Handouts

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The following is a sampling of various handouts from my discussion sections, as well as from lectures in which I stood in for the primary instructor. The handouts are drawn from the following courses: "Philosophy of Law" (Scott Soames), "Ethical Theory & Practice" (Robin Jeshion), "Moral Issues in the Legal Domain" (John Hawthorne), and "Freedom, Equality & Justice" (Jonathan Quong).

Contents

Week 2 Handout (Jan. 16): The Nature of Law

Legal Positivism v Legal Non-Positivism.

Three kinds of facts:

- there are *legal facts*: facts about what is legally permissible, obligatory, forbidden, etc.
- there are *moral facts:* facts about what is good or bad, right or wrong, fair or unfair, just or unjust, brave or cowardly, wise or foolish, kind or unkind, loving or unloving, etc.
- there are *social facts*: facts about what people believe, desire, plan, and do.

The positivist v. non-positivist debate is over whether we can explain all the legal facts by appealing only to social facts, or whether we also need to appeal to moral facts.

Legal positivists (e.g., Austin, Hart) say that the complete story about what legal facts there are in the world can be told without mentioning morality at all. Facts about people's attitudes and activities tell the whole story.[1]

Legal non-positivists (e.g., Fuller, Dworkin) say that moral facts appear somewhere in the complete story of what legal facts there are in the world. Facts about people's attitudes and activities don't tell the whole story.

Hart v. Austin

Austin: a law is the command of an uncommanded commander who will punish you if you don't comply. (At the end of the day, a legal system boils down to orders and threats.)

Hart: a law is a rule that is the product of a system that the community generally accepts as a system for making their rules. (At the end of the day, a legal system boils down to customs and habits.)

Why doesn't Hart like Austin's view?

- many laws are not command-like: some laws grant permissions or confer freedoms or powers (e.g, laws that empower people to enter into protected

[1]Legal positivists think that law and morality are tangled up in all sorts of ways. Positivists can accept the idea that a legal system has moral merits (goodness, fairness, justice, etc.); they can accept the idea that we may have moral reasons to obey the law; and they can accept the idea that we should make laws that align with morality. They just don't think that law *depends* on morality.

contracts, laws that empower people to marry, laws that empower people to leave money and property to their family).
- some laws have no threats or penalties attached
- laws don't need to come from a source that isn't, itself, subject to law: some laws are self-binding (e.g., Congress makes laws that apply to Congress).

Hart's primary v. secondary rule distinction:

- primary rules tell you what is legally required and permitted
- secondary rules are *about* primary rules: they tell you who can make and change the primary rules, and how.

Hart v. Fuller

Fuller likes many aspects of Hart's theory, but he disagrees with Hart's positivism. Fuller thinks that a legal system must meet certain conditions (many of them moral) in order to count as a *legal* system at all. Specifically:

- the primary rules of a system count *as laws* only if they don't depart from the "inner morality" of law: that is, only if are, in general, understandable, publicly available, free of contradiction, not demanding the impossible (and a few other things).[2] (Can think of these as secondary rules that are *not* the product of custom and habit.)

Gruge Informer Case:

- woman reports her husband's grumblings about Hitler to the German authorities in 1944.
- old 1871 law still on the books in 1944 Germany which forbids "illegally depriving someone of liberty"
- but also a law on the books in 1944 Germany that forbade negative remarks about Hitler under punishment of death
- woman tried in German court, 1949. Her defense: I did not violate the 1871 law, since I did not *illegally* deprive my husband of liberty.

Hart's take: she's right. The woman did not *illegally* deprive her husband of liberty, since the law forbidding negative remarks against Hitler under punishment of death was genuine law. The only way for the 1949 court to have a legal justification for sentencing her to prison would be for 1949 Germany to make a "retroactive" law.

Fuller's take: she's wrong. The woman did *illegally* deprive her husband of liberty; the law forbidding negative remarks against Hitler was *not* genuine law, since the Nazi legal regime departed too far from the "inner morality" of law. So the 1949 court has all the legal justification it needed with the old 1871 law.

[2] "To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system" (1958, p. 660).

	Hart	Dworkin
Can the law contain gaps?	yes	no
Must the law contain both rules and principles?	it can, but needn't	yes
Must the law be partly determined by the moral facts?	it can, but needn't	yes
Do judges sometimes need to go beyond *discovering* law and *create* it?	yes	no

Dworkin

> Fourth amendment to the US Constitution: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The fourth amendment contains some rules for the behavior of law enforcement officers. For example: it is a rule that law enforcement officers cannot search someone's house without a warrant.

> *United States v. Jones* (2012): The Government obtained a search warrant permitting it to install a GPS tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that

> admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Arguably, the police in this case did not violate any of the *rules* contained in the Fourth Amendment. So if rules are all there is to the law, the police did not break the law in this case.

But, says Dworkin, rules aren't all there is to the law. According to Dworkin:

> **Law = rules + the principles that make those rules make sense and make them as morally attractive as possible.**

What makes the fourth amendment make sense? And what makes the fourth amendment as morally attractive as possible? Perhaps:

- it's good for people to have control over their own lives and physical property.
- it's good for people to have privacy when they can reasonably expect to have privacy.

So even if the police did not violate any rules in the *Jones* case, it may be they still broke the law.

Because there are so many principles floating about, they fill in any potential gaps in the law. This means that for any action someone performs, that action is either legally permissible or legally impermissible. There's always an answer.

A statute reads, "No vehicles in the park." Are strollers legally permitted or not? The rules don't settle the question, but the principles do.

And because the law isn't "gappy", judges never need to *create* law, but only ever *discover* it.

Hart

> *Coconut Island.* One hundred shipwreck survivors live on a island. Over the years almost all of them have developed a habit of obeying whatever the oldest living person on the island says. One young man is rebellious, however, and whenever the elder makes some rule, the young man issues a contradictory rule of his own. When the elder says, "all persons must collect ten coconuts each day," the rebellious youth says, "no persons may collect ten coconuts each day." But everyone ignores the young man's rules.

Hart: it is part of the law of Coconut Island that all persons must collect ten coconuts each day.

Why? Because the Coconut Island community as a whole accepts it that:[1]

> Rule of Recognition. *Whatever the eldest living person on the island says is law.*

Because the rule of recognition is the thing that ultimately determines whether something is law or not in a community, *moral facts needn't play any role in determining the law in that community.* On coconut island, for example, moral facts play no role.

Because the rule of recognition is the thing that ultimately determines whether something is law or not in a community, *principles needn't play any role in determining the law in that community.* On coconut island, for example, principles play no role.

Because the rule of recognition is the thing that ultimately determines whether something is law or not in a community, the law might end up "gappy". If the eldest person has said not to collect *heavy* coconuts, then there will be some coconuts where there's no fact of the matter as to whether it's legal to collect them (since there are some coconuts that fall in the borderline between being heavy and light).

And because the law might end up gappy, this is why judges sometimes need to *create* law. If a 10lb coconut is not clearly heavy or light, then the judge will have to make it the case that its legally permissible or impermissible to collect 10lb coconuts.

some cases to play with

> *Reckless Randy.* The speed limit on route 4 is 70mph. But there is a special statute on the books when it comes to bad weather. It reads "no one may drive at unusually fast speeds in bad weather." There was heavy snowfall on the 20th of January, during which time Randy drove down route 4 at 55mph. This speed was reckless and dangerous. But there are no statutes in this community against driving recklessly or dangerously, only against driving *unusually* fast. And Randy was not driving unusually fast. People in this community usually drive 55mph on route 4 during heavy snowfall. Did Randy do something legally impermissible?
>
> *Smith v United States.* Smith did not discharge a firearm or threaten anyone with a firearm, but he did *trade* a firearm for illegal drugs. For this he was convicted of drug trafficking. But is he also guilty of violating the following statute: "Any person who. . . uses or carries a firearm [in the course of committing a crime of violence or drug

[1] For the community to "accept" this rule means that they act in accordance with it, and criticize and apply social pressure to those who don't act in accordance with it.

trafficking], shall, in addition to the punishment provided for such [a] crime... be sentenced to a term of imprisonment of not less than five years..."? Does the law subject him to an additional five years in prison?

Beauty the Horse. A contract provides that Liz 'agrees to sell the horse Beauty to Jose for $30.75'. If Beauty is a healthy horse, as anyone familiar with the circumstances of the contract would know, then a reasonable third party would conclude that the decimal point was a draftsman's error, and that the real price for the horse under the contract is $3,075. (Suppose the contract lists prices for many horses of similar quality are around $3,000 with every other price rounded to the nearest dollar.) Liz has signed the document, not noticing the error as she glanced over the contract (it's a very long contract). When Jose attempts to give her $30.75, Liz refuses to sell the horse that much. Jose takes her to court. Is Liz legally obligated to sell Beauty to Jose for $30.75?

The Peerless Case. Raffles makes a contract with Wichelhaus: Raffles will sell Wichelhaus 125 bales of cotton at an agreed upon price, to arrive at Liverpool on "*Peerless* from Bombay". It turns out, however, that there are two ships called *Peerless*, both sailing from Bombay to Liverpool that year. Neither Raffles nor Wichelhaus knows this. The first *Peerless* arrives at Liverpool in October 1863. Wichelhaus believed this to be the ship referred to in the contract, and when he finds no cotton onboard, believes Raffles to have failed to keep his end of the bargain. A second *Peerless* arrives from Bombay in December. Raffles believes this to be the ship referred to in the contract, and is furious when Wichelhaus refuses to accept the cargo. (The written contract specifies no date of delivery.) Raffles sues him for breach of contract. Did Wichelhaus breach the contract?

