Chapter 15
Ethics and Public Policy

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Abstract My work in ethics has focused on theoretical material from Aristotle on the good life, Mill on utilitarianism, Hume's emotivism and subjectivism, Kant's rationalism (including his account of the moral worth of an act and his categorical imperative about right acts), and W.D. Ross' intuitionism on what makes right acts right. I found all these very different views fascinating and wondered if one of the theories might truly be the correct one. In my studies of mathematics, I had been trained to find the correct answers, and from that perspective it was natural to have a similar expectation in my newer field of interest, ethics, which I characterize as an inquiry into and about ways of life and rules of conduct. I argue in this paper that often no one theory is correct, but ethical theory as a collective is essential for practical decision-making.

Keywords Ethics • Theory • Practice • Law • Decision making • Public policy

15.1 Introduction

I have been teaching and publishing in ethics, social and political philosophy, and philosophy of law for nearly 35 years. I was an undergraduate mathematics major, took a course in logic as a sophomore, and then fell in love with philosophy, particularly ethics, by my junior year. Like most other students, my first class in ethics focused on theoretical material from Aristotle on the good life, Mill on utilitarianism, Hume's emotivism and subjectivism, Kant's rationalism (including his account of the moral worth of an act and his categorical imperative about right acts), and W.D. Ross' intuitionism on what makes right acts right. I found all these very different views fascinating and wondered if one of the theories might truly be the correct one. In my studies of mathematics, I had been trained to find the correct answers, and from that perspective it was natural to have a similar expectation in my new field of interest, ethics, which I characterize as an inquiry into and about ways of life

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and rules of conduct. I argue that often no one theory is correct, but ethical theory as a collective is essential for practical decision-making.

We have probably all informally asked ourselves questions about the point or goal of life, how we ought to live, whether there is a fundamental principle at the root of all moral philosophy, and whether there is a single test for distinguishing right and wrong. Historically, moral philosophers have tried to give answers to these questions by proposing abstract theories, and their attempts have been classified as the core of what is called *theoretical normative ethics*. Unlike our own musings about these questions, moral philosophers have tried to give general or crucial guidelines rather than detailed advice for particular occasions. They have worked to set forth systematically first principles of morality that are consistent, often defending a true moral code, and they have tried to justify their accounts.

After taking and then teaching graduate courses in ethics and social and political philosophy, I soon was immersed in more practical ethical problems such as those concerning (1) when taking an action is the same or different from letting something happen through inaction; (2) when there appears to be an objective answer to an ethical question independent of one's mental states – attitudes, beliefs, or feelings of approval, and when one's feelings seem crucial to a moral decision, as Hume held; (3) arguments that favor absolutism, and the allure but difficulty of defending relativism; and (4) how to balance interests of an individual and individual rights against social benefit and public policy arguments.

However, as I wrote in the Introduction to *Theory and Practice* (Shapiro & DeCew, 1995):

> Since time immemorial, students of philosophy, politics, and law have disagreed over the relations between theoretical principles and everyday practice. Some have stressed the value of theory, arguing that it should be pursued for its own merits and that it is difficult, impossible, or misleading to apply its ideals to the real and imperfect world. Others have championed the importance of focus on practical problems in daily life and have urged that theory is not worthwhile unless it sheds light on how to resolve actual conflicts or real-world problems.

Aristotle and Kant made foundational contributions to this discussion, including Aristotle's (1941). famous distinction between *theoria* and *praxis* in *The Politics*. Both seemed to embrace a link between the two, and both are usually taken to be advocates of the traditional view in moral philosophy that the goal of moral theory is to resolve conflicts in moral decision making by giving clear guidance and systematizing moral thought to ultimately provide a principle or set of principles to overcome what at first appear to be irresolvable moral dilemmas. As Kurt Baier wrote, "when there are conflicts of interest, we always look for a 'higher' point of view, one from which such conflicts can be settled. …By the moral point of view we *mean* a point of view which furnishes a court of arbitration for conflicts of interest" (*The Moral Point of View*, NY: Random House 1965, 96). In contrast, over the last 35 years a group of contemporary pluralist philosophers including Ruth Barcan Marcus, Bas van Fraassen, Bernard Williams, Thomas Nagel and Stuart Hampshire have argued, to the contrary, that the inevitability of moral conflicts is data in the world, and that abstract and ideal theory is incompatible with conflicts, disagree-

ments and divisions that exist in practice. On their view, moral theory often cannot provide comprehensive explanations, evaluations, or answers to practical and fundamental problems in real life. The debate over both the value and relation between theory and practice continues, and I am convinced that the relationship is more nuanced than either the traditional or pluralist views acknowledge.

