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Should We Take Up the Slack?: Reflections on Non-ideal Theory in Ethics

Satoshi Fukuma[1]

Abstract

This article asks whether (and how) our moral duties are created by others' non-compliance and whether we should fulfill them or not. For example, do we need to donate more of our income to eradicate world poverty because billionaires do not donate? If so, how much should we donate? In short, should we make up for others' defaulting on their moral duties – and if so, how and to what extent? Such situations are called non-ideal circumstances in political philosophy. With the increasing importance of non-ideal theories of justice and ethics, the question of how we should act in non-ideal situations has received more attention in the ethics literature in recent years. This article poses and addresses the question of whether we should take up the slack when others do not comply with their own moral duty. This article examines how consequentialism and contractualism might respond to non-ideal situations of taking up the slack and then defends a contractualist-constructivist approach to dealing with these situations.

Keywords Non-ideal ethics · Contractualism · Constructivism · Consequentialism · Non-compliance · Slack taking

1 Introduction

Ideal and non-ideal theories of justice have attracted a lot of attention from philosophers in recent years, especially in political philosophy. There are two main controversies regarding ideal and non-ideal theories of justice. The first controversy concerns which theory, ideal or non-ideal, should have priority

✉ Satoshi Fukuma
  fukuma@tcue.ac.jp

1   Faculty of Regional Policy, Takasaki City University of Economics, 1300 Kaminamie, Takasaki, Gunma 370-0801, Japan

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when considering and realizing justice.[1] The second controversy concerns what one should do in non-ideal circumstances – that is, in situations where others do not act morally and there are no institutions to enforce morally right actions.

I think this second issue is extremely important in ethics, because we live in a world in which we need to cooperate morally with others, but in which others do not always act morally and we cannot necessarily force them to do so. This article focuses on whether and how we should think and act when others do not fulfill their moral duty.[2] The article proceeds as follows. In Section 2, I explain the differences between ideal and non-ideal theories in ethics. In Section 3, I review the problem of non-compliance and slack taking. In Section 4, I present the arbitrary view about taking up the slack. In Sections 5 and 6, I critically consider how consequentialism and Scanlonian contractualism might respond to non-ideal situations. In Section 7, I explain my approach *contractualist-constructivism*,[3] which espouses the arbitrary view, in terms of the proviso of positive natural duties and the *pro tanto* duty. In Section 8, I suggest that the shareability of reasons among relevant reasonable persons is the criterion for the appropriateness of moral judgments about taking up the slack and indicate how this criterion is incorporated into the contractualist-constructivist approach.

In our non-ideal world, it cannot be assumed that we all accept the same ethical theory. Then, we need an approach that can vindicate our actions against those who espouse different ethical theories. Though only preliminary, I believe this work will contribute to developing a non-ideal theory of ethics because my approach can indicate practical guidelines for moral judgments and justification in non-ideal situations in which people do not share the same ethical theory.

2 What is a Non-Ideal Theory and How Does it Differ From an Ideal Theory?

We are not living in an ideal world. Our world is full of deceit, unnecessary suffering and premature death, and, in some people's minds, dereliction of moral duty. Although ethics and political philosophy are full of ideal conceptions of justice and right, we need a non-ideal theory of ethics that can help us deal practically with

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[1] There are three parties in this controversy. Sen (2009) and Schmidtz (2011) defend non-ideal theories of justice and insist that we have to rectify real societal injustices rather than seek to construct an ideal theory of justice. Swift (2008) and Simmons (2010) defend ideal theories because they believe that such theories could form an adequate basis for promoting justice and correcting injustice. Ismael (2016) and Enoch (2018) take a neutral position, and they argue that neither ideal theories nor non-ideal ones should have priority because each is a constitutive part of any theory of justice.

[2] Rawls cites helping the needy, giving mutual aid and mutual respect, not harming or injuring other people, and not causing unnecessary suffering as natural moral duties (Rawls, 1999, 98). When I refer to moral duties in this paper, I have in mind these duties.

[3] I use contractualism to indicate my approach's normative ethical component and constructivism to signify its metaethical component.

non-ideal situations that we face every day. Here, I will briefly delineate both ideal and non-ideal theories of ethics.

The term "ideal theory" can be traced back to Rawls (1999). Rawls constructed principles of social justice for ideal circumstances – that is, circumstances in which everyone complies with the duties and obligations imposed by just institutions and in which there are favorable conditions for implementing such institutions. Rawls also described non-ideal theories of justice for practically responding to non-ideal circumstances in the real world, in which individuals may not fully comply with the moral duties imposed on them by institutions and in which there are no conditions for implementing just institutions.[4] In the contexts of climate change, global justice, and compensation theory, several political philosophers have discussed non-ideal theories of justice.[5]

Although in the field of political philosophy, ideal and non-ideal theories of justice are continuously debated,[6] in the field of ethics, they are still far from being discussed sufficiently.[7] Non-compliance with moral duty is a thorny problem in ethics – for example, when multiple agents are involved in mutual and collective activities to avert some anticipated harm, then they share collective moral duties; but how should these agents act when some of them neglect these duties?[8] I confine my discussion in this paper to situations where people do not comply with their moral duties, and consider only the following types of situations:[9]

Case 1: Three boys are drowning in a pond. There are three persons, including you, nearby. If they work together to rescue each boy respectively, they can save all three boys at little cost to themselves (e.g., getting their suits wet). However, you may have difficulty rescuing them all alone and may drown yourself. Should you attempt to rescue all of them alone, if the other two persons do not rescue them? Should you rescue them all, even if you will be harmed? Or, if you have already rescued one boy, do not need you rescue the other two boys?

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[4] He mentions the theory of punishment and compensatory justice, just war and conscientious objection, civil disobedience and militant resistance (Rawls, 1999, Ch. 53). However, considering these issues is outside the scope of this paper.