Riggs v. Palmer. Francis executed a will, leaving his estate to his daughter and grandson. Francis's grandson, Elmer Palmer, feared that his grandfather might soon change the will and so poisoned Francis to death. Elmer was later convicted of his murder. Palmer's daughter, Riggs, brought a claim requesting the court to find Elmer's share void. Was Elmer Palmer legally entitled to his share of the will?

rights

Hohfeldian Type	Correlative
A has **claim** against B	B has **duty** towards A
A at **liberty**	B has **no claim** against A
A has **power** over B	B **liable** to A
A has **immunity** against B	B has a **disability** towards A

- A has a claim against B to B's doing such-and-such = B has a duty ("owes it") to A to do such-and-such.
- A is at liberty to do such-and-such = no one has a claim against A that A *not* do such-and-such.
- A has a power over B = A has the ability to alter B's claims, duties, and liberties = B is liable to A.
- A has immunity against B = B does not have a power over A = B has a disability towards A.

Why care about this framework? It helps bring much needed precision to discussions about legal rights. Talk of 'rights' is deeply ambiguous.

Kim says, "I have a right to my property." There are a number of things she could mean:

- Kim could be asserting that she has certain *liberties*: that she has the legal permission to use her property.
- Kim could be asserting that she has certain *claims*: that other persons are under a legal duty to not use her property without her permission.
- Kim could be asserting that that she has certain *powers*: that it is up to her who is legally permitted on her property.
- Kim could be asserting that she has certain *immunities*: that, say, the local government does not have the power to strip her of the aforementioned liberties, claims, and powers without due process.
- Or Kim could be asserting more than one of these things at the same time.

Some practice applying these concepts...

> On Coconut Island, the rule of recognition is that *whatever the eldest living person on the island says is law.* The eldest living person says, "if the legal deed holder of a piece of land voluntarily sells the deed to another, then no one other than the purchaser may enter or use the land associated with that deed without the purchaser's permission." Ben, the legal deed holder of the banana patch, voluntarily sells the deed to Sarah.

After this transaction:

- Does anyone have any *claims*? Who? What claims, exactly?

- Does anyone have any *duties*? Who? What duties, exactly?
- Does anyone have any *liberties*? Who? What liberties, exactly?
- Does anyone have any *powers*? Who? What powers, exactly?
- Does anyone have any *immunities*? Who? What immunities, exactly?
- Does anyone have any *liabilities*? Who? What liabilities, exactly?

punishment

What is punishment?

Legal punishment is

(1) the deliberate
(2) infliction of a harm or deprivation of legal rights,
(3) imposed by a legal authority
(4) on an alleged legal wrongdoer
(5) for an alleged legal wrongdoing.

When is punishment morally permissible?

A pressing question because punishment involves doing things to people that we find obviously wrong when they're not done in the name of punishment.

Three theories:

(1) **Consequentialism**: it's morally okay to punish someone if and only if doing so will bring about *better overall consequences* than not punishing that person.

- First worry: this theory implies that it's sometimes okay to punish innocent people.
- Second worry: it's wrong to treat others as mere means.
- Third worry: this theory implies that, if it turned out that we could bring about the best overall consequences by never punishing murderers and rapists, then it would be impermissible to punish murderers and rapists.

(2) **Retributivism**: it's morally okay to punish someone if and only if that person *deserves* to be punished.

- First worry: there's no such thing as "desert".
- Second worry: there is such a thing as desert, but harm is not among the things that people deserve.
- Third worry: shouldn't the consequences make some difference?

(3) **Hybridism**: it's morally okay to punish someone if and only if doing so will bring about *better overall consequences* than not punishing that person and that person has forfeited their right not to be punished.

the insanity defense

ordinary criminal liability

actus reus = "guilty act" = whether you committed the crime

mens rea = "guilty mind" = whether you had the certain mental states when committing the crime.

For most US criminal laws, you can be criminally liable for violating that law **only if** you meet both the *actus reus* and *mens rea* conditions.

What are the *mens rea* conditions in US criminal law? That is, what does it take to have a "guilty mind" when committing a criminal offense?

A guilty mind comes in *four* degrees in US law:

1. You **purposefully** committed the crime: you intended to commit the criminal act (e.g., you wanted to kill the person and aimed to do so).
2. You **knowingly** committed the crime: you didn't intend to commit the criminal act, but you knew your action would have the criminal result (e.g., you didn't want to kill the person, but you knew that what you did would have the result of killing the person).
3. You **recklessly** committed the crime: you didn't intend to commit the criminal act and you didn't know your action would have the criminal result, but you knew it *might* have that result and you didn't make enough of an effort to avoid that result (e.g., you knew driving drunk might result in your killing someone).
4. You **negligently** committed the crime: you didn't intend to commit a criminal act, and didn't even know your actions might bring about the criminal result, but you should have known that your actions might have that result.

the insanity defense

English & US law provides a way for someone to avoid a 'guilty' verdict even if they satisfy the *actus reus* and *mens rea* conditions: they could adequately demonstrate a certain sort of mental incapacity.

Pre-1832: the "*wild beast test*". A defendant can avoid conviction if it can be shown that he "is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast" (Howell, vol. 16: 764–65).

Post-1843: the *M'Naghten Rules*. A defendant can be declared 'not guilty by reason of insanity' or 'guilty but insane' if and only if it can be *clearly proved* that, at the time of the criminal act, the accused either:

i. did *not know the nature/quality of the act* due to some "disease of the mind", or
ii. did *not know that the act was wrong* due to some "disease of the mind".

week 6: insanity in US law & ethics of self-defense

1 the insanity defense in the US

M'Naghten Rule. Declared 'not guilty by reason of insanity' if and only if it can be *clearly proved* that, *at the time of the criminal act*, the accused either:

i. did *not know the nature/quality of the act* due to some "disease of the mind", or
ii. did *not know that the act was wrong* due to some "disease of the mind".

Durham Rule. Declared 'not guilty by reason of insanity' if and only if it can be *shown beyond a reasonable doubt* that the criminal act was the product of mental disease or defect.

MPC Rule. Declared 'not guilty by reason of insanity' if and only if it can be clearly proved that, at the time of the criminal act, the accused either:

i. lacked substantial capacity to *appreciate the criminality* (wrongfulness) of his conduct as a result of mental disease or defect, or
ii. lacked substantial capacity to *conform his conduct* to the requirements of the law as a result of mental disease or defect.

Important differences:

- M'Naghten Rule only lets you off if you have some form of *ignorance* about your action as a result of mental illness.
- MPC Rule lets you off if you have some form of *ignorance* about your action as a result of mental illness *or* if you have some form of *compulsion* as a result of mental illness.
- Durham Rule is all about whether mental illness caused the action itself (whether by causing ignorance or causing bad desires or causing compulsion or...).

A history lesson: M'Naghten Rule dominates the US until *1954* when two states adopt the Durham Rule. In an attempt to achieve uniformity, a large group of lawyers and scholars produce the MPC Rule in *1962*. A large number of courts adopt MPC Rule until Hinckley successfully uses the MPC insanity defense to get off the hook for assassination attempt (1981) of President Reagan. Upset

about Hinckley getting off the hook, most of the US goes back to the M'Naghten Rule in 1984. And M'Naghten remains the dominant standard to this day.

2 the ethics of self-defense

2.1 the variety of cases

- *Villainous Aggressor.* A villain wants to kill you. The only way to prevent his killing you is to kill him. You kill him.
- *Villainous Aggressor + Human Shield.* A villain wants to kill you. The only way to prevent his killing you is to pull an innocent bystander in front of you to absorb the crossbow bolt. This is what you do, killing the bystander.
- *Innocent Non-Aggressive Threat.* A villain pushes an innocent bystander off a cliff towards you. You have a ray gun with which you can vaporize the falling bystander. Or you can do nothing, in which case the person will land on you, killing you (but they will survive the fall). You vaporize the falling bystander with your ray gun.
- *Villainous Aggressor to Other.* A villain wants to kill someone who is a stranger to you. The only way you can prevent this murder is to kill the villain. You kill him.
- *Mistaken Aggressor.* In a dark parking garage you reach for your cell phone. A stranger has lots of (mistaken) evidence that you're a villain and thinks you're pulling a gun to kill him. He attempts to kill you in self-defense. And now you realize that the only way you can prevent *his* killing *you* is to kill him. You kill him.
- *Responsible Mistaken Aggressor.* You're breaking into a stranger's home in the middle of the night to steal a valuable painting. She has good reason to think that you're an assassin who has come to kill her. She attempts to kill you in self-defense. You can only prevent *her* killing *you* by killing her. You kill her.[1]

  BIG ETHICAL QUESTION: for which of these categories is defense morally okay?

We presumably want a system of defense law that, to a large extent, allows morally okay defense and prohibits morally not-okay defense. So we need to answer the BIG ETHICAL QUESTION in order to answer the big legal question of what system of defense law we should have.

