualist theories differ in their conceptions of appropriate justifiability. However, as I will demonstrate, they all share a common structure, which is why they qualify as versions of Rule Contractualism.

According to Scanlonian Contractualism, acts are assessed indirectly, via principles.[4] That is, their permissibility depends on their conforming with appropriately justifiable principles—where appropriate justifiability is understood in terms of reasonable non-rejectability. Moreover, the justifiability of principles is determined on the basis of what would happen if they were generally accepted. Indeed, Scanlon specifies that

> When we are considering the acceptability or rejectability of a principle, we must take into account not only the consequences of particular actions, but also the consequences of general performance or non-performance of such actions and of the other implications (for both agents and others) of having agents be licensed and directed to think in the way that the principle requires. (Scanlon 1998: 202–4).[5]

These two aspects of Scanlon's view—the evaluation of acts for their conformity to rules which are themselves selected for their justifiability, and the reliance on a process of universalisation—suggest that Scanlonian Contractualism is a version of Rule Contractualism.

Another contractualist view, defended by Nicholas Southwood, has a similar structure, and so can plausibly be seen as another version of Rule Contractualism (Southwood 2010, 2019). According to

Scanlonian Contractualism An act is permissible if it is allowed by a common code which we would agree to live by if we were perfectly deliberatively rational.[6] (Southwood 2010: 86)

[3] As I will show in section 4, Scanlon and other rule contractualists are, in fact, also providing us with definitions of what it is for *acts* to be appropriately justifiable. According to Scanlonian Contractualism, for instance, an act which is allowed by non-rejectable principles is not merely permissible–it is also *justifiable* to everyone, and this accounts for its permissibility (see Scanlon 1998: 154). I will argue that such accounts of what it takes for acts to be justifiable are unappealing, but I set this question aside for now. For my purpose in this section, it is enough to show that rule contractualists evaluate acts indirectly, for their conformity to appropriately justifiable principle–whether they consider that this conformity makes acts themselves justifiable or not. I am grateful to Jussi Suikkanen for prompting this clarification.

[4] I will use rules and principles interchangeably.

[5] Note that, according to Scanlon, we must look at the consequences of the general acceptance of principles, rather than at the consequences of mere general compliance. For a discussion of the difference between acceptance and compliance, see Hooker 2002:75–80. See also footnote 7 below.

[6] A more complete formulation is found in Southwood 2019: 531: 'It is morally impermissible/obligatory for A to X iff if we were all perfectly deliberatively rational and charged with the task of agreeing upon a common code by which to live, then we would agree to live by a common code, C, that includes a principle P that forbids/requires A to X'.

Here again, acts are assessed indirectly; their permissibility depends on their conformity with a code (that is, a set of rules). And, again, a set of rules is selected for its justifiability—where appropriate justifiability is determined by whether a given code would be the object of hypothetical agreement between perfectly deliberatively rational agents. Moreover, since the object of hypothetical agreement is a *common code* which *everyone would* live by—that is, a common code which everyone would accept and comply with—we are again required to consider the consequences of the general acceptance of a given set of rules to determine whether it would be justifiable (Southwood 2019: 531–32). The only difference with Scanlonian Contractualism is that justifiability is not expressed in terms of reasonable rejection but rather in terms of hypothetical agreement between perfectly deliberatively rational individuals.

Lastly, broadly Kantian formulations of contractualism can also be interpreted as versions of Rule Contractualism. Consider these two views, defended by Thomas E. Hill and Derek Parfit, respectively:

Hill's Kantian Contractualism An act is permissible if it is allowed by a moral code which 'would be affirmed, after due reflection, by Kantian ideal "legislators" […] who aim for agreement on "universal principles", which can be seen as reasonable from the perspective of any member'. (Hill 2012: 199)

Parfit's Kantian Contractualism 'An act is wrong unless such acts are permitted by some principle whose universal acceptance everyone could rationally will'. (Parfit 2011: 341)

Hill contends that Kantian legislators are motivated by the ideal of human dignity, which entails treating people in ways which could be justified to any rational person adopting an impartial perspective (Hill 2012: 198–200). Moreover, Parfit argues that principles whose acceptance everyone could rationally will cannot be reasonably rejected, and that such principles are thus justifiable to everyone (Parfit 2011: 411–12). Therefore, once again, for both Hill and Parfit the permissibility of acts depends on the whether the rules that permit them are appropriately justifiable—where appropriate justifiability is determined by what ideal legislators would endorse, or by what everyone could rationally will. Since the justifiability of principles is also assessed under the assumption that they are universally accepted, Kantian Contractualism is a form of Rule Contractualism as well.[7]

To conclude, Scanlonian Contractualism, Deliberative Contractualism and Kantian Contractualism can all plausibly be interpreted as versions of Rule Contractualism even though they rely on different conceptions of appropriate justifiability, and even though their authors do not describe them as such.[8]

[7] Note that I have used 'universally accepted' and 'generally accepted' interchangeably. This is not to say that these formulations are equivalent. There is disagreement in the literature on Rule Consequentialism about what acceptance rate we should assume when we consider the consequences of the adoption of a set of rules (this debate is surveyed in Podgorski 2018). For instance, Hooker (2002: 80–85) believes that we should follow the set of rules which would make things go best if it was accepted by 90% of the population, while Parfit (2011: 312–20) argues that the best set of rules is the one that would make things go best at any level of acceptance. Adopting different acceptance rates alters the prescriptions made by Rule Consequentialism, since different sets of rules will be selected as the best ones. Importantly, this debate carries over to Rule Contractualism: different sets of rules will be deemed appropriately justifiable depending on whether we evaluate them at full or partial acceptance. However, I ignore these differences here.

