

1 Law and Social Justice: A Framework

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The Inland Northwest Philosophy Conference (INPC) is a conference hosted annually in Pullman, Washington, and Moscow, Idaho, by the philosophy departments at Washington State University and the University of Idaho. The contributions to this volume are, or are descendants of, some of the presentations made at the Fifth Annual INPC in the spring of 2002. The topic of that year's conference was "Law and Social Justice," a topic whose considerable breadth is illustrated by the breadth of these contributions. In addition to two special parts at the end of the volume on "Wittgenstein and Legal Theory" and "Author Meets Critics: A Panel on Jules Coleman's *The Practice of Principle*" (parts that have their own separate introductions, by Douglas Lind and Ken Himma respectively, and about which I shall therefore say nothing further here), the focus of these contributions ranges from broad, foundational, issues in moral, social, and political theory—instrumentalist versus Kantian conceptions of rights (Wenar), a defense of an egalitarian principle of distributive justice (Christiano), and the implications of a certain conception of "deliberative democracy" (Cohen)—to very specific problems regarding the admissibility of evidence of causation in toxic tort cases (Cranor); from questions concerning the extent to which the initial acquisition of goods yields property rights (Levey) to the treatment of intellectual property in China (Ivanhoe); from the place of "moral luck" in the criminal law (Eisikovits) to the place of strict products liability in business law (Silverstein).

The opening essay is Joshua Cohen's "Privacy, Pluralism, and Democracy," which is derived from his keynote address at the conference. Cohen focuses on the implications of his conception of "deliberative democracy" for privacy, both "privacy rights"—the rights it would be appropriate to honor as part of a society's formal political and legal structure—and

“privacy conventions”—informal social norms specifying conventions as to what topics are and are not suitable for public discussion. Deliberative democracy, as Cohen conceives it, contains three key ideas: (1) a conception of citizens as free and equal; (2) the contention that reasonable citizens do in fact adopt different, conflicting, “philosophies of life” (“the fact of reasonable pluralism”); and (3) the claim that a society’s coercive collective decisions should be founded on the “public reasoning” of its citizens. And the crucial implication is that such public reasoning can legitimately be concerned only with considerations that are not restricted to a particular philosophy of life. For, in Cohen’s words, “People are *reasonable, politically speaking*, only if they are concerned to live with others on terms that those others, understood as free and equal, can also reasonably accept”; and given that others may not accept one’s particular “philosophy of life,” the defense of those terms cannot depend on that philosophy.

The question, then, is whether, and to what extent, privacy rights and/or privacy conventions can be defended on the basis of deliberative democracy and its conception of public reason. Though Cohen expresses skepticism regarding the extent to which this framework can be used to defend informal privacy conventions, he claims that it does provide support for privacy rights. And one of the more theoretically significant implications of this claim is that defense of such rights does not depend on political liberalism; for, as Cohen emphasizes, liberalism is simply one philosophy of life among others, and, as such, cannot be appealed to in the public reasoning that underlies those rights.

In “An Argument for Egalitarian Justice and Against the Leveling-Down Objection,” Thomas Christiano defends equality as a principle of distributive justice, a principle asserting “that individual persons are *due* equal shares in some fundamental substantial good” (where a “fundamental good” is a good “whose value is not derivative from any other good,” and a “substantial” good is one that “any rational being must pursue”). He distinguishes this view from views according to which equality is merely a “good making property,” and also from both (1) a “formal” conception according to which “one must treat relevantly like cases alike and unlike cases unlike,” and (2) a “moral” conception according to which “all human beings have the same *fundamental moral status*.” The latter two conceptions, however, are included among the premises used in his defense of his

