

## LECTURE NOTES PHILOSOPHY 167      DWORKIN AND CRITICS SPRING, 2007

**1. A taxonomy of views.** What do we owe one another? One view is that we should always respect everyone's Lockean rights. (One respects a right by not violating it.) This Nozickian view is criticized by Amartya Sen ("Rights and Agency" on the ground that we ought to promote overall nonviolation of rights. This would be to treat rights as goals not side constraints. Sen also disagrees with Nozick about what rights people have. Sen suggests that morally fundamental rights are rights to capability or real freedom to achieve important human functionings.

John Rawls makes a different proposal as to the fundamental moral rights of individuals. He proposes that people have rights (1) to equal basic liberties of democratic citizenship (e.g., free speech and the right to vote and stand for office in free elections), (2) to fair equality of opportunity (all with the same native talent and the same ambition should have the same prospects for success in competitions for positions that confer social and economic benefits, and (3) to social arrangements that maximize the long run social and economic benefits of the least advantaged. These principles are nested, (1) having strict lexical priority over the others, and (2) having strict lexical priority over (3). These principles together are asserted to express the vision of a democratic society of free and equal citizens.

Rawls presents his view as a "political conception of justice." It is purported to be reasonable for us to accept, given the diversity of ultimate ethical beliefs among reasonable citizens. It is presented as a solution to the problem: how can government be legitimate, if people reasonably affirm different and opposed conceptions of the good and the right? A legitimate government coerces people and imposes policies on them only in the name of principles that it would be unreasonable to reject. Rawls supposes that a government can be legitimate even in a diverse society if the political conception of justice that is enforced attracts an overlapping consensus of all reasonable viewpoints that citizens affirm. We agree to disagree about much, including religion and ethics, but we can agree on a political conception of justice if Rawls's arguments succeed.

Rawls opposes Nozick's libertarianism on the ground that respecting libertarian rights might lead to unacceptable consequences over the long run, as the ways that individuals happen to exercise their Lockean rights can produce in the aggregate results that no one foresaw and intended and that perhaps no one would have wanted. The ensemble of exercise of individual Lockean rights might lead to stalemate, or might drive some unlucky persons to the wall, or might lead to a permanent underclass whose prospects are as bleak as you might imagine. In Rawls's original position, people are imagined to choose principles based on how well they expect to fare in the society regulated by the principles chosen. Rawls thinks that choice of Lockean rights would represent an unacceptable gamble with one's life prospects. Rawls opposes utilitarianism (institutions, practices, policies, and acts should be chosen so as to maximize utility or aggregate human good for a similar reason—he thinks the original position argument shows that utilitarianism would not be chosen as the basic framework of social cooperation under conditions that are fair.

One should notice that utilitarianism might justify a regime of Nozickian Lockean rights or something close to such a regime. This would be so if instituting and enforcing a regime of Lockean rights would be the best strategy for maximizing aggregate human good in the long run. On this conception rights are not morally fundamental, but derived. They are justified insofar as they are the best means for promoting utility. Richard Epstein (not a course author) defends a regime of rights close to what Nozick recommends in this way, as the best strategy for maximizing utility.

The utilitarian might defend a Rawlsian set of principles instead on the same basis. The disagreement between the Epstein-libertarian utilitarian and the Rawlsian utilitarian would be empirical, not moral. The issue is what rules and policies will work to promote utility in the long haul. Of course, the utilitarian might defend some different conception of rights and justice and reject both libertarianism and Rawlsianism. (The possibility that utilitarianism conceivably might prescribe a Rawlsian or a libertarian regime as means to maximizing utility does not gainsay the fact that the three views, taken as fundamental moral principles, are rivals.)

In *Sovereign Virtue* Ronald Dworkin sides with Rawls against the utilitarian view that the basis of interpersonal comparison for a theory of justice should be utility (happiness, desire satisfaction, or some alternate measure of the quality of an individual's life). For Dworkin, the proper measure of an individual's resource holdings for purposes of justice is what others would pay for what the individual has. An equally important difference between Dworkin and Rawls is that the former holds that one's resources include internal resources or talents as well as external resources such as material possessions. Dworkin also presses hard on a distinction that is maybe latent in Rawls, between choices and initial circumstances or option versus brute luck. One is reasonably held responsible as it were not for the cards that fate has dealt but for how one plays one's hand.