[8] For other examples of Rule Contractualist views, see Darwall 2006, Watson 1998, and Nagel 1991.

2.2 The Structure of Rule Contractualism

I take these views to be versions of Rule Contractualism because they share a common structure. They all evaluate acts on the basis of the justifiability of the rules that permit them, where the justifiability of a rule is determined by what would happen if this rule was generally adopted.

The two-level structure of Rule Contractualism resembles that of

> **Rule Consequentialism** An act is permissible if and only if it conforms to the best set of rules, where the best set of rules is the set such that things would go better (or at least as well) if most people accepted this set than if most people accepted any alternative set. (Hooker 2002)

Just like this view, Rule Contractualism evaluates acts indirectly, for their conformity to a set of rules, and sets of rules are selected for what would happen in an ideal world in which almost everyone accepted them. The difference is that, instead of rules the general acceptance of which would make things go best, Rule Contractualism prescribes following rules the general acceptance of which would be appropriately justifiable to everyone. This means that, whereas the consequences of the general adoption of a set of rules matter intrinsically to rule consequentialists, they matter to rule contractualists only to the extent that they affect the justifiability of these rules, or to the extent that they provide reasons for acceptance or rejection (Suikkanen 2020).[9]

Before I discuss the significance of the structural resemblance between Rule Consequentialism and Rule Contractualism in the next section, let me briefly mention the distinctive constitutive elements of the latter, which account for the variety of rule contractualist views found in the literature. Just as rule consequentialists can obtain different first-order moral views—some more plausible than others—by altering the axiology that grounds their evaluative ranking of options, rule contractualists can construct a wide range of first-order moral views by amending their theories in two respects (Suikkanen 2020: §5; 2021: 251–55).

First, contractualists can interpret the requirement of appropriate justifiability differently. For instance, for Scanlon, appropriate justifiability means being reasonably non-rejectable; for Southwood, it consists in being the object of hypothetical agreement between perfectly rational agents; and, for Parfit, it is determined by what everyone could rationally will. These differences in contractualist views lead to different results.[10]

Second, once one interpretation of justifiability is selected, changes in the theory of reasons or rationality which ground the normative ranking of options can further alter the implications of a rule contractualist view. For instance, deliberative contractualists might disagree on exactly what it is that perfectly deliberatively rational agents would agree on, and Scanlonian contractualists might disagree on what constitute reasons for reasonable rejection. The theory of rationality or reasons they adopt will significantly alter the first-order moral view they obtain.[11] In the rest of this paper, I will set aside these differences between rule contractualist theories.

[9] Note that Rule Consequentialism and Rule Contractualism can be made extensionally equivalent–for instance, if we consider that a rule is appropriately justifiable if its general adoption would make things go best. This is the crux of Parfit's (2011) Convergence Argument.

[10] For an example, see the discussion of the difference between reasonable and rational agreement in Scanlon 1998: 191–92.

[11] As an illustration, consider Scanlon's argument in favour of restricting reasons for rejection to reasons held by individuals (which is also known as the Individualist Restriction) in Scanlon 1998: 229–36.

2.2 Parallel with Consequentialism

Now, to the parallel with Consequentialism. It is widely accepted that there exists an act-based version of consequentialism. In a somewhat crude formulation, this well-known moral view says that

Act Consequentialism An act is permissible if and only if it makes things go best.

For both Act Consequentialism and Rule Consequentialism, the deontic status of actions is a function of the evaluative ranking of options following a given axiology; and changes to the axiology can lead to different first-order moral theories. The difference between Act Consequentialism and Rule Consequentialism is that the former has a one-level structure, whereas the latter has a two-level structure. That is, Act Consequentialism evaluates acts directly, whereas Rule Consequentialism evaluates them indirectly, for their conformity to a set of rules (itself selected on the basis of what would happen if it was generally adopted).

We have seen that, despite their differences, rule contractualist views share a common structure, and that this structure is similar to that of rule consequentialist views. Both Rule Contractualism and Rule Consequentialism evaluate acts indirectly, via rules, which are themselves selected on the basis of what would happen if they were generally adopted. This suggests the possibility of an act-based version of contractualism—one that would evaluate acts directly—much like there exists an act-based version of consequentialism. Such a view might look something like this:

Act Contractualism An act is permissible if and only if is appropriately justifiable.

This moral view, like Act Consequentialism, would evaluate acts directly, instead of evaluating them for their conformity to rules. Unlike Act Consequentialism, however, it would rest on a normative ranking of options according to a theory of reasons or rationality rather than on an evaluative ranking of options according to an axiology. Just as in the case of Rule Contractualism, what constitutes appropriate justifiability could be interpreted in different ways, leading to the formulation of different first-order theories. Depending on the account of appropriate justifiability which is selected, and on the theory of reasons or rationality that grounds it, versions of Act Contractualism could be more or less plausible, and be vulnerable or immune to different objections.

However, we might be getting ahead of ourselves. Some contractualists, following Scanlon, believe that asking whether one could formulate an act-based version of contractualism is 'misconceived' (Scanlon 1998: 197). In the next two sections, I unpack this claim and argue that, on the contrary, there seems to be conceptual space for an act-based version of contractualism which is neither conceptually mistaken nor extensionally equivalent to Rule Contractualism.

