Special Section: Open Forum

Morality, Prudential Rationality, and Cheating

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We have a philosopher friend who was quite ill and required surgery, but she was not ill enough to be admitted to hospital under the "life, limb, and organ preservation" guidelines that control surgical admissions. Her surgeon told her to go to emergency and gave her a list of symptoms to tell the physicians there. Those, he said, would get her a bed, and he would then come and perform the necessary surgery. And that is how our friend (who, ironically, taught ethics out of a textbook called *Virtue and Vice in Everyday Life*) got her surgery.

We have another rehabilitation physician friend who told us that she will sometimes violate practice guidelines. If a patient needs a tray on his wheelchair for positioning, that tray can be supplied without cost to him under British Columbia's medical services plan. But if a patient needs one for a computer, he has to pay for it himself. Misrepresenting a patient's need is the easy work of a minute, and our friend reports that she will sometimes do that.

These are not isolated stories. Rationing is a fact of life in every medical system, and physicians frequently flout the rules. They will say that their patients are sicker than they are to avoid early discharge or to receive home care, better than they are to secure placement in long-term care, or different than they are to get them tests that will only be provided free of charge if they have symptoms or family histories. If we are candid, we will admit that these are exactly the kinds of physicians we would like to have looking after us. But how should we view such violations from a moral point of view?

It will be useful to distinguish between three kinds of violations. The first is *conscientious*, where physicians violate rules of rationing because they think that there is something unfair about them—that they are unnecessary, or discriminatory, or do not make allowance for special circumstances in cases, or something of this sort. The second is *offensive*, where physicians violate rules that they expect other physicians to generally obey in order to gain an advantage for their patients. The third is *defensive*, where physicians violate rules because they expect other physicians to violate them and want to protect their patients from a pointless or disproportionate burden.[1]

Conscientious violations raise interesting questions—all the questions that make the problem of political obligation such a thorny one, in fact—but we want to set them aside. Offensive and defensive violations are our quarry. In discussing these, let us agree that there are insufficient resources to provide

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everyone with the treatment they need or want when they need or want it; that treatment should be distributed in accordance with need (vs., say, ability to pay); and that rules of rationing are necessary to ensure this. Let us further grant that the specific rules of rationing in question are fair, and that there are no special circumstances in the cases that would justify making exceptions to the rules.

Given this, we can now observe that offensive and defensive violations are always prima facie wrong, for physicians who violate in these ways necessarily introduce free riders and parasites into the healthcare system. Their patients are free riders because they enjoy the benefits of rationing without bearing the burdens that make those benefits possible. They are parasites because their lot is improved by putting burdens on other patients.[2] For example, with the above stipulations in place, our friend's physician put his patient ahead of those in greater need, and our rehab friend reduces the resources available for higher-priority care.

Whether offensive and defensive violations are actually wrong thus depends on whether there is any countervailing consideration to set aside the presumption that they are. There clearly is no such consideration in the case of offensive violations, and hence such violations are always wrong. The moral permissibility of defensive violations depends on whether the fact that others are violating the rules counts as a countervailing consideration. It is not immediately clear that it does; nor is it clear that it does not; there are two sides to the matter that have to be explored. For the time being, however, the moral status of defensive violations must be counted as indeterminate.

But settling the question of what should be done from the moral point of view does not settle the question of what to do, for morality is not the only thing to be taken into account. There is also what is in the interest of the agent or those the agent is interested in. This is what used to be called "prudence," is now in economics and decision theory called "rationality," and which we will call "prudential rationality."[3] If we now ask whether it is prudentially rational for physicians to violate rules of rationing, we get symmetrically opposite answers from the above. Defensive violations are at least sometimes prudentially rational, but whether offensive violations are ever so is not clear. It seems as if they would be, but there is an impressive line of argument initiated by Thomas Hobbes[4] and developed by David Gauthier[5] designed to show that, first appearances to the contrary, a prudentially rational person would not engage in them. Until this is examined, the prudential rationality of offensive violations must remain up in the air.

