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# \*\*NC - INNOCENTS\*\*

## NC SHELL – RAWLS F/W

### FRAMEWORK [1/4]

#### I negate and value justice, since the resolution is a question of assigning appropriate punishment.

#### The function of a legal system is to ensure cooperation amongst the people it brings together. By providing a framework for collaboration and trust, a state creates a space for free action.

John Rawls [James Bryant Conant Professor of Philosophy at Harvard University. A Theory of Justice. The Presidents and Fellows of Harvard College. Cambridge, MA. 1971. 233-236]

I now wish to consider rights of the person as these are protected by the principle of the rule of law.20 As before my intention is not only to relate these notions to the principles of justice but to elucidate the sense of the priority of liberty. I have already noted (§10) that the conception of formal justice, the regular and impartial administration [use] of public rules, becomes the rule of law when applied to the legal system. One kind of unjust action is the failure of judges and others [states] in authority to apply the appropriate rule or to interpret it correctly. It is more illuminating in this connection to think not of gross violations exemplified by bribery and corruption, or the abuse of the legal system to punish political enemies, but rather of [for instance] the subtle distortions of prejudice and bias as these effectively [that] discriminate[s] against certain groups in the judicial process. The regular and impartial, and in this sense fair, administration of law we may call "justice as regularity." This is a more suggestive phrase than "formal justice."¶ Now the rule of law is obviously closely related to liberty. We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a[n] coercive order of public rules addressed to rational persons for the purpose of regulating [to regulate] their conduct and providing [provide] the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties. Of course, other rules share many of these features. Rules of games and of private associations are likewise addressed to rational persons¶ in order to give shape to their activities. Given that these rules are fair or just, then [and] once men [people] have entered into these arrangements and accepted the benefits that result, the obligations which thereby arise constitute a basis for legitimate expectations. What distinguishes a legal system is its comprehensive scope and its regulative powers with respect to other associations. The constitutional agencies that it defines generally have the exclusive legal right to at least the more extreme forms of coercion. The kinds of duress that private associations can employ are strictly limited. Moreover, the legal order [and that it] exercises a final authority over a certain well-defined territory. It is also marked by the wide range of the activities it regulates and the fundamental nature of the interests it is designed to secure. These features simply reflect the fact that the law defines the basic structure within which the pursuit of all other activities takes [take] place.¶ Given that the legal order is a system of public rules addressed to rational persons, we can account for the precepts of justice associated with the rule of law. These precepts are those that would be followed by any system of rules which perfectly embodied the idea¶ of a legal system. This is not, of course, to say that existing laws¶ necessarily satisfy these precepts in all cases. Rather, these maxims follow from an ideal notion which laws are expected to approximate, at least for the most part. If deviations from justice as regularity are too pervasive, a serious question may arise whether a system of law exists as opposed to a collection of particular orders designed to advance the interests of a dictator or the ideal of a benevolent despot. Often there is no clear answer to this question. The point of thinking of a legal order as a system of public rules is that it enables us to derive[s] the precepts associated with the principle of legality. Moreover, we can say that, other things equal, one legal order is more [just] justly administered than another if it more perfectly [better] fulfills the precepts of the rule of law. It will provide[s] a more secure basis for liberty and a more effective means for organizing cooperative schemes. Yet [since] these precepts guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice. They impose rather weak constraints on the basic structure, but ones that are not by any means negligible.¶

### FRAMEWORK[2/4]

#### To ensure that people can rely on the state as an institution to promote social cooperation, it must consistently and fairly apply laws to promote legitimate expectations.

Soren Schonberg. [“Legitimate Expectations in Adminstrative Law.” Oxford University Press, Nov 23 2000.] AT

