

Utilitarianism and Public Justification

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Public reason liberalism holds that coercive political power must be justified to those over whom it is exercised in terms of their own evaluative standards. The view descends from the social contract tradition of Hobbes and Locke, maturing with Rawls's *Political Liberalism*. Public reason liberalism has blossomed of late: recent years have seen the emergence of significant new work refining and extending the theory.¹

This paper argues that public reason liberals misinterpret the implications of their own theory. Public reason liberals routinely frame their arguments by reference to the alleged defects of utilitarianism. However, I contend that public reason liberal objections to utilitarianism fail and that, contrary to the interpretation of public reason liberals themselves, the most plausible version of public reason liberalism coincides with utilitarianism in its implications.

A comprehensive comparison of public reason liberalism and utilitarianism is beyond the scope of this paper. Thus, I restrict my attention to distributive justice, and to one dimension of distributive justice at that: the pattern debate (determining *how* to distribute goods) rather than the currency debate (determining *what* to distribute). I believe that utilitarianism and public reason liberalism will also coincide on the question of currency (*inter alia*), but space limitations preclude a defense of this further claim.

¹ For recent work in defense of public reason liberal themes see Rawls 2005; Nagel 2003; Quong 2011; Gaus, 2011, Macedo, forthcoming; Habermas 1995; Nussbaum 2006. Recent work from fellow travelers in a broadly contractarian tradition includes Scanlon 2000 and Darwall 2006.

My general strategy involves showing that public reason liberals' objections to utilitarianism apply with equal force to public reason liberals themselves. I begin by considering the charge that utilitarianism is unacceptable because it fails to respect the separateness of persons. I argue that the predominant specifications of public reason liberalism are at least as likely to violate the separateness of persons as utilitarianism; thus the implications of the separateness of persons for theory selection are indeterminate (§1). Next I explain that regimes governed in accordance with prevailing public reason liberal conceptions of justice are at least as likely as utilitarian regimes to be unstable (§2). I then argue that public reason liberals must permit extensive interpersonal aggregation of costs and benefits in the style of utilitarianism to accommodate a range of intuitively compelling policies (§3). I conclude that the most defensible public reason liberal conception of distributive justice coincides with utilitarianism in its implications (§4).

§1

For the purposes of this paper, I follow theorists like Russell Hardin and Robert Goodin in interpreting utilitarianism strictly as an institutional philosophy.² That is, I will regard utilitarianism as a “normative guide to public affairs” while reserving judgment on its correctness as a comprehensive moral theory.³ Thus, I use the term *utilitarianism* to denote those theories according to which an institution is morally right when it maximizes utility compared to the available alternatives. Utility, in turn, can be specified in accordance with one's preferred utilitarian theory (e.g., hedonistic utilitarianism, preference utilitarianism, and so on). What is crucial for present purposes is the emphasis on the maximization of utility, however understood.

² Hardin 1988, Goodin 1995.

³ Goodin 1995, 4.

I'll understand *public reason liberalism* (hereafter 'PR liberalism') as the family of views according to which the principles underlying coercive political institutions are justified only if they appeal to reasons that can be recognized and accepted by the coerced.⁴ PR liberals deny that justification is owed to all citizens; rather it is owed only to *reasonable* citizens. Reasonable citizens do not free ride or impose excessive burdens on others.⁵ They also acknowledge the "burdens of judgment;" that is, reasonable citizens acknowledge that people can disagree about morality and religion (for example) without being biased, ignorant, and so on.⁶

PR liberalism harbors intramural disagreement. For example, some PR liberals, like Rawls, restrict the scope of public justification primarily to constitutional essentials; others believe that all coercive laws require public justification.⁷ Furthermore, some PR liberals insist on a "consensus" conception of justification according to which citizens must accept laws or regimes for the same reasons; others, adopting a "convergence" view, permit citizens to endorse laws or regimes for different reasons.⁸ Disputes also persist over how to properly idealize away real-world deficiencies of information, rationality, and impartiality.⁹

We can largely elide these kinds of differences because they do not bear on the central purpose of this paper. The key feature for this purpose is a commitment that all PR liberals share, namely the demand for unanimous justification. Political regimes must govern on the basis of principles that all (reasonable) citizens have reason to accept. According to the PR liberal view Rawls sets forth in *Political Liberalism*, an acceptable public conception of justice

⁴ For representative statements, see Rawls 2005, 137; Gaus 2010, 21.

⁵ Rawls 2005, 49.

⁶ *Ibid.*, 58.

⁷ See Gaus 2010.

⁸ For discussion, see D'Agostino 1996.

⁹ For a more detailed treatment of idealization, see Gaus 2011.

is compatible with the variety of comprehensive moral, metaphysical, and religious doctrines to which reasonable citizens subscribe.¹⁰

Notice that PR liberalism only supplies a formal criterion of justification: a principle is justified just in case all reasonable citizens can endorse it in virtue of their own evaluative standards. This formal criterion doesn't specify which substantive political principles are justified. Thus, PR liberals like Rawls recognize that utilitarianism is logically compatible with the formal requirements of public justification; however they rarely defend it as the preferred substantive principle.¹¹

PR liberal reticence to endorse utilitarianism is understandable. As noted, PR liberals claim that justice demands *unanimous* justification: a just political regime is justified from the perspective of each (reasonable) citizen.¹² At first blush, utilitarianism's emphasis on aggregation appears to be an awkward fit with the unanimity requirement. One obvious concern is that utilitarian political regimes will fail to elicit unanimous moral support from reasonable citizens because utilitarian regimes will not respect their separateness.¹³

At the most general level, the separateness of persons thesis is as follows: people have projects and aspirations of their own that are worthy of consideration and respect and so we cannot compensate for one person's sacrifice for the common good simply by providing gains to others. Desires, projects, and lives are not fungible. While an individual person might be justified in sacrificing some of her resources or well-being for the sake of a net gain

¹⁰ Thus, unlike his earlier work, Rawls's later view does not presuppose a Kantian comprehensive doctrine. I should note that whether Rawls's view in *Political Liberalism* differs substantively from his view in *A Theory of Justice* is a matter of dispute.

