

INTERVIEWER: So welcome to the final session of this conference, conference that started exactly almost a year ago with Micah and I. We were just on that evil network called Facebook talking about how we weren't aware of any conferences at that time in honor of the 50th anniversary of a theory of justice. And my natural instinct would be, well, that's too bad, and I'm going to go get a beer.

But Micah insisted. No, we should do something about it, and then Laurie graciously joined us. And so the three of us worked in the spring to-- and then the summer to put this together. Especially grateful to Micah for doing all the heavy lifting in terms of hosting it here at the University of Virginia. Thanks to Rebecca as well for all her hard work and everyone at the University of Virginia Law School for making this event a real possibility.

And thanks to all of you, the participants, for agreeing to present to come here to take part-- to make this event what it is, and we're very grateful for your presence here, for your papers, and for your questions and for your camaraderie.

So in the final session, which is on justice and legitimacy, we have three speakers-- Andrew Lister, who's an associate professor of political studies at Queen's University. He'll be speaking on conditional versus unconditional duties and justice as fairness. He'll be followed by Simon May, who's assistant-- associate professor of philosophy at Florida State University. His paper will be on the lexical priority of political legitimacy.

And Cynthia Stark will then speak, professor of philosophy at the University of Utah, on the basic structure structural injustice and the limits of fair equality of opportunity, and I believe that Christine Hartley will in fact-- or Christie Hartley will, in fact, read the paper. Is that right?

So, Andrew, take it away.

**ANDREW
LISTER:**

Thanks very much. Can y'all hear me? So

My subject today is the relationship between justice and reciprocity, but we can think of reciprocity in different ways, first of all as a strategy like Hume. But you can also think of it as a duty. That's how Allan Gibbard conceived of it in responding to Brian Barry's criticism of Rawls.

But I think we can also think of reciprocity in a third way, which is as a limiting condition. So my thought here is that it's possible to have a real duty when it limits the way I pursue my own interests but that obliges me only if those to whom I owe the duty would respect it as well if they were to find themselves in the situation in which the duty applied to them. That's probably too strict to formulation, but it gives the general idea.

So a basic philosophical question that interests me these days is to what extent are duties of justice conditional on reciprocity in this counterfactual sense. And then if so, what form does the reciprocity condition take and why?

Now in a book called *The Two Faces of Justice*, the philosopher Jiwei Ci has argued that justice is in general a conditional virtue. Justice is in general conditional in reciprocity. That seems plausible for some duties but not for all of them.

So, for example, the duty to obey unjust laws, I think it's reasonable for me to be willing to follow laws I disagree with only so long as others are willing to follow laws they disagree with. And I think something like that is implied by Rawls' condition that the burdens of the duty to obey unjust laws, somewhat unjust laws, must be evenly distributed. But I also think that I have a duty to vote for justice even if others are voting for self-interest, purely for self-interest, and I assume that I have a duty not to torture even known torturers. So if some duties are and some aren't conditional, which ones fall into which category and why?

So my paper is, of course, about Rawls' views on these questions on the one hand, Rawls' link to justice very closely with reciprocity, and this has been a source of controversy as previously mentioned in the previous talk. Yet his theory also had important unconditional elements, and so my first goal is to try to reconcile these two dimensions of justice as fairness. And I'll be focusing on a theory of justice almost entirely.

I have a second objective, though, which is to answer the objection that Rawls makes justice depend upon contingent facts about human nature. For example, the fact that we are for better and for worse motivated by reciprocity and that this confuses desirability with feasibility and wrongly waters justice down or defines justice down.

So here's the plan. First, I'm going to describe the roles played by reciprocity and justice as fairness, so that'll be the conditional aspect of the theory. Then I'll describe the parts of the theory that are unconditional, binding without-- duties binding without respect to whether other others are complying. Third, I will respond to the objection I just mentioned about watering justice down to fit with contingent facts of psychology. So there I'll argue that reciprocity is an intrinsic feature of justice. And finally, I'll explain how duties can nonetheless be effectively unconditional, and I'll explain that. Well, actually I'll conclude by noting that Rawls restricts the potential costs of unconditional duties.

