1. **Introduction**

Within public policy we often demonstrate a bias towards identified victims and one need only look at the proportion of our finite resources we direct towards medical treatments, as opposed to preventative methods, to note this. Undoubtedly, preventative methods, such as vaccination schemes, will save more people from disease than treatment will, yet nevertheless we still commit large amounts of our resources towards the treatment of these diseases. The upshot of this sort of consideration is that we tend to place more value on identified lives, for example those we know have the disease, than unidentified or statistical lives, the percentage of the population who would potentially contract the disease. Whilst the literature surrounding this issue usually attempts to demonstrate the impermissibility of this bias, and indeed posits the thesis that the claims of both statistical and identified persons ought to be weighted equally\(^1\), this paper will argue for the conditional claim that given a complaint model of morality, we have a greater obligation towards identified victims than truly undeterminable victims\(^2\).

Section 2 outlines the Complaint Model before showing, in section 3, that attempts to prove we have an equal obligation to both identified and statistical persons requires an *ex post* analysis of complaints. Section 4 shows that once we allow *ex post* analyses in the Complaint Model then we are either forced to accept the permissibility of inappropriately risk-sensitive policy choices or the permissibility of the aggregation of unequal harms which lead to policy choices that are not acceptable in the model. In section 5 two potential ways of resolving the dilemma are shown to fail, viz. the discounting method

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\(^1\) Henceforth referred to as the *Equal Obligation Thesis* or EOT.
proposed by Otsuka (2015) and restricting the discussion to probabilistic cases. Section 6 argues that given the rejection of the Equal Obligation Thesis, we ought to favour identified persons over statistical persons.

2. The Complaint Model

In brief, according to Scanlon's Contractualism morality requires us to value individuals as rational agents which we can do by justifying our moral principles to them. A principle which is justifiable to all in the sense that no one could reasonably reject it, is a principle which takes our status as rational agents seriously. Consequently actions are impermissible when, and just when, they are disallowed by some principle to which no one could reasonably object (Scanlon, 1982 and 1998).

The ‘reasonableness’ of a rejection is relative not only to how a principle impacts the individual but also how it impacts others. For instance, whilst it may be reasonable to reject a principle which asks for you to suffer a great deal of pain to spare another person a minor headache, it would not be reasonable for you to reject a principle which asked you to suffer this pain to spare another’s life. In the first case your complaint is graver than the other person’s complaint because of the amount of pain either one of you would incur.

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2 The term, 'unidentifiable victims', refers to victims who are objectively undeterminable as opposed to epistemically undeterminable. Otsuka (2015) illustrates the distinction with two scenarios: (1) There is large roulette wheel above California which selects one of the roughly 40 million Californians to die. In this case each Californian has an objective risk of 1 in 40 million of being killed; moreover, no one can know who will be killed until the roulette wheel is spun. (2) A deadly gas will be released over California which will certainly kill one person. As it turns out, the gas can only kill a person with a particular genetic mutation. There is only one of these people in California so that’s the only person who will die so they have an objective 100% risk of death and no other Californian has any objective risk of death. The person who will die is objectively determinable though we cannot identify them for epistic reasons.
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whilst in the second case your complaint is dwarfed by the other person's complaint of death. Consequently, justifiable principles tend to be those which minimise the complaint of the individual whose complaint has greatest weight. The Complaint Model, as a reading of Scanlon's Contractualism, holds that one can justify a principle if it minimises the complaint of the person with the greatest complaint.

Another characteristic of the Complaint Model is the Individualist Restriction it places upon aggregation; it does not aggregate the complaints of groups, instead the complaints of individuals are ordered by pairwise comparison.

3. The \textit{ex ante-ex post} Distinction

Take Daniels' (2015: 118) example:

We, as a morally motivated bystander, are in possession of five doses of a specific medicine and we are asked to choose between two options: firstly, giving an identified individual five doses of medicine to cure their illness which otherwise would kill them, and secondly, providing a single dose to five individuals as a vaccine when we are certain that otherwise one undeterminable individual will contract the disease and die.