In "Justice, Insurance, and Luck," chapter 9 of *Sovereign Virtue*, Dworkin criticizes the difference principle on three grounds: (1) there is no nonarbitrary way to define the worst off group, and whatever arbitrary specification one makes will be consequential for choice of policy, and (2) the difference principle is unfair in that it specifies too extreme a

preference for gains to the worst off in competition to gains for better off groups, and (3) it fails to incorporate personal responsibility into an account of justice in the right way.

According to Dworkin, people in a society should be compensated by others in the society for defects in the unchosen circumstances they face. An interesting feature of Dworkin's view is that personal talents and "untalents" qualify as unchosen circumstances. In the ideal case, initial circumstances are made equal for all. But given a fair framework for voluntary interaction, once circumstances are equalized, people should be held responsible for the outcomes of their choices. This means that the different voluntary choices that individuals make and the different option luck they encounter should trigger no claim on anybody's part to further redistribution in the name of justice.

Dworkin's ideal of the equality required by justice, equality of resources, defines this notion in terms of an ideal equal auction adjusted by two hypothetical insurance markets. In one, people can purchase insurance against having talent whose market value is small, and in another, people can insure against suffering disability or handicap. (For relevant details, see chapter 2 of *Sovereign Virtue*.)

We cannot actually implement the ideal auction and insurance markets. Dworkin suggests that what an actual society, striving toward justice, should do is figure out what the results of those ideal procedures would be if carried out under the society's actual circumstances and then arrange institutions and practices to mimic the results of these ideal procedures to the greatest extent possible. (For the flavor of this approach, see the applied essays in *Sovereign Virtue*, especially chapters 8 and 9. Notice that in his "Introduction," pages 3-4, Dworkin asserts that his chapters applying the theory including 8 and 9 also develop and extend the theory.)

One can distinguish two separable components of distributive justice views like Dworkin's. One is a proposal about the basis of interpersonal comparisons—how to measure people's condition for purposes of a theory of justice. Dworkin proposes resources not welfare. A second component is a principle of fairness that says what people owe one another by way of distributive justice.

Here's a chart:

**The basis of interpersonal comparison:**

***Resourcist views.***

Primary social goods (Rawls).

What others would pay for what one has in an ideal market (Dworkin).

***Welfarist views.***

\*Happiness or pleasure.

\*Desire satisfaction or life aim fulfillment.

\*Hypothetically rational desire satisfaction (satisfaction of the desires or aims one would have if fully informed and making no cognitive errors).

\*Getting the items on an "Objective List" of truly valuable goods (eg, friendship, love, achievement, pleasure/enjoyment, knowledge, autonomy, wide personal freedom).

One view that is a bit hard to classify is Amartya Sen's capability approach. Sen suggests that a just society provides equal (or adequate) real freedom for all, real freedom being equated to capability to achieve important human functionings. This might be construed as advocacy of equal opportunity for Objective List welfare, but Sen himself seems to want to leave the issue of interpretation open—capability might be variously interpreted. On the interpretation of Sen, see *Sovereign Virtue*, chapter 7, "Equality and Capability." Elizabeth Anderson might be viewed as advocating the view that justice requires that all persons be provided adequate capability or real freedom to participate fully in democratic society. For her, democratic capability is the measure of interpersonal comparison and sufficiency is the distributive justice principle.

**Principles of distributive justice.**

\*Equalize!

\*Equalize at the highest feasible level!

\*Equalize initial opportunities of individuals!

\*Maximize total benefits!

\*Maximize the average level of benefits enjoyed by persons!

\*Maximin! (Rawls)

\*Leximin! (clarification of maximin). As a first priority, maximize the advantages of the worst off person; as a second priority, maximize the advantages of the second-worst off person, and so on up to the best off person. \*Prioritize!

Maximize a function that gives extra weight to benefits for the worse off. The moral value of getting a benefit for a person (or avoiding a loss), is greater, the lower the person's absolute benefit level prior to receipt of this benefit, and greater, the greater the size of the benefit. Maximize the moral value of benefits for people! This characterization does not specify a specific principle, rather a family of views, that give more or less extra weight to securing benefits for the

worse off. The most extreme possible weighting of benefits yields leximin and maximin; the extreme minimalist weighting yields "Maximize total benefits!". We might loosely associate the priority doctrine with advocacy of a weighting midway between these two extremes.

\*The sufficiency doctrine. Justice requires that as many as possible of those who shall ever live are at or above the "good enough" or sufficient level. The sufficiency doctrine draws a line on a scale of benefits (whether utility, primary goods, Dworkinian resources, real freedom, whatever), and stipulates that those at or above the line have an adequate or sufficient amount and those below the line do not. For a sufficiency view, what happens to people once they are above the line of sufficiency is a "don't care" from the standpoint of justice. It is not morally bad if some have great wealth, for example, provided that society brings it about that all have enough.

