THEORIES OF JUSTICE
Legal Studies 107
Spring 2010

Lectures: T&Th 2-3:30, 2 LeConte Hall
Office Hours: Th 12-1:30
Course website: https://bspace.berkeley.edu

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Course description:
This course explores three fundamental questions about the idea of a just society and the place of the
values of liberty and equality in such a society:

   liberty? Political liberty?

2. What sorts of equality should a just society ensure? Equality of opportunity? Of economic
   outcome? Political equality? Equality for different religious and cultural groups?

3. Can a society ensure both liberty and equality? Or are these opposing political values?

We will approach these questions primarily by examining answers to them provided by three theories
of justice: utilitarianism, libertarianism, and egalitarian liberalism. To assess the strengths and
weaknesses of these theories, we will discuss their implications for some topics of ongoing political
controversy, including the legal enforcement of sexual morality, financing of public schools,
regulating labor markets, affirmative action, abortion, immigration, and human rights.

Books available for purchase at Cal Books:
John Stuart Mill, Utilitarianism (Hackett, 2002)
John Stuart Mill, On Liberty (Hackett, 1978)
Robert Nozick, Anarchy, State, and Utopia (Basic Books, 1974)

Several copies of each book will be placed on Course Reserves at Doe & Moffit Library. All other
readings (i.e. readings not in the books) will be available on bspace.

Course requirements and grading:
Your grade will be based on four components:

Paper #1 (5 pages) 25% Due Friday, Feb. 12
Paper #2 (5 pages) 30% Due Friday, Apr. 2
Final Exam 35%
Attendance and Participation 10%
Attendance and participation: Your attendance in both lecture and section is required. Your GSI will take attendance with sign-in sheets in lecture and section. Unexcused absences will count against your grade. If you have to miss a lecture or section, notify your GSI in advance. The lectures will explain the main ideas and arguments from the readings and answer any questions you might have. There will be time during every lecture for Q&A and discussion. In section discussion, you will have the opportunity to pursue issues raised in your reading and in lecture in greater depth.

You should complete the relevant reading assignments in advance of each lecture. Although some of the reading assignments do not involve many pages, the readings are often very dense and will require re-reading for comprehension. So do not wait until the last minute to complete the readings. As you read the assignments, think about what questions the authors were attempting to answer. Refer to the Study Questions listed on the syllabus. What answers do the authors suggest, and what arguments do they offer in support of their answers? Ask yourself whether you agree with the answers? Why or why not?

Papers: Paper topics will be distributed two weeks in advance of the due date. Before you write the first paper, please review the “Rules of Thumb” for writing papers on pp. 9-10 of this syllabus. Your GSIs and I will discuss the paper topics with you when we distribute them. You should follow up with your GSI if you have further questions. For additional help with writing, visit the Student Learning Center, which offers writing tutoring and workshops. They have drop-in tutoring hours where you can get help with your writing at any point in the writing process.

Policy on late papers: If you expect that you will need additional time to write you paper, you must ask your GSI at least one week in advance of the due date. If your paper is late and you have not received an extension from your GSI, the final grade of your paper will be reduced by a letter grade for every day your paper is late.

Policy on plagiarism and cheating: Plagiarism is the presentation of another’s words and ideas as one’s own without attributing the proper source. Plagiarism includes copying material from books and journals, as well as taking material off the internet. Plagiarism also includes privately purchasing or obtaining papers from others, which one then presents as one’s own. Any material taken word-for-word from another source must be placed in quotation marks and footnoted. You can use ideas and information from other authors without directly quoting from them, by paraphrasing, but you must acknowledge them in your footnotes or parenthetical documentation. Any student discovered to have committed plagiarism will receive an F for the assignment and the matter will be referred to the Office of Student Conduct for disciplinary action. Do not hesitate to ask if you are in doubt about what constitutes plagiarism. Another form of academic dishonesty is cheating; an example of cheating is using notes or books during a closed-book final exam. Anyone caught cheating on the final exam will receive an F for the final.

Special accommodations: If you need special accommodations for the final exam or any other aspect of the course, please let your GSI know during the first two weeks of the semester. We will work with the Disabled Students’ Program to make the necessary accommodations.
SCHEDULE AND READING ASSIGNMENTS

The readings marked with an asterisk (*) can be found on bspace. All other readings are in the books for the course. As you do each week’s readings, think about the Study Questions.

