

Public Hearings / Hearing Publics: A Pragmatic Approach to Applying Ethics

Kelly A. Parker
Department of Philosophy
Grand Valley State University
Allendale, Michigan 49401 USA
email: parkerk@gvsu.edu

1992

The original of this document is available at
http://agora.phi.gvsu.edu/kap/Public_Hearings/

In hearing litigations, I am as good as anyone. What is necessary is to enable people not to have litigations at all.

Confucius, *The Great Learning; Analects* XII, 13

The phrase “applied ethics” has lost much of the charm it initially had for philosophers. Alasdair MacIntyre, Tom Beauchamp, and others pointed out a decade ago that it is a mistake to think of ethics as a body of theory that can be carted in, when necessary, to sort out some particularly messy real-world moral dilemma.¹ According to these critics’ line of thought there may be good reasons to distinguish pure from applied mathematics, for example, but ethics is not (and should not pretend to be) the same sort of inquiry as mathematics. Every time we advertise a course in applied ethics, we implicitly suggest a separation between theory and practice. This separation rings especially false for those of us whose philosophical orientation derives from the work of the classical American pragmatists. In this paper I want to discuss a conception of applied ethics—call it “applying ethics”—that is rooted in pragmatic philosophy, and to suggest a kind

of practice which I think could be quite valuable both for society at large and for the society of philosophers concerned with ethics.

Pragmatism insists *both* that theory is a necessary guide to any practice, *and* that what we discover in practice must feed back into and modify our initial theories. William James stated the implication of this view for ethics when he wrote “there is no such thing possible as an ethical philosophy dogmatically made up in advance.”² Ethical theories are invaluable cultural constructs, but as with other kinds of theory, even their most fundamental features must be subject to modification when novel problems encountered in practice demand it. (As an illustration of such development, consider the long history of the concept of rights, which has recently been extended to apply not only to individual humans but also to future generations and animals.)

The notion that the meaning of ethical concepts does develop in practice is a central presupposition of my proposal. In *The Public and Its Problems*, Dewey describes a “Great Community” made up of various democratic publics united in “free and full intercommunication.”³ Ethical concepts develop as the publics that constitute the Great Community carry on a continuous dialog, aimed at managing the ever-changing conditions of their collective life. The conditions necessary for such social discourse to take place are many and difficult to specify. Dewey notes that “freedom of social inquiry and distribution of its conclusions” are an obvious requirement.⁴ In the information age, it is in fact not difficult for any group, no matter how small, to obtain more good and relevant information on matters of public concern than they can actually use. Among the concerns that ought to command our attention today are, first, providing opportunities for constructive public discourse, and second, ensuring that no parties with genuine interest in an issue are excluded from the debate over that issue.

The dialog of the Great Community serves as our ideal model of democratic debate. Within the scope of this ongoing public dialog, there would be a prominent place for the conscious testing of normative hypotheses. Andrew Altman, thinking along these lines, has suggested that “Applied ethics, pragmatically conceived, involves judging the consequences when persons attempt to make their conduct and social institutions conform to specified ethical principles.”⁵ He goes on to suggest that applied ethics so conceived would become “the principle phase of the enterprise of ethical philosophy,” the single best starting point for any talk about ethics.⁶ Public discourse would become the main locus of an ongoing experimental inquiry into what it means to live well.

My concern is that, with very few exceptions, there are no good institutional niches in our society designed so that what I here call “the practice of ethics,” or

“applying ethics,” can be recognized as an integral part of public discourse. We have very few appropriate forums to serve as the experimental space where ethical concepts can emerge and develop. Consequently, the major ethical theories of our day—marvelous and shining expressions of our highest social ideals though they may be—tend to be the utopian constructs of a few academic minds. Such theories as these are *not* designed to be put into dialog with public problems, but rather with other utopian ethical constructs, other lone academic minds, and our students—who go against their common sense and (for the purposes of the class) adopt the odd persona of the lone academic mind.

I think it would be valuable, both to society and to philosophy, deliberately to provide a public “place” for ethics to develop, rather than confining ethics to a private “noplac,” as is now often the case. I will discuss one way that such a practice might be encouraged – one way to open a space where novel concepts specifically relevant to ethics can emerge. I am interested in the practical question of what an ethicist might do, day to day, in the practice of “applying ethics.” Since there are few institutional allowances for what I here call “the practice of ethics,” I will go ahead and suggest one way to make such allowances. In a nutshell, I think there are situations where an ethicist, who would be an impartial participant in public discourse, could serve a very useful and productive function in resolving or even forestalling certain conflicts.