[5] For climate change, see Heyward and Roser (2016). For global justice, see *Social Theory and Practice*, Vol. 34, No. 3, July 2008 (Special Issue: Social Justice: Ideal Theory, Non-ideal Circumstances) and Sayegh (2019). For compensation theory, see Tessman (2014).

[6] For helpful reviews of this debate, see Stemplowska (2016a); Stemplowska and Swift, (2012); Valentini (2012).

[7] For exceptional discussions of non-ideal theories in ethics, see Murphy (2000), Miller (2013), Ridge (2010), and Rivera-López (2013) in the literature.

[8] In considering the problem of others' non-compliance, I assume that we, as normal moral persons, have natural moral duties to one another. I also presume that we share collective responsibility for the welfare of humanity and for building a better world. In my opinion, these assumptions are not particularly demanding and, in fact, they are accepted by most reasonable people.

[9] In this paper, I only deal with issues of normative ethics. The reason for this is that the main purpose of this paper is to establish a basic normative theory of non-ideal ethics. In another paper I will consider issues of applied ethics (e.g., punishment, drug regulation, eating meat, etc.) based on the basic normative theory that I elaborate in this paper.

Case 2: If everyone living in advanced countries were to donate 5% of their annual income, world poverty could be eradicated. However, as some extremely affluent people do not donate, your and others' donations cannot eliminate world poverty. That notwithstanding, should you donate? If so, how much?

These examples show that others' non-compliance with their expected moral duties in direct or indirect cooperative situations is a defining aspect of non-ideal situations. Therefore, if we had a just system to coordinate our cooperation in these situations, we would deal with non-compliance problems. If there were a mandatory Good Samaritan law requiring people to help those in need, and an international framework of collecting a tax of 5% of the income of people in advanced countries to aid developing countries, the problem of non-compliance might not arise. However, in reality, such an ideal law and system do not exist and are not likely to be enacted sometime soon.

Some ethicists use the concept of ideal agents in ethical deliberation – that is, they insist that we should act in such a way in ethical situations that an ideal agent would, in some way, approve of our actions.[10] For instance, Roderick Firth's ideal agent (observer) is "omniscient, omnipercipient, disinterested, dispassionate, and consistent, but otherwise normal" (Firth, 1952; Tropman, 2013, 2531). Contemplating how an ideal agent might act might help us determine how we should act in actual, non-ideal circumstances in which not all agents comply with what we might consider to be their moral duty (to not injure or deceive others, to help those in need, etc.). However, as Elizabeth Tropman points out, it is not clear whether the theoretical responses of an ideal moral agent will have normative authority or will inspire actual, non-ideal moral agents to act (Tropman, 2013, 2532). This is because a fully idealized agent may be so alien to us that their responses fail to be action-guiding for us. Ideal theories of ethics presume that one should act ideally no matter how others act, and that by fulfilling our moral duties we come closer to realizing an ideal world. However, it is clear from the above cases and reflection that when others do not fulfill their moral duties, an ideal world will not be realized by simply obeying our original moral duty. Should we obey moral duties more than our own as a non-ideal (normal) moral agent, with limited moral sensitivity and rationality?

3 The Problem of Non-Compliance and Slack Taking

Before we determine what kind of ethical theory is the most appropriate for us as non-ideal moral persons in non-ideal situations who share practical responsibility for our community's being morally good, we should examine the problem of non-compliance in detail.

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[10] O'Neill (1989, ch. 11) criticizes the "idealization of person," which is applicable to Rawls' theory of justice. In this paper, the theory that presupposes that neither circumstances nor individuals are ideal is referred to as non-ideal theory.

Now, why does non-compliance with moral duty matter?[11] According to Michael Ridge, others' non-compliance with moral duties can leave conscientious moral agents facing the moral conundrum of what to do when those with whom they jointly hold a moral obligation fail to do their fair share (Ridge, 2010, 195). He suggests that others' non-compliance generates two sets of unfair burdens. First, conscientious moral agents might pick up the slack of non-compliant agents. Second, if these agents do not pick up the slack, then a burden will be imposed on those to whom the collective duty is owed; it is hard to resist the conclusion that this burden is unfairly imposed (Ridge, 2010, 200).

How should we treat these unfair burdens that are imposed on moral agents and the recipients of moral action by the non-compliance of others? David Miller suggests three options to deal with this problem: (1) we can fulfill our initial fair share of duty despite the non-compliance of others; (2) we can do more than we were initially required to do, to make up for the non-compliance of others; and (3) we can do less than we were initially required to do, so that we conform more closely to the noncompliers (Miller, 2013, 210).[12] He broadly endorses the first option because "what justice requires is contributing your fair share, neither more nor less," "the collective responsibility to avert injustice has been fairly distributed, *ex hypothesi*, by doing my fair share, I have discharged my obligation, and the injustice that remains, because of partial compliance, is the responsibility of the noncompliers, and only theirs" (Miller, 2013, 216f).[13]

Miller's view follows Liam Murphy's one. Murphy suggested a "compliance condition" on the principles of beneficence – that is, that "the demands on a complying person should not exceed what they would be under full compliance with the principle" (Murphy, 2000, 6). That is, the burden on a moral agent should be the same both in situations where other agents are not compliant and in situations where they are fully compliant.[14] Thus, according to Miller's and Murphy's views, we should try to rescue the drowning boys as long as the harm we suffer is comparable to that which we would suffer in full compliance in Case 1, and donate only a maximum of 5% of our income in Case 2. Hence, we are only required to save one boy in Case 1 and to donate no more in Case 2.

Zofia Stemplowska offers the following views on this slack taking problem.

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[11] In this paper I consider the issue of slack taking, but if Case 1 is one in which the effect would be nothing without the cooperation of others, that is, a case where people need to make a human chain to rescue one drowning boy, so one cannot rescue him on my own, then the question arises as to whether one should fulfill initial moral duty (trying to rescue the boy) in the non-compliance situations. I will not consider this issue in this paper.

