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POSTSCRIPT: SUBJECTIVE UTILITARIANISM

RICHARD A. EPSTEIN*

In accordance with the Marquis of Queensberry's rules as adapted to academic exchanges, I have not made any changes in my original piece¹ to take into account Eric Mack's reply.² Nonetheless I am so taken aback, not to say stunned, by much of what he has written, that I think a few words of clarification are needed on my position. The fault may lie with me, and if Professor Mack has so misread my orientation, so might others. I hope to correct the misimpressions before they become widespread.

The key question is what it means to be a utilitarian. In Mack's view, which I take it has a long philosophical tradition, utilitarians are people who believe that there is an objective, disembodied, and impersonal good independent of persons, one that can be attached to given individuals and then summed in some arithmetic way. The world is thus viewed as one large organism of sorts where the pleasures of one person can be offset against the pains of another. Utility then is conceived as an impersonal value not attached to any single person. I should have thought that it was clear from my article (as in my comments on Dworkin's Derek and Amartya example)³ that I did not use utilitarianism in this "impersonal" sense, but rather as a theory that measures the desirability of alternative legal rules by the consequences that they generate for the persons they govern. In taking this position I quite agree with Mack that value is in some ultimate sense subjective, so that interpersonal comparisons of utility cannot be made rigorously.

In saying this I do not want to be taken as committing myself to a necessary philosophical truth, but only to a maxim of political behavior. I believe that we all make interpersonal comparisons of utility every day of our lives in our family, play and work settings. I think that the impulse to religious and charitable conduct is quite incomprehensible if these judgments were, at

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1. See Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

2. See Mack, *A Costly Road to Natural Law*, 12 HARV. J.L. & PUB. POL'Y 753 (1989).

3. See Epstein, *supra* note 1, at 745-49.

least in a rough way, foreclosed to us in our daily lives. Nonetheless as the numbers of individuals become larger, their affective senses are dulled, and the power to make these judgments weakens. The dangers of using interpersonal comparisons of utility as sources of *coercive* judgment strike me as exceedingly dangerous within a political system. I shall therefore assume that such judgments should not be part of any legal calculus, however important they are to the social fabric. The question is what should be made of the proposition that all value is subjective and that interpersonal comparisons of utility are out of bounds.

Until I read Mack's article, I did not think that the belief in subjective value was incompatible with utilitarianism, given its concerns about the pleasures and pains, about the benefits and burdens of real persons. Quite the opposite, I think that the emphasis on "flourishing" as used by modern natural law writers such as Finnis invites a utilitarian (or consequentialist) reading, even if that reading is disavowed by the writers themselves.

Once we accept some form of subjectivism, it must be asked how one can speak about consequences in the aggregate without treating "total utility" as some magical, well-nigh Platonic good that hovers over the individual members of the society. The answer lies I think in the choice of a measure of social welfare that allows judgments to be made about (total) social states without requiring interpersonal comparisons of utility. The standard accounts of Pareto superiority appear to me to satisfy both conditions.⁴ When one says that state *A* of the world is better than state *B*, he means by this criterion that at least one person prefers (by his own subjective lights) state *A* to state *B*, while no persons (by his own subjective lights) prefers *B* to *A*. In that situation we can collectively prefer *A* to *B* without having to make any interpersonal comparisons of utility. Similarly, to say that a state is Pareto optimal means that no one can be made better off unless someone else is made worse off. It is therefore odd to want any social state that is not Pareto optimal: why not make *X* better off by his own lights if no one else is hurt thereby.

The use of the Pareto test has been attacked as too stringent

4. See, e.g., Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

because it does not allow a movement to state *A* of the world from state *B* if any single person is made worse off, which seems highly likely when dealing with massive social programs. With heavy transaction cost barriers in place, we could not move from state *B*, the status quo, because the necessary side payments could not be made. In response to these pressures, the Kaldor-Hicks test allows the move to be made so long as there is some (hypothetical) transfer of money from *X* to *Y* that would leave both parties better off, again measured by their own subjective lights. Even this test, however, does not rely on interpersonal comparison of utility, only an effort to treat as social improvements states that would be achievable if transactions costs were low enough to permit bargaining to take place.⁵ The problems with hypothetical compensation are heavily empirical, and perhaps insoluble, but they are not conceptual. Indeed the Kaldor-Hicks test has properties that Mack would applaud because, unlike a total utility test, it rules out any form of coercive redistribution.⁶ The winners can only return the losers to their former state by giving back all that they have received, in which case the recipients can obtain no gain.