15.2 Applying Ethics to Public Policy

I have come to understand and be a productive advocate for various public policy positions, such as codes of warfare, arguments against the combat exclusion and in favor of the role of women in the military, the feminist critique of privacy, issues concerning privacy and drug testing, as well as privacy and medical information and genetic research; in doing so, I have found that this requires a solid grounding in the theories that have influenced moral thinking through the ages as well as the contemporary moral evaluations of these theories. At its best, philosophical analysis depends on achieving a thoughtful and fair understanding of major rival positions, whether or not one ultimately endorses them. In the process one also needs to engage in critical evaluation of the theories and theoretical attempts to set out fundamental concepts in ethics and morality.

Many will agree that there is not one single theory of morality or conception of ethics that allows us to settle all moral and public policy controversies. However, looking for insights in what different philosophers have said about what morality is can help us in crucial ways to evaluate how best to go about making moral decisions, how we can live life in as moral a way as possible, and what conflicts and fundamental disagreements in morality help us learn about the people and world around us. If we can identify some important visions from historical and contemporary moral philosophers and combine these with moral ideals that we find compelling, we will have made worthwhile progress. One must understand the weaknesses of utilitarian accounts and theories of individual rights, the difficulties of defending relativism, the advantages of objectivism in ethics as well as the contributions of emotivist and subjectivist approaches, before relying completely, or even in part, on such arguments. A major reason is that using practical examples from applied ethics is one way of testing various theories against our thoughtful and informed intuitions. At the same time real life examples are messy and complicated and not usually easily compartmentalized into analysis by a single theory or set of principles, and thus examining and working through ethical practice emphasizes the need for theory. In decision making in politics, economics or elsewhere in real life, a focus on only one or a couple strands of thought would be hasty. Pitfalls to avoid are dogmatism and emphasis on one perspective. In economic discussions, for example, it is not uncommon to find that efficiency arguments often dominate and win. But there are usually competing normative issues to consider that permeate a particular real life problem. It seems far better to expect a decision to be complex, to contain features or ramifications that are difficult to uncover, and that may rely on concerns

one had not anticipated. Life is messy – expect that messiness to arise in real life decisions, and recognize the ethical themes and implications relevant to a decision.

Contemporary moral philosophers often present applied cases which may at first seem oversimplified to a new reader. But the oversimplification, though real, is usually presented in order to highlight a particular moral distinction. For instance, consider Phillipa Foot's famous trolley examples: a runaway trolley with no brakes can head down a track with five workers on it or alternatively down a track where only one person is going to be hit. The obvious utilitarian response is that the engineer should head down the track with one, as it is better to kill one individual than five – the numbers do seem to count. In contrast, consider her other example of a rescue team on a deserted island. Imagine one person needing a rescue on the East side, and five on the West, and a driver who has not enough time to get to both sides to rescue all six. It is better to save the five than the one on her view. However if the *only* way the driver can get to rescue the five is to run over and kill the one on the narrow path along the way, then Foot argues that it is impermissible to kill one in order to save five lives – here it is not just the numbers that count. Some have disagreed with Foot here (e.g. John Taurek), but many have accepted her famous distinction between the morality of killing and letting die. Her examples may seem oversimplified, but her ethical point is not. It is in the real world that there may be a tangle of moral issues and distinctions like this – in debates over active and passive euthanasia for instance – that need to be addressed to generate a public policy recommendation for some practical field.

15.3 Theory Versus Practice

My first understanding of this important distinction between using theory (e.g. utilitarianism vs. Foot's examples) and practice (practical applications and decision making in the world of public policy) came during an exhilarating year of study on a fellowship during the 1980s at Harvard Law School. The initial impetus for this study was my positive response to a request to teach a course in Philosophy of Law, which I found totally absorbing but actually mostly a disaster – on the first attempt I realized I knew almost nothing about the theory or practice of law. I could barely keep ahead of the students and am sure I missed major points in the readings. My experience is not merely applicable to Philosophy of Law and legal ethics, but can be generalized. Anyone teaching or doing research in engineering ethics, business ethics, environmental ethics, and so on, would do well to have a firm grounding in both fields. I have, for instance, hired part-time instructors to teach Environmental Ethics, and when students feel they are getting an overdose of environmental studies without ethics or an overdose of ethical theory independent of environmental concerns they complain – legitimately I believe.