[1] These six cases vary along the following dimensions: whether the threat is from someone *trying* to kill you, whether the threat is *vicious*, whether the threat is *towards you*, and whether you defend yourself by *killing the threat or a bystander*. You can see how many categories of self-defense cases there are. And we haven't even considered other important variables: how *certain* the harm is, and whether the harm is *imminent*, *avoidable*, or *able to be prevented by less-harmful means*.

2.2 methods of answering the Big Q

(1) **Piecemeal approach**. Elicit intuitions about whether each category of defense is morally okay. And then leave it there.

(2) **Top-down approach**. Take an extremely general principle (e.g., the consequentialist principle that "it is only okay to do the action that will bring about the best consequences") and apply it to each category. And then leave it there.

(3) **Equilibrium approach**.

- First step: Elicit intuitions about whether each category of defense is morally okay.
- Second step: See what general principles make sense of all those piecemeal intuitions, considered together.
- Third step: revise our judgments about individual categories in light of those general principles.

Example: Quong's rights-based approach.

2.3 some rights-based answers

McMahan & Otsuka:

They accept three principles:

(a) Each person has a right not to be killed unless they do something to *forfeit* it.
(b) Someone can only forfeit their right not to be killed if they're *responsible* for causing a threat to someone who has a right not to be killed.
(c) It's never okay to kill someone who has a right against being killed.

morally okay	**morally not okay**
Villainous Aggressor	Villainous Aggressor + Human Shield
Villainous Aggressor to Other	Innocent Non-Aggressive Threat
Responsible Mistaken Aggressor	Mistaken Aggressor

Thomson:

Thomson accepts (a) and (c), but rejects (b). You don't have to be *responsible* for posing a lethal threat to someone to forfeit your right to life, she thinks; you just have to pose a lethal threat to someone who hasn't forfeited their right not to be killed.

Quong:

Quong accepts (a) and (b), but rejects (c). Some preference for yourself over others is morally okay. Just as morality doesn't demand that you risk your life to rescue another person from death, neither does it demand that you allow yourself to be killed, even at the cost of *allowing* someone else to die (unless you've consented to be killed or forfeited your right not to be killed).[2]

morally okay	**morally not okay**
Villainous Aggressor	Villainous Aggressor + Human Shield
Villainous Aggressor to Other	
Innocent Non-Aggressive Threat	
Mistaken Aggressor	

Hawthorne's worry: All three of the above views rely on the idea of rights forfeitures. But if people *forfeit* rights by (responsibly) posing lethal threats, why does it seem wrong to kill someone who attempted to kill you but no longer poses a threat?

[2]It's unclear what Thomson and Quong would say about *Responsible Mistaken Aggressor*. It depends on whether, in breaking into the house, you've forfeited your right against being killed.

self-defense law

UK Law: "A person may use such force *as is reasonably necessary* in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

- the force has to prevent some crime or assist in an arrest
- it has to be reasonable to believe that the force was necessary — that there wasn't a less violent means of stopping the crime or assisting in the arrest.
- the force has to be reasonable, which largely involves it's not being excessive given the situation.

In the US, a defendant can appeal to self-defense to be excused from certain crimes. Different states have different rules for what counts as a self-defense excuse.

In California, you are not guilty of battery, murder, resisting arrest, etc. if the force you used was in lawful self-defense, where one acts in lawful self-defense if:

> (i) The defendant reasonably believed that (he/she or someone else) was in *imminent* danger of suffering bodily injury (or was in imminent danger of being touched unlawfully);
>
> (ii) The defendant reasonably believed that the immediate use of force was *necessary* to defend against that danger; AND
>
> (iii) The defendant used *no more force than was reasonably necessary* to defend against that danger.

California abides by the "castle doctrine":

> Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be *presumed* to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who *unlawfully and forcibly enters* or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

The castle doctrine guarantees that you can use the self-defense defense if you kill someone who "unlawfully and forcibly" entered your home.

In California, there's no duty to retreat when you are in/on your "real property" (immovable property like a house, land, business, etc.); but there is a duty to retreat if you are anywhere else in California.

standards of evidence

A standard of evidence in the law is a standard for *how much* (admissible) evidence there has to be for some "legal eventuality" to come about.

Legal eventuality	standard of evidence	quantitative gloss
brief stop and search	"reasonable suspicion"	>10-50% likely
arrest, indictment, substantial search	"probable cause"	>30-60% likely
civil/family liability	"preponderance of evidence"	>50% likely
wills, libel, child custody	"clear and convincing evidence"	>65-75% likely
criminal liability	"beyond a reasonable doubt"	>90-95% likely

Statistical evidence:

> *Underage Drinkers.* Reliable studies establish that at the average USC house party over 70% of underage participants engage in underage drinking. On this basis the police stop and search every underage USC student arriving at every house party.
>
> *Blue Bus.* A vehicle hit John's car last night. Witnesses on the scene could determine that it was a bus, but could not tell what color the bus was. There are two bus companies in town, the Blue Bus Company (all of whose buses are blue) and the Red Bus Company (all of whose buses are red). John sues the Blue Bus Company for damages and puts forward as his only evidence the fact that 80% of the buses in town last were owned by the Blue Bus Company and that only 20% of the buses in town last night were owned by the Red Bus Company. The judge, on this basis alone, orders the Blue Bus Company to pay damages to John.
>
> *Two Shotguns.* Rumsfeld and Cheney both hate George. George went for a hike one day. Rumsfeld followed with a shotgun loaded with 99 pellets. Separately, Cheney also followed with a shotgun loaded with only 1 pellet. Both Rumsfeld and Cheney caught sight of George at the same time (from the same distance) and fired all their pellets at him. Of the 100 pellets in the air, only one hit George, but it him in the head and caused his death. There is no evidence from which gun the fatal pellet was fired, but there are multiple eyewitness and video evidence to testify to all of the aforementioned details. Rumsfeld is tried for murder on the basis of the fact that the odds are 99-to-1 that he killed George, and he is convicted.

Two puzzles about statistical evidence:

(1) It seems that we can give a quantitative gloss on standards of evidence. But if demonstrating a preponderance of evidence = showing that something

is >50% likely, then it seems like statistical evidence would play a starring role in the law. And yet judges and juries are allergic to statistical evidence.

(2) Judges and juries are allergic to statistical evidence, and yet are happy to consider how *non*-statistical evidence affects the probabilities. So it can't be probabilities in general that judges and juries are allergic to.

> *Blue Bus Testimony.* A bus hit John's car last night. There are two bus companies in town: the Blue Bus Company was running 50% of the buses last night and the Red Bus Company was running 50% of the buses last night. Christina saw the accident and says that the bus that hit John's car was red. Eyewitness reports about color at night are notoriously unreliable, however, and so tests are performed to determine Christina's reliability under conditions exactly like those on the night of the accident. On the test she discerns the correct color 70% of the time. On this basis the judge orders the Red Bus Company to pay damages to John.

statistical evidence in the law

The puzzle:

(i) In both civil and criminal cases, judges and juries are willing to convict defendants on the basis of evidence that makes it *sufficiently likely, though not certain*, that the defendant did what he is accused of doing.
(ii) Statistical evidence often makes it more than sufficiently likely that the defendant did what he is accused of doing.
(iii) And yet judges and juries are usually very unwilling to convict defendants on the basis of statistical evidence.

The question: is there a way to justify this surprising prejudice against statistical evidence?

Three possible justifications:

1. *The causal justification.* Eyewitness testimony and physical evidence is *causally connected* with the event it is evidence for. (The bloody knife caused the stabbing; the stabbing caused a witness to see a stabbing.) But statistical evidence is not causally connected with the event it is evidence for. Since we shouldn't convict people on the basis of evidence that is causally disconnected from the crime, we shouldn't convict people on the basis of statistical evidence.

2. *The knowledge justification.* Some sources of information can provide knowledge. For example, information obtained from one's senses, memory, or from testimony can provide knowledge. But statistical evidence, on its own, does not provide knowledge. (Even when I have only a 1-in-a-billion chance of winning the lottery, I don't *know* that my ticket is a loser until the winning number is called.) We shouldn't convict people on the basis of the sort of information that cannot provide knowledge. So we shouldn't convict people on the basis of statistical evidence.

3. *The manipulation justification.* We're lousy at statistical reasoning, and this makes it very easy for lawyers to manipulate the judgments of judges and juries. That's why we should keep it out of the courtroom.

It's definitely the case that we're lousy at statistical reasoning. Six well-known examples:

i. Base Rate Fallacy.

> You know some students at USC have a cold right now. You're told: "If a student has a cold, then it's 80% likely the cold-detector beeps on that person. And if a person does not have the cold, then it's 20% likely the cold-detector beeps on that person." You put the cold-detector on a student selected at random and it beeps. How likely is it that this student has the cold?

Many people are inclined to say 80%. But that would be a good judgment only if you thought *half* of the USC students had the cold right now. If you think (more reasonably) that only a small percentage of students have the cold right now, then the likelihood that this random student has the cold is much lower than 80%, even if the cold-detector beeped on them.

ii. Gambler's fallacy.

> I've got a fair coin. You know it's fair because yesterday you watched a statistician flip it 10,000 times and saw it come up heads exactly 5,000 times and tails exactly 5,000 times. Today I flip the coin five times. It lands heads each time. Am I more likely to flip heads or tails on the sixth flip?

There's a 50% chance you land heads on the sixth flip, and a 50% chance you land tails on the sixth flip. What's happened in the previous five flips has no effect on what happens in the sixth flip; each coin flip event is *independent* of every other.

iii. Inverse Gambler's fallacy.

