

Rights Based Paretianism

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I Introduction

An ethical theory is *axiological* just in case it makes the permissibility of actions depend solely on considerations of goodness. Act utilitarianism is the paradigm axiological theory. An ethical theory is a *pure rights theory* just in case it judges an action permissible if and only if it violates no one's rights. Libertarianism is a paradigm pure rights theory. I shall formulate and defend a type of axiological theory that, unlike act utilitarianism, is sensitive in a new and interesting way to whether rights are violated.

Let us start by briefly considering the strengths and weakness of act utilitarianism. Act utilitarianism judges an action permissible just in case it maximizes social (e.g., total or average) welfare. It has many attractive features. It is a clearly formulated theory that draws on the machinery of decision theory. It takes a tough minded approach to morality: always focusing on the outcomes of actions. And it takes human welfare very seriously. The axiological theory I shall defend will have all these features.

Act utilitarianism also has many unattractive features. It makes the questionable presupposition that there is an intersubjectively valid scale for making interpersonal comparisons of utility. It totally ignores the past: the permissibility of actions does not depend on what the past was like (what agreements and promises were made, what wrong doings took place, etc.).¹ It leaves very little liberty to the agent: the proportion of the feasible actions that are judged permissible is in general

1 Act utilitarianism is, of course, sensitive to what people *believe* the past to be like. It is not, however, sensitive to the *truth* of such beliefs. I discuss this issue at length in 'Teleology, Consequentialism, and the Past,' *The Journal of Value Inquiry* 22 (1988), 89-101.

very small. And it does not take the separateness of persons seriously at all: as long as *social* (e.g., total or average) welfare is maximized, it does not matter at all how *individuals* fare. Imposing a severe hardship on someone is permissible, if it maximizes social welfare. The axiological theory I shall defend will have none of these features.

Pure rights theories (such as libertarianism) need not – and in general do not – have the unattractive features of utilitarianism identified above. They need not presuppose that there is an intersubjectively valid scale for making interpersonal comparisons of utility: they need not make any such comparisons. They can be sensitive to what the past was like (for example, to what agreements were made, and to what wrongdoings took place). They need not be excessively demanding of the agent: as long as the rights are not extremely strong, a large proportion of the feasible actions will be judged permissible. And they can take the separateness of persons seriously: the constraints imposed by the rights can rule out treating individuals in various ways.

The main unattractive feature of pure rights theories is their inadequate sensitivity to the welfare of individuals. Any action that violates someone's rights is judged wrong – no matter how good its outcome would be for the welfare of the members of society. This is due to their non-axiological (deontological) character, i.e., to the fact that they do *not* make the permissibility of actions depend solely on considerations of goodness.

In this paper I shall motivate and formulate a theory that, like utilitarianism, is axiological (i.e., makes the permissibility of actions depend solely on considerations of goodness), but which, by being sensitive in a special way to rights considerations, avoids the unattractive features of utilitarianism identified above. Of course, not everyone will agree that the noted features are objectionable. The goal of this paper, however, is not to argue that these are objectionable features – this has been done by others² – but to sketch an interesting kind of axiological theory that does not have these features.

To avoid confusion the reader should note carefully that I make no attempt to offer specific conceptions of the central notions of welfare, rights, and outcome. The plausibility of any theory based on these notions will, of course, depend crucially on how these notions are under-

2 See, for example: J.D. Mabbott, 'Punishment,' in Samuel Gorovitz, ed., *Mill: Utilitarianism* (Indianapolis: Bobbs-Merrill 1971), 88-98; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books 1974) chs. 3 and 7; Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon Press 1982), chs. 1-3; and Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press 1973).

stood. I say little about these notions – not because they are not important – but because I wish to focus on how these notions (however understood) can be *related*. The reader should interpret these notions in whatever manner seems the most plausible. For example, welfare can be interpreted as happiness, preference satisfaction, self-actualization, material well-being, or whatever other conception of the good the reader finds most plausible.

Rights are here understood simply as certain sorts of sets of constraints on action. Rights generate constraints on how individuals may be treated, and for the present purposes all that matters is that there are some such constraints. I leave open whether the constraints are generated by negative rights (which merely rule out bringing about harm in certain ways to others), or by positive rights (which also rule out failing to help others in certain ways). I shall, however, assume that as a minimum the constraints rule out certain forms of directly and significantly harming others, breaking agreements, lying, and failing to compensate for past wrongs. Such constraints form the basis that any plausible rights theory would build upon.

We are finally ready to begin. The paper proceeds by successive approximation: it starts with act utilitarianism, and makes successive revisions to eliminate problematic features. This procedure will, I hope, help highlight the attractive features of the end product.