So where does reciprocity show up in justice as fairness? Well, the first place it shows up is in his intuitive argument for his principles in chapter 2 before we get to the original position. He says the difference principle expresses an ideal of reciprocity because it aims at mutual advantage. But mutual advantage compared to what alternative? It's not compared to no cooperation. Rather, it's compared to cooperative schemes that are more equal, hence the difference principle, but it seems to me the conclusion is already present in the implicit definition of reciprocity that serves as a premise, mutual advantage with respect to a fair baseline, which is greater equality.

I think we could eliminate the notion of reciprocity here in favor of more fundamental values-- equality, first of all, then well-being or advantage, and then finally a criterion for resolving your conflicts between the two, which is just universal improvement,

I'm skipping over complications involving chain connection here, but the basic point is that I don't think the idea of reciprocity is doing any real work in this argument in the core case where we assume that chain connection holds.

Second, Rawls does give an explicit definition of reciprocity later in chapter 8 in his moral psychology, but there it's not as a value but as an instinct left to us by evolution. This is the tendency to answer in kind, which I understand to be a non-instrumental tendency to mirror the pro-social conduct and attitudes of others. So that's his psychology of moral learning, the morality of authority, association, of principles. He says these are all reciprocity principles, meaning mechanisms of reciprocity. And this is important to his argument for the stability of justice as fairness. It depends upon this trans historical psychological fact, the psychological fact constructed by evolution, not by a variable or local social and cultural institutions.

So it seems to be a happy story. We're not trapped in a kind of narrow egoism, but reciprocity has a second face. For one thing, there's negative reciprocity, the tendency to answer violence with violence even if that sets back my own interests. But even if we set aside negative reciprocity, it seems that we are conditional cooperators, to use the language of Elinor Ostrom, and that's better than being egotists to be sure.

So when others fulfill their duties to me, I'll have a tendency to fulfill my duties to them. But if I'm motivated by reciprocity, it doesn't seem likely that I'll fulfill duties with respect to people who don't fulfill their duties to me. And that unwillingness might seem reasonable, but it might not. And I think the question of the extent of justice is conditionality is actually one about which people disagree. There's a pretty wide range of opinion here.

Thirdly, third rule of reciprocity and justice fairness as really an extension of the previous one that Rawls explicitly recognizes the conditionality of our sense of justice at least in part, at least it's in part conditional in his discussion of the role of the state in the production of public goods. He distinguishes the problem faced by egotists from that faced by people motivated by reciprocity here drawing on Amartya Sen.

So a person with a sense of justice prefers to contribute when others are contributing. They don't need to be punished. They don't need the threat of punishment if they know others are contributing, but they won't contribute when others aren't contributing. So even if everyone had a sense of justice, individuals need to know that, and they need to know that others know that they know and so on. So that's the assurance problem that faces conditional cooperators.

Now just a parenthesis here on political liberalism. In political liberalism, he builds this conditionality into the moral ideas of cooperation and personhood with formulas, for example, in his definition of reasonableness or fair cooperation with formulas such as provided that everyone else likewise accepts or given the assurance that others will, too, things like that. It doesn't really provide a moral rationale for those provisos.

Final rule of reciprocity and justice as fairness, this psychology and the conditionality of our sense of justice play an important role in the choice from the original position. I'm not talking about maxim N as a rule for choice under uncertainty. I'm talking about the main grounds of section 29, strains of commitment, publicity, and respect, publicity and stability together and respect. I think all three of these arguments depend upon the factual assumption that in a just society people will still be motivated by the psychology described in chapter 8. So in this vein, Rawls says utilitarianism demands too much altruism and that justice as fairness is-- and I quote-- closer to the tendency of evolution.

All that's to say that justice as fairness has an important conditional element, but it also contains elements of unconditionally. And so here I'll talk about three. First of all, the most general. In section 77 when Rawls talks about the scope of justice, who we have to treat justly, he says that we owe justice-- well, that we must treat justly all those capable of a sense of justice.

So that is to say anyone who has at least a minimal ability to understand and apply the concept of justice, regardless of whether or not they act justly. That's how I interpret Section 77. And then when it comes to talking about the basic liberties in the discussion of section 35 on the toleration of the intolerant, Rawls says we have a duty to tolerate intolerant sects so long as they're not too dangerous, even though they couldn't complain of intolerance. And he suggests the same reasoning applies to other basic liberties such as political liberty for those who reject democracy and free speech for those who reject free speech.

