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The Policy Maker: On Ethics and Public Policy

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The Policy Maker On *Ethics and Public Policy*

Elvio Baccharini

According to one of the interpretations of *The Prince*, Machiavelli's intention was to write a handbook for the statesman, to teach him how to realize the duties of his political role. An analogous intention may be read in Jonathan Wolff's book *Ethics and Public Policy. A Philosophical Inquiry*. The book, among else, appears as an excellent handbook for moral and political philosophers interested in participating to the creation of public policy. So, what would be wise to do for a political and moral philosopher (in the following part of the text referred to as 'the philosopher') who wants to participate in public policy making?

Wolff's book is rich of insights, sophisticated arguments and enlightening examples. I focus on only some of them. I take for granted that the reader of this article is familiar with Wolff's book, and, therefore, I reduce the descriptive part to the minimum.

I

Pluralism and Principles

I agree with Wolff's thesis that the dedication to too abstract and idealized theories, as well as to the research of the true theory, is not a suitable path for the solution of issues in public policy. I appreciate the intention to make the creation of public

policy a process hospitable for a wide range of different views, as well as Wolff's recommendation of the attitude to compromise and half-meeting. Such goals generally deserve approval.

My question is whether Wolff's recommendations concede too much in the approach to compromise and half-meeting. The risk of such generally laudable goals is to transform the philosopher into a neutral figure and a mediator. On the contrary, he or she can legitimately appeal to and defend a conception of justice in debates on public policy.

This is very important in cases when views and practices that contradict equality or basic liberties and rights are involved in the debate. In such cases to carve the edges of the normative requirements is not sufficient and the wish to look for hospitality for various views has dangerous consequence. Let's think about a case that took place in Seattle. I found the case described by Jacob Levy¹. Communities that immigrated there practice infibulations, which, as we all know, is an extremely cruel ritual. "Those who do not die of blood loss or infection face a life of great pain during sexual intercourse and great danger during childbirth".² As Levy indicates, there was a debate among the committee of the Medical Center and representatives of the community in order to look for a compromise. A base of compromise was found, because at least some representatives of the communities agreed that sunna circumcision (judged by medical experts as analogous to male circumcision) in appropriate hygienic conditions would be sufficient to meet the cultural and religious requirements met by infibulations. The sense was to have a symbolic representation of male supremacy. The policy was not endorsed, and the reason is that there was opposition to

¹ Jacob Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000).

² *Ibid.*, 54.

endorsing a policy that accepts a manifestation of gender discrimination. It seems to me that the refusal of the policy was a case of cruelty, and that the decision was catastrophically wrong. The girls were sent to the countries of their origin with tragic results.

Based on my reading of *Ethics and Public Policy* I believe that Wolff would support the (unrealized) Seattle compromise. This compromise is a case of reasonable policy.

But in my view it is important to remark that the philosopher has to accept this compromise only as a tactical and temporary allowance from justice,³ and he or she, even in bodies that debate on public policy, has to be not acquiescent with views that affirm inequality as a matter of justice. The leading inspiring intention must not be that “people can get much of what they want without taking too much away from others”.⁴ The leading intention must be to protect the discriminated as much as possible, and, therefore, that the repressive groups receive the less possible of what they want.

The problem is how the philosopher can support this intention. I agree with Wolff that to put forward a full moral theory (what Rawls calls comprehensive doctrine) proclaiming it as the true theory is not a good way. Such structures are complicated and very sophisticated and probably not accessible to the wider public, like in the case of economic theories or theories in natural sciences. Philosophers who rely on comprehensive doctrines in a public debate will almost certainly be ignored immediately after they have spoken, or even while they are

³ Even a very firm defender of egalitarian liberalism like Brian Barry is ready for such concessions. See Brian Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism* (Oxford: Oxford University Press, 2000), 19-54.