[12] In the first option, the burden caused by non-compliance is borne by the recipients, while in the second option, it is borne by the agents. In the third option, an excessive burden would be placed on the recipients.

[13] Kates (2014, 390) describes Miller's view as the "Never View," whereby "we are *never* required to do more to combat injustice simply because others have failed to do their part." Conversely, under the "Always View," Kates suggests that "we are *always* required to do more to combat injustice even if others have failed to do their part." Kates lists Singer (1972), Kagan (1989), and Unger (1996) as philosophers who champion the latter view.

[14] Murphy (2000) calls his principle the "collective principle of beneficence."

The Conservative View there is a duty to do one's fair share but no more than that. This view does not believe that one can compel those who have not fulfilled their duty of fair share to deliver it, or compel those who have already fulfilled their duty of fair share to deliver more than their duty.

The Responsive View there is an enforceable duty to do one's fair share as well as to take up the slack when others fail to do their fair share. This view believes that one can compel those who have not fulfilled their duty of fair share to deliver it, or compel those who have already fulfilled their duty of fair share to deliver more than their duty (to take up the slack), and that one has a duty to take up another's slack. That is, these duties are all enforceable duties.

While characterizing Miller's views as conservative views, Stemplowska herself defends the responsive view.[15] Her support for the latter view is based on the following reasons: she compares the *reasonable cost* incurred by the slack takers to the dire need of the recipients and argues that it is more important to eliminate the dire need than to bear a more than fair burden Stemplowska (2016b, 597). The key question here, however, is what the *reasonable cost* is, on which she does not elaborate. Indeed, given the assumption that the cost for taking up the slack is reasonable, it would seem justifiable to assume that we have the duty to do more than our fair share to eliminate the dire need. However, this condition by her is a kind of idealization.[16] Certainly, if this condition is valid in the two cases mentioned above, in order to take up the slack, the agent would also rescue the other two boys and donate more than 5% of their income. However, this condition would not necessarily hold true in these cases (especially with respect to Case 1). Whether her view is correct or not, it depends on what a reasonable cost is.

4 The Arbitrary View

Everyone would agree that to demand more than we are capable of is to demand too much. This is called the "ought implies can" principle. Nor is it desirable from a non-ideal perspective to demand too much of us in order to achieve an ideal state. For the best is often the enemy of the good. Forcing excessive demands on us in search of the best or the most desirable state may result in nothing being realized. Now, what cost or demand do we consider to be reasonable? According to Stemplowska, Miller, and Jonathan Cohen (1981), it is supposed that not only doing one's fair share but also taking up the slack is a reasonable cost.[17] However, they disagree

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[15] Additionally, Stemplowska defines the third view. The moderate view: there is an enforceable duty to do one's fair share, but not duty to take up slack. This view believes that one can compel those who have not fulfilled their duty of fair share to deliver it, but not compel those who have already fulfilled their duty of fair share to deliver more than their duty, and that no one has duty to take up other's slack oneself.

[16] This condition may indeed be valid in the case of accommodating refugees that Stemplowska (2016b) envisions.

[17] For Miller (2013, 209), it is "significant but not excessive."

about what it is to be the duty of taking up the slack. For Stemplowska (2016b), it is an enforceable duty (duty of justice); for Miller (2013), it is a humanitarian duty; and for Cohen (1981, 77), it is supererogation. Therefore, if the compliers, who have already fulfilled their fair share, do not take up the slack, they are not complained about by the victims in Cohen's view, but they are complained about by victims in Stemplowska's view, and they are complained about by victims, though not as much as the original noncompliers are, in Miller's view (2013, 224f).

In light of their views, I would like to present the third view on the issue of taking up the slack. It is as follows. First, costs in excess of the requirements of justice are excessively high or demanding. In Miller's steps, fulfilling our initial fair share is the requirement of justice. However, taking up the slack of noncompliers exceeds this requirement. The reason for this is that it is impossible to specify what requirements are reasonable in cost without such a restriction. Second, even if the burden of the initial fair share is reasonable in cost, the burden of picking up the slack will not be. This is because it is appropriate to assume that the cost of taking up the slack is cumulative. For example, in Case 1, the cost of rescuing the first boy is only the cost of wetting clothes, but the cost of rescuing the second boy may not be the same as that for the first. It would probably be more burdensome than rescuing the first boy, and there may be a possibility of drowning in the rescue of the third boy. Additionally, in Case 2, donating 10% of income to take up the slack is twice as costly to the agent in terms of numbers, but more so in terms of livelihood if opportunity costs are considered.[18] Therefore, I think that the duty of taking up the slack is an arbitrary one. This duty is neither enforceable nor supererogatory. So, is this duty humanitarian? It is not. An arbitrary duty means that it is up to the agent to decide whether or not to fulfil it, but if they did not fulfil it, the persons concerned can ask the agent the reason behind their not doing so, and depending on the reason that the agent presents, the agent can be accused by the persons. I call this third view the arbitrary one.

The Arbitrary View there is an enforceable duty to do one's fair share, but taking up the slack is an arbitrary duty. This view believes that one can compel those who have not fulfilled their duty of fair share to deliver it, but not compel those who have already fulfilled their duty of fair share to deliver more than their duty. Additionally, the persons concerned can ask one's reason for not taking up the slack, and depending on the reason that one presents, one can be accused by them.

So which view is preferable as a non-ideal theory? Is it appropriate to assume that taking up the slack is not a reasonable cost? Then, to gain some insight into these issues, I will examine how influential ethical theories might deal with non-ideal situations of taking up the slack. Due to space limitations in this paper, it is not possible

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[18] If an additional 5% of income were to be donated, the loss of satisfaction must be taken into account in addition to the donation, since the satisfaction derived from the goods that could originally have been purchased would not be obtained.

to examine all ethical theories. I will focus on consequentialism and contractualism, which are believed to be able to guide practical decisions.

