

MAKING ROOM FOR RULES

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Kantian moral theories must explain how their most basic moral values of dignity and autonomy should be interpreted and applied to human conditions.¹ Rather than simply relying on intuitions to determine what these values require in specific contexts, those who are inspired by Kant should aim for more structured and systematic ways of bringing thin and abstract moral considerations down to real world circumstances.

One place Kantians should look for inspiration is, surprisingly, the utilitarian tradition and its emphasis on generally accepted, informally enforced, publicly known moral rules of the sort that help us give assurances, coordinate our behavior, and overcome weak wills. Public rules in this broad sense, which include familiar moral rules against incest, murder and rape, are socially embedded norms and publicly recognized principles that are not necessarily as determine and tightly organized as those that define games, institutions and practices.² Kantians have tended to ignore longstanding utilitarian discussions of public moral rules, including well-known ones by Hume, Mill, H.L.A Hart, John Rawls, and Richard Brandt,³ mostly because they are skeptical of utilitarian ways of thinking, they regard basic moral principles as a priori requirements that cannot be tailored to human foibles and limitations, and they are suspicious of

¹ The title is a variation on the title of a paper of Barbara Herman's (2007a) called "Making room for character."

² The sense of "rule" I am concerned with is very broad and not limited to practices, such as games, rituals, and promising, which are forms of activity "specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure" (Rawls, 1999b, p. 20). Public moral rules, in my sense, can include what (Dworkin, 1977) calls "principles" and "rules."

³ Brandt (1963); Hart (1994); Hooker (2000); Hume, Norton, and Norton (2000); Mill and Crisp (1998); Mill and Ryan (2006); Rawls (1999b).

informal moralizing of the sort that socially embedded moral rules depend on. If we set aside utilitarian and consequentialist theories of value, however, there are important *structural* lessons Kantians can learn from utilitarians, and especially rule-utilitarians, about how public moral rules can help to bridge the divide between abstract moral values and everyday contexts.

With resources from the utilitarian tradition in hand, how might a Kantian make room for public moral rules? Kant himself is not much help because he does not explicitly countenance informally enforced moral rules as part of his middle level between the Categorical Imperative and what we ought to do in specific circumstances.⁴ We should look instead to contemporary Kantians, such as Thomas Hill (1992, 2005, 2007), Barbara Herman (1993d, 2000, 2008, 2013) and John Rawls (1999a, 1999b), for clues about how to incorporate public moral rules into a broadly Kantian moral theory.⁵

Drawing on these sources, I argue that Kantian moral theories should incorporate public moral rules as mid-level moral requirements for embodied and socially embedded human agents. I explain how certain specific moral judgments about how we, here and now, ought to act are justified by public moral rules, which are themselves justified by more fundamental moral requirements that need not be socially enacted.

My plan is as follows. I first explain the nature of public moral rules and give a Kantian account of what it takes for such rules to exist. I then distinguish three questions

⁴ On some interpretations, Kant divides *The Metaphysics of Morals* (1996), which is his most sustained attempt at interpreting and applying the moral law to human conditions, into “right” (or “justice”), which is concerned with legally enforceable rules and rights that regulate and protect our freedom, and “ethics” (narrowly conceived), which is constrained by “right” and within its limits gives unenforceable principles for personal motivation, deliberation and character development. Interpretations differ, but it is reasonably clear that this division is supposed to run deep and seems to make no room for social moral rules, which fall between these two extremes.

⁵ Others who have engaged with public moral rules from a non-consequentialist perspective include (Gaus, 2011; Richardson, 1990, 2002; Wolf, 2002).

we should ask about public moral rules: (1) Should our society support and maintain a code of public moral rules at all alongside our legal system? (2) If so, what is the best moral code for our society? And, (3) what kinds of reasons, if any, would we have to follow such rules? I go on to explore some virtues and defects of rule-utilitarian accounts of the grounds, legitimacy and authority of public moral rules. Then, I describe some features of a multi-stage Kantian framework that is structurally similar to rule-utilitarianism but has a non-consequentialist theory of value. Finally, I argue that, from the perspective of ideal legislators who are choosing moral principles for a society of rational human beings in the natural world, there are strong grounds for establishing a system of generally accepted and socially enforced moral rules of some kind.

Public rules

Public rules in general, such as laws, rules of games and etiquette norms, are openly addressed to groups of agents in order to regulate their conduct, establish mutual-expectations and give shape to their joint-activities.⁶ Rules of this type *purport* to be binding, they say agents putatively must act accordingly whether those people feel like doing so or not, but such rules are meant to give practical guidance as well. The public rules of a group are not necessarily justified or normatively binding, they only purport to be so, but when they exist in a group, public rules help to organize the conduct of its members, putatively say what those people are entitled to expect of one another and what they may legitimately criticize and blame one another for, help to specify a common

⁶ Here I follow Gert (1973, 2005); Hart (1994); Hume et al. (2000); Mill and Crisp (1998); Mill and Ryan (2006); Rawls (1999a, pp. 47-52; 207; 1999b).

point of view from which to adjudicate disputes and in some cases define new forms of cooperative activity.

Formal public rules, such as laws or regulations of professional associations, are public rules that are created, changed, destroyed and enforced by formal mechanisms and procedures.⁷ But there are other kinds of public rules that we take for granted in everyday life even though no committee or legislature explicitly created them, nor are they always printed in *official* documents or enforced by disciplinary boards or trials.⁸

Informal public rules, such as rules of etiquette and fair-play, along with familiar moral rules about murder and torture, gradually come to take hold in a group, becoming part of the “unwritten rules” that its members generally accept as binding on themselves and informally enforce in one another. Some, but not all, of our informal public rules have formal counterparts – we have laws prohibiting murder as well as socially enforced, generally accepted rules against it – but we currently have no laws that complement our informal public rules about adultery. Informal public rules are created, maintained and enforced through diffuse social mechanisms rather than through explicit formal procedures – particular rules of dress have long and complicated histories about how they evolved in a society; the ones that exist must be socially maintained or else they will fade away once enough people no longer accept them; yet we are all too familiar with the cold stares, eye-rolling and snide comments that can accompany even minor fashion *faux pas*.⁹

We usually accept and follow the informal public rules of our groups without having to

⁷ (Hart, 1994; Rawls, 1999a, p. 207). This sense of ‘formal’ is contrasted with ‘informal’ whereas another sense could be contrasted with ‘substantive’.

