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ROBERT E. GOODIN

EDITED BY
MICHAEL
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ROBERT E.
GOODIN

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CHAPTER 35

ETHICAL DIMENSIONS OF PUBLIC POLICY

HENRY SHUE

If one perused the professional backgrounds of the faculties of many of the most prominent schools of public policy, one could be forgiven for believing that one was looking at lists of the faculty members of economics departments, leavened to some degree by other social scientists whose methodologies are nevertheless heavily influenced by various forms of economic analysis. Any specialists on ethics or normative issues generally tend to be peripheral, served on the side like the wilted salad that comes whether requested or not, or perhaps sprinkled on top like the pepper that is entirely optional. I think this helps to explain the superficiality of much analysis of public policy—not, of course, because individual economists have particularly superficial minds and ethics specialists have deep ones, but because the most fundamental decisions must already be made before economic analysis can be valuable. And those less easily manageable decisions concern the considerations that can be systematically weighted only after ethical assessment.

Most important of all is the deceptively simple question of who, and what, counts (Sneed 1977; Barnett 2002; N. Crawford 2002; Finnemore 2003). This question must be decided before any useful calculations of costs, benefits, or risks can be made. Whose costs shall we count? And whose shall we ignore? Whose count fully, and whose are to be discounted? Only members of the constituency of the policy maker or also others who are deeply affected—sometimes more deeply affected (Scheffler 2001)? Only those alive today or those alive a century from now too (Barry 1991)? Only human society or also some or all aspects of the natural world, such as the pattern of changing seasons that in the temperate zones has guided farmers and inspired poets but is now being undermined by the climate change being accelerated by human economic activity (McKibben 1990)?

These are “messy” questions in the sense that they are not amenable to precise calculation. Any precise calculations, however, will mislead the makers of public policy to the extent that they omit matters that ought to be included. Not only is it true that the rule “garbage in, garbage out” prevails, but it is also true that “arbitrary features considered, arbitrary decisions made.” Obviously the alternative to analyses that are arbitrarily partial is not analyses that are literally comprehensive—no analysis could consider everything, and analyses can be arbitrarily inclusive as well as arbitrarily exclusive. This makes ethical analysis difficult. Selective judgements must be made, not least because an analysis that is to be useful in the choice of policy must focus attention sharply on whatever matters most in the area affected by the policy. So, what matters most? And what matters not at all? These selective judgements are ethical judgements.

The beginning of wisdom here is the realization that the most fundamental judgements, most especially the decisions about who and what to take into consideration in the first place, are judgements about relative importance—“value judgements.” However contentious or inconclusive ethical debates may be—and it is not obvious that they need be any more indecisive than debates among economists themselves—they are the debates that need to be conducted at the outset of well-grounded policy analysis. It is worth looking at a few typical instances of the rock-bottom choice about inclusion/exclusion. The purpose here is not to offer solutions, but simply to demonstrate why the choices need to be confronted in the fundamental ethical terms in which they arise and dealt with as the ethical issues they are.

1. WHO’S IN? WHO’S OUT? ACROSS TIME

Most economists do recognize that decisions about how far forward in time to run their calculations have enormous consequences; and different choices about how many generations to consider, and how heavily to consider those more distant in time, are understood to skew analyses completely. Yet, economists are amazingly quick to decide that the solution is to use wholesale discounting of total future welfare. Since most likely the numbers of people yet to live—let us temporarily indulge the customary arbitrary exclusion of the entire universe apart from humans—or even the numbers in future generations of one’s own community—now indulging the customary exclusion of strangers, without worrying just yet about how to specify relevant communities—will dwarf the number of people currently alive, consideration of all aspects of the welfare of all of them would overwhelm the welfare of the current generation. So selectivity of some kind is unavoidable. But indiscriminately discounting all aspects, major and minor, vital and optional, of the welfare of future generations is only one familiar, and comfortable way to proceed (Cowen and Parfit 1991; Broome 1994).

The arbitrariness of discounting as a general technique is a separate issue from the arbitrariness of the rate of discount selected. Three per cent seems to be highly popular in practice, and it does have a nice round appeal. Usually some reference point is used in a gesture at justification of the number chosen, such as some current interest rate. But why, if some discount rate is to be adopted in our calculations about the welfare of people in future, should this particular rate be the one?