From now on, I will refer to Rule Contractualism and Scanlonian Contractualism interchangeably. I do so because it is easier to have one version of the view in mind when considering examples, but also because this will allow me to address more closely Scanlon's claim, which is the main aim of this paper. However, since my arguments pertain to the structure of Rule Contractualism rather than to the peculiarities of the constitutive elements of Scanlonian Contractualism, they extend to rule contractualist theories at large.

3. Reasons and Principles

3.1 Scanlon's Objection

So, why would someone think that act-based contractualism is incoherent? Contractualists' antipathy towards an act-based version of their view rests on the thought that, since justification involves the use of reasons, and since reasons are best expressed through general principles, there is something conceptually mistaken in thinking that a contractualist theory can do without principles. This is the crux of Scanlon's objection to the possibility of Act Contractualism, which I reconstruct in what follows (Scanlon 1998: 197).

According to Scanlon, to justify an action to others is to offer reasons in favour of an act, and to claim that these reasons are sufficient to defeat objections in a given context. To do that, in turn, is 'also to defend a principle, namely one claiming that such reasons are sufficient grounds for so acting under the prevailing conditions' (Scanlon 1998: 197).

Let us take an example. When asked 'Why did you take an umbrella?', I might say 'I saw on the weather forecast that it was probably going to rain, I'm planning on walking around today and I don't like getting wet'. For Scanlon, a subtext of this claim is 'these reasons are sufficient to defeat any objection under similar conditions'. This is plausible enough: my claim would not make sense if there were stronger competing reasons against taking an umbrella—say, if I had promised not to take one, or if a pellebaphobic maniac threatened to kill me if I did so.[12]

More controversially, Scanlon then goes on to say that this amounts to defending a principle such as 'the facts that it rains, that I am going to walk and that I don't like getting wet are sufficient grounds for taking an umbrella in situations relevantly similar to this one'. To be sure, particularists like Jonathan Dancy might disagree with such a claim, and insist that reasons do not generalise in this way (Dancy 2004). However, this is not the route I will take. Instead, I grant that reasons work by way of principles, but I contend that this does not mean that Act Contractualism is conceptually mistaken.

3.2 Reformulation

Following Scanlon, I accept generalism about reasons, and I take principles to be 'general conclusions about the status of various kinds of reasons for action' (Scanlon 1998: 199).[13] I thus grant that, when an act contractualist justifies an act by offering reasons in its support, she is *also* defending a principle which states that these reasons appropriately

[12] You might be interested to know that 'pellebaphobia' refers to the fear of umbrellas.

[13] I said earlier that I would use rules and principles interchangeably, but this discussion might seem to call into question this simplification. To be sure, rules are not 'general conclusions about the status of various kinds of reasons for action'; rather, they are statements prescribing a certain course of action. Taking our umbrella example, it is technically false to say that the principle 'the fact that it rains, that I am going to walk and that I don't like getting wet are sufficient grounds for taking an umbrella in situations relevantly similar to this one' is also a rule. Rather, the corresponding rule would be something like 'if it is raining, you're planning on walking around and you don't like getting wet (and if no other facts constitute defeating reasons), take an umbrella'. However, this is not a problem for the discussion in this paper. The only difference is that principles refer explicitly to reasons, whereas rules do not; but an act which conforms to a principle also conforms to the corresponding rule. In other words, the prescriptions made by Rule Contractualism would not change if this theory prescribed following an appropriately justifiable set of principles rather than an appropriately justifiable set of rules. I thank Campbell Brown for making me aware of this potential problem.

support acts of this kind in similar circumstances. Under this understanding of reasons and principles, it seems right to say that, even for an act contractualist, an act is permissible *if and only if* it conforms to a certain principle. This is because

(P1) Act Contractualism: An act is permissible iff it is appropriately justifiable.

(P2) An act is appropriately justifiable iff it is supported by appropriate reasons.

(P3) For an act to be supported by appropriate reasons just is for it to conforms to a principle which states that acts of this kind are supported by appropriate reasons in similar situations.

(C) An act is permissible iff it conforms to a principle.

P1 is a statement of Act Contractualism; P2 stipulates further what it means for an act to be justifiable; and P3 is the generalist account of reasons I grant Scanlon. Together, these three premises imply that Act Contractualism deems acts permissible if and only if they conform to a certain set of principles.

So, I grant that Act Contractualism, just like Rule Contractualism, can be seen as evaluating acts indirectly, via principles. To reflect this, let us reformulate Act Contractualism in the following way.

Act Contractualism An act is permissible if and only if it is allowed by a set of principles such that acting on it is appropriately justifiable to everyone.

This reformulation is equivalent to the previous one—it merely makes explicit the role of principles in talk about reasons. If we interpret Scanlon's objection to the existence of an act-based version of contractualism as a claim that such a view would be incoherent because one cannot talk about reasons without talking about principles, as I have done so far, it seems that we have addressed his worry. Act Contractualism, so reformulated, does not seem incoherent in this way, since it makes explicit the use of principles. However, it is not yet out of troubles.

