Though the Heavens May Fall? Pluralism, Judgment, and Democracy in Public Applied Ethics

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> No one who works full time should live in poverty. Not fast food workers, Uber drivers, or hardworking folks at @BostonLogan. #Fightfor15
> —Elizabeth Warren, November 29, 2016

Introduction: Pluralism in Public Applied Ethics

This paper's epigraphic tweet is an instance of argumentation within the domain of applied morality that I will call public applied ethics (PAE). PAE is the practice of deciding what a political community ought, morally, to do or allow. It differs from individual applied ethics in that the agent whose action is in question is not a single individual, but rather a whole political community. And PAE differs from fundamental political theory—of the sort Rawls pursues in *A Theory of Justice*, for instance—in that its primary concern is the action of the state in particular, discrete cases, not overarching norms for structuring the social and political community as a whole.[1] To be sure, fundamental political theory has many implications for PAE. But it is a different inquiry nonetheless.

Senator Warren's tweet also represents a particular approach to PAE, which I will call the pure deontic approach.[2] The pure deontic approach attempts to move directly from a deontic principle to a conclusion about what the community ought to do.

[1] John Rawls (1999). *A Theory of Justice, Revised Edition* (Harvard).
[2] Senator Warren is, of course, hardly a consistent practitioner of this methodology. But it is her tweeted argument I'm addressing, not her whole body of work.

According to the pure deontic approach, it is licit to move directly from the per se injustice of a particular public action or policy to the conclusion that the state ought to eschew that action or policy. Or in some cases, the per se injustice of omitting a particular public action can directly license the conclusion that the state would be wrong not to perform it. The argument of Warren's tweet seems to proceed as follows:

1. It is unjust per se for people to be paid less than a living wage for their work.
2. A living wage is at least $15/hour.
3. (From 1 and 2) It is unjust per se for people to be paid less than $15/hour for their work.
4. Therefore, the state ought to mandate a $15/hour minimum wage.

Notice how Warren's reasoning assumes that the per se injustice of full time workers lacking a living wage is sufficient to generate the conclusion that the community ought, morally, to mandate a living wage for full time workers. This is the hallmark of the pure deontic model of PAE.

In some cases, opponents of an argument like Warren's will reply with a purely deontic move of their own. For instance, some libertarians insist that any minimum wage law is unacceptable, because any such law must necessarily violate individual freedom of contract.[3] But many will reply with pure consequentialist PAE arguments.[4] Such arguments, which are frequently cast in economic terms and supported by economic modeling, don't so much contend with the deontic principles at issue as brush them aside. In the case of #Fightfor15, opponents have often pointed out that raising the minimum

[3] See, for instance, Eric Mack (1981). "In defense of 'Unbridled' freedom of contract." *American Journal of Economics and Sociology,* 40(1), 1–15.
[4] See, for instance, Matt Zwolinski's arguments against a $15/hour minimum wage: "The Minimum Wage is a Bad Tool for Fighting Poverty." *Bleeding Heart Libertarians* (April 4, 2016).

wage would effectively penalize hiring at the bottom of the wage ladder, putting poor people out of work.

Most of us, at least when not engaged in political polemics, probably find ourselves deeply ambivalent about the tension between deontic and consequentialist pressures within PAE. Most people, I think, have the intuition that some public actions truly are unjust per se, and that economic and other consequences can't just normatively silence their injustice. But few of us are willing to stand with principle though the heavens may fall. Let's call the orientation to which so many of us gravitate *pluralism* about PAE. According to pluralism, consequentialist and deontic considerations are both genuine features of the normative space of PAE, and neither one resolves into the other. Thus, in order to decide what to do together as a public, we must weigh and compare moral factors that do not obviously share a common measure.

My aim here is to draw out some of the most important consequences of pluralism for PAE theory and practice, including the political practice of passing and enforcing binding law. Pluralism, I will argue, entails that PAE is inferentially gappy: There is usually no way to for an agent, whether individual or collective, to avoid non-inferential judgment in the course of reasoning about what the community should do. This consequence of pluralism, I think, supports two political theses. First, public decision-making should be rigorously democratic. But, second, democratic citizens should be epistemically modest, and so cautious, about pushing through policy on the strength of their perceived rankings of the PAE factors in play.