There are two readings of this example. According to the \textit{ex ante} reading, if the individual requiring the five doses were not given these doses, they would have the legitimate complaint of death; each of the five individuals only requiring one dose each has an independent complaint of having their risk of death increased by one-fifth if they are denied the medicine.

The second reading, the \textit{ex post} reading, appeals to a different intuition and it is this intuition which many of the proponents of the Equal Obligation Thesis appeal to, for example Otsuka (2015). According to the \textit{ex post} reading if we know that either one person or another will die, the fact we can identify one
of them and not the other ought not to make a difference. For regardless of whether they were 'statistical' or 'identified' persons, in the end a very real life will be lost. Accordingly, the *ex post* analysis encourages us to weigh the complaints involved in the dilemma by considering that if the individual requiring these five doses were not given these doses, they would have the legitimate complaint of death; if the five individuals only requiring one dose each were not given those single doses, then the one of them who would die as a result has a legitimate complaint of death.

It is clear that if defenders of the EOT adopted *ex ante* evaluation, it would be very difficult to get their arguments off the ground. For the individual who was declined treatment has the complaint of death whilst each individual who was denied a vaccination could only claim a one-fifth risk of death. Rather, the defenders of the thesis must adopt *ex post* evaluation of harm so the untreated individual and the person who would die if the vaccination policy was not chosen both have a complaint of death.

4. **The Dilemma**

Once we have established that a Complaint Model justification of the EOT requires an *ex post* reading, we need to ask whether it is actually compatible with the Complaint Model. This paper argues that it is not because it generates a dilemma. The first horn of the dilemma is that *ex post* analysis requires us to make incredibly risk-sensitive decisions (Verweij, 2015: 142.)

Take the following *Night Driving Case*:

Along a particular stretch of road a disproportionate amount of road accidents, which result in pedestrians being killed, occur at night. In the course of 20 years we are certain that one unidentified pedestrian will die at night, whilst each driver who uses that road at night during the twenty years will gain a benefit in the form of convenience.
If we adopt *ex post* evaluation then rather than discounting the harm to each individual by $1/n$ (where $n =$ the number of pedestrians), we are forced to give full value to the complaint of the individual who would die. As their complaint of death is greater than the complaint of the inconvenience of not being able to drive along this road at night, we are obliged to stop people from doing so. Yet to many this would seem disproportionate and overly sensitive. Indeed, such sensitivity would oblige us to prohibit many commonplace activities such as those exposing one to allergens in public given the small probability that someone might have a severe reaction or transportation by trains which might run over individuals at crossings.

To avoid these consequences, one would be forced to allow interpersonal aggregation so that the total amount of inconvenience for drivers outweighs the complaint of the individual who would lose their life within the 20-year period. Note that this conflicts with the *Individualist Restriction* of the definition of the Complaint Model. The tension between the Complaint Model and this horn of the dilemma is immediately evident. Yet the requirement to breach the Individualist Restriction as a means of reconciling the *ex post* reading with the Complaint Model is not as damning as the Individualist Restriction is regarded as suspect within the literature. Certainly, some recommend abandoning the restriction; they believe it clear that given the option of saving a group of five or an individual from death we should save the greatest number.

However, the Complaint Model requires still further revisions to overcome the problems of risk sensitivity. We are not only obliged to aggregate the complaints of groups but we would also be obliged to aggregate qualitatively unequal interpersonal harms. In familiar breaches of the Individualist Restriction we find ourselves weighing up equal complaints but here instead we must aggregate minor complaints against a major complaint. But allowing complaints
to aggregate in this way forces us to accept seemingly impermissible choices for example Scanlon’s famous *World Cup Case* (1998: 235), or the following *Late Train Case*:

As a large train is hurtling down a track the driver notices an unconscious man lying on the track in the distance. If the train driver does not stop the train now, the train will run over this man and certainly kill him. However, if the train driver stops the train now it will cause the train, and its passengers, to be very late. Ought the train driver stop the train?

