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Utilitarian Adjudication

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ABSTRACT: In this paper I offer a defense of the view that judges should decide cases in accordance with act utilitarianism: i.e., in whatever way maximizes overall well-being. To advance this thesis, I first briefly give reasons for dissatisfaction with the common-sense thought that judges should just decide cases as the law requires. I then briefly argue for the claim that all moral agents, including judges, have a pro-tanto duty to maximize overall well-being. In the remainder of the paper, I consider objections to my account. I first consider several standard objections to act utilitarianism as a general moral theory—objections concerning demandingness, personal relationships, and backward-looking reasons such as promises—and I argue that these considerations' force is blunted in the context of adjudication. Finally, I consider several objections to act utilitarianism specifically as a theory of adjudication—objections concerning cases in which act utilitarianism might appear to dictate obviously incorrect decisions, concerning “legislating from the bench,” and concerning a judge’s moral obligation to focus on the citizens of the nation or other political entity she serves. I conclude that the objections to utilitarian adjudication are less formidable than they might initially appear.

1. Introduction: Adjudication as a Moral Problem

A major question in philosophy of law is that of adjudication: how judges should decide the cases that come before them. This question is often regarded as answerable as a byproduct of answering what is perhaps the central question of philosophy of law, that of the existence conditions for valid or genuine law. If this central question can be answered, it is natural to think, then the related question of what the law requires in any given case will yield to apt methods of legal research and interpretation, and the question of how judges should decide cases can then be answered straightforwardly, at least on the assumption that judges should normally, if not always, decide cases as the law requires.

So, one way of answering the adjudication question is to work within the framework of the assumption that judges should decide cases as the law requires—either taking that assumption as true in all cases or taking that assumption as normally correct and proposing criteria for identifying circumstances in which it is incorrect. In this paper, I propose a different framework for answering the adjudication question: I argue that judges should decide cases in whatever way maximizes overall well-being. In effect, I treat the adjudication question as a topic in applied ethics, and I aim to show the plausibility of an act-utilitarian treatment of it. My approach does not repudiate the principle that judges should normally decide cases as the law requires; on the contrary, that principle is entailed by my approach. But my approach explains when that principle holds, as well as indicating when it does not.

My account of this approach proceeds as follows. First, in section 2, I briefly explain my dissatisfaction with what might be regarded as the common-sense answer to the adjudication question: the claim, which I mentioned above, that judges should just decide cases as the law requires. Then, in section 3, I very briefly argue that all agents, including judges, have a pro-tanto duty to maximize overall well-being. In sections 4 and 5, I address what I see as the main task for any advocate of act utilitarianism as a normative theory of adjudication: the answering of objections to act utilitarianism, which are many and varied. (So the form of my argument is not that because act utilitarianism is correct as a general moral theory, it's correct as a theory of this area of applied ethics. Rather, the form of my argument is that because all agents have a pro-tanto duty to maximize overall well-being, that duty should be discharged in any context in which no sufficiently strong countervailing considerations obtain—and the context of adjudication

is one such context.) I devote section 4 to familiar objections to act utilitarianism as a general moral theory, and I argue that however successfully these objections may show that act utilitarianism is unacceptable as a general moral theory, they have little or no force in the context of the adjudication problem. Finally, in section 5, I turn to objections that might be lodged against act utilitarianism specifically as a theory of adjudication. I argue that although certain classes of considerations that pertain specifically to the activity of adjudication might seem to provide reasons for judges not to always maximize well-being, such considerations actually track well-being-affecting factors that the act-utilitarian perspective takes into account. In this way, considerations that the act-utilitarian approach might seem to brush aside are actually largely endorsed by it, but with some important qualifications.