4. Two Distinct Views?

4.1 Universalisation

Another worry emerges from this discussion. Act Contractualism, as I have reformulated it, now seems suspiciously similar to Rule Contractualism. Indeed, both views have a two-level structure; they evaluate acts indirectly, for their conformity to certain principles. So, perhaps investigating an act-based version of Contractualism is conceptually mistaken, not because such a view cannot accommodate the role of principles in talks about reasons, but because, if it does accommodate it, there is no distinction to be drawn between act-based and rule-based versions of contractualism. In other words, perhaps if we formulate Act Contractualism to make explicit the reliance on principles, as Scanlon's remarks encourage us to do, then it becomes apparent that there actually exists only one contractualist view, because Act Contractualism becomes extensionally equivalent to Rule Contractualism.[14]

[14] See Sheinman 2011: 308: 'The argument implicitly at work in the contractualist literature is reminiscent of the one-time popular argument that rule-consequentialism collapses into act-consequentialism, only here the argument runs in the other direction. Presumably, the idea is that Act Contractualism is not a genuine alternative to Principle Contractualism because these theories are extensionally equivalent, namely give the same results in all cases.'

Before I address this worry, let me specify it further. The question is not whether there exists *any* version of Act Contractualism that is extensionally equivalent to *some* version of Rule Contractualism. After all, some Act Consequentialist views are extensionally equivalent to some Rule Consequentialist views—it all depends on their axiologies—and there is no reason why things should be any different for Contractualism. As we have seen in section 1, contractualist views will make different prescriptions depending on the account of justifiability that grounds them—and it is perfectly possible that some version of Act Contractualism relying on a given account of justifiability J will make the same prescriptions as a version of Rule Contractualism relying on another account of justifiability K. So, the question at hand here is rather whether *all versions* of Act Contractualism are extensionally equivalent to the corresponding versions of Rule Contractualism—that is, to the versions of Rule Contractualism that rely on the same accounts of justifiability.[15] In other words, we are asking whether Act Contractualism *just is* Rule Contractualism.

To know if this objection has any bite, we must determine whether our new version of Act Contractualism makes the same prescriptions as Rule Contractualism. Since we are looking at whether the structures of these two views make them extensionally equivalent, it will be enough if we determine whether or not they are extensionally equivalent when they are combined with the same account of justifiability. So, let us determine whether the two views would select the same principles as the ones to be followed when they are both combined with the Scanlonian account of justifiability as reasonable rejectability.

To be endorsed by (Scanlonian) Act Contractualism, a principle P must be such that no one can reasonably object to my acting on P in a relevantly similar situation—that is, such that no one has stronger reasons against my action than the ones I have in favour of my action. In other words, a principle P is endorsed by Act Contractualism if it states undefeated reasons *in favour of a certain action in a certain situation*.

To be endorsed by (Scanlonian) Rule Contractualism, a principle P must be such that no one could reasonably object to P being accepted as a general standard of behaviour—that is, such that no one has stronger reasons against P being adopted as a general standard of behaviour than the reasons I have in favour of it being so adopted. In other words, a principle P is endorsed if it states undefeated reasons *in favour of its adoption as a general standard of behaviour*.

We notice one major difference between the two views. Rule Contractualism, unlike Act Contractualism, involves a process of universalisation. It evaluates sets of principles on the basis of what would happen if they were adopted *as general standards of behaviour*—that is, it evaluates principles under the assumption that most people accept them. Since principles have very different implications depending on whether they are followed by one person or by most people, this process affects one's reasons for objection. This, in turn, means that Act Contractualism and Rule Contractualism are likely to select different sets of principles as the ones to be followed.

Consider the following example:

[15] Another way to put it, suggested by Campbell Brown, is this: let $E(AC, J)$ and $E(RC, J)$ be the extensions of Act Contractualism and Rule Contractualism when combined with the account of justifiability J, respectively. Is it the case that, for any particular J, $E(AC, J) = E(RC, J)$?

> **Boat** You are on a boat with nine other passengers. Nearby, another boat capsized, and there are now five people in the water about to drown. There are five lifejackets on your boat, which you and the other passengers could throw overboard to save the five from drowning. However, the lifejackets are stored in individual compartments with capricious locks, and opening them is slightly painful and annoying. Therefore, none of the other passengers of your boat bother doing anything. What should you do?[16]

Recall that, according to Act Contractualism, the appropriate principle is the principle P such that no one can reasonably object to my acting on P in a relevantly similar situation. In this case, it is plausible that P would be a principle that requires someone in your situation to save everyone even though doing so is painful. This is because no one, including you, can reasonably object to your acting on this principle in a relevantly similar situation.[17] On the contrary, the drowning people can reasonably object to a principle which requires you to do less than that. They have strong reasons to object (grounded in the fact that they risk death)—and these reasons outweigh the reasons you would have in support of this latter principle (such as that you want to avoid pain).

Now recall that, according to Rule Contractualism, the appropriate principle is the principle P such that no one could reasonably object to P being accepted *as a general standard of behaviour*. Therefore, we must take into consideration what would happen if most people accepted certain principles and select the principle which could not be reasonably rejected in such situations of general acceptance.[18] Given this, it is plausible that Rule Contractualism would select a principle which requires someone in your situation to contribute only their fair share of efforts to save everyone. Indeed, no one would have reasons to object to this principle being adopted as a general standard of behaviour, since all the drowning people (or, more generally, everyone who finds themselves in a similar situation) would be saved, and no one would suffer more than the minor discomfort involved in opening one lock.[19]

Note that this is the case even if we acknowledge that there can be widespread non-compliance to generally accepted principles. In Boat, it would be enough if only half of the passengers on your boat complied to a principle requiring them to contribute their fair share, and it seems reasonable to expect at least 50% compliance to generally

[16] This case is inspired by Hooker 2002: 164. See also Pogge 2001: 132–33.