The chart does not exhaust the possibilities of distributive justice views. For example, views like Nozick's do not involve any basis of interpersonal comparison and do not accept any principle of distributive justice that specifies how well off people should be in terms of the measure of interpersonal comparison. Nozick would hold that all of the views on the chart above are morally unacceptable end state views (see Nozick, chapter 7).

## 2. Dworkin and His Critics.

### *Welfare versus resources.*

Dworkin runs together two separate issues when he discusses the basis of interpersonal comparison issue. One issue is: Should welfare or something else be the measure? A second issue is: Should the principle of distributive justice specify that people are entitled to initial opportunities or final outcomes? The second issue is concerned with how to integrate personal responsibility into an account of justice.

Suppose we decide Rawlsian primary goods are the proper measure of people's condition. We then face a separate issue—should justice guarantee to individuals some initial allocation of primary goods or primary goods over the course of their lives? Suppose the fair allocation of primary goods is X, and Smith gets X primary goods. He then negligently and foolishly squanders his holding. If justice requires that people get some specified level of primary goods across their lives, then Smith now has a claim to more primary social goods. On an initial opportunity view, he has no further claim, given that he already got the fair amount of initial opportunity.

Dworkin's equality of resources ideal is better described as equal initial opportunity for resources. To focus on the basis of interpersonal comparison issue, we might imagine that justice requires equal initial opportunity, and then consider whether some construal of welfare or a Dworkinian construal of resources should be the measure.

Chapter 1 of *Sovereign Virtue* discusses the interpersonal comparison issue but merges it with the view that justice must require equality. So, for Dworkin, the issue becomes, equality of what? We need to keep in mind that the What Measure issue and the What Principle issue are separate and distinct.

Dworkin's chapter 1 raises interesting objections against particular interpretations of utility (or welfare, or well-being) as the measure. Against pleasure or happiness, he notes that people reasonably care about things other than the quality of their felt experience. Against desire satisfaction, he notes that people can desire things that intuitively have little to do with their welfare. Also, people's desires may be warped or stunted, so getting what you want may not be getting a good life. My sense is that these criticisms of particular construals of welfare, whether right or wrong, will not defeat generic welfarism. If one construal of welfare is (comparatively) bad, then some other is (comparatively) better.

Dworkin does have a master argument against all welfarist views. The idea is roughly that any conception of utility proposed to serve as a component of a distributive justice standard must incorporate a notion of reasonable regret that already includes a notion of fair distribution that logically preempts the space that the utility conception is intended to occupy. Question: Is this master argument any good?

An objection that Dworkin does not state but that is worth considering is this: We do not really have a conception of human good (well-being, utility) that renders interpersonal comparison of utility a coherent and attractive idea. We don't really have a method of aggregating the various components of utility for each person and arriving at a score for each person such that the numbers we have arrived at are meaningfully comparable. Rawls would say: in a pluralist society we adhere reasonably to different and incommensurable conceptions of human good, so none can serve as the basis of interpersonal comparison for a theory of justice. Question: How strong is this objection?

Dworkin's conception of equality (or equal initial opportunity for resources). Dworkin's equality of resources ideal rests on the idea that we can separate an individual's choices and circumstances and that when we do so it is reasonable to hold a person fully responsible for her aims and ambitions and for the choices she makes to achieve her aims and ambitions. An individual's native stock of talent, given by genetic inheritance and early socialization, is beyond her power to control, but we cannot view our aims and ambitions as afflictions that happen to us and for which we do not bear responsibility. Objection: Among an individual's talents are her talents at deliberation, value choosing, ambition

forming, and choice making and choice executing. If my low level of intelligence is a talent that is part of my circumstances, how can I reasonably be held fully responsible for my bad ambitions and aims, which may just be the outcome of my feeble attempts at deliberation and choice? (We can't distinguish cleanly between the cards that fate deals the individual and how she plays her hand if your ability to play cards is one of the cards fate deals you.) Arneson tries to develop a soft account of personal responsibility that is responsive to this point, but it might also be used to defend Rawls's position: It's not that there is no such thing as personal responsibility, but it is elusive, and inherently controversial, so cannot be made central in a political conception of justice suitable for a pluralist society.

