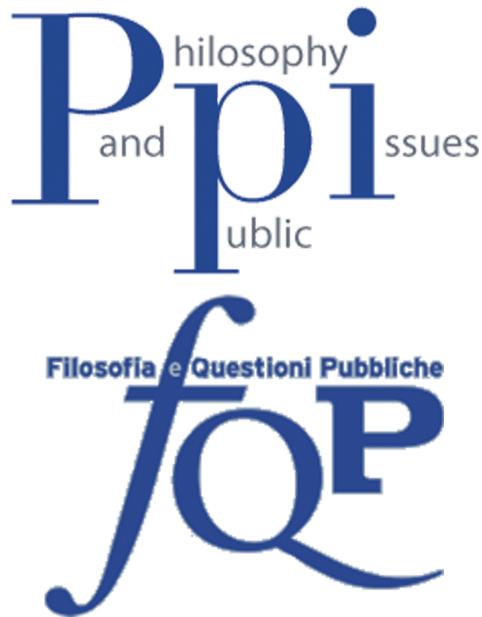


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Ethics and Public Policy. Response to Baccharini,
Kulenovic, Lang, Lever, Peter, and Smith

BY

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Ethics and Public Policy
**Response to Baccharini, Kulenovic, Lang,
Lever, Peter, and Smith**

Jonathan Wolff

It is an extraordinary privilege to have the opportunity to respond to such a powerful array of responses to my book *Ethics and Public Policy* as faces me here. I'm honoured that the editors of this journal were prepared to devote so much space to this exchange, and to the contributors to spending such time and care in preparing their papers.

I

Understandably many of the contributions concentrate primarily on methodological issues concerning the relation between political philosophy and public policy. They raise questions about what I say I am doing in the book, what I really am doing, and what, perhaps, I ought to have been doing or should do in future work. Let me start with Enes Kulenovic's extremely helpful classification of six different models of the relation between political philosophy and public policy. First, there is the Syracuse model, with Leo Strauss as an exemplar, which 'wants public policy to be directed by a philosophical principle', on the grounds that the political philosopher has access to the truth. Second, the Rawlsian model, inspired by Rawls' later work, identifies the basic values that a society identifies with, drawing primarily on arguments that are acceptable in public debate. The third model is called the 'value-pluralist' model,

inspired by Isaiah Berlin, and recommends the strong advocacy of one's own position while at the same time recognising that other positions, which tragically will have to be excluded, may also have validity. The fourth model, the proceduarlist, is Stuart Hampshire's extension of Berlin, which advocates procedures to deal with value pluralism, in which all views are given a hearing. Next we come to the 'Wizard-of-Oz' model, where the philosopher reveals, and critiques, the assumptions hidden behind the curtain of ordinary debate. And then, finally, we have the bullshit model, in which the philosopher acknowledges that there are no decisive considerations, but acts as a 'gun-for-hire' in public debate.

Reading through the paper my anxiety was how I was going to be classified. With the exception of the two extreme cases, I saw elements of each of these models in my thinking, which is exactly what Kulenovic concludes. Does this show fatal equivocation on my part? Kulenovic is kind enough to suggest not, and that the different models can work together. I would also suggest that there may also be variation by problem. In some cases, for example, it may be essential that all views get a hearing, when fundamental questions of life and death are involved. In others, where decisions have to be made urgently but the issues are less serious, then arguably less elaborate procedures would be appropriate. But generally the message is that you have to take cases as you find them. If you set out deciding that in every case there is unmasking to be done, then your approach will come over as forced and dogmatic. But if you never consider whether it is time for a bit of unmasking then you risk naivety. Different cases may need different approaches, and you will not generally know in advance.

II

Steven Smith also concentrates on methodological questions, in effect constructing my ‘missing chapter’ on methodology, drawing out four ‘rules’ from my scattered comments. But I have to confess that I break out into a cold sweat when particular rules or principles are attributed to me. For I doubt that there are rules, in the sense of firm guides that must be followed, in moral and political philosophy. I have long been sympathetic at least to the title of Feyerabend’s book *Against Method*. Unlike, for example, in accounting practices, or routine engineering, we are on very uncertain terrain in applied moral and political philosophy and have to make up the rules as we go. At best there are helpful starting points.

