

CHRISTIE Thank you. Welcome to Panel 3 on Labor, Education, and Justice. Our panelists are Gina Schouten who's
HARTLEY: associate professor of philosophy at Harvard University, and her presentation is "Sectoral Justice in the Case of Education," and Sabine Tsuruda who is an assistant professor of law at Queen's University, and her presentation is "Labor Association and the Priority of Liberty." We're going to start with Gina.

GINA Thanks. I can't be the only one who forgets this. Thanks to [? Laurie ?] and [? Micah ?] and [? Blaine, ?] and all of
SCHOUTEN: the presenters, and discussants, and everyone who's been here. It's been a really nice way to come back after a long hiatus from doing things like this. So I've had a really good time, sounds like everyone else has, too. So thanks very much.

So my contribution is about educational justice, and then tries to draw some-- or suggest some-- inferences about sectoral justice generally, structures for thinking about sectoral justice-- so justice in health care, environmental justice-- we're familiar with these things, but tries to maybe make the case that there are some general structural model kinds of things that we can say about how to go about making these inquiries.

So there's a handout floating around if you didn't get one. I think [? Micah ?] has some extras and there are some extras around. So the primary aim of my paper is to defend two substantive claims. First, that educational justice-- or justice in primary and secondary education-- is achieved only when students enjoy equal opportunities to live good lives upon leaving school. But second, in circumstances of broad social injustice, the course of educational reform that that ideal favors looks more prioritarian than egalitarian.

It's that latter thing, especially, that I'm going to suggest may be a general feature of sectoral justice in circumstances of injustice. So in my case for these claims is programmatic, I think is the sort of self-preserving way to put it. But I'm going to try to make both of these claims seem plausible and worthy of further consideration. And then, the secondary aim, of course, is to draw support for these substantive claims from theory and to show that that book yields surprising-- although maybe not to people in this room-- resources for thinking about what to do in circumstances of injustice.

So the first section of the paper really just sort of summarizes an argument that I've made elsewhere for a particular way of thinking about equal educational opportunity. So I'm going to just summarize the arguments briefly. So I argue that we should reconceptualize our thinking about equal educational opportunity and shift from thinking about equal opportunity for education-- so just looking within the sector, thinking about what are the educational outcomes, now let's make sure students all have an equal opportunity to achieve those educational outcomes-- to looking from education outward, and thinking about equal educational opportunity as a component for realizing equal opportunity more broadly, so equal opportunity through education.

And I argue that once we accept that shift, we'll be pushed toward accepting a fairly radical principle of equal educational opportunity, which I call, following some others, radical educational equality, which effectively equates equal opportunity in education with equal outcomes in terms of whatever educational goods justice regulates. Which you see at the bottom of the section I suggest, I argue, and summarize here, is, all things considered, life prospects.

So this is a progressive principle of educational justice that directs us to offset all educational disadvantage. My case, broadly, is that both the reconceptualization and this particular principle are more resonant than competitor views with our reasons for thinking of education as a particularly important site of justice in the first place. Happy to talk more about this, but there are two more specific argumentative moves.

The first is to argue for a kind of bounded luck egalitarianism, that we are rightly intolerant of unlucky disadvantage in the case of kids' education whatever we might make of unlucky disadvantage outside of that domain. And second, that among children, effort is rightly regarded as a social or natural contingency. And so from there I argue that radical educational equality condemns all educational disadvantage such that it's not just an ideal of educational justice, but a standard by which we can measure educational injustice.

So I don't argue that this is Rawls' principle of educational justice, but I do want to try to make the case that it's not terribly un-Rawlsian, the principle itself. And more ambitiously, I want to argue that the reconceptualization is rightly regarded as Rawlsian. And then, the particular principle is supported by that reconceptualization. So the idea that the reconceptualization is Rawlsian is what I try to do in Section 2-- so the idea that we should think of educational justice as-- sorry, we should think of equal opportunity-- equal educational opportunity as equal opportunity, broadly, through education.

So Rawls' principle of equal opportunity, fair equality of opportunity, specifies that, quote-- positions are to be open, not only in a formal sense, but that all should have a fair chance to attain them such that those with similar abilities and skills should have similar life chances. And among other things this requires, quote-- maintaining equal opportunities of education for all.

And toward that end, Rawls goes on to say, the school system, whether public or private, should be designed to even out class barriers. So Rawls construes equal opportunity as among the purposes of schooling. Schools should be designed to even out class barriers. Just as important for my purposes today is what Rawls says about other institutions.

So Rawlsian fair equality of opportunity requires contributions from different social sectors. Education can do its role only if inheritance and bequest are regulated so as to prevent large accumulations of wealth. And that's because, of course, families use material advantage to indirectly confer educational advantage. So only if wealth is broadly dispersed can educational institutions educate students to even out class barriers.

I think Rawls' discussion of economic systems, which we've already talked about this weekend-- this weekend-- provides occasion to notice the general importance of institutional division of labor to realizing justice. So taking up the question of what economic system best realizes the principles of justice, Rawls says that the principles under-prescribe the economic system. They leave it open, but they constrain the option.

So we could either have a property-owning democracy or a system of market socialism. And on his view, which best realizes the principles of justice just depends on the circumstances and the culture of society. But he distinguishes property-owning democracy from welfare state capitalism, even though both allow private ownership of productive assets. And he says, the emphasis of property-owning democracy falls on the steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest, on fair equality of opportunity, secured by provisions for education and training, as well as on institutions that support the fair value of the political liberties.

So in capitalist systems wherein wealth accumulates in the hands of the few, schools are going to be unable to do the very thing that they're for doing, from the perspective of Rawlsian justice, namely evening out class barriers. I should say one of the very things that they're for doing. And more broadly, to realize any general principles of social justice, we need an institutional division of labor.

So in the case of FEO, these passages suggest that Rawls envisions inheritance and bequest law coordinating with educational institutions. Only if wealth is broadly dispersed can educational institutions hope to educate students to enjoy FEO. So now I'm going to move into a question about imperfect compliance and compensatory social-- structural-- sectoral obligation, sorry. So this is Section 3.

So far, I've drawn on theory to support the idea that equal opportunity in education should be construed as equal opportunity through education, and that there's a Rawlsian case to be made for this construal. One thing that education is for is playing a role within an institutional division of labor that realizes FEO. But because education can't fully complete its evening out of class barriers when other institutions fail to do their part in the division of labor, the institutional division of labor, this account of sectoral justice for education is incomplete.

So I want to propose that an account of sectoral justice generally needs at least three things-- an account of the ideals of justice that a sector ought to promote, second, an account of how far the sector must go in taking up the slack when other institutions, other sectors, fail to do their part, and then third, an account of how the sector ought to go promoting the ideal. So a suitably robust principle of action guidance is this third thing.

And I've argued that fair equality of opportunity is one ideal of justice that primary and secondary schools ought to promote, that the ideal is plausible, too, as a standard of educational justice, meaning that the sector of primary and secondary schooling is just only when it leaves students enjoying equal prospects to lead good lives. Presently, I'll argue that radical educational equality is a standard of educational justice in ideal and non-ideal circumstances. So that'll answer our second question.

To be just, I want to argue, primary and secondary education must fully take up the slack caused by other institutions' failures. But first, I want to consider the worry that it's misguided to look to theory for guidance on these questions. So the second and third components of sectoral justice that I've just suggested raise questions of partial compliance. And it's generally thought that Rawls' only work in theory on partial compliance is his discussion of civil disobedience and conscientious refusal.

But that's clearly not his only attempt to theorize justice in a way that can inform partial compliance theorizing. So on my reading, and inferring from yesterday, I think, on other people's readings in this room, a primary contribution of theory to this project lies not in the specific principles that it endorses, but rather in the ideals and values that those principles embody for a particular set of circumstances, namely circumstances of full compliance wherein those ideals that are embodied by those principles in circumstances of full compliance might have a broader jurisdiction.

So consider that in his later writing, Rawls defends theory against the charge that it wrongly fails to address gender- and race-based discrimination. He begins by pointing out that an omission isn't necessarily a fault. Then he continues, quote-- whether fault there be-- sorry, I always think he sounds like a leprechaun there--

[LAUGHTER]

Whether-- whether fault there be depends on how well that conception of justice articulates the political values necessary to deal with these questions. Justice's fairness and other liberal conceptions like it would certainly be seriously defective should they lack the resources to articulate the political values essential to justify the legal and social institutions needed to secure the equality of women and minorities.

In theory, too, Rawls often talks about the values or ideals that inform the principles of justice, or that the principles embody in circumstances of full compliance. And for Rawls, what matters for justice is the way in which social institutions work together to realize those ideals. Precisely because this institutional division of labor for realizing-- precisely because of this institutional division of labor for realizing justice, a failure in one sector to do its part can affect what other sectors ought to do.