⁸ Miss Manners, for example, attempted to express and codify informal public rules of etiquette that we generally accept, but her pronouncements are not authoritative as such, although she may have also helped to shift public opinion on certain points.

⁹ An association may have an informal dress code, which is maintained and enforced through informal social mechanisms, as well as a formal dress code, which is enacted in its bylaws.

think much about them, but those rules become apparent to us when we see someone cutting a long line, talking loudly during a theater performance, smoking in a public place, or stealing someone else's philosophical examples. Explicit teaching or observation of others can transmit informal public rules, while organized efforts to change the public conscience can be effective at improving them.

No person or committee has legislative or judicial authority over informal public rules; instead, such rules exist in virtue of the attitudes and actions of the members of the group where the rule exists. What, more specifically, does it take for an informal public rule to exist in a group? The following conditions are generally agreed upon:¹⁰ First, most group members must accept a rule in order for it to be in effect in that group, so most of them must believe that the rule is binding on themselves and anyone else in the group who the rule applies to.¹¹ Second, most members of the group must be disposed to enforce its informal public rules in one another through informal social pressures, such as expressions of anger, resentment and indignation; we may also shame, ostracize, stigmatize, brand or disgrace others who break our rules, or simply disassociate with violators. Third, in order for informal public rules to exist, they must be regularly complied with and socially administered on a regular basis. And fourth, most everyone in the group must know that the rules are widely accepted, socially enforced and followed. The informal public rules of a group, when they exist, therefore presuppose

¹⁰ (Bicchieri, 2006; Gaus, 2011; Gert, 1973, 2005; Hart, 1994; Hooker, 2000; Mill & Crisp, 1998; Rawls, 1999a, 1999b)

¹¹ Fashion 'experts' or trend-setters, for example, may settle on a set of fashion norms that they *think* should be widely accepted even if relatively few people actually regard them as binding. Those rules may be said to exist among the 'in-crowd', who generally accept them, but they do not seem to exist in the wider public until most all of them accept the rules as well. Socially-enforcing the rules on unsuspecting people who do not yet know or accept them may be one way to bring more people on board.

that members are generally committed to the rules, that the rules are publicly understood, and that everyone has the ability to live up to them.

Philosophers who discuss informal public rules tend to think that accepting or internalizing a rule amounts to having a complicated complex of dispositions, including ones to follow the rule, to encourage others to do so, to condemn those who break them and to feel guilt or shame if one does so oneself.¹² A Kantian approach provides a more unified account of accepting rules that is closer to commonsense. When we accept a rule, on a Kantian view, we *will* to follow that rule; we also will to structure our choices around that personal policy or standard we have made for ourselves and to appeal to it in our practical deliberations. Willing or committing to a rule in this sense involves standing ready to follow it even on occasions in which we may not want to – when a person regularly follows a rule just out of habit, fear of reprisal, or desire for social advancement then she does not *accept* it because she does not regard the rule as necessary, as specifying acts that she *must* perform even if they are inconvenient, stressful or burdensome.¹³ On a Kantian way of thinking, we do not always have to consciously and explicitly commit to a rule in order to accept it; we can also just find ourselves willing it as a relatively stable policy that we reaffirm over time despite fluctuations in our feelings and desires.¹⁴ We may be unable to fully state the rules we accept, and when we do follow them, we may not have the rules before our minds, but our commitments tend to become apparent to us on reflection and they often figure

¹² See those people listed in the footnote 10.

¹³ (Kant, Hill, & Zweig, 2002 G 4:397) The *content* of a rule, however, can include implicit exceptions and qualifying conditions that make allowances for self-interest – I may accept a rule that says, for example, ‘keep to my diet as long as it is healthy for me to do so,’ or ‘do not snitch on my friends so long as my life is in danger,’ although if I accepted the latter rule I may not necessarily accept one that simply says ‘do not snitch on my friends.’ See Herman (2007c)

¹⁴ (Hill, 2006)

essentially in full explanations of why we act as we do.¹⁵ Informal public rules, on a Kantian view, are very different from a group's habits or its dispositions to behave or feel in certain ways because those rules exist only if most agents exercise their will, endorsing them as their own standards that (for practical purposes) we assume they can follow even if they are not inclined to do so.

Some informal public rules are treated as *moral* rules instead of mere etiquette norms or rules of fashion. The moral code of a group, in one sense of 'moral', is distinguished by which rules are universal and general¹⁶, which ones are treated as necessarily overriding, and which rules elicit guilt and resentment when they are broken. But the informal moral rules of a group, the rules it regards as its moral norms, can be morally unjustified in another sense of 'moral', while the true code of public moral rules would be morally justified were it to be instituted as a social practice.

Three questions about informal public moral rules

Informal public moral rules are a pervasive part of our lives – they help to structure our plans, relationships and joint-activities, we count on others to follow the socially enforced norms that are in effect, we appeal to those rules in discussions, and we tend to be disappointed when we or others do not live up to our mutually recognized standards.

Even though informal public moral rules are widespread, do we have good reasons to support and maintain rules of that type? Perhaps informal public moral rules

¹⁵ (Herman, 1993c, 2007a, 2007b)

¹⁶ (Rawls, 1999a, pp. 112-115)

are best abandoned altogether because they distort our moral judgment¹⁷; maybe we should be relying only on the law and individual conscience instead of putting so much effort into maintaining and following informal public moral rules; or perhaps rules of that sort are at best just rules of thumb that help imperfect agents conform to independently defined moral standards.¹⁸

But if having informal public moral rules is a good idea, what should those rules require of us? A *social ideal*, according to Rawls, specifies the most appropriate overall system or systems of public rules in general, including formal and informal ones.¹⁹ A central part of this ideal, for Rawls, is to define principles of justice to govern the most basic systems of formal public rules in a society, but he emphasizes that a social ideal will include a code of informal public moral rules that are enforced by “coercive influences arising from public opinion and social pressure.”²⁰ An ideal code of public *moral* rules, Rawls claims, will not specify how we must act on every occasion, nor will it determine the precise content that each and every etiquette norm and standard of friendship must take. It will instead define moral *constraints* within which individuals, friends, families and associations are at liberty to pursue their various aims and projects

¹⁷ Moral particularists, such as Dancy (2004), argue in this way, as do virtue ethicists, such as Hursthouse (1999).