¹¹ See, e.g., Rawls 2005, 170. Gaus (2011, 537ff) approves of what he calls "practical Paretianism," according to which violations of the Pareto criterion can be justified under certain conditions, (e.g.) so long as those on the losing side of social welfare gains are compensated for those losses out of the gains. As Gaus notes, these policies will sometimes amount to approximations of utilitarian outcomes without being grounded in utilitarian principle.

¹² See, e.g., Rawls 2005, 137; Nagel 2003, 86; Gaus 2010, 21.

¹³ For the classic discussion see Rawls 1999, 24.

in her stock of these goods, the same cannot be said for sacrifices *across* persons. A net increase in social utility is not sufficient justification for the costs such an increase can impose on a particular individual.

PR liberalism accommodates separateness by requiring that political principles be justified from the perspective of each person. Thomas Nagel says that the demand for unanimity contrasts with utilitarianism's majoritarian conception of impartiality:

Utilitarian assessment decides, basically, whether something is acceptable from a general point of view that combines those of *all* individuals. The method of combination is basically majoritarian. The alternative is to ask whether something is acceptable from a schematic point of view that represents in essentials the standpoint of each individual. The method of combination here is a form of unanimity, since acceptability from the schematic point of view represents acceptability to each person. Both of these conceptions can claim to count everyone equally, yet they are very different. My own opinion is that morality should be based on acceptability to each rather than on acceptability to all.¹⁴

Utilitarianism is indifferent as to whom burdens and benefits are distributed so long as the sum of benefits is maximized.

Rawls objects to utilitarianism's singular focus on the amount of social welfare at the expense of its division as well. Utilitarianism implies that "we are to accept the greater advantages of others as a sufficient reason for lower expectations over the whole course of our life. This is surely an extreme demand. In fact, when society is conceived as a social system designed to advance the good of its members, it seems quite incredible that some citizens should be expected [...] to accept lower prospects of life for the sake of others."¹⁵

Rawls's formulation of the separateness of persons objection to utilitarianism is too strong. *All* distributive arrangements require some citizens to accept lower life prospects for the sake of others because all distributive arrangements have opportunity costs.¹⁶ A dollar distributed to Al is a dollar not distributed to Bob. Consider Rawls's own difference

¹⁴ Nagel 2003, 86.

¹⁵ Rawls 1999, 178.

¹⁶ Brink 1993, 257.

principle: basic institutions should maximize the socioeconomic welfare of the worst off. This principle requires those citizens who are not among the worst off class to accept lower life prospects for the sake of those within the worst off class. The separateness of persons objection to utilitarianism therefore must be refined to avoid overgeneralizing and indicting all conceptions of justice.

The most plausible refinement to the separateness of persons objection, and one to which PR liberals are sympathetic, involves specifying some welfare losses as intrinsically morally worse than others.¹⁷ Both Rawls and Nagel defend the idea that we ought to preferentially distribute benefits to the worse off.¹⁸ This egalitarian tilt is grounded in the unanimity condition on political principles. Those made worst off by a distributive principle are the most likely to lack reason to accept that principle. Thus a publicly justifiable principle will be one that makes the worst off as well off as they can be.¹⁹

Here a dilemma arises for the PR liberal: they can either assign *lexical* priority to the interests of the worst off or not. That is, our reason to preferentially distribute gains to the worst off either unconditionally defeats our reasons to distribute gains to any other class or it does not. Either horn of the dilemma yields unpalatable implications for the PR liberal. The first horn is implausible while the second horn puts PR liberals at one with utilitarians.

Both Rawls and Nagel opt for lexical priority.²⁰ One reason to endorse lexical priority is to preserve PR liberalism's concordance with the interpretation of separate personhood sketched above. Rawls objects to utilitarianism because it implies that aggregated social benefits can compensate for the losses of some "in principle."²¹ The only way to rule out *in*

¹⁷ Brink calls this the "moral asymmetry thesis." Ibid., 260.

¹⁸ Rawls 1999, 65ff; Nagel 2003, 123.

¹⁹ See Nagel 2003, 123.

²⁰ See Rawls 1999, 65ff; Nagel, *ibid.*

²¹ Rawls 1999, 23.

principle the possibility of aggregated social benefits justifying losses to the worst-off class is to assert that our reason to distribute gains to the worst-off class unconditionally defeats our reason to distribute gains to any other class.

Here's the problem with assigning lexical priority to the interests of the worst off or any other class.²² It opens the possibility that everyone *not* in that class will endure absurdly large opportunity costs for the sake of tiny gains to those in the prioritized class. David Brink, for example, notes that theories like Rawls's and Nagel's which endorse the principle of "minimax complaint" (viz. we ought to optimize the condition of those with the worst complaint) give rise to an "implausible distributional norm."²³ Here's Brink:

Minimax holds those with less severe complaints—even if the complaints are only marginally less severe and no matter how many of them are—hostage to improvements to those with the most severe complaints—no matter how small a number they are. This seems to be a good illustration of the dictatorship of the worst (individual) complaint.²⁴

A number of philosophers have made similar objections.²⁵ Crucially, note that the objection applies beyond the principle of minimax complaint. It applies to *all* distributive principles that assign lexical priority to the interests of a particular person or group (call these 'lexical priority principles'). These principles permit limitless losses to those outside the prioritized group.

I contend that the objection lodged by Brink and others shows that lexical priority principles not only yield counterintuitive implications but can actually violate respect for the separateness of persons.²⁶ To borrow Brink's term, these principles hold everyone outside of

²² Although I follow Rawls in regarding the relevant class as those worst off in terms of income or socioeconomic status, my arguments apply to the lexical prioritization of any class. On my view, the problem resides with lexical priority principles as such because they permit limitless opportunity costs for those not among the prioritized class.

²³ Brink 1993, 265.