Jan. 19. Introduction: Problems of Justice in a Democratic Society
No reading

I. UTILITARIANISM (5 lectures)

Jan 21. Hedonistic Utilitarianism
Reading: *Jeremy Bentham, Introduction to the Principles of Morals and Legislation, chs. 1, 4, 13, 17 (sec. 1)

Study Questions: (1) What is Bentham’s “principle of utility” or “greatest happiness principle”? (2) Bentham says that pleasure is the only thing that is good in itself. Is he right? What about knowledge? Or beauty? Or achieving the aims you set for yourself? (3) How could Bentham make a utilitarian case against slavery or against punishing the innocent? Consider three cases: (i) the slave population is small; (ii) the slaves are members of a socially outcast group; (iii) the slaves are paid little, do backbreaking work, and are very productive. (4) Is the enforcement of a community’s moral code such a bad thing? Does Bentham make a persuasive case against it? (What does he mean when he says it is unprofitable?) Can you think of laws that regulate conduct because the conduct is immoral? What do you think of those laws?

Jan 26. Utilitarianism and the Enforcement of Morals

Study Questions: (1) Does the fact that sodomy violates common morality (assuming that it does) provide a legitimate reason for criminalizing it? (2) What is the distinction between the claim that sodomy violates the common morality in a society and the claim that it is condemned by the moral views of the majority in society? Does that distinction make a difference? (3) Utilitarians have traditionally opposed the enforcement of morality. Do they have a convincing utilitarian case against it? (4) Are there reasons for opposing the enforcement of morality that strike you as more convincing than the utilitarian argument? (5) If anti-sodomy laws are unacceptable, then what about bans on same-sex marriage? If the majority of the citizens of California believe homosexuality is immoral and want to express this view by legally banning same-sex marriage, should they be permitted to do so? (6) Is there a case for banning same-sex marriage that does not depend on judgments about sexual morality? (7) What reasons did the Massachusetts Supreme Judicial Court offer for permitting same-sex couples to marry?
Jan 28. Revisionist Utilitarianism: The Value of Self-Development
Reading: John Stuart Mill, *Utilitarianism*, chs. 1-2, 5

Study Questions: (1) What is Mill’s distinction between higher and lower quality pleasures? What does it mean to say that the quality of a pleasure is higher, not just that the quantity is greater? (2) Is Mill right about the kinds of pleasures that “competent judges” decidedly prefer? Who are these judges, and why should their judgments provide a basis for deciding about the quality of pleasures and the goodness of lives? (3) Does Mill’s higher/lower distinction reflect on objectionable elitism and an undue emphasis on intellectual pleasures? (4) Is it better, as Mill says, “to be Socrates dissatisfied than a fool satisfied”? Why? Is that because Socrates has better pleasures, or for some other reason?

Feb 2. Utilitarianism and Liberty
Reading: John Stuart Mill, *On Liberty*, ch. 1-3, 5

Study Questions: (1) Mill says that *On Liberty* defends “one very simple principle.” What is that principle? (2) How would Mill respond to restrictions on racist hate speech, or pornography, or slander? (3) How does Mill argue for his “simple principle” on utilitarian grounds? How is the general welfare improved by tolerating religious, philosophical, and moral dissent? What are the costs of such toleration? Why do the benefits outweigh the costs? (4) Do you think that conduct ought only to be regulated if it is harmful to others? Can you think of cases in which conduct ought to be regulated in the name of the person’s own welfare (drugs, seat belts), or because it is repulsive (bestiality), or because it is offensive to others (public sex), or because it is judged to be wrong (suicide, physician-assisted suicide)? (5) If you are not convinced by Mill’s utilitarian argument for his principle of liberty, can you think of a more convincing rationale?

Feb 4. Free Exercise and Religious Accommodations

Study Questions: (1) Why are religious convictions important? Are they more important than cultural commitments? (2) Suppose there are exemptions on religious grounds from generally applicable laws. Do such exemptions promise anarchy? (3) Do exemptions amount to favoritism, or a kind of religious establishment? (4) Do you think there ought to be exemptions of the kind explored in *Sherbert v. Verner* or *Employment Division v. Smith*? Should there be cultural exemptions as well? (5) Is there a compelling utilitarian case in favor of religious exemptions? Do utilitarians have a good way to capture the nature of the burden on religious liberty when there are no exemptions?
II. LIBERTARIANISM (6 lectures)

Feb 9, 11, 16. Possessive Libertarianism

Study Questions:  (1) What basic rights does Nozick attribute to individuals, and why does he suppose we have those rights?  (2) What is a *minimal state*, and does Nozick have a plausible story of how the state could emerge in a morally permissible way, without violating anyone’s rights?  (3) How does the idea of equality before the law fit into Nozick’s minimal state? Does the minimal state provide any assurance of the rule of law?  (4) Nozick says that people own themselves (pp. 171-2). What does that mean? Do you agree?  (5) What does Nozick mean when he says that “liberty upsets patterns”?  (6) Is taxation on wages the moral equivalent of forced labor? Can you see any differences between taxation on earnings from labor and forced labor? Are these differences morally significant?  (7) What justifies a right to private property in Locke’s view? Are there any limits on how much property one can acquire?