¹⁸ Cohen (2008); Kamm (2007); McMahan (2002) would likely view informal public rules in this way.

¹⁹ (Rawls, 1999a, pp. 8-9)

²⁰ (Rawls, 1999a, pp. 97, 107, 303, 407-409). Rawls says: “There is no reason to suppose ahead of time that the principles satisfactory for the basic structure hold for all cases. These principles may not work for the rules and practices of private associations or for those of less comprehensive social groups. They may be irrelevant for the various informal conventions and customs of everyday life; they may not elucidate the justice, or perhaps better, the fairness of voluntary cooperative arrangements or procedures for making contractual agreements. The conditions for the law of nations may require different principles arrived at in a somewhat different way. I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies. The significance of this special case is obvious and needs no explanation” (1999a, p. 7)

and to establish and maintain more parochial informal public rules, including rules of fashion and etiquette.²¹

If our society has good reasons to socially embed an ideal code of moral rules alongside our legal system and individual conscience, what implications would such a code have for the moral obligations of individuals? An ideal moral code does not exist in our society, yet many of our imperfect moral rules are serving valuable social roles, so perhaps we, here and now, are better served by following the standards that are in place while working to bring the ideal ones into effect. It may even be that the members of a “well-ordered” society, in which the ideal moral rules do exist, ought to follow the rules generally but also break them on certain occasions

Three basic questions we should ask about informal public moral rules, therefore, are: (1) Should our society support informally enforced and maintained rules of any kind, or would it be better for us to abandon public moral rules altogether in favor of laws, principles, virtues or individual judgment? (2) If having public moral rules is a good idea, what is the best moral code for our society and what would make it ideal? (3) What kinds of reasons would an ideal moral code provide to individuals? The three questions are closely related – whether it is good to have informal public moral rules depends on what those rules say and when they should be followed.

The structure of rule-utilitarianism

The utilitarian tradition has led the way in highlighting the social benefits that come from maintaining and following a publicly recognized code of informal moral

²¹ (Rawls, 1999a, p. 207)

rules.²² Act utilitarians see such rules, when they exist, as an effective but imperfect means of securing our wellbeing and of helping us act in ways that maximize the overall good. Rule-utilitarians go a step further by claiming that what we ought to do just is to follow the moral code that, if it were to exist, would maximize utility. Brad Hooker proposes the most subtle and sophisticated formulation of rule-utilitarianism yet.²³

An act is wrong if and only if it is forbidden by the code of rules whose internalization by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being (with some priority for the worst off). The calculation of a code's expected value includes all costs of getting the code internalized. If in terms of expected value two or more codes are better than the rest but equal to one another, the one closest to conventional morality determines what acts are wrong (Hooker, 2000, p. 32)

Although Hooker calls his view 'rule-consequentialism', because it incorporates some priority for the worst off when assessing rules, I will mainly use the more traditional label to emphasize connections with the long utilitarian tradition of theorizing about public moral rules and to focus attention on structural features of rule-utilitarian thinking rather than the value theory it presupposes. In response to the three questions about public moral rules, rule-utilitarianism claims that (1) such rules, when they exist, can provide significant social benefits, (2) the best code is the one that would maximize

²² Included in the utilitarian tradition are Hume and Mill (see (Urmson, 1953)), along with Richard Brandt and Brad Hooker. Criticisms of rule-utilitarianism have come from (Arneson, 2005; Hare, 1981; Lyons, 1965; Smart, 1956)

²³ There is also a nice discussion of rule-utilitarianism in (Parfit, 2009).

utility if it were generally accepted and (3) what we ought to do just is to follow that ideal code.

Rule-utilitarianism has fallen on hard times in large part because of J.J.C. Smart's seminal article "Extreme and restricted utilitarianism" (1956).²⁴ Smart showed that the two levels of traditional rule-utilitarianism, one about what makes a set of rules ideal and the other about when we ought to follow them, are inconsistent. Rule-utilitarianism combines a teleological theory of value, in which the only appropriate way to respond to value is to promote it, with an ideal code of rules, which may sometimes require failing to promote what is best. How can a utilitarian consistently justify assessing rules on the basis of their conduciveness to the overall good but refuse to evaluate acts on the same basis? Without a further explanation for why we ought to conform to the ideal rules when we can produce more utility by breaking them, rule-utilitarianism seems to support an incoherent sort of rule-worship or rule-fetishism.

This criticism, along with the charge that rule-utilitarianism collapses into act-utilitarianism, have seemed so effective that they have tended to obscure other flaws of rule-utilitarian thinking as well as conceal important contributions rule-utilitarianism should make to our understanding of informal public rules. There are still crucial lessons about informal public rules to be learned from rule-utilitarianism by looking more closely at how they approach the three questions about the grounds, legitimacy and authority of informal public moral rules.

²⁴ The history of rule-utilitarianism is, of course, more complicated. It was initially seen as a way of avoiding counter-examples to Kant and act-utilitarianism as well as the indeterminacy of Ross. Then worries arose about whether rule-utilitarianism collapses into act-utilitarianism, and Brandt and others attempted to respond. Rawls' 'Two concepts of rules' was initially seen as a promising alternative, but it raised problems of its own (e.g. it only seemed to help in cases involving formal and complex social practices and may still face the charge of rule-fetishism).

1. Why have informal public moral rules?

The utilitarian tradition has long emphasized that public moral rules about lying, promising and killing, for example, are a necessary part of any society with a minimally decent standard of living.²⁵ When such rules are widely accepted and we generally know that the rules will be followed, we are in a better position to count on what others will do, give them our own assurances, feel secure in our personal safety, and plan accordingly. The rules serve the public good by providing a basis for legitimate expectations, which helps us to coordinate our behavior, divide up responsibilities, and organize ourselves efficiently and effectively.