> It's quite unlikely to roll double sixes with a pair of dice: there's less than a 3% chance you'll roll double sixes on a given roll. Knowing this, you're surprised to enter the classroom and see, at that very moment, David rolling a pair of dices and getting double sixes on the first roll. Does the fact that David rolled double sixes on the first roll you witness give you some reason to think David has been rolling for quite a while?

No, it does not. Whether David has been rolling dice all day or whether he just started, it makes no difference to how likely he is to roll a dice on *this* roll.

iv. Simpson's paradox fallacy.

> In 2007 Jacoby Ellsbury had a .353 batting average and Mike Lowell had only a .324 batting average.[1] In 2008 Ellsbury had a .280 batting average and Lowell had only a .274 batting average. Does it follow that Ellsbury had a higher batting average over the course of 2007 and 2008 combined?

Surprisingly, no. Mike Lowell actually had a higher *combined* batter average in 2007 and 2008 than Jacoby Ellsbury. We overlooked a "confounding variable": the quantity of at bats for each player.

Year	2007	2008	2007 and 2008
Ellsbury	41 for 116 (**.353**)	115 for 554 (**.280**)	196 for 670 (.293)
Lowell	191 for 589 (.324)	115 for 419 (.274)	306 for 1008 (**.304**)

[1]For those unfamiliar with baseball, having a .353 batting average means that you hit the baseball in 35.3% of your "at bats".

v. Prosecutor's fallacy.

> Kim is on trial for robbing an art museum. At the scene of a crime is a single strand of hair. Extremely reliable tests reveal that only 1 out of 100,000 persons in LA are a match for this type of hair, and that Kim (an Angeleno) is a match. On this basis the prosecution argues that there is only a 1/100,000 chance that Kim is innocent (put differently: that there is a 99.999% chance she is guilty). Is this right?

No. It confuses the probability that *Kim's hair is a match given that she is innocent* with the probability that *Kim is innocent given that her hair is a match.*

> The probability that Kim's hair is a match given that she is innocent = 1/100,000 (.001%).

But since there are 4 million people in Los Angeles, this means there are 40 Angelenos whose hair is a match for the hair found at the scene of the crime. Which means that

> the probability that Kim is innocent given that her hair is a match = 39/40 (98%).

vi. Monty Hall problem.

> Suppose you're on a game show, and you're given the choice of three doors: Behind one door is a car; behind the others, goats. You pick a door, say No. 1, and the host, who knows what's behind the doors, opens another door, say No. 3, which has a goat. He then says to you, "Do you want to pick door No. 2?" Is it to your advantage to switch your choice?[2]

About 90% of people answer that there is no advantage to switching your choice from door No. 1 to door No. 2, because there's a 50% chance the car is being either of those two doors. But this isn't so. There's actually only a 33.3% chance the car is behind door No.1 and a 66.6% chance the car is behind door No. 2.

strict liability

Tort law: The area of law that deals with remedies for private (non-contractual) injuries.[3] If one private citizen (or organization) causes harm to another private citizen (or organization), the victim can sue and try to receive a remedy of

[2] You know: (1) The host will always open a door that was not picked by the contestant. (2) The host will always open a door to reveal a goat and never the car. (3) The host will always offer the chance to switch between the originally chosen door and the remaining closed door.

[3] Cases where someone sues another for breach of contract are not cases of tort law, but rather cases of contract law. The difference won't be important in this class.

some kind (usually monetary compensation, but sometimes restitution or an injunction).

A "tort" is not a crime, and tort law is distinct from criminal law. Torts are private wrongs (whereas crimes are wrongs against the state or public), and tort law aims to compensate rather than punish.

Most tort law is "non-statutory", which means that there aren't a lot of written laws about when someone should be held liable for a tort. Largely governed by precedent and judicial discretion.

Three kinds of torts:

"Fault" Torts:

1. **Intentional torts**. You try to harm someone and succeed in doing so (e.g., trespass, battery, assault, intentional infliction of emotional distress, nuisance).
2. **Negligent torts**. You don't take reasonable caution to prevent some harm, and this results in some harm (e.g., a doctor prescribes the wrong medicine, someone causes a wreck driving too fast).

"No Fault" Torts:

3. **Strict liability torts**. You do something that results in harm to another, but you did not intend the harm nor did the harm come about because you acted negligently (e.g., *product liability*, wandering livestock damage, escaped zoo animals, blasting).[4]

For some torts, the law requires fault; for others it doesn't. This raises big questions:

- Are there good reasons to sometimes hold people liable for harms they caused, even if they aren't at fault? If so, what are they?
- For what sorts of harms should we hold people liable even when they are without fault? For what sorts of harms should we *not* hold people liable when they are without fault?

[4]Strict liability is rare in criminal law, but we do find it in criminal cases involving statutory rape or "felony murder".

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"No Fault" Torts:

3. **Strict liability torts**. You do something that results in harm to another, but you did not intend the harm nor did the harm come about because you acted negligently.[1]

What sorts of torts are strict?

- Harms caused by *defective products*.
- Harms caused by "*mischief makers*" (i.e., an item you keep or an activity you undertake such that (i) it has a high risk of harm or some risk of serious harm where reasonable care won't eliminate the risk, (ii) it's not a matter of common usage, and (iii) it's value to the community does not outweigh its dangerous attributes).

Why strict liability in the case of defective products?

1. *Deterrence*. A strict liability standard incentivizes producers to take extra caution.
2. *Deep pockets*. A big company suffers less harm when they lose $1,000 than when an individual customer loses $1,000.
3. *Cost spreading*. Large companies can purchase liability insurance and then offset the cost of this insurance by very slightly raising their prices. Everyone pays a very tiny amount more instead of one unlucky victim paying all the damage.

Why strict liability in the case of "mischief makers"?

1. *Deterrence*. A strict liability standard incentivizes people with mischief makers to take extra caution.
2. *Special Duties*. When you keep a dangerous wild animal or start blasting on top of a mountain you take on a duty to bear any harms that result, even if you don't act negligently.

[1] Strict liability is rare in criminal law, but we do find it in criminal cases involving statutory rape or "felony murder".

privacy

A great deal of harmful interference falls under the domain of **trespass**.

1. *Trespass to the Person*
   1.1. Battery: unpermitted physical contact.
   1.2. Assault: threat of battery.
   1.3. False Imprisonment: prevention of another from moving
2. *Trespass to Chattels*: stealing or damaging someone's moveable stuff.
3. *Trespass to Land*: entering someone's land or structures.

But there's also a great deal of harmful interference that does not fall under the domain of trespass. Some of these are covered under the (much more recent) domain of **invasion of privacy**.

Type	**Description**
Intrusion of solitude	grabbing private information
Public disclosure of private facts	sharing true private information
False light	sharing info to put another in a false light
Appropriation	using another's likeness for commercial gain

Why are these sorts of harmful interference illegal but not *every* sort of emotional harm? Because central among democratic political values is freedom of speech, and freedom of speech would be limited by prohibiting many of the emotional harms that result from "speech".

Individualized information =df. information about an individual (rather than general information about a large class of people) that is not anonymized.

Two big questions:

1. In the US, when it is legally okay to collect individualized information about another person?
2. What is the point of having laws that regulate the collection of individualized information? What goods are at stake?

collecting ind. info in tort law

The collection of individualized information by private persons is primarily regulated by state-level *tort* law.[1]

Private persons are forbidden (in most states) to collect individualized information when three conditions are met:[2]

(i) a reasonable person could expect that the information in question would not be collected, and
(ii) a reasonable person would find the act of collection highly offensive, and
(iii) the information in question is not "newsworthy".

If these conditions are met, then the victim can sue for *intrusion of solitude* (see week 9 handout).

collecting ind. info in constitutional law

The collection of individualized information by the government is largely regulated by *Constitutional* law.[3] Most relevant:

> Amendment 4. The right of the people to be *secure in their persons, houses, papers, and effects, against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There's not a lot to go on there. So how has the Supreme Court applied this amendment to the case of the collection of individualized information?

[1] There are some criminal laws regarding invasion of privacy, but they're pretty rare.

[2] New York, Virginia, North Dakota, and Wyoming are the only states that do not forbid this sort of intrusion of solitude.

[3] It is also regulated by various statutes. For example, the *Stored Communications Act*.

Olmstead v United States (1928). Federal agents wiretap the bootlegger Roy Olmstead's phone without a warrant. The court rules that there is no fourth amendment violation.

Katz v United States (1967). Federal agents bug, without a warrant, a public phone booth used by the Los Angeles bookie Charles Katz. The court rules that there is a fourth amendment violation here.

Since Katz the standard principle is that police can collect individualized information in a certain way only if either

(i) they have obtained a warrant to do so, or
(ii) there is no reasonable expectation that the police not collect information in that way.

How this has played out in some concrete situations:

legal collection	legal only w/ warrant	legal in special cases
binocular observation of home	entering home	pat-down search
aerial observation of home	wiretapping	entering home in pursuit
dumpster diving	thermal imaging of home	entering home during evidence destruction
searching fields		car search

what goods are at stake?

1. Thomson: ownership rights.
2. Marmor: the good of having significant control over how one presents herself to others.
3. The good of not being under another's power.

free speech

Q1. What is the freedom of speech?