* First Paper Due: Friday, Feb. 12 *

Feb 18. Liberty and Labor Market Regulation

Study Questions:  (1) Why does the Lochner Court think it is illegitimate for the state to regulate labor markets in order to redress inequalities of bargaining power between employers and employees? Are there such inequalities? What are the implications of those inequalities for wages and working conditions?  (2) Is it paternalistic to try to correct for inequalities of bargaining power? Do such regulations make workers “wards of the state”? Is it similarly paternalistic to protect a person from physical assault?  (3) Are minimum wage laws or workplace health and safety regulations objectionably paternalistic?  (4) Does Nozick’s libertarian philosophy echo the reasoning in *Lochner* and *Coppage*?

Feb 23: No Lecture

Feb 25. Choice-Based Libertarianism
Reading: Milton Friedman, *Capitalism and Freedom*, Intro, chs. 1, 2, 10, 12, Conclusion

Study Questions:  (1) What does Friedman mean by “liberty”?  (2) What is a “right to liberty,” and why is there such a right? Are all kinds of liberty of equal importance?  (3) It is sometimes said (as in the Preamble to the U.S. Constitution) that government ought to make laws that promote the general welfare. What does that mean? Does Friedman agree? Do such laws violate the basic right to liberty?  (4) Friedman accepts certain kinds of anti-poverty programs and public spending on education as legitimate uses of tax dollars. How does Friedman make the case that an anti-poverty program might promote the general welfare (how does it promote the welfare of people who are not poor)?  (5) Why is it illegitimate for the government to promote what Friedman calls “equality of treatment”?
Mar 2. Equal Opportunity and Education

Study Questions:  (1) Justice Marshall says that there is a right to an equal start in life. What does an “equal start in life” mean? Do you agree that there is such a right?  (2) Does education help to ensure that everyone has an equal start—or at least an acceptable start—in life?  (3) Does a system of school financing based on local property taxes violate that right?  (4) Does a system of equal educational opportunity, financed out of taxes, violate the rights of parents to decide how much they want to spend on education?  (5) Does a program of state-financed, universal education promote the general welfare? How does Friedman make the case that it does? Do you find his argument convincing?

III. Egalitarian Liberalism (8 lectures)

Mar 4, 9, 11. Reconciling Liberty and Equality
Reading: John Rawls, *A Theory of Justice*, Sections 1-5, 11-14, 17, 20-26, 29, 32-33, 36-37, 67

Study Questions:  (1) Rawls presents the ideal of a fair society in which life chances are not settled by differences in social background or native endowments. How attractive is this ideal?  (2) Are native endowments (natural talents) morally on a par with the contingencies of social background? What does it mean to say that your background and talents are “arbitrary from a moral point of view”?  (3) What principles would people choose in a hypothetical original position, behind a veil of ignorance?  (4) Why should we care about what would be chosen in the original position?  (5) Is Rawls’s difference principle fair to people who would be better off under a less egalitarian principle?  (6) What is fair equality of opportunity, and is it a more compelling idea than formal equality of opportunity?

Mar 16. How Egalitarian Should We Be?

Study Questions:  (1) Suppose a person with unusual talents is unwilling to make a socially valuable contribution without receiving special incentives for that contribution. Is that unwillingness objectionably selfish, and is the distribution of rewards that results from paying the incentives unjust?  (2) What would a society be like if its ethos (and not only its laws) required members to make contributions without getting special incentives?  (3) Suppose that some racists in a society will make productive contributions that benefit racial minorities only if they (the racists) receive very large incentives. Does justice permit the payment of such incentives?  (4) Are there good reasons to confine the application of the difference principle to the basic structure of society, and not to worry about the choices individuals make within that structure?
Mar 18. Justice, the Family, and Gender Equality  
Reading: *Susan Moller Okin, Justice, Gender, and the Family, ch. 1, 5, 8*

Study Questions:  (1) What do you think Okin means when she says that the family is “the linchpin of gender”? (2) Okin criticizes Rawls’s theory of justice for being insufficiently attentive to sex and gender. How exactly is Rawls’s theory guilty of “blindness to sexism”? (3) Feminists have long criticized the public-private distinction. What is this distinction and why is it a problem? (4) Rather than rejecting Rawls’s theory, Okin seeks to revise it toward the pursuit of gender equality. What revisions does she call for? Do you find them convincing? (5) Okin argues for “minimizing” gender, even its eventual “disappearance.” Is this a desirable goal? What sorts of policies would get us there?