²⁴ *Ibid.*, 270.

²⁵ Arneson 2000, 238; Harsanyi 1975; Singer 1975.

²⁶ Whether these principles will have the counterintuitive implications in realistic conditions is a question I explore in [omitted] as well as section 2 of this paper.

the prioritized group “hostage” to those within the prioritized group. This result seems to violate the separateness of those who are not prioritized. *Their* interests and life prospects are tethered entirely to the fortunes of the members of the prioritized class. This arrangement neglects the fact that those who are not among the prioritized class are also individuals with lives and aspirations of their own. It is unreasonable to ask everyone not in the prioritized class to regard the potentially infinitesimal gains to the prioritized class as compensating for the potentially infinite losses that they suffer.

PR liberals can rightly note that PR liberalism does not *entail* a lexical priority principle despite Rawls’s and Nagel’s view that such a principle fits best within the framework of PR liberalism. PR liberals can choose the other horn of the dilemma and refrain from assigning the interests of any single class lexical priority. Perhaps we ought to view the urgency of benefiting the worst off as a scalar phenomenon. Martha Nussbaum, for example, argues that PR liberal justice is best served by a sufficiency principle that seeks to bring all citizens’ material condition up to “an appropriate threshold level.”²⁷ She does not, however, assign this principle lexical priority.²⁸

If PR liberals take this route, they cannot object to utilitarianism on the grounds that it can neglect a particular individual’s or group’s interests for sake of aggregated social benefits. After all, utilitarianism also views the urgency of benefiting the worst off as a scalar phenomenon. Utilitarian institutions preferentially distribute resources to the worse off due to the diminishing marginal utility of wealth—the fewer resources someone has, the more utility they gain from another unit of resources. However, utilitarianism agrees with

²⁷ 2006, 182. Although Nussbaum does not use the term “public reason liberalism,” her acceptance of the basic themes of PR liberalism is evident at *ibid.*, 70, 79, 163, 216, 217.

²⁸ *Ibid.*, 71.

nonlexical sufficientarianism that gains to the relatively worse off can, at some point, be trumped by sufficiently large gains to the better off.

The PR liberal might argue that nonlexical sufficientarianism is nevertheless superior to utilitarianism as a principle of distributive justice. That is a problem for another paper. What matters here is that nonlexical sufficientarianism, along with any other nonlexical principle, implies that aggregated social benefits can be sufficient justification for the losses those benefits impose on the disadvantaged. Thus, PR liberals who choose this option cannot reject utilitarianism on the grounds that it regards aggregated social benefits as sufficient justification for the attendant losses to the disadvantaged without thereby falling into self-defeat.

To summarize, if a PR liberal regime upholds the lexical prioritization of the welfare of a particular person or group, it can violate the separateness of the non-prioritized persons. If the PR liberal regime relaxes lexical priority, it opens the possibility of neglecting a particular person's or group's interests for the sake of aggregated social benefits and thereby deprives the PR liberal of the separateness of persons objection to utilitarianism. Thus, the separateness of persons does not arbitrate determinately in favor of prevailing interpretations of PR liberalism against utilitarianism.

§2

Rawls rejects utilitarianism partly because it fails to be stable for the right reasons.²⁹ This section argues that concern for stability does not arbitrate in favor of prevailing interpretations of PR liberalism against utilitarianism for some of the same reasons why the separateness of persons does not arbitrate in favor of prevailing interpretations of PR liberalism against utilitarianism. I contend that regimes governed by the antiaggregative

²⁹ For discussion see Freeman 2007, chapter 4.

principles favored by PR liberals have the same potential for instability as regimes governed by aggregative principles like utilitarianism.

Rawls understands stability—or more specifically, stability for the right reasons—as a regime’s or principle’s tendency to elicit enduring moral support.³⁰ A political regime is stable when citizens who subscribe to different comprehensive moral, metaphysical, and religious doctrines and whose psychologies are characterized by limited altruism can endorse the regime in virtue of their own evaluative commitments.

A key element of Rawls’s stability argument against utilitarianism concerns utilitarianism’s apparent inability to accommodate limited human altruism: the utilitarian “conception of justice is threatened with instability unless sympathy and benevolence can be widely and intensely cultivated.”³¹ Utilitarianism can impose large costs on some for gains to others, and so is potentially unstable—those for whom utilitarianism is excessively costly will not be able to willingly support utilitarian institutions. Although people sometimes make “substantial sacrifices for one another,” a conception of justice should not demand such sacrifices.³² In principle, utilitarianism has no objection to instability or stability “for the wrong reasons” (e.g., coercing citizens into compliance) provided that social utility is maximized.

Yet regimes governed by the antiaggregative principles favored by PR liberals can be just as taxing on citizens’ sense of sympathy and benevolence as utilitarian regimes. I have argued that antiaggregative principles, like aggregative principles, can impose large costs on some for the sake of gains to others. As noted, this point generalizes beyond the difference principle. *Any* distributive principle that assigns lexical priority to the interests of a particular

³⁰ Rawls 2005, 142.

³¹ Rawls 1999, 155.

³² Ibid.

person or group permits limitless losses to those not among the prioritized group. For example, a sufficiency principle that assigns lexical priority to the goal of bringing everyone to a basic minimum permits limitless losses to those above the minimum. Thus, although my arguments tend to focus on the difference principle for the sake of expository brevity, I must emphasize that they generalize to *all* antiaggregative principles that assign lexical priority to the interests of a disadvantaged class (however that class is specified).