[17] Even a version of Act Contractualism that accepts fairness-based complaints as legitimate reasons for rejection would select this principle. Indeed, it would be highly implausible to say that your fairness-based claim against this principle (a claim not to incur pain because others do not do their fair share) outweighs the claims of five people to be saved from drowning.

[18] Recall that, according to Scanlon, we must take into account the consequences of the general acceptance of a principle, where general acceptance entails general performance of the acts allowed by this principle (1998: 202–4). See section 1.1 above for a discussion of this claim.

[19] It is not clear what Rule Contractualism would have to say about a principle requiring you to save everyone. If this principle was accepted by most people as a general standard of behaviour, this means that everyone would have to open all the locks to save everyone, and this does not really make sense. So, I find it hard to say who would have a complaint against this principle (You? Everyone on your boat?), and what would ground this complaint. In any case, it is unclear whether Contractualism would endorse such a principle, whereas it seems clear that it would endorse a principle requiring everyone to contribute only their fair share. Moreover, is it possible that Rule Contractualism would also endorse a more complex conditional rule such as 'contribute your fair share unless others do not, in which case save everyone at higher cost to yourself'. The problem is that Rule Contractualism has no way of discriminating between this rule and one requiring you to do no more than your fair share because, with both rules, everyone would be saved, since we assume *general* acceptance.

accepted principles.[20] We can thus plausibly expect that everyone would be saved if a principle requiring one to contribute one's fair share in such a situation was accepted as a general standard of behaviour, even if a non-negligible portion of the population did not comply. Therefore, no one would have reasonable grounds to reject this principle as a general standard of behaviour.

Examples such as Boat thus seem to suggest that Rule Contractualism and Act Contractualism do not select the same principles to determine the permissibility of acts, even if we assume that both views have a two-level structure that relies on principles. Act Contractualism does not select a principle requiring one to contribute one's fair share (but no more) because, in this particular situation in which many people do not comply with this principle, the five people drowning have reasonable grounds to object to your acting on it. Real-world non-compliance provides them with reasons for rejection which they would not have if we assumed that such a principle was generally accepted, even if we account for the possibility of widespread non-compliance to generally accepted principles. This means that Act Contractualism and Rule Contractualism are not extensionally equivalent.

But things are not so simple. The prescriptions I have implied Rule Contractualism makes in cases such as Boat ('contribute only your fair share, even though others do not') are obviously implausible. And, in fact, Scanlon does not believe that *his* view would have such highly counter-intuitive implications. This is because acting on a principle, he argues, requires interpretation and judgement rather than applying a fixed, statable rule (Scanlon 1998: 197). As I am about to show, this means that the prescriptions made by Rule Contractualism will be closer to that made by Act Contractualism than I have suggested. However, we will see that the two views remain nonetheless extensionally distinct.

4.2 Judgement and Interpretation

The discussion of Boat is reminiscent of an important challenge often raised against Rule Consequentialism, and which was formulated by Derek Parfit (2011: 312–20) and Abelard Podgorski (2018): the Ideal World Objection. In a nutshell, this objection states that evaluating acts according to rules which would have certain consequences in an ideal world of general acceptance has absurd implications. Indeed, we have seen that Rule Contractualism seems to run into this problem: it might require you to act in ways that lead to disaster, such as the death of four people, simply because such acts are permitted by rules whose *general acceptance* would be appropriately justifiable. Cases such as Boat are thus designed to highlight the problematic structural implications of evaluating acts indirectly, via rules which are themselves selected on the basis of what would happen at idealised levels of acceptance.[21] Universalisation leads to implications which are not only intuitively implausible, but which also seem *unjustifiable* to people in the actual world, where there is less than general acceptance of the ideal rules.

[20] If you think that we can reasonably expect a smaller proportion to comply with generally accepted principle, imagine that there were more passengers on the boat – say, fifty, so that everyone would be saved if only 10% of the passengers complied with a generally accepted principle requiring them to contribute their fair share.

[21] Note that this objection applies whether we look at universal acceptance or general acceptance. This is why it is not enough to provide a convincing account of the reason why a justifiable code would contain rules to deal with non-compliance and moral education, as Suikkanen (2014) does.

To address this objection, rule consequentialists such as Brad Hooker have argued that the best set of rules includes an overriding Avoid Disaster rule (Hooker 2002: 98–99).[22] In the same fashion, rule contractualists could argue that, since the most justifiable set of rules includes an overriding Avoid Disaster rule, their theory does not entail that we should act in ways that lead to disaster in cases such as Boat. But this will not do. Although an Avoid Disaster rule makes Rule Contractualism less implausible in cases such as Boat, it still entails that we ought to act in ways that remain highly counter-intuitive, even though they do not lead to disasters. Imagine a modified version of Boat, in which the five people in the water risk a broken leg instead of death, or any harm you think would be short of a disaster. Rule Contractualism would then still require that you follow the rule which is justifiable when it is generally accepted, and thus that you only throw one lifejacket overboard. This implication is not only counter-intuitive, but it could also be reasonably rejected by the five who are at risk of harm, even if it is not considered to be a disaster.