Before proceeding in the way I just described, I want to mention three brief prefatory matters. First, for brevity, I'll just use the term 'utilitarianism' rather than the term 'act utilitarianism', though I'll be discussing a form of act utilitarianism throughout. Second, this paper focuses on defending utilitarian adjudication against objections, and leaves for another occasion the presentation of a positive portrayal of utilitarian adjudication (the chief constituents of which, I imagine, would be accounts of how utilitarianism would purport to solve a range of contemporary problems of adjudication). Third, since utilitarianism is not widely endorsed as a theory of adjudication—indeed is not even typically discussed as one of the leading contenders (as it is in ethical theory generally, at least)—many people expect a proposal in support of utilitarianism as a theory of adjudication to be highly revisionist with regard to adjudication. That is, they see utilitarianism and adjudication as having so little to do with each other that any

defense of utilitarian adjudication must argue that adjudication should be practiced quite differently from the way it is currently practiced. My defense of utilitarian adjudication, however, does not proceed in this way. In my view, adjudication as it is currently practiced (in the American legal system and relevantly similar legal systems) is both largely correct and largely consistent with the requirements of utilitarianism. I argue (mostly in section 5) that utilitarianism accounts for, rather than overturns, much of the widely accepted wisdom concerning how adjudication should be practiced, while also providing both an important corrective to some of those widely accepted views and a means of answering questions on which there is controversy rather than consensus.

2. The Common-Sense Answer to the Adjudication Question

It might seem odd to offer a controversial answer to the adjudication question, since there is already a common-sense answer: judges should just decide cases as the law requires. But this answer is problematic for two reasons. First, it is not always clear what the law requires. Consider, for example, the well-known case of *Riggs v. Palmer*, in which a man murdered his grandfather and then claimed to be legally entitled to the inheritance specified for him in his grandfather's will. It could be argued that the law required that the will be followed even in this unusual case, and it could be argued (to the contrary) that the law required that the murderer be denied his claimed inheritance on the grounds that no one should be allowed to profit from wrongdoing, and it could be argued (again, contrarily) that the law did not actually require either of these outcomes instead of the other. Obviously this is a very simple and relatively trivial example; more interesting ones concern issues such as reproductive freedom, affirmative action, eminent domain, criminal procedure (such as search-and-seizure provisions), the rights of foreign nationals

detained by American military and intelligence personnel operating abroad, and the rights of states such as California to impose more stringent environmental regulations on automobile manufacturers than the federal government does. To be sure, it has been claimed that the law actually says a lot more than it may seem to say because its meaning can be discovered by examining its original aims¹ or by uncovering moral and political principles that are truly elements of law but have not traditionally been appreciated as such.² The shortcomings of these other approaches are well known, and I will not review them here. Instead I'll proceed on the assumption that although what the law requires is sufficiently clear in many cases, it is quite murky in many others.

The deeper problem with the common-sense answer to the adjudication question is that sometimes, it is grossly immoral for a judge to decide a case as the law requires. For example, it was grossly immoral for judges in Nazi Germany to decide cases in accordance with many of the laws then in force. In some cases, the right thing for them to do would have been to spare Jews and other members of persecuted groups from the harms that were being inflicted on them, even when those harms were prescribed by law. I am not putting forward the extreme position that a judge is morally obligated to refuse to enforce every immoral law; sometimes, such rulings won't do any good (e.g., if the police and other armed state agencies are determined to implement certain policies), or won't do as much good in the long run as a more subtle strategy of working within the system. Rather, I am just denying the extreme position that a judge is morally obligated to enforce every law. I agree that judges should usually decide cases as the law requires; that follows from my utilitarian approach, as I explain below. But as a principled answer

¹ See Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* vol. 57 (1989), pp. 849–865.

² See Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

to the adjudication question, the common-sense thought that judges should just enforce the law will not do. A more promising answer is suggested by utilitarianism.

3. The Pro-Tanto Duty to Maximize Overall Well-Being

The status of utilitarianism in contemporary moral philosophy is a complicated one. On the one hand, no one denies that its guiding idea of promoting overall well-being has great appeal. On the other hand, utilitarianism is the target of many objections. In this section, I'll mention two considerations in support of the existence of a pro-tanto duty to maximize overall well-being, before addressing objections in subsequent sections.