What is even less adequately discussed is why we ought to reduce the weight attributed to absolutely everything about future generations and why the extent of that reduction has any rational relation to any dimension of our economy, like some current interest rate. It tends simply to be assumed that the only issue is how much future generations would have to pay to provide for themselves something to substitute for something else we did not provide for them. This of course assumes we are always concerned with substitutable, marketable commodities, like the cost of medical care for adverse health effects. For instance, it is sometimes argued as follows. Suppose we plan to leave behind some only temporarily secure hazardous nuclear waste that can be expected to cause malignancies, some fatal, among members of a distant future generation. If a public policy resulted in fatal illnesses among people living today, we would want to compensate their families for the loss of life. No one is claiming that a human life is worth only so much money and that the compensation is fully adequate; however, acknowledging the inadequacy and the incommensurability between life and money, it is still far better than nothing if compensation is provided, and even an inadequate gesture may symbolically express our respect. Since, in the case of the hazardous waste, we assume the illnesses will not occur for several generations, the rational path, it is argued, is to provide not the full amount of compensation but that amount suitably discounted.

However, in the current generation we compensate people for unavoidable deaths. We do not, by contrast, adopt a public policy in full knowledge that it is likely to kill a number of people and then at the same time set aside full (since they are contemporaries) compensation. Choosing to cause deaths and at the same time to compensate for the lives lost looks much too much like buying the right to kill the people, or purchasing their right to life with the amount of the compensation. We take all reasonable measures to avoid unnecessary deaths; when nevertheless some people unavoidably die, which may in practice be when the prevention of their deaths would be prohibitively expensive (e.g. requiring accident-free highways), we compensate their families for the loss.

It is important to be clear about precisely what is the blind spot in conventional calculations about future generations, and unfortunately what we do entirely within the current generation is rather complicated. As indicated by the notorious example of straightening the curves in highways in order to reduce accidental deaths, it may be that until all the highways have the ideal amount of curvature, we could save another life by eliminating, or softening one more curve. Yet at some point, what can be thought of as the cost of saving an additional life becomes unreasonably high, and we stop spending money on it. In a sense, this can be described as choosing to allow the person whose death could have been prevented to die. But if the cost of saving the

additional life has become astronomical, and especially if the same amount of money invested in safety elsewhere (say, shoring up the coal mine ceilings; or even better emergency room care for the people who do run off the less-than-perfect road) would save many more lives, we decide that, crudely put, more expenditure on curve adjustments is “unreasonable” (Sunstein 1996). One implication of its being unreasonable is that we do not judge ourselves bound to compensate those who then die because we stopped spending on highway safety. So, of course, costs come into it. The question is how and where costs come into it.

What we do not do within the current generation is simply decide that allowing people to be killed and compensating their families would be cheaper than saving their lives, and so choose to let them be killed when their deaths could still be prevented at a higher but perfectly reasonable cost. We do not stop spending on the highways as soon as deaths-plus-compensation would be less. In short, we often decide that death-plus-compensation as an alternative to life is not simply inadequate but unacceptable, provided the cost of saving lives, although considerably more, is still “reasonable.”

The issue about the conventional economic approach to future generations is that it is incapable of even considering a policy toward people in the future analogous to the policy toward people today that says: it would be cheaper not to spend any more on saving lives in this policy realm and simply compensate for all the unprevented deaths, but we cannot do that because these are human lives of more than economic value—we cannot simply buy, with our compensation, the right to let them be killed. The analogous policy toward people in future generations would say the following. If we adopt nuclear power and leave behind only temporarily secure hazardous nuclear waste (because we do not have a safe disposal technology for any waste we generate), we can save enough money on energy to compensate members of future generations who develop fatal cancers from exposure to our waste, even if we discount the appropriate level of compensation at an extremely low rate. We will, however, not choose this policy of death-plus-[discounted]compensation because these will be human lives of more than economic value—we cannot simply buy, with our compensation, the right to kill them with our radioactive waste. Nor, if we avoid nuclear power by burning coal, can we simply buy the right to inflict the deaths caused by the more severe climate change produced by the increased carbon emissions. If our policy should observe a minimal constraint against the infliction of death and severe bodily harm, the challenge is not to find the correct rate at which to discount the compensation for absolutely any avoidable deaths we choose to inflict, but to find a way not to inflict the deaths, for example, generate neither the deadly waste, as long as we do not know how to handle it, nor the increased emissions. The fundamental failure in conventional analyses, then, flows from the unargued ethical assumption that in the future, unlike the present, everything can be compensated for, not in the arbitrariness of particular assumptions about rate of compensation (Shue 1999).