5 Consequentialist Responses to Non-Ideal Situations

According to Blackburn (2016, 100f), consequentialism is the view that "the value of an action derives entirely from the value of its consequences." This is in contrast to deontological ethics, in which "the value of an action may be intrinsic, belonging to it simply as an act of truth-telling, promise-keeping, etc." (Blackburn, 2016, 76), and virtue ethics, in which "the value of an action may derive from the value of the kind of character whose action it is (courageous, just, temperate. etc.)" (Blackburn, 2016, 76). As consequentialists argue that right actions maximize good consequences, how would they respond in non-ideal situations?

There are two types of consequentialism: act-consequentialism and rule-consequentialism. Act-consequentialism holds that an action is morally right if and only if it maximizes the overall good—that is, if and only if an action's total amount of good for all minus its total amount of bad for all is greater than the net amount of any incompatible act available to the agent on that occasion (Sinnott-Armstrong, 2019). Ideally, we would have "full knowledge and perfect calculating abilities" with which to decide the best course of action as act-consequentialists (Portmore, 2011, 153). This would require us to have a "God's-eye point of view" (Hooker, 2010, 450) so that we could evaluate every possible consequence of every possible action. However, in practice, we act subjectively, with limited knowledge and with imperfect calculating abilities. As a result, we are often uncertain of the consequences of any possible action available to us. We can manage this uncertainty by thinking in terms of the expected outcomes of our actions. Indeed, most act-consequentialists judge the rightness of an act from the agent's subjective point of view.[19]

How would a non-ideal account of act-consequentialism respond to Cases 1 and 2? Some act-consequentialists might assert that if the overall utility of outcomes outweighs the expected cost of taking up the slack,[20] we should rescue more than one boy in Case 1 and donate more than % of our income in Case 2. Perhaps the most famous act-consequentialist account in this regard comes from Peter Singer, who suggested that we should always try to act in such a way as to "[prevent] something bad from happening…without sacrificing anything of comparable moral importance" – that is, "without causing anything else comparably bad to happen, or doing something that is wrong in itself, or failing to promote some moral good, comparable in significance to the bad thing that we can prevent" (1972, 231).

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[19] Portmore (2011, 153) says that "the primary function of an ethical theory is to provide an account of rightness that can be used to guide our practical deliberations and to inform our assessments of blame and praise – that is, to provide an account of subjective rightness," and I agree with him.

[20] I think that non-ideal act-consequentialism views an action as right if the benefits of its consequences exceed its costs, rather than viewing rightness of an action based on the criterion of maximum utility.

For Singer, others' non-compliance with moral duties does not mean that we need not carry out our own moral duties (Singer, 1972, 233). Only when the overall utility of expected outcomes might fall below the expected cost of complying should we not fulfill our moral duties. Therefore, if the overall utility of outcomes may outweigh the expected cost of an act of complying moral duties, act-consequentialism espouses the responsive view: one has a duty to take up another's slack. One can compel those who have not fulfilled their duty of fair share to deliver it, and compel those who have already fulfilled their duty of fair share to take up the slack.

In contrast to act-consequentialism, rule-consequentialism holds that "an act is morally right if it is allowed by the rules whose general acceptance (including the costs of getting them accepted) has the greatest value" (Hooker, 2010, 453). Ideally, this means that everyone fully accepts a given set of moral rules and that those rules have the greatest utility (i.e., result in the greatest good for the greatest number of people). However, in reality the moral rightness of an act is measured against rules that are not agreed upon by all and which do not have the maximum utility. In order to determine what the rule of maximum utility is, it would be necessary for us to have God's eyes. Therefore, in practice, we must act by rules that have the greatest expected value when only the majority of people followed them.

Thus, rule-consequentialists would likely select rules that center on common-sense morality (i.e., not killing others, not lying, attending to others' welfare when we have a special relation to them, etc.) because they would see that the expected value of these rules accepted by a collection of people is quite high. However, when rule-consequentialists choose common morality, there is an assumption that most people will follow such rules. Therefore, will most people accept as a common rule that there is a duty to take up the slack in the case of non-compliance by others? If the rule is expected to maximize the utility, rule-consequentialists require the agent to compensate for the slack of others, and then they espouse the responsive view. In contrast, if the existence of such rules encourages non-compliance by others, then the utility cannot be maximized. In this case, rule-consequentialists would espouse the conservative view.

Now, from the above, how do these theories understand reasonable costs? I think that conventional act-consequentialism demands enormous sacrifices of ourselves as reasonable cost, even under the most ordinary circumstances, and it demands that we make these sacrifices even when they would only slightly increase the overall good. For example, an act-consequentialist might take Singer's side in Case 2 and require that we all donate our incomes until everyone in the world has the same well-being and standard of living. Moreover, if it is more efficient to require the complier to take up the slack than to compel the duty to do one's fair share on the noncomplier, the act-consequentialist requests that this be done. Furthermore, in Case 1, even if my sacrifice of life as a middle-aged person is needed to rescue the young boys, if doing so will produce more utility in terms of the difference in remaining life expectancy, my sacrifice is required as a reasonable cost. Hence, act-consequentialists adopt the responsive view in Cases 1 and 2. However, is it a reasonable cost to take up the slack in this manner?

Act-consequentialism is, at first glance, more demanding than rule-consequentialism, which asks us to obey the rules that the overwhelming majority of people

will accept and thus has a kind of built-in mechanism to stop us from making excessive sacrifices for small moral gains. Without such a mechanism, it is unlikely that people would be willing to follow the rules that rule-consequentialism recommends. Hence, rule-consequentialism might espouse the conservative view. However, as mentioned above, if a rule that assumes non-compliance by others and that requires the agent to bear the slack produces more utility than the utility produced by other rules,[21] then rule-consequentialism may require us to perform the same act as act-consequentialism.