Consider the strains that the difference principle can place on all citizens who are not included in the worst off class. As Rawls himself recognizes, the difference principle implies that under certain conditions resources should be distributed such that each member of the worst off class (or all of those below the sufficiency threshold, etc.) has an extra penny even if everyone outside of the worst off class (or the sufficiency threshold, etc.) must forgo billions of dollars to provide that penny.³³ Even setting aside the counterintuitiveness of this implication, it seems clear that such a society is far less stable than a society that deprives the worst off class of the penny but enables all others to flourish. The regime is subject to the very objection Rawls lodges against utilitarian regimes: it “is threatened with instability unless sympathy and benevolence can be widely and intensely cultivated.”³⁴ Those not among the prioritized class can be required to make “substantial sacrifices”—something that Rawls claims a conception of justice should *not* require.³⁵

Rawls offers two replies to this line of objection. Here’s the first:

The problem with maximin would appear to lie with those who are better situated. They must accept less than what they would receive with the utility principle, but two things greatly lessen their strains of commitment: they are, after all, more fortunate and enjoy the benefits of that fact; and insofar as they value their situation relatively in comparison with others, they give up that much less.³⁶

³³ Rawls 1999, 136.

³⁴ *Ibid.*, 155.

³⁵ *Ibid.*

³⁶ Rawls 1974, 144.

There are a number of points here that are worthy of comment. To begin, Rawls's claim that the better situated do not suffer from excessive strains of commitment cannot rely too heavily on their desire for high relative standing. He says that rational people—the sort of people he models in his theory of justice—generally do *not* concern themselves with their relative position.³⁷ A just society, in Rawls's view, will exhibit tendencies that diminish concern for relative standing. This is not a trivial point: a serious and pervasive desire for relative position would threaten Rawls's tolerance for the inequalities permitted by the difference principle.³⁸

Here's the second problem with Rawls's argument. He says that under the difference principle the better situated “must accept less than what they would receive with the utility principle.” Rawls assumes that the difference principle will transfer more resources from the better off to the worst off than the utility principle. Yet this claim saddles Rawls with another dilemma.³⁹ These additional redistributed resources will either be worth more to the worst off than the better off or they will not. If they are worth more to the worst off than the better off, then the utility principle would have assigned them to the worst off in the first place. In this case, the difference principle and the utility principle would imply identical distributions and thus impose identical strains of commitment.

If the additional redistributed resources are worth *less* to the worse off than the better off, then the strain for the better off due to not having them is greater than the strain for the worst off due to not having them. Diminishing marginal utility applies to units of resources, not units of utility itself. Thus, it does not follow that those who are “more fortunate and

³⁷ Rawls 1999, 124-5.

³⁸ On the idea that the inequalities permitted by the difference principle typically will not engender envy, see *ibid.*, 125.

³⁹ Thanks are due to [omitted] for this argument.

enjoy the benefits of that fact” value an extra unit of *utility* any less than those who aren’t as fortunate. *By definition*, losing an extra unit of utility brings just as much dissatisfaction to the relatively better off as it does the relatively worse off.

A PR liberal might concede that the loss of an extra unit of utility causes no more strain for the worse off than the better off when considered in isolation. Nevertheless, because the worse off suffer greater strains overall, a concern for stability should prompt political regimes to preferentially benefit the worse off.⁴⁰

In response, let me note that the preceding reply reintroduces the dilemma canvassed earlier. Suppose PR liberals endorse preferentially benefiting the worse off as defined by some income or utility threshold. From here, they can either (i) refrain from assigning lexical priority to the interests of the worse off or (ii) assign lexical priority to the interests of the worse off. On the first alternative, PR liberals run afoul of their own objection to utilitarianism. Any nonlexical principle (utilitarian or otherwise) will permit regimes to distribute sufficiently large benefits to the better off at the expense of distributing smaller benefits to the worse off. Yet this implication is precisely what Rawls and other PR liberals find objectionable about utilitarianism—it requires the worse off to accept large gains to the better off as justification for their lesser life prospects.

To avoid this problem and thus preserve their criticism of utilitarianism, PR liberals can choose the other horn of the dilemma and opt for lexical priority. On this alternative, however, they become susceptible to my original objection. There will be conditions under which all citizens outside of the prioritized group will be required to forgo limitless gains to provide a barely perceptible gain to members of the prioritized group.⁴¹ This implication

⁴⁰ I am grateful to an anonymous referee for suggesting this reply.

⁴¹ Perhaps Rawls could reply that he simply defines the concept of stability in such a way that a regime is more stable the less dissatisfaction suffered by the worst-off class (or those beneath the

speaks to the regime's potential for instability: there will be cases in which the regime will be unable to generate robust moral support from the nonprioritized citizens because it will be excessively taxing on their sense of sympathy and benevolence. Thus, accepting either horn of the dilemma renders PR liberal regimes vulnerable to instability in principle.

This last point brings us to Rawls's second reply to the objection that the difference principle permits excessive opportunity costs: it's unrealistic. He says, "The possibilities which the objection envisages cannot arise in real cases; the feasible set is so restricted that they are excluded."⁴² Rawls is not proposing principles for all possible worlds but rather societies like ours, characterized by familiar circumstances of justice. Indeed, I agree with Rawls that those economic systems that assign lexical priority to the interests of the worse off will not require excessive losses for non-prioritized groups in realistic circumstances. I have argued elsewhere that redistributing all of the surplus goods possessed by non-prioritized people to provide a trivial benefit to the prioritized class would, in real-world conditions, decrease the total number of goods available for everyone—including the prioritized class—by decreasing the incentive of members of the non-prioritized class to contribute to the production of those goods in the first place.⁴³ Thus, this scheme would do worse by the prioritized class than available alternative schemes and thus be forbidden by the lexical priority principle.

sufficiency threshold, and so on). But this reply rigs the stability test in favor of the difference principle from the start: only the difference principle could satisfy such a stability condition by definition. Thus, stability could not serve as an independent criterion for evaluating principles of justice.

⁴² 1999, 136.

⁴³ [omitted]

However, whether Rawls is correct that the difference principle will not require a billion dollar loss for the better off in realistic conditions is not what is critical here.⁴⁴ What's critical is that Rawls's reply indicates that merely allowing for instability in principle is not sufficient to defeat a conception of justice. The conception must be unstable in practice.