The rules attributed by Smith to me are:

- 1) The anti-abstraction rule.
- 2) The full description of policy/public debate uncovering moral dilemmas rule.
- 3) The full description of empirical realities ensuring accurate interpretation rule.
- 4) The over-arching applied philosophical analysis rule.

The first states that ethical principles should not be articulated before considering the specific policy issues at stake. The second and third are perhaps self-explanatory, ruling that full descriptions of both the ethical dilemmas and the empirical realities are needed. And the fourth states that rules 1-3 have to be followed before philosophical analysis can usefully be applied.

Do I accept the these rules? Regarding numbers 2 and 3 I recall Nancy Cartwright once observing in a fraught committee meeting that ‘full discussion’ is a ‘bogus concept’, and the claim that ‘we shouldn’t make a decision until we have had a full

discussion' is generally merely a delaying move. But if we replace 'full' with 'extensive' I have no quarrel with these two rules. What do I think about (1) and (4)? I can understand why I can be read as endorsing these rules, but I can also see why they are problematic. First, it is hard to see how we can articulate the dilemmas of public policy without using normative language, which may well include ethical principles. Hence rule 2 seems to assume the denial of rule 1. And, more subtly, if we accept, as I do, that observations are very often theory laden, then rule 3 also pre-supposes rule 1, in that descriptions of reality very often are as they are because of an individual's value commitment. Accordingly rule 4 is also false.

Reflecting on my position from this vantage point, I would want to replace rules 1 and 4 with warnings that although abstract principles can be appealed to at any point in the discussion, doing so is very likely to lead to problematic policy recommendations (empty, or out of date, or counter-productive) unless there has been extensive engagement with the policy dilemmas, empirical conditions, and history of the area under discussion.

Smith argues for what I think is a similar conclusion by a more substantial route. He very clearly sets out three approaches to value-pluralism: incommensurability, intuitionism (allowing trade-offs on the model of indifference curves) and lexical priority, and carefully explains how these different meta-ethical approaches will construct policy dilemmas in different ways. Hence, he argues for a symbiotic relationship between abstract philosophical reflection and empirical investigation. I think that this must be right. The last thing I would want to do is replace one one-sided model with its mirror image. Nevertheless, there is still to me something right in the idea that we should start with problems in need of solutions, rather than theories in need of problems to solve.

III

Annabelle Lever is also concerned with methodological issues, and after a very generous and insightful discussion of the main themes of the book—a discussion that in many ways improves on what I say myself and links it to some of my other work—gently accuses me of not pushing the methodology as far as I should. Specifically, she points out, I pay very little attention to issues of power, voice, and implementation of policy, and also to issues of standards of evidence. I am not going to try to defend myself against these points as they are very fair and important criticisms. These are significant gaps in the book, and they do need to be addressed. Lever hopes for a sequel in which I pay attention to the very difficult issues that take place ‘before the philosopher enters the room’: questions of who is asked for their input, what they are told about their role, why they are selected, and what is going to count as the evidence they are to assess and use to inform their recommendation. It is a reasonable request but a daunting task, going beyond philosophy and public policy to the sociology and politics of knowledge and power. Just to take one prominent example, drug regulation policy in the UK has been surprisingly resistant to evidence about the harms of drugs both relative to other drugs and relative to the other risks of life (alcohol, and, notoriously, horse riding). How to make progress in a policy area which is explicitly set up to receive, review and take account of scientific evidence but then routinely ignores it, requires a depth of understanding of politics, sociology and the media. Writing on these topics will be a challenge for me and in the spirit of co-operation my own hope is that someone else—perhaps Annabelle Lever herself?—writes the missing sequel before I have a chance.

IV

Fabienne Peter, again after providing a generous and insightful account of the main themes of the book focuses on the question ‘why does agreement matter?’, especially from the point of view of political legitimacy. Peter asks

How can we make sense of the idea that agreement about a moral judgement matters more than the truth of that judgement in the sense that agreement is both necessary and sufficient to legitimise basing a policy choice on that judgement?