The proposal depends upon the following account of the roots of ethical conflict. Any person occupies a number of social roles simultaneously, and these roles each entail particular sets of responsibilities. A doctor is not just a caregiver, but also (for better or worse) a revenue generator for a hospital or clinic, and often an employer besides. A journalist is part of a publishing business, but is also a member of a political institution—the free press. And consider the military chaplain, whose position as commissioned military officer and representative of God can become a veritable squared circle of internal ethical conflict.

Josiah Royce suggests that unity in a personality, in a human life, comes from committing oneself to a cause, embracing a set of roles it involves, and exercising loyalty to that cause and those roles. A guiding purpose provides a degree of unity in one’s actions and one’s beliefs. On the other hand, though, commitments are the foundation upon which conflicts are built. Royce writes:

Moral doubts arise in the loyal mind when there is an apparent conflict between loyalties. As a fact, that cause, which in any sense unifies a life as complex as my human life is, must of course be no perfectly simple cause. By virtue of my nature and of my social training, I belong to a family, to a community, to a calling, to a state, to humanity.⁷

The internal ethical conflict among different loyalties *may* be painfully apparent to a person from the first moment that a decision is faced. Classroom texts on applied ethics are filled with examples of such situations where the individual must choose among loyalties. The act of decision may even fracture the individual's personality, necessitating a long healing process of reconstructing loyalties and reconciling the conflict which an internally incoherent guiding purpose has created.

This process of healing, at the individual level, is one area where ethics can in fact develop. Those professionals who help with this healing process—psychologists, ministers, family counselors, and others—are “applying ethics” in the sense I envision. They help the individual or family to reassemble a system of loyalties so as to make a more coherent life—and this involves a rethinking of what the good of that life ought to be.

There is a more publicly significant kind of ethical situation involving conflicting loyalties that I want to discuss, however. Here the conflict among loyalties to different causes—the responsibilities associated with different roles—these conflicts are not primarily manifest within an individual. Rather, they come out as public conflict among individuals or among groups.

Consider a recent case in Tennessee. OSCO (Oil Service Company), a hazardous waste treatment company, was planning to build a new plant in Nashville to process aqueous industrial waste. The company had been operating in an old sewage treatment facility in the nearby city of Columbia, Tennessee. Due to a number of citizen complaints about odor and concern over potential harm to the Duck River, the City of Columbia forced the company out. The city government simply refused to renew OSCO's lease on the treatment facility or to sell it to them. I will note in OSCO's defense that around this time the state air pollution control department carried out a two-month investigation of the complaints. This was done at the request of three Congressmen and the Governor, who were responding to citizen concern. No violations of air quality regulations were found. Nonetheless, the city pulled the plug on OSCO and a new plant had to be built. The only early Nashville press report I could find about the impending relocation carried no details, saying only that the new plant would be built in an “undisclosed county” in the near future.

By the time some of the citizens of the undisclosed county discovered that the plant was to be built near their homes and workplaces in Nashville, OSCO had invested a great deal of time and money in designing the facility, acquiring land, and filing permit applications. Local environmental and citizens' groups only found out about the plant once the permitting process was well underway. A

number of concerned and angry people showed up for the public comment forum for the air quality control permit.

Since this public forum was virtually the only established opportunity for concerned locals actually to see the OSCO executives, and since many of these people felt powerless, inadequately informed, and victimized, the resulting exchange there was less than constructive. One speaker after another challenged the *moral-ity* of building and operating a hazardous waste plant on a five-acre site—near the Cumberland River, two prisons, a glass plant, a major food distributor, and a minority residential neighborhood. They saw the company as a dangerous and unwanted intruder, and refused to consider the local need for a hazardous waste treatment facility. Everyone in the room eventually came to realize, however, that the permit board could do nothing with any comments except those directly concerning compliance with air quality regulations. The board could (and did) modify the permit specifications somewhat to prevent really dirty air; they could do *nothing* to prevent what was widely perceived as a really dirty deal. Most comments were thus in fact wasted breath, except for citizens' feeling better for having voiced their concern to the OSCO executives.