⁴ Jonathan Wolff, *Ethics and Public Policy. A Philosophical Inquiry* (London: Routledge, 2011), 203.

speaking. This practical problem is relevant, but I indicate another problem, as well. Even if, in some way, one succeeds in passing the law that follows from his or her theory (perhaps, in virtue of some contingent political alliance), the decision is not legitimate. I say this in virtue of the liberal principle of legitimacy. John Rawls's formulation of it is the most relevant. He says: "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."⁵ Contrary to Rawls and in agreement with some public reason philosophers, I think that the public reason requirement, properly reformulated, applies to all decisions on public laws and policy and not to constitutional essentials only. To be sure, the principle does not look for the endorsement of all actual people in actual societies, but looks for a level of idealization. The endorsement of only reasonable citizens is all that is required. Such are citizens that appeal to the basic principles of the family of eligible conceptions of justice: (a) certain basic rights, liberties and opportunities; (b) the assignment of special priority to them; (c) measures to ensure to all citizens the use thereof.⁶ They appeal to other principles, values and ideals that citizens who view each other as free and equal can endorse, as well.

In brief, I totally agree with Wolff's recommendation to abstain to appeal to the 'true moral theory' in public policy engagement. But I rely on an alternative possibility of philosophical background that Wolff does not defeat in his book, at least not explicitly. This is Rawlsian political liberalism that,

⁵ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993/2005), 137.

⁶ *Ibid.*, 6.

although it recommends not to appeal to comprehensive moral doctrines and to moral truth in public policy debates, it requires the philosopher not to renounce to the reasonable conception of justice. According to political liberalism, it is important to translate comprehensive doctrines in the form of public values, i.e. values that we can bona fide expect to be accessible to reasonable fellow citizens that see each other as free and equal and that they can reasonably endorse. In practice Wolff's and the political liberal's recommendations may converge frequently, as is visible, for example, in the chapter on scientific experiments on animals. There he indicates that the very general methodologies, i.e. those that, inside a comprehensive doctrine, look for a master-feature that gives credentials for entering in the realm of beings with moral status, have proved unsuccessful. Wolff proposes a more nuanced methodology, one that consists in relying on features that we take as morally relevant, and making proper use of them. For example, because of the fact that we take pain as morally relevant, we have to attribute proper moral consideration to animals that feel pain, and, consequently, to protect them from pain.⁷ But, importantly, the philosopher who is a political liberal defends, among else, his or her position by remarking the supreme relevance of principles that protect equality and basic rights and liberties. We can carve them on the edges and regulate them, but not neglect them, and only in extreme cases and in temporary limits they can be overridden at their core meaning. For the political liberal it is important to be engaged to obtain that everybody "can get much of what they want without taking too much away from others,"⁸ but only as far as the view of each citizen as free and equal is not threatened. When there is collision, principles that protect freedom and equality must be privileged over intersubjective agreement. My question is whether this is

⁷ Wolff, *Ethics and Public Policy*, 11-36.

⁸ *Ibid.*, 203.

acceptable for Wolff. There is indication that it is,⁹ but I think that the question is legitimate, because Wolff's discussions where he gives detailed explanation of his view regard cases when only edges, and not the core of liberty and equality principles, are threatened, and I have doubts about what his position would be when the core would be menaced. My doubts also regard the reasons that for Wolff permit changes that are highly contentious or unpopular, and have no consensus behind them.

In any event, it seems to me that having a strong commitment for the protection of equality and basic rights and liberties is a virtue of political liberalism.

Wolff can object, here, by relying on the experience about public decisions that regard the regulation of gambling, where it appears that an irremovable appeal to liberty principles is not recommendable, because the commitment of the wider audience to them is not firm as it is among many philosophers. Most people appear ready to take distance from liberty principles when the regulation of gambling is at stake. But political liberalism does not suggest the rigid top down appeal to principles. It is related to the Rawlsian method of reflective equilibrium that gives the optimal resource to philosophers in their engagement in the public decision making process.¹⁰ Reflective equilibrium recommends considering adjusting principles in relation to widely

⁹ "This is not to say that radical, discontinuous, change is impossible. Slavery was abolished. Neither must there always be a consensus behind the change. Often change is highly contentious or unpopular" (35).

