

## Concepts for Cases

### I. Basic Ethical theory

#### ***Deontological theories***

Deontologists believe that certain moral acts are right in themselves, and not in virtue of the consequences that will likely follow from such acts.

##### *Kant*

Two versions of the Categorical Imperative

1. Act only on maxims that are *universalizable*. (*Universalizability*)
2. Treat persons as ends in themselves and never merely as means. (*Respect for persons*)

*Perfect and Imperfect duties*. Perfect duties are clearly spelled out and absolutely binding. For example if I make you a promise, I owe it to you to keep my promise. Imperfect duties allow for more latitude. I have a duty to be charitable but no particular person has a right to my charity; rather I can choose how to be charitable.

***Moral Rights*** are *legitimate claims which society should uphold*. These claims imply *correlative duties*. The most commonly cited rights are: *right to life, right to liberty, right to property, right to bodily integrity*. Liberty is not an unlimited right. Rawls described it as a right to as much freedom as is compatible with a like amount for others. JS Mill introduced the harm principle as a limitation on liberty; my liberty ends when its exercise does harm to others. Property is not an unlimited right either. Locke based the right to property on the need to have means to preserve life, so we can't claim so much that not enough is left for others.

***DW Ross*** argued that we have certain *prima facie duties*. These are duties that we know are morally binding on all persons, but to figure out what duties we have in a particular case, (*actual duty or duty all things considered*) we must see what prima facie duties are involved in the case, how to prioritize them, etc. He offered the following list of types of prima facie duties: *duties of fidelity, gratitude, justice, beneficence, self-improvement and a duty not to harm others (non-maleficence)*.

***Contractarian*** views. Some people hold that our duties are the duties that rational persons would agree to under some ideal bargaining situation. **John Rawls** described the ideal bargaining situation as one where persons were in the *original position* (we are coming up with the rules which will bind us all), *behind a veil of ignorance*. (Here we imagine that but we don't know the details about ourselves that will allow us to be influenced by our particular self-interest.) Rawls also thought that we would want to rules to be at least acceptable to *the least well off*.

#### ***Teleological views***

***Consequentialism*** is the view that morality is a function of the consequences that we can create by our actions. Thus we should use *consequentialist principles*.

*Utilitarianism* is the view that the right act is the one which maximizes pleasure (*hedonistic utilitarianism*—This view is associated with Jeremy Bentham), or happiness (JS Mill), or preferences (*preference utilitarianism*).

Other consequentialists have argued that there are other goods that we should try to maximize. Amartya Sen argues that we should maximize pleasure and justice; GE Moore argues that we can recognize a number of things (e.g. beauty) as *intrinsic goods* (something good in itself and not because it would be a means to achieving something intrinsically good. This second kind of a good is an *instrumental good* ).

### ***Virtue Theory***

Virtue theorists say that we should develop our *virtues*--certain fixed dispositions to behave in a certain way. The right dispositions are those that would allow us to live a *flourishing human life* in a *just society*.

Some (Mill and Kant) argue that we need to look to independent standards to decide what dispositions are virtues, and which not. Mill appeals to utility, Kant the categorical imperative.

Different descriptions of virtue have been developed which depend on differing conceptions of human flourishing. Plato stressed *justice*, Aristotle *courage*. These are virtues needed by the citizen warriors of Athens. In the Christian tradition we *see faith, hope, charity and obedience* as the cardinal virtues. Confucius stresses *jen (benevolence, humanity), righteousness, propriety and filial piety*. Other virtues you might talk about are *honesty, fidelity, loyalty, kindness*.

In an *Ethic of Care*, *caring* is the primary virtue (Although Nel Noddings doesn't see it as a virtue but a complex orientation to relationships). In my account of an Ethic of Care, *caring* involves *moral attention, and sympathetic understanding*.