For instance, referring to market imperfections in otherwise just economic systems, Rawls says, quote-- what really counts is the workings of the whole system and whether these defects are compensated for elsewhere. And in talking about how we might choose among several unjust institutional schemes, he notes that the best we can do, quote-- sometimes will include measures and policies that a perfectly just system would reject.

This means that for Rawls, institutions can be tasked with taking up the slack from other institutions. Now, in referring to the compensatory measures that a perfectly justice system would feature, he calls those compensatory measures injustices. So he says, he follows up on the quotes just read-- two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, an adjustment of compensating injustices.

But I think in light of the theory as a whole, Rawls shouldn't call these compensating-- compensating adjustments injustices. Even in circumstances of full compliance, we know, certain institutions can be tasked with compensating for the reality that human behavior makes certain ideals unrealizable. For example, FEO tasks schools with compensating for the unavoidable disadvantage caused by children's unequal starting points, even when we have just market socialism, or property-owning democracy.

And Rawls, elsewhere, is clear that the justice or injustice of institutions should be assessed in light of how an institution is realized at a certain time and place. So I think what Rawls should say is not that competing injustices balance out, but rather that the very same standard of justice demands more or different things from one sector when other sectors fail to do their part.

So when it comes to the sector of primary and secondary education, I think we have a quite extreme form of compensatory institutional obligations. To be just, primary and secondary education must fully take up the slack caused by other institutions' failures. My case draws on two considerations-- first, compensatory obligations in general makes sense. And second, education incurs quite a strong version because it's a social sector that's primarily for realizing this principle of equal opportunity.

So to try to make the first case, I draw on the example of affirmative action and how it makes sense to think of affirmative action and other things that we might do in higher education as a compensatory institutional obligation. So even if you think that affirmative admissions is unjustified, that doesn't really-- that debate doesn't really hinge on the question of whether institutions can incur compensatory institutional obligations.

Similarly, you might think curricular and extracurricular programming for first generation students, or poor and minoritized students, these things, I think, are appropriately thought of as compensatory institutional obligations. And if people disagree about whether we should have them, they're not saying that this is an incoherent idea that one institution should do something to compensate for failures, residual injustices, that are tolerated by other institutions.

So I propose to ask what must the sector of primary and secondary schooling do to realize equal opportunity when other sectors fail to do their part? And the case of affirmative action-- sorry, affirmative admissions, I think, suggests that we've long been asking this question about higher education, and that compensatory obligations make sense as part of our answer.

Now, I think someone might insist that even in circumstances of injustice, we should think of justice in any particular sector as just what that sector would be tasked with doing in an otherwise just basic structure. So educational institutions should be internally just. They should do what they would do to promote equal opportunity and adjust basic structure. But they're not appropriately expected to do more in promoting justice beyond that.

But I think that the denial that institutions can have compensatory obligations comes at a high cost. And here, I draw on the case of policing. So if we think that policing can have any legitimate social ends, it's plausible to think that there are some policing practices that might be perfectly acceptable in an otherwise just basic structure, but that would exacerbate social injustice in our circumstances, and that they therefore should refrain from doing, and that this makes sense to think about on the model of compensatory obligations.

OK. So the case for acknowledging compensatory obligations seems especially strong in the Rawlsian and framework within the sector of education. So if promoting ideals of distributive justice is part of what-- is part of education's social role, then saying that it needn't take up additional slack when other institutions fail to do their part is like saying that a tax and transfer system needn't be any more progressive when dire need is unmet than when everybody is flourishing. We think that the progressiveness of a tax and transfer system depends on what other institutions are doing, or failing to do, in their role in a just basic structure.

We saw earlier that for Rawls, the just use of markets depends on the history and culture of society. And I think that we should also take justice in one sector to depend on circumstances, including the extent to which justice is being realized by other sectors of society. So equal opportunity through education means equalizing students' prospects for leading good lives. So long as other institutions are very unjust, this can't be fully accomplished. And it certainly can't be accomplished without running afoul of other values.

But the standard of educational justice doesn't change when other institutions fail. And at bottom, I think that's because the standard of educational justice is set by children's entitlements of justice. Students are entitled to equal prospects which they can thereafter make of what they will. Since schools are the social sector that's for equalizing prospects, they're the institutional guarantor of that justice entitlement.

So educational justice isn't achieved, even when other institutions fail, until students enjoy equal prospects. This doesn't mean education should equalize students' prospects at any cost. Schools are subject to other moral requirements, against which we have to balance equal opportunity. And in the next section, I'll propose a principle for action guidance in light of these considerations. But it does mean that we shouldn't say that we've achieved educational justice short of equalizing students' prospects. I think that's a virtue of the account, not a liability.

So Section 4, Prioritarianism and Sectoral Justice. So I've argued that fair equality of opportunity is an ideal of justice that primary and secondary schools ought to promote and that it's plausible to use as a standard of educational justice. I've argued that social sectors can have compensatory obligations and that these can be stringent. And I've argued that a case can be made that these arguments are Rawlsian arguments.

Finally, drawing on these points, I suggested that radical educational equality may be a standard of educational justice even in circumstances of profound injustice. So if that's right, we now have an answer to our second question. To be just, primary and secondary education must fully take up the slack caused by other institutions' failures. So this leaves our third question of electoral justice-- how should the sector go about promoting the ideal that justice tasks it with?

So it might not be immediately obvious how this question differs from the ones that I've already addressed. But in arguing for radical educational equality as a standard of justice in education, I mean to endorse it as a standard by reference to which we can judge injustices. So long as students don't emerge from primary and secondary school with equal opportunities to live good lives, we shouldn't say that educational justice is realized.

But a familiar point in our circumstances, radical educational equality is wholly unattainable and very high standards of justice can easily fall short when it comes to action guidance. So I've taken educational justice to be strictly egalitarian. But when it comes to questions about what we should do to pursue it, I'll argue that we'd be better guided if we hew closer to Rawlsian-- the other Rawlsian principle of distributive justice.

So the difference principle favors the social arrangement with the highest floor, the one where the worst off are better off than they would be under any other arrangement. Applied to schools, quote from Rawls-- the difference principle would allocate resources in education so as to improve the long term expectations of the least favored. If this end is attained by giving more attention to the better endowed, it is permissible, otherwise not-- end quote.

So I don't endorse the corollary of the Rawlsian indifference principle exactly as a principle of rectification for education. For one thing, I don't endorse the absolute priority of the very worst off, relative to others who are badly off. Now, you might think that without a simplistic mechanism for discounting gains to the progressively better off, we also don't have a perfectly action guiding principle in a prioritarian principle of educational justice, but educational decision makers don't need perfectly action guiding normative principles.

In our actual circumstances, they lack the fine-grained descriptive information that would make perfectly action guiding principles actionable. So for one-- for example, they won't be perfectly able to discern which students' prospects are the worst, and by what margin in comparison with every other student. So the kind of action guidance we would get from a lexical priority difference principle just couldn't be used in this domain anyway as a principle of action guidance because we lack the empirical information that we would need to have in order to make good use of it.

So it's enough from the perspective of action guidance for a teacher to know that she can best act within her role of promoting justice by prioritizing the interests of students in proportion to their disadvantage. And of course, I'm also not here endorsing the difference principle as a standard of justice and education. For that, I've defended radical educational equality. My proposal rather is that we embrace prioritarianism as a principle of reform and education.

So in crafting and evaluating educational policy in circumstances of injustice in schooling and in other institutions, and in acting as individuals within schools, we should attach greater moral weight to students' interest in proportion to how badly off those students are, as measured by their prospects for living good lives. So I'm just going to describe this next bit.

I just compare this in structure to the way that some maximizing consequentialists will say, well, of course, we need a different principle for action guidance because maximizing consequentialism-- which is perfectly plausible, they'll argue, as a standard of right action-- can't give us good guidance for how to act because if we're always trying to think that to do the thing that maximizes the good, we're likelier to fall short than if we just follow some rules of thumb.

So similarly, I'm saying the standard of right action is egalitarian, but the principle to guide action for reform is prioritarian. So I propose that a good action guiding principle for educational reform will issue action guidance for reform towards the right standard of justice, issue action guidance at a level of precision fit for the context of decision making, and issue action guidance that is flexible enough to be robust across circumstances and to preserve appropriate space for the exercise of judgment.

And I want to argue that a prioritarian principle of educational justice is a good principle of action guidance for the social sector of primary and secondary education. So first, if I'm right that a just educational system is one that equips students with equal opportunities to live good lives, then we can make progress toward a justice system by systematically privileging the students whose life prospects are worse.

We've seen that this prioritarian principle isn't perfectly action guiding. Even if decision makers had perfect descriptive knowledge of their circumstances, my principle leaves normative uncertainty concerning the degree to which the value of promoting students' prospects is indexed to their disadvantage. But again, in light of irresolvable descriptive uncertainty, a very fine-grained principle for pursuing equal educational opportunity would be wasted.