Another important utilitarian idea is that the need for instituting public moral rules arises because of limitations in human nature. If human beings were omniscient and omnibenevolent, with perfect cognitive abilities and ideally strong wills, then utilitarians would see little need for informally enacted moral rules. We would simply coordinate our behavior based on the public knowledge that each of us will always do what maximizes utility. But actual people have limited information about the overall benefits of our available actions and about what others will do (and acquiring more information is usually costly), we tend to be biased toward ourselves and our friends and family, we make cognitive mistakes, especially when we are in a hurry and time is short, and we sometimes give in to temptation even when we know how we ought to act. When public moral rules are socially enforced in a society of human beings, they help us to overcome these infirmities of our nature. The rules, when they exist, tell us what kinds of acts we must stand ready to perform and what kinds of evidence we are responsible for having; they also provide incentives to be impartial, diminish the time it takes to make sensible

²⁵ (Hume et al., 2000; Mill & Crisp, 1998)

decisions, help us overcome potentially weak wills, and serve as credible threats that deter various kinds of acts.

2. What informal public rules should we have?

The system of informal and overlapping public rules that currently exists in our society is not ideal. Although our communities, organizations, families and society at large support moral rules that require us to honor our commitments, do our fair share and give mutual aid as well as ones that forbid ridiculing others, inflicting needless pain or killing innocent people, there are other aspects of our socially enforced public code that are unfair, exclusionary, racist, onerous, silly and self-defeating. Even the rules we treat as moral may forbid acts that they should allow, or permit ones they should forbid; our moral rules do not always incorporate the right kinds of exceptions or qualifying conditions; and they may overreach into circumstances or areas of life that are better left to the law or individual judgment. If we have good reason to establish and maintain a system of public moral rules, we need some way of determining what those rules should be.

If we abstract from the underlying value theory that rule-utilitarianism assumes, we find several structural features of that view that should figure in how we think about public moral rules. Rule-utilitarianism defines a *standpoint* from which to evaluate *systems* of public moral rules under the assumption those rules exist under *ideal conditions*.

First, rule-utilitarianism offers a conception of the moral point of view. Those who take up that standpoint, as rule-utilitarians conceive of it, achieve a kind of impartiality because they are only motivated by the common good, rather than by their

own interests, they know all of the information that they can reasonably be expected to have, and they are only charged with assessing universal and general public moral rules, not particular acts directly.²⁶ The most appropriate way to determine how one ought to act, according to rule-utilitarians, is to consider which acts would be allowed by the system of public moral rules that would be endorsed from this perspective.

Second, rule-utilitarianism requires us to compare systems of rules as a whole rather than comparing particular rules in isolation from others or resting content with *prima facie* rules that cannot be systematized any further.²⁷ They recognize that the content of a particular rule should vary depending on what others rules might say. Rules about how difficult it is to get a divorce, for example, should vary depending on the rules about how difficult it is to get married; rules about mutual aid for bystanders should be sensitive to the rules governing emergency personnel; and rules about gratitude should vary depending on rules about beneficence.

Third, rule-utilitarianism relies on ideal theory to assess candidate codes of moral rules.²⁸ For each proposed system of moral rules, we are to imagine an ideal society in which most everyone, over generations, accepts and knows that code. We are then supposed to compare how well the moral codes do in these well-ordered societies, taking into account costs of internalizing the various codes, to see which one is best. The moral code that is ideal in this sense serves as a standard of improvement for our own system of public moral rules.

²⁶ Other variations on rule-utilitarianism are possible besides Hooker's; for example, they might assume that rules are assessed by those who are omniscient.

²⁷ See (Ross & Stratton-Lake, 2002)

²⁸ See (Brandt, 1963, p. 169)

Facts about human nature itself, however, play a prominent role in determining the justifiability of a code as compared to its competitors, according to rule-utilitarianism. It may not be possible for certain extremely complicated or demanding moral codes to exist in any society of human beings with our limited cognitive and motivational capacities. If human beings are unable to determine when a rule is being complied with or violated then rules of that sort cannot be ideal either because they cannot satisfy the existence-conditions of such a rule.²⁹

3. Why should we follow ideal public moral rules?

Besides giving an account of why we should have rules and what makes a moral code ideal, rule-utilitarianism also holds that acts are wrong just in case they do not conform to the ideal rules, whether or not those rules actually exist. Rule utilitarians claim that ideal moral rules have the kind of moral necessity that we think, on reflection, commonsense moral requirements actually have: We *must* not kill, lie or break promises in certain circumstances, even when we may want to, when others refuse to follow them, when we could prevent more violations in the future, and when we could do slightly more good otherwise. And, according to rule-utilitarianism, commonsense moral requirements are not mere rules of thumb, either, but instead figure essentially in explanations about why certain acts are wrong. Why should we agree with rule-utilitarians, however, that ideal moral rules have this kind of moral necessity?

Consider first a well-ordered society in which we have managed to put in place an ideal moral code. Rule-utilitarians can offer a plausible justification for why members of this society should *generally* comply with their ideal moral rules. In order for those rules

²⁹ See (Brandt, 1963, pp. 166-167)

to produce the greatest good, they have to be followed in virtually all contexts, even in particular cases in which breaking them might produce slightly more good in the short-run. Public trust can probably survive a few rule violations, say in cases of disaster, but more than a few open violations of the rules encourages human tendencies to make exceptions of ourselves, to lose confidence in others, and to quit following rules when we think others are taking advantage of us. Thus, more or less strict adherence to the existing public moral rules, even at the expense of small utility gains, tends to be better for society overall. There may be some occasions, however, in which someone in this society can do more good overall by breaking their ideal moral code, perhaps by breaking the rules *secretly* so as not to undermine the public trust. If the point of the rules is to bring about the most good, why not sometimes violate them when that will produce the best effects?³⁰

Not only do rule-utilitarians have difficulty explaining why we should follow ideal rules even when they exist, they have even more trouble justifying why we, here and now, ought to follow some ideal moral code that is not actually in effect. The public moral rules that we have in place may not be perfect, but they are doing much of the work that rule-utilitarians think rules are supposed to do, such as coordinating our behavior, grounding legitimate expectations, and helping us to overcome vice. We may

³⁰ (Hooker, 2000, pp. 23-29). Hooker's response to Smart's objection is to introduce a non-consequentialist value, which he calls impartiality, and claim that we always have most reason to follow the best moral rules because sticking to the them manifests our fundamental moral concern to do what is impartially defensible, even when we can produce more good by doing otherwise. More explanation would be needed, however, to justify this conception of impartiality as compared to those that do not appeal to public moral rules at all, or ones that select such rules on the basis of other values besides overall wellbeing and priority for the worst off. Further explanation would also be needed to explain why impartiality, in the sense Hooker defines, overrides other values that might be served by breaking the rules. Although Hooker does not do so, if one were to interpret impartiality as a teleological value then appealing to that value does not resolve the worry about internal inconsistency, because it seems that there could be cases in which breaking a rule would produce more good overall (including more instances of impartiality) than following the generally useful rules.