I was also moved to learn more about the law and legal arguments because my teaching and scholarship had clarified for me that for many of our major moral issues, such as capital punishment, euthanasia, abortion affirmative action, and

more, it was the courts making the actual decisions for us. It seemed obvious that I had better learn more about their reasoning and constraints on these major public policy problems. Unfortunately, Harvard no longer has this Liberal Arts Fellowship in Law program allowing professionals with advanced degrees in the humanities and social sciences to study law for a year (without enrolling to get a J.D. degree) to learn more about the law and legal research to take it back to their own disciplines to use in their teaching and research with credibility. But other law schools might be willing to allow a similar opportunity, and I would recommend it to anyone working in theory or practice in a field where legal decisions are crucial. The experience was profound for me because it altered my teaching and scholarship in a huge way: nearly all my teaching and research is now interdisciplinary and legal cases and discussions are now a routine part of my teaching and publications. I have learned that in addition to a mountain of ethical arguments, judges often add in practical appeals to administrability (the ability to administer and enforce decisions), political appeals to deference to the legislature and the role of courts and judges in a democracy, economic arguments, as well as concerns about whether a particular decision will cause a flood of litigation, and more. These are hardly arguments that play a prominent role in ethical theory.

One might be tempted to think, therefore, that since theory is distinct from practice, practitioners need not study moral theory. However the combination of work in law and ethics makes manifest the many ways in which theory and practice are intertwined. Legal decisions may highlight concerns about individual rights, duties and obligations, social benefit, responsibility, guilt, mental state, free will, causation, autonomy, paternalism, privacy, self-defense, and a whole host of issues that dominate philosophical discussions, especially those in ethical and social and political theory. In the context of legal and practical decision making, these issues gain importance and complexity. In addition, it is not uncommon to find that arguments on the majority and minority side of a case appear to checkmate each other: there are often utilitarian arguments on each side, individual rights arguments on each side, legal precedents on each side, economic arguments on each side, justice and fairness arguments on each side, and judges must determine which are most compelling and deserve the most weight.

15.4 Examples from Case Law

Consider, for example, a pair of legal cases that illustrate how real life dilemmas reflect the importance of ethical theory concerns and moral reasoning. These cases focus on causation and responsibility. In *Palsgraf v. The L.I. Railroad Co.* (New York Court of Appeals, 1928), an employee of the railroad saw a passenger attempting to board a train as it began moving forward. Hoping to help the passenger, the employee rushed over to give him a hand to get on the train before it was too late. The passenger was holding a brown bag, and in the process of helping him, the train employee dislodged the package, which dropped. The bag contained fireworks, and

when it fell it set off an explosion which rocked the wooden train platform, rattling a metal scale on a wooden overhang further down on the platform, which then fell onto and hurt Mrs. Palsgraf. A real life story and obviously far more complex than most examples one finds in the literature on ethical theory.

Up until this time the legal standard on causation had been a reasonably straightforward principle that whoever causes the damage must pay reparation, and it seemed obvious the outcome would be some compensation for Mrs. Palsgraf for her injuries. But no, in a famous opinion by Justice Cardozo, the court in a close decision changed the course of public policy, arguing that while there was a clear and direct causal chain from the action to the injury, that the causation was not proximate or close enough, that the railway employee could not have foreseen that fireworks were in the package and thus could not have foreseen the damage, and that he displayed no negligence. Mrs. Palsgraf did not recover any compensation. Even though the employee did push the passenger enough to set in motion the harm to Mrs. Palsgraf and could have acted otherwise, leading to his moral responsibility on some accounts, he was not legally liable. One might think the moral of the story is that ethical theory is irrelevant. But to the contrary, the case led to consideration of an individual's right to recover, the responsibility of the railroad company and its employees, the role of the mental state of the employee who did intend to push the passenger onto the train but did not intend any harm, concerns over forseeability and negligence, and perhaps most importantly the public policy concern about what precedent would be set for society by a decision either in favor of or against Mrs. Palsgraf.