¹⁰ In my opinion, the final, applicative, chapter of Mill's *On Liberty* is an exercise of reflective equilibrium, with the intention to develop understanding of his liberty principle. Unfortunately, I am not able to argue for this, here.

shared beliefs. At the same time, it does not recommend to surrender to such beliefs.¹¹

To put it with Wolff's example of gambling, the mere fact that most people are ready to accept restrictions to gambling is not a decisive reason for the liberal philosopher to renounce to the firm appeal to a liberty principle in such a case. But reflective equilibrium suggests that wide and strong rejection is a reason for the philosopher to re-think about the principles that he or she endorses. For example, in front of wide and strong rejection of unlimited access to gambling, or of the decriminalization of drugs, the philosopher must reason about whether they really represent central cases covered by liberty principles. There is no guarantee that strict formulations of liberty principles win against limitations. But the reason is that we are not always dealing with instances of protection of the core meaning of liberty principles (it is difficult to imagine that, in ordinary situations, for someone gambling and consuming drugs are linked to a conception of good life or living in accordance to conscience, some of the core rationales for liberty principles). When this is the case, the wise application of the method of reflective equilibrium requires adjustment on the edges. But sometimes there may be an abuse over someone's conception of good life, or conscience (for example, in the case when consuming drugs is related to religious rituals), and in such circumstances the philosopher is right in insisting against the limitations, even if this means that he or she is not taken with consideration in a stage of the debate. It is important to defend principles, when they are concerned with basic rights and liberties. In practice there can be frequent convergence with what Wolff recommends, precisely in all cases when the core meaning of basic rights and liberties is not

¹¹ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971/1999), 18-19, 42-45.

threatened, and most probably, this is the case in the issue that Wolff debates, i.e. gambling. But the adjustments that, by relying on Rawls's political liberalism, I recommend are limited to cases of nested inconclusiveness. Such are situations where competing conclusions can be reasonably justified on the base of the same principle, and the principle is conclusively justified.¹² In other words, such are cases where there is reasonable pluralism about the understanding of the principle, but not about the principle itself. For political liberalism, the re-thinking of the principle is generally fruitful only in the limits of nested inconclusiveness. If a law or public policy is opposed to all reasonable interpretations of a principle that protects a basic liberty or right, then it requires full opposition. As I said above, I see this as a virtue of political liberalism.

The reason of my uncertainty about whether Wolff is committed to the protection of equality and basic rights and liberties with the same strength of political liberalism is that his detailed discussions are limited to cases of nested inconclusiveness of reasonable understanding of principles.¹³ My question is what his attitude is in relation to the protection of the core meaning of liberty and equality principles and (if he is ready to accept it) which kind of compromise he would be ready to accept as far as the core meanings of these principles are concerned.

¹² Gerald Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996), 157-158, 180-182.

¹³ Specifically, of Mill's liberty principle, where Mill himself is aware of the fact that the core of the liberty principle is probably not sacrificed by some restrictions.

II

Consistency and the Advantage of the *Status Quo*

Wolff indicates the issue of the legal status of consuming drugs as a case where it appears that a KO resource in philosophical discussions is not so conclusively powerful in public policy disputes. This is the appeal to (in)consistency. As Wolff indicates, one of the favourite philosophical moves appears not to be efficacious in such debate. Usually, the philosopher investigates whether there are relevant differences between consuming alcohol and consuming drugs, and requires an identical regulation if there are not. Wolff says that this is not sufficient in public policy controversies. The basic reason is that, contrary to what happens in philosophical debates, the question, here, is not what is just at an abstract level, but what we must do, starting from where we are: what would result from de-penalizing the use of drugs in our actual situation?