Finally, I think that the natural duties also are unilateral or unconditional, binding unconditional and compliance on the part of others. So mutual aid, mutual respect, and also the creative aspect of the duty of justice. The duty to comply with just institutions is a bit more complicated. I'll just leave that aside. I'm thinking of the duty to create justice institutions.

So there are the two dimensions of justice as fairness as I see it. Now, I think these pose two problems. The general problem is just how do they fit together, the conditional and unconditional aspects of the view? The specific problem, and here I'm thinking of Jerry Cohen-- is whether Rawls is right to make empirical facts of human psychology play such a large role in determining what counts as just.

So I'll just take those in reverse order. So it can be objected that Rawls' concern with stability leads us to water down justice. Suppose we discover that justice as fairness were unstable. Rawls thought it was stable, but suppose it wasn't. Suppose it was unstable because it wasn't sufficiently retributive. Would we then want to adopt a different conception of justice? Would we say that's not the truth about justice?

Or suppose one thinks that justice is more unilateral than Rawls says. Should one accept justice as fairness just because it doesn't fit-- just because one's own more unilateral conception doesn't fit so well with evolution? The danger here is that we're going to lower our sights, compromise with injustice, but not be able to realize that we're doing so.

And then the second problem is-- so suppose we managed to show that reciprocity was an intrinsic feature of justice, not just a contingent factor psychology that limits our ability to realize justice. How then can duties ever be unconditional? So those are the problems I'm aiming at. My general solution is to argue that duties of justice can have a multilateral structure that makes them effectively unconditional, all things considered, even if each individual directed duty is bilaterally conditional on reciprocity.

And so this is not straight out of Rawls. I'm looking at Rawls' 1963 article on the sense of justice and what he says in section 74. So the line of reasoning is this. We owe duties of justice to only those who could complain of not being treated justly, number one. Number two, those who recognize no principles of justice applying to their own conduct can't complain of injustice they suffer.

So putting those two together, we don't owe justice to-- duties of justice to those who recognize no principles constraining their own conduct. And just to articulate the idea here, the idea is that if I think of us as equals, I can't recognize that you have standing to demand that I comply with a duty that you would never comply with were our positions reversed.

I can freely decide to sacrifice myself for someone else, even someone who may not merit it. But if I consider myself your equal, I can't recognize that I have a duty to you to do so. I can't admit that you could demand that I do so if you would never do the same for me or for others. So that gets us, I think, an intrinsic element of reciprocity and justice. But nevertheless, I can still have duties of justice with respect to people who don't recognize duties of justice if I owe those duties to others, others who do recognize duties of justice.

So the general structure here is to say that Andrew can have a duty to phi with respect to Beatrice, and Andrew can owe that duty to phi with respect to Beatrice not only to Beatrice but to Charlie and Debra and Edward, et cetera. And that would mean that, even if Beatrice's unwillingness to comply voids my duty to her to phi with respect to her, it doesn't void my duty with respect to all those others to phi with respect to her. So that's the general idea of a multilateral duty.

Now, where do I see this in Rawls? First of all, in the expressive arguments he provides for the duties of mutual aid and mutual respect. I think those have a communicative element that don't just target the person directly concerned, the person helping, but everyone else in the environs. And also with the basic liberties. Rawls says here about the duty to tolerate the not too dangerous intolerant-- they can't complain of intolerance, but others can. And Rawls suggests the same thing applies with respect to other rights and other basic liberties.

So that's the basic argument. That's my attempt to reconstruct Rawls. At least some of our duties-- and I'm thinking these as general duties, duties not grounded on reciprocity. These aren't duties based on past receipt of benefits-- are conditional on a counterfactual expectation of reciprocity. And that's not simply a device to lower their costs, but a consequence of the idea that equals can't recognize duties to each other that the other rejects.

And so then the issue is, well, how does Rawls avoid-- how, if we're Rawlsians, would we avoid the conclusion of [INAUDIBLE] which I think is that all duties of justice are conditional on, as he puts it, universality of performance. And so my answer has been that duties can have a multilateral structure such that bilateral failures of reciprocity don't void our all things considered duties.

But, and this is the final point-- I guess I'm racing through this a little bit here, but that's OK-- Rawls also limits the potential costs of this unconditionality. So first of all, the positive natural duties become supererogatory when they become too costly. So the duty of aid, for example, is the duty to help you if you're in trouble as long as I can do so without too much danger to myself.