distributive principle, a defense that also appeals to (3) a “principle of propriety,” (4) a particular conception of the special significance or status of persons, and (5) a closely related conception of “well-being” as the substantial fundamental good that should be distributed equally. The principle of propriety is simply the principle that justice consists in a person’s getting his or her due. Combining this with the “formal” principle, we get the result that “the relevant similarities and distinctions among persons that justify similar or different treatment” must be “ones that are meritorious or features that display a distinctive worth or status in the persons.” And our “distinctive worth or status” as persons, Christiano argues, lies in our “humanity” and consists in our “capacity to recognize, appreciate, engage with, harmonize with, and produce intrinsic goods”; the “equal moral status” of human beings then derives from the fact that this capacity is one we all share. Conceiving “well-being” as “that quality of a person’s life that involves an appreciative and active engagement with intrinsic goods”—a conception according to which “well-being” is clearly closely connected to that which provides persons their special status—Christiano contends that “well-being” is the good that, according to his principle, should be distributed equally: “only equality of well-being is compatible with the fundamental value of well-being, the formal principle of justice and the absence of relevant differences between persons.” The paper concludes with a defense against the “leveling-down objection,” the objection that egalitarians are counterintuitively committed to holding, for instance, that if S1 is an egalitarian state, whereas S2 is non-egalitarian but strongly Pareto superior to S1 (everyone has more well-being than they do in S1), then S1 is preferable to S2. The heart of Christiano’s response is that egalitarians are not committed to holding that every egalitarian state must be superior, in at least one respect, to any non-egalitarian state, but only “that for every non-egalitarian state there is some (not Pareto-superior) egalitarian state that is superior to the non-egalitarian state.”

Carl F. Cranor’s “Justice, Inference to the Best Explanation, and the Judicial Evaluation of Scientific Evidence” is concerned with the implications of three controversial decisions by the U.S. Supreme Court—*Daubert v. Merrell-Dow Pharmaceuticals Inc.* (1993), *General Electric v. Joiner* (1997), and *Kumho Tire v. Carmichael* (1999)—for the admissibility or inadmissibility of evidence of causation in toxic tort cases. These decisions give judges not

only a “heightened duty” to determine whether (alleged) scientific evidence of causality is admissible, but wide latitude both in making, and in deciding how to make, this determination. And, in Cranor’s view, the admissibility decisions courts have made on the basis of this heightened duty have often been mistaken, primarily because they have failed to appreciate both the importance of “inference to the best explanation” as a form of scientific reasoning and the various kinds of evidence that can provide a basis for such inferences. The specific mistakes courts have made, according to Cranor, include the following, among others:

1. Demanding that experts base their testimony at least in part on epidemiological studies. As Cranor argues, although good epidemiological studies provide excellent evidence of causation, they are not the only source of such evidence; case studies (to which Cranor devotes considerable attention), animal studies, and diagnostic tests may also provide such evidence, evidence that in many circumstances is sufficient.
2. Regarding negative epidemiological studies as demonstrating lack of causation. This in effect conflates “no evidence of effect” with “evidence of no effect.”
3. Excluding specific kinds of evidence, such as case studies and animal evidence—and relatedly, failing to appreciate the “never throw evidence away” principle and “weight of the evidence” arguments. For example, in *General Electric v. Joiner*, the district court excluded each item of evidence piecemeal without considering the weight of the evidence as a whole—a policy that the Supreme Court later strongly endorsed.

And in virtue of such mistakes it may well be that plaintiffs have unjustifiably been denied relief in cases where they were in fact injured by defendants’ toxicants.

The problem of “moral luck”—a problem introduced, at least in recent philosophical literature, by Bernard Williams and Thomas Nagel—is the topic of Nir Eisikovits’s “Moral Luck and the Criminal Law.” As Eisikovits notes, we constantly make moral—and legal—judgments that depend on factors beyond the agent’s control, and, thus, on moral luck. For example, if the driver of a school bus dozes off at the wheel and swerves into the opposite lane, our condemnation of him—and the legal punishment he would face—would typically be much more severe if his lapse injures or kills someone than if it “luckily” does not. Yet this obviously conflicts with