recognize that it would be best overall to enact and maintain a better moral code than the one we have, but in the meantime, following those rules when so few others are doing the same can undermine public trust, disappoint legitimate expectations, and, in extreme cases, result in personal ruin or social disaster.³¹

The more general issue is why should we agree with rule-utilitarians that wrongness is always and only about breaking *public moral rules*, whether ideal or not? On the one hand, from a commonsense perspective, we may sometimes be permitted to break the best public moral rules even if we also recognize *reasons*, but not necessarily conclusive ones, for following those rules as well. When a normally binding rule has lost its point in a rare and unforeseen case, for example, we may recognize that the rule should not be changed yet also think that it deserves some allegiance even in instances in which the rule misfires.³² On the other hand, it may be wrong to act in certain ways that are permitted by ideal rules. Perhaps having socially enforced rules about, for example, doing favors or improving ourselves would be too burdensome, difficult to codify or onerous to enforce. We may still think, on reflection, that it would be wrong to refuse to help others or improve ourselves on certain occasions. Without further argument, we should not close off the possibility that breaking ideal moral rules can be right while conforming to them can be wrong.

Rule-utilitarians endorse a tight connection between the justifiability of an ideal moral code and the wrongness of acts, but there are more complicated ways of relating

³¹ Hooker (2000, pp. 98-99) argues that an ideal moral code would include a disaster clause that forbids us from bringing about a disaster. There could be situations, however, in which following the perfect rules in an imperfect world would cause something very close to a disaster, or at least be disastrous for individual people, although no explicit exceptions in the ideal moral code would likely be made for such cases. Brandt (1963, pp. 171-172) modifies his formulation of rule-utilitarianism to make allowances for well-established moral convictions that already exist in a society, but this stipulation appears ad hoc and Brandt himself does not attempt to justify it except to claim that “it is not obviously a mistake.”

³² Perhaps including exceptions of this sort would make the rule too complicated or liable to abuse.

these ideas. Perhaps if an ideal moral code were to exist, we normally ought to comply with it or at least have good reasons to do so; but if the system of public rules we actually have is reasonably justified, it may deserve some allegiance, until we are able to progress our society to the better one. In certain non-ideal circumstances, perhaps we ought to follow the ideal rules only toward those who are willing to do the same for us.³³ Non-violent, conscientious and open violations of generally accepted moral rules, as well as more radical rule-violations, may also be justified as ways of changing the rules. Without further argument, we should not assume that the connection between ideal moral rules and moral obligations is as simple as rule-utilitarians suppose.

Publicity

Some philosophers have questioned the publicity condition that rule-utilitarianism places on moral requirements.³⁴ One issue they raise is why we ought to follow the ideal code of moral rules, which must be available for public acceptance and discussion, when we could otherwise act in a way that “will, if and only if it remains secret, have best consequences.”³⁵ A second concern they raise is whether we should perhaps teach one set of rules to an elite group of people with superior intellect and character while inculcating another set of rules in everyone else.³⁶ And a different, but related, worry is whether a person ought to follow certain rules when the point of having the rule is lost because others have violated it, such as when a lone soldier must decide whether to stand

³³ Hooker makes this somewhat Kantian suggestion in (Hooker, 2014)

³⁴ See for example (De Lazari-Radek & Singer, 2010)

³⁵ (De Lazari-Radek & Singer, 2010, p. 43)

³⁶ Margaret Little reportedly raised an objection of this kind to a talk given at St. Andrews.

his ground against the invading army, as the rules require, even though his comrades have already retreated.³⁷

These are complicated issues, but there are additional lessons to be drawn from how a rule-utilitarian might address them. As Hooker has argued, rule-utilitarians can admit that the ideal code of public rules can include explicit clauses that sometimes allow people to act in secret. The rules may also include vague or uninterpreted concepts that permit people to use their best judgment when applying them. A general, for example, need not always announce which of the tactics that are permitted by the rules he plans to use; he may also be given some discretion to decide how and when to punish deserters as well as whether to make those decisions widely known. In order for public rules to be socially enforced in a society, there must *generally* be ways to determine whether they are followed in most cases, so the rules may also require certain secret acts to be announced and evaluated in due course, but a code can continue to exist even if it is not possible or advisable to publicly evaluate every act falling under it.

Rule-utilitarianism, in the form Hooker characterizes it, says that ideal rules are necessarily internalized by “the overwhelming majority of everyone everywhere in each new generation.”³⁸ Yet it seems we should sometimes institute more specific rules, with a more limited scope, in particular societies, communities or families depending on their intellectual capacities, moral character and specific circumstances. But on Hooker’s formulation such rules can be ideal only if *most everyone else* accepts and knows those rules as well, not just the members of the particular groups who will be in a position to

³⁷ This worry is raised in (Arneson, 2005) and discussed in (De Lazari-Radek & Singer, 2010; Hooker, 2014)

³⁸ (Hooker, 2000, p. 32)

actually follow them. We must also take into account the costs of teaching the rule to all sorts of people who will never have any use for it. There may be significant benefits overall for a small community in the desert to institute complex moral rules about water conservation, for example. But there are significant costs to internalizing such parochial norms in “everyone everywhere in each new generation,” including vast numbers of people who have no need to understand how one tribe in a desert context should distribute its water. If the internalization costs outweigh the benefits of instituting the local conservation rule then, on Hooker’s view, it is not among the rules that ought to be followed, even though we seem to be rejecting a perfectly fine rule for apparently bureaucratic reasons.

Rule-utilitarianism should instead incorporate overlapping and nested sets of rules for specific societies, communities and families that can vary from one group to another depending on their geographic area, population size, intelligence and so on. These more specific rules would be subordinated to the universal, and potentially very thin, set of moral rules that would be best if they were accepted and known by virtually everyone. Some moral rules, however, have a more limited scope, so it seems we should not have to evaluate them on the assumption that they are internalized by most everyone everywhere. One possibility is to assess rules by supposing that they are generally accepted by those who *fall within its scope*.³⁹ On this modified version of rule-utilitarianism, a society may have some basic rules that apply to everyone along with a more specific set of rules for the upright and astute and another set for the base and unintelligent.