II Rights Constrained Paretianism

A standard objection against act utilitarianism is that it does not take the separateness of persons seriously enough, in that it is insensitive to how particular individuals fare. Any action that maximizes aggregate welfare is judged permissible – no matter how adversely affected some individuals are. One way of overcoming this objection is to specify a set of rights, and apply the utilitarian principle only to those actions that satisfy the constraints generated by those rights. For brevity, let us hereafter call the generated constraints on action – whatever they might be exactly – *the constraints*. We are considering, then, the following theory:

Rights Constrained Utilitarianism: an action is permissible just in case of *those actions that do not violate any of the constraints*, it maximizes social welfare.

According to this theory no action that violates any of the constraints is permissible – no matter how high the social welfare of its outcome. This provides a minimum level of protection for each individual.

A second standard objection to utilitarianism is that it leaves very little liberty to the agent. The only actions that are judged permissible are those that maximize social welfare, and in general very few actions meet this condition. (Indeed, unless there is a tie for maximal social welfare, only one action will do so.) Morality, many would insist, leaves more freedom of choice to the agent, in that it normally leaves the agent a wider range of permissible actions.

This objection applies equally well to rights constrained utilitarianism. Although it provides greater protection to those affected by actions than utilitarianism, it is just as demanding of agents as utilitarianism. Pure rights theorists, of course, would say that we should simply drop the welfare maximization requirement, and stick solely with the constraints. The problem with that approach, however, is that the permissibility of actions would no longer be sensitive to the welfare of individuals.

There is, however, a middle path between simply dropping the welfare maximization requirement and keeping it as it is. This is the path of merely requiring *Pareto optimality*. An action is Pareto optimal *relative to a given set of actions* just in case no action in that set has an outcome that makes at least one person better off and no one worse off. An action is Pareto optimal – with no explicit relativization to a set of actions – just in case it is Pareto optimal relative to the set of *feasible* actions.³

To illustrate the notion of Pareto optimality consider a choice situation in which there are three actions (a1, a2, and a3) that affect Smith's and Jones' welfare as shown below in Table 1.⁴

TABLE 1 – Welfare

Action	Smith	Jones	Pareto Optimal?
a1	2	1	n
a2	2	3	y
a3	4	2	y

3 Note that relative to a given set, Pareto optimality is necessary, but not sufficient, for total welfare maximization.

4 For ease of readability here and below I express people's welfare in terms of numbers. Note, however, that I only make use of the ordinal properties (equals, is greater than, and is less than) of these numbers for a given person. Welfare is not assumed to be cardinally measurable nor interpersonally comparable.

Relative to the set {a1, a2, a3} a1 is not Pareto optimal, since under a2 Jones is better off (3 vs 1), and Smith is at least as well off (2 vs 2). On the other hand, both a2 and a3 are Pareto optimal. Action a2 is Pareto optimal, since, although Smith is better off under a3, Jones is worse off. Action a3 is Pareto optimal, since, although Jones is better off under a2, Smith is worse off.

Consider, then, the following theory:

Rights Constrained Paretianism: an action is permissible just in case, of those actions that do not violate any of the constraints, it is Pareto optimal.

This theory is considerably less demanding of the agent than both utilitarianism and rights constrained utilitarianism. In general there will be many actions that are appropriately Pareto optimal. Like pure rights theories, rights constrained Paretianism holds that satisfying the constraints is a necessary condition for being permissible, but unlike pure rights theories, it denies that satisfying the constraints is a sufficient condition for being permissible. Actions which satisfy the constraints, but which, relative to the set of actions satisfying the constraints, are not Pareto optimal (because some other action satisfying the constraints makes someone better off and no one worse off) are not permissible. (Thus, for example, in the choice situation of Table 1, if all three actions satisfy the constraints, then a2 and a3, but not a1, are judged permissible.)

Rights constrained Paretianism is not subject to the three objections raised against act utilitarianism at the beginning of the paper. By making the satisfaction of the constraints a necessary condition for permissibility, it respects the separateness of persons (because it prohibits directly and significantly harming anyone) and is past-regarding (because it prohibits breaking agreements, and requires one to compensate those whom one has wronged). By requiring mere Pareto optimality (as opposed to total welfare maximization) it leaves the agent a significant amount of liberty, and does not presuppose that there is an intersubjectively valid scale for making inter-personal comparisons of welfare. Because it never compares the welfare of one individual with that of another (for example, it does not add utility numbers together, as does utilitarianism), there is no need for such a scale.⁵

⁵ In fact rights constrained Paretianism does not even presuppose that welfare is cardinally (reflecting intensity) – as opposed to ordinally – measurable.

Pure rights theorists, of course, will object to rights constrained Paretianism on the grounds that – although it is an improvement over rights constrained utilitarianism – it is still too demanding of the agent. Satisfying the constraints, they will insist, is sufficient for being permissible. Even the Pareto optimality requirement, they will claim, is excessive.