standard assumptions about the legitimate bases for, and limits of, the ascription of moral responsibility. Following Nagel, who distinguishes four categories of moral luck—"constitutive luck" (which concerns the agent's inclinations, capacities, etc.), "circumstantial luck" (which involves the problems and situations deriving from an agent's specific history), "causal luck" (which has to do with the circumstances antecedent to action), and "outcome luck" (which concerns the way our projects and actions turn out)—Eisikovits begins by discussing the fourth category, outcome luck, which has been the primary focus of the debate regarding moral luck among commentators on the criminal law. He summarizes, and provides some criticisms of, the arguments on behalf of the opposing views in this debate—the "subjectivist view," which holds that, since "only intentions, and the criminal acts they produce, are subject to an agent's control . . . they alone constitute the appropriate basis for responsibility and punishing," and the "objectivist view," which holds that, although intentions do indeed have a role in the ascription of blame and punishment, the amount of harm that an agent's act causes is also a relevant factor. Yet Eisikovits refuses to take sides in this debate, contending that "the problem of moral luck represents a paradox in the heart of our moral practices; it needs to be described rather than 'solved,' since paradoxes cannot be argued away." But what can be done, he claims, is to "elucidate and explain" how the paradox operates. And he concludes his essay by attempting two such elucidations: (1) a demonstration of the significance for the paradox of the distinction between anger and blame, and (2) a discussion of the ways in which, despite the emphasis in the literature on outcome luck, both constitutive luck and circumstance luck are relevant to the criminal law.

In "Intellectual Property and Traditional Chinese Culture," Philip J. Ivanhoe looks at the historical and intellectual background of traditional China in an attempt to explain why China has not developed a strong conception of intellectual property rights. He rejects the explanation propounded by William P. Alford in *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*—an explanation whose central contention, according to Ivanhoe, is that "classical, canonical sources" were so revered in traditional China "that no one dared to claim that they had created something new and of sufficient value to bother identifying it as their own." Ivanhoe rejects this explanation on the grounds that, first, it does not distinguish China from the West—indeed, Ivanhoe claims that

there were perhaps more competing traditions, and more variety within each tradition, in China than in the West; and, second, that, even if there had been a unified view concerning the significance of certain classical sources in traditional China, “there is no clear conceptual link” between this and opposition to the idea of intellectual property. Ivanhoe’s alternative explanation contains two “complementary parts.” The first concerns the fact that intellectuals were construed as working for, or at least in support of, the empire, to which, therefore, anything they produced belonged. Hence, “there was little room for personal claims of ownership.” And the second concerns the philosophical conception of knowledge, or at least its most important part—knowledge of the *Dao* or “Way.” The crucial point here is that, given the *Dao*’s objectivity, activity that conforms to it is regarded as arising “out of spontaneous, natural processes as opposed to calculated, personal schemes,” and is thus “thought to be *ziran* ‘so of itself’ rather than the result of individual effort.” Hence, “any idea or cultural creation that is true, good, and beautiful can never belong to an individual, rather, both by nature and function, it belongs to everyone.” At the end of his paper Ivanhoe suggests some possibly fruitful modifications to the policies and attitudes we adopt in dealing with China, and with other countries, on the issue of intellectual property.

Property rights are also the focus of Ann Levey’s “Initial Acquisition and the Right to Private Property”—though her concerns, and the context of her discussion, are very different from Ivanhoe’s. Levey criticizes theories that claim that the initial acquisition of goods yields full ownership rights. “First possession justifications,” in her view, depend on the “asymmetry thesis,” the thesis that, since later comers are competing with those who are already using the goods or territory in question whereas first comers are competing with no one, there is a significant asymmetry between first possessors and those who arrive later. And the asymmetry thesis in turn rests on two assumptions, the “no antecedent claims” assumption and the “moral meaningfulness of first claims” assumption—assumptions that, she argues, “are at least contentious.” One reason one might reject the “no antecedent claims” assumption, Levey suggests, is that one might hold that “everyone has equal competing claims to the world.” Such a view she ascribes to Locke; for Locke held that God gave the earth to mankind in common, which means we all have rights to it—and, thus, that it’s false to say that, prior to acquisition by a first comer, there are “no antecedent