Lot's of things fall under the umbrella of "speech" in discussions of freedom of speech: speaking, writing, acting, marching, advertising, slandering, singing, making art.

Two types of freedom of speech:

- freedom from (the threat of) *legal* punishment
- freedom from *social* pressure

Q2. What good is the freedom of speech?

Q3. Are some forms of speech more important than others?

Q4. What other goods come into conflict with speech?

Q5. What sorts of speech should be legally permitted, and what sorts should not be?

A clearly implausible position: ALL speech should be free.

Mill's suggestion: all speech should be free except when it results in certain sorts of harm.

Harm, narrowly conceived: directly injuring another's body or property.

Harm, broadly conceived: directly or indirectly injuring another's body or property, or causing them offense, psychological distress, or spiritual or intellectual injury.

> **Mill's Harm Principle (Narrow)**: It is only permissible to use power over another person if doing so prevents wrongful harm (narrowly conceived) to others.
>
> **Mill's Harm Principle (Wide)**: It is only permissible to use power over another person if doing so prevents wrongful harm (broadly conceived) to others.

The narrow principle seems to allow *too much* speech; the wide principle seems too uninformative.

So where to draw the line? It helps to focus on particular forms of speech and think about where to draw the line in these localized settings.

Q6. Where to draw the line with pornography?

Q7. Where to draw the line with hate speech?

Q8. Where to draw the line with political speech?

Second amendment: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Eight amendment: Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments* inflicted.

constitutional interpretation

How do the speech acts of lawmakers change the law?

Some theories of constitutional interpretation:

Literalism. The legal effect of a legal sentence (which might be written or might be spoken) is determined by the conventional meaning of that sentence.

Example: In 1776 Congress says, "Killing fish in Chesapeake Bay is prohibited. Killing aquatic creatures that are not fish is permitted." Literalism tells us to look at the public meaning of 'fish', etc. If whales belong to the extension of 'fish' (as used in 1776), then this law has the effect of making it illegal to kill whales. If whales do not belong to the extension of 'fish' (as used in 1776), then this law has the effect of making it legal to kill whales.

Applied to eighth amendment:

Applied to the second amendment:

Intentionalism. The legal effect of a legal sentence is the legal effect intended by the lawmaker.

Example: In 1776 Congress says, "Killing fish in Chesapeake Bay is prohibited. Killing aquatic creatures that are not fish is permitted." Intentionalism tells us to look at what the speaker(s) of that utterance intended. If they intended this utterance to make it *prohibited* to kill whales, then the law does make it prohibited to kill whales (even if whales do not fall under the extension of 'fish' in 1776).

An immediate problem for Intentionalism: speakers can have conflicting intentions. Suppose whales do *not* fall under the extension of 'fish' in 1776, and a speaker makes the above utterance with the following intentions:

(i) to prohibit killing fish
(ii) to permit killing non-fish
(iii) to prohibit killing whales

Since whales are not fish, intention (ii) is an intention to permit killing whales; but intention (iii) is an intention to prohibit killing whales. Conflict!

Intentionalism needs to tell us what to do in these cases.

Simple Intentionalism. If the speaker of a legal sentence does not have conflicting intentions, then the sentence has whatever legal effects the speaker intended. If the speaker of the legal sentence does have conflicting intentions, then the sentence has no legal effect; it's a dud.

Concrete Intentionalism. If the speaker of a legal sentence does not have conflicting intentions, then the sentence has whatever legal effects the speaker intended. If the speaker of the legal sentence does have conflicting intentions, then we prioritize the more specific intentions.

Dispositional Intentionalism. If the speaker of a legal sentence does not have conflicting intentions, then the sentence has whatever legal effects the speaker intended. If the speaker of the legal sentence does have conflicting intentions, then we prioritize whichever intentions the speaker(s) would have prioritized had they been aware of a conflict.

What would the intentionalist say about the legal effects of the second and eighth amendments?

second amendment decisions

Second amendment: [A well regulated Militia, being necessary to the security of a free State]$_{\text{prefatory}}$, [the right of the people to keep and bear Arms shall not be infringed.]$_{\text{operative}}$

- *U.S. v. Miller* (1939). In 1934 Congress passes the National Firearms Act, requiring certain types of firearms (including sawed-off shotguns) to be registered with the federal government. Miller, a known bank robber, was prosecuted for violating this amendment, being found in possession of

a sawed-off shotgun. Miller claimed this Act was unconstitutional. The Supreme Court shot him down.

Supreme Court understood the "prefatory" clause to limit the "operative" clause. The arms one could keep and bear are only those connected with use in a militia:[1]

Heller v. District of Columbia (2008). D.C. passed the Firearms Control Regulations Act in 1975, which said that (i) rifles within the home must be unloaded, disassembled, and trigger-locked, and (ii) prohibited the ownership of handguns that had not been purchased prior to 1975. Six D.C. residents brought suit. The Supreme Court ruled the FCRA unconstitutional.[2]

McDonald v. Chicago (2010). Chicago has regulations very similar to those found in the FCRA. Several Chicago residents took the issue to court. The Supreme Court ruled that the fourteenth amendment "incorporates" the second amendment — i.e., makes it applicable not just to the federal government but to state governments too. Thus, applying the Heller decision, the Court recognized an individual right that a *state* government not prevent a citizen from *possessing* a firearm unconnected with service in a militia, or from *using* that firearm for lawful purposes, such as home defense.

capital punishment

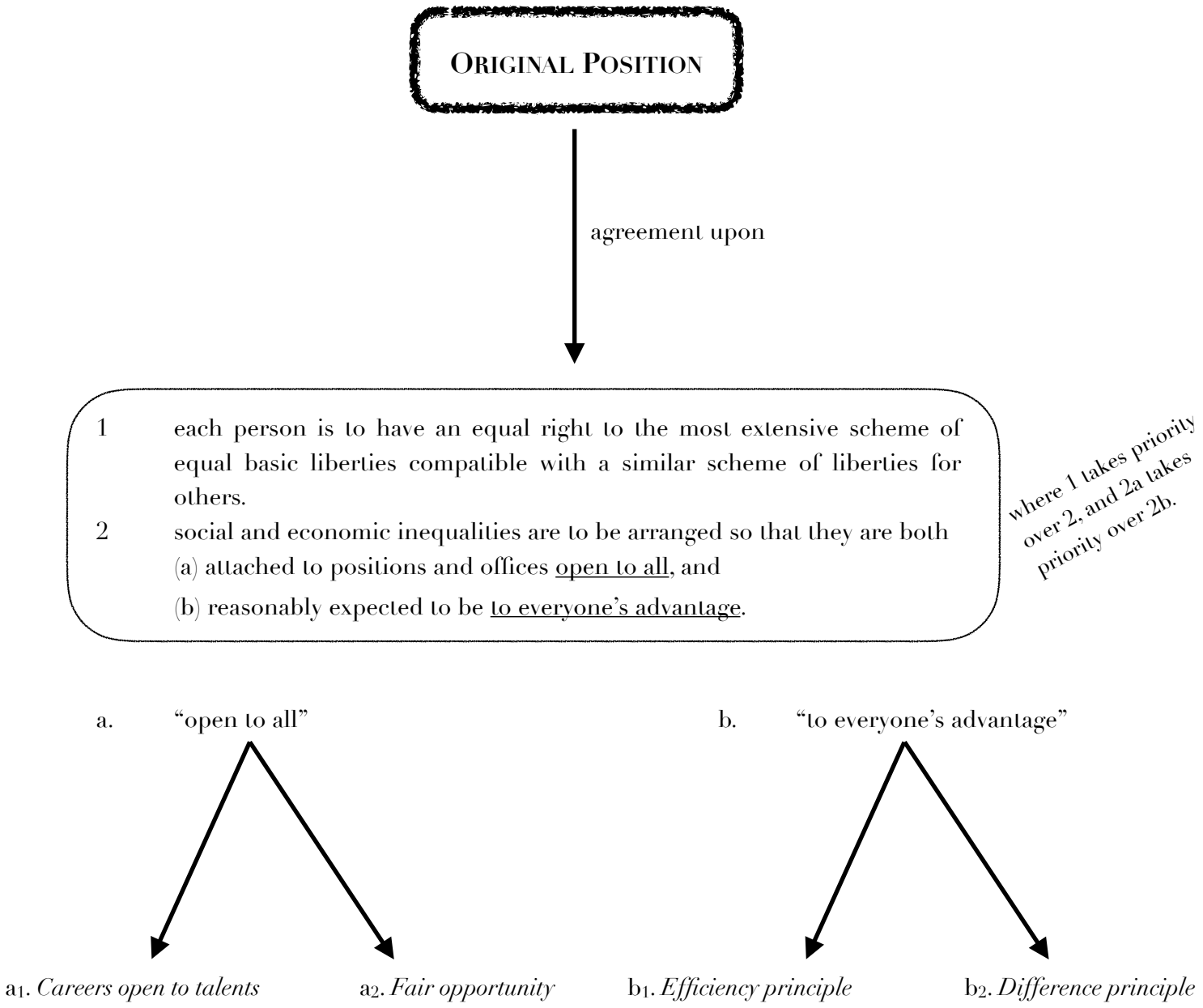
Some states use is; some states don't. The Supreme Court has ruled that capital punishment is sometimes constitutional.