Basic liberties aren't subject to a similar cost limit. So I have a duty not to murder innocent people even if that's the only way to save my life or save my kid's life. However, the state's charged with enforcing respect for these basic rights. So where Rawls's conception of justice imposes unilaterally binding domains, I think it's either limited with respect to the costs it can impose or supported by centralized enforcement.

And I think this can help explain both-- well, I think it can help explain why Rawls, first of all, didn't arrive at the same conclusions as did many Rawlsians about global justice. And I think we can also use this basic way of thinking to justify something roughly like the basic structure response to Cohen's critique of productive incentives.

I don't mean that justice only applies to institutions, but that some of our duties of justice are subject to a reciprocity condition and so binding only given assurance of compliance on the part of others. So I think this makes some aspects of Rawls view more plausible than if you view it as somehow an extension of a duty of reciprocity. I think that interpretation from Gibbard is a non-starter. It's not going to work.

But it also shows why a lot of people are uncomfortable with Rawls' view, because a lot of people just think justice is much more unilateral and unconditional. Thanks very much.

[APPLAUSE]

SIMON MAY: Let me start first by apologizing for getting this paper written and sent up on Thursday night at 7 o'clock or whenever it was instead of the week beforehand that everybody else seems to have done. I have this frightful habit of managing to write very close to the end. Thanks to Blain, Lori, and Micah for organizing the conference.

And I'm really glad, happy, honored, privileged, and everything to present at a conference on what I think of, only half facetiously, as a seriously underrated book. No matter how much attention it gets, I always find something new in *A Theory of Justice* that makes me think, oh, I hadn't realized that or I didn't think about that before. Sheesh, this is a good book.

[LAUGHTER]

So the present paper-- let me just take a step back and say where I'm coming from. ' 12 years ago, I published a paper called "Religious Democracy and the Liberal Principle of Legitimacy" wherein I took up the question posed by Rawls' claim on page-- what is it-- 225-26 of *Political Liberalism* that the liberal principle of legitimacy would be selected in the original position with the guidelines of public reason for pretty much the same type of arguments as *The Principles of Justice*.

And I argued in that paper, well, maybe not. Maybe instead of accepting or selecting the liberal principle, they would only select the democratic principle, and the difference between the two-- I used the example of a religious democracy, a scrupulously democratic form of religious establishment, to exemplify the difference, essentially saying I don't think we have an original position argument for why this religious establishment is illegitimate.

Since then, I realized two things I should have made much clearer in that paper. First, I'm not defending religious democracy. As a card carrying member of the atheist militant international conspiracy, that would be bad form. I in fact have quite a strict take on the Establishment Clause in American jurisprudence. So it's not in any way a defense of religious establishment. It's just the claim that secularism per se is not a requirement for political legitimacy.

And second, it isn't and I didn't intend it to be the claim that political liberalism is wrong, only that of all the many ways that we can get to political liberalism arguably, I think legitimacy is a poor route, that legitimacy is not the right way to go. Instead, something like Andrew's civic friendship or ideas of community or some ideal of public justification based on mutual respect, that would be quite different.

So I'm going to talk about the paper. But I'll start out by reading the first paragraph, which is my opening rhetorical flourish which I came up entirely by myself. And that was going to be fun until Professor Larmore spoiled the party. Legitimacy is the first virtue of political institutions, as truth is of systems of thought and, so Rawls claims, justice is of social institutions. The theory must be revised or rejected if it is untrue.

Likewise, a political system must be reformed or revolutionized if it is illegitimate. The only thing that permits us to tolerate an illegitimate government is when that is necessary to avoid even greater illegitimacy. Like truth and justice, legitimacy is an uncompromising value. But political institutions are, of course, social institutions, a special kind of social institution. So they must be both just and legitimate.

But if justice and legitimacy are both first virtues or uncompromising virtues, then they can't be entirely independent. Otherwise, you'd have two uncompromising values in conflict with each other, which is not going to work very well. So rather, I think we can claim that the legitimacy of political institutions must be part of a broader theory of justice. And in particular, legitimacy is that part of a theory of justice that concerns, roughly speaking, the conditions under which a group of officials may exercise political power in society.

So my question here then is, OK, if we think about legitimacy in something like that way, how does it fit in to a broader theory of justice? And in particular, how does that fit in with justice as fairness? And more in particular, how do the demands of legitimacy, whatever they may be, relate to or bear on or connect up with other demands of justice that are not also demands of legitimacy? So that's the question of the current paper.

