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Universal Rights Localized or Local Rights Universalized?

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Abstract: A universalist conception of immigration, assuming that all humans have a fundamental ethical right to equal consideration (Brücker), is contrasted with a particularist ethical conception that restricts equal consideration to members of a given community (Osterloh/Frey). It is argued that within the limits of Robbinsian economics only a communitarian conception is acceptable while an ethical theorist might lean towards a universalist view.

Keywords: welfare economics, universalism, particularism, Robbins, Weber

Jeremy Bentham as one of the founders of utilitarian universalism referred to universal natural human rights as “nonsense upon stilts”: “But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not that right—want is not supply—hunger is not bread.” (Bentham 1843, Article 2)

In a narrow interpretation of his claim, Bentham clearly is correct: that in some normative theory a demand ‘exists’ as an implication of the theory does not as such bring corresponding social practices into the world. It takes a state and its legal staff engaged in real legal/social practices to create full-fledged rights. However, as far as implementation is concerned Bentham’s own theory has to cope with the same problems as the theories he criticizes. For, a universalist utilitarian ethical theory like Bentham’s can exert a causal influence on the world only when human individuals are motivated by their understanding of it at least to criticize, to applaud, express support of measures etc.

More generally speaking, in the context of state-sponsored positive law, what will be ‘produced’ in practice by real people is causally influenced by their understanding of normative theories. Once we take account of interactions between (ideal) normative theories and real social practices of positive law seemingly subtle distinctions between universalism and particularism in normative argument start to matter not only in theory but also (at least potentially) in practice. The

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papers on immigration by Herbert Brücker (2018) and Margit Osterloh and Bruno Frey (2018) form cases in point.

1 Welfare Economic Universalism

Brücker's argument extends welfare economic utilitarianism to all human individuals around the world. I take it, that he would agree that his argument must be localized according to circumstances of time and space even further than he does himself. So, I do not accuse him of neglecting the need to localize his universalist policy advice. Yet, I take issue with his assumption that universalism is compatible with the skeptical meta-ethics of economics. On the ultimate level Brücker's utilitarian analysis is treating humans equally. Where they are located in time and space matters merely as circumstantial implementation conditions of his universalist theory. Ultimately, the interests of those who intend to immigrate into a country are taken into account on a par (symmetrically) with the interests of citizens of the country of their intended destination.

Now, to be causally and motivationally effective in the real world, any argument must be addressed to somebody. As policy advice Brücker's utilitarian argument has to be addressed to citizens of target countries of immigration. Sufficiently many, sufficiently influential citizens of a country of destination must not only adopt what has traditionally been called an ethical point of view but a specific universalist consequentialist point of view of the Smithian impartial observer if Brücker's theory is to make a difference in the real world.

The preceding conditions may be approximately fulfilled for parts of the elites in countries of destination yet it seems a rather precarious assumption concerning the general populace of present constitutional democracies. To the extent that citizens of the constitutional democracies of destination of potential migrants are not already at least in some implicit sense utilitarian universalists or even consequentialist welfare economists like he himself, Brücker faces one of two not altogether attractive alternatives: He would either have to suggest that (a.) his policy recommendation is to be imposed on citizens who as a matter of fact endorse a personal welfare functional that is incompatible with the utilitarian one he endorses¹ or he would have to present (b.) auxiliary arguments of 'the doing well by

¹ It would require an additional argument to show that rationality does not imply the assumption of symmetrical (universal) rationality. Only with such an assumption it would be possible to argue that imposing what is rational according to some variant of broadly 'Bayesian' decision theory is sufficient. Yet, since there are logically possible worlds in which individual utility functions

doing good (or right)' kind to provide reasons for acting 'as if' adopting an impartial utilitarian point of view.

Ad a: Welfare economists can violate Robbins' suggestion to constrain themselves to technological advice of means that are suitable for the pursuit of *given* ends ('given' by the addressees of the argument as the ends they own as a matter of fact) only at the price of giving up Weberian value neutrality (Robbins 1935). Unable to remain silent on ends such welfare economists become merely one partisan voice in political competition of groups that pursue competing aims, ends or values. Like other welfare economists Brücker cannot go that route without giving away his game. Ad b: Economists could well provide arguments why it may, for instance, be 'wealth-increasing' for those already living in target countries if they would admit immigrants. The latter kind of argument may be highly relevant and is in fact acknowledged to be so by many citizens of developed constitutional democracies. Yet, it falls short of Brücker's aspiration to provide a utilitarian ethical argument. Contrary to a proper universalist ethical argument the 'doing well by doing good' argument is certainly not decisive all things considered. It is fine as policy advice for those addressees who as a matter of fact seek to increase the wealth of their societies. For them it is advisable to admit immigration as a means to that end (as 'given' by them). Yet the opportunity costs in terms of satisfaction of other ends may render it inadvisable to admit immigration.