There remain further questions:

- The 'Who?' Question. What groups of people may be subjected to capital punishment? What groups of people may not be? (Juveniles? The intellectually disabled?)
- The 'For What?' Question. For what crimes may someone be subjected to capital punishment? (Murder? Rape? Child molestation?)
- The 'How?' Question. What methods of capital punishment may be employed? (Lethal injection? Electric chair? Gallows? Beheading? Drawing and quartering?)

[1] One telling quote: "In the absence of any evidence tending to show that possession or use of a"shotgun having a barrel of less than eighteen inches in length" at this time **has some reasonable relationship to the preservation or efficiency of a well regulated militia**, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

[2] The Supreme Court did, however, affirm the constitutionality of a number of restrictions about *who* can keep and bear arms (e.g., not mentally ill persons), *what* sorts of arms one can keep and bear (e.g., no fully-automatic weapons), and *where* one can keep and bear them (e.g., not in public buildings).


ORIGINAL POSITION
agreement upon
1 each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
2 social and economic inequalities are to be arranged so that they are both
(a) attached to positions and offices open to all, and
(b) reasonably expected to be to everyone's advantage.
where 1 takes priority over 2, and 2a takes priority over 2b.
a. "open to all"
b. "to everyone's advantage"
a1. Careers open to talents
a2. Fair opportunity
b1. Efficiency principle
b2. Difference principle

Scenario 1: the laws of a country permit only men to occupy the position of CEO of publicly-traded companies.

Scenario 2: the law contains no class restrictions on who can occupy the position of CEO, but due to the culture within most American companies, it is in general much harder for women than men to advance in the workplace, and thus much fewer women hold the position of CEO.

Scenario 3: The law contains no class restrictions on the hiring of faculty at public universities. UCLA has a disproportionate number of white faculty, and in an effort to have more racial balance decides to privilege racial-minority applicants for a period of three years.

Possibility set #1

	Person A	Person B	Person C
Distribution$_1$	2	3	4
Distribution$_2$	2	4	4

Possibility set #2

	Person A	Person B	Person C
Distribution$_1$	2	3	4
Distribution$_2$	2	4	4
Distribution$_3$	5	6	3

Possibility set #3

	Person A	Person B	Person C
Distribution$_1$	2	3	4
Distribution$_2$	3	4	3

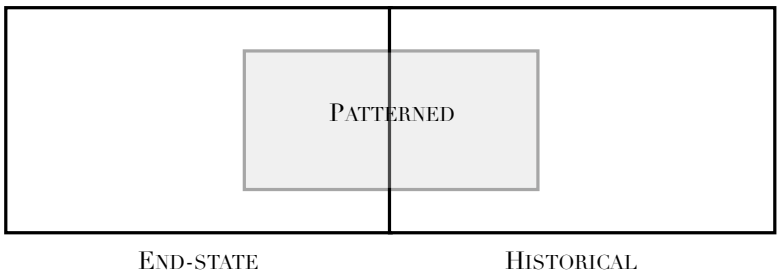
Possibility set #4

	Person A	Person B	Person C
Distribution$_1$	2	4	5
Distribution$_2$	3	3	5
Distribution$_3$	3	4	4

Possibility set #5

	Person A	Person B	Person C
Distribution$_1$	2	3	7
Distribution$_2$	3	3	5
Distribution$_3$	3	4	4
Distribution$_4$	3	4	5
Distribution$_5$	3	4	6

Theories of distributive justice:



End-State Theory: a theory of distributive justice is an end-state theory if whether a distribution is just (at a time) depends only on how things are distributed (at that time).

Historical Theory: a theory of distributive justice is a historical theory if whether a distribution is just depends at least in part on how that distribution came about.

Patterned Theory: a theory of distributive justice is a patterned theory if whether a distribution is just depends on whether that distribution varies along with some dimension (e.g., I.Q., usefulness, virtue, need, effort, social caste, etc.)

Entitlement Theory:

(1) A society's distribution of holdings is **just** to the extent that every individual in the society is entitled to the holdings she has.

(2) An individual is **entitled** to a given holding just in case

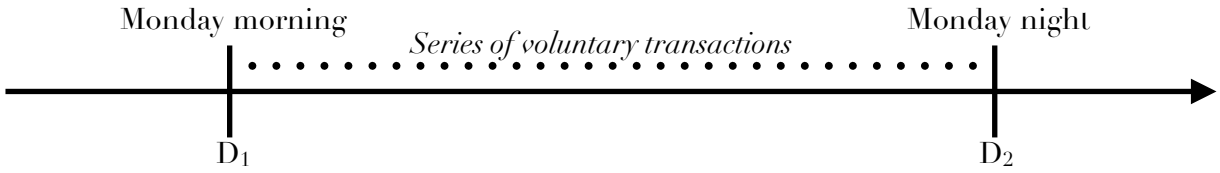
(a) the holding was previously unowned and she came to hold it in accordance with the principles of **acquisition**, or

(b) the holding was transferred to her in accordance with the principles of **transfer** by someone who was entitled to it, or

(c) the holding was transferred to her in accordance with the principles of **rectification**.

(Important corollary: a change to a just distribution results in a just distribution so long as no principle of acquisition, transfer, or rectification is violated.)

Wilt Chamberlain Argument:



P1. If a patterned or end-state theory of distributive justice is true, then a distribution is just if and only if it accords with some patterned or end-state principle P.

P2. If one moves from a just distribution to another distribution via only fully voluntary transactions, then the latter distribution is also just.

P3. All the transactions between the basketball fans and Wilt Chamberlain on Monday afternoon are fully voluntary.

P4. As part of the story: (i) D_1 accords with some patterned or end-state principle P, (ii) D_2 is the result only of the transactions between the basketball fans and Wilt Chamberlain, and (iii) D_2 does not accord with principle P.

Therefore,

P5. A patterned or end-state theory of distributive justice is false.

Just distribution + fully voluntary changes = just distribution

Cohen, "Freedom and Money"

The Right's argument against poverty relief as primary task of government:

(A) *The freedom claim*. Freedom is the absence of (liability to) interference.

(B) *The money claim*. To lack money is *not* to suffer (liability to) interference.

From (A) and (B) it follows that:

(C) *The poverty-isn't-unfreedom claim*. To lack money is *not* to lack freedom.

(D) *The task-of-government claim*. The primary task of government is to protect freedom.

From (C) and (D) it follows that:

(E) *The no-poverty-relief claim*. Relief of poverty is *not* part of the primary task of government.

	"The Right"	Berlin/Rawls	Cohen
Freedom	✓	✓	?
Money	✓	✓	✘
Poverty-isn't-unfreedom	✓	✓	✘
Task-of-government	✓	✘	?
No-poverty-relief	✓	✘	?

Most Leftists challenge the argument by rejecting (A) *The Freedom Claim* or rejecting (D) *The Task-of-Government Claim*. Cohen says that *even if* the Right is correct about (A) and (D), their argument still fails, since (B) is false:

COHEN'S MAIN CLAIM: To lack money *is* to suffer (liability to) interference.

Cohen's first argument for Main Claim:

Two people, Jack and Jill, each want a sweater from a certain store. Jack has enough money to buy it, and thus has a way to acquire the sweater without being interfered with. Jill does not have enough money to buy it, and thus cannot acquire the sweater without being interfered with (if she tries to take the sweater she will be taken in by security).

The takeaway: Money serves, in a variety of circumstances to remove liabilities to interference one would otherwise be subjected to. To be poor, then, is to be liable to interference one would not otherwise be liable to.

Cohen's second argument for Main Claim:

Consider moneyless, ticket-based society. It's clear that to possess more or less of these tickets is to possess more of less liability to interference. "But a sum of money is…a highly generalized form of such a ticket" (182). So to possess more or less money is to possess more or less liability to interference.

1 what is socialism?

A society is socialist to the extent that it realizes (i) *socialist equality of opportunity*, (ii) *income+leisure equality*, and (iii) *communal reciprocity*.

What is **socialist equality of opportunity**?

A society realizes socialist equality of opportunity to the extent that “difference of outcome reflect nothing but differences of taste and choice, not differences in natural and social capacities and powers” (18).

What socialist equality of opportunity requires:
▹ any two people —- regardless of their person’s social classes (e.g., race, gender, religion), upbringing (e.g., educational opportunities), and natural abilities — have the same *chances* of enjoying the same *income + leisure total* as one another.

What socialist equality of opportunity does *not* rule out:
▹ one person having more income/wealth than another;
▹ one person enjoying more leisure than another;
▹ one person enjoying a greater income+leisure total due to “regrettable choice” or “option luck”.

But if discrepancies in income+leisure totals become large enough (due to regrettable choice and option luck), then community will suffer. The poor will be cut off from the common life of the rich, and vice versa.

A socialist society, then, must realize more than socialist equality of opportunity. It must also have **minimal differences between the income+leisure totals of its members**.

A socialist society must also be such that the exchanges of goods are primarily motivated by **communal reciprocity**, and not by motives of fear or greed (since exchange motivated by fear and greed destroy community).
▹ A community is characterized by communal reciprocity to the extent that its members (i) desire to benefit others *for the other’s own sake*, and (ii) desire to be benefited *by* others where the other cares about the member *for her own sake*.

2 is socialism desirable?

Says Cohen: of course it is. The values exhibited on the camping trip are desirable and these are values for which the more the merrier.