It would be ideal if defensive violations could be shown to be always morally permissible and offensive violations to be never prudentially rational, for then morality and prudential rationality would never conflict. We will argue, however, that we can only have half of what we would ideally like. Specifically, we will argue in the next section that offensive violations are sometimes prudentially rational and in the subsequent one that defensive violations are always morally permissible. There will therefore be scope for conflicts between morality and prudential rationality in the case of offensive violations, but not in the case of defensive violations. However, although the arguments of those sections will leave us with the possibility of conflicts between morality and prudential rationality, they will also put us in a position to conclude that such conflicts will be rarer in practice than might be supposed. It will emerge that,

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for the most part, it will be both prudentially rational and morally permissible for physicians to violate fair rules of rationing if and only if they can expect to get away with it. This proposition may strike one as implausible and immoral, but our overall aim is to establish it.

Offensive Violations

The view that morality and prudential rationality always coincide is enormously attractive. On any account, morality puts constraints on action. If these constraints require one to act contrary to one's interest, one can ask "Why should I be moral? Why not be prudentially rational?" No one wants to have to choose between these. Nor would one have to if we could show that it is in one's interest to accept the constraints of morality. For then morality and prudential rationality would always point in the same direction, and there is no room for asking why one should be moral or should be prudentially rational. We would have found the Holy Grail of moral philosophy.

This is the project undertaken by Hobbes and Gauthier. They both seek to show how we can (to use Gauthier's phrase) "bargain our way into morality."[6] To see how they try to do this, we can conveniently consider what James Wallace calls a "Hobbes situation." This is characterised by four features:

1. Everyone is apt to benefit if all or most people in the situation conform to a set of rules B, but this benefit is not realized unless most conform.
2. Conforming to B generally involves some sacrifice, so that, other things being equal, it is apt to be maximally advantageous for an individual not to conform when most conform.
3. As a rule, the sacrifice involved for an individual in conforming to B is small in comparison with the benefits to him of the conformity of most people to B.
4. It is apt to be maximally disadvantageous to an individual to conform to B when not enough others conform to realize the benefit.[7]

With a minor modification, this is exactly the situation we are faced with in the case of scarce medical resources where care must be prioritized and rationing is held out as the way forward. To adapt it, all we have to do is understand *B* to be *rules of rationing*, and distinguish the persons acting from those receiving the benefits or carrying the burdens; specifically, to understand *the individuals who will conform or not conform to B* to be *physicians* and *the recipients of the benefits or burdens of this behavior* to be *patients*.

We can now ask: Faced with rules of rationing, how should a physician act in order to maximize the interests of her patients? Either all or most other physicians will conform or they will not, and she also must either conform or not. It does not matter for our present purposes *why* these parties violate the rules if they do, that is, if they violate offensively because they expect that others will conform to the rules and want to gain an advantage, or defensively because they expect that others will violate and do not want to be taken advantage of. The argument at hand aims to extract morality out of considerations of prudential rationality, and the only thing that counts for that are the preference-ratings of various combinations of conformity and violation; motivation is irrelevant. Given this, there are four possible outcomes:

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1. Most violate the rules, and I (as a physician) do too.
2. Most follow the rules, and I do too.
3. Most follow the rules, and I selectively violate them.
4. Most violate the rules, and I follow them.

From the point of view of advantage to my patients, (3) is the best situation, for then my patients get the benefits of rules of rationing without having to bear any of the burdens, and (4) is the worst, for then my patients bear burdens and no advantages accrue. Because I can get the best outcome and avoid the worst by violating rules of rationing, my dominant strategy must be to violate. But if that is the dominant strategy for me, it must also be for all other physicians, and if they acted prudentially rationally, we would have situation (1). (1), however, is the second worst situation, for although my patients are not specially disadvantaged, the benefits of rules of rationing are forgone. (2) would be much better, for it yields benefits that are greater than its costs, which is a situation that is second best only to (3), where my patients get benefits that have no costs. But to get (2), all or most physicians have to put constraints on the pursuit of the interest of their patients. These prudentially rational and impartial constraints constitute morality, and therefore (so the argument goes) it really is advantageous to be moral—in this case, to be fair—as long as others are too.[8]

The last clause is crucial. It is prudentially rational for me to constrain my pursuit of the interest of my patients only if I have some assurance that other physicians will constrain their pursuit of the interest of theirs. Hobbes sought the necessary assurance in a political solution: Appoint what he called a "Sovereign"—some person or body of persons to police the rules of morality. In the case of rules of rationing, perhaps some professional college could be given omnibus powers of investigation and the authority to impose sufficiently draconian penalties to make violations of those rules unattractive. Prudentially rational people would then make two agreements. They would agree to follow the rules of rationing and agree to put themselves under a policing authority.