It would provide guidance at a level of granularity that empirical uncertainty precludes making use of. So with their instincts, their knowledge, and their goodwill, teachers and other educational decision makers can work to allocate educational resources at their disposal, quote-- so as to improve the long term expectations of the least favored.

And it's precisely by doing that aggressively and even at some cost to other values that they can work toward realizing the standard-- the egalitarian standard of justice that radical educational equality specifies. So what of the third condition for a good principle of educational reform? Is the prioritarian principle I propose flexible so as to enable robustness as circumstances change?

I think it is. It directs decision makers' moral attention to whomever enjoys the least favorable prospects over the relevant interval of time. By leaving open the degree of priority, it enables decision makers to employ useful heuristics and to make judgments about how to adjudicate benefits among different kinds of students, all of whom enjoy sub-optimal or sub-equal prospects.

So suppose the district is choosing between two investments. And this is on your handout. Either they'll add more school bus routes in neighborhoods-- sorry, in neighborhoods housing relatively disadvantaged students in order to decrease the time those children spend in transit and enable them to get more sleep in the morning, or they'll invest in support specialists to enable students with behavioral health difficulties to spend more time in their regular classrooms.

Suppose the most disadvantaged group of students, from the Rawlsian perspective, are those from the disadvantaged neighborhoods who also have behavioral health difficulties. Both investments cast a wide net relative to this most disadvantaged group because not all those who would benefit from better bus coverage have behavioral health difficulties, and not all those with behavioral health difficulties come from these disadvantaged neighborhoods.

Still, the priority in principle of action guidance doesn't tell us to reject both of these big net investments in favor of some more targeted but less efficient or less cogent alternative. And because it leaves open the degree of prioritization, it avoids the need to discern relative degrees of disadvantage with precision.

Finally, the principle leaves room for judgment in light of the circumstances, and of the other values that a sector should realize, and that circumstances might render more or less salient. So perhaps in the wake of school closures and disruptions due to COVID-19, keeping behaviorally vulnerable kids in their classrooms should take priority. Or perhaps if the school hasn't traditionally served the disadvantaged neighborhoods well, and now struggles to win trust from the families in those neighborhoods, it should prioritize the added bus routes as a show of good faith.

Or suppose that because of failures in other social sectors, many students' caregivers are involuntarily unemployed. This will plausibly interfere with the learning of the affected students. Either investment that the district is considering will prompt hiring in the neighborhood and the community, but increased hiring of bus drivers plausibly will benefit the more disadvantaged students because bus driving requires less credentialing than does becoming a behavioral specialist and because it benefits some workers' schedules.

So prioritarianism can incorporate these various sources of benefit and work within the practical and value-based constraints that characterize any particular choice scenario. It's appropriately precise, appropriately flexible in its action guidance, and that action guidance will incline decision makers toward promoting radical educational equality. So for these reasons, I think prioritarianism is a plausible action guiding principle of reform for primary and secondary schooling, and a plausible companion to radical educational equality as a standard of justice.

I suspect, moreover, that any social sector with some role to play in promoting egalitarian justice which must work against failures in other institutions and which faces trade offs between egalitarian justice and other values has good reason to adopt a prioritarian principle of reform. So compare the observation that distributive and racial injustice causes problems for certain policing practices that might be acceptable-- the practices might be acceptable in other circumstances-- in circumstances of a just basic structure.

So assuming that policing has a legitimate role and a just institutional structure, that role will weigh against any reason it has to promote prioritarian and distributive justice. So unlike education, maybe this is a sector that's not principally for promoting equal opportunity. It's principally for doing something else. Nonetheless, it might be constrained by this prioritarian consideration.

So if certain ways of going about its legitimate business exacerbate prioritarian injustice, if they harm particularly badly off groups, that's a consideration that favors a police force pursuing its legitimate business in other ways. Although the weightiness of the relevant countervailing considerations will vary from sector to sector depending on what those sectors are for doing, I submit that prior prioritarianism can be a helpful principle generally for acting on the compensatory obligations of justice that sectors inherit when other sectors fail to do their part. And I'll stop there.

CHRISTIE Thank you, Gina.

HARTLEY:

[APPLAUSE]

Sabine?

SABINE

TSURUDA:

Good morning, everyone. I just want to begin by briefly expressing my gratitude to the organizers and the Karsh Center here at University of Virginia for having me. Thanks as well very much to everyone here for helping me with this very early stage project. I appreciate you coming out here and engaging with this kind of new idea.

So this is a project about the constitutional dimensions of workers' collective activity. It's not explicitly-- for those of you that have read the paper-- it's not explicitly about how to interpret Rawls, let alone how to interpret a theory of justice in particular. Instead, what I try to do here is to show how a theory of justice and Rawls has, at least, influenced my thinking and why I think it offers valuable resources.

So what I do is I take up some central ideas and a theory of justice in the paper. These ideas include the idea of democracy as an ideal of cooperative interdependence, as well as the liberal democratic commitment to our basic moral equality-- to the idea that each life is of fundamental and hence equal value, as well as the idea that a central aim of a democratic society is to secure social conditions that treat us in accordance with our basic, moral equality.

So these are some kind of big picture ideas that I think offer some really valuable resources for thinking through some thorny and controversial issues about workers' freedom of association. So in this paper, what I do is I draw on these kind of liberal egalitarian resources, try and give a bit of content to them, and argue that when workers come together to try and exercise-- to try and have a voice in their working conditions, we should understand those workers as attempting to exercise the basic freedom of association.

And labor rights, because they create legally protected opportunities for workers to come together and to try and have a say in their working conditions, should be protected and interpreted as implementing the basic freedom of association in our constitutional legal order. So in order to develop this picture, what I'll do today is begin with--

[WHISPERING]

So in order to develop this picture of labor rights as associational rights, I'll begin just by briefly situating constitutional questions about labor rights in a recent legal controversy about collective bargaining. And then, I will-- well if I can get the clicker to start working again-- sorry, I think it-- if you could-- OK, great. Then I'll turn to my own account of workers' associational freedom.

I'll briefly expand on the notion of basic liberties that I'll be working with and then explain how occupational freedom, I think, implicates many basic liberties and so should be viewed as a basic liberty, and labor rights enable employees and covered workers to exercise this occupational freedom in ways that constitute their resistance of particular relationships of subordination in the employment relationship, maybe also broader social relations of subordination.

And because of this role that labor rights plays in protecting workers in asserting occupational freedom and resisting subordination, I argue that they should be viewed as kind of quasi-constitutional rights. And so I'll conclude by briefly walking through some ways in which we might view labor rights as quasi-constitutional rights, what those implications are. But most of my presentation will focus on these first two larger issues given the kind of philosophical orientation of the group.

And of course, happy to talk about anything in the discussion later on. And then I'll end by briefly touching on some other sites of legal reform. OK, so are labor rights associational rights? So for-- there's a long tradition in labor law theory of viewing workers' rights to come together, to have a voice in their working conditions, as political liberties, political rights that enable workers to have a voice in public affairs and to kind of act as a countervailing weight to the very powerful voice that owners of capital have.

More recently, this view has been revived in the wake of a Supreme Court opinion from 2018 *Janus*. In that case, the Supreme Court held that mandatory agency fees-- so agency fees are fees that go towards covering the costs of collective bargaining. So they held that state statutes requiring public employees to pay these agency fees, even when they're not members of the union, and even when they disagree with what the union is doing-- that those statutes violate those employees' First Amendment rights by requiring them to subsidize speech on matters of public concern that they disagree with.

Now, lots of labor scholars and people working in the labor movement have, I think rightly, argue that this has dealt a major blow to the labor movement, depriving a lot of unions of the financial resources they need to advocate on behalf of the workers they represent. But they've sought to kind of find the silver lining in this. And the silver lining in this for such scholars is that, well, now it looks like collective bargaining-- like the Supreme Court has recognized collective bargaining as an exercise of political liberty.

So if that's the case, why not view other labor rights as protecting political liberty. So for example, the National Labor Relations Act protects employees when they engage in speech-- critical speech for purposes of mutual aid or protection-- so when employees complain to their boss about pay scales, or complain to one another about maybe an unfair process that they're being asked to undertake in the workplace.

So perhaps a speech about collective bargaining is a speech on a matter of public concern because it concerns things like public spending, what the government should be providing for its workers. Maybe this other kind of speech should be protected as political speech. And then, of course, unions, as sites for developing the positions advanced in collective bargaining, might also be viewed as political associations and hence vehicles for political participation, and might on that basis, be offered their constitutional protection.

So this is a view that has received a lot more recent attention. And I don't disagree in any way that labor rights often protect really important exercises of political liberty for workers. But in this paper, I want to-- I briefly point out that there are some respects in which, if this is going to be our model for constitutional protection of labor rights, it has some important limits.