This indicates the need at least to consider approaches other than discounting. Perhaps at least some of the constraints on what can be done to human beings that apply to people alive today apply as well to any people who will live, irrespective of

their identities. If we must not, for example, allow the torture of prisoners now, perhaps we should not allow the torture of prisoners later either, insofar as we have anything to say about it. Then we should not sponsor political choices now that make it highly likely that a succeeding regime will torture its prisoners, at least not if the costs to us of not sponsoring such choices are not prohibitively high. To put the point more generally, if all human beings have some basic rights, then human beings in future generations will then have the rights as fully as humans alive at the moment do now. Since we do not think that the appropriate policy now toward the right not to be killed is violation-plus-compensation, no reason is apparent why that would be the appropriate policy toward humans yet to be born. This means that there are fatality-producing outcomes that it would be wrong to choose and then compensate for. The objection is not that the compensation is inadequate; insurance policies today often pay only inadequate sums to compensate for deaths. Compensation for many human losses is inadequate. The objection is that one may not purchase an insurance policy on someone's life, with her family as beneficiaries, and then kill her because her death serves some purpose of one's own. The issue is not the adequacy of the compensation—it is making specific avoidable choices to end human lives. Why should it matter that the life, and the premature death brought about by our policy choice now, lie in the future? Matter so much that not even minimum standards of treatment apply? But we must move on to other cases, since our cases are after all intended only as illustrations of underlying ethical assessments typically left undefended.

2. WHO'S IN? WHO'S OUT? ACROSS SPACE: EQUALITY OF HARM

One might call the problem sketched above transgenerational minimization: reducing (often to the vanishing point) the significance of people who will be profoundly affected at a distant time by policy choices made now. A somewhat similar, but often much more extreme form of conventional reasoning might be called transnational minimization: effectively ignoring people in a distant place, even while deeply shaping their fates. In many of the calculations concerning public policy the welfare of persons outside whatever is taken to be the relevant constituency is not discounted but completely ignored. And this partiality is not only not always wrong but indeed sometimes required, which adds fascinating complexity to the policy choices. In the instance of transgenerational minimization I suggested merely that we should critically examine the strikingly extreme and simple, but completely standard assumption that absolutely all aspects of the welfare of persons who come to live in later times may be discounted. I did not even discuss whether on some points we not only may but ought to favour our contemporaries. In the case of transnational

minimization we must take very seriously the spatial version of favouring our own (Goodin 1985; Miller 1995; J. Crawford 2002; Buchanan 2004).

The fundamental tension consists in the following. On the one hand, there is a global consensus, with very few significant holdouts, on the view that all human beings are equal in a fundamental dimension, although there are differing views about whether to understand the dimension as dignity, worth, value, fundamental rights, or some combination of the preceding. For our purposes we can simply call this the consensus on human equality. On the other hand, it is nonsense to say, as surprisingly many theorists do, that if there are universal rights, there are universal duties, where “universal duties” are duties that fall upon every person and are more than a merely negative duty not to violate the rights. If every person has some fundamental entitlements, then for every person there must be some other persons who bear the positive duties to protect and if necessary, fulfill the rights. But those “other persons” certainly need not be all other persons. It is not even clear what it could mean in operational terms for every person to be carrying out duties toward every other person—this would not even be physically possible in a world of six billion people. If, for example, every child’s dignity demands that he not be left hungry and naked, there must be for every child, one or more persons bound to step in as long as the child is helpless. But it might be that for every child with living parents, the relevant other persons are in the first instance at least, its own parents. This is simply a division of labor in the moral realm—a division of moral labor. No child is less worthy of food and shelter than any other child—all have an equal claim. But not all are specifically your responsibility. So even with a universality of rights there is—indeed, there really must be—some division of responsibility. Naturally, one crucial question is: upon whom does responsibility fall when those with the primary responsibility fail? But whatever the correct answer is, an important matter that we cannot pursue here, it is not: everyone else. Some specific assignment must also be made of default, or back-up responsibilities.