I am interested in the *ethical* aspect of this situation, again, and in what an ethicist might do to help. As things typically stand, this sort of antagonistic showdown is the rule. Little comes of these encounters—it is unfortunate that Greenpeace-style publicity tactics are often far more effective ways to register one's opposition than is participation in legally sanctioned public comment hearings. Now there is an ethical dimension to this kind of public confrontation, in that the dispute ultimately comes down to a disagreement over right and wrong. The executives sincerely saw the new plant as a *good* and necessary thing for the community; they did and have since made every effort to conform to regulations and to operate the plant safely. The citizens who came out to cry NIMBY (Not In My Back Yard!) to OSCO saw it as a complex, alien, dangerous, and generally *bad* thing. This forum was not about an air quality permit; it was about perceptions of right and wrong, of good and evil.

I argue that public discussion about *those* issues is not only inevitable but also useful and potentially quite productive. Many public and private officials seem to dread public discussion of "values" because (as at the OSCO forum) it takes away from proper discussion of scientific facts and the law. That it does, but I take this as a good reason to provide *separately* for such debate over value issues. Given the current institutional channels for encounter between various parties, much public discussion is far from productive. Why is this? I suggest that the adversarial setting prevents the various sides from presenting themselves as whole

persons who are, after all, linked together as parts of a complex society. When the executives' plans were challenged, they reacted by retreating into the social role of business leaders acting within the law and providing a needed service. They shed the less strategically advantageous roles of neighbor and fellow inhabitants of the watershed. Citizens likewise fortified their positions as champions of the public health and of ecological integrity, repudiating their roles as members of the society that requires such a facility and of the local economy that stood to gain from the relocation. (Ten million dollars went into construction of this plant, and the region does presently need a way to deal with its hazardous waste.) The public forum where these parties encountered one another forced each to portray themselves as advocates of a single narrow viewpoint. They each saw themselves and the other as *caricatures*, not *persons*. The whole thing looked like a cartoon battle between, say, the Eco-Avengers and the Evil Greedheads of Music City.

Most of our institutional mechanisms for public input are designed, at best, to grind out a grudging compromise between adversaries such as these. The ethicist called in to help could expect whatever advice is offered to be used as ammunition by these adversaries against one another. I want to suggest an alternative course, a way to allow for genuine dialog about the ethical issues. In this approach, the ethicist would be central to a process of communication among parties, a process aimed at identifying and meliorating the internal role-conflicts on *all* sides. The ethicist here would not speak on behalf of any *special* interest. Thus, I said earlier that this role would be impartial. *Impartiality* does not mean *moral neutrality*, however. The ethicist would speak on behalf of the regulative ethical ideal of *community*, of the common good.

The idea is that early in the development of something as controversial as the OSCO facility, involved parties would be brought together so that the major concerns on all sides could be aired. Since these people are in fact all in the same boat—they *need* each other, at some level—the ethicist's role as mediator would be to bring out their shared interests, in a dialog aimed at mutual understanding. It would be to effectuate, in Sandra Rosenthal's words, "the socializing adjustment of incommensurable perspectives" by deepening the level of awareness to "a more fundamental level of community."⁸ The public hearings, environmental impact statements, and litigation involved in the current adversarial system clearly *fragment* rather than *build* community. Though a compromise may be reached through present channels, the conflict remains unresolved. I suggest that we begin to propose and test some alternative mechanisms which would provide the space for such dialog to occur.

Now I think I hear you saying, in unison, "That may sound good in theory, but

it will never. . . .”

It *won't* work in all situations, of course, and the channels for dispute resolution we now have will still be needed. Lawyers need not fear for their jobs. What I am talking about is a practice, the aims of which are different not only from the theoretical study of ethics, but also from the kind of dispute resolution that takes place in the courts. It is similar to non-binding arbitration, but it differs from such arbitration in that it would occur early in the course of a dispute. Ideally, the process would be started even before conflicting parties have had the chance to become entrenched adversaries.

The closest thing to a working model of this process I have found so far is the Environmental Protection Agency's experimental "Regulatory Negotiations" program, which is designed to streamline the process of implementing environmental regulations.⁹ The standard approach is for EPA officials to draft a proposed regulation, open it to public comment, revise the regulation accordingly, and then promulgate the final rule. This is typically followed by a flurry of lawsuits challenging the rule. While these are pending, the rule is in limbo—the EPA can't enforce it, and businesses don't know *whether* or *how* to plan around it.