In my opinion, it is not so clear that the appeal to inconsistency is so weak an argument as Wolff wants to show. Precisely, I am not sure that Wolff has really offered a counter-example to the strength of the appeal to inconsistency in public policy debates. Consistency, here, corresponds to a valid application of the principle of universalizability. To put it simply, the principle requires that if we make a normative decision (express a judgment) on the base of a (set of) feature(s), we must make the same decision when the same relevant features are present (and there are no defeaters of them). So, in order to offer a counter-example to the relevance of consistency, Wolff has to show that we can plausibly expect that the alcohol and the drug case do not merit the same reaction, even if they are equivalent in the (set of) reason(s) we have found as relevant.

It does not seem to me that Wolff really indicates examples where the use of drugs has legitimately a different treatment from

the use of alcohol, while the two cases are truly equivalent. A point that Wolff expresses is crucial. When we judge about this, as well as in other issues, it is important to debate the issue not in abstract, but by focusing on the contextual elements. Exactly as Wolff says, the question is not simply whether we have good reasons to criminalize drugs, but whether we have good reasons to modify the actual legislation, when drugs are already criminalized. What would the decriminalization of drugs imply? It may happen, for example, that it implies the overall increase of criminality. This is a reason to avoid the decriminalization of drugs. What would the criminalization of alcohol imply? Perhaps, again, a catastrophic increase of criminality (as, in fact, happened in the age of prohibitionism). But these reasons differentiate substantially the case of drugs from the case of alcohol. There is no inconsistency between forbidding one of them, and not criminalizing the other one, or leaving the latter legal, while leaving the former criminalized. We cannot universalize from one case to the other, because there are relevant features they do not share.

An inconsistency might appear, nonetheless, in the treatment of people. The worry is that by criminalizing consuming drugs, we stigmatize the behaviour and the person in relation to drugs, while we do not do this in relation to alcohol, although they are equivalent in the relevant intrinsic moral features. Still, the inconsistency of criminalization is not proved. It is important to remember that consuming drugs is penalized not for its intrinsic features, but for its external contingent features. But the reference to stigmatization extends the discussion and opens a new question, where claims of consistency can reappear with authority. Perhaps, we are speaking of a case when criminal sanctions and stigmatization do not come together.

To be sure, if we stop speaking *ex hypothesis* and look at the drugs case concretely, we see that the possible bad consequences of the decriminalization of drugs are still unproved. Now, for Wolff it seems that the possibility is sufficient for not realizing decriminalization. There is an advantage for the status quo, and until reasonable doubts are removed the new policy must not be introduced. But is there really an advantage for the status quo in general? This is disputable.

Probably, it is reasonable to argue for the advantage of the status quo in the case of recreative drugs. The consequences of decriminalization can possibly be deleterious, while recreative drugs are not a central component of conceptions of the good life and of living in accordance to conscience for people. Not so clearly reasonable in the case of medical use, like the medical use of cannabis. Although perhaps there is still no clear evidence that it really helps, many people strongly believe that it does. Forbidding the use appears as an interference into a domain that is rather embarrassing to control by state interference, i.e. the domain of people's decisions in central matters of their health. This appears as a central domain of decisions in people's life where the person involved has a strong presumption of the right to have the last say. The point is, perhaps, even stronger in the case of ritual religious use of drugs.¹⁴

Another example where, in my opinion, there is no advantage for the status quo is mentioned by Wolff in his book: the decriminalization of homosexuality. I add a further example, the use of assisted procreative techniques, opposed by many in the past. In such cases, there are clear discriminations of some people in some central aspects of their lives. In the former case, the right

¹⁴ Cfr. Samuel Freeman, "Liberalism and the Accommodation of Group Claims," in P. Kelly (ed.) *Multiculturalism Reconsidered*, (Cambridge: Polity Press, 2002), 24.

to have a full realization of emotional life, something that is taken for granted for heterosexual people. In the latter case, the right to have genetically related children (for at least one member of the couple). Again, this is something taken for granted for most people. Here we have clear evidence of the damage of the status quo. In both cases, central aspects of life aspirations and of components of part of what many people take as a full life realization, taken for granted for many people, are denied to other people.

