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978-0-521-10242-1 - Moral Legislation: A Legal-Political Model for Indirect Consequentialist Reasoning

Conrad D. Johnson

Excerpt

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Introduction

This essay is an attempt to buttress the case for a consequentialist moral theory. In doing so, it addresses an important and recurrent difficulty confronting consequentialism: the problem of providing a rationale for the moral prohibitions that, in our commonsense thinking, we take seriously. The kinds of prohibitions I have in mind include those – like the prohibitions on lying, stealing, and killing – that sometimes constrain one to do or avoid certain actions even when compliance with the prohibition would produce less overall good than some other action available to the agent. Consequentialism in its broadest conception I take to be the view that the ultimate, foundational criterion of the rightness of actions refers to consequences. From that broad conception, we can follow some of the more familiar divisions among types of consequentialism. Act consequentialism proposes that an act is right if and only if it would have the overall best, or equally best, consequences of any alternative open to the agent. It is thus a direct form of consequentialism because the overall consequences of each action are directly relevant to its rightness or wrongness.

The fundamental appeal of consequentialism as a moral theory no doubt owes to its use of a widely shared and plausible idea: that if the rightness of actions is to be explained at all, it must be in terms of good consequences that are brought into being by those actions. We often have conflicting intuitions about what is right, and we sometimes recognize that our ideas about the right thing to do need correction or adaptation. It seems that the most plausible common currency by which we can resolve conflicting intuitions and correct our moral opinions is that of the goodness of consequences – that the concept of right should rest squarely on the concept of the good.

Important as these advantages of consequentialism may be, it nevertheless confronts some well-known difficulties. Applied thoroughly and consistently, it has often been said, consequentialism

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would in a number of areas come into radical conflict with our commonsense moral views. For consequentialism seems ineluctably to bring a maximizing doctrine with it; that is, if overall good results is the ultimate determinant of the right, then it can never be wrong to do that which maximizes overall good. Indeed, some have maintained that this maximizing doctrine has such intuitive appeal that it constitutes the main reason why utilitarian moral theory continues to exercise such a hold on the philosophical imagination, in spite of the abundant criticisms that have been made of it.¹ Yet this maximizing feature of utilitarianism is most troublesome in many contexts precisely because it conflicts with what we take to be some of our most compelling moral reasons. For the idea that maximization is always permissible (or perhaps required) means that we may or must do what brings about the best consequences even if doing so would involve lying, cheating, killing the innocent, or anything else that goes against some of our most deeply held common-sense convictions.

These implications, I take it, constitute difficulties for consequentialism. But in calling them such, I do not presuppose that common-sense convictions *must as such* be accommodated within any adequate moral theory.² Nor am I suggesting that the guiding idea behind the development of an adequate moral theory is to reach a kind of reflective equilibrium between theory and commonsense convictions. However, consequentialists do need to take account of commonsense convictions in the following way at least. It is reasonable even for a thoroughgoing consequentialist to afford some presumption in favor of commonsense morality on the ground that, given certain normal background conditions at least, a deeply entrenched and long held article of commonsense morality would probably not survive long if its existence did not do some good, or perhaps maintain some valued stability in the circumstances. Still, nothing of importance for our purposes depends on this being the case. What is important about the difficulties is that they may, I contend, constitute unnecessary obstacles to the philosophical acceptance of consequentialism, for they arise from a

1 Scheffler regards this maximizing feature not only as inherent in utilitarianism, but as that feature of utilitarianism which gives it its great and persistent appeal. See Scheffler, 1982, p. 4; and 1988, p. 1.

2 Michael Slote stressed the importance of making this point clear at this juncture.

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misconception about the ways in which rational agents are to take account of consequences in their thinking and action.