One solution open to rule contractualists is to take the Avoid Disaster provision even further. Scanlon, for instance, suggests that his view does not have such problematic implications. It is only 'normally' the case that we ought to follow justifiable principles, and 'normally' covers many qualifications (Scanlon 1998: 197–202). Taking the example of promises, Scanlon even argues that any principle which does not start with 'in the absence of special justification' could be reasonably rejected (Scanlon 1998: 198–99). I take it that similar qualifications apply to rules covering other areas of morality as well. In the same vein, Hill suggests that moral principles should make exceptions under certain conditions, and that they apply to various circumstances in different ways, which requires 'knowledge, judgement and creativity' (Hill 2012: 84–88; 197–98).[23] Moreover, he explains that, even under ideal circumstances of general acceptance, the set of rules which the Kantian deliberators would agree on would take into account the evil-doing of others (Hill 2012: 222–23; 241). This means that they would address situations of non-compliance in the real world. Such provisions as those suggested by Scanlon and Hill mean that, when there are strong reasons to go against a justifiable rule, or when the reasons to accept a justifiable rule are weakened, one is permitted to act differently from what the rule would prescribe. They ensure that following justifiable principles does not lead to counter-intuitive results like in our modified Boat example.

However, we will next see that Scanlon—and rule contractualists in general—stop short of implying that one should deviate from a justifiable principle every time acting on it can be reasonably rejected in the real world.[24]

[22] However, I have shown elsewhere that it is not obviously the case that the best set of rules would contain an Avoid Disaster provision. Moreover, even if we accept this clause, Rule Consequentialism nevertheless entails the counterintuitive implication that one should bring about bad-although-not-disastrous consequences, since rule consequentialists resist the collapse of their theory into Act Consequentialism.

[23] See also Hill 2012: 206: 'It is generally understood that developed moral attitudes, good character, and judgment are needed for wise application of rules and for situations for which rules do not apply'.

[24] It is possible that Hill believes that one should deviate from a justifiable principle whenever others in the real world can reasonably object to its application, given the distinction he draws throughout his work between the philosopher's task of devising a system of ethical principles and everyday decision-making (Hill 2012: 84; 90–91; Hill 2000: 33–55). However, I contend that this would make his theory collapse into Act Contractualism, at least when it is used for everyday action-guidance.

4.3 Collapse

First, let me note that it is not obviously the case that a principle which does not start with 'in the absence of special justification' could be reasonably rejected as a general standard of behaviour. Indeed, one could imagine a principle which would be specific enough to ensure that it could not be reasonably rejected in any situation which would occur under ideal circumstances of general acceptance. Such a principle would be non-rejectable as a general standard of behaviour even though it does not start with 'in the absence of justification'.

Scanlon might reply that a principle which would be specific enough to be non-rejectable in all possible situations would be too complex to ever formulate, and that there would always be nonstandard cases that are not covered by any formulable principle, even in an ideal world of general acceptance. After all, the ideal world we consider when we want to determine which rules are justifiable only differs from the real world with respect to the acceptance level of a given set of rules. Apart from that, it is in every respect similar to the real world, including in its complexity. Therefore, it is likely that, even in an ideal world of general acceptance, there would be someone who could reasonably reject an unqualified principle—one which does not start with 'in the absence of special justification'. Moreover, a finer-grained principle might well end up being overly burdensome, because it would require the agent to collect a great amount of information to know what the principle in question prescribes in a particular situation (Scanlon 1998: 205). It would also be costly to inculcate and internalise, and such costs are part of what we should consider when we evaluate the consequences of the general acceptance of a rule.[25] All this constitutes grounds for agents to reasonably reject overly complex principles, which suggests that simpler principles starting with 'in the absence of special justification' would be non-rejectable in comparison.

Now, if we accept that non-rejectable principles start with 'in the absence of special justification', it seems like Rule Contractualism might indeed be able to address the Ideal World Objection. In Boat, for instance, the fact that four people will drown (or be harmed, in the modified Boat example) constitutes special justification not to follow a principle which tells us to only contribute one's fair share of efforts. If this is the case, Rule Contractualism does not have the counter-intuitive implication that you ought to let four people drown or be harmed. At least in this example, it does not entail that you ought to act in ways that can be reasonably rejected by people in the real world for the sake of acting according to a rule which would be justifiable if it was generally accepted.

However, this does not guarantee there will be no cases in which Rule Contractualism prescribes acting in ways which can be reasonably objected to in the actual world. Rule contractualists must specify what constitute sufficient reasons not to follow a principle—that is, they must specify when the evil-doing (or non-compliance) of others should ground an exception. In Boat, it seems straightforward that the fact that four people would be badly harmed (short of disaster) if you only contributed your fair share of efforts to help those in need gives you strong reasons to deviate from the original principle. But what about cases in which the consequences of

[25] Hooker argues that we should take into account costs related to internalisation and inculcation when we evaluate rules (2002: 75–80).

following a principle are less catastrophic—say, if the people in the water risk a broken finger? Does the fact that they risk a minor harm constitute 'special justification' to deviate form a principle which prescribes contributing only one's fair share?

The question is to know whether the 'special justification' clause applies every time following a non-rejectable rule can be reasonably objected to in the real world—as seems to be the case in a version of Boat in which the people in the water risk a minor harm. If the answer is no, Rule Contractualism will sometimes entail acting in ways which can be reasonably objected to by people in the real world. If the answer is yes, Rule Contractualism collapses into Act Contractualism. The idea is that, if rule contractualists accept that one should deviate from justifiable principles every time someone can reasonably object to the application of these principles in the real world, then their theory simply prescribes acting in ways that are appropriately justifiable every single time—which is exactly what Act Contractualism prescribes.