While act-consequentialism espouses the responsive view, rule-consequentialism espouses the responsive view or the conservative view, depending on whether accepting the duty to take up the slack as our common rule can maximize the utility or not.

6 Scanlonian Contractualist Responses to Non-Ideal Situations

So how does contractualism respond to non-ideal situations? In the first place, Murphy's principle (collective principle of beneficence) is argued from his criticism that consequentialism is too demanding. Consequentialism, particularly act-consequentialism, requires us to keep benefiting others until the point where further efforts would burden us as much as they would help others (Murphy, 2000, 6). This "optimizing principle of beneficence" requires agents to always do the best they can for others. For Murphy, it is over-demanding because it requires us to pick up the slack caused by the non-compliance of others to the extent possible (Murphy, 2000, Ch.5). So, can contractualism, unlike consequentialism, fend off the criticism that its demands are excessive?[22]

According to Elizabeth Ashford, contractualist Thomas Scanlon does not address this non-compliance problem. He describes contractualist principles as being "for the general regulation of behavior" and presumably has situations of widespread compliance primarily in mind (Ashford, 2003, 284). Hence, his contractualism is an ideal theory, but it may also be applicable to non-ideal situations. However, in such cases, whether its demands are too strict will be discussed below.

The point of Scanlonian contractualism is that acceptable moral principles must be justifiable to each individual who is burdened by them from that individual's own standpoint. An act is right if and only if it could be justified by moral principles that people could not reasonably reject (Scanlon, 1998, 4, 153). In a non-ideal situation, a slack will be created by non-compliance, and the question arises as to who should bear it. As mentioned above, there are three views in a non-ideal situation, and in

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[21] The rule "Donate 5% of your income to eradicate world poverty. If others do not donate, you should donate more" could produce more utility than the rule "Donate 5% of your income to eradicate world poverty."

[22] Indeed, there may be right ethical theory, albeit its demands are excessive. Even if one might accept the existence of such a theory as an ideal theory, the non-ideal theory needs to present a view that is workable for people, so that not being too demanding is a criterion for a correct non-ideal ethical theory.

each view, the persons bearing the burden and the degree of burden are different. What view is justifiable for the person who will bear the burden of slack?

If we select the conservative view as a principle for non-compliance situations, the burden will fall on the drowning boys and the person in need. If we select the responsive view as a principle, the burden will fall on the compliers. If we select the arbitrary view as a principle, it is up to the compliers to decide who should bear the burden. Hence, the burden may fall on the recipients or the compliers. Then, which principles can they reject (or justify) on the grounds of complaints they would have in such situations?

In Case 1, the complaint that the boys have about the conservative view, will be greater than the one that the complier has about it, because if this view was chosen, the boys' death would be certain. Compared to the boys' complaints in the conservative view, how are the complier's complaints handled when the responsive view is chosen? If the complier is obligated to rescue the second and third boys despite the possibility of their drowning, then their complaint is deemed to be greater than that of the boys. This is because that the complier has fulfilled their fair share of the burden by rescuing the first boy, and it is an excessive demand on the complier to take up the slack despite facing a danger to their life. Demanding sacrifice from those who are not in danger is considered a more excessive demand than demanding sacrifice from those who are already in danger. The conservative view is reasonably rejected by the boys, and the responsive view is reasonably rejected by the complier. Therefore, these views would not be justified as a principle that cannot be reasonably rejected in Scanlonian contractualism. How about the arbitrary view? In this case, the burden may fall on the boys or the complier. This view does not deny the possibility that the complier may voluntarily take up the slack for the boys. Therefore, the complaint of the boys in the arbitrary view is less than that of them in the conservative view, who would be least likely to be rescued and that of the complier in the responsive view, whose life is at risk from a safe condition. Then, the arbitrary view would be justified as a principle that neither the boys nor the complier can reasonably reject.

How about Case 2? Again, the parties' complaints must be compared with each other in each view. In the conservative view, the complaints of the needy are greater than those of others in other views. The complaints of the needy in the conservative view are greater than those of the compliers in the responsive view. This is because, for the latter, it is merely a request for a reduction in assets, whereas for the former, it is a life-threatening matter. Furthermore, the complaints of the needy in the responsive view are less than those of the needy in the arbitrary view. This is because in the latter view, the needy are less likely to be assisted than in the former. Therefore, in Case 2, the responsive view would be justified as a principle that cannot be the most reasonably rejected in Scanlonian contractualism.

Hence, Scanlonian contractualism espouses the arbitrary view in Case 1 and the responsive view in Case 2.

7 Contractualist-Constructivism

In sum, act-consequentialism espouses the responsive view, and rule-consequentialism espouses the responsive view or the conservative view, depending on the consequence of accepting the duty to take up the slack as our common rule. Scanlonian contractualism espouses the arbitrary view in Case 1 and the responsive view in Case 2.

So, if the responsive view is justified in Case 2, to what extent are we required to aid? This is the upper limit problem. Perhaps we should aid those in need until their complaints and ours are balanced. For example, are we required to aid the needy until they are no longer in poverty as we are? I think that this seems to be extremely demanding. It seems to me that act-consequentialism, rule-consequentialism, and Scanlonian contractualism cannot appropriately set an upper limit to our obligations in non-ideal situations. How far do we have to go to be regarded justified in our actions? Additionally, in Case 1, the conservative view is a heavy burden for the boys, and the responsive view is overburdening for the complier. Hence, the arbitrary view, supported by Scanlonian contractualism, seems the most plausible for the boys and the complier.