So my view, I suppose, has three parts. Firstly, that we-- actually, four parts. Well, we need a definition of the concept of legitimacy. That's first. Second, with that concept of legitimacy or some vague or some-- not vague but more or less determinate concept of legitimacy, we need to look within the original position at what would be selected, what principles of legitimacy would be selected.

And in particular, I want to argue that the best way of thinking about this is in what I call a special session of the original position to address this particular task. The third element of the view is, if we set things up that way, then we at least get the democratic principles of legitimacy. There's a procedural component that's something like Rawls' principle of participation.

But I also think there's a substantive component that legitimacy requires governments to treat us as equals in the decisions that it makes. The fourth part of the view concerns the relationship between these-- and there may be additional requirements of legitimacy. And for present purposes, add in the liberal principle. If you want to be a political liberal, great. Go ahead. Add in that. I don't want to dispute that here at all.

The fourth part of the view is the conjecture that there will be a lexical priority relationship between the conditions of political legitimacy and the other elements of justice, that just as lexical priority in the existing theory means we can't sacrifice basic liberties for the sake of a better satisfaction of the-- "satisfaction," that's-- better satisfaction of the difference principle, I think that we should get the conclusion that we may not sacrifice conditions of political legitimacy for the sake of satisfying other elements of justice, including elements of the first principle, the basic liberties principle, that are not also requirements of legitimacy.

So yeah, that's the aim. There's an intuition that's powering it. There are lots of different moving parts. And it doesn't hang together now, but something in the future may hang together. So just in the first part-- so I think about political institutions as the highest order decision or rule making entities in society. They have a monopoly of decision making authority, and only some citizens make those decisions. We inevitably have to delegate political power to some people in any society.

More specifically, I think it's the authority that generates the problem of legitimacy. Rawls seems to think that coercion is what triggers the problem of legitimacy. I think of it as decision making authority. So for instance, I'm very happy with the idea that informal, customary social rules can be just or unjust, or structures as Cindy will talk about. But there isn't a question of the legitimacy of a customary rule that wives defer to their husband because nobody came up with that rule. It's just an unjust feature of our society.

So what is legitimacy? Rawls exemp-- or discusses the difference between justice and legitimacy in his response to Habermas. I'm not going to read that passage from his reply to Habermas. I think people are very familiar with it, the idea that legitimacy is a weaker idea than justice because we can have legitimate constitutional procedures and they can issue in decisions that we correctly think are unjust, but they're still legitimate as long as they're not too unjust.

But that discussion-- well, the claim that justice and legitimacy are not co-extensive doesn't tell us what legitimacy is. There are lots of things that are not co-extensive with justice. So you could think of legitimacy as merely the justice of the decision making procedure. For a couple of reasons, I don't think that's right.

So I suggest, following-- lots of people think about legitimacy in this way. I don't know if Rawls does. I don't know if it's the best way to interpret Rawls. That's a separate question. But I think of legitimacy as the moral right to rule, that a government is legitimate when it has this moral right to rule. A law is legitimate when it is a law that the government has the moral right to enact, impose, enforce. And if the constitution, the government, or a law is illegitimate, then it lies outside the scope of its moral right.

So that gives us a notion of what legitimacy is, but it's helpful only if we define what a moral right to rule is. That's a tricky problem. This is one of the moving parts. I struggle to give a definition of this moral right. But I want to make eight points. There are seven in the paper. I'm going to add one. Firstly, it's a complex right. There'll be a network of relationships between different people and different institutions that constitute the government. And we'll understand the right to rule as a network of rights held by those officials.

Secondly, there's the right to rule relative to your citizens or people in your society. That's a problem of domestic justice. There's also the external dimension, the right of the Chilean government to rule relative to the Bolivian government. I want to ignore that law of peoples type question and focus simply on the internal question.

Thirdly, the right to rule is exclusive. This is, I think, a key feature. Only one group of officials at any one time can possess legitimacy. Either Rome or Avignon, but not both. So here legitimacy differs from the justified exercise of political power. Two different political agents may be equally justified in seizing or claiming power, but only one of them can have the right to rule.