Mar 23 and 25: No Lecture – Spring Break

Mar 30 and Apr 1: No Lecture

* Second Paper Due:  Friday, Apr. 2 *

Apr 6 and 8. Equality and Personal Responsibility  

Study Questions: (1) How compelling are the principles of equal importance and special responsibility? (2) How does Dworkin’s insurance model reflect these principles? Where does the idea of special responsibility fit into the insurance scheme? (3) Are the inequalities sanctioned by Dworkin’s insurance model consistent with the idea that it matters equally how well each person’s life goes? (4) What is the case against what Dworkin calls “the severe policy,” and is it a convincing argument against current American welfare policy? (5) What is the “rescue approach,” and would it better fit the requirement of equal concern? How would the rescuer approach work in the case of health care?

Apr 13. Equality and Affirmative Action  
Reading: *Grutter v. Bollinger (2003)*

Study Questions: (1) Are all uses of racial classifications on a par, and equally objectionable? Is it just as objectionable to have an affirmative action program that benefits a minority as to have a program that benefits the racial majority? (2) What is “diversity,” and why does the majority in Grutter think it is so important? Do you agree that it is of great importance? If so, why? If not, why not? (3) What does Justice Thomas mean by “racial aesthetics”? (4) Can you think of other means than affirmative action programs for achieving the educational benefits associated with such programs? (5) Is Dworkin’s idea of equal importance consistent with an affirmative action policy? (6) Do affirmative action programs undertaken to promote racial diversity in universities rest on objectionable stereotypes, or reinforce racial divisions?
IV. TOPICS  (4 lectures)

Apr 15. Abortion
Reading: *Roe v. Wade* (1973); *Judith Thomson, “Abortion”

Study Questions: (1) The Court majority says that “the right of privacy…is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” What reasons are given in support of this conclusion? (2) Does the state have a compelling interest in protecting human life from conception onward? (3) Can men and women be equal in a society with restrictive regulations on terminating pregnancies? (4) The majority opinion refers to a “wide divergence of thinking” on the question of when life begins. What sort of divergence do they have in mind? What is the relevance of this observation?

Apr 20. Human Rights
Reading: *Joshua Cohen, “Minimalism about Human Rights: The Most We Can Hope For?”

Study Questions: (1) Is the idea of basic human rights a parochial, Western idea? Is it a problem if it is parochial? (2) Do you think there are any human rights? Why? What are they? Are human rights confined to basic protections of bodily security (e.g. right not to be tortured, right not to be subject to cruel and inhuman punishment)? (3) How is membership (or in Cohen’s words, “inclusion”) in a state connected to the idea of human rights? Do you think membership in a state entitles one to a greater set of rights and obligations?

Apr 22. Immigration
Reading: *Joseph Carens, “Aliens and Citizens: The Case for Open Borders”

Study Questions: (1) Do you agree with Carens that liberal principles cannot support closed borders? Why or why not? (2) On what grounds, if any, do you think immigration should be restricted? To preserve a national culture? To protect the employment opportunities of native workers? (3) Assume that the benefits of immigration outweigh the costs for both immigrants and the citizens of the host society. Should immigration still be restricted? Why? What sorts of restrictions would be justified?

Apr 27. Rights and Emergencies
Reading: *Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism*, ch. 1; *Hamdi v. Rumsfeld* (2004), opinions by Justices O’Connor and Scalia

Study Questions: (1) Does a threat to the security of large numbers of people justify detention without the usual judicial procedures? Does it justify a suspension of the presumption of innocence? (2) Does a threat to national independence justify such detention and suspension? (3) Does it matter to your answers to the first two questions whether the people who are detained are citizens or foreigners/noncitizens? (4) Are your answers to these questions guided by utilitarian ideas? If not, what principles are guiding your judgments?

Apr 29. Concluding Lecture

* Final Exam: Monday, May 10, 11:30 - 2:30pm *
SOME RULES OF THUMB FOR WRITING PAPERS

Here are some suggestions about writing papers. Please read through them before you write the first paper.

1. **State the main thesis** of your paper at (or near) the beginning, preferably in the opening paragraph. It is not bad to say something like: “I will argue that…” If you do not have a thesis, get one.