So first, it has uncertain application to private workplaces. The principle in *Janus* has grounded the view of collective bargaining as being on matters of public concern, in part on the fact that the employer was a public employer, that they were negotiating with the government. So what do we do about small private workplaces that are not the government? So labor rights and core, daily exercises of labor rights are exercised in private workplaces.

And often what's being asked for has a very local and relational and character. So it's not necessarily about affecting public spending or about affecting broader public policies about offering health care. It's often about particular pay scales in the workplace, or about particular processes, or dress codes, or processes for prescribing medication in hospitals, that sort of thing. So it often has a-- when people exercise labor rights covered by the National Labor Relations Act and other like [? Wagner ?] models, it really has this kind of local, inward character.

And one might worry, if you were trying to protect that kind of activity on the ground of its political character, that you would get kind of uneven protection. So it seems like the way labor rights work as you get protected regardless of whether anyone takes an interest in the broader public policy considerations that you're raising by your labor activity. And it doesn't matter if you're trying to change the society or not. It's perfectly all right for your activity to be highly localized and really targeted at specific employment relations, and not at the relationship between workers and the state, for instance.

So I think these models have some limits. I should say that I don't talk about other models of associational freedom in the paper, but of course, there are other models. So under constitutional jurisprudence here and elsewhere, there're also expressive associations that are protected by the Constitution-- so groups of people coming together to develop a shared message and to express that message.

There're also what I call moral associations of which religious organizations are paradigmatic examples where people come together to develop moral views and to influence one another's consciences. But I also think these two models sometimes offer some support for protecting labor rights, but not always, in part because even though workers do often come together to communicate a message, it's not really just about the message. It's about affecting the employment relationship. And that's reflected in the rules for membership in unions.

So unions can't turn members away. That's in part because they're supposed to advance the shared interests of the group. And that's their animating purpose, unlike expressive associations or moral associations where we think it's really important that we not regulate their membership. So we may think that maybe-- maybe labor rights don't protect anything like the basic freedom of association, at least in these kind of core, quotidian exercises that I've been discussing. Maybe there's something there.

But I don't think we should stop there. I think that there are reasons to look to philosophy, in part because our extant legal categories don't always exhaust the moral universe. Sometimes we get things wrong. And sometimes philosophy can get us some resources to think through what the other possibilities might be in light of our more basic political values. It also seems to me to be false that our interests in core exercises of labor rights are just pecuniary, that it's just about money.

So if we think that it's not about association or speech, then that kind of supports, in some respects, predominant jurisprudential view that these kind of core exercises of labor rights-- just-- it's just mere economic activity. It's not the kind of thing that rises to the level of implicating constitutional issues. But I think that that's wrong because employment has a tremendous moral and social significance in our lives, particularly when viewed through the lens of liberal egalitarianism and liberal egalitarianism's protection of people in being able to set their own ends and in being able to form a variety of relationships over which they can exercise some kind of meaningful agency.

And there's also, I think, a real kind of equality worry at work here, too. The employment relation is legally constituted and, as I'll say a little bit more in a couple of minutes, gives employers a tremendous amount of authority over dimensions of work that are morally salient-- so over what kinds of ends people pursue, over how they pursue those ends. So that's how they use their body.

And so to say that this is just merely a response to pecuniary interest, I think, grossly misrepresents the reality of employment. And so I think we should still ask, even if our extant legal categories aren't super helpful right now, whether workers' collective activity to try and have a say in their working conditions should be protected as a basic right. I think we should still ask this question.

Now, I just want to briefly touch on a few more risks that might arise in turning to liberal theory to respond to these questions that in part, I think, connect to some of the discussions we were having yesterday. So one is just we want to make sure that we use and deploy liberal concepts in a way that attends to the reality of social oppression. And so there's a risk that if we-- if the way we ask the question of whether labor rights are associational rights-- if we ask that question by asking what kinds of rights would workers have in a fully just society, I think we really risk missing the point of labor rights and securing social conditions of freedom and equality in our current social reality.

And so what I want to try to do just methodologically is ask not what labor rights would we have under conditions of perfect justice, or even reasonable justice-- under a reasonably just society, but rather what, here and now, are the essential institutional conditions for treating workers as free and equal? And so what, here and now, would workers' basic associational rights look like?

So that's one kind of methodological way I'm trying to deal with this worry about overlooking the reality of social oppression. So to elaborate a bit more-- so I want to kind of-- so what I want to do, then, is use the basic idea of a basic right, or a basic liberty of liberalism, and then quickly turn to the very non-ideal conditions in which we live, and then ask what would the basic right of association look like for workers under those non-ideal conditions?

So following Rawls, and many other liberal egalitarians, I assume in the paper that basic rights and liberties are the essential institutional conditions for securing our status as free and equal. I want to just break this down briefly. So institutional conditions-- so following Rawls and others, I view basic liberties in this paper as institutional, as a framework of legally protected paths and opportunities that make it the case that we can do, or not do, something free from state and private interference alike.

And then, I view social conditions of freedom and equality as being-- as imposing requirements of substantive freedom and substantive equality on the state that social conditions for freedom include those that would secure the adequate development and full exercise of our moral agency over the course of our lives. And so following Rawls here, I view our moral agency as including the capacity for a conception of the good-- so our capacity to be able to set ends for ourselves and to exercise agency over what ends those are, and to act on those ends as well, as well as our capacity to act morally and justly by treating other people's lives as valuable and equally important to our own lives.

So there's the capacity to conception of the good, and then our capacity for justice. And so social conditions of freedom are those they give us the social and material means we need to develop these capacities and exercise them over the course of our lives. Conditions of substantive equality in turn treat us as having equally weighty claims to social conditions of freedom. And maybe that equality also includes other things here, but that would just mean this is just a among the-- among the conditions for substantive equality, not necessarily exhausting all the ways in which-- all the kinds of demands that equality might make on us.

OK. So with all of that being said, what I want to ask is should workers have a basic liberty to come together for purposes of having an effective voice in their working conditions? So is being a-- is being legally protected, when workers come together for purposes of having an effective voice in their working conditions, an essential institutional condition for substantive freedom and substantive equality? So that's the basic question.

Now, the view that I advance is fairly schematic. So I'd be really help-- I'm really interested in receiving any feedback, any constructive suggestions here on what needs to be filled in in this part of the paper. But just to refresh our memories, so what I begin with is a point about occupational freedom. So a lot of liberal egalitarians-- I think as Samuel Fried-- Samuel Friedman recently wrote-- nowadays liberal egalitarians just largely agree that occupational freedom is a basic liberty not because work is special or should have some kind of special status in our lives-- so not for kind of perfectionist reasons-- but because the way we organize employment implicates practically every other basic liberty that we have.

So employment engages our minds and bodies in the pursuit of particular ends. Its structures our days and thus its structures our opportunities for association. Workplace rules and policies can, in a very real way, shape what views we express, both in and outside of the workplace. I think that the list-- I think, goes on. So employment is really quite life-shaping in these respects. And as a result, it's really important that it be, in some meaningful sense, up to us how we labor and for what ends.

And under the extant legal regime in the United States-- but I should also say, coming from Canada, the same can be said in Canada, though for perhaps different reasons-- because of the-- because one, of the distribution of power and ownership in society, but also because of the particular legal rules, occupational freedom isn't just kind of threatened at the moment of formation of an employment relationship where an employer, because of their control over the many goods of employment, can exert asymmetrical control.

So it's not just about the moment of formation, but it's about what happens after an employment relationship is formed. So for instance, when employment is at will-- which as we know, it often is here-- an employer enjoys the privilege of prospectively imposing new working conditions on employees. So they're not contractually bound not to do that. It's totally within their legal rights to do so. And there's nothing an employee can really say to complain unless the new working condition is discriminatory or otherwise violates extant law.

Even when employment isn't at will, at common law-- in Canada, in the United States, in the Commonwealth more broadly-- employees are under a legal duty to obey all of their employer's reasonable orders. And a breach of that duty provides a paradigmatic example of cause for termination. Now, the duty of obedience really just directs employees to-- I guess, really just empowers employers to fill gaps in the employment relationship and to change terms-- to change the requirements of a job in ways that best suit the employer's interests.

So-- and the interests of the employers are really quite broad. Courts don't like restricting the range of interests employers can have. They include everything from their public image, to their aspirations of economic domination. So the duty of obedience also gives employers a tremendous amount of unilateral authority over how a job is carried out and for what ends.

So Facebook can rebrand its model and ask all of its engineers to create the Metaverse. And employees at Facebook don't have any-- oh, Meta, now-- don't have any legal basis to complain. In fact, obligated to comply. So there is this-- it's a social reality that for many people, employers have largely unilateral authority over the employment relationship. And this, I think, renders occupational freedom for many employees illusory.