Proponents of this theory, inﬂuential both in Britain," on the Continent,” and in the EC context,“ see the principle of legitimate expectations [is] as one aspect of the Rule of Law. Like the reliance theory, the Rule of Law theory proceeds from autonomy” For individuals to be autonomous they must, at least, be able to plan ahead and therefore ﬁomesee with some degree of certainty the conse- quences of their actions.” Laws, and the actions of those who apply them, are therefore subject to a requirement of predictability and certainty.“ From an eco- nomic perspective, legal certainty is, as Max Weber has shown, a prerequisite for rational enterprise in a capitalist economy.“ Economic activity, which is an important aspect of autonomous decision-making, [which] can only be carried out if economic operators ‘can rely on something” In a rapidly changing and increasingly uncertain world, law is something that operators should be able to, and to a large exuent do, rely on [law].” In administrative law, the importance of certainty is increased by wide- ranging discretionary powers being vested in public authorities.” Individuals cannot easily predict how discretionary powers will be exercised because the provisions conferring such powers are linguistically indeterminate and because informal working rules and other constraints, of which individuals are not nor- mally aware, affect their exercise in practice.” Representations may create expectations as to the manner of, or criteria for, their exercise. Respect for these expectations therefore makes the exercise of discretion more predictable. However, the importance of the Rule of Law does not stop here. A number of more detailed requirements of the Rule of Law have been derived, most clearly by Joseph Raz, from the basic requirements of predictability and certainty.” These requirements have implications for legislators, judges and administrators alike.“ Two of them are of particular importance for our purposes. First, the Rule of Law presupposes formal equality“ That is, [thus] like cases must be treated alike by the correct and consistent application of law. [Since] Without formal equality law becomes arbitrary and thus unpredictable and uncertain.” Second, the Rule of Law presupposes a certain measure of constancy in the law. The law should ensure that administrative action is based on a mix of short-term exigencies and more long-term considerations.“ Individual planning becomes difficult or impossible if law and policy are changed too often and too abruptly. Moreover, frequent changes may undermine individual rights by creating uncer- tainty about the boundaries of those rights.” The legal protection of expectations by administrative law principles is a way of giving expression to the requirements of predictability, formal equality, and constancy inherent in the Rule of Law. However, it is important to be clear that the requirements apply differently to the four situations identified above.

#### A society that punishes innocents violates the rule of law by inconsistently applying punishment, which undermines the legitimate expectations that are key to social action.

John Rawls [“Two Concepts of Rules” The Philosophical Review, Vol. 64, No. 1 (Jan., 1955), pp. 3-32]

Try to imagine, then, an institution (which we may call "telishment") which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent ¶ [person] man whenever they are of the opinion that doing so would be ¶ in the best interests of society. The discretion of officials is limited, ¶ however, by the rule that they may not condemn an innocent ¶ man to undergo such an ordeal unless there is, at the time, a ¶ wave of offenses similar to that with which they charge him and ¶ telish him for. We may imagine that the officials having the ¶ discretionary authority are the judges of the higher courts in ¶ consultation with the chief of police, the minister of justice, and ¶ a committee of the legislature. ¶ Once one realizes that one is involved in setting up an institu- tion, one sees that the hazards are very great. For example, what ¶ check is there on the officials? How is one to tell whether or not ¶ their actions are authorized? How is one to limit the risks in- ¶ volved in allowing such systematic deception? How is one to ¶ avoid giving anything short of complete discretion to the au- ¶ thorities to telish anyone they like? In addition to these con- ¶ siderations, it is obvious that people will come to have a very ¶ different attitude towards their penal system when telishment is ¶ adjoined to it. They will **be uncertain as to** whether a convicted ¶ man [person] has been punished or telished. They will wonder whether ¶ or not they should feel sorry for him. They will wonder whether ¶ the same fate won't at any time fall on them. If one pictures ¶ how such an institution would actually work, and the enormous ¶ risks involved in it, it seems clear that it would serve no useful ¶ purpose. [And] A utilitarian justification for this institution is most ¶ unlikely. ¶ It happens in general that as one drops off the defining features ¶ of punishment one ends up with an institution whose utilitarian ¶ justification is highly doubtful. One reason for this is that punishment works like a kind of price system: by altering the prices ¶ one has to pay for the performance of actions it supplies a motive ¶ for avoiding some actions and doing others. The defining features [of punishment] are essential if punishment is to work in this way; so that ¶ an institution which lacks these features, e.g., an institution ¶ which is set up to "punish[es]" the innocent, is likely to ha[s]ve about ¶ as much point as a price system (if one may call it that) where ¶ the prices of things change at random from day to day and one ¶ learns the price of something **after** one has agree[ing]d to buy it."4

#### And, regardless of the telishment ideal, retribution is better for legitimate expectations since the individual can always decide whether or not they commit crime, but can’t control the utility of punishing them if we can punish the innocent.

