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## **PubPol 580: Reading Notes for Class 9 & 10 (October 6 & 8, 2009)**

On Tuesday we will begin several weeks of discussions about the concepts of justice and rights and their application to a series of policy questions. We'll all meet in 1230 both days next week; we'll split up into two groups for the second half of Thursday's class. On Tuesday I'll talk about the readings about justice and try to provide an organizing framework for the series of classes to follow. For the first half of Thursday I'll do the same for rights. There is a lot of reading for next week. Don't be put off by their abstract nature, writing them off because it's not clear how you would apply them. All of these readings grapple with very deep and significant issues, and while in the end you may find the level of abstraction unsatisfying, it's worth tackling them on their own terms before making such a judgment.

Theories of justice and rights share the claim that utilitarianism is not an adequate account of morality. John Rawls's theory was offered explicitly as an alternative to utilitarianism, as he explains in Section 5 of *A Theory of Justice*. Robert Nozick's *Anarchy, State, and Utopia* was written in response to Rawls's book and is best seen as a rights theory, in that its theory of justice is basically a property rights theory. It's also among the more compelling accounts of libertarianism. Michael Walzer advances a pluralist theory (and a casuist theory)—he says there are different spheres of justice and we need to craft an appropriate account of justice for each of them that is sensitive to the moral and political history of the nation in question. The communitarian account of justice is the hardest to characterize of the ones we'll look at. It grows out of a contemporary reaction against what its proponents see as an excess of "rights talk" in American society, and attempts to forge a new balance between individualism and community, and rights and responsibilities. And don't forget that utilitarians believe that utilitarianism offers a successful account of justice.

There is another account of distributive justice that is central to debates in America about distributive issues. This is the account that relies on equal opportunity to establish a "level playing field," and then uses a variety of competitions and markets as the principal ways to distribute resources in society. This is the account one often finds in letters to the editor and pronouncements of elected officials, so you ought to think how it fits, or doesn't, with the other theories you'll be reading about.

Another concept you might keep in mind as you read the assignments and think about the cases is "desert." One can see justice as giving individuals what they deserve (where what they deserve is determined first in some fashion) or as defining what people deserve. So think about the ways in which the various theories address (or don't address) your everyday intuitions about desert.

### **RAWLS**

John Rawls's *Theory of Justice* provides an account of how we should organize the basic structure of society--the ways in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. Fairness is the leitmotif of Rawls's theory. It is a VERY abstract theory, but you should resist

discounting it because of this. It offers an alternative to utilitarianism that has much of the appeal of utilitarianism (through the importance it assigns individual liberty and through the difference principle that governs distributive decisions). According to Rawls, it is superior to utilitarianism because it recognizes and honors the moral distinctiveness of persons better than utilitarianism, which tends to lose sight of individuals in the aggregation process.

You should pay attention to three things as you read:

1. the way the argument is framed—the principles of justice are chosen through a hypothetical contract. It's a thought experiment—it's about how to think about justice or how to define justice--not an historical account or an account of something that might actually occur.
2. the assumptions underlying the original position—the veil of ignorance and the way it handles the “natural and social lotteries,” the results of which, Rawls claims, are morally arbitrary and therefore should not influence the choice of principles.
3. The substantive principles of justice that Rawls argues would be chosen in a properly designed original position.

A hypothetical contract is a method for deciding “what we mean by justice.” By appealing to the notion of a contract, Rawls builds on the notion of consent. By making it a hypothetical contract, he avoids the strategic inequalities of real bargaining and ensures that the effects of the social and natural lotteries are nullified. The veil of ignorance keeps morally irrelevant information from affecting the decision, and thus it renders all parties to the social contract equal behind the veil. It reduces the selection of the principles of justice to a decision about what a representative rational person would choose as principles of justice in a “fair” original position —it is thus an attempt to ground morality in the rational choices of an individual.

Rawls seeks “a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in the quest for political and economic advantage.” The “luck of the draw” involved in these lotteries is morally arbitrary (he says)--you don't DESERVE these outcomes so they shouldn't affect the decision concerning principles of justice. Rawls treats the outcomes of these lotteries as common resources and not as matters of desert. This is a controversial claim—much of the natural and social lotteries have to do with advantages (and disadvantages) that are passed on from parents to their children. Rawls's treatment of these factors inspires Nozick's critique, in which he argues that individuals may not deserve the attributes they acquire through these lotteries, but they are nevertheless entitled to them.

Finally, there are the specific principles that Rawls argues would be chosen in the original position: (1) each person is to have an equal right to the most extensive basic liberty consistent with a similar liberty for all; and (2) social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged (the difference principle). The first principle takes priority, which offers greater autonomy to individuals than does utilitarianism, and this priority means that society cannot accept increased

inequality of individual liberties as a means to further the second principle. Do these principles accord with your own moral intuitions about justice? Do they do so better than utilitarianism?