2. **Stay focused.** Your papers should critically assess some important aspect of one of the theories we have been discussing. The thesis of your paper, stated near the beginning (see point 1 above) will say what that aspect is. Before getting to the evaluation you will need to describe the relevant aspect(s) of the theory you are assessing. But do not try to provide a comprehensive overview of the theory. Instead, guide your presentation by the particular problems that animate your paper. For example, if you are writing in criticism of John Rawls’s “difference principle,” you should not try to sketch his theory of the original position and the argument for the principle within the original position. Confine yourself to the aspects of Rawls’s view that are of immediate relevance to his account of fair distribution. Anything else will be a distraction.

3. **Do not lead with (or conclude with, or otherwise include) sweeping generalities,** such as the following: “Rawls's theory of justice is the most important recent contribution to the perennial human search for the ideal society” or “Since Plato, philosophers have sought out the meaning of justice” or “For millennia, human beings have searched for truth.” “Philosophy is based on reason, not rhetoric.” (What about: “Man is born free, but is everywhere in chains.” If you are Jean-Jacques Rousseau, you are allowed to break any rule that I have stated here.) Such remarks add nothing of substance; indeed, they subtract by distracting from the issues at hand. Moreover, they suggest that the writer is unsure what to say, and is looking for a way to fill some space. You do not want to create that suspicion. So just get right to the point.

4. **Write clearly.** That’s easier said than done, and hard to make operational. But you can make a first step by writing short sentences, avoiding page-long paragraphs, and being careful to signal transitions. Operationally: If a sentence occupies more than, say, 5 lines, find a way to divide it up. If a paragraph goes on for more than 20 lines, find a way to divide it up. If your paper falls into sections, make sure to include a sentence or two of connective tissue between the sections. Moreover, put things as simply as you can. Writing philosophy does not require purple prose, neologisms, or polysyllabophilia. In a poetry course, the rules are different, but in this prosaic course, your writing should focus readers’ attention on the ideas you wish to express, not on the words you have chosen to express those ideas.

5. **Do not make the writing boring and clumsy.** Introduce some stylistic variety. For example, do not start every sentence with the subject. Moreover, stay away from passive constructions. Instead of “The wheel was invented by Joe,” why not: “Joe invented the wheel.” Do not have too many sentences that begin “It is…” or “There is…” Though such constructions are sometimes appropriate, overusing them slows things down. Avoid long strings of prepositional clauses. And try not to repeat the same words.
6. **Support assertions.** When you attribute views to the person whose ideas you are addressing, indicate the evidence for the attribution by noting relevant passages. But you need not include quotations. As a general rule, you should only quote a passage if the passage plays an important role in the paper (say, it is a passage that you will want to be able to refer back to at various points in the argument), or if you think that there is some controversy about whether the philosopher actually held the view that you are attributing to him or her. Do not submit a paper that strings together lots of quotations.

7. **Take the views you are discussing seriously.** The political philosophers we are reading are not fools. If, as you describe the relevant parts of their views, you find yourself attributing foolish views to them, assume you have misinterpreted. (Perhaps you have not. But treat “misinterpretation” as the default setting.) One strategy for taking a view seriously is to “argue against yourself”: ask yourself how the philosopher you are criticizing would respond to your criticism. Try to get “inside” the conception you are discussing; develop a sense of its internal integrity, and see if you are able to understand how someone (who may have strange ideas, but is neither a moron nor a sociopath) might have come to hold the views in question. The books and articles we are reading are the product of sustained reflection, over a long period. The authors often distributed drafts of their manuscripts to other people, and then tried to incorporate responses to the objections they received. The result is not that their views are right, or genuinely coherent, or nice. But you can be sure that they have greater depth and coherence than you may suspect on first reading.

8. When you finish writing, **read your paper out loud.** Writing that does not sound right will not read right.

9. In high school, you were probably told not to **use the first person singular.** Forget that piece of bad advice. (“In this paper, I will argue that…” is fine. However, “The author of this paper will argue that…” is not fine. “In this paper, it will be argued that…” is also not fine.)

10. **Do not plagiarize.** Plagiarism comes in two forms, both unacceptable. First, you plagiarize when you use the words of a source without quotation marks. If you take words from a source, you must use quotation marks, not just a footnote. Moreover, you should not present a close paraphrase from a source: either use the exact words with quotation marks, or restate the point in your own words. Second, you plagiarize if you take ideas from a source without footnoting the source. Sanctions for plagiarism depend on its severity, and may range from lower grades on an assignment to a failing grade for the course.

Applying these rules of thumb will require that you spend some time editing your own prose. But the additional time will be worth it. Your papers for this course will be better than they would otherwise be, and you will eventually start to edit as you write.

**N.B.** If you are concerned about your writing, make an appointment with the writing tutor who has been assigned to the course. See the course website for contact information. Small investments of time can produce important results.