The trouble is that Rawls's stability objection to utilitarianism is framed in terms of utilitarianism's susceptibility to excessive strains of commitment *in principle*.⁴⁵ Here's the relevant passage:

There is no reason in principle why the greater gains of some should not compensate for the lesser losses of others; or more importantly, why the violation of the liberty of a few might not be made right by the greater good shared by many. It simply happens that under most conditions, at least in a reasonably advanced stage of civilization, the greatest sum of advantages is not attained in this way.⁴⁶

We can plausibly view excessive strains of commitment due to utilitarianism as a mere abstract possibility unlikely to be encountered in practice. Considerations like diminishing marginal utility, social stability, maximizing opportunities for economic production, and empathy provide utilitarian reasons for an adequate social minimum. And of course many utilitarians do endorse a healthy social minimum.⁴⁷ Thus, the utilitarian can reply to Rawls's stability objection in kind: utilitarian institutions will not tolerate preventable poverty in realistic conditions. If plausibility concerns can be enlisted on behalf of the difference principle, they should be eligible to support utilitarian conceptions, too.

⁴⁴ Although see Harsanyi 1975 and Arneson 2000 for arguments suggesting that the maximin principle will impose massive opportunity costs in some realistic cases.

⁴⁵ For a similar observation about Rawls's oscillation between possible and likely circumstances in his evaluation of utilitarianism and the difference principle, see Arneson 2000, 239. However, Arneson's focus is on whether the implications of the difference principle in unlikely circumstances are consistent with our considered judgments rather than with a stability condition on regime selection.

⁴⁶ 1999, 23. Italics mine.

⁴⁷ See, e.g., Goodin 1995, chapter 14; Hare, 1973; Brandt, 1981.

Whether a principle will be unstable in practice is ultimately an empirical question that philosophy cannot answer.⁴⁸ Thus, if the stability criterion only rules out principles that are unstable in practice, then we need to suspend judgment as philosophers about which principle the stability criterion favors. As in the case of the separateness of persons, stability does not arbitrate determinately in favor of prevailing PR liberal conceptions against utilitarianism.

§3

A more basic question about stability remains: what role should it play in theory specification? It's surely good if a political regime is stable for the right reasons. Utilitarianism will recommend that political institutions strive to win citizens' willing moral support if only to minimize compliance and enforcement costs. But I will argue that stability for the right reasons is best regarded as merely one value among others. It is reasonable for citizens to accept some loss of stability for sufficiently large gains in other goods like health, wealth, or pleasure.

Consider two regimes. The first, R1, governs 1,000 citizens and all 1,000 citizens find support for the regime in their own evaluative standards. For each of these citizens, however, R1 is *just barely* worth supporting. If it were only marginally worse (that is, if it satisfied their evaluative standards only marginally less), all 1,000 citizens would revoke their support.

The second regime, R2, also governs 1,000 citizens, yet only 999 can support it in virtue of their own evaluative standards. But these 999 are ecstatic with the regime. Moreover, R2

⁴⁸ Which regime will best satisfy the stability condition depends on a variety of factors, such as socioeconomic circumstances and the particulars of the political context. Generally speaking, lexical priority principles will fare worse than nonlexical principles in terms of stability in those conditions where benefiting the prioritized group involves excessive opportunity costs for the non-prioritized group. However, as noted, determining when this is the case is a task for empirical social science.

just barely loses the support of the one holdout, such that if the regime were only marginally better with respect to his interests he would support it as heartily as every citizen of R1 supports their regime. Nevertheless, as the situation stands, he must be coerced into compliance.

Let us simply grant that regime 1 better satisfies the requirement of “stability for the right reasons” than regime 2 because none of its citizens must be coerced into compliance. We can also stipulate that conditions in both cases are such that everyone’s satisfaction level will persist indefinitely, so that we cannot classify R2 as more stable than R1 in virtue of having a larger margin for error than R1.

PR liberals face another dilemma: assert that the high-utility regime (R2) is preferable from the standpoint of justice or that the high-utility regime is not preferable. Suppose they take the first horn. The PR liberal might argue that the high-utility regime is justified after all because it would elicit the support of the holdout citizen—*if* that citizen were reasonable. It is unreasonable for him to insist on small gains for himself at the cost of huge aggregated gains to others. Some of Gerald Gaus’s arguments suggest this possibility.⁴⁹ Perhaps ideal deliberators of the sort modeled by PR liberal theories will accept trade offs between stability for the right reasons and other goods.

The trouble with this reply is that it deprives PR liberals of their initial objection to utilitarianism. Utilitarians could simply follow the PR liberals’ lead and declare citizens unreasonable when they insist on lesser gains for themselves at the cost of forgoing greater aggregated gains for others. That utilitarianism permits these citizens to be coerced into compliance could no longer be regarded as a defeater for the theory without thereby indicting PR liberalism as well.

⁴⁹ See 2011, 541.

On the other hand, the PR liberal might assert that it is reasonable for the holdout citizen to insist on a different regime. The high-utility regime is *not* preferable because it fails (barely) to meet the evaluative standards of the one citizen and thus fails to be justified compared to the available alternative. I believe that this claim is counterintuitive in part because the gain to the prioritized citizen resulting from the low-utility regime is both absolutely small and significantly smaller than the gains to all other citizens resulting from the high-utility regime. Indeed, there is reason to believe that Rawls himself should be sympathetic to this objection to the low-utility regime. After all, Rawls seems troubled that the difference principle might require the better off to forgo limitless gains to provide one penny to the worst off, as evidenced by his attempt to show that his theory excludes this possibility. However, it is precisely this kind of insensitivity to the condition of the non-prioritized class that makes the choice of the low-utility regime problematic.

Below I will consider the possibility that PR liberals will bite the bullet and select the low-utility regime. But first consider another case that causes the same difficulties. Rawls regards a guarantee of healthcare adequate to realize ‘species-typical functioning’ as a constitutional essential.⁵⁰ Suppose further that a small class of citizens suffers from a rare disease that is both painful and impairs their mental and physical functioning. Although this condition is tolerable, it diminishes their health to the point where it is marginally below species-typical functioning (however defined). The only way to raise this class of citizens to species-typical functioning is to undertake a Manhattan Project-style effort to find a cure for the disease—an effort that would necessitate raising the marginal income tax rate to 90 percent.⁵¹

⁵⁰ On the idea that “normal health care” is a constitutional essential, see Rawls 2005, 407.