So even though it may be-- they may be uncoerced when they enter an employment relationship, it's a relationship that gives an employer power over the very kinds of-- over the very dimensions of employment that make occupational freedoms so important to begin with. So authority structure in the employment relationship, I think, can render occupational freedom illusory. And anyway, that's not just bad for freedom, but in a way, that's bad for equality.

So workers are made less free because they are subordinated to the ends of another. So they have to work for the employers' ends and under their control and authority. So there's also, I think, an equality objection here in addition to just brute loss of freedom. And in contrast, when workers come together to have an effective voice in their working conditions, they assert their entitlement to occupational freedom.

They're trying to have a say, to not let their employer just decide how their bodies are going to be used, or for what ends they're going to be pursuing, through what processes. And that's one way that they assert their entitlement to occupational freedom. But in doing that, they also resist employer subordination. So they can test the authority. Even if they're not successful in changing the authority in the employment relationship, it still creates a different stance.

So they're no longer just relating to their employer as someone who, at least superficially, complies with the authority structure by occupying the stance of resistance. It creates a kind of alternative to just being completely subordinated to their employer. So it's that kind of partially liberatory, but still very imperfect position. And I think there's something valuable in being able to do that.

Now, I think that if a society didn't create legally protected pathways and opportunities for workers to come together and have such a voice, that that society would fail to treat workers as free and equal. So it's hard to imagine how a society could, on the one hand, claim that its workers are entitled to social conditions of freedom and equality, and yet on the other hand, permit, if not empower, employers to silence even just their claims to such social conditions.

So in a way that I think shares many affinities with protection of civil rights protest, the law should be-- should protect people's claims to equality and to freedom, and that employers pose a specific threat to being able to stake that kind of claim, let alone act on it. So I think that we could think about workers' associational freedom as part of the basic freedom of association because it enables workers to-- protecting it is part of ensuring that we treat workers as free and equal.

And because labor rights create these legally protected pathways and opportunities for workers to come together and have a voice, labor rights should be interpreted as implementing workers' basic associational freedom. So that's roughly the picture of workers' associational freedom I advance in the paper. And I want to just briefly discuss what some of the legal and institutional implications of this would be.

I think it would require significant reform in the United States in ways that-- in ways that actually would bring constitutional law in the United States more in line with their neighbors north of the border. So in Canada, there actually is a constitutional right to engage in some forms of labor organizing, and also under international human rights obligations, as well. So this is not-- this is not a completely wild view. It's actually quite common outside.

So because labor statutes on this view would implement the basic freedom of association, I argue that they should be treated as quasi-constitutional. So behind the little screen up there is the word "quasi," for those of you that can't see it. And so-- and so what this means, just roughly, is that because they implement an important constitutional value, they should be given priority over other general, non-quasi constitutional statutes, as well as certain common law rights and doctrines.

So to try and be a little bit more concrete about this, this would require treating labor rights as inalienable, like you can't just contract them away, not just because the legislature maybe intended that, not just because there's a no contracting out provision in a labor statute. But even if there were no no contracting out provision in a labor statute, this normative foundation for labor rights would entitle a court to at least imply such a protection that you can't contract out.

And it would also require giving labor statutes priority over certain kinds of statutes. I discuss one case where I think the Supreme Court does-- gets-- gets both of these points exactly backwards. In *Epic Systems versus Lewis*, a group of workers sued their employer for, among other things, wage theft. And all those employees had signed mandatory individual arbitration clauses. So that would require them to arbitrate their wage theft claims individually.

So they couldn't-- so they've signed away their right to collectively pursue a legal remedy which is arguably protected under the National Labor Relations Act. The majority didn't agree, but I'll just bracket that issue for now. Predictably, the employers responded by seeking to compel mandatory individual arbitration. If we had this view of the National Labor Relations Act that I've been arguing for, they would have lost for two reasons.

So one-- they would have lost simply because they shouldn't be able to alienate the right to engage in collective activity for their mutual benefit or assistance. But two-- the statute that the Supreme Court relied on to enforce the mandatory arbitration agreement would not have been-- would not have been given priority over the National Labor Relations Act. So the Supreme Court explained that there's this other statute, the Federal Arbitration Act. It came before the National Labor Relations Act. It implements a really strong public policy in favor of arbitration.

And so that public policy should prevail in a particular case. But here, I would argue that the National Labor Relations Act should take precedence over that national policy in favor of arbitration because of its quasi-constitutional status, and not just because, as Justice Ginsburg explained in dissent, the National Labor Relations Act came after and is a specific-- is a specific statute rather than a general statute. So I think things would require being rethought here.

In the paper, I also discuss that this view of labor rights as associational rights would also require protecting organizing efforts relative to employers' property rights-- so not just permitting employers' property rights to trump labor organizing. I'm happy to talk about this case a little bit more in the discussion later, if that's of interest to anyone, of this recent case *Cedar Point Nursery* that's on this issue.

So I think that implementing the view that labor rights protect the basic freedom of association would also require some changes to labor law itself. So for those of you that are familiar with the National Labor Relations Act, you'll remember that the subjects of bargaining are limited in scope. And traditionally, they do not include higher level managerial issues and policies. So really the kind of permissive and mandatory subjects of bargaining are about things like pay, vacation time, health care.

But these higher level issues, in many ways, quite strongly implicate employees' occupational freedom, and so should also be included at least in the permissive subjects of bargaining. So similarly, the NLRA has traditionally been interpreted to not protect employee speech when it's critical about these high level issues-- the ends of work, or processes that are important to management.

And that area of labor law should also be reformed to protect speech even when it's about, like, a new prescription policy at the workplace, or challenging, maybe, an artificial intelligence company's decision to produce weapons systems rather than self-driving cars, for instance. That's actually a real case. I have a friend that-- that had his switched like that. He was making artificial intelligence software for self-driving cars, and then a new investor came in who had connections to the government. And now their software is for weapons systems. So quite different, no basis to object. But maybe the NLRA should be used as a basis to protect objections to that.

I think that we might also view this approach as grounding constitutional objections to exclusion from labor law. So for instance in Canada, workers can bring a claim for violation of their constitutional rights are being excluded. So farm workers might be able to bring such a claim under the National Labor Relations Act because they're excluded from the National Labor Relations Act. So that's just to say in focusing on constitutional jurisprudence, I don't mean to say that labor law is perfect.

I think that we might revise labor law, as well, in light of its role in protecting workers' associational freedom. So thank you so much for listening. And I look forward to discussing more with you shortly.

[APPLAUSE]

CHRISTIE Thank you, Sabine. Let me just take one minute to get questions down. OK. So we have a long queue. And while I
HARTLEY: continue to write down names, I'm going to go ahead and call on [? Laurie. ?]

[INAUDIBLE]

LAURIE: I just want to put it back on record that I loved the paper. It was really great and I want to invest more time in thinking through your arguments. But this is just really a clarificatory question, not a challenge. And what index for living a good life do you think is the most defensible one? Are you primary goods? Are you capabilities? Or are you freedom is nondomination? Where do you sit on how we're going to index that?

GINA
SCHOUTEN: So in the paper, I argue that we should think about it in terms of prospects for flourishing. And I have a very quick passage that's meant to suggest that-- again, this part of the paper is not-- and this is Rawls' view. Well, none of the paper is trying to excavate Rawls' view. But this part in particular, I'm not even really trying to say is consistent. But there is-- there are places where I think Rawls suggests that a different metric of justice for children is appropriate.

And so I do think that, because the metric of social primary goods presumes that the subjects of distribution are agents who can convert an instrumental good into a good for them, and because that assumption that the people who are-- to whom were distributing goods are agents isn't appropriate in the case of children, we should use prospects for flourishing rather than prospects for social primary goods as the metric, by way of which we're measuring their prospects.

LAURIE: OK, I-- we can talk about this later given there's a long queue. But I think you might want to think carefully about conditions for nondomination and what that would be for an adult life in terms of education securing those conditions. But we can chat.

GINA
SCHOUTEN: Yeah, we should chat. I mean, one thing is, unattainable as it may be, if we think about-- I mean, so I don't think that the standard of equal prospects, understood as prospects for living good lives, is unattainable in a just basic structure. And although I emphasized in the verbal discussion here the way that unjust social inequality influences students' prospects at the outset of education, another feature of a just basic structure is that educational outcomes wouldn't so closely predict ultimate life course outcomes.

And so if you're thinking about nondomination because you're worried about students with cognitive disabilities, or how-- how would the standard even be attainable in a just basic structure, I think that that's less of a concern once we think about the ways in which a just basic structure would be very different than ours, not only in terms of the disadvantage that students bring into the system, but also in terms of the way that academic achievements would fail in a just society to predict, as they do in ours, ultimate life course-- ultimate flourishing. But yeah, let's talk more. Thanks.

CHRISTIE
HARTLEY: OK. So on the queue, I have [? Blaine, ?] [? Simon, ?] [? Larry, ?] [? Catherine. ?] I have your question. I have another question in the back, and [? Cindy, ?] and [? Tommy. ?] Did I miss anyone? OK. [? Blaine. ?]