4.4 Resisting the Collapse

This would be bad news for rule contractualists. Indeed, Act Contractualism is simpler than their view: one must only consider the reasons that those affected by our actions have to object to them in particular instances. Rule Contractualism, on the other hand, requires that we first consider what would happen if everyone accepted a given principle as a general standard of behaviour, before asking whether anyone can object to the application of this principle in a particular instance, and eventually deciding what to do instead of following this principle if the answer to this question is positive. So, if Act Contractualism and Rule Contractualism are indeed extensionally equivalent, we have good reason to adopt the former rather than the latter, for the sake of simplicity and conciseness.

However, rule contractualists, just like rule consequentialists, want to avoid the collapse of their theory into an act-based version of it. Scanlon, for instance, suggests that we ought to deviate from a justifiable principle only when there are *strong* reasons to do so (Scanlon 1998: 199–201; 298–99). This suggests that, whenever the reasons to object to the application of an appropriately justifiable principle in the real world are less than strong, Scanlonian Contractualism will still prescribe that we follow this principle, even if doing so can be reasonably rejected by someone in the real world.[26]

As an illustration, think again about our modified Boat example. There is a threshold below which the harm faced by the five people in the water is not important enough to constitute 'strong' justification to deviate from a rule that prescribes to contribute only one's fair share of efforts to help others. Since this principle is appropriately justifiable as a general standard of behaviour—that is, since its general acceptance would be appropriately justifiable—and since the 'in the absence of special justification' provision does not apply, Rule Contractualism then entails that you are only obligated to throw one life jacket overboard. Yet, it seems like the five people in the water have strong claims to be rescued, and that they could reasonably object to your failure to save them as long as the harm they face outweighs the inconvenience you would endure because of the capricious locks (and in the absence of other reason-providing

[26] In the same way, Southwood defends an 'ideal-theoretic' formulation of his view and maintains that actual levels of compliance should not constrain the choice of principles made by ideally rational deliberators (2010: 105–7). This means that one should follow the appropriately justifiable principle even when acting on it in the real world does not seem appropriately justifiable.

features). Since Act Contractualism prescribes acting in ways which cannot be reasonably rejected in the real world, it would thus prescribe throwing enough lifejackets to save everyone. Therefore, Act Contractualism and Rule Contractualism are not extensionally equivalent. We should thus consider these views separately.

5. Two Different Accounts of Justifiability

I have shown that Act Contractualism is not conceptually mistaken, and that it is not extensionally equivalent to rule contractualist views such as Scanlonian Contractualism. I now want to suggest that the difference between these two views runs even deeper. Indeed, Act Contractualism and Rule Contractualism do not only differ in the prescriptions they make; they also rely on two different conceptions of justifiability. Since the ideal of justifiability to others is central to the contractualist rationale, these different accounts of justifiability have important implications regarding the support this rationale lends to Act Contractualism and Rule Contractualism. And, as I will argue, Act Contractualism is better supported by the contractualist rationale than Rule Contractualism.

Let me explain. Rule Contractualism places no bar on how strong a reason to object to a principle must be when we determine which principles are appropriately justifiable as general standards of behaviour—that is, when we assess the justifiability of principles under idealised circumstances of general acceptance. For instance, nothing says that a claim not to suffer a minor harm (such as a broken finger) does not provide reasonable grounds for objecting to the general acceptance of a principle, as long as the complaints against alternate principles are even less important. Yet, rule contractualists, when they resist the collapse of their theory into Act Contractualism, place such a limit when they determine when we can permissibly deviate from a justifiable principle in the real world. This means that the same feature of a situation (say, that someone will suffer a minor harm) might constitute a reason to object to a principle being adopted as a general standard of behaviour, but not a reason to object to a particular instance of following this principle. In other words, a given feature might constitute reasonable grounds to object to a principle under idealised circumstances of general acceptance, but not constitute reasonable grounds to object to the application of this principle in the real world. More generally, we can say that the same feature would affect whether the adoption of a given principle as a general standard of behaviour is appropriately justifiable, but not whether an act which conforms to this principle in the real world is appropriately justifiable.

As we have seen, rule contractualists insist that real-world non-compliance and the reasons it provides for accepting or objecting to a certain course of action have a limited influence on the selection of justifiable principles. So, Rule Contractualism sometimes selects principles that prescribe acting in ways which are unjustifiable in the real world—or, at least, in ways which cannot be justified by appealing to the same criteria Rule Contractualism uses to determine the justifiability of principles in an ideal world of general acceptance. Now, one might be tempted to say that this oddity makes Rule Contractualism inconsistent, since it does not prescribe acting in ways that are appropriately justifiable *in the real world*.[27] But this need not be the

[27] This is akin to the Inconsistency Objection levelled against Rule Consequentialism, which can be found in Smart (1973), Card (2007), Wiland (2010) and Rajczi (2016). This objection has been answered by Hooker (2002: 100–2; 2007).

case. For rule contractualists, (real-world) justifiability to others consists in just this: conformity with rules which would be appropriately justifiable under idealised circumstances of general acceptance. They thus suggest a substantive definition of real-world justifiability which entails universalisation.[28]

Two different conceptions of the justifiability of acts become apparent. The first one is what we might call the act contractualist conception: an act is appropriately justifiable if it cannot be reasonably objected to, for instance, or if it would be the object of hypothetical agreement between ideally deliberatively rational contractors. The rule contractualist conception of the justifiability of acts (for clarity, let us call it justifiability*), on the other hand, is more complex. An act is justifiable* if it conforms to principles which would be appropriately justifiable as general standards of behaviour. In turn, the justifiability of principles is assessed in exactly the same way as Act Contractualism assesses the justifiability of acts—that is, it depends on whether the rule (when generally accepted) can be reasonably rejected, or on whether it would be the object of agreement between ideally deliberatively rational contractors, for example. So, for Rule Contractualism, an act is justifiable* in the real world if it conforms to a principle which would be justifiable in an ideal world of general acceptance.