### FRAMEWORK [3/4]

#### Thus my standard is avoiding punishing innocents.

#### *Moreover, punishing innocents destroys the expectation that rights won’t be taken away at any moment, which is the foundation of society. Prefer this because it contextualizes a harm in terms of a government obligation.*

#### *And, the resolution concerns institutional design, not contingent decision making since it is a question of which paradigm of punishment to use, not about whether to apply one specific instance of punishment. Protecting innocents avoids the problem of institutional design and contingent decision-making because it is about abstract harm rather than being dependent on situational factors.*

### CONTENTION [4/4]

#### I contend that rehabilitation is comparatively worse for punishing innocents than retribution.

#### Making rehabilitation or any other utilitarian goal the guiding principle of the justice system would create a line-drawing problem that would inevitably justify applying state coercion to the innocent.

Bradley 03 [Bradley, Gerard V. RETRIBUTION: THE CENTRAL AIM OF PUNISHMENT. Harvard Journal of Law and Public Policy 27. 1 (Fall 2003): 19-31. <http://search.proquest.com.libproxy.usc.edu/docview/235188882#center>. AJ.]

In fact, all alternative [within] aims of punishment other than retribution swing blithely free of specific anti-social acts by the condemned; the ends can and often are served by "punishing" the innocent. The utilitarian concerns of tranquility, for example, may be served as well or better by the sacrifice of innocents. Further, if we consider [like] rehabilitation in either its therapeutic or moral sense, one can scarcely argue that the law's ministrations must be limited only to those justly convicted of a crime. Some people [even if innocent] need moral or psychological help [via rehabilitation], quite apart from any criminal misbehavior. In all these perspectives, therefore, the line between guilt and innocence can be traversed precisely in pursuit of the state objectives. That line will therefore sometimes seem an arbitrary barrier, which only the scrupulous or feckless dare not cross.¶ Conversely, the goal of retribution cannot be obtained by imposing punishment on the innocent. Punishing someone who has committed no offense is impossible. It is not that a certain group of people cannot err simply because they view retribution as the only moral justification for punishment. In fact, they might act immorally and "punish" the innocent. But they cannot knowingly punish the innocent, for if a given person has not distorted equilibrium by committing a criminal act, any attempts to restore what has not been disrupted [that equilibrium] are futile.¶

#### The only way to avoid this outcome is to reconcile the retributivist punishment of an individual because of guilt with the utilitarian justification for punishment as an institution. The retributivist view is the application of utilitarian principles to specific cases.

John Rawls [“Two Concepts of Rules” The Philosophical Review, Vol. 64, No. 1 (Jan., 1955), pp. 3-32]

For our purposes we may say that there are two justifications of punishment. What we may call the retributive view is that punishment is justified on the grounds that [because] wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not, and it is better irrespective of any of the consequences of punishing him. What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probableR consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not. I have stated these two competing views very roughly to make one feel the conflict between them: one feels the force of both arguments and one wonders how they can be reconciled. From my introductory remarks it is obvious that the resolution which I am going to propose is that in this case one must distinguish between justifying a practice as a system of rules **to be applied and enforced,** and justifying a[n] particular action which falls under these rules; utilitarian[s] arguments are appropriate with regard to questions about practices, while retributiv[ists]e arguments fit the application of particular [apply] rules to particular cases. We might try to get clear about this distinction by imagining how a father might answer the question of his son. Suppose the son asks, "Why was J put in jail yesterday?" The father answers, "Because he robbed the bank at B. He was duly tried and found guilty. That's why he was put in jail yesterday." But suppose the son had asked a different question, namely, "Why do people put other people in jail?" Then the father might answer, "To protect good people from bad people" or "To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn't be able to go to bed at night and sleep in peace." There are two very different questions here. One question emphasizes the proper name: It asks why [a person] J was punished rather than someone else, or it asks what [they] he was [were] punished for. The other question askswhywehave the institution of punishment: Why do people punish one another rather than, say, always forgiving one another? Thus the father says in effect that **[says]** a [person] particular man is punished, rather than some other [person] man, because [they are] he is guilty, and he is guilty because he broke the law (past tense). In his case the law looks back, the judge looks back, the jury looks back, and a penalty is visited upon [them] him for something [they] he did. That a man is to be punished, and what his punishment is to be, is settled by its being shown that he broke the law and that the law assigns that penalty for the violation of it.¶ On the other hand we have the institution of punishment itself, and recommend and accept various changes in it, because it is thought by the (ideal) legislator and by those to whom the law applies that, as a part of a system of law impartially applied from case to case arising under it, it [they] will have the consequence, in the long run, of furthering [furthers] the interests of society. One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, qua judge, sounds like the [is] retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the [is] utilitarian view. Thus both views have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one's initial confusion disappears once one sees that these views apply to persons holding different offices with different duties, and situated differently with respect to the system of rules that make up the criminal law.5

#### Thus while we can still accept utilitarian justifications as generally true, the criminal justice system must have retributive ideas as a limiting principle to protect the innocent.