BLAINE: Yeah, so to some extent, I'm following up on [? Laurie's ?] question, but about the metric of justice, this idea of flourishing-- now, I read the paper as forward-looking, like the point of fair equality of opportunities to get children once they become full agents, full citizens, to have fair-- equal prospects in terms of their quality of life.

And so it seems like-- but then you said something respond-- in response to Laurie that suggests that this was a-- primary goods might be good for that, like for adults, citizens. But children need a different kind of-- we need-- we should use some other kind of good to evaluate how they're doing. But that isn't-- that is not really how I understood the paper. I thought the paper was more forward-looking. Like, we're--

So there's a lot of literature on childhood goods. And we might-- there's a debate-- debates about whether or not to the extent to which childhood goods can be understood in terms of Rawlsian primary goods, and so forth. And that's one debate people can have. But you seem to be suggesting something different. There's this different metric that's different than primary goods and the purpose of educational institutions is to prepare people to have, irrespective of their natural or social situation, roughly equal shots at-- as they become adults.

So it seemed to be like a forward-looking view, not saying, well, I'm concerned about realizing child-- distinctly childhood goods during the childhood phase of their lives. So I guess I was a bit-- just to follow up on Laurie. And then I had just one other quick-- my original question, which I'll keep quite brief-- is that I don't-- maybe this is a clarification question, or just-- or a comment of some kind.

But I'm not really sure you need the bounded-- what you call bounded luck egalitarianism stuff, partially because that's-- obviously, the political liberal in me-- like suddenly, the red lights start flashing once I see that. And I'm thinking, well, you're automatically going to-- you're making this metaphysical and not political by introducing that kind of idea. And I just don't see why you need it.

I mean, in a way, the luck egalitarian stuff presupposes a certain view of responsibility and free will. And none of that seems to be relevant when we're talking about people who are children, who are not yet-- maybe it's a bit arbitrary when we assign agency-- but are becoming agents.

And is it-- once-- OK, once you have agents, then maybe something like luck egalitarianism makes sense, but I just don't see why you need any-- however bounded you want to make it, why you even need that for the purpose of the argument, which I-- which like Laurie, I think is really great and interesting. I just don't see why you need luck egal-- so there's two questions there. Sorry about that.

**GINA
SCHOUTEN:**

No, thanks. This is great. And the first one, I'd just like-- I mean, offline, I'd like more help thinking about this. So I don't mean it to be that future-oriented. I want the metric to be prospects for flourishing over the course of a life. And it just seems to me that lots of the things that are going to be constitutive of childhood flourishing, like investing in kids' interpersonal skills, are also going to be investments in their future flourishing.

But you're right that-- and so for the part of it that is future looking, my case for not wanting to have the agency assumption inform the metric of justice doesn't really apply. And so there's a sense in which what I have is an argument for a kind of split metric where maybe we think about future prospects in terms of social primary goods and current prospects in terms of flourishing.

But I'm not really sure what that would look like. And I don't think we violate a commitment to respecting agency by thinking about-- OK, let's equalize prospects for flourishing in the institutions that interact with children, even though the agency would-- assumption would be appropriate to make about them, post their principal interaction with those institutions. So this is a thing that I struggle with because I do think that-- sorry, again, I'm calling it the agency assumption because-- maybe it's in your work, Blaine.

Somebody calls it the agency assumption that--

AUDIENCE: [INAUDIBLE]

GINA SCHOUTEN: Thank you. So the reason that social primary goods is an inappropriate metric for children is because children aren't the kinds of agents that we can hold responsible for converting instrumental goods into their ultimate advantage. And I think that that's right, but because educational goods are both for children now and for children's prospects, I'm not sure how to-- how to think about a radically egalitarian principle of education operating over that kind of split metric. So that's just to say I think that this is kind of an unresolved wrinkle for me.

Now, with respect to the bounded luck egalitarianism-- so I shouldn't call it that. But it really is-- I mean the premise for me is that we should not tolerate unlucky disadvantage in children. And I actually think that we don't need a comprehensive luck egalitarianism to believe that that's true. I think that the basic commitments that comprise reasonableness can get us that. But it-- because it is, like-- the way that I want to explain my divergence from Rawls in treating natural and social contingents-- like, he--

He treats them as subject to two different principles. And I'm saying we should be egalitarians with respect to not just social disadvantage, but also natural disadvantage. I sort of make this argument on the back of a premise about rightful intolerance of for unlucky disadvantage where, for children, all disadvantage is unlucky disadvantage. But I think you're right that for arg-- I should do without the baggage of luck egalitarianism.

But I do think it's like half of the luck egalitarian premise, which is not-- I don't want to approve a disadvantage insofar as it's not due to luck here. I don't need any of that. I just need the premise that impugns unlucky disadvantage in this light. But-- but-- maybe even calling it unlucky is doing-- is drawing on that tradition more than I need to. I certainly want to make clear that it's not a premise that you should agree with me about only if you're a luck egalitarian. And maybe I need to do that more strongly than I had and just completely disassociate it from that comprehensive conception of justice.

CHRISTIE Simon?

HARTLEY:

SIMON: Sabine, thank you both for the papers. They're both very interesting. I apologize, Sabine, if I've overlooked something here. I read the papers very quickly in the last couple of days. I generally find myself in very broad agreement with-- or at least sympathy with-- the view that you propose. My question is there's at least one sphere of employment where I become very skeptical of unions to resist subordination, or unions to grant those workers a strong bargaining power. And that's police unions.

And part of the reason is that police, when they work, are agents of the state. And there are strong reasons to hold them accountable as agents of the state. And a second reason is because I think police unions become politicized and when they become politicized, they're-- we're not too far away from burning crosses-type of-- there's sort of an implicit threat when police unions become involved in political activity.

So my question is, how would you deal with that? Is it-- my intuitions are perfectly acceptable and consistent with your views? Or would it be no, the fundamental liberty of association, here, that is generally applicable, is also applicable in this case? The same applies for military unions that they have in Europe in some countries.

SABINE Sorry, I just have one follow up question for you. Could you say a little bit more about what your worry is about
TSURUDA: police being agents of the state in the connection between that and unionizing?

SIMON: Well, because police officers are agents of the state, we have a public interest in holding them accountable in a way that we don't have a public interest in holding Susie who works in Burger King accountable. And in addition, police officers, at least in this country, go around killing people. Whereas Burger King workers don't do that. So it's a-- it's a different kind-- at least as far as I know--

[LAUGHTER]

AUDIENCE: [INAUDIBLE]

SIMON: Yeah, exactly. [LAUGHTER] So for labor law in general, it strikes me that we should be carving out an exception for police and perhaps other types of employment. That's my intuition. And I want to know if my intuition is perfectly compatible with your view or whether your view would require me to revise my intuition and say, yeah, well, jeez, you know police and soldiers, they get to have the same types of labor rights as workers, generally.

SABINE Oh, OK, OK. So I understand. Thanks, Simon, that's really helpful. So just one clarification first-- I don't mean to
TSURUDA: suggest that labor rights should be the same in every single case. It may be that certain-- like, so in the recent Supreme Court case that I mentioned just in passing at the end, *Cedar Point Nursery*, it was about access rights for union organizers to be able to come onto the property of growers to be able to organize workers.

And my view there is, like, the ground for whether a labor right should include this right of access depends a lot on the particular circumstances of the employment. Where is it undertaken? How isolated is it? What are the possible channels for communication? And so-- so that's not obviously about-- obviously not about police unions.

But the-- but the scope of labor rights that police should have, and the military, should be responsive to the kinds of concerns that you have. Now, I don't think that that means that they can't organize at all, but there may be limits on the extent to which how they organize, and the sorts of positions that they can advocate without betraying their responsibility as agents of the state.

So I would-- so I would kind of take a kind of intermediary position between the two poles you discussed-- same exact-- where, on one side, we have same treatment as everyone else, and on the other side, we have exclusion. I think it just requires regulation in a way that's sensitive to the kind of competing interests that we have as a society, and that-- but that the workers, nevertheless, still have.

AUDIENCE: [INAUDIBLE]

SABINE Sorry, I didn't hear that.

TSURUDA:

AUDIENCE: [INAUDIBLE]

SABINE Yes because the-- so the liberty of association has to be interpreted in a way that's harmonized with our other
TSURUDA: basic rights and liberties. And to the extent that the liberty of association for police officers is being used to violate the liberty of the person for many people, or to compromise its fundamental equality rights, then the liberty of association does not cover those activities.

CHRISTIE

Larry.

HARTLEY:

LARRY:

Thanks. And thanks for both talks. So this is primarily for Gina, but there'll be a little place for Sabine to jump in if she wants to. So I followed you all the way with the argument about educational justice and the connection to Rawls. And then, where I'm pausing and having trouble is the claim about what the educational sector is for. And you actually formulate it in different ways at different times because I wrote it down in the paper.