Before I begin, I should note that this paper constitutes a first swing, at some of the difficulties pluralism raises for PAE. I will offer little in the way of hard and fast

solutions, and it is my hope that, through discussion, we will be able to make more headway with these problems than I have been able to make on my own.

Inferential Gaps and the Problem of Public Justification

As we observed above, pluralism asserts that correct PAE reason incorporates both irreducibly deontological and irreducibly consequentialist elements. Since each of these types of elements is irreducible, neither reduces to the other. Moreover, it seems fairly clear that there is no third moral category that somehow subsumes and relates them. Furthermore, although something like a lexical ordering of the deontic over the consequential is logically available, the intuitive implausibility of such a neat solution is part of what motivates PAE pluralism in the first place.

The problem of inference presented by pluralism about PAE is a kind of incommensurability. Since deontic and consequentialist consideration in PAE both exert moral force without exerting identifiable *degrees* of force within a shared schema, there is no way to infer, from all of the facts of a given case together with applicable moral principles and possible consequences, what the public ought to do. Moral theories such as Kant's deontology and Mill's utilitarianism offer a moral standard (goodness of will and utility, respectively) into which all moral considerations resolve, thus rendering correct moral judgments about the relative weight of competing considerations inferentially available, at least in principle. But PAE pluralism offers no such ultimate standard. This means that competing considerations of different moral kinds under PAE are incommensurable according to any cardinal ranking. But this doesn't mean that they are *utterly* incommensurable, or incapable of any ranking at all. If this were the case,

pluralism would render PAE deliberation not just difficult, but impossible altogether. The PAE task, after all, is to negotiate competing considerations in the domain of public ethics and decide what it is best for the community to do. What the PAE deliberator under pluralism must negotiate is the practice of *ordinal* ranking—or ranking alternatives above or below one another—in the absence of a *cardinal* ranking—or ranking in terms of a shared metric that the deliberator can use to see precise value differences between alternatives.[5]

So where does this leave the PAE deliberator? The situation of PAE deliberation under pluralism is illuminatingly similar to that of the moral agent in W.D. Ross's intuitionism.[6] According to Ross, right moral reasoning has its proper foundation in the direct perception of goodness and rightness (and badness and wrongness) in particular kinds of things and actions. We are rightly confident that we should observe such duties as beneficence, honesty, and gratitude, among many others. But each of these duties is, in abstraction from a particular case, merely prima facie. What one ought morally to do, all things considered, in a particular case cannot be rationally inferred from the fact that some particular plurality of prima facie duties bears on the case. One may judge wrongly or rightly about what to do, but judgment is necessarily unmoored from anything like strict inferential criteria.

Ross offers the case of someone who must choose between paying back a very undeserving, rich creditor and helping a highly meritorious person in great need.[7] There can be no doubt that there are prima facie duties of promissory fidelity and beneficence in

[5] On cardinal and ordinal rankings in relation to value conflicts and incommensurability, see Michael Stocker (1990). *Plural and Conflicting Values* (Oxford).
[6] See, e.g., W.D. Ross (1927). "The Basis of Objective Judgments in Ethics." *The International Journal of Ethics* 37 (2), 113-127.
[7] Ross, "The Basis of Objective Judgments in Ethics," 126-127

play. But which one wins out as her all things considered duty under the circumstances is not similarly epistemically determinate. To be sure, greater consequences for the deserving acquaintance count in favor of breaking the promise, but there doesn't seem to be any amount of potential suffering on his part that *entails* that our agent's promissory obligation is, in this instance, silenced. This is not to say that there *are* no such instances: It is highly implausible that promissory duty trumps the duty of beneficence under all circumstances. But even so, Ross's agent lacks the luxury of an inferential procedure for identifying the circumstances in which it does not. She must simply judge, as sensitively, reflectively, and carefully as she can.