## **II. Topics in Ethical theory**

### ***Group Rights***

1) Robert Williams Jr.: (Director of the Indigenous People's Law and Policy Program at James E. Rogers College of Law (U of Az)

*Doctrine of Discovery* which "refused to recognize legal status or rights for indigenous tribal peoples because 'heathens' and 'infidels' were legally presumed to lack the rational capacity necessary to assume an equal status or exercise equal rights under the European's mediievally-derived legal worldview." (641)

Argues for an "*Americanized*" *scholarship* which offers a "vision of life which might permit both peoples to pursue their separate paths in peace and without resort to power". (639) "At the core of an *Americanized* vision of law is the idea that freedom requires different peoples to respect each other's vision of how their respective vessels should be steered." (642)

*Tribal nations resist integration* because they "have not forgotten the history of conquest justified by European-derived legal discourse....Pushed to the brink of extinction by the premises inherent in the European's vision of the world, contemporary tribalism recognizes the compelling necessity of articulating and defining its own vision within the global community". (643)

2) Will Kimlicka, <http://hevra.haifa.ac.il/~soc/lecturers/smooaha/files/1812.pdf>

3) Seyla Benhabib: argues that people who say that we should always respect group rights, claims to cultural sovereignty, we are accepting a picture of culture as univocal. Instead she sees culture as "complex human practices of signification...representation...organization and attribution, which are internally riven by conflicting narratives." So, "struggles for recognition that expand democratic dialogue by denouncing the exclusivity and hierarch of existing cultural arrangements deserve our support." (ix)

### ***Reproductive Rights***

When we talk about reproductive rights, most people think of rights to birth control and abortion. Reproductive rights are framed in these debates primarily as negative rights--the right to be free from interference in the use of these rights. Angela Davis expands the idea of what a reproductive right is by pointing out the history of reproduction in the U.S. for poor women and women of color--forced reproduction of African American slave women, forced sterilization of black and other women of color (especially Native American women) in later years. This coercion extends to social and economic conditions that pressure these women not to reproduce. Hence, she argues for an expanded notion of a right to reproduction, which includes both a negative right and a positive right.

1) Angela Davis' Reproductive Right

Negative right:

the right to legal and easily accessible birth control and abortion and right not to be sterilized without free and informed consent.

Positive right:

the right to provide adequately for any children you decide to have.

2) Mary Gibson's Reproductive Right

Gibson focuses on the way women's (and men's) reproductive choices have been constrained by industry. There women have been forced to choose between reproduction and gainful employment. This issue was ultimately decided by the U.S. Supreme Court in *UAW v. Johnson Controls* (a summary of which is in your packet). She defines a reproductive right primarily as a negative right:

The right to make one's own decisions about whether and when to have children and at what risk and to carry out these decisions.

3) John Robertson gives us a moral rights defense. We have a moral right to procreative liberty. Procreative liberty is part of a liberty right because reproduction is "central to personal conceptions of meaning and identity. To deny procreative choice is to deny or

impose an all-encompassing reproductive experience on persons without their consent, thus denying them respect and dignity at the most basic level”.

### ***Environmental Ethics***

We have two main options of the question of moral considerability:

*Anthropocentric view*: humans are the only morally considerable creatures.

We ought to use the earth and its non-human creatures as a resource for the well-being of humans, including future generations.

Non-anthropocentric views include:

*Sentience view*: All creatures capable of feeling pleasure and pain are entitled to moral consideration. This view is associated with Utilitarianism. It was Jeremy Bentham’s view and Peter Singer is a strong current defender of it.

*Holistic views*

The earth taken as a whole is morally considerable and we are merely a part of it.

### ***Health care Ethics***

The central values are:

*Do no harm. (non-maleficence)*

*Benefit patients (beneficence)/ Do what is in the patient's best interest.*

*Patient autonomy* (respect for patients as autonomous agents)

*privacy, confidentiality, informed consent, patient's rights*

*Allocation of health care resources* (Justice in how we allocate scarce resources.)

(These first four are called the “Four principles approach”)

I would also add: *Professional responsibility* (a virtue conception), *Care* and *Cultural sensitivity*.

Note that these can conflict. In particular, patient autonomy can often conflict with what a *health care practitioner* thinks is in the patient's best interest. A health care practitioner's professional responsibility can also conflict with patient autonomy. Patients or their families can want treatment that, if given, would strain health care resources.