Rights constrained Paretianism is clearly not a pure rights theory. It does, however, take the constraints very seriously. As such it may seem to be an attractive way of combining rights and Paretian considerations. It has, however, one major shortcoming: it is not sufficiently sensitive to the welfare of individuals. Any action that violates the constraints is judged impermissible – no matter how good its outcome for everyone. But suppose that by violating the constraints some people would be better off and no one would be worse off than if none of the constraints were violated. Isn't such an action permissible? In the next section I shall formulate a modification of rights constrained Paretianism that gives an affirmative answer to this question.

III Rights Based Paretianism

Consider the choice situation represented in Table 2 below.

Table 2

Action	Welfare		Satisfies	Judged Permissible
	Smith	Jones	Constraints	by Rights Const. Paretianism
a1	1	1	y	n
a2	2	3	y	y
a3	4	2	y	y
a4	2	4	n	n

This table defines a choice situation in which there are four feasible actions. Actions a1, a2, and a3 satisfy the constraints, whereas a4 does not. Actions a2 and a3 are judged permissible by rights constrained Paretianism. Action a1 is not judged permissible, because, relative to the actions that satisfy the constraints (a1, a2, and a3), it is not Pareto optimal.

Consider now *a4*, and compare it to *a2*, which is judged permissible by rights constrained Paretianism. Action *a4* makes Jones better off than *a2* (4 vs 3) and Smith equally well off as *a2* (2 vs 2). So, if *a2* is permissible, and *a4* makes Jones better off and Smith at least as well off, then surely *a4* is also permissible – even if it violates the constraints. To deny this is to take the constraints too seriously. It is to lose sight of the importance of human welfare. And yet this is exactly what rights constrained Paretianism does. It judges *a2* permissible, but *a4* impermissible.

One condition of adequacy, then, is that a theory have the monotonicity property defined below. Let us say that an action, *ac1*, is *weakly Pareto superior* to *ac2* just in case everyone is at least as well off under *ac1* as under *ac2*. Let us say that *ac1* is *Pareto superior* to *ac2* just in case it is weakly Pareto superior and at least one person is better off under *ac1* than under *ac2*.

Monotonicity (of permissibility with respect to weak Pareto superiority): If *ac2* is weakly Pareto superior to *ac1*, and *ac1* is permissible, then so is *ac2*.

Rights constrained Paretianism does not satisfy monotonicity. In the choice situation of Table 2 it judges *a2* permissible and *a4* impermissible – even though *a4* is strictly Pareto superior to *a2*.

One way of modifying the theory so as to guarantee monotonicity is as follows. For brevity let us call the actions that are judged permissible by rights constrained Paretianism *the RCP candidates*. A modified theory might judge an action permissible just in case it makes each person at least as well off as some RCP candidate (even if the action in question violates the constraints). With respect to Table 2, this modified theory would judge permissible *a2*, *a3*, and *a4*, but not *a1*. Here the RCP candidates are *a2* and *a3*. Actions *a2*, *a3*, and *a4* each make everyone at least as well off as some RCP candidate (*a2*, *a3*, and *a2* respectively), and are therefore judged permissible. Action *a1*, however, does not make everyone at least as well off as either *a2* or *a3* (the only RCP candidates), and so is not judged permissible.

The main problem with this suggestion is that it does not go far enough. It satisfies monotonicity, but it does not satisfy the following Pareto optimality condition:

Pareto Optimality: Only actions that are Pareto optimal with respect to the set of feasible actions are permissible (i.e., if feasible action *ac2* is Pareto superior to *ac1*, then *ac1* is not permissible).

On the suggested modification non-Pareto optimal actions are judged permissible, and so the Pareto Optimality condition is not satisfied. For example, in the choice situation of Table 2 a2 is judged permissible, even though it is not Pareto optimal (since a4 makes Jones better off than and Smith equally as well off as a2).

In order to guarantee Pareto optimality, the following modification seems more promising.

Rights Based Paretianism: an action is permissible just in case it is Pareto optimal relative to the set of actions that make each person at least as well off as some RCP candidate.⁶

In very broad outline this is the theory I wish to defend.

Unlike rights *constrained* Paretianism, rights *based* Paretianism does not treat the constraints as real constraints, since satisfying the constraints is not treated as a necessary condition for being permissible. The constraints are treated simply as determining a set of reference points (the RCP candidates). Making each person at least as well off as at least one of these reference points is a necessary condition for being permissible, but being one of the reference points – or more generally, satisfying the constraints – is not. Thus, in the choice situation defined by Table 2 a4 is judged permissible even though it violates the constraints.

Unlike the modification briefly considered above, rights based Paretianism treats Pareto optimality (relative to the set of all feasible actions) as a necessary condition for permissibility. Actions, such as a2, which are RCP candidates, but which are not Pareto optimal (because some other action that violates the constraints is Pareto superior to it), are not judged permissible.