Gauthier takes another tack.[9] He argues that Hobbes's solution is costly and—given that power corrupts—dangerous, and that voluntary compliance with prudentially rational agreements would be much better. Gauthier does not contend that institutions of enforcement can be entirely eliminated, but that reliance on them can be severely reduced if individuals voluntarily formed a disposition to keep mutually advantageous bargains even when violating would be maximally advantageous.[10] In his terminology, this amounts to becoming "constrained maximizers" as opposed to "straightforward maximizers," who will violate when it is advantageous to do so.[11] He further argues that it is prudentially rational for individuals to form such a disposition because they will then be trusted, included in cooperative ventures, and thereby maximize benefits to themselves and those for whom they are agents.

This is very plausible if individuals were (to use Gauthier's terms) "transparent," that is, if others could see immediately whether they are constrained or straightforward maximizers.[12] It is less obvious, but arguable, if they were "translucent," that is, if others could make reasonable but not infallible estimates of what kind of maximizers they are. But it is not true at all if individuals were "opaque," that is, if others could have no reason to think that they are constrained or straightforward maximizers. In this case, Gauthier admits, there

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is a loss rather than a benefit in becoming a constrained maximizer. A straightforward maximizer who is opaque will do better both in a community of straightforward maximizers and in a community of constrained maximizers. In the former, she will minimize the risk of being exploited, and in the latter, she can exploit others without risk of being exploited herself.

It is plain that straightforward maximizers who are recognized as such will not do well in healthcare (or generally any other) environments. But rather than changing their ways and becoming constrained maximizers, they would be better off remaining straightforward maximizers and becoming opaque. They would be best off, however, remaining straightforward maximizers and presenting themselves as constrained maximizers. Physicians cannot successfully do this if they violate rules of rationing regularly or openly, but they can if they violate occasionally and judiciously. Thus, rather than form a disposition to be "constrained maximizers," it would be best if they became what David Copp has called "reserved maximizers."[13] These are essentially rationally prudent straightforward maximizers, that is, individuals who will generally act as constrained maximizers but are always on the lookout for the opportunity to violate rules of rationing with impunity. There is nothing incoherent about such a disposition, and it should come naturally to physicians, who are taught to think of horses when they hear hoof beats, but to keep an eye open for zebras.

It thus seems that the only hope for making offensive violations always disadvantageous lies in Hobbes's appeal to a Sovereign. But this too must be unsuccessful. The prudential rationality of offensive violations depends on four things: the potential benefits of violating, the potential costs of getting caught, the probability of each, and the individual's evaluation of what benefits are worth what costs. This last condition makes judgments of prudential rationality so subjective that it is not clear that *any* Sovereign could make it *always* prudentially irrational for physicians to violate fair rules of rationing. But we need not invoke eccentric preferences and quibble over this. What is quite clear is that any Sovereign that could conceivably do this would not be worth having. For any such Sovereign must have intrusive modes of surveillance (e.g., make regular random audits of patient charts or institute an analog of a "Baby Doe" hotline to encourage whistle-blowing), or the will to administer extremely severe punishments for violations (e.g., permanent loss of license or criminal penalties), or both. If the stakes were higher—if they were, as in Hobbes's theory, between such a Sovereign and a State of Nature in which "the life of man is solitary, poor, nasty, brutish, and short"—such a Sovereign could be contemplated, but surely not to ensure that physicians do not violate fair rules of rationing.

If, however, any acceptable Sovereign must have lesser powers of surveillance (e.g., must rely on monitoring deviations from patterns of practice and adventitious discoveries) and lack the will to punish severely (e.g., must limit violations to things like reprimands or fines), physicians would not have to have eccentric concerns about their patients for it to be prudentially rational for them to violate on occasion. For then the risk of the coming to real grief from judicious and occasional violations would be extremely small, and physicians could sometimes be moved to set such risks aside with only very normal concerns for the welfare of their patients. Given that physicians live under this kind of Sovereign, we thus arrive at our first promised conclusion: Offensive violations are sometimes prudentially rational.[14]

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We now turn to defensive violations of rules of rationing, where physicians violate the rules because they expect that other physicians will violate them, and complying with the rules would thus put a pointless or unfair burden on their patients.