It would seem that if pluralism about PAE is right, the PAE deliberator finds herself in a Rossian deliberative position. She is responsible for choosing well, but without the help of decisive procedure for moving from patterns of facts, principles, and potential consequences to conclusions. The necessary role of non-inferential judgment in PAE under pluralism generates a problem of public justification: it is hard to see how a public official's personal moral judgment, however carefully considered, can bind other people. Consider hard cases like Ross's creditor case Since the Rossian model does not and cannot include a meta-level decision rule for weighing different sorts of moral principles against one another, the Rossian agent in this scenario must, in the end, make a kind of radical personal commitment. Judgment is available to help bridge the gap between principle and action, but certainty through inference is not in the offing. In the end, even the most prudent agent must commit herself to a choice and bear responsibility for her commitment. This is (perhaps) well and good for individuals, but it seems troubling for people choosing on behalf of whole political communities of other people.

For even if makes sense to say that I am answerable to decisions which, though made by other people, somehow flow inferentially from reason to which I have (or should have) access, it is much less plausible that I am answerable to others' non-inferential judgments.

I suggest that the justificatory problem just raised motivates two moral pressures that should help structure our political practice. I use the term 'pressures' instead of more assertive 'criteria,' because their relative strength, like the distinct moral elements in the pluralism that motivates them, is subject to non-inferential judgment. First, there is a pressure for rendering whatever decision-making power the state in fact holds as rigorously democratic as possible. To the extent that it is necessary for the community to issue binding judgments on hard cases without the help of rational inference, it is important for the people to coauthor those judgments to the greatest possible extent. However, due to procedural problems that afflict even the best-ordered deliberative democracies, the extent to which the members of a political community can reliably coauthor their laws is limited. Some binding political judgments will inevitably be arbitrary from the perspective of at least some reasonable citizens. And since subjection to norms that are arbitrary from one's own perspective is a serious matter, we are faced with our second pressure: Deliberative citizens, including those in a position to push through controversial policy to which they are sincerely committed, have a standing prima facie reason to exercise caution and constraint in doing so. This is, like the first pressure, open to exceptions, and there will be times when citizens will reasonably judge that no caution or restrain is warranted. But since we are here concerned with pluralism,

prima facie principles are the order of the day, at the meta-level no less than with respect to first-order PAE considerations.

Pluralism and Democracy

I want to suggest in this section that democracy can do much (though not, perhaps, as much as we might hope) to render public PAE judgments *our* judgments. But many will reject this suggestion out of hand for a reason that is both simple and powerful: No matter how fair and deliberative a democracy might be, it is simply false that individuals possess autonomous control over its actions. For a person to possess autonomous control of something is, in the ordinary sense, for her to be able to change, in an intentionally directed way, what *it* does by changing what *she* does. I am in control of the screen/keyboard interface on my computer, for instance, because what appears on the screen includes all and only what I intentionally put there by tapping the keys. There is no democratic arrangement that can make my democratic inputs (votes, points in deliberation, demonstration, or whatever) relate to the decisions of the body politic in anything like the way the letters on the screen relate to my typing.

Jason Brennan has suggested that our tendency to see democracy as a source of autonomy for individuals rests on a simple instance of the fallacy of division.[8] We observe that democratically structured political communities (as opposed to a tyrant, the market, an oligarchy, etc.) autonomously control public action, and so we judge that each of its parts must do so as well. But this inference is no better than an inference from the power of a plane to fly to the conclusion that all (or, indeed, any) of its parts can fly.

[8] Jason Brennan. 2016. *Against Democracy* (Princeton), 110.

This challenge is a serious one. In fact, I think it is decisive against what we may call the personal authorship interpretation of the thesis that democracy makes us authors of the public choices that bind us. But I don't think we need to rely on the personal authorship interpretation in order to secure the conclusion that democracy can render public action attributable to the citizens, at least to some considerable extent. This is because there is good sense to be made of citizens as coauthors. As I will shortly argue, the logic of coauthorship differs from that of sole-authorship in such a way that democratic coauthorship by each citizen can make sense even though democratic sole-authorship cannot.