The pro-tanto duty to maximize overall well-being is expressed by the following claim: in the absence of sufficiently strong reasons to the contrary, an agent ought to choose the act, of those open to her, that will maximize overall well-being. In support of this claim, I would first point out that utilitarians are not alone in requiring agents to improve others' well-being. On the contrary, they are joined by non-utilitarian consequentialists, Kantians, contractualists, contractarians, and most virtue theorists. Admittedly, certain extreme forms of libertarianism may not ever require agents to improve others' well-being; they may impose no duties on agents except duties of non-interference. But a wide range of moral theorists who disagree about many aspects of morality find common ground on the point that sometimes, agents ought to improve others' well-being. How can this convergence be explained? I would suggest that the best explanation for this convergence is the thesis I'm currently arguing for: that agents have a pro-tanto duty to maximize well-being. For if agents had such a duty, then (assuming we expect moral theories to track the truth, however imperfectly) we would expect most moral theories to accord well-being the favorable status that they do, in fact, give it. That

most moral theories also claim that many other things than promoting well-being are important does not undermine my argument, since here I am only asserting the existence of a pro-tanto duty to maximize well-being, not the existence of an all-things-considered duty to maximize well-being.

Let me defend the pro-tanto duty to maximize well-being with a second argument, also brief, but based on our reactions to a couple of very simple cases. If an agent has two options open to her, and there is nothing to be said in favor of one option or the other except that one will better promote well-being, then it would be wrong for her to choose the one that would result in an unnecessarily low level of overall well-being. Her choice to promote well-being less, rather than more, would be regarded as gratuitously unkind, possibly even cruel (depending on the magnitudes involved). I think such reactions would be right. Now so far I've just been speaking of agents generally, not judges specifically. But judges are, of course, agents, and the decisions they make to settle the cases that come before them are acts, as subject to moral appraisal as any others. If a judge, in deciding a case, has two options open to her, and there is nothing to be said in favor of one option or the other except that one will better promote well-being, then it would be wrong for her to opt for the one that would result in an unnecessarily low level of overall well-being. Now, I maintain that if the maximization of well-being can be a tie-breaking consideration, it is always a pro-tanto consideration. Admittedly, some might argue that reasons don't work that way—that a reason can be a tie-breaking consideration but have no force in some cases in which the other reasons don't balance out evenly. For reasons of space, I won't reply to this objection here; I just want to acknowledge that the matter is complicated in this way. Let me close this section by asserting that if this objection (and

other objections that might be raised) can be answered, then like my earlier argument concerning the convergence of a wide range of moral theories on the value of well-being, this argument would establish the very modest claim that in the absence of sufficiently strong reasons to the contrary, an agent ought to choose the act, of those open to her, that will maximize overall well-being.

4. Objections to Utilitarianism as a General Moral Theory

Even assuming that I have established that people ought to maximize overall well-being when no sufficiently strong reasons to the contrary obtain, it might be thought that this will not get us very far, because sufficiently strong reasons to the contrary often obtain, as objectors to utilitarianism stand ready to assert. In this section, I'll discuss three familiar objections to utilitarianism, each of which might be thought to supply or show the existence of a reason that makes it permissible or even obligatory for an agent not to maximize overall well-being in some cases. I claim that two of these three objections are essentially inapplicable in the context of adjudication, and that the third objection, though applicable, does not have much force. As I indicated earlier, in the next section I'll discuss objections that arise specifically in the context of adjudication.

The first objection I want to consider is that utilitarianism is excessively demanding. This objection claims that if each person were always obligated to promote well-being as much as possible, nearly all of us would be obligated, for the foreseeable future, to give away nearly all of our possessions to the worst-off people in the world, and would have little opportunity to pursue our own plans and interests. We would all be unwilling and full-time soldiers in a world-wide and never-ending war on every kind of misfortune. Now I'm not sure that measures effectively reducing poverty, disease,

famine, and other things that make people unnecessarily badly off would be such a bad thing, even if it were very costly to those few of us who are better off than the vast majority of the world's population. But setting this point aside, even if the demandingness objection is taken to show that utilitarianism is unacceptable as a theory of how people ought to live their personal lives, it has no relevance to judges. When a judge decides a case, no decision she could make is significantly more or less demanding than any other: if she did have a vested interest in the case, so that one outcome would be especially demanding for her to choose, there would be good utilitarian reasons for barring her from hearing the case in the first place (as dictated by normal conflict-of-interest provisions). So there is no reason to worry that utilitarianism, as an approach to adjudication, would be excessively demanding.