claims.” Further, although she admits that asymmetry is part of Locke’s account, she contends that his asymmetry “is uninteresting from a justificatory point of view” since it “plays a role in allocation only. The justificatory role is played by one’s equal claim to have access to the means of self-preservation.” Moreover—and crucially—she argues that accounts such as Locke’s fail to justify “full-blown ownership rights.” Turning to the moral meaningfulness of first claims assumption, Levey contends that proponents of the asymmetry thesis assume that, given the no antecedent claims assumption, initial acquisition is “morally unproblematic.” But although “mere takings” may be morally unproblematic in this context, the acquisition of genuine property rights, she argues, is not. For genuine property rights impose duties on later comers, duties that those later comers need a moral reason to accept; and later comers “appear to have no such moral reason, at least in the absence of already sharing a conception of acquisition with would-be appropriators.” In short, the moral meaningfulness of first claims assumption is essentially question-begging.

In “Justice and Strict Liability” I discuss the strict liability policy that most states have applied to product liability since the 1960s. According to this policy, a company is properly held liable for harms caused by a defect in one of its products even if that defect did not result from negligence, or any other fault, on the part of the company. This policy thus conflicts with what seems to be a very plausible principle regarding the conditions under which a person (including a legal person, such as a company) can justly be held responsible for a harm—the principle that, roughly, a person cannot justly be held responsible for a harm unless either (1) that person voluntarily agreed to take responsibility for harms such as the one in question, or (2) the harm resulted from that person’s doing something wrong. I argue that neither the two main legal defenses of strict liability—the “make the company shape up” defense and the “distribute the burden” defense—nor two recent philosophical defenses by George G. Brenkert and John J. McCall succeed in defending strict liability against the charge that it is unjust because it violates this principle. I conclude, however, by giving my own defense of strict liability, a defense that attempts to undermine this charge by showing that not only are there a number of noncontroversial cases outside the product liability sphere in which our judgments of responsibility conflict with this principle—cases in which we hold

parents responsible for harms caused by their children, pet owners responsible for harms caused by their pets, and so on—but that such cases share important features with product liability cases. In short, I attempt to show that, if this principle is not simply false, it at least has an important class of exceptions, a class that can properly be taken to include product liability cases. At the end of the paper I make a very tentative suggestion regarding the principle, or type of principle, that may underlie these exceptions.

One of the foundational issues in moral theory—the justification of rights—is the topic of Leif Wenar’s “The Value of Rights.” His focus is the debate between “status-based” and “instrumental” theories of rights, the former claiming that rights are justified as due the rights-holder in virtue of his or her status, the latter that they are justified as “instruments for achieving further state of affairs”—more specifically, as “instruments for bringing about distributions of advantage.” Though this distinction may sound like the distinction between Kantianism and utilitarianism, Wenar insists that “the stylized contrast between Kantian theories and utilitarian theories is misleading.” For in the first place this contrast is not exhaustive; the class of instrumental theories, Wenar claims, is a great deal larger than the class of utilitarian theories and includes, *inter alia*, egalitarianism, perfectionism, Scanlon’s contractualism, both Dworkin’s and Posner’s theories of law, and even Rawls’s theory of justice. And in the second place, status-based and instrumental theories, as he construes them, are not mutually exclusive. Indeed, at the end of the paper he argues not only that a few rights—for example, the “right in utilitarianism to have one’s interests taken equally into account,” or the “right in Dworkin’s theory to equal concern and respect”—require a status-based justification, but that such rights are foundational for instrumental theories. His central concern, however, is to show that most rights, including “classical individual rights” such as rights to free speech and bodily integrity, can best be defended by instrumental theories. Focusing primarily on free speech, Wenar argues, for example, that instrumental theories, unlike status-based theories, can appeal not only to the advantages of free speech for those who exercise it but to its advantages for audiences. And on a more specific issue, he argues that instrumental theories can do a much better job of explaining “an interesting and important part of our settled understanding of the right to free speech,” namely, “that there should be a legal right to lie in political speech, but no legal right to lie in commercial speech.”