⁵¹ Here it might be objected that such a high marginal tax rate would produce self-defeating incentive effects in real-world conditions. I agree. See [omitted] for more on this claim. However, recall that

Let's suppose that, in the absence of the tax, the healthy citizens—who constitute an overwhelming majority of the population—are quite wealthy and, in turn, quite pleased about the regime's facilitation of their achievement of their conceptions of the good. Those with the disease—who constitute a small minority of the population—are almost, but not quite able, to adequately advance their conceptions of the good. Should the tax be instituted, the sick subpopulation will move from just below the threshold of species-typical functioning to just above. Yet this gain comes at a cost: the new taxes mean that the remainder of society is now just barely able to advance *their* conceptions of the good. Their satisfaction with the regime is now on a par with the formerly ill group—it only marginally passes the threshold of acceptability. If PR liberalism requires the selection of the policy that is justified to more of the public than all of the available alternative policies, then PR liberalism requires the 90% tax rate. This result seems implausible. If, on the other hand, PR liberalism allows a regime to trade the loss of some citizens' willing moral support for the sake of sufficiently large gains in other goods like social wealth, then it finds itself in agreement with utilitarianism.

Before proceeding, let's pause to address an objection. Rawls might characterize the preceding as a case of *special* health care that ought to be set aside from the standard problems of distributive justice.⁵² Standard problems concern those people who are “full and active participants in society” and who have “physical needs and psychological capacities within some normal range.”⁵³

I believe that this counterexample speaks against Rawls's view for at least two reasons. First, Rawls does not deny that his theory applies to and thus has implications for special

Rawls objects to utilitarianism in principle; thus, it is fair to object to Rawls's view on the grounds that it yields unacceptable implications in principle.

⁵² See Rawls 2005, 272 n.10.

⁵³ Ibid.

cases; he says only that “we can attempt to handle these other cases later.”⁵⁴ So we can regard the counterexample as an attempt to shift the burden of proof to Rawls and other PR liberals to show that their view does not have the implications that it appears to have.

Second, Rawls’s reply amounts to provisionally stipulating away the objection. If this dialectical strategy is available to Rawls, then it ought to be available to the utilitarian. Critically, many of Rawls’s objections to a utilitarian theory of distributive justice evaporate if we evaluate utilitarianism under the same “normal” conditions under which Rawls evaluates his own principles. As noted, these are conditions in which citizens are assumed to be “full and active participants in society” and “everyone has physical needs and psychological capacities within some normal range.”⁵⁵ If all citizens are active contributors and their psychologies and physical needs are roughly similar, then a society governed by utilitarian principles is assured of a roughly egalitarian distribution of resources. For example, if citizens are psychologically similar and thus have similar utility functions, then there are no “utility monsters” who are hyper-efficient at converting resources into utility and thus would receive an unequal share under the utility principle. There are also no citizens with adaptive preferences who only desire a minimum of resources and thus would receive a lesser share under the utility principle. Both PR liberalism and utilitarianism yield fewer counterintuitive implications for normal cases than for abnormal cases. Thus, if we evaluate PR liberalism while restricting our attention to normal cases, we should do the same for utilitarianism.

Perhaps the PR liberal will deny that endorsing the low-utility regime and the Manhattan Project-style medical research program is a devastating bullet to bite. Both aggregative and non-aggregative conceptions of justification have counterintuitive implications in unusual

⁵⁴ Ibid.

⁵⁵ Ibid.

conditions and this might be an acceptable place for PR liberals to dig in their heels.⁵⁶ But this move comes with a cost. The philosophical commitment that PR liberals would need to make to support the low-utility regime and the health care project would also undercut their ability to support policies that are indisputably permissible and, in some cases, explicitly endorsed by those working within the public reason framework themselves.

The commitment in question resembles the principle of minimax complaint discussed earlier: those people who are (sufficiently) worse off relative to other members of the population have veto power over the laws or regimes in question. Endorsing such a principle amounts to assigning lexical priority to ameliorating the condition of the worse off (perhaps as specified by some absolute income or utility threshold). As discussed earlier, this approach seems to align with the basic motivation of PR liberalism. Just regimes are justifiable to all citizens and therefore just regimes will tilt in favor of the worse off—i.e., those with the least reason to endorse the regimes.

Here's the problem. There are many policies that any conception of justice must permit but appear impermissible by the lights of the above principle. Consider T.M. Scanlon's treatment of public projects. Scanlon accepts the following "unanimity" condition: acts are wrong when they violate principles that no one can "reasonably reject."⁵⁷ Yet Scanlon recognizes that this condition appears problematic when applied to projects that involve the risk of tremendous losses for some. For example, Scanlon endorses the permissibility of undertaking "public projects, such as building a bridge, road, or tunnel that will make travel convenient for many people" even though these projects will result in some cases of serious harm and death.⁵⁸ Note that the paralyzed or deceased bystander is put in a far worse

⁵⁶ Thanks are due to an anonymous referee for raising this point.

⁵⁷ Scanlon 2000, 153.

⁵⁸ *Ibid.*, 236.

condition as a result of our undertaking the tunnel project than any driver who is inconvenienced by *not* undertaking the project. Thus, a puzzle arises: how do we justify the policy to the person who dies or suffers paralysis as a result of the policy?⁵⁹

This problem is not limited to a handful of isolated cases. For instance, governments license ice cream truck drivers. Permitting these trucks on the road will certainly result in the death or paralysis of at least one pedestrian who is hit by an ice cream truck. Here again, those who suffer death or paralysis due to ice cream truck licensure are placed in a dramatically worse condition than those made worse off by the disallowance of ice cream truck licensure—say, the driver who loses income or the children who lose the enjoyment of ice cream.