Second, utilitarianism is commonly criticized as prescribing behavior that is destructive of the personal relationships that are among the central goods in human life. What it means to be a sibling or spouse or parent or friend, it is commonly thought, is to give a certain other person, or certain other people, a kind of priority that utilitarianism's strict impartiality denies. For example, most people think it is morally permissible, and perhaps even morally required, that a parent save her child from a moderate harm rather than pass up that opportunity in order to save a stranger's child from a somewhat larger harm. In contrast, utilitarianism would require the parent to choose the latter option. As with the previous issue, there is much to be said in defense of the utilitarian position here—we should encourage altruism to be practiced across wider circles than the narrow ones within which most people confine the majority of their other-directed beneficence—but even granting this point to the objector, it does not tell against utilitarianism as a

norm for adjudication. It is already commonly accepted that a judge should not allow any of her personal relationships to enter into her legal decisions. Indeed a case that gave a judge the opportunity to do so, like a case in which one decision would be more demanding for the judge to make than another one, would be a conflict of interest. So it could be said that utilitarianism's refusal to give a special status to personal relationships is actually a mark in its favor as an approach to adjudication.

Third, utilitarianism is commonly criticized for not giving weight to “backward-looking reasons”—reasons that, by referring to past events independent of their impact on the future, are disregarded in a calculus that weighs only *future* harms and benefits. By far the most common backward-looking reasons are those stemming from promises: it is widely thought that if one person promises another that she will do something, then this is a reason for her to do that, and is a sufficient reason for her to do that even in many cases in which, as it happens, she can produce more well-being in some other way. Yet utilitarianism denies this: it says that if an agent can produce more overall well-being by breaking a promise than by keeping it (taking account of disappointed expectations, the breakdown of trust, and so on), then she must break it. In response, it can be argued that when the benefits of breaking a promise are great enough to outweigh the harms such as disappointed expectations and the breakdown of trust, the benefits must be great indeed, and thus perhaps are worth securing. But even if one denies this response, the question of an agent's keeping her promises does not arise for a judge deciding a case: a judge has not promised anything to any involved party. To be sure, involved parties have been promised things (though not by a deciding judge) in cases involving contracts, and I will

touch on the issues raised by such cases below. But even in such cases, the judge herself has not made any promise that she can now, in deciding the case, either keep or break.

Many judges, though not bound by any promises specifically pertaining to individual cases, are bound by their oaths of office. And it might be thought that in taking their oaths of office, and promising to decide cases as the law requires, judges thereby promise not to maximize well-being in any case in which the legally required outcome does not happen to result in as much well-being as possible. This, it might be thought, is a serious objection to the proposal that judges should always decide cases in whatever way maximizes overall well-being.

It turns out, however, that this objection is based on a mistaken notion of judges' oaths of office, since they do not typically require judges to simply decide cases as the law requires. For example, here is the oath for U.S. judges, including justices for the U.S. Supreme Court:

I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.³

Of course, it might be held that one of the "duties incumbent" upon judges is to decide cases as the law requires. And we could well imagine legal systems not very different from our own explicitly incorporating that into the language of the oath itself.

Thus it might seem most fruitful to proceed by assuming, for the sake of argument, that we are dealing with an oath such as the following:

I, ___ ___, do solemnly swear (or affirm) that I will decide cases as the law requires. So help me God.

³ United States Code, title 28, part I, chapter 21, section 453.

Then we would envision judges who had made promises the fulfillment of which would be incompatible with maximizing overall well-being in some cases. And we would then investigate whether such promises would, at least in some such cases, provide reasons strong enough to overcome the pro-tanto duty to maximize overall well-being. In my view, however, disproving this is a heavier burden than I need to bear, because it imagines judges to have a narrower function than judges do in the American and similar legal systems, as reflected in the real oath quoted above. That oath, with its injunctions to “administer justice” and “do equal right,” expresses the widely held thought that judges are free and indeed obligated to consult their own senses of justice and morality, and to think in explicitly ethical terms—not merely mechanically interpret and apply the law.

But I do not want to completely dodge the question of whether a judicial oath might create a strong reason against maximizing overall well-being in some cases. So let us add a phrase about deciding cases as the law requires to the real oath quoted above, and imagine that the U.S. oath were the following:

I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and decide cases as the law requires, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.