Based on the discussion so far, existing theories could not determine which view is the most desirable in non-ideal situations. Should the agent adopt a different view depending on the circumstances? This is extremely *ad hoc*. So, what should we do? Let's reconfirm the discussion so far. The conservative view is burdensome for the recipients (the drowning boys and the needy), while the responsive view is overburdening for the complier(s). How about the arbitrary view? This view is less burdensome for the recipients than the conservative view, and less demanding for the complier(s) than the responsive view. This view is permissive with respect to the duty of taking up the slack, but a reason is required for not fulfilling this duty. If this reason is not sufficient, then not fulfilling this duty is considered to be inappropriate.

In what follows, I will explain contractualist-constructivism as a theory compatible with the arbitrary view. If this theory is appropriate in non-ideal situations, then the arbitrary view can also be deemed appropriate. This theory affirms contractualism in normative ethics and constructivism in metaethics. I will explain the characteristics of this theory.

7.1 Taking Up the Slack and Excessive Risk

In this subsection, I will consider what the appropriate upper limit of obligatory action is in non-ideal situations. I think that the answer to this upper limit problem lies in the nature of the duty. Rawls cites helping the needy, giving mutual aid and mutual respect, not harming or injuring other people, and not causing unnecessary suffering as natural duties. He specifies the former three as positive duties (doing something good for another) and the latter two as negative duties (not doing something bad). Positive natural duties are subject to a proviso that "one can do so [fulfill

duties] without excessive risk or loss to oneself" (Rawls, 1999, 98). How should we interpret this proviso?

I believe that the criterion for "excessive risk" depends on the agents and their circumstances. For example, in Case 1, if it is highly likely that one will drown while attempting to save the second and third drowning boys, one should not attempt to rescue them because this attempt would be excessively risky. However, whether this risk is excessive or not is up to the discretion of the moral agents themselves. This means that some people may try to take up the slack at any cost, while others will not attempt to do so if there is even a minor risk of suffering a minor injury. We can see how this might depend on the agents' circumstances: someone living in poverty with many dependents might be less likely to put themselves at risk of missing work due to injury, and a wealthy person living off of passive income might be less perturbed by a small injury. This line of thinking suggests that there is no absolute standard of "excessive risk" and that it is instead relative to each person. In situations of non-compliance by others, these more individualized decision-makings become important. In other words, it is up to the individual to decide how much slack to bear. The answer to the question, "What is the upper limit of required actions and who can set it?" is that it is the agents themselves and they can set the upper limit individually. Rawls's positive duties correspond to Kant's imperfect duties, which have the feature that there is latitude for discretion as to what the action might be. That is, in fulfilling these kinds of duties, an agent is allowed discretion as to whom they help and to what extent (Kant, 1996, 521–522).

This latitude, that is, agent-relativity, as I will discuss below, is central to contractualist-constructivism.[23] However, even if we can determine how much slack to bear by ourselves, whether our decision is reasonable or not depends on the evaluation of others. If one can reasonably explain the reasons for not taking up the slack (to protect oneself and one's family) in helping someone in danger, and if relevant reasonable others can recognize those reasons as acceptable,[24] then one's conduct can be considered morally appropriate under non-ideal circumstances.

7.2 Taking Up the Slack as *Pro Tanto* Duty

From a metaethical point of view, we can characterize the creation of moral duty by non-compliance of others by introducing the concept of *pro tanto* duty. In full compliance situations, one's initial and natural moral duties are all-things-considered duties, – that is, duties that we must fulfill if we have appropriate grounds to support doing so and these grounds outweigh any reasons for not doing so. By contrast, *pro tanto* duties are those we must fulfill if and only if there is an appropriate basis for doing so (Russell, 2015, 290). Hence, these are duties that need not be fulfilled if there is no appropriate basis for fulfilling

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[23] In this paper, I use the term *agent-relativity* to refer to the position that permits agent-relative elements (Portmore, 2013, 163) in making moral judgments. Agent-relative elements include *my* interests, aims, associative ties, etc.

[24] See Section 8.

them. So, which is the duty of taking up the slack? Is it all-things-considered duty or *pro tant* one?

In non-compliance situations, according to the responsive view, the duty of taking up the slack is an enforceable and all-things-considered one; in contrast, according to the conservative view, it is not so. Then, according to the arbitrary view, it is a *pro tanto* one. Which view is correct for this duty?

In non-compliance situations, in which others' no-compliance causes the duty of taking up the slack, this duty can be outweighed or overridden by another duty or set of moral considerations. Why is this so? This is because others' non-compliance is a kind of "disabling condition" (Suikkanen, 2015, Ch. 5), since it induces us to consider whether to fulfill the duty of taking up the slack. Therefore, this duty is a *pro tanto* one. Then, the arbitrary view is correct. For instance, in Case 1, we initially owe one drowning boy the moral duty to rescue him. If we fulfill this duty and other bystanders do so as well, there is no further duty for us. However, if they do not fulfill it, this causes a duty on our part to take the slack. Nevertheless, this other's non-compliance is a disabling condition, which makes rescuing other boys not unconditionally required for us, if we have fulfilled our own initial duty. Similarly, in Case 2, we initially owe the needy the moral duty to donate 5% of our income. If we fulfill this duty and others do so as well, there is no further duty for us. However, if some affluent people do not fulfill this duty, this causes a duty on our part to take up the slack. Nevertheless, this other's non-compliance is a disabling condition, which makes more donating not unconditionally required for us, if we have fulfilled our own initial duty. In these cases, our initial moral duties to rescue one boy and to donate 5% of our income are an all-things-considered duty, but the disabling condition renders taking up the slack a *pro tanto* duty.[25]

Therefore, if the duty of taking up the slack is a *pro tanto* duty, how is it determined whether or not this duty should be fulfilled? For this determination, it is necessary to identify normative properties in this situation. Normative properties, in my view, are constructed or constituted by agents' normative deliberation of non-normative properties (i.e., the base properties or the basis conditions),[26] which can include not only the state of affairs from which the agents make a moral decision but also the agents' own (mental, physical, financial, etc.) state(s). By normative deliberation, I mean agents' ability to discern the basis conditions as a reason for action. They then form their moral judgments from these deliberations and endorse these judgments with

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[25] Since it is a *pro tanto* duty, it does not mean that one does not have to fulfill the duty; it is the duty that must be fulfilled if there is no proper reason not to fulfill it.