³⁹ All moral rules, of course, are universal in a thin sense that anyone who is in the precise position described by the rule must follow it, but there can be moral rules with a more limited scope, such as those for teachers, police officers, and judges.

There is an intuitive distinction between acts that are right only when others also perform or fail to perform them and acts that are right independently of whether others do or fail to do so as well. From a commonsense perspective, refusing to torture a suspect is usually justified even if others are not following suit while the amount we should give to charity often depends on how much others are giving. Rule-utilitarianism, in its current form, does not respect this distinction into its ideal moral code. Some acts are such that, whenever they are performed in a society, they almost always diminish the overall good even when others regularly perform those same acts. This is one kind of argument for prohibiting, say, murder and rape in the ideal moral code. Other acts have significant effects on the overall good only when many others are doing or not doing the same thing. If we can depend on “virtually everyone, everywhere” to do follow the ideal rules of charitable giving, for example, then the ideal code should require each of us to give some modest amount because our combined efforts would do the most good. We may also think that when others are not doing their part, we should have to give more to make up the shortfall. Rule-utilitarians may be tempted to incorporate conditions of this sort into the ideal moral code, by requiring us to do or not do certain things only if others fail to live up to the rules. But if the rules are chosen on the assumption that nearly everyone will in fact comply with them then there is no basis for rule-utilitarians to include such provisions in the ideal code for a non-ideal world.

A further modification to rule-utilitarianism would be to choose different sets of rules for ideal and non-ideal societies. Some rules will figure in virtually all moral codes because they require or prohibit acts that diminish the overall good whether or not others are doing them as well. Other rules will apply only in societies in which most everyone

is following them while others will hold only in less than perfect circumstances. There may also be transition rules that help to bring about the ideal moral code. While the ideal moral code may require soldiers to stay and fight the enemy, our own code may allow them to retreat if enough others have already fled.

Various arguments have been given to explain why moral requirements must be open and available to all. Rawls and Gert have argued for publicity on conceptual grounds, as a formal requirement on the concept of right while, Hooker has claimed that publicity is part of the fundamental moral idea of justifying ourselves to others that we would affirm on due reflection, while Bernard Williams argues for publicity as a substantive moral value. As I will now suggest, if we make room for public moral rules in a Kantian broader moral theory, we can begin to explain the value of publicly recognized norms as well as some of their limits.

A multi-stage Kantian framework

There are various lessons that Kantians can draw from rule-utilitarian thinking. Public moral rules provide enormous social benefits, they should be systematically assessed from the moral point of view, facts about human nature figure in explaining why such rules are needed and which ones are best, and the relationship between an ideal moral code and the moral obligations of individuals can be more complicated than rule-utilitarians suppose.

Public moral rules, however, also seem to conflict with certain Kantian commitments. Kantians have been focused on finding the supreme principle of morality, which we are supposed to follow whether or not that principle is publicly enacted and socially enforced. Kantians are also reluctant to ‘water down’ moral principles by

tailoring them to the sorts of facts about human nature that are presupposed by public moral rules for us – moral requirements do not change, they think, even if we have difficulty learning, applying and following them, as long as it is possible for us to do so. Kantians tend to be skeptical about aggregating value across persons, they think that there are other ways of responding to values besides promoting them, and they worry that informal social pressures can be unjustifiably coercive and meddlesome.

Some might be concerned, however, with allowing an ideal moral code to be tailored to facts about how ignorant, short-sighted, biased and weak-willed human beings tend to be.⁴⁰ If we were more intelligent, the best rules might include some plausible exceptions that our ideal moral code nonetheless has to leave out because it would be too costly to inculcate those rules. Yet if it would be better overall to enact a moral rule except for the high costs of getting people with our biases and weak wills to accept and follow it, why should our reluctance to act as we putatively should free us from performing the more demanding acts?

Drawing on the ideas I have highlighted from rule-utilitarianism, where might public moral rules fit into a non-consequentialist moral theory that retains these basic Kantian commitments? Fully assessing the role of rules in a Kantian framework will require a complete account of the content of those rules and our moral obligations with regard to them. What I want to show here is a crucial but limited piece of that larger project: Public moral rules are specifically designed to accommodate various impediments faced by imperfectly rational human beings who live together in society. The more basic moral requirements, which apply to all agents, including those who may

⁴⁰ G.A. Cohen (2008) objects to Rawls' project on similar grounds. Similar worries are expressed in (Kamm, 2007)

not be subject to our vulnerabilities, provide strong reasons for us to establish a code of public moral rules, which in turn play an essential role in determining how we ought to act.⁴¹

Suppose the most fundamental moral requirement is a one that says we ought to conform to those principles that are justifiable to all rational agents if they were fully rational and were to take up a suitably impartial point of view. Instead of testing very specific moral principles straight away to see whether they are justifiable to everyone, suppose we proceed in stages. These levels are distinguished by the scope of the principles that are supposed to be selected, the conception of the agent to whom the moral principles selected at that level apply, and the conception of the circumstances in which those agents are assumed to exist.

First stage

At the highest stage of co-legislation, the aim is to specify moral principles that apply to all rational agents in all circumstances, without restricting those principles to certain types of rational agents or specific circumstances. Here rational agents are taken merely as such and their circumstances are all those in which those agents can possibly exist. The most general conception of a rational agent must therefore “abstract from the personal differences of rational beings” (Kant et al., 2002 G 4:433) including physical features, non-rational psychological propensities, and personal ends. What remains, on one Kantian ways of thinking, are capacities, commitments and propensities that are constitutive of rational nature as such. Those features include the capacity to set ends and

⁴¹ Those who are skeptical of abstract moral principles that apply to all rational agents as such may be content with the third stage, which assesses moral principles for socially embedded human agents in our world.

effectively pursue them, an ability to think for oneself, presumptive rational dispositions to respect ourselves, ensure our continued existence and to effectively exercise our rational capacities and dispositions, and a basic commitment to morality.⁴² There are various ways of filling out the details of the very abstract and potentially conflicting interests we have just as rational agents, but the moral principles that would be selected at the first stage are ones that any and all rational agents would agree to on the basis of their rational nature as such.