This sort of oath, I submit, provides a more appropriate context in which to explore the bearing of a judicial oath on a judge’s pro-tanto duty to maximize overall well-being.

To address this issue, let me briefly outline two responses that space constraints will prevent me from developing here as fully as they deserve. My first response capitalizes on the inclusion of the promise in question in a list of several things promised. When an oath involves a promise to do several different things, then the person taking the oath will be understood to be entitled, indeed required by circumstance, to balance the

various things promised in cases when they conflict. And if the law were to require a judge to decide a case in a way that resulted in an unnecessarily low level of overall well-being, the judge could perceive her duty to do equal right to all citizens to be more weighty than her duty to decide cases as the law requires.

The second response I want to outline is that, unlike promises to act in specific ways on specific occasions, sweeping promises such as oaths are generally understood not to be very weighty on specific occasions. To see this by way of illustration, suppose someone takes an oath of citizenship that requires him, among other things, to obey the laws. Now suppose that this person and some other citizen—a natural-born citizen who has not taken that oath—both break the same law. If one thinks that the new citizen has acted wrongly, then one is likely to think that about the natural-born citizen, and for the same reason. One's negative judgment is likely to be grounded in the importance of the particular law, rather than in the fact of the oath to obey the law generally. On the other hand, if one thinks that the natural-born citizen has not acted wrongly, perhaps because the law-breaking conduct was minor or because the law is immoral, then one is unlikely to take a harsher stance towards the new citizen just because he swore to obey the law generally. In either case, the oath itself does not seem to have much moral weight.

The judicial oath, I would suggest, does not have much moral weight, either. This does not mean that the things that judges swear to do are unimportant; it just means that when they do fail to do them, and they thereby in many cases act wrongly, the wrongness comes from the importance of the things they fail to do, not from their having promised to do them. Moreover, to say that the judicial oath does not have much moral weight is not to deny that the judicial oath causes other people to have expectations concerning

judges' conduct, and that the fulfillment or disappointment of other people's expectations must be taken into account in the sort of cost-benefit analysis that utilitarianism embraces as a part of its standard of right and wrong. To say that the judicial oath does not have much moral weight is just to say that once all these and other consequences of violating it are taken into account, the fact of the oath itself is not a significant further consideration that might override whatever the overall consequentialist judgment turns out to be.

As I said above, these two responses deserve more space than I can give them here. I do hope, though, to have given reasons for thinking that the judicial oath does not provide a significant reason against judges' deciding cases in ways that maximize overall well-being. If that claim can be sustained, the judge's pro-tanto duty to maximize overall well-being is unaffected by any of several standard of objections to utilitarianism as a moral theory.

5. Objections to Utilitarianism in the Context of Adjudication

The other class of objections that I want to consider here comprises objections to utilitarianism specifically as a theory of adjudication. In this section, I consider three such objections: that it is easy to think of hypothetical cases in which the utility-maximizing decision would be obviously incorrect, that utilitarian judges would engage in "legislating from the bench," and that utilitarianism implies that judges' moral obligations extend more widely than they actually do.

First, it seems easy to think of hypothetical cases in which the utility-maximizing decision would be obviously incorrect. For example, suppose a very poor office worker embezzles a thousand dollars from a corporation that is owned by approximately ten thousand stockholders, and uses that money to buy clothes and school supplies for her

children. Given that the theft costs each stockholder an average of only ten cents, and given that most owners of stock are not very poor to begin with, the diminishing marginal utility of money would suggest that the thousand dollars does a lot more good for the poor office worker than for the stockholders. It might appear, then, that if the office worker is prosecuted for this crime, then utilitarianism would require a judge hearing the case to set him free, even if the law contains clearly stated sanctions for embezzlement.

In fact, however, utilitarianism would require the judge (or jury) to find the employee guilty, because of the damage to legal predictability that would result if judges ignored plainly stated provisions of the law. The issue of legal predictability, in order to be properly understood, needs more conceptual analysis and empirical support than I can provide here, but I think it is unarguable that one of the largest contributions that any judge can make to overall well-being is to preserve the predictability of the legal system she serves. It is easy to forget, in focusing on controversial appellate-level cases of the kind legal philosophers typically discuss, how many cases are not appealed, and how many cases do not even arise at the trial level, because parties to a dispute or a potential dispute agree in their predictions of how a judge would decide their case. This is an essential but often overlooked benefit of a well-functioning legal system, and I believe that maintaining it is normally, by far, a judge's best contribution to overall well-being.