*Some common medical terms*

*DNR Do not resuscitate.* (Sometimes called "no code"). A competent patient (one generally aware of what is going on) can sign a DNR. A family member can sign one for an incompetent patient. This means that if the patient's suffers a cardiac arrest or some other life-threatening event, nothing will be done beyond keeping the patient comfortable.

*CPR Cardio-pulmonary resuscitation.*

*PVS Persistent vegetative state.* In this irreversible brain state, the only the brain stem (lower brain functions) is working. Higher brain function is lost.

*Death* In the U.S. the *whole-brain standard* is used to pronounce death. In other places the *cardio-respiratory standard* is used. Some have argued for using a higher-brain function

standard since when we lose higher brain function we lose the ability for sensation and any cognitive awareness.

*Medical futility* Health care practitioners say that when there is nothing else that would make a difference in whether someone lives or dies that treatment is *medically futile*. Of course there may still be many things that can be done to make the patient more comfortable.

*Euthanasia* refers to the practice of ending a patient's life. *Passive euthanasia*, the withdrawal of treatment that is merely prolonging the dying process is defended by the AMA. *Active euthanasia* involves taking a deliberation action aimed at killing the patient. When this is done by a physician, it is called *physician assisted suicide*. (Many people question whether the distinction between active and passive euthanasia is either medically or morally significant.)

*Living will* This is a document where you say how you would want to be treated medically in the event that you are incompetent. People often pair this with a *durable power of attorney for health care* where they assign a particular person or persons to make health care decisions for them in the event that they can't make them for themselves.

### ***Professional Codes of Ethics***

Professional codes are designed to provide a shared view of moral standards for particular professions, to provide a standard for teaching and discipline, and to guide the behavior of members in difficult situations. Like all moral rules, they must be defended. The defense can be made in two ways: by appeal to their centrality to the furtherance of a particular institution and the utility of that institution, and on other moral grounds (e.g. respect, care, virtue). So if a professional code of ethics is relevant, look at the code and critique by appeal to these two defenses. If it (or the relevant clause) is defensible, what does it tell the professional to do?

<http://ethics.iit.edu/index1.php/Programs/Codes%20of%20Ethics>

### **III. Shared Concepts in Ethical Theory**

*Moral responsibility* involves a competent agent who could have done otherwise and who knew or should have known that his/her action or omission would cause harm, and whose action or omission was part of the causal chain that resulted in harm.

*Ought Implies Can* This is the idea that I cannot be morally obligated to do something that is beyond my ability.

*Supererogation* An act is *supererogatory* if it morally praiseworthy but above and beyond the call of duty.

### **IV. Political Philosophy**

#### ***Liberalism***

John Locke ( 1632-1704)

1. A State of Nature and *Natural Rights to life, liberty and property*
2. A *Social Contract* must protect these natural rights.
3. Government is legitimate if it has the consent of the majority.
4. The *Common Good* as a limitation on freedom.
5. In the state of nature men and women are equal, and no one's moral rights may be violated by a legitimate social contract.
6. One is entitled to claim as one's property something that one has mixed one's labor with as long as as much and as good is left in common for others.

John Stuart Mill ( 1806-1873)

1. The only legitimate restriction on liberty is harm to others. (This is called *the harm principle* and is a very common foundational principle in legal systems.)
2. Individual liberty is a fundamental value because it is only through the free marketplace of ideas that we can figure out what is true and no one is a better judge of what will make you happy than you are.

John Rawls

1. Modified Social Contract (*the Original Position*)  
Bargainers who were behind *a veil of ignorance* (with no knowledge about factors that would allow self-interest to come into play) and asked to choose principles of justice are said to be in the Original Position. Rawls argues that they would choose his Principles of Justice (PJ). Here is how the bargainers will reason:
  1. I will want to be happy and have self-respect.
  2. Being happy and having self-respect requires that I have a rational plan of life and be following it with some success.
  3. Following such a plan requires liberty and other *primary goods* (Goods which I would want, regardless of what else I want.).
  4. The PJs will give me the best shot at following my rational plan with some success,
  5. I will accept the PJs.
2. Two principles of justice would be chosen in the original position.  
"First Principle  
Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.  
Second Principle (Note: also called *the Difference Principle*)  
Social and economic inequalities are to be arranged so that they are both:
  - (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
  - (b) attached to offices and positions open to all under conditions of *fair equality of opportunity*." A Theory of Justice p. 302

Robert Nozick (*Libertarianism*)

1. Kantian respect for persons requires that we respect negative liberty.
2. The only government which respects negative liberty is an extremely minimal one. (This is the *libertarian night watchman state*).
3. This night watchman state should protect my liberty and property.