Taken together the discussion of (a.) and (b.) shows that Brücker's aspiration to do ethics while keeping a neutral stance does not work. Though this error is wide spread among economists (including such diverse notables like James M. Buchanan, Milton Friedman or John C. Harsanyi) in the end it is either starting from particular 'given' ends or adopting a universalist stance that may or may not contingently be present among the ends of addressees of the universalist argument. Particular addressees of policy advice may or may not have reasons to 'ratify' it in view of their ends. The Osterloh-Frey contribution may be impervious to the objection of smuggling in universalism camouflaged as a rationality requirement. Yet, it allows for two interpretations of which only one is fully compati-

representing universalist rankings of the welfare of the collectivity diverge, selecting one of those possible worlds does amount to imposing one specific conception of rationality. That the reasoning about knowledge approach to game theory—like general equilibrium analysis—is based on an ideal theory symmetry assumption does not justify that assumption outside the approach. It seems that the first who understood that the von Neumann-Morgenstern axiomatization of utility as mere representation of preferences requires modifications of traditional welfare economics was Vickrey 1948, 329, who later was unduly but conveniently neglected by the universalist faction; since I cannot expand on this here, see for further discussion and references Kliemt 2017.

ble with Robbins' effort to restrict economic to 'technological' or 'means-to-given-ends' advice.²

2 Local Cooperatives in a (Non-)Universalist Framework

The Osterloh-Frey paper frames immigration decisions in terms of the interests of the admitting societies only. It is instructive to distinguish two possible interpretations of the approach. There is (a.) a kind of universalist justification for framing potential host countries in terms of what Osterloh-Frey call 'cooperatives' (in economic parlance 'clubs' (Buchanan 1965; Cornes/Sandler 1996) and (b.) a strictly particularist mode of justification.

Ad a: The first interpretation starts from ascribing rights universally to each and every human individual qua being human (or, say, being endowed with reason). If it is in this setting assumed that despite the finiteness of the surface of the earth humans can legitimately acquire rights to the exclusive control of parts of that surface and at the same time may engage mutually agreed contracts that pool their property rights they are entitled to form cooperatives of exclusive land-use. With this entitlement in hand cooperatives may specify conditions of access for people who intend to enter their territorial domain.

To illustrate the implications of this kind of argument it may be useful to recall a remark of James Buchanan concerning Nozick's well-known Wilt Chamberlain example against non-voluntary wealth ('re-')distribution (Buchanan 1999, 41). According to this argument, if, say a million individuals are willing to pay each one dollar for watching Wilt's outstanding basketball performance why should he not be entitled to keep his earnings without having to pay (progressive) taxes on it? To this Buchanan responded by a gentle reminder of the fact that Wilt Chamberlain originated in Puerto Rico (affiliated with the United States but not a state of the union) and could (under Nozick's own premises) legitimately enter the United States of America only in mutual agreement. Under the universalist natural law entitlement scheme the terms of this agreement could have been freely specified by the US. To the extent that it is conceived as a cooperative of individuals who are controlling the US territory jointly (on the basis of agreements under natural law) the cooperative of US citizens is free to choose whom to admit. In Puerto Rico,

² A restriction that is not only characteristic of Robbins but by broadly Humean ethical theory as well: Mackie 1977.

Buchanan argues, Wilt's skills may have been worth, say, \$1000 a year, in the US they, at least in the example, Wilt earned \$1 million each year. For the bargaining region between \$1000 and \$1,000,000 the agents of the cooperative were entitled to specify that Wilt would gain access only by agreeing to comply with US law including progressive income tax laws. Wilt would have had reason to voluntarily agree to the exchange contract if offered but he had no right to demand such an offer.