The hypothetical case I mentioned above is one in which the judge does not need to look any farther than the letter of the law, but similar considerations apply to other established sources of law, such as the intent of statutes' authors and ratifiers, precedent, and unwritten but widely accepted norms such as fundamental precepts of fairness and justice. It might be thought that a utilitarian approach to adjudication would involve

irresponsibly brushing these aside, but to the extent that these are sufficiently clear and established sources of law to generate widely held expectations that certain kinds of cases will be decided in certain ways, the argument from predictability will urge judges to give serious weight to these venerable sources of law. In this way, a defender of a utilitarian approach to adjudication should have an essentially conciliatory posture towards this first objection, arguing not that clear legal requirements should be ignored, but that maximally promoting well-being usually requires enforcement of them.

A second objection to utilitarianism as a theory of adjudication is that it advocates “legislating from the bench”—overstepping the bounds of the judiciary and engaging in a kind of policy-making that is properly the province of the legislature (or administrative agency, or other law-making body). On this view, when a judge decides cases on moral grounds (as opposed to simply enforcing the law as it then exists), she purports to correct moral defects in the law as it then exists, and thereby both (1) illicitly shields the legislature (or administrative agency, or other law-making body) from being held accountable for those defects and (2) removes some of the incentive, which the law-making body would otherwise have, to make the law free of those defects. For example, it might be argued along these lines that when the Supreme Court decided *Brown vs. Board of Education* (1954), finding that segregation in public schools was in violation of the Fourteenth Amendment of the U.S. Constitution, the Court talked itself into misinterpreting that amendment to save the country from the work of passing an amendment to the Constitution that actually would forbid segregation in public schools. This objection might be thought of as based on a notion of a division of labor according to which judges are supposed to simply enforce the law, not consult the kinds of moral or

other policy considerations that a legislator (or national public) might take into account in making the law.

There is a kernel of truth in this objection's portrayal of the self-conception of a utilitarian judge, insofar as a judge committed to the maximization of overall well-being will not see herself as simply automatically or mechanically enforcing the wishes of a legislature (or other established sources of law) and bearing no moral responsibility for the consequences of her decisions. Instead, she will see herself as an agent engaged in an activity that has significant effects on other people, and she will see herself as morally responsible for those effects. In taking this perspective, she will deliberate and act with greater independence than a judge who says, "I don't make the rules; I just enforce them." Nevertheless, it is not to be feared that a utilitarian judge would be especially activist, in the sense of trying to use her office to implement new policies. The office of a judge is very different from the office of a legislator, because the occupants of the two offices face very different constraints that significantly determine the consequences of their actions. Utilitarianism might require a legislator to vote in favor of changing an existing law, while not requiring a judge to decide cases as if the law had already been changed, both because the benefits of the judge's refusal to enforce the law in the particular case would normally be smaller than the benefits of changing the law and because the predictability of the legal system is maintained or enhanced far more when defects in the law are fixed by law-making bodies than when they are addressed on a case-by-case basis by judges. In telling judges to maximize overall well-being, utilitarianism does not tell judges to behave like legislators, because that is not a good

way for judges to maximize well-being. Utilitarianism will hold that in most cases, judges ought to wait for law-making bodies to make the law better.

Nevertheless, there may be some cases in which more well-being would result from the kind of judicial activism under discussion, even taking into account how much greater the benefits would be if the law were changed by a legislature (or other law-making body). The chances of that happening may be too low, or the urgency of the situation may be too great, for it to be wise for a court to wait for the law to be changed. In the early 1950s, the problem of segregation in public schools may have presented such a case: public-school segregation was a great evil, and the southern states may have had enough political power to block the necessary constitutional amendment but not enough political power to resist enforcement of a desegregation order from the Supreme Court, given that most of the country was prepared to support it. If the situation was like that, it might have been a situation in which utilitarianism would require the sort of activism that it would normally counsel against. So utilitarianism does not always advise against the sort of activism that the legislating-from-the-bench objection criticizes. But it seems implausible to deny that in some rare cases—perhaps those resembling *Brown vs. Board*—judges should legislate from the bench, if the likely benefits are large enough.