***Communitarianism***

Michael Sandel, Alasdair MacIntyre, and Alison Jaggar are prominent contemporary communitarians. Though Communitarians differ on a range of issues, there is some agreement about the following:

1. The liberal theory of human nature (what Sandel calls the *unencumbered self*, Alison Jaggar *abstract individualism*, MacIntyre the Sartrean self) is wrong. The better theory is that humans are what Sandel calls *embedded selves*.
2. The source of value is in some sense social.
3. Humans are not autonomous in the liberal sense. That is they are not free to decide what to value (choose, etc.) Rather, their choices are severely constrained by their societies, traditions, etc. There is a second sense of autonomy, freedom from constraint. Liberals endorse this as a value, communitarians, who believe that we are already constrained by our societies etc. are more skeptical.
4. We should be concerned about protecting communities, and not just individuals. (They might also add, and feminist and Marxist communitarians (e.g. Jaggar) would certainly agree, that a recognition of the role of our communities in shaping us requires a rigorous critique of social institutions.)
5. The criticism of existing social institutions will (should? inevitably does?) spring from our traditions and history.

**V. Issues in Political Philosophy**

***Justice***

*Distributive Justice*

This concerns the distribution of social goods. Libertarians argue that we shouldn't distribute social goods because doing so is a violation of the right to property--I am entitled to whatever I can legitimately get for myself. Others argue that at least some social goods are important enough to need to be distributed by a *principle of distributive justice*. Some options for such a principle are *equality, merit or contribution, need and ability (Marx)*. Equality in distribution can be defended either as *equal opportunity* or *equality of outcome*.

*Retributive Justice*

This concerns how we punish people. The two main theories here are *retributivism, and deterrence theory*. Retributivists argue that the punishment should fit the crime. Deterrence theorists argue that punishment should deter both the person contemplating committing a crime (*special deterrence*) and anyone else who might contemplate committing a crime (*general deterrence*).

*Compensatory Justice*

This concerns how we compensate victims.

### *Equality*

There are two rather different ideas of what equality means. The first is treating everyone the same. The second is equal burdens or benefits. Take taxes, for example. Defenders of equality as sameness might argue that everyone should pay the same percentage of income in taxes while a defender of equality as equal burden would argue that 10% of a million dollar income would be a smaller burden than 10% of a \$20,000 income.

### *International relations*

#### *Rawls, Law of Peoples:*

The L o P is derived from an international conception of the Original Position. (He calls this the second Original Position.)

1. The representatives are "the rational representatives of liberal peoples"
2. They are rational "since the parties select from among available principles for the Law of Peoples guided by the fundamental interests of democratic societies, where these interests are expressed by the liberal principles of justice for a democratic state." (32)
3. V o I applies. They do not know, "the size of the territory, or the populations, or the relative strength of the people whose fundamental interests they represent." (32)

They are "(1) reasonably and fairly situated as free and equal, and peoples are (3) deliberating about the correct subject, in this case the content of the Law of Peoples...Moreover, (4) their deliberations proceed in terms of the right reasons (as restricted by a veil of ignorance). Finally, the selection of principles for the Law of Peoples is based (5) on a people's fundamental interests, given in this case by a liberal conception of justice (already selected in the first original position)." (33)

He argues (41) that the following conditions, which he describes as "familiar and traditional principles of justice among free and democratic peoples" are the ones that would be chosen in OP2.