Regulatory Negotiation has been tried as an alternative several times since 1985. The process brings together the parties who would be affected by a proposed regulation, and has them help write it. The process of working together to compose the regulation allows the parties to develop a good knowledge of *all* aspects of the regulation, to get to know one another as persons representing various perspectives, to find the common ground beneath all their various vantage points, and to claim some responsibility, some "ownership," of the final regulation. The familiarity among parties thus established helps build consensus about the final regulation.

Some of these experimental negotiations have collapsed, but others have produced regulations that stand up. A smaller number of challenges typically come during the regular notice-and-comment period, and in the courts after the rule is promulgated. When this negotiation *does* work, it is because all sides recognize that something is going to be done one way or another, and they would prefer to see something *acceptable* get done. Environmentalists see this as a way to have a hand in hammering out the details, to make sure the letter of a particular regulation reflects the spirit of the broader law; businesses see this as a way to reduce the costs and delay involved in the lawsuits which almost always come to challenge a new rule.

Similar concerns and interests would be motivations for taking part in the sort of conflict resolution / avoidance that I propose. Citizens would want to be in-

cluded in the planning process if only so their concerns can be heard. Executives would be interested in building good will, and in avoiding a potentially long and expensive string of protests and lawsuits. (OSCO's air quality permit, for example, has been *formally* challenged several times, starting even before it was issued.)

I suggest that we look at the existing channels for public discussion of controversial proposals, and build into the early stages of the process a forum for dialog among affected parties. A sense of the ripe areas might be gleaned by looking at which kinds of public conflict wind up in court or in the appeals process of regulatory agencies most often. What would go on in such dialog is nothing new—it goes on informally all around us, when circumstances happen to allow it. My proposal is for specifically established forums for such dialog among affected parties. The mediator of such dialog—whoever it may be—would be charged with “applying ethics” in the sense I have outlined. It would be a conscious and deliberate effort to forge a sense of common need and common effort in matters of public concern, an effort to reconcile the conflicting aims which can emerge and fracture the underlying unity of a community. It would be a continuous experimental inquiry into the permanent question of pragmatic ethics: “What does it mean for us to live well here, now, together?”

Notes

⁰Presented to the Society for the Advancement of American Philosophy annual meeting, Vanderbilt University, Nashville, Tennessee, March 1993. An earlier version of this essay was presented under the title “Applying Ethics: A Pragmatic Conception of the Ethicist's Role in Conflict Resolution” at the National Multidisciplinary Conference on Ethics and the Professions in Gainesville, Florida, 30 January 1992.

¹See for example Andrew Altman, “Pragmatism and Applied Ethics,” *American Philosophical Quarterly* 20 (1983): 227-235; Alasdair MacIntyre, “Does Applied Ethics Rest on a Mistake?” *The Monist*, 67 (1984): 498-513; and Tom L. Beauchamp, “On Eliminating the Distinction between Applied Ethics and Ethical Theory,” *The Monist*, 67 (1984): 514-531.

²James, “The Moral Philosopher and the Moral Life,” in *The Will to Believe and Other Essays in Popular Philosophy* (Cambridge: Harvard University Press,

1979), p. 141.

³John Dewey, *The Public and Its Problems*, in *John Dewey: The Later Works 1925-1953*, vol. 2, ed. Jo Ann Boydston (Carbondale, Illinois: Southern Illinois University Press, 1988), p. 367.

⁴*Ibid.*, p. 339.

⁵Altman, "Pragmatism and Applied Ethics," p. 233.

⁶*Ibid.*

⁷Josiah Royce, *The Philosophy of Loyalty* (New York: The Macmillan Company, 1908), ch. 4, sec. 6, p. 180.

⁸Sandra B. Rosenthal, *Speculative Pragmatism* (LaSalle, Illinois: Open Court, 1986), p. 171.

⁹My account of the program is based on the work of Elizabeth Alice Lyons, "Assessing Decision Making and Dispute Resolution in Environmental Policy: Regulatory Negotiations at the Environmental Protection Agency," PhD dissertation, Vanderbilt University, 1991.