# \*\*FRONTLINES\*\*

## LIMITING RETRIBUTIVISM

#### Classical ideas are outdated – the modern form of retributivism, called limiting retributivism, accepts deterrence as its justification and only functions as a side constraint on ACs.

Barbara Hudson. Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory. March 1, 2003. Open University Press. (Kindle Locations 846-854). Kindle Edition.

If asked `Why punishment and not compensation?', most retributivists would undoubtedly answer either [say] that punishment is necessary to bring[s] about remorse on the part of the offender (the communicative theory, which is really a form of moral rehabilitationism) or that punishment is more effective than compensation in deterring crime. Most contemporary retributivists readily admit that their principle is concerned with distribution rather than justification, and their limiting of their claims to retribution as a rule for sentencing rather than for the existence of a system of punishments at all has become clearer as the new retributivism has been refined. Both von Hirsch and Duff, for example, separate the censure and hard treatment aspects of punishment, giving to censure the function of expressing the wrongness of the act, and to hard treatment that of providing a `prudential' reason for restraining from crime. The existence of a tariff of punishments will deter people from crime by telling them that it is wrong and that they will suffer unpleasant consequences if they commit it. Von Hirsch (1993: 13) sums up the two aspects of retributive punishment [are] thus: Persons are assumed to be moral agents, capable of taking seriously the message conveyed through the sanction, [and] that the conduct is reprehensible. They are fallible, nevertheless, and thus face temptation. The function of the disincentive is to provide a prudential reason for resisting the temptation. The account would¶ make no sense were human beings much better or worse: an angel would require no appeals to prudence, and a brute could not be appealed to through censure ... Von Hirsch agrees that the institution of punishment would/should be abolished if it were not necessary for the prevention of crime, so that his general justification is consequentialist and forward-looking. He insists, however, that `[since it is] making prevention [deterrence] part of the justification for punishment's existence ... does not permit it to operate independently as a basis for deciding comparative punishments' (ibid.: 17).

## A2 PUNISHMENT DEFINITIONALLY PUNISHES THE GUILTY ONLY

#### Semantic distinctions don’t matter – whatever you call it, util still justifies hurting innocents.

Binder and Smith 2000 [Guyora Binder \* and Nicholas J. Smith\*\*. \* Professor of Law, State University of New York at Buffalo. \*\* Law Clerk, Judge Nygaard, U.S.C.A. 3rd Cir.; J.D., Buffalo; Ph.D., Vanderbilt. “FRAMED: UTILITARIANISM AND PUNISHMENT OF THE INNOCENT.” Rutgers Law Journal¶ Fall, 2000. 32 Rutgers L. J. 115. AJ]

This response is obviously question-begging. It misses the point of McCloskey's example, which is that utilitarian ethics might tempt someone to misapply punishment by framing the innocent. Even if purposeful punishment of the innocent is a logical contradiction, framing the innocent so as to cause others to punish them is not. Neither is framing the innocent so as to create the public impression that they are being punished.¶ In any case, the definitional stop cannot be derived from Bentham's conception of punishment. Bentham carefully avoided defining punishment to require the deliberate punishment of the guilty, precisely to avoid begging the question of the utility of punishing the innocent. n29 For like reasons, he argued against restricting the term punishment to the purposeful ("directly intentional") as opposed to the knowing or reckless ("mediately intentional") infliction of suffering on account of a prior act. n30 On Bentham's definition, the suffering of an offender's family as a result of his incarceration or execution is also punishment.¶ This, however, is but a question of words. Take any lot of evil you will, . . . say that it is punishment, the reason for avoiding to produce it, if unavoidable, will not be the stronger; say that it is not punishment, the reason for avoiding to produce it, if avoidable, will not be the weaker. n31

## A2 RESTRICTION/MINIMIZATION: UTIL = LEGAL THEORY

#### Both ways of restricting util fail since they ignore that util as a legal theory doesn’t need to follow ethical theories’ constraints.