Given that a division of moral labor is unavoidable, it is not at all surprising that the division that arises often takes the form: “we will look after ours, and you look after yours.” And, to emphasize, for me to believe, for example, that I ought to feed and clothe my child but not yours, because you ought to do the same for yours, in no way whatsoever commits me to believing that my child is of greater worth, or has more rights, than yours. In general, a division of responsibility does not presuppose a hierarchy of value (Miller 2001; Scheffler 2001; Green 2002; Caney 2005).

When one turns to specifics, matters again become richly complex. One might expect that in war, the ultimate recourse on behalf of the national interest of sovereign states, and perhaps in security policy generally, the commitment to universal human equality would play little to no role. Yet the persons on the other side count, and sometimes count fully, in perhaps surprisingly many respects—at least four: in the firm requirement that only those who have committed a wrong may be attacked, in the requirement that military force must prevent more harm than it

causes for all concerned, in the strict equality of non-combatants, and in the strict equality of combatants.

First, although the decision to go to war is ordinarily made only if doing so appears to be in the national interest, it is not sufficient justification that war would be in the interest of the nation that initiates the use of force. It is a legal as well as a moral requirement that the adversary targeted must have acted wrongly; more specifically, must have committed aggression or otherwise be, in the judgement of the UN Security Council, an active threat to international peace (Roberts and Guelff 2000). The simple fact that, if one attacked and defeated a rival, one would be much better off than otherwise is not a good enough reason for launching a war. This clearly presupposes that the interests of the people in the adversary nation, and of other people who would be affected by the war, are being given at least some weight. Otherwise, if war were strongly in the interests of one's own people, and only their interests counted, one could simply go ahead and start the war.

Second, the kind of proportionality that must, again both legally and morally, be considered as part of any justified resort to the use of force internationally similarly includes the interests, or welfare, of everyone affected (Henckaerts and Doswald-Beck 2005). "Proportionality" is used equivocally in norms concerning war (Shue 2003). What has been called "micro-proportionality," and might equally well be termed intra-war proportionality, applies to the conduct of war (in medieval terms, *jus in bello*). Since the applications of this version of proportionality are made when the war is already under way and each side is attempting to defeat, if not destroy, the forces of the other, it would be ridiculous to suggest that each side should give weight to the interests of the other. By contrast, what has been called "macro-proportionality," and could be termed pre-war proportionality, is the norm applicable to the decision whether to resort to war (*jus ad bellum*). This proportionality norm is highly universalistic and takes into account all interests affected, including the interests of people of neutral nations, the interests of at least the non-combatants in the potential adversary (and possibly the potential combatants even), the interests of allies, and the interests of all people who would be affected by the precedents set regarding acceptable grounds for the resort to war and by the effects of the war on the international system (e.g. encouragement of appeasement or deterrence of aggression). Resort to war is justified only if, all these things considered, it would be a proportional act (bearing in mind the kinds of military actions that would be permitted on both sides by intra-war proportionality, which is justifiably not universalistic in its counting of interests). I believe, although space to go into it is not available here, that these two points are closely related. One reason why only an adversary which has acted wrongly—usually, committed aggression—may have force used against it is that pre-war proportionality can be satisfied only if the war serves an end like the deterrence of aggression and/or the entrenchment of the norm against aggression in addition to any national interests it may advance. These considerations centrally ground the unacceptability of preventive war (Crawford 2003; Luban 2004).

Both of these first two points indicate that interests of outsiders are to be given significant weight, but not necessarily equal weight with interests of insiders. Even more surprisingly, there are two more points in the ethics of war where equal weight is given to one's own people and the adversary's people. The first of these, and the third point overall about war, is equality of consideration of non-combatants. Non-combatants retain all pre-war—that is, general human—rights. They are, therefore, like all persons immune to violent assault; the immunity of non-combatants is the fundamental principle for the conduct of war. And although less thoughtful commentators sometimes fall into inappropriate terminology like “enemy non-combatants,” a non-combatant is simply a non-combatant, reflecting what is in principle at least an extraordinary commitment to equality.

