
SWEATSHOP REGULATIONS AND EX ANTE CONTRACTUALISM

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A COMMENTARY ON Huseyin S. Kuyumcuoglu (2019), “Sweatshops, Harm, and Interference: A Contractualist Approach,” *J Bus Ethics* (First Online: 19 October),

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ABSTRACT

Kuyumcuoglu argues that defenders of sweatshop regulations should reject consequentialism and accept an *ex ante* interpretation of contractualism instead. In this Commentary I show that Kuyumcuoglu’s argument doesn’t succeed. Defenders of sweatshops shouldn’t become *ex ante* contractualists because its advantages on this issue are more apparent than real.

HOW SHOULD WE morally evaluate proposals to legally regulate sweatshop labor, e.g., by increasing the government-mandated minimum wage? In “Sweatshops, Harm, and Interference: A Contractualist Approach,” Kuyumcuoglu (2019) advances a novel answer to this question.² Drawing on an *ex ante* interpretation of the contractualist moral theory developed by Scanlon (1998), Kuyumcuoglu argues that we can avoid the counterintuitive conclusion that it’s impermissible to increase the minimum wage for sweatshop workers simply because it leads to a loss in employment without having to endorse the consequentialist argument that the reason why it’s permissible to do so is that it maximizes aggregate welfare. In this Commentary I show that

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² Unless otherwise indicated, parenthetical references are to Kuyumcuoglu (2019) in its first-online edition.

Kuyumcuoglu's argument doesn't succeed. Defenders of sweatshop regulations shouldn't become *ex ante* contractualists because its advantages on this issue are more apparent than real.

I.

To motivate Kuyumcuoglu's argument, consider why he rejects the consequentialist case in favor of sweatshop regulations. Although he agrees that it's permissible to increase the minimum wage under certain circumstances, Kuyumcuoglu believes that the consequentialist argument for that conclusion is mistaken. In order to determine whether it's permissible to increase the minimum wage, consequentialists simply add up the benefits and harms to all affected workers. If the benefits to workers who keep their jobs outweigh the harms to those who lose them, then minimum wage increases should be accepted. By contrast, if the harms outweigh the benefits, then they should be rejected.

The problem with this argument, in Kuyumcuoglu's view, is that it overlooks something important, namely, "the complaint of the workers who lose their jobs." For although "others might gain" from an increase in the minimum wage, "this does nothing to compensate those who lose their livelihood as a result" (3). Indeed, the reason why consequentialists overlook this complaint is that they permit "aggregation." They believe it's morally justifiable to impose sacrifices on the few if that produces a greater sum of advantages for the many.

In order to avoid this problem, Kuyumcuoglu believes we should adopt a moral theory that has a non-aggregative structure, i.e., contractualism. For, according to contractualism, the moral rightness of a regulation depends on its justifiability to *each* person. More precisely, we should compare the complaint of each worker who loses a job with the complaint of each worker who gains additional income and accept or reject a regulation based on whose complaint is stronger.

Notice, however, that if sweatshop regulations are evaluated from a contractualist perspective, then it seems that they should be *rejected*. For the complaint of those who lose a job is much stronger than the complaint of those who would have to forgo additional income. Indeed, that's an implication of what Kuyumcuoglu calls *ex post* contractualism and it's precisely why he doesn't accept it. But, as

Kuyumcuoglu points out, that's not the only version of contractualism. For, according to *ex ante* contractualism, when

local government is making progressive laws, they only know that it is likely that some workers might lose their jobs . . . Their act bears some *risk* for the sweatshop workers, and a risk of losing one's job is not equal to a certain lay off (5, emphasis in the original).

Hence the right way to look at this problem is to take up the representative standpoint of an individual risk-bearer, i.e., the perspective of "a worker who takes the risk of losing her job as the result of an interference" (6). And a representative worker would accept the risk if there's a low probability of losing her job, i.e., if the overall number of workers is large and the likelihood of an individual worker becoming unemployed is small.

This is an ingenious argument. If successful, *ex ante* contractualism reconciles two seemingly divergent aims. First, it "tak[es] the number" (6) of affected workers seriously since the likelihood that each sweatshop worker will be harmed or benefitted by a regulation depends on how many of them are impacted. Second, it takes the "complaint" (3) of laid-off workers seriously since a regulation must be justified to *each and every* sweatshop worker. *Ex ante* contractualism thus appears to combine the strengths of consequentialism and *ex post* contractualism while avoiding their weaknesses. I will argue, however, that appearances can be deceiving. There is no middle ground between consequentialism and *ex post* contractualism on this issue.

II.

To see why *ex ante* contractualism fails to take the number of affected workers seriously, consider the following counterexample. Suppose the government wants to increase the minimum wage in both a capital-intensive industry that employs 100 workers and a labor-intensive industry that employs 100,000 workers but, due to political pressure, it can only regulate one of them.³ Suppose, furthermore, that the following outcomes (represented in Table 1) will likely obtain:

³ For simplicity, assume that each worker initially has the same income.

Table 1.