Defensive Violations

The prudentially rational status of defensive violations is easily determined. If offensive violations are sometimes prudentially rational, defensive violations must be so as well. There is less risk of physicians getting caught, as defensive violations track the behavior of other similarly situated physicians, and hence do not deviate from patterns of practice. However, because there is always the possibility of being discovered in some other way, and because some physicians may not think that *any* risk is worth taking for their patients, defensive violations cannot be deemed *always* prudentially rational. But, given that physicians sometimes do not want their patients to be disadvantaged over those of others and are sometimes willing to run small risks to ensure that, they can be deemed *sometimes* prudentially rational. The moral status of defensive violations is less clear.

Physicians have a clear prima facie obligation to obey fair rules of rationing. The question we must now tackle is how they should act if they expect other similarly situated physicians to violate those rules. Must they obey them anyway? Or are they only obligated to obey the rules provided that others can be expected to too? And if the latter, what does the fact that others are expected to violate imply: That physicians should not obey the rules, or that they may violate them, that is, that there is an obligation not to obey, or merely that it is permissible not to? We will conclude that defensive violations are morally permissible, but will begin by considering the claim that they are morally obligatory. This is an implausible claim if we are talking about individuals making decisions for themselves as to whether to obey rules. At most, the fact that they expect others to violate the rules releases them from any obligation to obey. But it is not at all implausible when we are talking about agents of individuals (such as physicians) making decisions for those individuals (such as their patients). Here it is at least plausible to suggest that it is obligatory and not merely permissible for physicians to act in their patients' interests.

It is clear that physicians should engage in defensive violations when they expect others to generally violate. Rules of rationing are designed to give reasonable assurance that treatment will be delivered in accordance with need, and if violations of those rules were so common that the objective is not achieved, obeying the rules would put a pointless burden on patients. It is also clear that physicians cannot justify defensively violating rules if enough physicians obey them so as to yield benefits, but some physicians violate them some or most of the time. Obedience is not pointless in this circumstance; nor can patients who are held to the rules plausibly complain that their physician has placed an unfair burden on them. What is not clear is what physicians should do when they expect that most other physicians will obey rules of rationing most of the time, but that most will violate them in certain circumstances. In such situations, should physicians engage in defensive violations to ensure that their patients do not bear a disproportionate amount of the burden?

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One may say "No," on the ground that one should only act in a way that one wishes that others would, even if one also knows that others will not, as long as enough others obey so that obedience is not pointless. Assuming that the rules of rationing are fair, this would be to follow the rules. To rest on this principle is to endorse a generalized version of the Golden Rule: Do unto others as you would wish them to do unto you. Alternatively, one may say "Yes," arguing that one should act in a way that takes into account how others actually behave, and violate the rules in proportion to the number and kind of violations expected by others. This is to adopt a generalized version of (what Gregory Kavka has called, because it glitters less brightly than the Golden Rule as an inspiring moral ideal) the "Copper Rule": Do unto others as they *will* do unto you.[15] We call our versions of these Rules "generalized" because the standard is how you would like others to act or how they will act, not *toward you*, but rather *in general*.

Each view has a substantial claim to being fair. A physician who acts on the Generalized Golden Rule guarantees that no free riders or parasites are added to the system by her actions. The physician thus does what she can to ensure that no one will get benefits without bearing a fair share of the burdens and that less needy patients will not be treated before more needy ones. A physician who acts on the Generalized Copper Rule does what she can to prevent her patients from being held to a higher standard than are those of others. If a physician is never prepared to introduce free riders and parasites into the system, that physician's patients will sometimes bear more burdens than other patients to secure the same good and line up when other patients do not. Each view is also open to the charge of unfairness, for each will necessarily lack the fair-making characteristic of the other and thus allow unfair burdens to fall on patients. The Generalized Golden Rule does this by prohibiting actions that would remove inequalities in how patients are treated, the Generalized Copper Rule by enjoining actions that will put burdens on patients who should not have to bear them.