The last objection to utilitarianism as a theory of adjudication that I'll discuss here concerns the scope of judges' moral obligations. This objection maintains that even if judges have an obligation to promote well-being rather than simply decide cases as the law requires, they do not have an obligation to maximize overall well-being; at most, they have an obligation to maximize the well-being of the citizens of the nation or other political entity that employs them. Federal judges in the United States, for example, have

no obligation to promote the well-being of citizens of India, or Brazil, or Canada; at most, they have an obligation to maximize the well-being of Americans. On this view, a judge is an agent of the nation or other political entity that employs her, and even if we assume that political entities aim to maximize their citizens' well-being, a judge's fiduciary duty to her employing entity translates, in practice, into a duty that extends no more broadly than to the citizens of the entity in question.

This objection to utilitarianism as a theory of adjudication is based on an alternative normative theory of adjudication that rightly repudiates the facile thought that judges should just decide cases as the law requires. But, despite possessing that virtue, this alternative, essentially nationalistic, view is deeply flawed, because it is plainly false that a governmental official is morally permitted to disregard the interests of people who are not citizens of the political entity that pays her salary. If that were the case, then American war planners assessing the merits of continuing military operations in Iraq could rightly ignore civilian deaths there, American intelligence officers could not be morally criticized for torturing and executing suspected foreign terrorists (except insofar as such policies backfired against U.S. interests), and American legislatures voting on trade and environmental legislation would be morally entitled to enact policies that sacrificed important interests of citizens of other countries in order to promote minor interests of Americans. To be sure, it may be the case that most judges rarely decide cases that affect significant interests of any people except Americans. But there are some such cases, such as the several cases this decade in which the U.S. Supreme Court has affirmed some rights of foreign nationals who are in the custody of American military personnel at Guantanamo Bay. When such cases arise, sometimes the right decision is to rule in favor

of Americans and against foreign nationals—but that is because sometimes the well-being of the Americans outweighs the well-being of the foreign nationals, because of some combination of the number of people affected and the seriousness of their affected interests. It cannot be the right decision on the grounds that the interests of Americans are more important for officials to take into account than the interests of non-Americans.

In this section, I have considered three objections to utilitarianism as a theory of adjudication: that it would lead to many obviously wrong decisions, that it would involve judges in “legislating from the bench,” and that it implies that judges’ moral obligations extend more widely than they actually do. I take the first of these concerns to be by far the most significant, and in closing I want to briefly revisit my response to that objection and relate it to a point that I made in the first section of this paper. My response to that first objection, that utilitarianism would lead to many obviously wrong decisions, was not that the decisions that the objection suggests that utilitarianism would lead to are not obviously wrong, but that the decisions that the objection suggests that utilitarianism would lead to are not really ones that utilitarianism would lead to. In the vast majority of cases, the largest contribution that a judge can make to overall well-being is maintaining the predictability of the legal system, so that people going about their daily lives in commercial, personal, political, and other contexts are likelier to all have the same understanding of what sorts of claims will be enforced by courts and what sorts of claims will be rejected. Because of this fact, utilitarianism will require judges to decide cases as most people expect them to decide cases, which will be highly correlated with deciding cases in ways that people consider to be obviously correct. As a result, what I see as the

main objection to utilitarianism as a theory of adjudication is based largely on a misperception of what it would actually require in adjudication.

This brings me back to a point that I made at the end of the first section of this paper. There I mentioned that although many people assume that a utilitarian theory of adjudication must be highly revisionist, this is not necessarily the case. The matter ultimately depends on empirical assumptions, of course, but I would suggest that the assumptions on which I've based my argument—in particular, the assumption of the value of predictability in a legal system—are not too controversial. If that is the case, then it is not too controversial to claim that a utilitarian theory of adjudication will be far less revisionist than one might initially assume. This fact, I believe, suggests that the objections that a utilitarian theory of adjudication must overcome are more manageable than one might initially assume.