Industry	Number of Workers Benefited	Number of Workers Harmed
Capital-Intensive	99 double their income	1 loses their job
Labor-Intensive	99,000 double their income	1,000 lose their jobs

Which of these regulations would ex ante contractualism recommend? Surprisingly, it would be indifferent between them because representative workers in both industries face the exact same profile of ex ante risks and benefits, i.e., a 99% chance of doubling their income and a 1% chance of losing their job. But it clearly seems preferable to regulate the labor-intensive industry given how many more workers stand to benefit.

Why does ex ante contractualism generate counterintuitive results in cases that involve vastly different numbers of workers? The reason is that, unlike consequentialism, it does not attach *intrinsic* moral significance to the number of workers that are positively or negatively affected by a regulation. To the contrary, the number of affected workers matters only insofar as it impacts the balance of probability. But that overlooks cases where the balance of probability is the same, yet the number of affected workers is different. Notice, furthermore, that Kuyumcuoglu can't block this objection by arguing that neither regulation takes the "complaint" of laid-off workers seriously. For he explicitly grants that governments should permit regulation in situations where "99% of the workers are expected to benefit" (3). But if that's the case, then Kuyumcuoglu faces a dilemma. If he admits that it's preferable to regulate the labor-intensive industry, then he must explain how it's possible to reach that conclusion without aggregating harms and benefits. By contrast, if he denies that it's preferable to regulate the labor-intensive industry, then not only does that seem arbitrary but it's unclear why we should adopt ex ante contractualism to evaluate regulations that potentially impact millions of workers.

III.

To see why ex ante contractualism fails to take the complaint of laid-off workers seriously, recall Kuyumcuoglu's claim that when a government is proposing a minimum wage increase, they only "know that it is likely that some workers might lose their jobs . . . Their act bears

some *risk* for the sweatshop workers, and a risk of losing one's job is not equal to a certain lay off" (5, emphasis in the original). There are, however, two problems with this claim.

First, it's ambiguous. On the one hand, Kuyumcuoglu might be arguing that there's *doubt* as to whether any sweatshop worker will be adversely affected by a minimum wage increase, i.e., there's a chance that *no one* will lose their job. However, not only does the empirical evidence suggest that at least some workers will lose their jobs as a result of the increase, but if no one's adversely affected, then what grounds are there for departing from ex post contractualism? On the other hand, if we can be reasonably certain that at least some workers will lose their jobs, then it's unclear why it matters whether we evaluate the regulation *before* or *after* its implementation. Either way, someone will *predictably* become unemployed and that person will, by hypothesis, have the strongest individual complaint in a pairwise comparison. To be sure, we won't necessarily know *who* will end up losing their job—i.e., whether it will be worker A or worker B. But why is that morally relevant from a contractualist perspective?

Second, even if one grants that there's a difference between a certain harm and the mere risk of its occurrence, it doesn't necessarily follow that it tracks our intuitive sense of who has the strongest individual complaint in a pairwise comparison. To see why, consider a scenario where the magnitude of a harm and its likelihood diverges. Suppose, for example, that anti-sweatshop activists plan to lobby the government for a 50% increase in the industry-specific minimum wage but they only have the resources to engage in one of the following advocacy campaigns: they can either target (1) the textile industry or (2) the garment manufacturing sector. Both employ the same number of workers but their response to the increase is different. Whereas the former will reduce the hours of each worker by 5% the latter will lay off 1% of all existing workers.

Which campaign would ex ante contractualism recommend? The answer is the second one. Since the certain prospect of losing 5% of one's income produces greater expected harm than a 1% chance of getting fired, each worker in the textile industry has a stronger individual complaint in a pairwise comparison.⁴ But that's implausible. Even if a representative worker faces a much higher risk, ex ante, of

⁴ If x = a worker's increase-adjusted income, then $(0.05)x > (0.01)x$.

receiving less income, the inevitable outcome is that a certain number of garment workers will lose their jobs. And that's clearly worse from a contractualist perspective.

Why does ex ante contractualism generate counterintuitive results in cases where the magnitude of a harm and its likelihood diverges? The reason is that, unlike ex post contractualism, it *discounts* the strength of an individual's complaint by the probability of its occurrence. But the fact that there's merely a risk of harm doesn't change the *gravity* of its impact; it simply changes *whether* one worker will be harmed as opposed to another. Indeed, this is a point that Kuyumcuoglu seems to tacitly recognize. For he argues that a further implication of ex ante contractualism is that if the government increases the minimum wage, then they are required to "tur[n] expected victims into expected winners" (7) by providing compensation to laid-off workers. But that's only consistent with a view that judges the wrongness of a regulation according to its *actual*, and not merely *prospective*, impact. After all, someone deserves compensation only if they have been *wronged*. But if it's reasonable for a representative sweatshop worker to accept a minimum wage increase because the risk of losing their job is small, then, by assumption, they don't have the strongest individual complaint in a pairwise comparison. And if they don't have the strongest individual complaint in a pairwise comparison, then, according to ex ante contractualism, they haven't been wronged. Hence the only explanation for why laid-off workers deserve compensation is that the wrong in question was the actual loss of their jobs.

IV.

In conclusion, Kuyumcuoglu faces a choice. If he wants to take the number of affected workers seriously, then he should accept consequentialism. Alternatively, if he wants to take the complaint of laid-off workers seriously, then he should accept ex post contractualism. He should, however, reject ex ante contractualism because, despite his powerful argument to the contrary, it does neither one of those things.

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