Capitalism is undoubtedly efficient at producing certain desirable ends (e.g., total wealth). But considering capitalism’s many undesirable features —- it stimulates low-grade motivates, exacerbates inequality, and undermines community — it’s clear that if socialism can be only somewhat less efficient, it would be more desirable than capitalism.

3 is socialism feasible?

Two potential obstacles:

(1) limits of human nature: people by nature may not be sufficiently generous and cooperative to meet the requirements of socialism on societal scale.
(2) limits of social tech: even if people by nature sufficiently generous/cooperative, we may not know how to make an economy run on the back of generosity rather than self-interest.

Cohen isn't worried about (1), but he is worried about (2). Consider:

(i) Market signals "make known how much people would be willing to sacrifice to obtain given goods and services: they show how valuable goods are to people, and thereby reveal what is worth producing" (61).
(ii) An economy can function efficiently only if participants know how valuable goods are to people and what is worth producing.
(iii) So an economy can function efficiently only when there is a glut of market signals.

Cohen thinks this argument plausible. So it raises the question: how to keep all the *market signals* of a capitalist economy in a socialist economy?

Central-planning socialism = the state controls the means of production, employs the workers (everyone), and redistributes wealth to equality. No competitive market.

Carens-style socialism = just like a capitalist economy (wherein individuals or private groups control the means of production), but wealth is redistributed to equality. Competitive market with strong taxation intervention.

Market socialism = the means of production are controlled by public collectives, but these collectives compete in a competitive marketplace. Competitive market, but where competitors are public entities.

▹ Old-school *central-planning socialism* loses all the market signals and thus is inefficient.
▹ *Carens-style socialism* keeps many of the market signals, but the economy still runs on the base motives of capitalism, thus harming community.
▹ *Market socialism* keeps many of the market signals, but since the public firms are competing there will be winners and losers, thus harming equality.

	Efficiency	Equality	Community
Market capitalism	✔	✘	✘
Central-planning socialism	✘	✔	✔
Carens-style socialism	✔	✔	✘
Market socialism	✔	✘	✔

Cohen thinks our best bet is *market socialism*, though he's unsure whether or not there's a way to make it work that balances all three of efficiency, equality, and community.

"is multiculturalism bad for women?"

OKIN'S CENTRAL CLAIM: the legal protection of minority cultures is incompatible with promoting the opportunity for women "to live as fulfilling and as freely chosen lives as men can".

Two varieties of multiculturalism:

Affirmative Multiculturalism: members of minority cultures should be accorded special privileges that are available to only members of their group — "group rights" (e.g., right to polygamous marriages).

"Leave-alone" Multiculturalism: the law should provide sufficient freedoms to individuals and groups such that members of minority cultures are free to continue in their way of life without the need for special group rights.

Why multiculturalism? (i) For members of minority cultures, their ability to continue in their way of life is central to their well-being, and (ii) because such cultures are minority cultures, they risk extinction without protection.

Why not multiculturalism? Okin's argument:

O1. Male control of women is especially prevalent in traditionalist and religious cultures ("those that look to the past—to ancient texts or revered traditions—for guidelines or rules about how to live in the contemporary world").
O2. Most minority cultures are religious or traditionalist.
Therefore,
O3. To protect minority cultures is to prevent many women from the opportunity to live as fulfilling and freely chosen lives as men can.

Kymlicka's compromise: *Restricted* Multiculturalism: Protect only those minority cultures from extinction that meet some freedom and equality baselines.

Okin's rebuttal: Almost no minority culture would meet the baseline.

Questions:

Q1. What to do about the tension between multiculturalism and feminism (O3)? What values undergird feminism? What values undergird multiculturalism? How do we weigh those values against each other?

Q2. What about women who voluntarily enter into traditionalist, inegalitarian communities? What about women who voluntarily remain in such communities?

Q3. What is Okin's support for O1? What moral assumptions underlie the plausibility of O1?

Q4. If multiculturalism, of what variety? If restricted, under what restrictions? If "leave-alone", what general rights should be in place?

	Restricted	**Unrestricted**
Affirmative		
Leave-alone		

1 mozert v hawkins

The Christian parents' complaint:

1. The reading program exposed our children to a variety of points of view.
2. Exposing our children to such viewpoints lessens the likelihood that they will become/remain members of our faith community.
3. The free exercise of religion includes the freedom to promote one's own children's faith commitments.
4. So the free exercise of religion permits withdrawing the children from the reading program. [from 1,2, & 3]

The court rules against the parents.

Macedo asks: What justifies the court in this ruling?

Macedo answers: Political Liberalism.

2 introducing political liberalism

2.1 comprehensive liberalism v political liberalism

Comprehensive Liberalism. The hallmark of the good life is freedom and autonomy. The good life is one in which a person is able to freely deliberate among a diverse menu of "life plans", select one to their liking, and live that life plan out.

Comprehensive Liberalism would certainly justify the court's ruling. But Macedo thinks judicial decisions (and political decisions more broadly) shouldn't be grounded in Comprehensive Liberalism, since it is

- too partisan, and
- not easily defended.

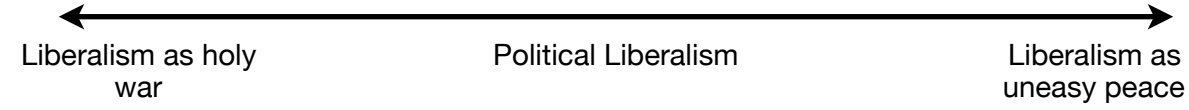
Political Liberalism. The most basic political rights and institutions should be justified in terms of reasons and arguments that can be shared with reasonable people whose religious and other ultimate commitments differ.

An improvement upon Comprehensive Liberalism, since Political Liberalism is

- less partisan, since it treats all comprehensive doctrines equally, and
- more easily defended, since it appeals to no contestable comprehensive doctrine and is arguably supported by a number of different comprehensive doctrines.

2.2 the moderate neutrality of political liberalism

A liberal compromise:



One one extreme ("holy way"): liberals attempt to ram their Comprehensive Liberalism down everyone else's throats. On the other extreme ("uneasy peace"): liberals advocate that everyone be free to appeal to their comprehensive doctrines in the political process.

One respect in which political liberalism is neutral: it "disallows the use of political power to promote directly anyone's contestable comprehensive ideals" (482).

One respect in which political liberalism is *not* neutral: some groups will get the short end of the stick.

2.3 accommodation?

In view of this lack of neutrality, should political liberalism be supplemented with a policy of accommodation? Macedo: yes, on rare occasion.

Macedo's rule: accommodate only when (i) the public imperatives are marginal and the burdens on particular groups are very substantial, or (ii) the public imperatives are marginal and the prudential gains — e.g., drawing dissenters into the public sphere — are very substantial (484).

But otherwise, show no quarter: "Why should we apologize if disparate burdens fall on proponents of totalistic religious or moral views who refuse to concede the political authority of public reason? We must not forget how such people would behave if they had political power" (484).

3 macedo on mozert v hawkins

Macedo:

> It is hard to see how schools could fulfill the core liberal civic mission of inculcating toleration and other basic civic virtues without running afoul of complaints about "exposure to diversity." Since "exposure to diversity" is a necessary means for teaching a basic civic virtue, it cannot support a fundamental right to be exempted from an otherwise reasonable educational regime...To acknowledge the legitimacy of the fundamentalist complaint as a matter of basic principle would overthrow reasonable efforts to inculcate core liberal values...Intransigence is in principle justified in *Mozert* because a politically basic purpose – the promotion of tolerance – is at stake (485-486).

Accommodation for the Mozert parents? Macedo says no: the burdens imposed on the Mozert family not sufficiently great to outweigh the important political value at stake of promoting tolerance (486).

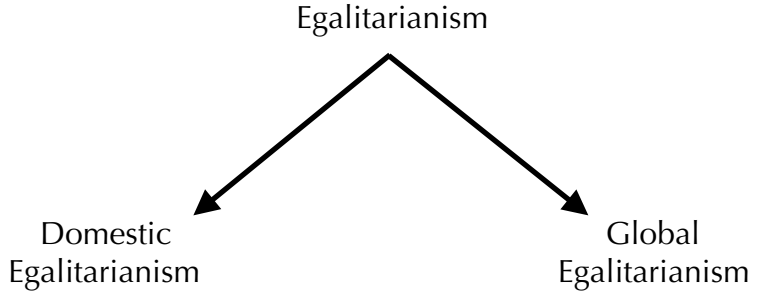
4 some questions

Q1. Macedo thinks political liberalism justifies the court's decision to require the children to attend the reading group. Does it really?
Q2. Why (not) political liberalism?
Q3. To which political actors, and which rights should political liberalism apply (if it should apply at all)? Only government officials, or also citizens? Only basic or constitutional rights, or *all* legal rights?
Q4. Political Liberalism tells us that laws must be justifiable on the basis of reasons acceptable to all *reasonable* citizens — what's this "reasonable" business?

Fabre, "Global Distributive Justice: an Egalitarian Perspective"

1 Fabre's central claim

> *Just as the untalented and the disabled have a claim for compensation against the talented and the able-bodied, those whose residence in a given country makes them badly off have a claim for compensation against those whose residence in a given country makes them well off* (152).



Egalitarian Principle. Justice requires that one person not have fewer resources for leading a good life than another if it is not the former's fault that she has fewer resources.