How can we decide between these Rules? John Stuart Mill faced a similar problem of conflicting dictates of justice in Chapter V of his *Utilitarianism*. He there anticipates circumstances in which supporters of conflicting positions can each invoke undeniable rules of justice and comments that: "Each is triumphant so long as he is not compelled to take into consideration any other maxims of justice than the one he has selected; but as soon as their several maxims are brought face to face, each disputant seems to have exactly as much to say for himself as the others. No one of them can carry out his own notion of justice without trampling upon another equally binding."[16] This is precisely the situation that we find ourselves in, and Mill's conclusion is that "social utility alone can decide the preference."[17] That "from these confusions there is no other mode of extrication than the utilitarian."[18]

But appealing to utility will not help with our problem. To begin with, there is no reason to think that utility will systematically favor the Generalized Golden Rule or the Generalized Copper Rule. It may turn out that, depending on circumstances, either Rule could maximize utility. However that may be, as the following considerations will show, utility cannot be invoked to decide between the Rules either in general or in specific circumstances.

If acting on the Generalized Copper Rule maximized social utility, physicians should indeed act on that Rule (assuming, as seems reasonable, that acting on it would also maximize utility for their patients). If the interest of one's patients

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and the general interest are both best promoted by acting on that Rule, there is no reason to act otherwise. But if utility were maximized by acting on the Generalized Golden Rule, it would not immediately follow that physicians should act on the Rule. For physicians may contend that it is not their business to maximize the utility of patients or persons generally, but to do so of *their* patients. Physicians who hold that the physician–patient relationship requires that they do all they can for their patients, and that this involves doing what they can to ensure that they are not treated worse than those of most other physicians, will reject the standard of utility. Physicians would only conclude that they should act on the Generalized Golden Rule when that maximized utility if they held a different view of their obligation toward their patients, specifically, if they held that they should do all they can for their patients *as long as* they do not violate fair rules that are generally obeyed. It thus appears that social utility cannot decide the preference between the Generalized Golden Rule and the Generalized Copper Rule until the question of the appropriate physician–patient relation is settled. If so, appeal to social utility cannot decide that preference. For settling the question of the appropriate physician–patient relation is one and the same as deciding between the Generalized Golden Rule and the Generalized Copper Rule.

But if the preference between those Rules cannot be settled by appeal to social utility, it is hard to see how it can be settled at all, as the only alternative is intuition, which is highly fallible in general[19] and does not speak with a clear voice in this case. After careful deliberation, one must still feel pulled in the direction of obeying rules of rationing by the thought: How can physicians exempt their patients from bearing their fair share of burdens necessary for a common good or push them ahead of more needy patients who have done nothing to deserve that? At the same time, they must also feel pulled in the direction of selective violation by the thought: How can physicians *not* do those things when most other physicians are, and the behavior of those physicians further disadvantages theirs? It thus seems that we are at a stalemate, and there are no considerations that would favor acting on either Rule over the other. If so, given that physicians must either act on one Rule or the other—they must either violate or not—it cannot be morally wrong for physicians to act on either Rule. But if it is never wrong for physicians to act on either Rule, then, because anything not wrong is all right, it must be always all right, that is, morally permissible, for them to act on either. It follows that it is always morally permissible for physicians to act on the Generalized Copper Rule, and hence that it is always morally permissible for them to violate fair rules of rationing if most other similarly situated physicians can be expected to. This establishes our second conclusion: Defensive violations are always morally permissible. Because it is hard to see how physicians would be morally justified in violating fair rules of rationing in any other circumstances, we can strengthen this to the way in which we will make use of it in our Conclusion, namely: It is morally permissible for physicians to violate fair rules of rationing if and only if most other similarly situated physicians can be expected to.

Conclusion

The upshot of the above is that morality and prudential rationality cannot be perfectly reconciled. There is reconciliation in the case of defensive violations,

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which are never both prudentially rational and morally impermissible, but not in the case of offensive violations, which are sometimes prudentially rational but never morally permissible. This is an unhappy result, and when such conflicts occur there is no clean way of resolving them. Both one whose fundamental commitment is to prudential rationality and one whose fundamental commitment is to morality must deplore the situation in which there is not general obedience to fair rules of rationing. But once there is general obedience, the former must violate when it is prudentially rational to do so and the latter must obey.