## **THE NO CHILD LEFT BEHIND ACT AND THE RAWLSIAN DIFFERENCE PRINCIPLE**

The NCLB Act has been criticized for its provision that a school can't be labeled a success unless a very large proportion of students in various subgroups (racial, ethnic, etc) are passing standardized tests. This leads to cases where 95% of the kids may be doing fine but the school gets a poor mark because the passing rate for one small subgroup doesn't meet the standard. This feature of the NCLB Act bears a passing resemblance to Rawls' difference principle—the notion being that (educational) justice is achieved when the least-achieving group is doing as well as it can (or is at least achieving at a high standard). What do you think about this feature of the NCLB?

## **GANDHI'S TALISMAN**

Rawls wraps his theory of justice in a good bit of rationalist apparatus, which may or not appeal to you as a way to think about justice. There is a quote from Gandhi that has a very similar spirit to Rawls' original position and difference principle but is presented without all the apparatus. It is as eloquent a presentation of the basic idea as I've seen.

"I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest person whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to that person. Will that person gain anything by it? Will it restore that person to a control over his or her own life and destiny? In other words, will it lead to freedom for the hungry and spiritually starving millions? Then you will find your doubts and your self melt away."

Source: *Mohandas Gandhi: Essential Writings*

## **NOZICK**

The most important contribution of Nozick's work, in my view, is its argument that justice is not a patterned principle (one that looks at the distributions of outcomes, as does utilitarianism and Rawls's difference principle), but an historical principle that refers to just processes. An outcome is just if it arises from an initially just position through a just process. It's easiest to follow what he's up to if you think of entitlements as mostly being about property (including one's own body). There are three parts to this theory—principles of justice in acquisition (how one initially acquires an entitlement), justice in transfer (how one justly transfers an entitlement), and justice in rectification (how one rectifies violations of the previous two principles, and a principle that Nozick doesn't say much about). The basic moral rule is that you cannot violate entitlements. The principles

of justice in acquisition and transfer are the key features. You acquire an entitlement through luck, through physical labor (e.g., clearing 40 acres of land in the colonies at the time John Locke was writing about this notion) or through your mental labor (e.g., having bright ideas, like Thomas Edison). As long as you acquire your entitlement in a manner consistent with the Lockean Proviso (you didn't take it from someone else, there was "as much and as good" left for others), it is legitimate. Here is where Nozick and Rawls differ on the fruits of the social and natural lottery—Nozick agrees that you don't deserve your good luck, but says you're entitled to it because you acquired it in a manner consistent with the Lockean Proviso. Justice in transfer allows individuals to give, trade, or sell their entitlements to others on a voluntary basis (so charity and the market are the principal processes at work). The basic idea is that if society begins with a just distribution of entitlements and all the bilateral exchanges in a society are just, then the resulting distribution of entitlements is just as well. It is not a problem from Nozick's point of view if the cumulative effects of these exchange processes leave some with a lot and others with very little, which patterned theories of justice might condemn. Note that involuntary taxation violates Nozick's principle. As you might expect, such a theory doesn't allow for much government. Taxation must be supported unanimously—taxes for courts, cops and corrections and external defense as necessary to implement the principles of the theory will presumably receive unanimous support, but beyond that unanimity will break down and voluntary associations will have to pick up the slack. He therefore talks about "the minimal state."

Nozick's theory is pretty simple—you start at a distribution of entitlements that is just and as long as every transfer of an entitlement is just then each new distribution of entitlements along the way is just. But is this "one step at a time" account of justice compelling? Suppose that over several years (millions of individual transfers, each of which meets his criterion for justice in transfer), we end up with a world in which some individuals accumulate greater bargaining power than others, so they end up being able to command disproportionate shares of the gains from trade, which leads to growing inequality over time. Nozick wants to say that as long as the process is fair (one step at a time) then we can't criticize the unequal world as unfair because we can't identify a step along the way that's unjust. "Patterned" justice theorists disagree. You can't have it both ways, so this presents you with a fundamental choice about what you think justice means.

## **WALZER**

Elsewhere Walzer has written about "thin" and "thick" accounts of justice. A thin account is intended to be universal—all societies can subscribe to the substance of this account. The Universal Declaration of Human Rights, for instance, is a part of this widely-subscribed-to thin account. A thick account of justice is the fully articulated theory of justice that a society uses to analyze and settle particular issues before it. As a casuist, Walzer argues believes that the reigning thick account in a society is a function of the society's particular context, culture and history. Thus the differences among the fully articulated accounts of justice across nations. To get an idea of the casuist nature of Americans' conception of justice, fairness, etc., consider what moral and political and rhetorical power are attached to the following phrases: Jim Crow laws, McCarthyism, Watergate, Tuskegee experiment,

9/11, internment of Japanese-Americans, “separate but equal,” and so on. These have real normative power in the US, but probably would seem obscure (and certainly not as powerful) to citizens of other countries (who would have their own list of such terms).