Or consider a case that more clearly involves government coercion: taxation of income from life-saving labor such as medicine, firefighting, police work, or ambulance driving to fund luxury projects such as parks or museums.⁶⁰ All things equal, taxing life-saving labor reduces its supply. Workers will choose to substitute more leisure for labor as taxes rise. And someone who dies or suffers paralysis due to (e.g.) being operated on by a lesser surgeon because a superior surgeon retired early or being assaulted by a criminal apprehended too late due to an undersupply of detectives is worse off than the person who is deprived of her enjoyment of an art museum.

⁵⁹ For additional discussion of this and similar problems and their relevance to the debate between consequentialists and contractualists, see Norcross 2002, 311ff.

⁶⁰ Some might deny that taxation is coercive. This thought is suggested in some of G.A. Cohen's work, for example. Cohen (1995) argues that the state's protection of private pretax property is coercive because it forcibly interferes with the public's freedom to use that income. I will not take a stand on this debate. What's important for present purposes is that even if one subscribes to Cohen's view, we can refashion our example to yield the same implication. Suppose that raising taxes on luxuries like ice cream delivery from 10 percent to 30 percent would maximize revenue for hospitals but also raise the cost of ice cream. Then the question becomes whether the PR liberal view implies that the state's decision to not raise taxes (and thus coercively protect that 20 percent of the driver's property) is justified.

Indeed, the preceding analysis stands even if we consider a general principle that bans all projects similar to ice cream trucks and tax-funded luxury goods. There is no doubt that such a principle is restrictive. But surely it is better for a person to live in a world without ice cream trucks and national parks than to die or be paralyzed in a world with ice cream trucks and national parks.⁶¹ After all, life was worth living before the advent of the ice cream truck and the national park.

PR liberalism has trouble accommodating the intuitive permissibility of ice cream truck licensure or tax-funded parks because those citizens whom they make worse off are significantly worse off than those citizens whom they benefit. It is unclear why the paralyzed citizen has reason to accept policy that results in her paralysis. If she does not have reason, then it seems as though tunnel construction, ice cream truck licensure, and taxation for luxury goods cannot be publicly justified. But this is a strike against PR liberalism: intuitively, a theory of justice should be able to explain why these policies *can* be justified.

Although Rawlsians might object to these examples on the grounds that only constitutional essentials require public justification, it still applies to those PR liberals who believe that all coercive government policy requires public justification.⁶² And Rawls himself concedes that it is “usually highly desirable to settle political questions by invoking the values of public reason” even if it is not always so.⁶³ So if the principles of public reason are, at a minimum, applicable to the issues of ice cream truck licensure and tunnel projects (*inter alia*)

⁶¹ For a similar point about a general principle restricting all public projects, see Norcross 2002, 312.

⁶² See, e.g., Quong 2004; Gaus 2010, 21.

⁶³ Rawls 2005, 215. Elsewhere Rawls (2001, 91 fn. 13) contends that demanding public justification for specific legislative decisions is “neither desirable nor attainable.” At first glance, this claim seems inconsistent with the claim quoted in the text above. Jonathan Quong (2004, 234) interprets Rawls as asserting “that it might sometimes be beneficial to settle non-essential political questions through the use of public reason, but that a general principle mandating this aim would be unacceptable.” Thus, the principles of public reason are at least applicable to legislative questions even if they need not actually be applied in some specific cases. Thanks are due to an anonymous referee for drawing my attention to the relevant passage from Rawls and emphasizing its importance for my argument.

and we assume that any plausible conception of justice must permit ice cream truck licensure and tunnel projects, then PR liberals must be able to account for the permissibility of these projects within the constraints of their theoretical framework.⁶⁴ To do so, PR liberals must ease their restrictions on aggregation in a way that will oblige them to support the high-utility regime, oppose the special health care tax, and retract their objections to utilitarianism.

The problem for the PR liberal is that the *ex post* costs to the dead or paralyzed pedestrian outweigh the *ex post* benefits to any particular individual due to the fun provided by the ice cream truck. So I take it that the most natural way to publicly justify these kinds of projects is to focus not on *ex post* costs and benefits, but rather *ex ante* costs and benefits. We can publicly justify these projects on the grounds that everyone, the pedestrians who died included, would accept the costs *ex ante*. That is, prior to any deaths and not knowing whether they would be among the few who die, everyone would be willing to accept the risk.

The strategy sketched above is similar to Scanlon's approach to public projects. He suggests that people could not reasonably reject a principle that allows these sorts of projects assuming adequate precautions were taken. Here's Scanlon:

Those who would benefit, directly or indirectly, from the many activities that the principle would permit may have good generic reason to object to a more stringent requirement. In meeting the level of care demanded by the principle, they might argue, they have done enough to protect

⁶⁴ Here is another reply that I will briefly mention but cannot explore in detail. Rawls (1974, 142; 1999) suggests that maximin reasoning is only appropriate for large-scale problems such as the design of the basic structure of society. Part of the reason for this restriction is that the stakes of deciding on a basic structure are very high. Yet the stakes of deciding on ice cream truck licensure and similar cases are also very high for at least some people given the risk of death or paralysis. Moreover, the feature of maximin reasoning that makes it counterintuitive in its implications for ice cream truck licensure—namely, its complete insensitivity to those who do not suffer the worst outcome—also makes it counterintuitive in its implications for the basic structure. Lastly, as Rawls suggests, perhaps maximin reasoning is only appropriate for conditions of sufficient uncertainty such as those in the original position. But the inability to form probability estimates in the original position is simply a stipulation of Rawls's design that we can revise. After all, information about (e.g.) the income distribution would not bias the selection of principles because it would not enable selectors to learn their own place in the distribution.

others from harm. Refusing to allow activities that meet this level of care would, they could claim, impose unacceptable constraint on their lives.⁶⁵

Scanlon stresses that his argument does not appeal to interpersonal aggregation of costs and benefits but rather intrapersonal aggregation. “It is aggregation *within* each person’s life, summing up all the ways in which a principle demanding a certain level of care would constrain that life, rather than aggregation *across* lives adding up the costs or benefits to different individuals.”⁶⁶ Scanlon’s argument, then, resembles the following: *ex ante*, the constraints or costs involved to each particular individual in prohibiting the relevant risky projects are too great, therefore the prohibition is unjustified on individualistic grounds.