At one point, you say at the end, it's part of what the educational-- distributive justice is part of what the educational for-- sector is for-- and then, in the handout today, it was primarily what it was for. And then, maybe even once when you were talking just verbally, you just said it was what it was for. So I guess I want to push back a little bit, or wonder what happens if you want to push back.

It seems to me there are other things that the educational sector could be for besides realizing people's life outcomes. And that affects certain debates in important ways. So one could be that, like, part of the educational sector's purpose is to encourage the spirit of inquiry and the pursuit of knowledge as far as possible, and that anything that puts any bounds on that is problematic. And that's a higher purpose.

And maybe, this is where Sabine can come in if she wants to, that has something like a parallel in structure to the sort of like, well, labor law doesn't get into the purpose of the organization, kind of thing. I don't know if that's a fair parallel or not. And she could comment on it. You can comment on it if you want. But I do think this plays out in debates. So for instance, probably know the-- in New York City, there's been a lot of controversies over the status of gifted and talented programs in the specialized high schools.

And the mayor and the mayor-elect are arguing over that. And you read your paper, and it seems like you have to be on team Bill, as it were. But-- was arguing for the abolition of [INAUDIBLE] these programs. But it seems to me, there's an argument on behalf of team Eric, that they're not-- that's not entirely unreasonable, or just advantaging the interests of the wealthy, that there is something that looks like putting a bound on the pursuit of knowledge and inquiry if you smack down gifted and talented programs and the kind of specialized high schools that have produced incredible graduates for a really long time, even some from lots of very poor circumstances.

So I mean, I just-- I want know where you stand on that debate.

GINA

SCHOUTEN:

Yeah, so I'm sorry that I was not always careful enough in the formulation. So I definitely don't think that fair equality of opportunity is the only thing that schools are for. If I thought that, then that would entail that schools owed nothing to students who had unjustly favorable life prospects. And I don't think that. I think that fair equality of opportunity is the principal thing that schools are for from the perspective of the distributively just basic structure.

And so I think that's the sort of primary ideal of distributive justice, that-- the standard of distributive justice by which we can measure educational injustice. I do think that the kind of-- the thing that schools are for that makes it the case that they owe-- even the educate-- even the student with unjustly favorable life prospects, educational enrichment-- I think maybe it sounds like I don't think that weighs as heavily against educational justice as you do.

So I think that when we look at gifted and talented programs, we should be really attentive to what the data tells us. And if it tells us that these programs in certain places are actually an engine of promoting life prospects for disadvantaged students, then we should do it. If it turns out that-- if the data tell us that the students who enjoy the added educational benefit of these kinds of enrichment programs go on to have a really public spirited pursuits in higher education and they want to innovate on pedagogical curricula for kids with Down syndrome, then maybe that's a good reason to do it from the perspective of prioritarian justice.

But I don't think that just merely enlarging the good of like expansive intellect for the most advantaged students weighs very heavily when we're talking about scarce educational resources against this justice mandate that I'm trying to excavate. And it sounds like maybe we would diverge in that weighting.

But yeah, just-- to-- thank you as an--

AUDIENCE: [INAUDIBLE]

GINA I'm sorry?

SCHOUTEN:

AUDIENCE: [INAUDIBLE]

LARRY: I mean, there are because one belongs to the sphere of justice and the other doesn't. So we're talking about very different types of considerations. So weighting is very hard here, so--

GINA Well, I don't think those different considerations are incomparable, though. We often think that my commitment
SCHOUTEN: to-- my sort of special commitment to my child has to give way when it comes at a great cost to a public good like distributive justice. So I-- I don't think that the idea that we would have to weight different educational ends-- even very, very, very different educational ends-- is a problem for the account.

CHRISTIE Sabine, would you like to comment, too?

HARTLEY:

SABINE Sure. So Larry, you mentioned that maybe labor law is an example of a place where we don't really get into the
TSURUDA: purpose of the organization. But it's actually quite the opposite, which is interesting and I think poses a bunch of complexities I'm not quite sure how to settle, right?

So it matters, for instance, for your speech that's protected under the NLRA, whether it's for purposes of mutual aid assistance. And what makes something a union isn't just that it's an association of workers, but also for a particular purpose, like for purposes of collective bargaining. And that's in some ways a kind of constitutional anomaly in the United States.

So if we were to adopt my proposal-- so normally we think that associations get protection just merely because they're trying to express a particular view, but not because of the content of that view. So as an American trained in America, I get nervous when I start hearing about protecting speech on the basis of its content, or protecting association on the basis of its purposes. But at the same time, I wonder whether the kind of stringent prescriptions on protecting on the basis of content might maybe be overly-- might require some revisiting.

So to just briefly point to another related context, it's how we often protect civil rights protests not on the basis that it's people trying to stake a claim to equality, or to resist state oppression, but because of-- but on the basis of wanting to protect a plurality of different ideas in the public sphere. And that seems to, I think, miss a really important purpose of protecting civil rights protest. So I think it's actually complicated how much the purpose of a labor organization should matter, but maybe in ways that might fruitfully lead us to question the prescriptions on content-based protection.

**GINA
SCHOUTEN:**

I'm just going to ask how many people are in the queue because I had a follow up, but I'm happy to--

**CHRISTIE
HARTLEY:**

OK, we still have several people on the queue. One, two, three, four, five, six. OK. Catherine.

AUDIENCE:

[INAUDIBLE]

**CHRISTIE
HARTLEY:**

OK. I'm sorry, I don't know your name.

DEBBIE:

I'm Debbie. I'm going to [INAUDIBLE]. Debbie Hellman, I teach at the law school here. Thanks so much. I thought both those were fabulous. My question's a-- it was sort of the same question as Larry's, but I'm going to try to ask it again, with a little bit of a follow up. So I also was struck by the way that kind of certain aspects of what I think of as the goal of education seemed to fall out.

And just one comment would be I'd love the examples-- and I should say, I didn't read the paper, so maybe I just heard your presentation, maybe they are in the paper-- but would be ones where we see that conflict more between the goals of education-- other goals of education besides equality of opportunities.

And I think that the cases that, to me, are the hardest ones are the ones that don't involve resources. So even in answer to Larry, you were saying something like, well, you could see how you should put resources rather than to the kids who have an unjust excess of life prospects versus to-- we should give it to kids that are more disadvantaged.

I think a lot of the debates that animate people in the public schools are actually not about resources. They're about things like tracking of classes. So you could say, OK, we should spend 20 times the amount of resources on the kids that are most in need. And so that's where we're going to put all the educational resources, extra supplemental teachers, and whatnot. But we're still going to allow tracking of classes.

And I take it that's in conflict with the idea of equal life prospects, at the end of the day. But it's also in service I think of the kind of educational goals that you might think an education system poses. And I think it's those conflicts that are most pressing. So I guess I would-- I think it makes it too easy if we just talk in the dimension of resources. And one tiny little thought, also, about the example that you talked about at the end of your presentation.

It was striking to me that in thinking about-- in the action guiding principle of should we go with the buses, or the extra teachers-- like, neither of the conversations-- it was sort of focused on which group was most in need and which one would-- which policy would help their kind of life prospects the most.

But the other feature of what the goal of education is wasn't part of the discussion. I kind of wanted to know was sleeping more helping them to develop their capacities more, as compared to having the extra teacher? Like, that other piece of what education is just seemed to drop out so strikingly.

**GINA
SCHOUTEN:**

Thanks. So one thing is-- and this is-- I really appreciate the opportunity to say this. I think when I say resources, I mean something broad enough-- so my read on the data about tracking is that one of the reasons that tracking in practice looks so disadvantageous to the most vulnerable students is because the people who are sitting in the desks next to you are an educational resource.

And so I just mean it as something-- so absolutely, I want the-- I want that question to fall within the purview of what I'm talking about. And I think it is analogous in interesting ways to the case that Larry was talking about. So if it turned out that there were some students who had a very particular kind of educational impediment such that a pullout program actually did best serve their needs, even if it was a costly pullout program, then the principal would advise that.

But it looks like given the way that tracking is actually implemented in schools, it is disadvantageous to students along the relevant metrics. And so the kinds of costs that you impose on the most educationally and life prospectively advantaged students by avoiding tracking are justified by the fact that equal opportunity is an important one among the things that schools are supposed to do.

I do think-- I mean the busing case, for me, is motivated by just being struck by disparities and how long differently situated students spend on the buses. And I think some arguments that this actually is-- time not spending on buses is an important kind of educational resource. And so a lot of this is just going to be-- well, let's go back and look at the data and see if, in these particular kinds of circumstances, understood with as much granularity as we can get data for, adding an additional teacher would make a bigger difference than limiting time that these-- this kind of-- these students spend on the bus every day.