Consider textual coauthorship more closely. When some group of people authors a text together, their aim is to express, in one voice, a single coherent vision and line of argument.[9] Moreover, what counts as a successful suggestion by one of the co-authors is largely endogenous to the ongoing activity she shares with the other coauthors. Its quality depends on the ongoing conceptualization of the project that is continually being produced by deliberation among the coauthors in light of their previous decisions. If someone agreed to coauthor a document with some others but then showed up at the writing session with list of content she wanted to end up in the final product, regardless of the process of creation in conjunction with the others, we would say that she is not really willing to be a coauthor at all. Rather, she wants to author her own ideas, using the writing process as a vehicle for them. True coauthorship is thus control of the creation of a text that is irreducibly collective. It is not control by any one author, nor is it each author's individual control aggregated into some kind of additive heap, as would be the

[9] The material in this paragraph and the next borrows from my earlier work. See Daniel Layman. 2016. "Robust Deliberative Democracy." *Critical Review* 28 (3-4): 494-516.

case if each author wrote her bit separately and then tried to negotiate its inclusion. Each of the authors takes part in one and the same process of control, and for this reason, she may—and indeed should—lay claim, equally with the others, to the entire text.

We can isolate two (related) features of genuine coauthorship that distinguish it from sole-authorship. First, coauthorship is deliberative. This means that coauthored content is determined by a process through which the coauthors offer reasons to one another and assess them using a shared standard. Moreover, the rational standard appropriate to the deliberation at hand must be the *only* criterion for including content in the text. To the extent that someone's ideas worm their way in through fame, fear, bullying, or sheer rhetorical skill, the text under construction is to that extent less fully coauthored. Second, to the extent that coauthorship is deliberative in the sense just described, the considerations that go into determining what appears on the page are endogenous to the process of discussion. This does not mean that authors are forbidden to submit ideas they have thought about prior to entering the writing process. But it does mean that all parties are required to assess and defend their contributions using the standards proper to the shared process of construction, and it means that all must be ready to alter and relinquish their ideas in light of those standards.

In the most familiar cases, coauthorship and its characteristic deliberation take place on a very limited scale. But all can agree, I take it, that coauthorship can and does occur (despite many failed attempts), and that when it does, the resulting work is genuinely attributable to each of the authors, even though no author bears an ordinary control relationship to the content. Moreover, I will assume that no one holds the view that the logic of coauthorship limits the number of coauthors of a particular work to the

two or three who tend to write books together. Indeed, there are easily available examples of works that have been coauthored by hundreds of people: think of the UN *Declaration on Human Rights,* for instance. Coauthorship hinges on the character of the process for assessing inputs as a group, not on the size of the group.

It is important to note that a deliberative creative process doesn't need to result in unanimity in order for its decisions to be attributable to all of the coauthors. In the case of textual coauthorship, it is probably rare for a group of authors to reach full unanimity on every point of the text. And unanimity likely becomes harder and harder to come by as the number of authors working on a project grows. But when it comes to light that there was disagreement in the process of textual authorship, we don't conclude that a co-author who was ultimately overruled in the deliberative process is less fully a co-author than the others. If co-authorship were simply aggregated sole authorship, it would make sense to consider the overruled party less fully a coauthor. But co-authorship has its own logic: To be a co-author is not to author a discrete text that is then pasted together with others. Rather, it is to occupy, in conjunction with others, a deliberative role that has a single text as its aim and, when all goes well (or well enough), its result.

As is no doubt apparent by now, I mean to suggest that democracy can and should be procedurally analogous to textual coauthorship. To the extent that deliberative democracy can achieve this goal, public action can be no less attributable to individual citizens than is the content of a coauthored book to individual coauthors. There is no fallacy of division in claiming that the content of a coauthored book is attributable to each coauthor, albeit not in the way that control over my Word document is attributable to me. By the same token, there is no reason to doubt that the decisions of a deliberative

democratic body can be attributable to me, at least if the process that body employees is relevantly similar in its dialogical character and its adherence to shared standards.