The nature of rights based Paretianism can be clearly displayed by a diagram in welfare space. Consider Diagram 1 below.

⁶ Note that the set of actions relative to which Pareto optimality is to be assessed is the set of actions that make each person (taken one by one – not collectively) at least as well off as some (not necessarily the same for all) RCP candidate. The universal quantifier (for each person) precedes the existential quantifier (there is some RCP candidate). Thus, there need not be some (particular) RCP candidate relative to which everyone is at least as well off (i.e., actions need not be weakly Pareto superior to some RCP candidate).

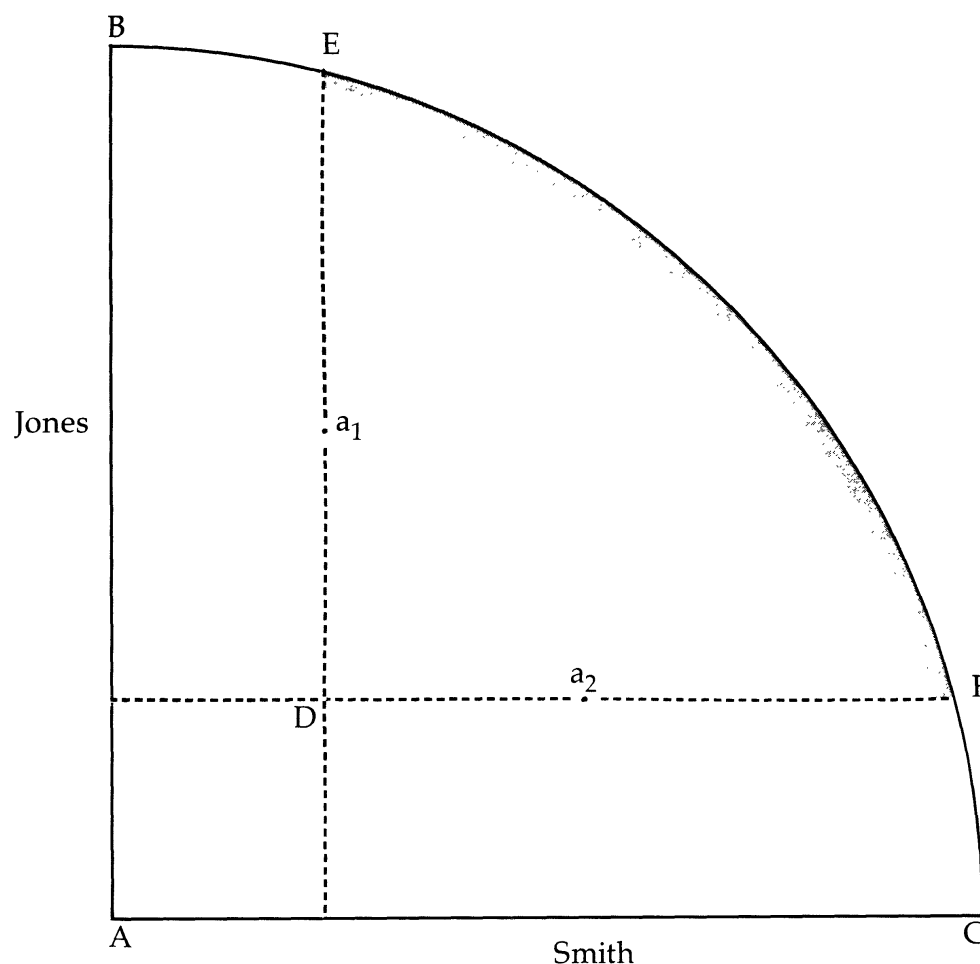


Diagram 1

Diagram 1 represents in welfare space a choice situation in which: (1) Smith and Jones are the only two individuals, and (2) a_1 and a_2 are the only RCP candidates. The A-B-C region represents the set of feasible actions. Each feasible action is represented by a point in this region. Actions with the same welfare values are represented by the same points. Smith's welfare values are mapped along the x axis, and Jones' are mapped along the y axis. Region D-E-F is the region of those actions that make each person at least as well off as some RCP candidate (above D-F because a_2 is the worst RCP candidate for Jones, and to the right of D-E because a_1 is the worst RCP candidate for Smith). The shaded curve segment (E-F) is the Pareto optimal set of D-E-F, and therefore represents the set of permissible actions for the agent to perform; i.e., all and only actions that have welfare values that fall in the shaded region are permissible.