- "1. People are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. People are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-respect but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restriction in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their have a just and decent political and social regime." (37)

### *Civil Disobedience*

From Stanford Encyclopedia of Philosophy: "On the most widely accepted account of civil disobedience, famously defended by John Rawls (1971), civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. On this account, the persons who practice civil disobedience are willing to accept the legal consequences of their actions, as this shows their fidelity to the rule of law. Civil disobedience, given its place at the boundary of fidelity to law, is said to fall between legal protest, on the one hand, and conscientious refusal, revolutionary action, militant protest and organised forcible resistance, on the other hand." <http://plato.stanford.edu/entries/civil-disobedience/>

### *Immigration*

1) See discussion of citizenship in Stanford Encyclopedia of Philosophy.  
<http://plato.stanford.edu/entries/citizenship/>

2) Michael Walzer, *Spheres of Justice*: Most important good to be distributed is membership in the community. Basic Argument: "...it is only as members somewhere that men and women can hope to share in all the other social goods - security, wealth, honor, office, and power - that communal life makes possible." (63) (Page numbers are from Walzer's book,)

#### *Principles for distributing membership:*

- I. Global Libertarianism: no membership should be distributed.
- II. Global Socialism: All human beings are members of a global state.
- III. Neighborhood: No bar to entry; individuals and families choose (within the constraints of market) to be members of whatever state they choose.
- IV. Club: Only original members choose themselves; all others are chosen by members by appeal to standards adopted by members.
- V. Family: We are obligated to offer membership to "particular groups of outsiders, recognized as national, ethnic" or political "relatives".
- VI. Mutual Aid: Membership should be granted "if (1) it is needed or urgently needed ... (2) if the risks and costs of giving it are relatively low." (33)

#### *Argument against III. (37-39)*

1. "Such a world would not allow for patriotic sentiments."
2. Free movement might interfere with efforts "to raise the standard of living among the poorer classes."
3. The promotion of moral and intellectual culture and the efficient working of political institutions might be "defeated" by the continual creation of heterogeneous populations."
4. Most people are "inclined to stay where they are unless their life is very difficult there."
5. "Neighborhoods can be open only if countries are at least potentially closed."
6. "The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life."

*Argument against IV:* We sometimes feel the bounds of kinship to help others who are not members and we have a general obligation of mutual aid. (Why? This is hard to argue for on Walzer's grounds.)

Walzer appears to settle on a combination of IV, V and VI, with the restriction that the state has an obligation to protect its territory and way of life. VI. provides a prima facie reason why needy immigrants should be admitted.

*Walzer's Restrictions on Immigration*

Need to protect some territory

- a) because the link between land and people is crucial feature of national identity,
- b) many issues can best be resolved within geographical units.

Need to protect way of life that is required for stable, ongoing associations of people with special commitments to each other.

*Argument for territory:*

1. "...the link between people and land is a crucial feature of national identity." (44)
2. "...because so many critical issues...can best be resolved within geographical units, the focus of political life can never be established elsewhere." (44)

*Argument that Way of Life should be protected:*

1. Without the protection of way of life, "there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life".

*Walzer's Argument for allowing all immigrants to become citizens*

Walzer argues that if we allow immigrants, we ought to allow them to become citizens. (Here, he is focusing on guest worker programs, but perhaps we could generalize this discussion to illegal immigration.)

*Argument:*

1. "...the processes of self- determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law." (60)
2. "Political power is precisely the ability to make decisions over periods of time, to change the rules, to cope with emergencies; it can't be exercised democratically without the consent of its subjects." (58)
3. "And the subjects include every man and woman who lives within the territory over which those decisions are enforced."(58)
4. Guest workers have not consented in any real sense to their existence outside the political community.

5. Guest workers are not tourists "who spend their days as they please...." (59) They are even more subject to the state than citizens are.
6. Guest workers "do socially necessary work." (60)

Walzer does not address the question of whether we should allow visitors to our country and under what conditions we should admit them, but presumably we can use the same criteria for deciding whether to grant visas.

3) See also **Howard F. Chang**, "Immigration Policy: Who Belongs? The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory" , Winter, 41 *Cornell Int'l L.J.* 1 (2008)