The chapter of Spheres of Justice I’ve assigned lays out what Walzer thinks each nation faces as it constructs its own thick account of justice. Nations will arrive at different accounts of justice, each reflecting the context, history, and priorities they assign to the various spheres. His basic argument is that distributive justice is relative to social meanings. There are many social goods and they have social meanings in society and we find our way to distributive justice through an interpretation of those meanings. Meanings change over time and are therefore subject to dispute and reformulation. To give you a flavor of the social goods at issue, the other chapters of Spheres of Justice are Membership, Security and Welfare, Money and Commodities, Office, Hard Work, Free Time, Education, Kinship and Love, Divine Grace, Recognition, Political Power, and Tyrannies and Just Power.

Walzer’s is a pluralist theory—he tells us to attend to social GOODS, not to THE good. The result is what he calls a theory of complex equality. Each social good has a separate set of legitimate claimants and different goods are distributed for different reasons. Society works out principles that govern each of these spheres. He focuses on three different distributive principles (free exchange, desert, need) and how they apply in different spheres. The principal challenge to complex equality is that a person’s or a group’s relative power in one sphere can be converted to power in another and this may offend justice. Some inequality is nearly inevitable in each sphere, and this by itself may not threaten justice. But when one sphere (say, the economic), governed by one distributive principle, comes to dominate others (say, the political) which are governed by other distributive principles, injustice occurs. So, for example, money (generated by free exchange in the marketplace) may come to dominate politics (where equality of citizenship is the appropriate principle). Or family economic status may dominate opportunities to get an education, where we think a more egalitarian norm ought to reign. The challenges for complex equality are (1) to figure out what we thinking the appropriate norms are for the many social goods that make up society and (2) to keep some spheres from dominating others. The political community is where we work out our society’s response to these challenges.

One way to try on Walzer’s approach to see how it works is to identify something in society that you believe to be unjust and so see if you can construct a Walzerian argument about why it’s unjust and what society should do about it.

## **COMMUNITARIANISM**

This is a relatively new approach to justice, and is more of a political movement than a philosophical approach. It has its roots in the emphasis Republicans have placed on individual responsibility in the welfare debates, in calls for community values that come from the religious right, in the efforts of organizers to use the concept of community to organize neighborhood initiative in central cities, and in the attempts of the Democratic Leadership Council and the Progressive Policy Institute ([www.ndol.org/](http://www.ndol.org/)) to work out a

more middle-of-the-road Democratic agenda (a 'third way philosophy', with the Clinton Administration being the most significant example of this attempt).

Communitarians are usually committed to equality at some level, to mutuality and reciprocity, to stewardship as a way to embody community, and to liberty, but the latter is not assigned as high a priority as it is in more "liberal" approaches. The idea is to pay more attention to community values in shaping public policy and to involve community members more actively in public life. Since communities vary a great deal, public policies that arise from this approach will vary as well. Such outcomes are likely to be challenged on grounds of consistency or on grounds that community-based policies violate individual rights that transcend community. There is also the question of "which community?"

One communitarian practice that raises the hackles of opponents (often the ACLU) is shaming—using (the threat of) public humiliation as a tactic to influence behavior and reinforce the connections between an individual and his/her community. Americans are often suspicious about using "community values" to override individual liberty. What do you think about this practice—say, publishing in the paper the names and addresses of men picked up for soliciting prostitutes, for being ticketed for being drunk in public, etc.?

Communitarians are often supporters of mandatory national service (in the military or in some other public service arena), seeing in this service an important socializing influence, an exposure to young people different from themselves with whom they find common purpose, etc.). You might think about your views on this matter as a way to test your communitarian sympathies.

## **THE CONCEPT OF A RIGHT**

Here are some of the points I think are important in the reading so you'll have a sense of what I'm hoping you'll pick up as you read.

The first significant distinction is between moral and legal rights. Mostly in policy debates we are concerned with legal rights (which ones do we have, which ones we should have, etc.) Legal rights can be grounded in various kinds of arguments, including being derived:

1. from basic moral rights (Ronald Dworkin derives legal rights from the basic moral right to equal concern and respect; Robert Nozick appeals to basic rights concerning entitlements)
2. from rule-utilitarian reasoning (human welfare would be maximized by having a particular set of legal rights in place), or
3. through a social contract (we would choose to live in a society that guaranteed a particular set of legal rights; a Rawlsian social contract is an example here).

Rights theories of the kind in (1) use moral rights as the basic moral building blocks of

morality. The other arguments derive rights from more fundamental, non-rights moral principles. In this section of the course we're particularly interested in basic moral rights and the role they play in discourse about public policy.