In a universalist individual rights position as Robert Nozick's (1974) the cooperative or club of those who have pooled their rights to control some territory can specify immigration laws as seems fit to them. The ethical legitimacy of specifying conditions of access seems to obviously rest with those who are already members. In line with the gist of the Osterloh-Frey paper they may specify the conditions on which the collective goods are provided and membership in the cooperative is granted to new entrants.

It may be worth re-emphasizing that Buchanan's argument depends strongly on whether Nozick's own premise that it is legitimate to acquire rights to an exclusive use of parts of the surface of the earth is valid within a universal rights approach. Moreover, the argument in favor of justifying progressive taxation will work in this context only for immigrants and not for those who are born into the cooperative without ever entering into it contractually.³ In view of these problems Brücker's ascription of a particularist rather than universalist communitarian conception of cooperatives to Osterloh-Frey should be considered. Endorsing a universalist approach Brücker, though he does not do so explicitly, should reject such a view whereas a Robbins-type economist as well as an adherent of a Hume-Mackie type meta-ethics should endorse it (Mackie 1977). So let us turn to such a non-universalist argument.

Ad b: It's somewhat unclear whether Osterloh-Frey would actually reject claims to universal ethical justification altogether and be content to let normative argument be constrained to suggesting means to given ends whatever those might be. Yet, even though I do not know whether my friends Margit and Bruno would be with me in that, I believe that such a 'relativist' position is entirely reasonable.

First, the elaborate systems of rule of law and priority of liberty that have emerged in the last 200 years in the so-called 'Western' constitutional democracies are created by particular 'national communities' rather than humankind at large. It seems intuitively rather implausible to assume that entry to the open ac-

³ That is, outside his elegant argument against Nozick, Buchanan's own contractarianism remains standing on clay feet. But his argument is at least democratic and communitarian in that he allocates ultimate authority to an *exogenously* defined *sub-group* of humankind.

cess societies particular groups managed to establish for their own members by their own efforts in the national and international game of power must be opened by them to outsiders.⁴ Second, in view of the *fact* that ‘hunger is not bread’ and systems of rights and rule of law must be produced by members of the relevant cooperatives it seems hard to see why they would be under some ultimate obligation not to provide preferential treatment to contributing fellow members of their own cooperative but to treat outsiders as having the same rights as insiders.⁵ Third, even if we wish humankind well for the future and share the ideal of making the world a better place for *all* members of our kind we have strong reasons to be partisan for those forms of social organization that made rule of law and basic rights ‘locally universal’ in particular communities for all *members* in the first place.

3 Concluding Remark

If ‘America first’ would be meant in the sense of acknowledging priority in access to those who have created the systems of rights in America and contribute to upholding it (by taxes and compliance), it would actually be reasonable. However, as trumpeted it is clearly not expressive of being partisan for free Western institutions. It is quite to the contrary hostile to the great achievement of the rule of law in open access society even on the local level. It is merely expressive of impulses of ‘we against them’ (Greene 2013) rather than enlightened self-interest and real political pursuit of Western ideals. Yet, as dangerous as the marching tune of the trumpeters is, it is at least as dangerous to put whatever partiality we may find in free Western societies in favor of open access institutions at risk by indulging in universalist parrot talk. To express high ideals of universalism while being oblivious of the fact that universal rights like all rights must be produced locally—by some community of individuals partisan for those rights—puts the locally produced rights at risk while doing hardly anything for promoting them elsewhere.

⁴ The rise of open access societies is instructively discussed in many books. The most convincing account seem to me North 2013. The thesis that the ‘West’ did that at the expense of other regions of the world seems rather far-fetched even if we include the abominations of colonialism. In particular, if we focus on the times after WWII and factor in the progress achieved during the last fifty years on a global scale progress around the world seems rather striking; see in a popular vein Norberg 2017, as an early mover Pinker 2012 and the beautiful web-page ‘Our World in Data’: <https://ourworldindata.org>.

⁵ Interestingly most of the European nations stopped to require explicit permits to enter their territory after the ascent of the railway system in the decades preceding WWI.

Despite the preceding criticisms the two papers discussed have the great merit that they are willing to respect empirical facts for what they are when addressing normative issues. Whatever brings issues of immigration from the skies of quasi-theological discussions of normative ideals down to earth of comparative institutional analysis is a good thing. As every other practical political issue immigration should be discussed in comparative institutional terms respectful of whatever suitably localized empirical evidence concerning likely effects of alternative policy measures is available. As far as this is concerned the papers have great merit.

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