A further case might be represented by enhancement policies. Some people strongly oppose them in virtue of precaution that regards innovations. But perhaps we urgently need enhancement (for example, cognitive enhancement) for finding solutions for many bad things that happen to humans in virtue of their fragility: threats to health, disease, natural catastrophes, etc.¹⁵

The clearest cases, however, are cases of discrimination. “Justice too long delayed is justice denied,” said M.L. King.¹⁶ King’s thought is fully proper for the decriminalization of homosexuality, as well as for assisted procreation if delayed long time after the technique became available. On one side, we have clear cases of discrimination,¹⁷ on the other side only conjectures

¹⁵ John Harris, “Moral Enhancement and Freedom,” *Bioethics* 25 (2011): 102-111. I find reasonable supporting the advantage of status quo in some of the cases remarked by Persson and Savulescu, precisely cases when we can lose a lot, for a possible marginal advantage, even when the probability of the former is much smaller than the probability of the latter. Ingmar Persson and Julian Savulescu, *Unfit for the Future. The Need for Moral Enhancement* (Oxford: Oxford University Press, 2012).

¹⁶ Martin L. King, “A Letter from Birmingham Jail,” in *Civil Disobedience in Focus*, ed. Hugo A. Bedau (London: Routledge, 1991), 72.

¹⁷ I take the right to assisted procreation, here, as a negative right, and I accept as a reasonable question whether, in the world of scarcity where we live it is a positive right, as well. Cfr. Colin Farrelly, *Justice, Democracy and Reasonable Agreement* (Basingstoke: Palgrave MacMillan, 2007).

about possible future harms. Why is the status quo to be privileged? It seems to me that here we have a case of unreasonable attitude adverse to risk. The devil that we know is not always the better.

Now, there is certainly a sense in which the social condition must mature in order to implement rights in these, as well as in other fields. As a matter of fact, in democracies, typically, a right can be implemented only when a sufficient part of the demos is ready to accept it. So, Wolff is right that the decriminalization of homosexuality was available, as a matter of fact, only when there was a sufficiently numerous part of the demos around the idea that the state must not interfere in the moral life of people. What was required was, at least, a division in the demos. But this is no reason for the philosopher not to fully and uncompromisingly oppose criminalization even before the society is ready to accept it, and to do this not only in his or her separate, future oriented activities, but in his or her engagement with actual public policy, as well.

Does this imply the risk for the philosopher to be ignored, or marginalized in the creation of public policy, and that the debate will continue without him or her? Perhaps this can happen in specific committees, councils, etc., where he or she risks finding the incredulity, scepticism, interest-based rejection, or even the sense of moral disgust of the interlocutors. But taking part in such bodies is not the only form of engagement with public policy. The philosopher can, for example, try to find an institutional alliance in the Supreme Court, as the moral/political philosophical dream team has tried to do in relation to the right

to physician-assisted suicide.¹⁸ Their attempt has failed, but they have indicated an important possible path.

Another one is participation in activities of civil disobedience. This practice can be very important for the vitality of democracies, sometimes even crucial, as Daniel Markovits shows from a republican point of view.¹⁹ Here, there is an ample space for philosophers to influence policy making in the immediate and actual, even when the views that they defend are more enlightened than the common sense of the age, and, for this reason, they would be marginalized in the mainstream institutions.²⁰

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¹⁸ Ronald Dworkin et al., “The Philosophers’ Brief,” ed. Margaret P. Battin et al. (London: Routledge, 1998), 431-442. I borrow the use of the expression ‘dream team’ in this context from Zarko Puhovski.

¹⁹ Daniel Markovits, “Democratic Disobedience,” *Yale Law Journal* 114 (2005): 1897-1952.

²⁰ Many thanks for the precious comments on an early version of the paper to the participants in the symposium dedicated to this book in Belgrade, in March 2013. In particular, I have great debts with Jonathan Wolff for his patient and useful replies. My colleagues, students and friends at the Department of Philosophy in Rijeka discussed a draft of the paper in August 2014. The comments helped me to work on its improvement. Thanks to Riccardo Mangano for language editing.

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