

A CONTRACTUALIST DEFENSE OF SWEATSHOP REGULATION

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AN INVITED RESPONSE TO Michael Kates (2021), “Sweatshop Regulations and Ex Ante Contractualism,” *Bus Ethics J Rev* 9(6): 33–39,
<https://doi.org/10.12747/j1i06>

ABSTRACT

Kates argues that *ex ante* contractualism fails to defend interference with sweatshops on moral grounds. In this commentary, I argue that Kates does not apply this approach correctly. *Ex ante* contractualism, indeed, successfully defends interference and thus should still be considered an appealing alternative to other moral approaches for evaluating when and how to interfere in sweatshop conditions to help workers.

BUSINESS ETHICISTS DISCUSS whether interference with sweatshops might sometimes be morally impermissible due to the expected harmful consequences to some of the workers. For example, when a host government enforces minimum wage laws in these industries, the sweatshop decision-makers often end up laying off several workers to offset their profit loss due to the mandated wage increase.

Two sweatshop critics, Coakley and Kates (2013), successfully argue on welfarist grounds that such interference does not necessarily harm sweatshop workers. Nevertheless, there is a drawback to their welfarist defense of sweatshop interference. The welfarist account appeals to the expected *aggregate* welfare increase of sweatshop workers and non-workers in the host country because of interference. However, this account ignores the complaint of the workers who expect to lose their jobs due to the same interference.

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Appealing to *ex ante* contractualism to morally ground any interference with sweatshops overcomes this problem. This *ex ante* interpretation of T. M. Scanlon's contractualist moral theory successfully distinguishes cases when a prospective interference's risks to sweatshop workers are morally acceptable and when they are not. (Cf. Chapter five of Scanlon [1998] for a detailed account of this theory.)

Kates (2021) has challenged the purported success of the *ex ante* contractualist account. He provides two example cases where *ex ante* contractualism seems to fail on moral grounds. Kates holds that *ex ante* contractualism fails on these types of cases because 1) "unlike consequentialism, it does not attach intrinsic moral significance to the number of workers that are positively or negatively affected by a regulation" (Kates 2021: 36) and 2) "unlike *ex post* contractualism, it discounts the strength of an individual's complaint by the probability of its occurrence" (Kates 2021: 38).

In what follows, I argue that although both claims about *ex ante* contractualism are correct, neither supports the argument that this theory fails on moral grounds in the cases that Kates provides.

The first challenge

In the first example case, Kates mentions two industries, one capital-intensive and one labor-intensive. In this example case, due to some political pressure the government can interfere with only one of these industries. In both cases, 1% of workers expect to lose their jobs. However, the labor-intensive industry employs many more workers; thus, the number of workers who expect to double their income due to interference is higher than those in the capital-intensive industry.

Kates rightfully concludes that it would be counterintuitive if a moral theory is indecisive regarding which industry to interfere with. Nevertheless, he is wrong to hold that *ex ante* contractualism would stay inconclusive in the face of such a problem.

Indeed, *ex ante* contractualism does not attach intrinsic moral significance to numbers. Hence, when we compare two individuals' complaints of similar strength as in this case, *ex ante* contractualism might seem indecisive at first sight. Scanlon is aware of this possible problem that could challenge contractualism and suggests a solution.

For the sake of simplicity, assume that in an emergency rescue situation, an agent can save either one person or a group of two

people. If this agent were to save the smaller group composed of one person, then one individual in the second group could complain that the agent did not give positive weight to her life. She could reason that this agent could reasonably act the same way even if she were not present and both groups therefore had only one individual. Given that she is in fact present in the second group, her presence should change the moral calculation because the agent must give positive weight to *her* life. On the other hand, the single person in the smaller group cannot complain similarly if the agent saves the group of two individuals. Their life would not be denied positive weight even if the agent were to save the larger group. Therefore, contractualism concludes that the morally right action is saving the group of two individuals. (Here, I summarize Scanlon's [1998: 223] solution to the mentioned problem.)