Despite the great variety of issues and concerns illustrated by these essays, perceptive readers will no doubt be able to find a number of connections among them. I will conclude this introduction by considering one such connection, a focus on the strategy of attempting to derive comparatively specific, and often controversial, judgments from more abstract and putatively less controversial principles. At least four of the eight essays I describe can legitimately be viewed as having at least some concern with this strategy. Levey in effect criticizes an attempted use of it by contending that the relevant grounding principles are more controversial than their proponents assume; I make a similar criticism, but conclude with a brief, tentative, suggestion of my own that in effect adopts this strategy; and the central arguments of both Cohen and Christiano clearly employ it. And it seems to this writer that, though this strategy is of course used often throughout philosophy, it is perhaps used more widely in moral and social philosophy than anywhere else. But of course this strategy faces well-known difficulties; any attempted use of it is subject to the challenge that the supporting principles are no less controversial than the more concrete judgments they allegedly support, and/or that they do not really support those judgments. Despite the admiration many people (including this writer) have for Kant's moral theory, for example, there are very few philosophers who would accept the claim that the categorical imperative is both a logically necessary principle of practical reason and a principle from which specific, concrete, duties can be deductively derived. These problems, moreover, exist even where one does not employ the extreme form of the strategy found in traditional rationalism—that is, even where one does not claim both that the relevant grounding principles are logically or metaphysically necessary and that the derivation of specific judgments from those principles is demonstrative.

In concluding, then, I want to illustrate the force of these problems by showing how one might criticize one of Cohen's attempted applications of, or derivations from, his conception of deliberative democracy. Cohen argues that, on the basis of this conception (and, thus, without appealing to political liberalism), we can defend an essentially permissive, pro-choice policy regarding legal restrictions on abortion. Having contended that, once we accept this conception, "we need to let political ideas of burdensomeness track the weight of reasons within the reasonable views of those we are regulating," Cohen argues that restrictive regulations against

abortion are “especially burdensome”—and thus conflict with legitimate privacy rights—because they undermine both the equality of women and the right, in the words of the U.S. Supreme Court’s *Casey* decision, “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Opponents of abortion may respond, of course, by arguing that abortion is “the taking of innocent human life.” But this argument, he contends, “cannot be made, except by appealing to a particular outlook that is rejected by many who are reasonable, politically speaking”—which means that this argument is illegitimate within the framework of deliberative democracy. The problem with this contention, however, is that, just as the view that abortion is “the taking of innocent human life” appeals “to a particular outlook that is rejected by many who are reasonable, politically speaking,” so does any opposing view—from the view that a fetus is just a hunk of organic material with no moral significance to Thomson’s view that, even if a fetus has full personhood status, a woman has no obligation to grant it the use of her body. Hence, if arguments in defense of the former view are illegitimate in Cohen’s framework, so, it would seem, are arguments in defense of any of the latter. Nor does the appeal to “burdensomeness” help Cohen’s position. For from the point of view of opponents of abortion, permitting abortions imposes the ultimate burden—death—on beings who should be given full consideration when burdens are being calculated, namely, fetuses. (Consider, for example, how implausible it would be to use Cohen’s argument to defend a policy permitting the killing of infants. And lest this example be dismissed on the ground that such a policy could not be supported by anyone who is “politically reasonable,” remember that, in the context of the abortion debate, some philosophers have put forward serious defenses of infanticide.) In sum, it would appear that Cohen’s framework cannot, in the end, determine the appropriate legal policy regarding abortion. And since Cohen’s framework is essentially procedural, this is just what one would antecedently expect.

My purpose here has not been to attack Cohen’s framework, for I think not only that his other attempted applications of it are more plausible but that the framework overall is very interesting and worthy of serious discussion. And I am certainly not challenging the strategy at issue in general—indeed, any such challenge on my part would be inconsistent, since, as I have indicated, I suggest an application of this strategy myself,

albeit in a very cautious and limited way, at the end of my own contribution. My purpose, rather, has been to emphasize the difficulties which those of us who attempt to employ the strategy must be prepared to confront, difficulties that serve to remind us (as if any of us needs such a reminder!) how difficult it is to do philosophy—and in particular, how difficult it is to produce arguments sufficient to convince not only ourselves but our philosophical colleagues that the claims and theories we are attempting to defend are both significant and true.