Domestic Egalitarianism. The Egalitarian Principle is restricted to persons within the same national borders.

Global Egalitarianism. The Egalitarian Principle is *not* restricted to persons within the same national borders.

2 t**he standard argument for global egalitarianism**

1. Justice requires that one person not have fewer resources for leading a good life than another if it is not her fault that she has fewer resources. [Egalitarian Principle]

2. Inequalities between individuals from different countries is primarily the product of the access those countries have to natural resources. [causal claim]

3. Most people are not at fault for the access their country has to natural resources. [responsibility claim]

Therefore,

4. Justice requires that, in general, individuals from different countries have roughly the same resources for leading a good life. [from 1, 2, & 3]

Fabre thinks the second premise false. National wealth is not, as a rule, determined by access to natural resources (e.g., Japan). Rather, it is determined by a nation's human and technological infrastructure (e.g., economic system, educational system, legal-political system, culture).

What determines individual wealth, then: *access* to a nation's human and technological infrastructure. And that access if primarily a matter of *residence*.

3 **Fabre's new-and-improved argument for global egalitarianism**:

i. Justice requires that one person not have fewer resources for leading a good life than another if it is not her fault that she has fewer resources. [Egalitarian Principle]

ii. Inequalities between individuals from different countries is primarily the product of where those individuals *reside*. [causal claim]

iii. Most people are not at fault for residing in the country they do. [responsibility claim]

Therefore,

iv. Justice requires that, in general, individuals from different countries have roughly the same resources for leading a good life. [from i, ii, & iii]

In defense of (iii): For many, it is impossible to emigrate; for many others, it is far too costly (materially and psychologically).

4 the self-determination objection

O1. If global egalitarianism were implemented, then nations would not have extensive rights to decide what to do with the wealth they create, nor to decide what to do with the resources that they happen to possess within their territory.

O2. But nations should have extensive rights to decide what to do with the wealth they create and the resources that they happen to possess within their territory. (Oil under Mecca example.)

O3. So global egalitarianism must be false. [O1 & O2]

5 Fabre's reply

It's true that, if global egalitarianism were implemented, nations would have *less* extensive sovereignty rights than we normally take them to have, but they'd still have *some* sovereignty rights. For example:

▹ Even if a nation was denied the right to forbid non-citizens to enjoy the benefits of its natural resources/wealth, it would still be free to decide the *means* by which those non-citizens enjoy those benefits.

▹ Even if there were a global tax, nations would still be free to decide how to levy and redistribute the tax (within the bounds of what is required by global egalitarianism).

▹ Nations would still be free to promote distributive justice when there are inequalities that are the product of things other than national residence.

▹ Nations would still be free to do all those things that do *not* fall within the purview of distributive justice — e.g., maintaining a criminal justice system, making decisions about religious freedoms, etc.

▹ Even if a nation is only permitted by global egalitarianism to a certain portion of its own natural resources/wealth, it can still decide what to do with the resources/wealth it is allotted (e.g., whether to use the money to fund the arts or to develop certain technologies).

Miller, “Immigration: the case for limits”

against NO LIMITS

Miller takes issue with three standard arguments that purport to establish a *general* right to unrestricted international migration.

Some conditions — call them *prerequisite conditions* — are such that *no one* can live a decent life in their absence (e.g., access to water, food, shelter, sleep, air).

THE ARGUMENT FROM FREEDOM OF MOVEMENT:

Some conditions — call them *prerequisite conditions* — are such that *no one* can live a decent life in their absence (e.g., access to water, food, shelter, sleep, air).

A1. Everyone has a right to prerequisite conditions.
A2. Freedom of movement is a prerequisite condition.
A3. Therefore, everyone has a basic right to freedom of movement. [from A1 & A2]
A4. If someone has a basic right to freedom of movement, then she has a basic right to international migration.
A5. Therefore, everyone has a basic right to international migration. [from A3 & A4]

Miller thinks A4 false: some freedom of movement is a prerequisite condition, but for most people the freedom to migrate internationally is not.

THE RIGHT OF EXIT ARGUMENT:

B1. People have a right to exit their country of residence.
B2. People have a right to exit their country of residence only if they have a right to *enter* some other countries.
B3. Therefore, people have a right to enter some other countries. [from B1 & B2]

Miller thinks B2 false: compare the right to marry.

THE DISTRIBUTIVE JUSTICE ARGUMENT:

C1. Justice requires that one person not have fewer opportunities than another if it is not her fault that she has fewer resources.
C2. It is no one’s fault what country they are born into.
C3. Therefore, justice requires that one person not have fewer opportunities than another on account of what countries they are born into. [from C1 & C2]
C4. Such injustices are often rectified only if wealthier countries open their borders to members of poorer countries.
C5. Therefore, justice requires that wealthier countries open their borders to members of poorer countries (up to the point of distributive equilibrium). [from C3 & C4]

Miller thinks C1 false; and that even if it were true, it’s scope would be merely domestic.

The upshot of these three argument: no *general* right to international migration.

in support of SOME LIMITS

It doesn't follow from the absence of a general right to international migration that states are morally permitted to close their borders to whomever they choose. There are still strong moral reasons to let individuals immigrate. So if a state wants to prevent some people from entering their borders, there needs to be strong reasons to do so.

Miller gives two:

i. cultural continuity

D1. There are strong reasons for a state to preserve a common public culture that in part constitutes the political identity of their members.
D2. Therefore, there are strong reasons for a state to restrict immigration to a level where the state's common public culture can be *continuous*. [from D1]

ii. population control

THE GLOBAL POPULATION CONTROL ARGUMENT:

E1. States have strong political incentives to "export" their surplus population via international migration, since population control policies are very unpopular.
E2. Therefore, if there aren't some immigration restrictions, then some states will not be responsible for controlling their population. [from E1]
E3. A viable population policy at the global level requires each state to be responsible for controlling their population.
E4. Therefore, a viable population policy at the global level requires some immigration restrictions. [from E2 & E3]
E5. There are very strong reasons to have a viable population policy (e.g., the earth's carrying capacity).
E6. Therefore, there are very strong reasons to have some immigration restrictions. [from E4 & E5]

THE DOMESTIC POPULATION CONTROL ARGUMENT:

F1. For some nations, if there are no immigration restrictions, then there will be serious ecological and quality-of-life costs.
F2. Nations have the right to decide whether to bear such costs.
F3. Therefore, nations have the right to restrict immigration down to a level where it will not impose serious ecological and quality-of-life costs.

a tension for contractualism

On the face of it, seems hard for social-contract theory to explain duties to future generations.

The basic tension: According to social-contract theory, the principles of justice are what *rational*, *mutually disinterested* people who reciprocally interact would agree to under fair conditions. But we cannot interact with people in the far-distant future. So why would the *mutually disinterested* bargainers agree to sacrifice for future people?

Some social-contract theorists bite the bullet. Rawls doesn't.

recalling Rawls's theory of justice (two claims)

First claim: the principles of justice are whatever principles the bargainers in the original position would agree to regulate society by, where the bargainers in the original position are

- rational
- mutually disinterested (like lawyers bargaining on behalf of their clients)
- ignorant of their place in society, social class, race, gender, and natural abilities
- *under the assumption that each generation will enjoy favorable conditions.*

Second claim: the bargainers in the original position would agree to the following principles (in lexical order):

1. *Liberty Principle*: Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
2. Social and economic inequalities are to be arranged so that they are both
   (a) attached to positions and offices open to all (*Fair Equality of Opportunity*), and
   (b) reasonably expected to be to everyone's advantage (*Difference Principle*).

Rawls and future generations

To accommodate future generations, Rawls proposes that bargainers in the original position would agree to an additional principle:

> *Just-Savings Principle.* Each generation is to save as much resources for the next generation as is necessary for them to establish and preserve a just basic structure,

where the lexical ordering is as follows:

> Liberty > Fair Equality > Just-Savings > Difference

But why think the bargainers in the original position would agree to this principle?

Rawls offers two distinct solutions at different times:

1. Bargainers in the original position are not purely selfish; they also care about their descendants for a generation or two.

Worry: The proposal seems *ad hoc*, contrived, gerrymandered. Why, if bargainers don't care about their *contemporaries*, do they care about some future generations? And why only *some* future generations? (The proposal isn't just *ad hoc*; it also undermines one of the central features of the original position: fairness.)

2. Suppose (i) bargainers don't know to which generation they'll belong, but (ii) they can assume that previous generation will abide by whatever principles are selected. Then I (as a bargainer) will have good reason to select the just-savings principle.

Worry: it seems the bargainers would go for the Rawlsian lexical ordering *only if* we assume that favorable conditions will continue — otherwise there may be conflict between the Liberty Principle and the Just-Savings Principle.

Mulgan: if bargainers drop that assumption and consider the possibility of a broken world, it seems they'll prioritize the Just-Savings Principle above all the other principles. After all, if the bargainers don't know which generation they'll belong to, they know they may belong to a broken world.

> Just-Savings > Liberty > Fair Equality > Difference

What implications would this have for 2018? If climate change may plausibly lead to a broken world, and climate change is plausibly a product of the extent of liberty and consumption we enjoy, then justice requires us to curtail some of our present freedoms and consumption. For example:

- lowering social minimums
- curtailing reproductive freedom
- cutting legislation that encourages reproduction
- doing away with private cars and non-essential consumption of fossil fuels
- banning climate change denial