The complementary form of equality, and fourth point about war, is the odd but real form of equality of combatants. In one respect obviously the combatants on the two sides could not have more unequal status: the combatants on this side are allowed to try to kill the combatants on the other side. But of course the combatants on the other side are allowed to try to kill the combatants on this side. In vulnerability to attack combatants on both sides are equal. This equality in the conduct of war is extraordinary in light of the fact that the resort to war can be justified only if one side is taken to be so seriously in the wrong that the other side is right to use military force against them. How can the combatants on two sides taken to be so unequal in justification—one in the wrong, one in the right—have such equal entitlements in the conduct of the conflict? Some moralists find this troubling: surely, they argue, those fighting for the unjust cause should not be allowed to kill those fighting for the just cause (McMahan 2004). Although I think this is rather like asking, “why do guilty defendants receive the same procedural rights as innocent defendants?” in that at the relevant time no one is in an authoritative position to do the moral sorting, what is important for present purposes is that in international law and in the generally accepted understanding of the ethics of war, the interests of people on both sides are counted to some degree in all four of the ways listed above, and counted equally in at least the last two ways (Walzer 2000).

Now, one might reasonably contend that since the one kind of duties that are literally universal are negative duties, supreme among which is the duty not to harm, and since war is the supreme institution for the infliction of harm, it is not surprising that war is hedged about with some strong negative duties—most obviously perhaps, the prohibition against (intentionally) harming non-combatants. The positive weight given to the interests of outsiders prior to the resort to war is, equally unsurprisingly, not equal. It is often assumed that since economic policies are, broadly speaking, intended positively to benefit the interests of insiders, or constituents, national economic policies are free to consider only the interests of insiders. Let us now as usual look a little more concretely at specific illustrative policy areas.

3. WHO'S IN? WHO'S OUT? ACROSS SPACE: INEQUALITY OF BENEFIT

The presupposition that inflicting harm is so sharply and significantly distinguishable from refraining from providing benefit that the two can be governed by radically different principles—namely the infliction of harm is universally prohibited in a manner that treats all humans equally, while the provision of benefit may be selectively focused on “one’s own”—is a major ethical assumption with powerful implications that is regularly adopted, rarely defended, and usually not even made explicit. A failure to provide a benefit can have exactly the same results as the infliction of a harm. Yet policy analysts, whose calculations otherwise simply measure results by whatever process the results are arrived at, here use a difference in process—this difference between harming and not helping—to draw a radical distinction between what counts regarding outsiders (only harm) and what counts regarding insiders (net benefit). Whether this rigid distinction between what counts for outsiders and insiders is arbitrary is a more foundational ethical issue, however, than we can take up here, beyond noting its importance, which will in the following simply be assumed.

So it is typically assumed that domestic economic policies may properly focus on promoting the welfare of domestic constituents exclusively. Policy A, which greatly promotes the welfare of insiders, may be preferred to policy B, which still promotes the welfare of insiders but not quite as much as policy A does while greatly benefiting outsiders. Policy A may be preferred to policy B in spite of the fact that the overall human benefits of policy B would be much greater. The possible benefits to outsiders of policy B may thus be discounted totally—ignored. In some cases this may again be a kind of division of labor—a division concerning the objects of responsibility—that is unobjectionable. If the widely shared political convention is that each government will promote the economic interests of only its own people, one government’s efforts might be thrown into disarray if some other government arbitrarily adopted policies also intended to benefit the first government’s constituents. Of course, instead of one government’s unexpectedly launching attempts to benefit other governments’ constituents, explicit agreements on shared policies can be made among governments in cases where the cooperative policies would be more beneficial to each state considered separately than any uncoordinated efforts at mutual benefit would be likely to be. Presumably this is the underlying idea of a regime like the WTO: wide agreements in a broad range of areas will enable each state to do better than it could do if each pursued the interests of its own constituents in uncoordinated and unrestrained ways. Some shared constraints are thought to be generally and over the long run beneficial to all.

The underlying ethical commitment of each state, however, is still taken to be to its own constituents. Neither the WTO nor other economic regimes represent commitments by every nation to promote the welfare of humanity generally; they simply reflect the judgements that cooperative and coordinated policies subject to