However, when stated in such terms, I wonder whether anyone really does hold the stated position that agreement is necessary and sufficient for legitimising a policy choice. This is one of many areas where, while the concepts of necessity and sufficiency are indispensable for clear thinking, they come to be something of a straitjacket when it comes to setting out positions to be defended. Agreement, surely, cannot be necessary for legitimacy, as a single hold-out would render a policy illegitimate. But actually what Peter means by agreement includes democratic procedures in which minorities can be outvoted, and her point is to distinguish procedural, agreement based approaches from ‘truth-based’ approaches to decision making, correctly noticing that for me agreement is more important than truth. Is agreement (unanimous or democratic majority) sufficient for legitimacy? Yes, if it is well-informed and non-coerced, and perhaps meets some other conditions. But then that is a way of saying it is isn’t sufficient after all. Or to put it closer to Peter’s own terms, we must distinguish a descriptive and a normative sense of legitimacy. Even if, descriptively, everyone does in fact agree, still from a normative point of view something may nevertheless have gone wrong. On this view, the connection between agreement and normative legitimacy must be looser than the quoted position assumes. I think I would be prepared to

endorse the view that the greater the agreement the greater the probability that the outcome will be legitimate, but even the limit case of full agreement is not enough to guarantee legitimacy, if, for example, there are adaptive preferences to oppressive policies.

I'm not, though, completely sure that the concept of legitimacy is as key to my thinking as Peter would like it to be. I deliberately avoided engaging in the high political philosophy of legitimacy as developed by Larmore, Gaus and Peter herself. I'm largely concerned about a more prosaic question that has taken something of a backseat in philosophy. I'm interested in what are now often called 'second-round' effects. How can we best ensure that any changes we introduce will be accepted and followed, rather than being seen as obstacles to be ignored or worked round, which, given infinite human ingenuity, will happen if the changes are not accepted? To take a very topical example, I was on a committee that recommended that the number of 'fixed odds betting terminals' per bookmaker outlet in the UK would be limited to a certain number. We also, for other reasons, recommended the relaxation of some planning and zoning restrictions. We did not, however, consider it a serious possibility that these particular betting terminals would be so profitable that it would be worthwhile for the same company to open more than one bookmaking outlet on the same street in order to have more terminals, and that the changes in zoning, for the first time, would make this possible. As a result of bookmakers working out how to 'get round' regulations they clearly did not agree with, the number of bookmaker outlets in the UK has risen, against our intentions, at least in prominent locations, to great public disquiet.

Clearly there are connections between legitimacy and the 'bindingness' of laws and regulations, although there will be many factors that determine whether such laws will tend to have

unwelcome unintended consequences. Of course I am interested in the normative questions of legitimacy that Peter raises, and discusses with insight and originality, but not to the exclusion of the descriptive questions of how regulations and policies will actually be received. Achieving normative legitimacy will be little consolation if new policies badly backfire because they have not achieved the approval in practice of enough of those who have to follow, implement, or enforce them.

V

Elvio Baccarini raises a number of important questions, but here I will focus on just one: his worry that the methodology of seeking compromise as a way out of disagreement concedes too much to obnoxious moral positions. He discusses the example of ‘infibulations’, also known as genital cutting, focusing on a case in Seattle described by Jacob Levy in which a hospital offered to substitute a much less intrusive, safe and largely symbolic version of the operation in hygienic conditions in place of the dangerous and brutal versions of the operation that were currently taking place. This compromise, however, was refused on the grounds that it was wrong to collude with policies of gender discrimination. As a result young girls were sent back to have the operations in their countries of descent, with ‘tragic results’.

Baccarini is right that, on the basis of the limited information given in his description, and the small amount of other material on the topic I have read, I would be inclined to support the hospital policy, in the hope it will prevent much worse practices, although I would want to look at a wider range of views and concerns before making a final recommendation. But nevertheless, so far, as I take it, we agree. But Baccarini believes we differ in that, given that genital cutting, however minor and

symbolic, is an exercise in male supremacy, any compromise should be regarded as a ‘tactical and temporary allowance from justice’, for, as I read his argument, Baccarini regards the practice of genital cutting as an expression of an ‘unreasonable’ conception of the good in Rawls’s sense, offending against freedom and equality. I certainly agree with Baccarini that there can be policy proposals that so offend against freedom and equality that they should not be tolerated, even in a tactical sense. For example, consider a religion that decided that all first born children should be male (or female) and practiced infanticide for children of the wrong sex. There is every reason for prohibiting this practice with severe penalties, and a hospital that offered to collude with the practice, even to prevent more painful forms of infanticide would rightly be condemned. However the lines are hard to draw. Baccarini, in effect, offers a three way distinction. First, there is a compromise we can be happy with in the long term. Second, there is a ‘temporary and tactical’ compromise. And third, areas where no compromise is acceptable. Here we are concerned with the distinction between the first two.