Like rights constrained Paretianism, rights based Paretianism leaves the agent a significant amount of liberty, and – via the reference point determining role of the constraints – takes the separateness of persons seriously. Like utilitarianism, but unlike rights constrained Paretianism, it is axiological because it makes the permissibility of actions depend solely on considerations of goodness. Any two choice situations that have the same structure in welfare space (i.e., for which [a] the set of feasible actions occupy the same region of welfare space, and [b] the set of RCP candidates occupy the same region of welfare space) have the same regions of welfare space judged permissible – no matter how different they may be with respect to non-welfare features.⁷ Although rights based Paretianism makes the constraints relevant for the determination of the permissibility of actions, it is only the goodness of the outcomes of actions satisfying the constraints that matters. Even actions that violate the constraints are judged permissible, if they are Pareto optimal and make each person at least as well off as some RCP candidate.

Let us now compare this theory to both act utilitarianism and pure rights theories.⁸

IV Comparisons

Like act utilitarianism, rights based Paretianism is an axiological theory for which Pareto optimality is a necessary condition for being permissible. Individuals are not permitted to waste welfare. And like act utilitarianism, it based the permissibility of actions on their total outcome – both what agents bring about and what they merely allow to happen. Unlike act utilitarianism, it does not require social welfare to be maximized, but only that the actions be appropriately Pareto opti-

7 For further discussion of the axiological/non-axiological distinction, see Ch. 2 of my dissertation 'The Teleological/Deontological Distinction' (University of Pittsburgh 1984), and my paper 'The Teleological/Deontological Distinction,' *Journal of Value Inquiry* 21 (1987), 21-32. I there argue that it is a more fundamental classificatory distinction than the traditional teleological/non-teleological distinction(s).

8 Given greater space I would defend a modified version of rights based Paretianism. The modified version would allow – but not require – agents (1) to waste their own welfare when it is at no cost to anyone else (so actions need not be Pareto optimal, if the only person who could be made better off is the agent); and (2) to sacrifice their own welfare for the benefit of someone else (so agents can choose to have their welfare drop below their minimum entitlement). For the present purposes, however, I shall ignore these modifications.

mal. Consequently, it leaves the agent a significant amount of liberty, and does not presuppose that there is an intersubjectively valid scale for making interpersonal comparisons of welfare (since it never adds one person's welfare with that of another). Furthermore, unlike act utilitarianism, rights based Paretianism makes the permissibility of actions directly sensitive (via the reference point determining role of the constraints) to whether the action involves deception or brings about harm to others, and to what the past was like (e.g., what promises and agreements were made, and what violations occurred).

In summary, unlike act utilitarianism, rights based Paretianism treats social welfare maximization neither as necessary for permissibility (actions that are appropriately Pareto optimal are judged permissible, even if they do not maximize social welfare), nor as sufficient for permissibility (actions that do not make each person at least as well off as some RCP candidate are judged impermissible, even if they do maximize social welfare). Convinced utilitarians will find these deviations from utilitarianism inappropriate, but many axiologists will find merit in the way rights based Paretianism combines Pareto optimality with sensitivity to rights considerations.⁹

Like pure rights theories, rights based Paretianism can, if the constraints are appropriately specified, leave the agent a significant amount of liberty, be past-regarding, distinguish (in the constraints) between bringing about harm and merely allowing harm, and include rectification considerations for past violations. Unlike pure rights theories, however, it does not recognize any non-value-theoretic action types (such as promise-breaking, lying, etc.) that are *absolutely* forbidden. If a given action is permissible, then any other action that makes everyone at least as well off as the given action is also permissible – even if it violates the constraints.

In summary, unlike pure rights theories, rights based Paretianism treats the satisfaction of the constraints neither as necessary for permissibility (actions that are Pareto optimal and make each person at least as well off as some RCP candidate are judged permissible, even if they violate the constraints), nor as sufficient (actions that are not

⁹ In *Collective Choice and Social Welfare* (San Francisco: Holden-Day 1970), Amartya Sen proves that in a certain sense it is not possible to consistently combine Pareto-optimality with certain rights considerations. In 'How to Combine Pareto Optimality and Rights Considerations' (unpublished) I use rights based Paretianism as an example of how Pareto-optimality can be combined with important rights considerations. Although this in no way undermines the validity of Sen's important theorem, it provides insight concerning the plausibility of the conditions on which Sen's theorem rests.

Pareto optimal are judged impermissible, even if they do satisfy the constraints). Convinced pure rights theorists will find these deviations from pure rights theories inappropriate, but many who find merit in rights considerations will find merit in the axiological and Pareto optimality features of rights based Paretianism.

Rights based Paretianism is in some very rough sense intermediate between act utilitarianism and pure rights theories. To see this consider the following example. Suppose that I purchase some word processing software, and the terms of sale to which I agree specify that I am not to give or sell copies of the software to anyone else. A friend of mine already has a software program, but it is not as sophisticated as mine, and she asks me if I would give her a copy of the software. She is relatively poor and not willing to spend the \$400 that my software program costs, so if I don't give her a copy, she will continue to use her old program. Is it permissible for me to give her a copy of my program?