[26] This is moral supervenience, which is the relation between normative properties and non-normative (i.e., natural or descriptive) properties: normative properties supervene upon non-normative properties just in case no two things can differ with respect to normative properties without also differing with respect to non-normative properties. Therefore, if the non-normative property changes from its previous state, the normative property will also change accordingly. In explaining moral supervenience in constructivism, I refer to LeBar (2013, ch. 8). He uses the term *subvening conditions*, rather than base properties or conditions.

the fact that such reasons will be shared with relevant and reasonable others.[27] In short, by moral supervenience in my concept of contractualist-constructivism, I ensure that normative properties supervene on and are constituted by the agent's normative deliberation of the two non-normative properties in a given situation (the state of affairs and the agent's own states). This important feature of constructivism defines normative properties as response-dependent. In constructivism, our moral duty to do an action is not determined by the situations that we face. Our moral duty is the thing for performing what we have a reason; that is, we have moral duties for what we would be motivated to do after a certain deliberation about the state of affairs and our own states.[28]

In Case 1, for example, the basis conditions are that the boys are drowning and that other bystanders are not trying to rescue them. The agent's situation (others not rescuing boys) and their state (say, being aware of having many dependents) might reconfigure their normative deliberation of these basis conditions. From their normative deliberation of the basis conditions, they decide that it is not inappropriate[29] for them and others whose state is the same as theirs not to fulfill the *pro tanto* duty of taking up the slack.[30] In a similar way, in Case 2, the basis conditions are that there are people who are impoverished and that some extremely affluent people do not donate. The agents' situation (some affluent people are not donating) and their state (say, being aware of having many dependents and not being so wealthy) might reconfigure their normative deliberation of these basis conditions. Then, from their normative deliberation of the basis conditions, they decide that it is not inappropriate for them and others whose state is the same as theirs not to fulfill the *pro tanto* duty of donating more than 5% of their income.[31]

The constructivist component of contractualist-constructivism can explain the formation of an agent's moral judgment in a non-ideal situation. Now, what justifies their moral judgment about taking up the slack or not? In other words, what are the criteria for justifying moral judgments in non-ideal situations? What judgments would be deemed appropriate for agents in these situations? I suggest that we can answer these problems with reference to what I call the "shareability of reasons among relevant reasonable persons." This is the contractualist component of contractualist-constructivism. Our moral judgment does not end with an action, and its evaluation is determined in dialogue with the persons concerned after the action.

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[27] As explained below, this fact constitutes the *contractualist* component of contractualist- constructivism.

[28] Van Roojen explains constructivism about moral obligation (2015, 286): "We have a moral obligation to do an action iff correct deliberation from our existing motivational set and based on true facts would wind up motivating us to do that action."

[29] It is more suitable in my position to say that "it is not inappropriate" than that "it is not wrong." The reasons for this are discussed in Section 8.

[30] The situation is the same, but if the agent is single, physically fit, and has enough spare energy to rescue other boys, from their normative deliberation of the basis conditions, they will decide that it is inappropriate for them and others whose state are the same as theirs not to fulfill this *pro tanto* duty.

[31] The situation is the same, but if the agents have sufficient financial resources to donate more than 5% of their income, from their normative deliberation of the basis conditions, they will decide that it is inappropriate for them and others whose state are the same as theirs not to fulfill this *pro tanto* duty.

8 The Shareability of Reasons Among Relevant Reasonable Persons

When we make moral judgment, in general, we take other people's needs and potential views of our actions into account. We usually use these needs and views to justify our actions. In contractualist-constructivism, I suggest that we justify our moral judgments about taking up the slack via consideration of whether the reasons behind our moral judgments *will* be shared among *relevant* reasonable persons. I think that these concepts and phrasings of "will" and "relevant" are crucial to non-ideal ethics, because saying that these reasons "can" or "could" be accepted by "all" people is a form of idealization (Bohman & Richardson, 2009). I suggest that the justifiability or appropriateness of moral judgments in non-ideal situations need not be confirmed by *all* reasonable persons. Only the *relevant* reasonable persons – those affected directly by the agent's action[32] – determine this confirmation.

Contractualist-constructivism is therefore a type of act-contractualism (Sheinman, 2011). Contemporary contractualism[33] is derived from Scanlon's principle-contractualism, in which an act is right if and only if it could be justified by moral principles that people could not reasonably reject (Scanlon, 1998, 4, 153). It first justifies a set of principles as being reasonably unable to be rejected by people, and then justifies actions, second, by their conformity to those principles. In contrast, act-contractualism, which is my approach, first justifies actions based on whether they are reasonably unrejectable, and then justifies principles by prohibiting rejectable actions (Sheinman, 2011, 311f). Scanlonian contractualism considers principles first and actions later; it represents a two-step and idealized justification of actions. In contrast, my contractualist-constructivist approach is a one-step, actual justification of actions.

Furthermore, my approach designates the shareability of reasons among relevant reasonable persons[34] as a criterion for assessing moral judgments and thus does not rely on the existence of independent moral truths.[35] By designating shareability of reasons as its criterion of right and wrong, my approach focuses on permissible

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[32] There is always difficulty in establishing who *the relevant reasonable* persons are. I think that *reasonable* implies understanding the other person's situation and not making excessive demands. Then, *relevant* means that a person's requirement for the reasons for the agent's action is valid. For example, the relevant reasonable persons are the second and third boys (if miraculously saved on their own) and their families in Case 1, and the neediest in the world in Case 2.

[33] For an explanation of contemporary contractualism, see (Suikkanen, 2020).