Pair the *Palsgraf* case with a later one, *Summers v. Tice* (Supreme Court of California, 1948). Summers, Tice and a friend have gone quail hunting. The three begin as a group, but spread out and Summers urges the others to stay in a straight line together as they walk. Disobeying his own instructions, Summers moves ahead so that the 3 hunters form a triangle, with Summers 75 yards in front and in an unobstructed view of the others. Tice flushes out a quail which flies above Summers, and both other hunters shoot at the quail. Summers is injured by bird shot in the right eye and face, and yet because both other hunters had identical shotguns and ammunition there was no way to tell if one had shot Summers twice or each had shot him once. This time the context was also complicated and the situation was the opposite of *Palsgraf*. No direct causal chain could be identified to determine who – one or the other or both of the shooters – caused the damage to Summers, and the court again ignored the previous dictum that whoever causes the harm must pay, but in a different direction. The court decided both hunters should pay damages to Summers, in a proportion they could negotiate. So without direct evidence of who caused the harm, Summers' claim to a right for damages was upheld, the danger was said to be foreseeable and both hunters were deemed negligent for shooting in Summers' direction. Yet, the decision still seems both legally and morally problematic. Fault was ambiguous, Summers certainly added contributory negligence by disregarding his own caution to stay in line as he moved ahead where he was more likely to be hit, and it is not difficult to question whether the other hunters' rights were violated in the name of providing the best public policy for society. The simple

rule that whoever causes the harm must pay was insufficient in both cases. So the legal cases move on as new and unexpected complications arise, but fundamental moral issues remain as judges work to find the best legal outcomes.

Consider one more example from case law, since that is my interdisciplinary area of expertise. Another famous case, *Henningsen v. Bloomflield Motors* (Supreme Court of New Jersey, 1960), demonstrates different ways in which moral arguments often dominate legal practice and decision making. The Henningsens bought a car manufactured by Chrysler from Bloomfield Motors and then Mrs. Henningsen suffered harm in an accident caused by defective parts. The car advertisements proclaimed the safety of Bloomfield Motors' cars, and the Henningsens signed a contract with Bloomfield Motors with an explicit clause that the seller and manufacturer would not be held liable for defects in the cars they sold. Overruling the traditional understanding of a single principle *caveat emptor* – let the buyer beware – the court acknowledged the importance of freedom of contract, and acknowledged that ignorance is no defense if one has signed a contract, yet upheld the Henningsen's claim for damages for the injuries. Not only the traditional understanding of *caveat emptor* but also the traditional priority of contracts entered into freely and with full consent, as well as the letter of the law would normally have left the Henningsens with no redress.

What swayed this court otherwise? First, they cited the advertising assuring safe cars. Second, they pointed out that the contract signed by the Henningsens was a uniform one, used by all manufacturers in the American Automobile Association, and thus it was the same contract they would have had to sign to buy a car from any motor company and manufacturer – in effect creating a monopoly and thus an unfair contract. Third, they defended the Henningsen's right to compensation for the harm caused to them. Fourth, they argued that as the use of cars was becoming more common and essential in everyday life, law needed to keep up with evolving technology and the understanding of *caveat emptor* could not be upheld for a complex product like an automobile, which a buyer could not possibly assess properly for safety. Fifth, they defended the view that public safety was paramount, and the best public policy to assure the safety of cars would place the burden of liability for defective cars on the manufacturers and sellers. Sixth, they argued that the interests of the consumers with little bargaining power needed to be protected. For the judges, context was important, along with the rights and protection of consumers with less power than the large companies involved, as well as the best public policies of fair contracts, safe cars, and preservation of public safety in general. Together these arguments were used to override traditional respect for freedom of contract and the principle of *caveat emptor*. In this case, the Henningsen's rights arguments aligned with the multiple utilitarian defenses of the court's decision. Some have argued that the court took the side of the arguments displaying fairness and justice. Others have felt that the judges were most persuaded by the public policy arguments, while still others have charged they were exhibiting extreme judicial activism for defending a decision inimical to the traditional prominence given to freedom of contract and the written law. But the multiplicity of perspectives and arguments addressed and balanced by the decision maker is the key: focusing on a single one or two of them

would hardly be adequate for such a difficult and complex decision, especially one which overrules the prior path of law in product liability cases.