Those who wish to defend a form of consequentialism that avoids these difficulties often turn to forms of indirect consequentialism. Indirect consequentialisms use some intermediate concept standing between the appraisal of actions and the appraisals of consequences. One such proposal would have us evaluate the rightness of an action by reference to what a properly motivated person would do, defining a properly motivated person as one whose motives lead to the best overall long-term results of any set of motives possible, say, for that person. Another type of indirect consequentialist proposal is the much more familiar category of rule-consequentialist theories. They hold that the rightness of actions is to be determined by reference to rules which must in turn be justified by reference to *their* consequences. Once we use such an intermediate concept, it is no longer so easy to argue that an act of lying or of killing the innocent would be permitted. Thus it seems quite unlikely that a general rule permitting actions of this kind would itself be utilitarianly justified.

It is significant that indirect consequentialisms typically retain some version of a maximizing doctrine. The difference, of course, is that the idea of maximization is shifted to another level. Thus rule consequentialists typically claim that, although the maximization requirement is not to be applied to individual acts, it is to be applied to the rules by which those acts are to be judged: An act is right if and only if it conforms to the utilitarianly best rule.

But this shift from the idea of maximization at the level of individual acts to that of maximization at the level of rules has served to trade one set of problems for another. I think it is fair to say that in recent years the preponderance of philosophical opinion about rule consequentialism has been unfavorable to it. To most philosophers it has seemed to be an unstable and unmotivated compromise between consequentialism, which holds that the morally right is a function solely of the good (usually understood as the good consequences of actions), and deontology, which denies this. For if a rule requires an action that does not maximize overall good, then, even if the rule is wholly justified in terms of the good it brings about, the question can always be raised why one ought to comply with the rule. Many would hold that, by hypothesis, there

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is no satisfactory answer *in terms of the bringing about of good* that can be given. Another problem arises even more directly from shifting the applicability of the maximizing doctrine from acts to rules. The most likely objection to this move is that existing rules and practices are usually less than the best and cannot be changed by one person. In what sense, then, does maximization have any place in a theory that might require me to act in accordance with a rule when (i) the act does not itself maximize, and (ii) the rule in accordance with which I am acting is also not the best?

A central object of this essay will be to state, and in part to restate, a case for rule consequentialism that escapes the most important of the traditional objections to it, including the objection that there is no satisfactory reason for complying with a justified rule in cases in which compliance will not maximize overall good. It will be no part of my proposal to suggest that the rightness and wrongness of actions is in all circumstances to be referred to rules; nor that the concept of right can only be meaningfully used in moral judgments when some rule is being presupposed. The main idea is rather that, in some, though surely not all, spheres of behavior, it is highly desirable for us to abdicate our title always to act to produce the best overall results, and that it is rational for us to recognize utilitarianly justified rules as preempting – that is, partially replacing – the reasons for maximizing that we individually have. But this abdication of individual title does not entail giving up collective responsibility to maximize, and it is in their function in promoting collective maximization that social rules and practices find their justification.

When we conceive of the responsibility to maximize as a collective concern that properly focuses on social rules and practices, we can recognize at once the limitations and obstacles that we face as moral agents. Improving social institutions is obviously not a matter of simply imagining what the best would be like, and then acting straightway as the best institutions would require. It is mostly a matter of public criticism of institutions, of persuasion, of setting good examples, and of using public instrumentalities like the law, to bring about changes in the complex set of attitudes and expectations of which social institutions consist. Thus the most reasonable application for the maximization doctrine at the level of evaluating and changing social institutions is to think of it as re-

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quiring us to act (i) in ways that will change those institutions for the better, but (ii) in a way that is respectful of one's responsibility to do one's part under justified, even if imperfect, social rules and practices.