[34] This shareability of reasons means that we can accept other's reasons for action as understandable and permissible in the situation in question. As this premise, it is supposed that we are reasonable beings capable of making judgements and acting on the basis of reason. We are concerned with ourselves and others "as beings acting on reasons and capable of self-reflection but also entitled to demand reasons from others" (Bagnoli, 2022, 7) and required to support our judgements on reasonable grounds. This premise is based on the concept of moral agency that is a component of constructivism, but also our ordinary self-knowledge. So, it is not idealized.

[35] Constructivists are generally agnostic about the existence of independent moral truths, which leads to "an intersubjective conception of practical reason: if nobody has the ultimate legitimate claim to be right (not even in asserting that there are no truths), then reasoned action must be action that 'is informed by principles all in the relevant domain can follow'" (Ronzoni, 2010, 79). My approach espouses just such an intersubjective conception of practical reason by reinterpreting intersubjectivity as the shareability of reasons among relevant reasonable persons. Therefore, my approach is neither an objectivist version of constructivism (cf. Meyers, 2012) nor a subjectivist one.

and practical right actions instead of abstractly reasoned justifications for actions. Although shareability seems to be a weaker criterion than Scanlonian unrejectability, it is actually stronger given the flexibility required for non-ideal situations, where contextual appropriateness is crucial.[36] My notion of shareability can be thus an adequate criterion for moral judgments in such situations.[37] In short, when forming moral judgments about taking up the slack, we should consider their suitability and accountability. The former is tied to our response to the basis conditions, whereas the latter is tied to the public intelligibility of our judgment among relevant reasonable persons. Suitability is specified by supervenience (i.e., the same moral judgment must be made under the same basis conditions), and accountability depends on the public intelligibility of our reasons for moral action.[38] In the arbitrary view, by considering their suitability and accountability, our moral judgments of taking up slack are optional but not whimsical.

I think that each moral agent's moral judgments about taking up the slack differ from one another's because each moral agent's state(s) is/are different. I delineate the structure of moral judgment based on the arbitrary view as follows:

(1) The agents normatively deliberate basis conditions (the non-compliance of other and their own states).
(2) After assessing the conditions, they consider whether it is appropriate or not for them to take up the slack as a *pro tanto* duty.
(3) They make a moral judgment about taking up the slack based on whether the reasons behind their decision are suitable to basis conditions and are likely to be shared among relevant reasonable persons.
(4) They act according to this judgment.

In the arbitrary view, people's actions in the cases outlined in Section 2 would differ depending on their individual situations and states. I argue that recognizing this agent-relativity is a positive feature of my approach, because this difference in actions, situations, and states is an inherent characteristic of non-ideal situations.

The following objections might be raised: The arbitrary view is too permissive with respect to the duty of taking up the slack and the shareability of the reason is too weak criterion for moral judgement about it. In response to the first objection, it is true that arbitrary view is more permissive than Stemplowska's responsive view, but it is stricter than Miller's conservative view. Even a non-ideal theory, as long as it is an ethical theory, must strive for desirability, but the last-minute reasonable

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[36] Appropriateness is a value that depends on the agents and the situations where they are placed. This concept has no absolute (context-independence) implication such as rightness, but is relative to the agents and their situations, making it suitable for a non-ideal theory. We can say like this, "Your action was not necessarily right, but it was appropriate in such a case."

[37] In Case 1, when you explain why you could not rescue the second and third boys to their bereaved family, they might say: "We can share your reason for not rescuing him, but resolutely reject it." In this case, they do not affirm that your action was right, but they tolerate your action as not inappropriate for your situation.

[38] On the relationship between moral judgment, supervenience, and publicity, see LeBar (2013, Ch. 8).

balance between the ideal and realistic views is the arbitrary view. In response to the second objection, I believe that our moral judgment is vindicated only when it is eventually acceptable for persons concerned as reasonable, and that nothing but this criterion exists in non-ideal situations. This criterion makes only minimal assumptions about people and is therefore suitable and acceptable for those, like us, who espouse different ethical theories. Thus, it is pertinent to the criterion of moral judgment for non-ideal ethical theory.

The discussion so far seems to have clarified what kinds of decisions by agents should be acceptable in non-ideal situations. The shareability of the reasons behind one's actions among relevant reasonable persons is the only criterion for the appropriateness of moral judgments about taking up the slack.[39] If the moral judgment does not reflect the agent's state and circumstances, then it is improper. It will be appraised as inappropriate by relevant reasonable persons. The following objection may also be raised: my approach is trivial because it only describes our everyday moral action and deliberation. In response to this objection, I insist that my approach makes it possible to explain why the moral duty of taking up the slack changes depending on the agent and the situation they face, and what moral justification appropriate to non-ideal circumstances is. My approach may be trivial, but it is a correct non-ideal ethical theory.

9 Conclusions

In non-ideal situations, the range of people's reactions is diverse, but not all are deemed appropriate. My contractualist-constructivist approach to non-ideal ethics espouses the arbitrary view and suggests that we must be able to justify our moral judgments to the relevant reasonable persons and, *post hoc*, confirm whether our moral judgments are actually shareable with them or not. This means that the reasons grounding our moral actions are initially subjective and then become inter-subjective (and therefore reasonable and normative) once they are understood and endorsed by relevant reasonable persons. We live in a non-ideal world whose feature is the pluralism of people's moral views, and it cannot be assumed that all people can accept the same ethical theory. Then, we need an approach that can vindicate our moral actions against those who espouse any ethical theory. I think that my contractualist-constructivist approach could be a candidate for such an approach. This research is only preliminary suggestions for how non-ideal moral agents should act in non-ideal situations. I intend to further develop this work in future research.

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[39] Then, I add; (5) They explain the reason of their moral judgment to the relevant reasonable persons. The process of the agents communicating reasons to such persons will be discussed in my next article.

Declarations

Conflicts of Interest/Competing Interests The author declares that hehas no conflict of interest.

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