#### *Welfarist Dworkinism.*

We might agree or disagree with the antiwelfarist component of Dworkin's position. If we disagree, what then? One possibility is "welfarist Dworkinism" or in other words equal opportunity for welfare. Interpret this as follows: in a just society institutions and practices are arranged so that each person, if she behaves prudently throughout her life, gets the same level of welfare or well-being as anyone else, this equal well-being level being made as high as possible. (This norm cannot be fully implemented, because some people unexpectedly die young via brute luck not option luck, and cannot be brought to the high equal level of well-being.) Registering the point of the previous paragraph, we might modify this view by stipulating a soft account of personal responsibility. Very roughly, we hold an individual for behaving as prudently as it is reasonable to expect, given his circumstances including the impact of genetic inheritance and early socialization on his character and traits. Society is arranged so that if each person behaves as prudently as it is reasonable to expect her to behave, she gets the same high level of well-being as anyone else.

Now consider Bert, who has just become an adult, and has been given a fair initial allocation of resources and opportunities. He behaves unwisely and imprudently, so he is responsible for what ensues even on a soft account of personal responsibility. He drives a motorcycle dangerously fast on a desert road (no danger posed to anyone other than himself) without purchasing accident insurance. He has a bad accident, and will be a vegetable for the rest of his life unless we provide him an operation that will restore his mental faculties and good health and give him great life prospects again. Should we aid him?

The proponent of equal opportunity for welfare, it seems, must say No, and even a proponent of the version of equal opportunity that embraces a soft account of personal responsibility must say No. This may seem harsh. Let's explore the reasons that might support this judgment. (Marc Fleurbaey proposed the Bert example as an objection against equal opportunity for welfare type views.) Notice that the objection does not apply only against equal opportunity for welfare views. If one held that fair provision of opportunity differs from equal opportunity, one could redirect the objection against your favorite fair equality of opportunity for welfare view. (Resisting the objection, one might hold that to aid Bert in the circumstances described would be charitable, nice, but not required by justice.)

In the example as stated, it looks as though there is a straight utilitarian reason to hold that Bert should get extra aid. The aid will do a lot of good at a cost of comparatively modest resource expenditure. The greater the total well-being gain that would result from aiding Bert, the stronger the case for providing him extra aid, other things being equal.

In the example as stated, Bert, a very young person, will have extremely low lifetime well-being if he dies after the accident or lives a vegetable-like existence for the rest of his life. So there is a prioritarian reason to extend him further assistance. The lower Bert's lifetime well-being will be unless he gets the operation he needs, the stronger the case for providing him this extra aid, other things being equal.

Finally, in the example as stated, although Bert behaves badly and is responsible for his bad choice, he also suffers very bad option luck. His "punishment" one might say is disproportionate to his "crime" of irresponsible imprudent conduct on one occasion. He ends up with worse life prospects than he deserves to have, one might hold. The higher one's age-adjusted lifetime virtue or deservingness score, the stronger the case for aiding one if one is in grave need or peril, like Bert, other things being equal.

We might test the degree to which the three reasons just noted account for our response to the Bert case by considering variants of the example in which these three reasons become less weighty or even disappear. So suppose that instead of Bert, it is Bert's aged Grandpa who drives the motorcycle recklessly or negligently and ends up very badly off, with no future worthwhile life prospects unless he is given brain surgery. But Grandpa Bert unlike Bert has already acquired a high lifetime well-being level, so the prioritarian reason to provide aid is pretty much extinguished. We can also vary the case by supposing the aid the needy person (Bert or Grandpa Bert) requires becomes increasingly expensive and the benefit to the needy person becomes smaller and smaller. (Suppose the brain surgery costs not \$100,000 but ten million dollars and instead of restoring Bert from coma to normal human life it restores him to very reduced mental life, say at the level of an average chipmunk.) We can also vary the case by supposing Bert's negative desert increases. Suppose there are many accidents, each one chipping away slightly at Bert's brain, until finally after many accidents he is in a coma like existence and needs expensive brain surgery to have normal life prospects as in the original example. But in this many-accidents version, in which Bert repeatedly engages in reckless

conduct again and again, he does not suffer bad option luck, and his “punishment” no longer seems disproportionate to his “crime.”

Putting together the three considerations that I am suggesting account for our “too harsh” response to the Bert case if indeed we do have that response, I suggest that a principle that incorporates these reasons is desert-catering prioritarianism (DCP, for short): We morally ought to choose actions and policies that maximize a function of total human well-being that gives extra weight to gaining a benefit for a person, the greater the well-being gain she would get, the worse off in lifetime well-being she would be in the absence of this benefit, and the higher her age-adjusted lifetime deservingness score.