There is, however, reason to think that, in the case of rules of rationing, offensive violations will seldom be prudentially rational in practice. One deterrent to them is that, because offensive violations occur only in circumstances in which other similarly situated physicians are expected to obey, there is always an increased risk of detection. They could still be commonly prudentially rational if physicians themselves typically stood to gain significantly from them, or if the interests of their patients typically became their interests in the way the interests of one's family can become one's interests. For then it may be worthwhile for physicians to run the increased risk of detection. But neither of these things is so. Patients will always benefit from offensive violations, but, given that physicians do not want to get caught and typically lack incentive to risk that, it will seldom be prudentially rational for physicians to engage in them. Thus the spheres of prudentially rational actions and morally permissible actions will generally coincide. For the most part, it will be both prudentially rational and morally permissible for physicians to violate fair rules of rationing if and only if other similarly situated physicians can be expected to in those circumstances or, to put it in the provocative way we did at the outset, if and only if they can expect to get away with it.

Notes

1. The distinction between offensive and defensive violations comes from Kavka G. *Hobbesian Moral and Political Theory*. Princeton, NJ: Princeton University Press; 1986:139, 346–7.
2. It is not clear *who* should be called free riders and parasites: physicians or patients. We have more or less arbitrarily chosen the latter for purposes of exposition, but any blame will primarily fall on the former, as they are the persons responsible for the latter being in the position they are.
3. The evil of using the currently popular term "rationality," unadorned by the qualifier "prudential," is that it fosters without argument the contentious view that the only noninstrumental reasons for action are prudential, and hence that practical rationality and prudential rationality are one and the same.
4. Hobbes T. *Leviathan*. 1651.
5. Gauthier D. *Morals by Agreement*. Oxford: Oxford University Press; 1986.
6. Gauthier D. Bargaining our way into morality: A do-it-yourself primer. *Philosophic Exchange* 1979;2(5):14–27.
7. Wallace J. *Virtues and Vices*. Ithaca: Cornell University Press, 1978:96. Cited in Darwall S. *Impartial Reason*. Ithaca: Cornell University Press, 1983:176–7.
8. This is the logic of the Prisoner's Dilemma applied to our Hobbes situation relating to rules of rationing. See Gauthier D. Morality and advantage. *Philosophical Review* 1967;76:460–75; note 5, Gauthier 1986:60–82, especially 79–82.
9. The account that follows is based on Gauthier 1986:157–89. See note 5.
10. See note 5, Gauthier 1986:164–5.
11. See note 5, Gauthier 1986:167.

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12. Gauthier defines this term and the sister terms "translucent" and "opaque" in Gauthier 1986:173–4. See note 5.
13. Copp D. Contractarianism and moral skepticism. In: Vallentyne P, ed., *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement*. Cambridge: Cambridge University Press; 1991:220–1.
14. And also, on the Hobbes-Gauthier account, according to which nothing prudentially rational can be immoral, not immoral. This constitutes a *reductio* of the attempt to reconcile morality in any recognizable sense with prudential rationality. More generally, if acting prudentially rationally entails acting like a straightforward maximizer, and acting like a straightforward maximizer is incompatible with recognizing morally binding constraints, prudential rationality is incompatible with morality, for such constraints are constitutive of morality. Thus one whose fundamental commitment is to prudential rationality must reject morality. See Browne K. *Morality and Rationality*. Unpublished M.A. thesis. Vancouver: University of British Columbia; 2005.
15. Kavka attributes a Copper Rule morality to Hobbes. See note 1, Kavka 1986:338–49. Hobbes's basic moral principles are his Laws of Nature. There are 19 such Laws, and they all have the same logical form: "Do X (e.g., seek peace, lay down your right to all things), provided others are doing so as well." Hobbes claims that the Golden Rule summarizes his Laws of Nature, but Kavka acutely comments that it only summarizes the main clauses. Once the qualifying clauses are taken into account, it is the Copper Rule that summarizes the Laws. Kavka goes on to argue that the application of the Copper Rule to real-life situations is not perfectly clear either in Hobbes's account or in fact and provides a sympathetic and illuminating discussion of this matter (see 347–8 and 368–78).
16. Mill JS. *Utilitarianism* 1861:Ch. V, para. 27.
17. See note 16, Mill 1861:Ch. V, para. 29.
18. See note 16, Mill 1861:Ch. V, para. 30.
19. As even Ross admits. Ross WD. *The Right and the Good*. Oxford: Oxford University Press; 1930:42.

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