On the one hand we have the man’s complaint of death and on the other hand we have the aggregate complaints of all the passengers about being late with all the harms that being late entails. Intuitively it seems impermissible for the train driver to run over the man. In fact no matter how fantastically big the train gets and how many passengers it holds, it seems clear that we are committed to the principle that it is impermissible for the train driver to let the man die. Yet, if we allow the aggregation of unequal complaints at some point the aggregate complaint of the passengers will be larger than the man’s and we ought to find ourselves inclined to let him die.

Consequently, if we allow proponents of the *EOT* to use an *ex post* reading, we are forced to accept a certain oversensitivity to risk which contradicts our intuitions. Otherwise, we are forced to accept the aggregation of interpersonal harms which are unequal, leading to impermissible conclusions. However, if we do not allow an *ex post* analysis then it’s difficult to see how one would be able to build a complaint-based justification for the *EOT*. For the sake of clarity, a reconstruction of the argument offered is provided:

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3 There is much discussion on the relationship between the model of contractualism under discussion and aggregation, see Parfit (2003), Reibetanz (1998) and Fried (2012) for further detail.
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P1. Attempts to build a complaint-based argument for the EOT requires *ex post* analysis of the complaints of individuals.

P2. *Ex post* analysis leads to a dilemma, either
- Impermissible oversensitivity, or
- Impermissible aggregation of harms.

C. Therefore, we ought to reject attempts to build a complaint-based argument for the EOT.

5. Defending the Dilemma

One might question the sensitivity horn on two fronts: first, one might doubt these situations actually require such sensitivity, and secondly one might doubt our intuitions concerning these situations are correct. Otsuka (2015) employs the first of these methods; he argues that if we discount by the probability that some unidentified individual will be harmed, then the complaint is outweighed by the complaints of others. So for example, we can still use trains if the probability of someone accidentally being killed by them is sufficiently low that the complaint of death can be discounted to the point that it is outweighed by one of the passenger’s counter-complaints. This method, however, is not without its difficulties in that it assumes that the potential outcomes are probabilistic, that is, that the probabilities of the outcomes are not certain. If they weren’t probabilistic but certain, then there would be no factor to discount by so discounting cannot account for the bizarre conclusions the *ex post* reading leads to. For example, in the *Night Driving Case* there is certainty that someone will die so the non-discounted complaint of death ought to make us risk-sensitive. Hence Otsuka’s account cannot explain why cases such as these are permissible given that the complaint remains non-trivial.

In response to this, one might object that it actually is impermissible to risk death in the *Night Driving Case* and that our intuitions might be confused by ‘real life’ equivalents where we are not dealing with certainties but probabilities. The *Probabilistic Night Driving Case* is the same at the *Night
Driving Case except that each year there is a one-twentieth risk of a pedestrian dying on the road at night. Potentially we find these cases permissible because we have more reason to believe there won't be a death than in 'certainty' cases. Maybe our familiarity with this sort of probabilistic case is affecting our intuitions concerning certainty cases which are in fact impermissible.

Nevertheless, even if we accept the psychological claims of the objection, there is still a good reason not to accept this. In probabilistic cases we also have a better reason to think more than one could die just as we have better reason to think fewer than one could die. In certainty cases exactly one will die but in probabilistic cases the outcomes are independent probabilities. It is statistically possible for multiple people to die, or for no people to die. Given this, it is difficult to establish why certainty cases ought to be impermissible whilst these ought to be permissible.