Where do moral rights come from? In most theories, they are axiomatic--they are the givens, not derived from other things; they embody our deepest and strongest moral intuitions about what it means to be human and to act morally. They are often referred to as "natural rights," those rights we have by the very nature of being human (i.e., all moral agents have them). They constitute the basic rights without which we cannot act as moral agents and plan and carry out our lives.

The international level is where the notion of moral rights seems most critical. As we saw in our discussion of Peter Singer's solution for world poverty, the utilitarian argument has limited strength across national boundaries, so it may be insufficient to protect vital individual interests around the world. And the absence of an authoritative account of justice that applies to all societies weakens the power that concept to protect these vital interests. The notion of basic human rights as a grounding for morality resonates strongly here.

A (moral) rights claim is a very strong form of moral claim. The basic rule in a moral rights theory is "Don't violate a moral right." Because the idea that to violate a right is to act wrongly is so strong, we talk instead about "overriding a right" and the debate centers on what considerations permit one to override a right. The nature of a right presumes that you need compelling reasons to override it, and the language of moral discourse assigns the burden of proof to someone who argues for overriding a right. In Ronald Dworkin's language, a right "trumps" other forms of argument. In his structure, a right serves to trump a consequentialist argument that fails to honor Dworkin's basic moral right—the right to equal concern and respect. In Robert Nozick's theory of justice rights act as constraints—actions that don't violate rights are morally permissible, acts that do violate rights are prohibited.

The simplicity and clarity of the rule "don't violate rights" presents the principal challenge a rights theory faces—the theory must avoid circumstances in which rights conflict since such circumstances may preclude action of any kind. One can do this in one of two ways: (1) have few rights so that conflicts will be unlikely to arise (Nozick's approach) or work out a "hierarchy of rights" approach that allows higher priority rights to trump lower priority rights (making sure that the higher priority rights won't conflict very often). The UDHR includes too many rights for it to fit the first approach; you might go through it and identify the small number of "really basic" rights that would constitute for you the "moral minimum." The UDHR can provide good practice in the second approach. Going through the UDHR looking for potential conflicts among the rights enunciated there and thinking about how you would prioritize them is good practice in seeing how hard it is to construct sets of rights that do the job we want them to do in bringing moral order to international affairs.

## **RIGHTS AND DUTIES**



How do rights work? There are various accounts of this, but one you might consider is the following: in defining a right, we need to specify answers to the following questions:

1. What is the content of the right?
2. Why is the content of the right so basic that it should be enshrined in a right?
3. Who has a right against whom?
4. What duties are embodied in the right and who has them?
5. What kind of enforcement is appropriate?

As you read through the UDHR you might keep these questions in mind and try to identify some rights where you are confident of the answers and some others where you find it difficult to specify the answers.

### POSITIVE AND NEGATIVE RIGHTS

A distinction among rights that has featured prominently in debates about them is the distinction between “negative” and “positive” rights (or positive and negative liberties). The most well known discussion is Isaiah Berlin’s “Two Concepts of Liberty.” Negative rights are those where the principal duty of others is “to not interfere.” Rights of free expression, personal security, and property are typically used as examples. If I have these rights, you have a duty not to interfere with my expression, not to harm my person and not to take my property. These duties are “negative”—they don’t cost you anything. Positive rights, on the other hand, such as a right to health care, a right to an education, a right to food, or a right to a job, assign “positive” obligations to others—you may have to use your resources to pay for my health care, my education, my food, or my wages. In general, the US government has, at both the domestic and international levels, been more receptive to claims about negative rights than about positive rights. This distinction is not as simple as it might at first glance appear. It may help to think about there being a range of duties, from non-interference, to stopping others from interfering, to removing barriers that allow others to achieve the substance of their right, to actually putting up resources to guarantee the substance of others’ rights. Thus, while it is true that negative rights call for non-interference by others, and if everyone fulfilled this duty there would be no need for further response by society, it turns out that societies spend a lot of money making sure that negative rights are honored (for starters, on police, judicial, corrections systems, and defense forces). Some of the hardest cases involve positive rights where the corresponding duties are “imperfect” in the sense that the party with the duty is not specified. An important case of this is humanitarian intervention—genocide violates human rights and nations have obligations to intervene, but the fact that every nation has such an obligation often leads to none of them stepping up to act.

The assignment for the presenters on Thursday is to talk about Article 25, Section 1 of the Universal Declaration of Human Rights: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing,

housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” This is one of the significant rights in the UDHR. It is a “positive” right in the way that term is usually used. If it’s a moral right, who has what kinds of obligations to guarantee it (so that it’s treated as a right, not just an aspiration)? What do you say to the argument that the negative and positive rights in the UDHR are separable, that the former are more fundamental?