Binder and Smith 2000 [Guyora Binder \* and Nicholas J. Smith\*\*. \* Professor of Law, State University of New York at Buffalo. \*\* Law Clerk, Judge Nygaard, U.S.C.A. 3rd Cir.; J.D., Buffalo; Ph.D., Vanderbilt. “FRAMED: UTILITARIANISM AND PUNISHMENT OF THE INNOCENT.” Rutgers Law Journal¶ Fall, 2000. 32 Rutgers L. J. 115. AJ]

Thus, the strategies of minimization and comparison dispose of a good deal of the charges on the retributivist indictment. Yet they leave open whether utilitarianism permits individuals to frame the innocent, if sufficiently confident that they can keep their deception secret. The strategy of restriction is a failed attempt to answer this question in the negative. It fails because it interprets utilitarianism as hedonistic ethics, but offers no very good reasons why hedonistic ethics should be restricted to universalizable rules, and why it is not possible to universalize a rule of framing the innocent whenever it can be done secretly and beneficially. Ultimately, the strategy of restriction fails because it misconceives utilitarianism as an ethical theory (which can only be defended by restricting it to the ethics of policymaking). But utilitarianism is not an ethical theory. It is a legal theory.

## A2 CAN’T KNOW FUTURE

#### This argument only damages util, which requires knowledge of future consequences.

Saul 90 [Saul Smilansky. “Utilitarianism and the 'Punishment' of the Innocent: The General Problem.” Analysis, Vol. 50, No. 4 (Oct., 1990), pp. 256-261. Oxford University Press. [**http://www.jstor.org/stable/3328264**](http://www.jstor.org/stable/3328264). AJ]

The utilitarian is likely to have a number of replies. Firstly, she¶ might doubt whether we can have such probable knowledge of the actual effects of the 'relaxation of standards'. This is a dangerous argument for utilitarians however, for utilitarianism in general depends on the strong possibility of having such knowledge of probable utilities, and excluding this in the case at hand would seem to be ad hoc. And it does seem reasonable to think that we can have the general sense of assurance about likely consequences which my case assumes. Perhaps it would be going too far to say that we can formulate a statistical law of 'increasing and diminish-¶ ing utility', whereby relaxing standards at the price of risking more and more 'punishment' of innocent people would contribute a¶ greater beneficial return (reducing crime), until we would reach a stage where the standards for conviction would be so lax as to¶ cause 'too many' innocents to be 'punished' (i.e. an unacceptable number in utilitarian terms --a number that would create fear, lack of confidence in the judicial system, and the like). But even if we cannot formulate such 'laws', surely we have some working notion of the risks involved in various alternatives - after all, our¶ current standards are widely perceived as practically protecting¶ innocent people from being 'punished'.

## A2 ANONYMITY

#### Public knowledge of the punishment does not create the harm, it is the punishment itself.

Saul 90 [Saul Smilansky. “Utilitarianism and the 'Punishment' of the Innocent: The General Problem.” Analysis, Vol. 50, No. 4 (Oct., 1990), pp. 256-261. Oxford University Press. [**http://www.jstor.org/stable/3328264**](http://www.jstor.org/stable/3328264). AJ]

Similarly, the utilitarian cannot get much mileage from the fact¶ that the innocent people - those who are likely to be 'punished' if standards of criminal conviction are relaxed --are unknown, unlike in the case of framing an identifiable person. If the 'punishment' of innocent people is morally abhorrent than promoting it is so as well, and the anonymity involved seems not to matter.

## A2 SYSTEM WILL ALWAYS PUNISH INNOCENT

#### The current system is comparatively better since it strongly favors the innocent.

Saul 90 [Saul Smilansky. “Utilitarianism and the 'Punishment' of the Innocent: The General Problem.” Analysis, Vol. 50, No. 4 (Oct., 1990), pp. 256-261. Oxford University Press. [**http://www.jstor.org/stable/3328264**](http://www.jstor.org/stable/3328264). AJ]

A third possible utilitarian argument can be that in effect we are already involved in utilitarian calculations today, and are pre-¶ sumably willing to risk the 'punishment' of innocent people (or we would not have a punishing system at all). If this argument is simply a claim that even today we consider the likely outcome of various alternatives when determining policy, or even that there is a strong utilitarian rationale behind the institution of punishment in itself, then this point is harmless. However, it would be unconvincing to say that we currently have no strong non-utilitarian concern for preventing the 'punishment' of the innocent. Just con- sider the strength of the case that the prosecution has to make,¶ and the strong provisions built into current trial (and appeal)¶ procedures in order to help the accused respond to the prosecu- tion's case (provisions made use of by many of the guilty in order¶ to escape conviction). There is perhaps always a risk of injustice, but doing as much as we do to prevent it would seem to protect us¶ from any description of quasi-utilitarianism.