At such an abstract level, it may be that the parties only have sufficient grounds to decide on a few very general and vague presumptions and values that are intentionally left indeterminate, which are to be interpreted and applied by further stages that take account of more information. For example, the parties are likely to conclude that, presumptively, the lives of rational agents are to be preserved, rational agents in general are to be respected and their self-respect protected, they are to be afforded the conditions necessary for them to think for themselves, to freely pursue their own plans and projects and otherwise to live as a rational, autonomous agent. In other words, the parties would settle on a number of mid-level moral values, such as freedom, equality, respect and happiness, which are to guide the construction of more specific moral principles. The precise nature of these values and what they require in specific contexts is intentionally left vague at this level, to be filled in by subsequent levels.

Second stage

With these abstract principles and values as fixed, we move down a level and ask a more specific question, namely, what moral principles should govern rational *human*

⁴² See [Citation omitted for blind review] as well as (Hill, 2012; Rawls, 1999a)

beings in the natural world. This more specific question helps the parties to specify more determinate principles that apply to a particular class of agents in a specific context.

Rational agents who are embodied in human form have a rational nature, but there are also essential features of our human nature that can interfere with the full and proper exercise of our rational capacities. At this stage we abstract from the particular ends, physical characteristics or psychological propensities of particular human beings as well from specific historical and geographic circumstances in which the agents live, along with facts about whether resources are extremely scarce or quite abundant and whether agents live together in small groups, large-scale societies, or on their own.

What remains is a conception of rational human beings as such. We are finite creatures who exist as substances in time and space, we have basic human needs for food, sleep, etc., we are mortal, and we are vulnerable to attack. Our cognitive abilities and access to information is limited, we are subject to cognitive biases, and we are prone to epistemic mistakes. We have trouble making reliable moral judgments in complicated situations, when time is short, or our friends and family are involved. We have wills that can be weak – we often give in to temptation and act contrary to our better judgment. We tend to make exceptions of ourselves by assuming we are unable or not required to act in ways we do not want to. We tend to be inscrutable to ourselves and others, which makes it difficult for us to predict how we or others will act. Rational human beings tend to lose respect for ourselves easily when we think that others have little respect for us; yet we also tend to be arrogant and hold ourselves above others.⁴³ We are prone to cynicism, despair and moral apathy when we encounter war, selfishness and rampant immorality,

⁴³ See [Citation omitted for blind review] as well as (Kant, Wood, & Di Giovanni, 1998 R 6:26-7; Rawls, 1999a, pp. 155-156)

especially when we suffer as a result of doing the right thing when few others are doing the same.⁴⁴ And we are sociable creatures who tend to enjoy communicating with one another, engaging in cooperative endeavors, and forming relationships.

At this second stage, where the task is to specify moral principles for rational human beings living in the natural world, we imagine that the parties are themselves fully rational human beings. They are supposed to deliberate and choose on the basis of their rational nature, but as embodied rational agents of a certain sort living in the natural world, their rational interests are given fuller content. For example, their rational interest in preserving their own continued existence extends to ensuring that their basic human needs are satisfied. In light of the human tendency to lose respect for themselves when others humiliate or ridicule us, their rational interest in having proper respect for themselves includes a rational interest in being treated with respect by others.⁴⁵ And rational human beings have a rational interest in perfecting their rational capacities and abilities.

Given their more robust motivations as embodied rational agents, parties at the second stage are likely to settle on principles that, for instance, presumptively prohibit drowning others, withholding life-saving aid, and sexual assault. As of yet, however, the parties are unlikely to legislate for every type of social arrangement. Lone outsiders, families and small tribes may get along well enough, for example, without explicitly specified public rules, relying instead on moral principles that are applied by individual judgment, inculcated as virtues and enforced by conscience.

⁴⁴ See [Citation omitted for blind review] as well as (Kant, 2006)

⁴⁵ I elaborate on this argument in my [Citation omitted for blind review]

Third stage

Guided and constrained by the principles chosen at these higher levels, the legislators then consider an even more specific question, namely, what moral principles should govern rational human beings in the natural world who live together in society. At this stage, we suppose that rational human beings, in the natural world, are living together over generations in a society, which has a large geographic territory, regular interactions among its many members, and limited scarcity of resources. This account of their social world provides even further content to their rational interests and so gives them a more determinate basis for settling on more specific moral principles. For instance, because resources are scarce and rational human beings live alongside one another in a limited geographic territory, their rational interest in forming and pursuing a plan of life extends to a rational interest in securing some kinds of help from others in achieving their personal ends.⁴⁶ As I will now argue, when human agents in the natural world live together in society, their rational interests in securing their basic needs, developing their rational abilities, successfully pursuing their own conceptions of the good exercising their freedom, having proper respect for themselves, relating with others and maintaining their commitment to morality gives them strong reasons for establishing and maintaining a public moral code.

A Kantian case for public moral rules

Once we distinguish these three levels, we can begin to explain how public moral rules can figure in a multi-stage sequence that interprets and applies the most fundamental moral requirement to specific human conditions. Legislators at each stage

⁴⁶ I argue for this in [Citation omitted for blind review]. See also (Herman, 1993a, 1993b).

have options about the form their legislation will take. They can agree that certain areas of life, within limits, should not be governed by moral principles at all but instead left to individual choice or moral virtue. When they choose to adopt moral principles, they can opt for ones that are presumptive and those that are all-things-considered. And the parties can decide whether or not to socially embed the principles they choose in a code of public moral rules that are socially enacted and enforced. Public moral rules can even be presumptive moral principles that are generally binding unless they are defeated by other moral principles, which may or may not be instituted as rules. The rules would not merely be heuristics or rules of thumb, but would have the form that at least some moral principles at that level of generality should take – public moral rules are a way of *implementing* or *putting into effect* moral principles. Rational agents of other kinds may not require public moral rules, but ideal human legislators may decide that facts about human nature and the circumstances in which we live provide good reasons for ensuring that some of the moral principles they select are publicly known, taught to children, socially enforced, and otherwise occupy a prominent position in society alongside a legal system and the consciences of particular individuals.

There is room for public moral rules in a Kantian theory because the rational legislators at each level are free to enact moral principles into a social moral code. But why might they choose to do so? A strong case for establishing and maintaining such rules comes at the third stage, in which the aim is to find principles to govern rational human beings in the natural world who are living together in a society. There are several reasons why parties who take up this Kantian standpoint would decide to institute some kind of public moral code.