DCP abandons the opportunity-oriented focus of the equal opportunity or fair opportunity principles. This represents another controversial shift away from Dworkin’s position. For Dworkin, the line between option luck and brute luck is crucial; for DCP, pertinent distinction is rather between being virtuous and vicious, deserving and undeserving.

The Bert case appears to pose a difficulty for a broad range of views that resemble Dworkin’s, whether they take a welfarist or resourcist form. For the Berts of the world, what does justice require?

*Against luck egalitarianism; For democratic equality.*

In “What Is the Point of Equality?” Elizabeth Anderson criticizes Dworkin’s conception of distributive justice along with a broader group of views of which Dworkin’s is a member. The broader family of views she calls “luck egalitarianism.” According to the luck egalitarian, the results of unchosen luck should be equalized, but the outcomes of chosen luck (as well as the outcomes of gambles that are negligently not noticed) should not be tampered with. She proposes that instead of embracing luck egalitarianism we should embrace what she calls “democratic equality”—the view that society should guarantee that everyone has adequate opportunity throughout her life to participate fully in democratic society. This is a capability doctrine allied to a sufficiency doctrine. Samuel Scheffler agrees with Anderson both in being against luck egalitarianism and in being for the democratic equality ideal.

According to Anderson, luck egalitarianism is

1. Too harsh to those who suffer bad option luck. Suppose that after a fair initial distribution of opportunities, Smith makes a bad mistake, and ends up in the gutter. The luck egalitarian must deny that society has any further responsibility to aid the individual who unwisely exercises her fair initial share of opportunity.
2. Too censorious and hence disrespectful to individuals. Suppose Smith is in bad shape, and needs help. Should society provide the help? According to the luck egalitarian, we must first undertake an investigation to determine whether Smith is responsible for his plight (whether it is due to bad brute luck or bad option luck). We must separate out the deserving from the undeserving among the disadvantaged and help only the deserving. Anderson says something is clearly going wrong here. Our theory of justice is a broken thermometer.

A closely related point is that Anderson holds that luck egalitarianism is unfair to those who suffer bad brute luck. She supposes such a person must establish in a public forum that he has disparaged traits and so merits compensation. Some call this shameful revelation and urge that it should not be a condition of eligibility for assistance in a decent society.

3. Too ambitious or extensive in its scope. According to Anderson, the point of justice is not to undo all unchosen bad luck, but to undo oppression, which is caused by society not nature.

I won’t here try to assess the Anderson and Scheffler critiques of luck egalitarianism or her rival “democratic equality” conception. See her essay for pertinent detail. It would be a useful exercise to think through what Dworkin could and should say by way of reply. (See also Arneson’s comment, “Luck Egalitarianism and Prioritarianism.”)

It is perhaps worth noting that Dworkin’s actual published response to the Scheffler critique (in a 2003 essay, not a course reading: “Although Scheffler identifies me as a luck egalitarian, his definition of that movement in fact excludes me.” (Presumably Dworkin would make a similar reply to Anderson.) Dworkin continues by insisting that the general idea of his equality of resources norm “is to make circumstances equal under some appropriate version of the envy test,” and that “the appropriate version of this test is “that people be made equal, so far as this is possible, in their opportunity to insure or provide against bad luck before it has occurred, or, if that is not possible, that people be awarded the compensation it is likely they would have insured to have if they had had that opportunity.” To my mind, Dworkin’s declaring that he is not a luck egalitarian is like the Pope announcing that he is not a Roman Catholic, but if you read chapters 8 and 9 of Sovereign Virtue, you see he maybe has a point.

*Opportunities versus outcomes.*

Dworkin's insurance proposals model justice as taking an ex ante view of people's risky choices. When people are making risky choices, what is fair is what looks fair from a standpoint before it is known how the risks will turn out. If people cannot actually choose insurance for themselves in a way that is fair, justice requires treating them according to the insurance policy they (or people generally) would have chosen had they had a fair opportunity to purchase such insurance.

Suppose it is possible to equalize initial opportunities and then let people choose riskier or less risky lives, insure themselves against risk to any degree they choose including zero, and bear the consequences. Would this be morally desirable? One worry arises if it is known in advance that provision of opportunities to people will do them no good. If we know for certain that if Arneson is provided an expensive opportunity, he will ignore it or waste it, are we still required morally to provide the opportunity. If at the fundamental level justice requires opportunity provision, it seems we must—providing fair opportunities is per se morally desirable, whatever outcomes ensue.