Nonetheless, once the distinction between probabilistic and certainty cases within this general class of cases has been drawn, it would be appropriate to test whether this affects our analysis. Thus far we have employed certainty cases alone, so we need only check the consequences for probabilistic cases. With respect to premise P1, do probabilistic cases require ex post analysis to make an argument for the EOT? Yes, in fact it seems less likely that it can employ ex ante evaluation given that we are no longer certain of any harm but we could still build an ex post case, although admittedly a weaker one, on the basis of the expected harm. The truth of P2.a is given by the aforementioned Probabilistic Night Driving Case. Finally we can check P2.b by amending the Late Train Case so that the each passenger has a certain probability of being

4 Take Daniels' case: if the undeterminable class of individuals is probabilistic, with each individual exposed to an increase of one-fifth risk of death if the vaccination was not given, we'd expect that one of the five would die given the odds.
harmed by the lateness of the train. If the number of passengers is sufficiently large then the probability of harmful outcomes is high so, granting the aggregation of unequal harms, it would be permissible to allow the patient to die. Therefore, this argument applies regardless of the distinction between certainty and probabilities within the class of undetermined cases.

6. **Defending the Bias**

We can conclude that a Complaint Model justification of the EOT imposes *ex post* evaluation and for this reason it requires us to choose between two unacceptable consequences, either over-sensitivity to risk or the aggregation of unequal harms, regardless of whether we consider outcomes for the affected individuals as certain or probabilistic. This suggests that we ought to reject *ex post* evaluation within the Complaint Model and we ought to reject the *Equal Obligation Thesis*.

Once we have rejected the EOT we are left with two alternatives: either we have a greater moral obligation towards identified victims or we have a greater moral obligation towards unidentified victims. But the former seems true. It seems we require objectionable *ex post* analysis to justify the EOT but it also seems, for the same reasons, that any bias towards unidentified victims would also depend on objectionable *ex post* analysis.

Further, for still other reasons, the Complaint Model seems to provide grounds for giving the more legitimate complaint to identified victims, specifically on the grounds that the identified victim is necessarily exposed to a higher level of risk than unidentified victims because there are more unidentified victims. Therefore, each statistical person has their chance of incurring the harm discounted by the number of candidates competing for the harm. Whether it's probabilistic or certainty cases, all the harm of one scheme is concentrated on the identified individual whilst the risk of harm of the second scheme is
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distributed (evenly) amongst multiple individuals. Therefore, the withholding of treatment justifies a larger complaint from the individual because they have been exposed to more risk.

One might be tempted to object that risk in itself is not grounds for complaint and only becomes relevant \textit{ex post}. However this certainly doesn’t seem to fit our conception of risk; as Otsuka notes, we seem to view exposure to risk as a legitimate complaint for forcing Russian Roulette on you regardless whether you live or die (2015: 83). Similarly, we can have a legitimate complaint against the reckless driver of the car we’re in even if it doesn’t eventuate in bodily harm for us. These intuitions show exposure to risk is a legitimate complaint. Consequently, \textit{ceteris paribus}, the identified victim has a larger complaint than the multiple potential victims. We should forgo vaccinating Daniels’ five in favour of treating the one.

7. Conclusion

In light of this discussion, one may conclude that the Complaint Model provides a sound argument for the claim that we have a greater obligation to save identified versus unidentified victims. We noted first that given this model we must reject the \textit{EOT} because it relies on \textit{ex post} evaluation of harm which forces us to accept one of two seemingly unacceptable consequences. Given the rejection of this thesis, the idea we have a greater obligation to identified victims than to unidentified victims is both strongly implied by our current intuitions and by considerations of the concentration of risk in relevant cases.

This conclusion has both policy implications and broader philosophical implications. First, it provides justification for policies which favour identifiable

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victims and consequently it may motivate certain policies ranging from end-of-life treatments to natural disaster responses. However, please note that the point is not to try to determine the extent to which the bias is justified; the answer to that question ought to be sought in the development of research on this problem. Nonetheless as this paper arrives at this policy conclusion through a critique of the use of *ex post* analyses within the Complaint Model, it can be seen as an extended criticism of philosophical arguments that employ these methods.

**Bibliography**


Scanlon, Thomas M. 1998, *What We Owe to Each Other*, Harvard University Press.