(1) If the role of public moral rules in helping people coordinate with one another, grounding legitimate expectations and providing a minimally decent standard of living are to count as moral reasons for legislating public moral rules, those reasons will have to be justified on grounds other than their contribution to overall wellbeing. Each moral legislator has rational interests in satisfying her own basic human needs, developing her rational capacities, and attaining her own personal ends. By abstracting from information about what place each legislator might have in a society of limited scarcity of resources, satisfying these rational interests in survival, self-perfection and happiness requires that members of her society be able to coordinate with one another and give and receive assurances. However, human beings are not omniscient, we have imperfect cognitive abilities, we have wills that can be weak, so even in an ideal society in which everyone is actually acting as they should, there may still be doubts about whether members of society can trust one another. We are also less likely to make personal sacrifices in the name of morality if we suspect that others are ‘free-riding’ on our efforts without following those standards as well. Public moral rules, which are publicly known, generally accepted and socially enforced, are an effective way to help rational human beings coordinate and cooperate with others. The social pressures that enforce them deter immoral behavior and provide some assurances to otherwise good people that most others are acting as they should as well, which mitigates their concern that they are being taken advantage of. The rules help individuals determine what evidence must be gathered and what acts they must stand ready to perform, educate them to the received moral wisdom, train them to look for morally relevant considerations, diminish the time it takes to make a justified decision, and allow people to divide up responsibilities so that we can rely on

one another to do their part in cooperative arrangements. The legislators would therefore likely agree to institute a moral code of some sort so that they are each better able to satisfy their basic human needs, develop and exercise their moral powers, rational capacities and natural talents as well, and pursue their various conceptions of the good.⁴⁷

(2) Ideal human legislators have additional reasons to secure methods for establishing and securing legitimate expectations. Each of them is concerned with their own *freedom* to develop and carry out their own plans of life. When a rational human being is unsure how others will act, particularly when her own security is at issue, she is less free in how she organizes her life than if she could form legitimate expectations about how others will behave and rely on them to act in morally permissible ways. Her freedom is also constrained by uncertainties about whether she and others are overstepping the boundaries of morality. Socially enforced public moral rules protect the freedom of everyone by making people more likely to act as they should and by providing clear, determinate and publicly known ways of specifying how to behave. Thus, the rational interest in securing their own freedom gives the legislators further reasons to support a code of public moral rules.

(3) All rational human beings have an interest in respecting themselves, but as Rousseau (1997), Kant (1998), Rawls (1999a) and others have argued, rational human beings tend to lose self-respect when we reasonably believe that others do not respect us and our self-respect tends to be reinforced when our compatriots show us proper respect.⁴⁸ Ideal human legislators therefore have a rational interest in establishing ways to publicly affirm and express the respect we have for one another and public moral rules

⁴⁷ (Strawson, 2008)

⁴⁸ I discuss this idea in [Citation omitted for blind review]

offers an effective way for rational human beings to do so. Expressing respect requires mutually recognized symbols, gestures or words that carry the intended meaning, so a publicly recognized moral code provides a particularly effective way for limited creatures like us to communicate respect to one another.⁴⁹ Consider the rules of games, which determine who is an equal player in the game by openly specifying the responsibilities and powers of each person. When the chess pieces are set or the players walk onto the court, everyone knows they are all held to the same rules. It can be quite demeaning to offer an opponent an opportunity to put their captured queen back on the board, to keep the same sides in tennis so that he never has to look into the sun, or to take a water break in the middle of the game. Even when these offers are made out of genuine concern, they can send the wounding message that the other person is not an equal and full participant in the activity. Because of the expressive meaning attached to our established moral code, breaking a promise to someone or lying to him can be ways of ridiculing and demeaning that person, as well as ways of leading him lose respect for himself.⁵⁰ But when we hold one another to certain mutually recognized rules, we regularly receive public affirmation that we are full and respected members of society, players in the game, which reaffirms and supports the respect we have for ourselves.

(4) Rational human beings are social creatures, so we tend to enjoy forming relationships of various kinds with one another. In a society of rational human beings, public moral rules provide background conditions in which people can join together in worthwhile joint activities and valuable relationships. Public moral rules can also become part of what binds us together in various kinds of intrinsically valuable

⁴⁹ (Buss, 1999; Feinberg, 1973; Hill, 2012)

⁵⁰ I argue for and elaborate on this point in [Citation omitted for blind review].

relationships, such as ones of friendship, solidarity and cooperation.⁵¹ The value of certain games depends on public moral rules against violence and ridicule while the value of certain relationships depends on socially enacted moral rules against adultery and murder. When public moral rules become part of a relationship, say one of friendship, those mutually recognized standards help to define certain boundaries between the friends, what they can legitimately expect of one another and what they can justifiably blame one another for. Therefore, the legislators have reason to establish public moral rules because rational human beings have an interest in joining together in worthwhile projects and in relating with one another on mutually agreeable terms,

(5) Rational human beings have a human tendency to become cynical and apathetic when they observe rampant immorality in the form of, for example, oppression, violence, ridicule, deception and manipulation, particularly when others are taking advantage of their good conduct. When we recognize pervasive obstacles to moral perfection, the despair and resignation we experience can lead us to regard a perfectly good society as chimerical and unfeasible, which can undermine our own commitment to morality. Knowing this, the ideal legislators, who have a fundamental interest in maintaining their commitment to morality, have reason to look for ways to give people hope for a better future. A code of public moral rules that is generally accepted, widely known and socially enforced can help rational human beings maintain their good wills by diminishing wrong-doing and by providing publicly affirmed and determinates way for them to see that others are acting as they should.

⁵¹ Scanlon (1998, 2008) argues that social norms can play a constitutive role in friendships and in [Citation omitted for blind review] I argue that they can be part of broader relationships of solidarity and cooperation.

Features of our human nature and the social circumstances in which we live, therefore, provide strong reasons for instituting a mutually-beneficial system of public moral rules within a Kantian framework that interprets and applies basic moral values to real world conditions. It remains to be seen whether a moral theory of this sort, which shares some structural similarities with rule-utilitarianism, may also provide a reasonable standpoint for assessing the content of public moral rules and for explaining when they ought to be followed.

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