The pure rights theory answer – assuming a constraint against breaking agreements – is clear: It would be wrong for me to give her a copy of the program. I promised not to do so, and that settles the matter. The utilitarian answer is less clear in that it will depend on the specifics of the circumstances. In many situations of this type, however, the benefit to my friend of giving her a copy of the program will outweigh the costs to others (e.g., the owners of the software company), and so will be permissible. More generally, in many situations of this type it would be Pareto sub-optimal not to give her the software, since, given that she will not buy the program in any case, giving her the program would benefit her at no cost to anyone else. In such situations it seems excessively rigid to judge it wrong to give her the software, simply because it violates an agreement.

Rights based Paretianism takes a position roughly intermediate between pure rights theories and utilitarianism. In many situations of the above type, it would judge it permissible to give my friend a copy of the program, since it would be Pareto optimal (no one's welfare being wasted), and would make everyone at least as well off as my not giving her a copy (a RCP candidate). (The owners of the company are not made worse off, since in any case she wouldn't buy the program.¹⁰) Like utilitarianism, this seems to give the intuitively correct answer. Furthermore, unlike utilitarianism, it gives more than indirect consider-

10 Here I assume that welfare is understood in a narrow, self-regarding sense according to which the welfare of the owners is not affected by the mere fact that my friend obtains a copy of their program without paying.

ation to the fact that an agreement is being broken. For suppose the situation were a bit different in that either: (1) my friend *would buy* the software from the company, if I didn't give it to her; or (2) if I give her the software, she will give a copy to someone else who would otherwise buy the software. In such situations rights based Paretianism would likely judge it impermissible for me to give it to her, since that would likely make the owners of the company worse off than if I did not break our agreement. Again, because agreements (for example) do count for something, this seems to give the intuitively correct answer. Rights based Paretianism, I suggest, combines Pareto optimality considerations with rights considerations in an intuitively attractive manner.¹¹

V Some Objections

I have, of course, only given a sketch of the form that rights based Paretian theories might take.¹² To formulate a theory proper the exact nature of the constraints, of individual welfare, and of the outcomes of actions needs to be carefully specified. And to give a full defense of the theory would require applying the theory to a wide variety of cases, and showing that (as compared with competing theories) it best captures one's considered judgments. Still, enough has been said about rights based Paretianism to see what sorts of objections will be raised against it.

Pure rights theorists will object that rights based Paretianism fails to treat the satisfaction of the constraints as a *necessary* condition for being permissible. Rights based Paretianism judges it permissible to torture, lie, and break agreements, if doing so is Pareto optimal and

11 In 'Rights and Agency,' *Philosophy and Public Affairs* 11 (1982), 3-37, and 'Evaluator Relativity and Consequential Evaluation,' *Philosophy and Public Affairs* 12 (1983), 113-32, Amartya Sen develops a very different way of making an axiological theory sensitive to rights considerations. He does this by using a teleological (goal maximizing) theory, where the goal is sensitive to rights considerations. His theory, I would argue, is not appropriately sensitive to welfare considerations. Nonetheless, the motivation for his theory is similar to that for mine.

12 I have focused on rights based Paretian theories of the permissibility of actions. Similar theories can be formulated for assessing the permissibility of other sorts of objects (e.g., social institutions, basic social structures, etc.). For example, a rights based Paretian theory of the permissibility of basic social structures might judge a structure permissible just in case it is Pareto optimal relative to the set of social structures that are weakly Pareto superior to some appropriately specified social structure.

makes at least one person better off, and no one worse off, than some RCP candidate. But such actions, it is objected, are *always* wrong – no matter how good their consequences.

The frequency with which rights based Paretianism judges actions that violate the constraints permissible depends on how strong the specified constraints are. The stronger the constraints are, the fewer the actions that satisfy them will be, and the less frequently there will be an action violating the constraints that is weakly Pareto superior to some RCP candidate. So, if the specified constraints are fairly strong, it will be relatively rare for an action violating the constraints to be judged permissible.

Nonetheless, for any specification of the constraints, there will be at least some situations in which rights based Paretianism judges actions that violate the constraints permissible. The defense of this feature of the theory rests on the strong intuitive appeal of the monotonicity condition – i.e., the condition that if one action is permissible, and another action is weakly Pareto superior to it, then the second action is also permissible. This is an axiological condition, and says that human welfare (understood appropriately) is the ultimate basis for morality. So, if one action that satisfies the constraints is permissible, and some other action that violates the constraints makes everyone better off (for example), then the second action is also permissible.