But what’s our principle of *ex ante* reasoning? How do we know when the *ex ante* costs of a project or law are justified? Maximin won’t work. We know that ice cream trucks will kill or paralyze at least one person. So prohibiting the trucks makes the worst outcome as good as possible: it eliminates the possibility of death (the worst outcome) at the cost of reducing fun. Lexical priority principles in general won’t work.⁶⁷ Consider, for example, a sufficiency principle according to which the reason to raise people to some threshold level of well-being unconditionally defeats the reason to benefit people above that threshold. A person who is dead, paralyzed, or comatose will fall below any plausible specification of the threshold and so the sufficiency principle implies that ice cream trucks ought to be prohibited from the road.

⁶⁵ 2000, 237.

⁶⁶ Ibid.

⁶⁷ Note that, unlike the case of basic economic arrangements that we discussed earlier, PR liberals cannot here appeal to the possibility of self-defeating incentive effects to explain why lexical principles will be sensitive to the condition of those who do not suffer the worst outcome or sufficiently bad outcomes. Even if the principles do dampen economic production in these contexts (e.g., by minimizing economic opportunities for would-be ice cream truck drivers), they would still optimize the worst outcome or sufficiently bad outcomes (e.g., death or paralysis).

It's clear we need an aggregative principle of *ex ante* reasoning because the benefits of ice cream truck licensure to any particular person are trivial compared to the costs to any particular person. Expected utility maximization delivers the correct result. States should license the trucks if the expected benefits of licensure (e.g., the benefit of convenient ice cream delivery multiplied by the likelihood of being among those who experience the pleasure of convenient ice cream delivery) exceed the expected costs of licensure (e.g., the cost of death or paralysis multiplied the likelihood of being among those who die or become paralyzed). Although the greatest cost suffered by any one person as a result of the policy is greater than the greatest benefit enjoyed by any one person, ice cream trucks are permitted because the probability of being among those who suffer the terrible cost is surpassingly small compared to the probability of being among those who enjoy the benefit.

Here's the problem for PR liberals: if they *consistently* apply expected utility maximization to policy decisions they arrive at utilitarianism. So how can the PR liberal block this creep toward a thoroughgoing utilitarianism? Scanlon's suggestion is to differentiate between broad categories of moral seriousness.⁶⁸ We can use aggregative reasoning within but not across categories. For example, we should save ten lives rather than one because the choice involves a trade off within the same category of moral seriousness. We could also spare ten people ten minutes of pain instead of sparing one person eleven minutes of pain because the latter sort of harm is only slightly worse than the former.

Let me first note that even if Scanlon's strategy of permitting aggregation within categories of moral seriousness is viable, it would oblige PR liberals to accept the high-utility regime and reject the special health care tax. The loss to each member of the better off class due to living under the low-utility regime is significantly greater—and thus presumably more

⁶⁸ Scanlon 2000, 239.

serious—than the loss to the worst off person due to living under the high-utility regime. Moreover, the high-utility regime is only marginally worse (by hypothesis) for the worst off citizen than the low-utility regime.

There are also reasons to reject Scanlon's prohibition on aggregation across categories. Scanlon's account faces two objections. First, there's a vagueness problem. We cannot draw well-defined and principled lines between categories of moral seriousness. The objection asserts that *wherever* the PR liberal locates the line will be arbitrary.⁶⁹ For any proposed seriousness threshold, we can always ask in virtue of what considerations it is uniquely appropriate to draw the line demarcating a new category of seriousness *there* rather than just after there, or just before there, where the harms are only marginally more or less severe. Losing a hand is a serious harm. Does the loss of four fingers belong to the same category of moral seriousness? Three fingers?

Suppose, though, that we can draw principled lines between categories of moral seriousness. Now a dilemma arises: do we assign the alleviation of more serious moral harms lexical priority over the alleviation of less serious harms? If so, then Scanlon must *accept* a principle disallowing projects like tunnels. The loss of life or mobility is surely a more serious harm than the loss of a shorter commute. But this position is both contrary to Scanlon's stated view and implausible in its implications for public policy. Furthermore, it's counterintuitive to claim that our reason to alleviate one instance of a moral problem that just *barely* crosses the threshold into a higher category of seriousness ought to trump our reason to alleviate an *infinite* number of instances of a moral problem that just barely misses the threshold to enter that higher category of seriousness.

⁶⁹ One plausible and non-arbitrary candidate for a threshold concerning overall well-being rather than particular benefits and harms is the point of diminishing marginal returns to income. See [omitted]. However, Scanlon's concerns seem to focus on types of benefit and harm and, in any case, utilitarians can also recognize this point as a morally important threshold.

On the other hand, if we do not assign the alleviation of more serious moral harms lexical priority, then Scanlon's theory collapses into an aggregative one. Scanlon's theory, like utilitarianism, would imply that our reasons to promote sufficiently large aggregations of ice cream-based pleasure can trump our reasons to save human lives. This horn abandons a fundamentally non-aggregative justificatory framework and thus robs PR liberals of their "individualistic" objections to utilitarianism.

§4

My arguments indicate that the PR liberal insistence on the unanimous justification of political principles does not arbitrate decisively against utilitarian regimes. They also suggest that a utilitarian conception of distributive justice satisfies the requirements of public justification at least as well as prevailing PR liberal conceptions. Of course, utilitarianism and prevailing PR liberal conceptions of justice differ along other dimensions. I believe that the theories coincide in their implications for many of these dimensions as well, but defending that claim remains for another paper.

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