To illustrate, if *X* starts with 100 and *Y* with 10, a coerced redistribution resulting in *X* with 90 and *Y* with 20 does not meet Kaldor-Hicks test for a social improvement because the only way that *X*'s utility could be restored to the level that it had prior to the transfer is to give him back the 10 units that were taken. The conclusion holds even if each additional unit of wealth subjectively had diminishing marginal utility for *X*. There may be little lost per unit from the taking, but by the same token only small increments of utility are added as each unit of wealth is restored to its original owner. The principle of diminishing marginal utility holds in both directions, so every unit of wealth that is removed must be restored in order to bring *A* back to his original utility position. It cannot be otherwise. Suppose *X* loses 10 units of wealth, and then 8 units are restored. If he enjoys the same utility level as before, then we can repeat the process (if it costs less than two units) indefinitely and generate gains not obtainable simply by lowering *X*'s

5. The transaction costs theme, neglected by Mack, was pursued in Epstein, *supra* note 1, at notes 25, 29, 65 and accompanying text.

6. See, e.g., *id.* at notes 28 & 60 and accompanying text.

wealth 2 (or 10) units initially. Alchemy is no substitute for gainful production.

There can be lots of debates as to whether Pareto tests should dominate Kaldor-Hicks tests and in what context. But whatever the relative methods of the two approaches, two points do seem to be clear. First, both approaches, associated with "efficiency" or "social welfare" analysis in economics, seem to fall within some ordinary layman's definition of utilitarian. Surely they are not deontological. Second, these tests do not require positing some Platonic pleasure independent of persons of the sort that Mack decries.

The harder question is whether the use of Paretian criteria commits us to some version of "total utility" and "objective values" thought part of classical utilitarianism. Jules Coleman has written for example that "[t]he Pareto-superior standard is often thought of as normatively rooted in classical utilitarianism."⁷ Thereafter he appears to take the position that the Pareto standard does require the use of objective comparisons of utility, but he acknowledges that others have disagreed with him. On this point, moreover, I think he is wrong for the reason mentioned above. So long as we know that each person advances by his own lights, then we are confident that total utility (to use that phrase) has advanced, even if we do not know (or care) by how much. We do not have to sum utilities across people to make the necessary comparative judgments. Those who try to make social judgments in a world where interpersonal comparisons are not possible, are, it seems, utilitarians who are skeptical about the belief of interpersonal comparisons of utility. They are certainly not deontologists.

It is of course evident that these tests are often very difficult to apply in order to make even rough judgments between alternative legal rules. But what options are open to us? Mack relies upon an intuitive and absolute sense of autonomy that guarantees to each person his own unique preferences, purposes, goals and desires in life. But what should be done when they conflict, as they do, for example, when one person takes something out of the common that another person would like to have as his own? Do we have a realization of the purposes and goals of *X* or a frustration of the purposes and goals of *Y*? I

7. Coleman, *supra* note 4, at 515.

have tried to show why the first-possession rule is a reasonably good first approximation for the right rule to justify the acquisition of property, just as both Locke and Hume thought, albeit for somewhat different reasons. Autonomy need not be our intellectual primitive, but as a derived principle it is a powerful starting point to develop a system of rights that hopes to yield satisfactions that are Pareto superior to those obtainable in some alternative legal regime.

Whether I am right or wrong, it is not enough to talk solely about goals, aims and purposes, and the uniqueness of different individuals. It is necessary to talk as well about the role that scarcity and self-interest have in organizing human affairs. We do not know, for example, whether Mack's view of autonomy is so strong and absolute that it invalidates all forms of taxation, or denies the state the power of eminent domain. Those have been regarded as the necessary consequences of an unlimited commitment to individual autonomy. We need to know whether Mack accepts that strong conclusion, or whether he qualifies it, and if so why. When reasons are given, in the end consequences will count, even for those who believe in subjective value. The large literature on prisoner's dilemma games, public goods, holdout problems and transactions costs makes it clear that autonomy can undermine subjective value in many settings, just as it advances it in most. Once the necessary link between autonomy principle and subjective value is broken, then the intuitive appeal of the deontological position is lost. The more troubled and vexed world of collective action has become inescapable. Today we know enough so that there is no philosophical safe harbor that spares us the pain of hard social choices. Any deontological, natural rights theory that ignores these hard questions of social coordination is a dead loser, today and forever more.