Although this does not make Rule Contractualism inconsistent, there is a sense in which this rule contractualist account of justifiability* is unsatisfying. As Hanoch Sheinman points out, it is not clear exactly what is attractive in a relation of conformity to justifiable rules (Sheinman 2011).[29] Sheiman thus suggests that Rule Contractualism derives its appeal from the contractualist ideal of justifiability to others, but that this appeal is ill-deserved. As I will now argue, this seems right.

Indeed, Contractualists contend that their theory is appealing because we have good reason to want to act in ways that can be justified to others. For instance, Scanlon argues that, by acting in ways which are appropriately justifiable to others, one acknowledges them as rational and reasonable equals to whom justification is due, which in turn promotes valuable relationships of mutual recognition (Scanlon 1998: 158–68). The reasons we have to be contractualists, he tells us, are thus grounded in 'the reasons we have to live with others on terms that they could not reasonably reject' (Scanlon 1998: 154).

However, Rule Contractualism only prescribes acting in ways that are justifiable*—that is, in ways which conform with principles which would be justifiable in an ideal world. Importantly, this is different from acting in ways that are *justifiable* (no star) in the real world. Indeed, I have just shown that Scanlonian Rule Contractualism sometimes requires us to act in ways which others can reasonably object to. Recall the version of Boat in which the five people in the water risk a minor harm which is below the threshold required for the 'special justification' clause to apply. In this

[28] This takes on different forms depending on the contractualist theory at hand. For instance, Scanlon specifies that an act is appropriately justifiable, not if it cannot be reasonably rejected *by anyone*, but if it cannot be reasonably rejected by people *whose aim it is to find principles for the general regulation of behaviour*. He thus restricts his conception of reasonable rejection so that reasons provided by individual instances of acting on a principle cannot constitute reasonable grounds to reject this principle. Since the hypothetical people we want to be justifiable to are moved by the aim of finding rules *for the general regulation of behaviour*, features of a particular situation are irrelevant – hence Scanlon's insistence that reasons for rejection be *generic* (1998: 202–6). For more on this, see Pogge 2001: 122–23. Southwood also builds the idea of general compliance into his theory of justifiability when he says we should assume that general compliance is up to the ideally deliberatively rational contractors who select the principles to be followed (2010: 105–7).

[29] See also Murphy 2021: 252.

example, the five people in the water have reasonable grounds to object to your failure to save them (as long as the harm they risk is worse than the discomfort you would incur by opening the locks). Yet, Rule Contractualism recommends that you do not rescue them, because it grounds real-world justifiability* in ideal-world justifiability. Therefore, the ideal of acknowledging others as reasonable equals to whom justification is due, which is supposed to derive from acting in ways others cannot reasonably object to, does not seem to be fulfilled by Rule Contractualism. Quite the contrary: it is plausible that living with others on terms they cannot reasonably reject entails acting in ways which they cannot reasonably object to *in the real world*. Therefore, the compelling reasons rule contractualists offer in favour of their view actually support Act Contractualism and its conception of justifiability as real-world justifiability. So, the contractualist ideal of treating others as reasonable equals to whom justification is due might be better fulfilled by Act Contractualism.

6. Conclusion

Contractualists, following Scanlon, have long assumed that the debate between act-based and rule-based theorising which takes place among consequentialists does not carry over to contractualism. However, I have shown that raising the possibility of an act-based version of contractualism is not 'misconceived'. There is such a view as Act Contractualism, which is neither conceptually mistaken, nor extensionally equivalent to existing forms of (Rule) Contractualism. Moreover, this view seems better suited to fulfil the contractualist ideal of justifiability to others. We should thus treat Act Contractualism as a serious contender to Rule Contractualism, rather than taking the two-level structure of existing forms of contractualism for granted.

I have only focused on the structure of Act Contractualism to argue that it deserves attention separately from Rule Contractualism. Further work should be conducted to look at Act Contractualism in more detail and explore the various first-order moral views which can be obtained by amending its constitutive elements. This will give us additional grounds to weigh it against Rule Contractualism, and to assess its overall plausibility more generally. Indeed, an important reason why one might favour Rule Contractualism over Act Contractualism stems from the worry that the latter risks being vulnerable to challenges raised against Act Consequentialism, given the structural similarities between these views. It might also turn out that Act Contractualism proves unable to account for cases in which reasons for rejection do seem to depend on what would happen if everyone felt licenced to act a certain way, such as cases involving promising or privacy.[30] To know whether this is the case—which would give us reason to stick with Rule Contractualism—we must determine how Act Contractualism fares with respect to the objections levelled against Act Consequentialism. This, in turn, requires carefully formulating the most plausible version of Act Contractualism.

Lastly, it could be argued that reasoning by universalisable rules is necessary or desirable—for example, if doing so is required for social coordination, demanded by solidarity, or advantageous given our cognitive and motivational limitations.[31] But these potential considerations in favour of Rule Contractualism should be weighed against the overall plausibility of this view, in contrast with that of Act Contractualism.

[30] I thank Tim Scanlon for bringing these cases to my attention. I address this worry in Bourguignon (MS).
[31] For a defence of some of these claims, see for example Hill 2012: 225–48.

My hope is that this these questions will be investigated, and that Act Contractualism will get attention in its own right—be it from friends or foes.

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