To think of moral rules as social rules or practices that function as public and right-defining standards is, of course, not the only way in which philosophers in the utilitarian tradition have conceived of rules, though it is at least close to the way in which John Rawls once conceived of them.³ Other philosophers do think that there is a place for rules in moral thinking, though the rules as they conceive of them are rules of a very different sort: They do not have any right-defining function. Thus one may acknowledge the usefulness of rules of thumb in giving the individual some general indication as to what is right or wrong on some independent criterion. And one may likewise acknowledge that rules can be used simply as summaries of what has been found to be right or wrong on some independent criterion ("As a rule, it has almost always turned out to be wrong to do X."). And recently, at least one writer has suggested that one can conceive of moral rules as strategies that it is rational for the individual to adopt for the more effective pursuit of the good.⁴ A strategy, unlike a summary rule, can provide one with rather stringent reasons for doing certain things that seem not to be recommended from the standpoint of simple maximization. For example, Smith, knowing of his weakness for rationalization, and hence mistake, when faced with the temptation to do X, might be rational in adopting the strategy of refusing all temptations to do X. Like rules of thumb and summary rules, rules conceived as strategies never replace or supplement the independent criterion which alone gives the meaning of "right action": that an act is right if and only if it produces the overall best consequences of any alternative available to the agent. I shall argue that, important as these devices are as aids in doing the right thing, they do not reach far enough. They are insufficient primarily because they do not provide us with an adequate basis for mutual trust, nor for engaging

3 "Two Concepts of Rules," in Bayles, 1968, p. 59. As will become clear, some of my ideas about the proper function of rules derive from Rawls, though there are important differences. I leave my account of these differences for Chapter 9.

4 Berger, 1984.

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in collective moral debate, mutual evaluation, and the exercise of influence on one another's behavior in accordance with standards that are public and knowable to all.

Central to this argument is the idea of the good of mutual trust, a good that is in many areas undercut by the use of individual strategies of doing good. What is required is a mutual resolution or willingness – like a Humean convention in the sense that it characteristically does not arise from any act or promise – to adhere to rules that limit individual discretion to maximize. The good to which this resolution gives rise derives only partially from the fact that, by and large, it leads to acts that have good consequences. No doubt it is the tendency to think of all good consequences as somehow reducible to the good consequences of behavior that has been the major source of the conviction that rule utilitarianisms, in their most usual form, are unstable and must collapse into act utilitarianism. There are other kinds of good consequences than those traceable to acts or even, speaking more generally still, behavior: There is, for example, the good that derives from the general knowledge that one lives among people who, following justified rules, have forsworn individual maximization; they are people of virtuous character and not just people of correct action.

That people are of virtuous character in this sense might be understood to mean nothing more than that they have been so socialized, trained, or even brainwashed that they do not even think in terms of doing the most overall good; instead, one might understand this to mean that they have been developed to think in ways that will lead others to trust them, and that is all we need to achieve the good of trust. But on this conception of trust there is still an important component of the good that is missing. For we want to live among people who do the right thing autonomously and with full information about what is right. Though it might even be possible, however doubtful, to force on people the requisite false ideas and beliefs to get them to behave in beneficial ways, and even to develop general confidence that they will behave in beneficial ways, it is far better if this confidence is based on the mutual recognition that others are disposed to do the right because it is right. Relationships between people are both more stable and intrinsically better when mutual respect is based on autonomous individual recognition of the right than when it is based on ignorance, brainwashing, or other forms of diminished opportunity to use

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one's moral capacities. I shall argue that this feature of the good tells against those proposals that would drive a wedge between the objectively right and that which is supposed to be a reason for action.

Some forms of rule utilitarianism propose that the rules binding on us are those rules that would, if accepted, be the best possible. And this might seem to be the only plausible course open for any kind of utilitarianism that takes the notion of maximization seriously, even if maximization is an idea to be applied to rules rather than to acts. Surely, the thought runs, virtually any prevailing moral rule, not to mention whole moral codes, are utilitarianly defective in some way or other, and it just seems wholly unmotivated to link the rightness of acts to any rule that is less than the best. Against this familiar line of thought, I shall argue that generally accepted rules do have some priority over ideal rules that are not generally accepted. (How much priority, and in what circumstances they have priority, are questions to be dealt with later.) This priority is itself based on the idea of maximizing good, and is not, as some might think, (inexplicably) divorced from it: For the point of having rules – that everyone abdicates title to engage in unlimited individual maximization – would be defeated if it were left to the discretion of each to determine which rules would lead to the best results if generally accepted.