Consider the practice of abortion. For many people abortion is simply a former of murder and hence in conflict with freedom and equality. Some of these people regard abortion as others would treat infanticide and actively, and sometimes violently, campaign for its complete, or near complete, prohibition. But there are others who oppose abortion but treat it in the same spirit that the Seattle hospital offered to treat genital cutting. Knowing that desperate women, especially those of low income, will turn to very dangerous forms of abortion, they will accept hospital based abortions under restrictive conditions as the lesser of two evils. Such opponents of abortion have Baccarini’s attitude, that this is a ‘tactical and temporary’ retreat and would hope to convert others to their view. Yet many others consider current policy on abortion as a sound compromise that should be

preserved unless facts change or knowledge improves in relevant ways. In other words, how to draw the distinction between reasonable and unreasonable conceptions of the good, and therefore permanent and temporary compromises, already seems to depend on one's conception of the good, and there is no truly neutral ground. Accordingly I am unsure how to draw the distinction between 'tactical and temporary' compromises and some sort of valuable permanent compromise. While there may be a distinction to be drawn, different people will draw the line in different places and put different compromises on different sides. The key lesson, though, from Baccarini is that even if you accept a compromise for the purposes of public policy, this should not stop you from arguing and trying to convince others that further changes are needed, if that is what you think.

VII

Finally Gerald Lang discusses my chapter on crime and punishment. Lang correctly observes that this is in a way less empirically well grounded than other discussions in the book, as my work on crime and punishment has been less extended than on some other topics. My motivation for this chapter was the observation that the philosophical discussion of punishment has often taken place with only minimal reference to the crime for which punishment is said to be deserved. I wanted to explore the consequences for a theory of punishment if one starts from the intuition that punishment should in some way be responsive to what it is that we find objectionable about crime. After all, if we were not especially worried about crime then it is unlikely that we would have developed substantial practices of punishment. And in particular I wanted to consider what it is like to be the victim of a crime, believing that it would be fruitful to consider the

difference between being the victim of crime and being the victim of an unsuccessful attempt. I conjectured that when a crime is disrupted then although the attempt is disturbing nevertheless one may emerge with a feeling of triumph. This would not be the case when an attempt succeeds. I further conjectured that the difference is that a successful attempt in some way reduces the victim's status, at least in their own eyes, and that punishment is an attempt to rebalance status.

Lang, while generously showing a degree of sympathy, provides a sophisticated argument designed to show that my account cannot explain or justify our practices of punishment, and substitutes his own theory in which punishment seems to be derived from the right to self-defence. To simplify a complex line of thought, one question is that, even if rebalancing of status is needed, why is 'hard treatment' in the form of punishment the correct way of doing this? This objection forces me to reflect on the ambition of my account, and my feeling now is that it should not have been offered, if it was, as a sole account of punishment, rather than one factor, among others that explain and justify our practices. And it is probable that Lang's account is another element in the patchwork of justifications to which we must appeal. For Lang's theory, if we take it as a singular account, also leaves us with some puzzles. If I am a shopkeeper and you attempt to rob my shop, in self-defence I can probably lock you in my store room for an hour or two until the police arrive. But I can't keep you there for three months, even if the crime would normally lead to a three month sentence. Or for another example, many minor offences lead to a fine, but as a victim I have no right to take your money in 'self-defence'. We seem to draw on different sources to calibrate justified self-defence and justified punishment. Lang, no doubt, has answers but considerable elaboration and refinement, which may well include appealing to

other considerations, will be necessary to generate a complete account.

VIII

In brief conclusion I would like to repeat my thanks to my commentators for their excellent contributions. All of them have led to changes in my view, or clarifications, or the recognition that more is needed. They are the sort of comments I would have liked to have received while still working on the text, and undoubtedly would have improved the final version. One day, perhaps, there will be a revised edition where I can make proper use of these excellent thoughts.

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