Deliberative democracy in general has given rise to an enormous literature, and many of its critics might object at this point simply because deliberative democracy has arrived on the scene. Many, for instance, have argued that limited knowledge and altruism render any form of deliberative impracticable.[10] I by no means want to diminish the importance of such concerns: indeed, I have recently addressed them elsewhere.[11] But in the present context, I want to focus on two possible objections that are appear especially threatening for the move I'm trying to make. The first of these, I think, is less troubling than it might seem, while the second is actually quite serous. Lets' take them in turn.

The first hinges on the purported rational apathy of citizens in relation to the political process. Any form of democracy robustly deliberative enough to qualify as a site of coauthorship will require a great deal of buy in and investment from citizens. But citizens, many have suggested, rationally lack such buy in and investment, since they have almost no chance of effecting their preferences through political means. I have granted that citizens of have almost no chance of effecting their pre-existing preferences through political means. I have urged instead that citizens have a chance to share in coauthorship with their fellow citizens, which is a different matter entirely and valuable for different reasons. Thus, in the present context, this objection would simply beg the question. Now, to be sure, most western citizens today are highly ignorant of political

[10] For an especially clear and empirically rigorous development of these criticisms, see Mark Pennington. 2011. *Robust Deliberative Democracy* (Edward Elgar).
[11] Layman, "Robust Deliberative Democracy," *passim*

questions, and many have very little interest in them.[12] But my point here is about how democracy should be in order to deal with the problem of the irreducibly judgment-based character of PAE. It is not some kind of heterodox empirical claim to the effect that people are actually good, invested deliberative citizens after all.

The second objection is much more troubling, and it hinges on the internal character of even the most well designed deliberative democratic processes. The trouble is that deliberation—including good faith deliberation—is a skill, and some people will inevitably be better at it than others. There is no clear way to prevent some deliberative voices from ruling the roost, not due to corruption, but simply because they present more compelling reasons and do so more articulately. Mark Pennington expresses the worry succinctly: "Procedures that rely on the statement of explicit reasons are…likely to exclude systematically those individuals who are less able to engage in the articulate persuasion of majorities."[13] This problem is mitigated to some extent by the fact that all deliberative inputs must meet a shared standard of mutual acceptability, a standard that counts the judgment of weak deliberators no less than that of strong deliberators. Nevertheless, some people will remain relatively less able to contribute successfully to the deliberative process than others, even under the best conditions.[14]

I do not have an answer to this objection: It points, I believe, to an imperfection that no form of democracy can fully expel. This does not mean that democracy is worthless as a means for dealing with the problem of justification in the midst of the inferential gaps that necessarily characterize PAE under pluralism. But it does mean that while there is a moral pressure to democratize public decision-making, there is a

[12] On voter ignorance, see Ilya Somin, (2013). *Democracy and Political Ignorance* (Stanford).
[13] Pennington, *Robust Deliberative Democracy*, 77
[14] Thanks to Julia Maskivker for helping to convince me of the seriousness of this problem.

countervailing pressure on democratic bodies to exercise modesty. If we can never be sure of the extent to which even the best structured democratic processes really render all citizens coauthors of PAE judgments, there is reason to avoid pushing too hard for a particular, controversial ranking of reasonable PAE considerations. This meta-principle, like the first-order deontological and consequentialist claims it governs, is itself inferentially underdetermined with respect to its application. Citizens will have to decide how much caution is warranted out of respect for reasonable disagreement in particular cases, and there can be little hope for a hard and fast decision rule. Here, as elsewhere in PAE under pluralism, non-inferential judgment remains stubbornly in charge.

A Case of PAE Reasoning Under Pluralism: Back to the Minimum Wage

In order to see how pluralism's first and second-order moral pressures on the deliberative process might apply in a concrete case, it will be useful now to return to the minimum wage controversy with which we began. The range of morally relevant issues that pertain to the minimum wage question is wide and, no doubt, highly complicated. But for simplicity's sake, let's suppose that only the following two moral considerations are in play and that both are correct:

> P1: It is unfair—and so unjust—per se for an employer to pay a full time employee less than a living wage, where a living wage is not less than $15/hour.
>
> P2: Raising the minimum wage would cause unemployment among many low-wage workers, harming them significantly.