And not having enough sleeping in the morning does seem to be really bad for students. And students who are brought to schools from far away often are up very early. So that was what motivated that kind of case. And I really wanted to use it to try to show that we can be thinking about life prospects in this broad way. But I think a more conventional example would involve-- like--

OK, so which group of students-- say we do have tracking. And say that's a hard constraint because if we don't have a gifted and talented program, then our tax base will leave the district. And so we have to-- this is just a concession we have to make for the sake of the most vulnerable students. We have to keep these taxpayers in our community. We have to have tracking. OK, well then let's think about where the class sizes are going to be smallest.

Are they going to be in the class that-- the sort of AP classes that serve the students who have unjustly favorable life prospects? Or are we going to have a smaller student to teacher ratio in the main track, or remedial track classes? So I feel like this could guide us in terms of thinking through second best, concessive options, as well, even when we have to do pandering to keep certain kinds of parents in school districts, or something like that.

But I appreciate this. And I will try to think about ways to make that clear with the examples. But I absolutely-- I wanted to speak to these harder cases, and just meant to be using resources in a really encompassing way that includes peer effects and things like this.

CHRISTIE

We have four people left on the queue. Can I ask for an additional five minutes for questions, and request short versions of questions, and short versions of answers? In the very back?

HARTLEY:

AUDIENCE: Hi, I'm Sam. I'm a grad student at UVA in the political science department. And this is a question for Gina, but Sabine could chime in if she'd like. So I really like the idea of sectoral justice as an interplay between institutions, but I worry that you might not be taking into consideration just how deep this interplay goes.

And so for example, in regard to taxes-- and I am trying to make this very short-- in regard to taxes, it's not an interplay from inside the institution of education. It's related to the state in some way. And so even outside of a United States context, education would be considered a different part of the state infrastructure compared to the collection of taxes. And so given that there is a finite amount of resources and the formulation of the principle is such that the educational institution is responsible for correcting for this discrepancy in justice between institutions, and given the diversity that exists inside of the educational institution in terms of actors, I worry that it might be a very demanding principle for teachers.

So the example that sprung to mind is like, OK, we know that small classroom sizes are best for student outcomes. Does this mean that teachers are required to take pay cuts to hire more teachers to improve the quality of education? And so the question here that I think Sabine can chime in on if she'd like is about the relationship between actors inside of institutions as individuals who possess these basic need-- or basic rights, and their obligations as actors inside of the state apparatus.

GINA

SCHOUTEN:

Yeah, that's a-- that's a really great question. So I mean, I think that this is-- actually hopefully Sabine will jump in because I think there's just a very big and hard question about how-- what costs any individual is obligated to incur to work within an unjust system to try to mitigate the particular harms that befall people unjustly within that system. And I think that this probably applies in both of our contexts.

So I don't have a good answer to that. I mean, I certainly think that it would be unjust if teachers had to organize among themselves to try to lessen their pay in order to lower class sizes. But I don't think that that's different in kind from what-- we hear all these accounts and the pandemic of these heroic things that teachers have done to try to preserve the educational experience of their students.

So I'm going to carefully not say that I think justice requires them to do that, but it doesn't feel like the principle pushes us to something that's different in kind. We just see when we live in a really unjust society the cost of trying to make it better often unfairly befall the most vulnerable. And we have to think about remedial strategies, too, for how to adjudicate those costs.

I don't-- I don't have a particularly good account-- I don't-- I don't have any account of that. But I don't think it's uniquely a problem for the account of educational justice that I'm proposing. But maybe you have something more satisfying to say.

SABINE

TSURUDA:

I don't know. I don't know. It's a really hard question.

GINA

SCHOUTEN:

It's a great question.

SABINE I mean, [INAUDIBLE] there are lots of other questions, too. But with respect to workers in the workplace, so I
TSURUDA: don't take a position in the paper on whether workers are obligated to form a union or to exercise labor rights. But I think to the extent that unions and just worker representation in the workplace is a prerequisite for occupational freedom in the workplace, workers-- at least individual workers-- I think have a duty to do their part in supporting that.

And it may mean-- that may not mean going out in the streets and doing labor protest, but it may mean paying agency fees, for instance. And so there may be actually a good reason to legally mandate agency fees. But that's a very tentative view.

DEBBIE Thank you.

HELLMAN:

CHRISTIE Cindy.

HARTLEY:

CINDY: Can you hear what I'm saying? OK. This is for Sabine. So you, at one point, said you thought that the-- that freedom of occupation was essentially illusory once you took into account the kind of hierarchical, sort of dominant-subordinate relationship between employers and employees. And my question was just-- well, I just-- I actually think that's probably not true.

Because I think they're really just two separate values there. So occupational freedom, understood along the lines of, say, freedom of conscience, or freedom of movement, or something like that, is the freedom to not have the state assign you an occupation, or to have the state not prevent you from having a certain occupation. But then, the kind of freedom that people-- employees lack once they're employed is a kind of, I think, just a different ideal as kind of an ideal of autonomy.

So it's not clear to me that the former right is in fact undermined by the hierarchical arrangement that we find in a lot of employment settings.

SABINE Thanks-- thanks for your question, Cindy. So, I mean-- so I actually-- so one, I think you're saying a couple
TSURUDA: different things. So one, to violate occupational freedom, it has to be via state action. State has to coerce you into-- in order to count-- in order for a society to fail to secure occupational freedom, I take it that you're saying the state has-- I mean, the state is the only actor, I hear you saying, that can violate occupational freedom?

CINDY: I'm not sure I want to say something that's strong. I just want to say there's two different values-- the values of having an occupation that one prefers and the value of having autonomy once one has that occupation.

SABINE Right. So, so-- OK, so I see what you're saying. But I think that the way authority structure works in the workplace
TSURUDA: is that it undermines your choice to choose an occupation to begin with. So if you-- so you might think, like, there are certain epistemic conditions that need to be in place in order to exercise meaningful occupational freedom at the outset.

Or you need to know something about the job-- how is it going to shape your life? How is it going to implicate your core values? Like, will you have time to see your children? Where will you live? Like, these kinds of things. And it's-- and it's not just that you need to know more or less how it's going to shape your life, but you should be able to choose, in some meaningful sense, how it's going to shape your life. Right? So it shouldn't be enough at the outset to know that you're contracting into a relationship in which your employer can-- can change all these things kind of at will, on their own-- however they feel like.

So I do think that authority in the employment relationship actually does compromise occupational freedom by both-- by compromising its epistemic conditions, then also by just the scope of that authority itself over the nature of the job. Thanks.

CHRISTIE Tony?

HARTLEY:

AUDIENCE: [INAUDIBLE]

CHRISTIE OK, and then we had one more person on the queue. Yes.

HARTLEY:

AUDIENCE: [INAUDIBLE]

AUDIENCE: I'm sorry. I'm very sympathetic to the answer you gave to Cindy. I like the idea that the hierarchical authority within the employer relationship can undermine occupational liberty. And I am also sympathetic to, like, an associational right being constitutional. I just don't know that-- I wonder about the match between them. Like, the adequacy of an associational right to address that problem.

Like, I think that the-- so I get a liberty to organize with my employees, but what are we going to do? We're going to, like, go have a protest and try and force my employer through some sort of quote-- economic, political, coercive process to change the conditions of my employment. I'm not getting a right to do that.

And I think that the thing that I would be more-- I would sort of picket stronger. Maybe this is-- would be something like-- what would reconcile the unilateral authority they have over me would be a legal right to participate in the decisions about the-- so something like worker-members on the board, something like that, something that addresses the problem of a unilateral authority in the relationship itself.

SABINE So I actually am very sympathetic to a lot of the suggestions that you make. And so I don't-- I don't-- I completely agree that-- so first, I agree that labor rights are not the complete solution to the problem of authority that I raise. I think that's absolutely right. For-- for-- I mean, so the main reason why I think it's not is because labor rights help to give workers a voice in the kind of basic terms of the employment contract and in modifications to the employment contract.

But as many of us know, employment contracts are really incomplete. There's a lot of questions that come up about how to actually execute a particular job. And there may be reasons that happen during the lifetime of an employment contract, or during the lifetime of a collective bargaining agreement, that give the workplace reasons to change the purposes that they're pursuing.

And so I do think that the-- that the kind of complete-r picture of the workplace would include not just labor rights for purposes of shaping the terms of the employment contract and ensuring that employees have a regular voice in how those terms develop over time, but also reforming the law of employment contracts to give employees joint authority and collective authority over how the employment contract is interpreted, and over how gaps are filled over time.

And so that might happen through the German co-determination model that you alluded to, like putting workers on board. Maybe in other workplaces, you might have more direct forms of democracy. But I'm--but I'm quite sympathetic to what you've described.

CHRISTIE

Thank you to Gina and Sabine for a fantastic presentation.

HARTLEY:

[APPLAUSE]