All of this leads to a final introductory remark, one especially apropos of this book's title. When some of the most important moral rules are conceived, as they are in this book, to be social rather than personal, this raises an important new question: What are the processes by which such rules are brought into existence, changed, or eliminated? What processes constitute the analogues in morality to the familiar processes of legislation and creative interpretation in law? My answer to this – developed in Chapter 8 – is roughly that we use whatever resources are available and reasonable in light of the overall spirit of the enterprise, the main object being to get general acceptance of justified, and, where possible, improved, moral rules. Sometimes we can coordinate our acceptance of a justified rule around the persuasive leadership of some individual, precisely because of the salience of that person. More often, perhaps, we look to the coordinating effect of the legal institutions of our society, allowing the debates and decisions that take place in and around both legislatures and courts to serve as the hitching

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posts for our common moral views. In this way, moral legislation often rides piggyback on legal legislation. None of this, I shall argue, need be thought to endanger the independence and autonomy of moral thinking; nor does it entail thinking of those with the power to enact laws as also having the authority, by virtue of their position, to “enact” valid moral rules.

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*The primary principle:
Doing good*

2.1. INTRODUCTION

My purpose is to motivate and sketch a teleological conception of morality, one on which rules and practices have an important function in defining the right, while the rules and practices themselves are ultimately to be evaluated and justified by considerations of the good they produce. On a teleological conception as I shall understand it, the ultimate good or goods are not themselves to be explained by reference to what is right or obligatory: We are not to explain the goodness of a state of affairs by referring to some obligation to bring it about; instead, we are to explain obligations by reference to the good. This is one natural meaning of the familiar utilitarian notion of the priority of the good over the right. These ideas are by themselves nothing new. Together they comprise the central features of what has usually been called “rule utilitarianism,” of which many versions have been proposed. But the view for which I shall argue – the moral legislation model (MLM) – differs from most other recently proposed rule utilitarianisms in at least one major respect: It uses the notion of a collective rule or practice of a social group, thus conceiving of some of our most important rule-based moral judgments as relative, either to rules that already exist in a particular group, or to rules that, it is implied, ought to exist.

My object is to make such a view as this plausible, defending it at least against the most serious objections likely to be raised against it. Later I shall explain part of the motivation for defending a form of rule utilitarianism that conceives of right-defining rules and practices as those of actual communities, and then raises the kinds of questions just mentioned. In later chapters, I turn to some theoretical issues drawn from recent philosophical debate about con-

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sequentialism, and I discuss the ways in which the MLM compares to several other consequentialist theories.

2.2. THE GOOD

Our attention will be focused mainly on the theory of the right. But we need at least a sketch of a theory of the good. If we think of social practices as playing an important role in defining the right, and if social practices themselves are to be evaluated, and accepted or rejected, in accordance with the good that they promote or fail to promote, then we need some idea of what the good is.

A pluralistic concept of the good, viewing a number of things as intrinsically good, is more defensible than a concept on which all goods are reduced to one intrinsic good, like pleasure or happiness. It would be difficult to reduce the value of knowledge to the pleasure it produces, which is often lacking. And it would be a mistake to reduce the value of friendship to the pleasure that it often brings. Various things, then, are good: beauty, friendship, loyalty to a worthy cause, complex goal-oriented activity, and individual autonomy. In accounting for these goods, it is helpful to distinguish between those things which owe their importance to the structure of a particular person's desires from those that owe their importance to the fact that they are good to everyone. And we can distinguish these two from those things that owe their importance to what might be called a "species ideal."¹ For example, that human beings are different from other animals in having moral capacities, like the capacity to understand moral concepts, to have a developed conscience, and to exercise and act upon autonomous moral judgment, is an important fact giving rise to an ideal regarding their good: It is one of our ends to be in a position to exercise these capacities, and the opportunity to develop and exercise them is itself a good that is distinguishable from the goods we may or may not achieve through their exercise.

The idea that the satisfaction of desires is an important part of the good is central to, and indeed a starting point of, a proper account of the good. Yet some desires are more important than others, and can be thought of as the foundation for interests, some

1 In this I follow Griffin, 1986, p. 56. Griffin calls these "desire" accounts, "objective" accounts, and "perfectionist" accounts, respectively.