We can adapt this reasoning to Kates's first example. If the government chooses to interfere with the capital-intensive industry, then a representative sharing the standpoint of workers in the labor-intensive industry who do not expect to double their income anymore will have a complaint. This representative could reasonably hold that the government could reasonably act the same way even if the two groups had an equal number of workers who stood to double their income after interference. Given that she is present in the second group, the government must give positive weight to *her* presence and interfere with the labor-intensive industry. On the other hand, a representative in the capital-intensive industry who would not stand to double their income were the government to interfere in the labor-intensive industry cannot hold a similar complaint because the decision-makers would have already placed a positive weight on their presence.

Therefore, according to *ex ante* contractualism, interfering in the labor-intensive industry where more workers expect to double their incomes after interference is the morally right policy. Hence, the premise that *ex ante* contractualism would be indecisive in the face of such problems is false.

The second challenge

In the second example, we again have two industries among which the activists can interfere with only one. Activists plan to lobby the government for a 50% raise in industry-specific minimum wage but they

can lobby either for the textile or the garment industry, and not for both. This time, the sweatshop decision-makers in different industries are expected to react to interference in different ways. If the activists choose to interfere in the textile sector, workers expect to have 5% reduced work hours for their new increased wages. On the other hand, if the activists interfere in the garment industry, 1% of workers expect to lose their jobs following a government-mandated wage increase. How should an *ex ante* contractualist decide on which policy to support?

Ex ante contractualism compares the expected benefits and harms for individual standpoints and reasonably rejects the principle that permits a worse benefit-harm output; one that would induce a more significant complaint. In this example, if the government interferes in the textile sector, the expected increase-adjusted income for a random textile worker would be $(0.95)x$, where x is the new – increased – total income after interference. On the other hand, the expected increase-adjusted income for a random garment worker would be $(0.99)x$, a number larger than the expected gain for a textile worker. In such a situation, the complaint of a garment worker would be more significant were the government to interfere in the textile sector. The garment workers reasonably prefer that they receive the increased income. Therefore, it is morally impermissible to interfere with the textile industry.

Kates (2021: 37ff) finds this result implausible:

Even if a representative worker [in the textile sector] faces a much higher risk, *ex ante*, of 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.

The final sentence in this quote is misleading. We should correct it as: that's clearly worse from an *ex post* contractualist perspective.

From an *ex ante* contractualist perspective, a policy is permissible only if the decision-makers can turn all the expected victims of this policy into expected winners *before* they enact the policy. Thus, interference in the garment industry is morally permissible only if the activists take enough precautions and provide enough benefits for the workers who expect to lose their jobs because of interference.

One way to benefit workers who might expect to lose their jobs is to establish a fund that will partially support these expected victims for a reasonable duration. Such a fund ensures that although we are confident that 1% of workers in the garment industry will lose their jobs after interference, each worker still expects to win even before the policy is enacted. To be sure, activists do not have to ascertain a total *ex post* compensation to workers who lose their jobs. They only need to provide a high enough chance to win (99% in this case) and a fund for partial compensation, *ex ante*. These conditions would be enough to make it reasonable for every worker to welcome the interference.

According to Kates (2021: 38), offering compensation to workers before the decision-makers enact the policy means accepting that these workers will be wronged: “After all, someone deserves compensation only if they have been wronged.” However, this claim is true only from an *ex post* perspective. It is true that activists are imposing risk on workers who expect to lose their jobs due to interference. Nevertheless, from an *ex ante* perspective, activists no longer impose an *unfair* risk on the workers by promising compensation to expected victims before enacting the policy. Hence, activists are not offering compensation because their action will wrong some sweatshop workers; they offer this fund so that no one is wronged *ex ante*, i.e., before the policy is enacted.

Therefore, according to *ex ante* contractualism, the morally right policy would be interfering in the garment industry where workers expect to lose more absent the interference, only if the activists can turn the expected victims into expected winners. Hence, the premise holding that *ex ante* contractualism would give implausible results in the face of such problems is false.

Conclusion

Contrary to what Kates elegantly argues, *ex ante* contractualism does not fail to take the number of affected workers seriously, nor does it fail to respond to the complaint of laid-off workers. Thus, activists and decision-makers should still consider *ex ante* contractualism an appealing alternative to other moral approaches for evaluating when and how to interfere in sweatshop conditions to help workers.

Received 21 November 2021 / Posted 24 March 2022

ACKNOWLEDGEMENT

I am grateful to Christopher Morgan-Knapp for reviewing this Response.

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