Before rejecting the monotonicity condition, rights theorists should note carefully that it does *not* say, as utilitarianism does, that rights considerations are irrelevant, that it is permissible to sacrifice one person's welfare for that of another, or that one must promote human welfare as much as possible. All it says is that if one action is better (in the sense of weak Pareto superiority) than a second, and the second is permissible, then so is the first. It has been generally supposed that one had to choose between the monotonicity condition and the relevance of rights considerations, but rights based Paretianism shows that this is not so. The relevance of rights considerations is compatible with the monotonicity condition, and does not require one to treat the violation of rights as *absolutely* prohibited. Consequently, rights sympathizers have a choice as to whether to view rights as absolute, or as reference points that can be overridden (a sort of *prima facie* rights). Given the plausibility of the monotonicity condition, they would do well, therefore, to drop their insistence that satisfaction of the constraints is a necessary condition for permissibility.

Pure rights theorists will also object that rights based Paretianism fails to make the satisfaction of the constraints a *sufficient* condition for being permissible. Rights based Paretianism judges actions that satisfy the constraints impermissible, if they are not Pareto optimal. But, pure rights theorists claim, there is nothing wrong with such actions.

The requirement that actions be Pareto optimal is simply the requirement that we not waste human welfare. It is compatible with further requiring that no one's rights be violated, and it does not say that it is permissible to sacrifice one person's welfare for that of another. Many rights theorists (such as libertarians) will reject the requirement as excessive, but many who recognize the relevance of rights will also recognize the relevance of not wasting welfare.

In any case, if the Pareto optimality condition is rejected, a near cousin of rights based Paretianism should be taken seriously. This theory judges an action permissible just in case it makes each person at least as well off as some action that satisfies the constraints. It is like rights based Paretianism except that the Pareto optimality requirement is dropped, and the reference points are the actions that satisfy the constraints instead of the RCP candidates. The theory is axiological, satisfies the monotonicity condition, and is sensitive to rights considerations, but does not require Pareto optimality. Unlike rights based Paretianism, this theory makes the satisfaction of the constraints a sufficient condition for permissibility. Given the plausibility of the monotonicity condition, this is, I claim, a more plausible way of recognizing rights considerations than a pure rights theory.

Given greater space I would defend the Pareto optimality condition, and the use of the RCP candidates as the reference points. But if these conditions are rejected, and satisfaction of the constraints is taken to be a sufficient condition for permissibility, then some sort of rights based axiological theory satisfying the monotonicity condition – rather than a pure rights theory – is, I would argue, the more plausible way of recognizing rights considerations.

Act utilitarians (and with the substitution of the appropriate goals, act teleological theorists generally) will object that rights based Paretianism fails to make social welfare maximization a *sufficient* condition for permissibility. Any action that maximizes social welfare is, they claim, permissible – even if it does not make each person at least as well off as some RCP candidate.

In order to raise this (and the following) objection it is necessary to assume that interpersonal comparisons of welfare are meaningful. For the sake of argument, let us grant this highly dubious assumption.

The reply to this objection is, of course, that it does not take the separateness of persons seriously enough. Human welfare matters – not because welfare is a stuff, and we want as much of it as possible, but rather – because the welfare of *individual people* matters. There are moral limits on the extent to which it is permissible to sacrifice one person's welfare for that of others, and these limits are determined by rights considerations.

Because it has been commonly supposed that welfare considerations – such as monotonicity and Pareto optimality – were incompatible with rights considerations, welfare-minded theorists have rejected rights considerations. Rights based Paretianism, however, shows that the two sorts of considerations are compatible. Rights considerations (which need not be very restrictive) can be used to determine a welfare floor for each individual, rather than types of action that are absolutely prohibited. Thus, given the force of the separateness of persons objection against utilitarianism, welfare theorists can and should reject the ‘no holds barred’ view, and endorse a rights based view.¹³

Act utilitarians will also object that rights based Paretianism fails to make social welfare maximization a *necessary* condition for permissibility. Morality, they will insist, requires more than mere Pareto optimality. It requires that we *maximize* social welfare (or the welfare of the least well off, or some other conception of the good), and in general few Pareto optimal actions do that. Rights based Paretianism is, they claim, too permissive.

The objection makes the dubious claim that morality is highly demanding of agents (i.e., leaves them few permissible actions). Indeed, one of the motivations for developing rights based Paretianism was the desire to avoid the common objection against utilitarianism

13 Note, however, that rights based Paretianism is subject to the following objection: consider a situation in which by making *one* person *slightly* worse off than his/her minimum welfare entitlement an agent could make *millions* of people *very significantly* better off. In such a situation (1) rights based Paretianism seems to say that it is wrong to make the one person slightly worse off, and (2) that seems like the wrong answer.

It is not automatic, however, that rights based Paretian theories will say that such an action is wrong. It all depends on what rights the theory is based on. Rights generate constraints that apply under specified conditions. An action type that violates the constraints under normal conditions may not violate the constraints under catastrophic conditions. Thus, for example, under normal situations, killing someone violates the constraints, but killing someone in self-defense does not. Likewise killing one person to save the lives of millions may not violate the constraints, if the constraints are appropriately specified. So, some – but not all – rights based Paretian theories have the objectionable implication. The question is whether the most plausible such theory has the implication.