Suppose that the members of a democratic body agree that these principles are, if not definitely correct, at least plausible enough for citizens to be reasonably committed to

them. Some citizens judge that P1 ranks ahead of P2, whereas others judge that P2 ranks ahead of P1. That is, some citizens judge that it is more important to respect the demands of fairness than it is to avoid the bad consequence that would following from respecting fairness in this case, while others hold the contrary position. Under these circumstances, the moral pressure for modesty points in the direction of looking for an alternative that will leave fewer people on the wrong end of a moral judgment. Put more simply, deliberative citizens should compromise, not in the sense of striking a deal, but in the sense of looking for a solution that minimizes the extent to which citizens are alienated from the judgments that bind them. But how?

I suggest that the right move here is to look for a nearby deontic principle with which to replace P1. As written, 1 seems to have two moral motivations. The first concerns exploitation: If an employer is taking full time work from an employee, she exploits him unless she pays him a living wage. The second concerns something like social fairness: We, as a society, cannot allow hardworking contributors to live in squalor. The defender of P1 would no doubt like to see both of these motivations find expression in the law. But suppose that something like a basic income guarantee could deal with the social fairness problem without placing the brunt of the burden for it on employers. Such a solution would, from the perspective of someone fully devoted to P1, be a definite downgrade. For part of her position is that justice require employers to pay adequate wages to those from whose labor they benefit. From this perspective, spreading the costs of securing a sufficient income for workers to others would move costs away from those who ought morally to bear them. Moreover, such a basic income alternative is likely to look like a distant second place to P2's most convinced champions.

Nevertheless, both sets of defenders ought to be ready compromise out of respect for their fellow citizens. If, for instance, the P1 camp has the sheer numbers to push its position through, its members ought to think long and carefully before doing so. As I argued earlier, the power of democracy to institute self-authorship among citizens is significant, but it is limited. And on account of its limits, hard cases call for respectful caution.

It is important to emphasize again that the kind of compromise I am endorsing here is not the sort of horse-trading compromise common in actual political wrangling today.[15] I am not assuming that supporters of either position lack the numbers to simply push their position through. Rather, I am making a moral claim about a variety of moral pressure that ought to figure into deliberative democratic deliberation, even—in fact, *especially*—in cases where a dominant party could get away with ignoring it.

I mentioned above that just as in the case of ordinary first-order deliberation in PAE, the extent to which respectful caution is warranted in particular cases is hard to pin down. Deliberators here, as elsewhere, must simply judge as well as they can. But it is important to emphasize that there can be cases in which no compromise is warranted. Sometimes morally untenable PAE positions gain ground, and it is entirely possible for a deliberative citizen to be justified in holding the line, inevitable frailties of the democratic process notwithstanding. Indeed, it is plausible that some proposals under consideration in the US Congress today are sufficiently evil to justify completely unqualified resistance, even though others genuinely disagree on principled grounds that appeal to a

[15] Several news outlets recently relayed a story from Sen. Chuck Schumer, who claims to have reached a tit-for-tat bargain on cocaine sentencing with Sen. Jeff Sessions while waiting for the shower at the Senate gym. This is not the sort of thing I have in mind.

number of purported consequentialist and deontological considerations. But here too, judgment must, frustratingly, serve as the ultimate standard of appeal.

Is Pluralism Worth It?

My aim in the paper has been to take some initial steps towards assessing the consequences of taking seriously the pluralistic phenomenology of PAE. These consequences include some very heavy costs. In particular, it would seem that pluralism leaves the PAE reasoner—most significantly, perhaps, in her role as a deliberative citizen—with myriad considerations making claims on her moral attention, but without any means of reliably inferring correct choices from patterns of facts, principles, and possible consequences. In these costs some might sound the retreat: The right PAE methodology must, somehow, allow for ordinal rankings of the sort that pluralism cannot support. Indeed, one can almost imagine Bentham pounding the table in frustration at this point and bellowing: Just stick with the consequences! But for all the ease and elegance of a single-value approach to PAE, most of us find ourselves just as unable to abide by the Benthamite injunction to focus on utility as we are unable to accept the dictates of deontology, though the heavens may fall. Thus, the problems of PAE pluralism may be ones that we are stuck with.