15.5 Complex, But Necessary

Although I have described some famous legal cases to illustrate my views, I think the points can be generalized. If a policy maker is attempting to assess whether and what anti-pollution restrictions to impose on an individual or a privately owned corporation, there are going to be issues of individual property rights to use and enjoy one's property as one wishes and, in contrast, there will also be utilitarian and public policy issues about the benefit to society in minimizing pollution for the environment. There will likely be concerns about an individual property owner's ability to be autonomous as a decision-maker opposed to arguments favoring governmental paternalism to demand proper environmental controls. There will be economic issues about the costs imposed on the property owner, and the extent to which social benefit should mandate financial assistance for the property owner. There will be practical issues about the ease or difficulty of installing anti-pollution controls, as well as issues of protecting the integrity of the land as well as the environment.

In my essays on the combat exclusion and the role of women in the military, I criticized then Chief Justice Rehnquist's majority opinion in the U. S. Supreme Court's 1981 decision in *Rostler v. Goldberg*, which has perpetuated inequality for women in the military. I identified a wealth of arguments on each side. In favor of excluding women from combat roles there were early paternalistic and protectionist views about women's roles, concerns about the physical disadvantages of women, questions about the purported psychological differences between men and women, the relevance of women's biological roles in pregnancy and child rearing, purported problems of team spirit and bonding among women, issues of fraternization, how the role of women can denigrate the effectiveness of the power of the armed forces, and an overall malevolent interpretation that women are inferior. There was no mention of skills women had attained in engineering, aeronautics, as pilots and so on. Arguments against the combat exclusion may be fewer but are powerful, stressing equal rights and equal opportunity for women, fairness and justice, the need for women to face combat to be promoted, the changing meaning of "combat" over time, the importance of clarifying whose perspective is relevant in evaluating the qualifications of women, and the social benefit of including well trained women with special talents in a military changing with new technology. The arguments favoring the combat exclusion repeatedly ignore the perspective of women, rely on stereotypical and paternalistic views of their needs and abilities, assuming there is no difficulty with the status quo of the military, and ensuring that women and men cannot and will not be deemed similar enough to be treated alike. With women barred from combat, their absence leads to a culture that breeds sexism and domination and leads to increased harassment and abuse. The example illustrates a situation where either failing to recognize or ignoring or omitting nearly all the ethical argu-

ments on one side led to a biased decision violating individual rights and weakening the social benefit of a military enhanced by the inclusion of all the best talent our nation has to offer.

What I hope my students take away from a case when we study it in class is not only the different theories of law and judicial-decision making at work (which I have not been able to discuss here), but also the multiplicity of ethical considerations and arguments on both sides of a case, going beyond the practical arguments that are relevant. In the *Henningsen* case, for example, no single argument won the day; no single theory seemed to override all the others. In this case the Henningsen's rights arguments fell on the same side as most of the utilitarian arguments defending maximal benefit to society. But surely if the two were competing then, despite Ronald Dworkin's strong view that individual rights arguments should nearly always trump utilitarian arguments, it is worth our while to understand the merit of both types of arguments, while also being mindful of the weaknesses of utilitarian claims which can easily overwhelm individual rights claims in pursuit of the ends without adequate consideration of the means. Having a grasp of traditional moral theories and contemporary commentaries on these views gives one the tools to assess the value and weight of these multiple arguments in complex cases, without feeling obliged to rest one's case on a single theory or approach. The intricate and complex and sometimes overlapping arguments arising in real life and practical cases for decision makers have roots in alternative ethical theories and moral visions. The best philosophical and analytical reasoning takes John Stuart Mill's advice to assess each moral approach in its best light, considering all the possible angles and arguments, understanding which arguments are ethical ones and which are practical or prudential ones, and not being blinded by a single perspective or point of view. Some decisions may seem to be clear cut; more often, decision making is more complicated and the best answer is unclear. But not recognizing the relevance of the ethical theory concerns behind the arguments, and their strengths and weaknesses, leaves one open to misunderstanding, lack of depth in one's reasoning, and quick, efficient solutions that may overlook crucial considerations of justice and morality.

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