Furthermore, even if the most plausible rights based Paretian theory has this feature, having this feature may be the least of several evils. Any theory that recognizes the separateness of persons by placing limits how one person can be sacrificed for the welfare of others will be subject to counter-examples of the above sort. And theories that do not recognize the separateness of persons are subject to an opposite kind of counterexample. Prohibiting the sacrifice of the one for the many in extreme cases is an objectionable feature, but overall (considering a wide range of cases) doing so may give better answers than not doing so.

that it is excessively restrictive. Nonetheless, for the sake of argument let us grant that morality is highly demanding. It does not follow, however, that morality requires us to maximize social welfare (or some other goal). There are at least two ways in which rights based Paretianism can be highly demanding. One is that the specified constraints may be highly restrictive (e.g., generated by strong positive rights). This has the consequence of narrowing down the Pareto optimal region of actions judged permissible (since there will be fewer actions that satisfy the constraints, and therefore fewer actions that make each person at least as well off as some RCP candidate). Furthermore, no matter how strong the specified constraints are, agents can always narrow down the set of permissible actions by making various sorts of agreements. The more agreements that are made, the fewer the actions that satisfy the constraints (and in particular, that keep agreements), and the fewer the actions that are judged permissible. This latter way of narrowing down the permissible set of actions is independently attractive in that it leaves room for real life agents to decide – within limits – how much moral freedom they are to have. So, depending on the specification of the constraints, and the number and kinds of agreements made, rights based Paretianism can be a highly demanding theory.

Now, of course, some act utilitarians (and other teleological theorists) will be unconvinced by this reply. They claim, not only that morality is demanding, but also that it is demanding in a particular way: it requires that social welfare be maximized. I have already indicated one reason for rejecting this claim, namely that it presupposes that interpersonal comparisons of welfare are meaningful. Another reason is that it allows – and normally requires – that one person's welfare be sacrificed for that of another, if that is what it takes to maximize social welfare.

Suppose, however, that our objector is unmoved by these reasons against requiring social welfare maximization. Then, he/she should consider, I claim, *rights based utilitarianism*, according to which an action is permissible just in case it maximizes social welfare *relative to those actions that make each person at least as well off as some RCP candidate*.¹⁴ This theory is axiological and sensitive to rights considerations. The only difference between it and rights based Paretianism is that it requires social welfare maximization – not mere Pareto optimality – relative to the appropriate set of actions. The only difference between it and act utilitarianism is that it requires social welfare maximization relative to those actions that make each person at least as well off as some

14 Rights based utilitarianism should not be confused with rights constrained utilitarianism, which was introduced in Section 2. The latter is not axiological, and does not satisfy the monotonicity condition, because it absolutely prohibits violating the constraints.

RCP candidate – not relative to the set of feasible actions. Actions that do not make each person at least as well off as some RCP candidate are judged impermissible – even if they maximize social welfare relative to the feasible actions.

Rights based utilitarianism is more plausible than utilitarianism because, by being sensitive to rights considerations, it places a limit on the extent to which one person's welfare can be sacrificed for others. So, even if the social welfare maximization requirement is imposed, a rights based axiological theory (namely, rights based utilitarianism) is more plausible than a form of utilitarianism that ignores rights considerations.

VI Conclusion

Although I have focused on rights based Paretianism, the most basic claim I want to defend is the adequacy of some sort of rights based axiological theory. The two fundamental intuitions supporting this view are that an adequate ethical theory must be monotonic and must be sensitive to some sort of rights considerations (thereby establishing a limit on the extent to which one person's welfare may be sacrificed for others). If one further accepts – as I do – the intuitions that an adequate moral theory must require Pareto optimality, leave the agent a significant amount of liberty, and not require that welfare be interpersonally comparable, one is led naturally to rights based Paretianism. But even if the Pareto optimality requirement is either rejected (thereby leaving the agent even more liberty), or strengthened by requiring (for example) social welfare maximization (thereby reducing the liberty of the agent), accepting monotonicity and the relevance of rights considerations still leads to some sort of rights based axiological theory.¹⁵

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¹⁵ Inspiration for this project comes both from Nozick's remarks in *Anarchy, State, and Utopia*, Ch. 4 on permitting constraint violations provided proper compensation is given, and from David Gauthier's discussion in *Morals by Agreement* (Oxford: Oxford University Press 1986) of the importance of Pareto optimality and of using rights-like reference points to ensure a minimum welfare entitlement. I have benefited from critical comments on earlier versions of this paper made by David Braybrooke, Daniel Chan, Peter Danielson, Dave Davies, David Gauthier, Bruce Hunter, Tom Hurka, Shelly Kagan, Jan Narveson, and an anonymous referee for this journal.