A fourth point, and this is the addition-- legitimacy is potentially rare, or at least it doesn't have to be there. It's almost always the case that at least some group of people are justified in seizing power or having power or exercising power in a society, at least if anarchy is to be avoided or if they are better than mere anarchy. But it doesn't have to be the case that any-- there must be some group of people who have the right to rule. If we live in a state full of fascists, is any outcome legitimate here? I think the answer there is no. There's just no legitimacy here. There's just the justifiable resistance to fascists.

So the next four points follow the idea that rights can be explicated through Hohfeldian terminology, through Hohfeldian incidents. And I think we're going to see various elements of these incidents in the right to rule, with the proviso that we shouldn't expect there to be a uniform, determinate Hohfeldian definition of the right to rule that is neutral between substantive theories of legitimacy.

The analogy I want to press here is what property is. We can think about ownership as a bundle of Hohfeldian incidents, but I think only-- it's a sophomoric view that thinks that one type of property encompasses exactly the same Hohfeldian incidents as all other types of property, and that we can just have a neutral definition between substantive moral views about when you own something.

So it's going to be a bit vague and clustery. So the first point is, at the very least, if there's a legitimate government, then other agents will have duties not to depose it or not to prevent it from exercising power. It doesn't follow necessarily that we have the duty to obey a legitimate government. That's been a topic in the theory of legitimacy and authority for a number of years now. And I don't want to suppose that legitimacy entails the duty to obey, certainly not a duty owed to the government. But I do presume that there are some duties attendant on the right to rule.

Legitimate government possesses the moral liberty to make, impose, and enforce decisions even if those are the wrong decisions to enforce. It's not the enforcing of the decisions that's wrong but rather the content. So political institution is a normative power, as I've said. And I think the moral right to rule would also involve a moral power, in particular the moral authority, that is, the ability to create content-independent duties on at least some citizens to do stuff. Maybe not the average citizen, but a police officer would acquire a moral duty to arrest someone for a crime if the legislature has legitimately made that a crime. And then eighth, standard immunities.

So if legitimacy is the moral right to rule, then it should also be selected in the theory of justice that determines what rights agents have in society. So in that sense, it's no different. But of course, it's a very special kind of right. Why? Because it's a right that governs the ultimate decision making mechanism in any society. And therefore, I don't think we can simply have a theory of justice and allow the authority of the state to be decided on by the people in the way that the authority of the chess club executive can be decided upon by people in free institutions.

We need to address the authority of the right of the government to rule specifically in the original position. And I want to go stronger and say that there must be-- no matter what kind of argument you can array for a conception of legitimacy if you're going to advance a contract doctrine, there must be a derivation of a principle defining the government's right to rule in the original position. Lori is shaking her head.

SUBJECT 2: [INAUDIBLE]

SIMON MAY: Sorry?

SUBJECT 2: Is this a [INAUDIBLE]

SIMON MAY: Oh, OK. It's not because I'm a lion in a den of political liberal Daniels, is it? That's nothing to do with it. OK. So how do we proceed here? So I think what we need to do is have this, as I say, special session and modify the conditions of the original position as necessary. So there are eight headings that I use that replicate ways of describing the original position.

So the first is the subject of legitimacy. So the primary subject of justice is the basic structure of society. It should constitute a cooperative scheme between free and equal persons. The primary subject of legitimacy or the subject of legitimacy, I say, is society's system of political decision making. And that system should constitute a fair scheme of cooperation between free and equal citizens in and of itself. Of course, it's competitive, but competition can be cooperative, I assume.

The circumstances of legitimacy. Here these follow the standard circumstances of justice. I also add in, just to be explicit about this, that there are disagreements about principles of justice, including legitimacy. And this is a condition of society where the problem of legitimacy arises. We need to decide what the terms of political decision making are when we disagree about justice and legitimacy.

The compliance condition, third, is strict compliance. Again, this gives us ideal theory. In a separate paper, I've argued that it's a mistake to think of ideal theory as establishing a single ultimate destination for society and non-ideal theory being just how do we get there. Rather, I argue that the strict compliance assumption stems from the very nature of a cooperative scheme.

So every moral theory of cooperation needs a strict compliance assumption somewhere. And if we're going to have a moral theory of cooperation in decision making that constitutes legitimacy, then we need a strict compliance assumption too. The model of legitimacy-- since legitimacy is weaker than justice, you could have a perfectly legitimate society-- I call it a well constituted polity-- that is not a fully legitimate society across the board. It doesn't have the right, say, economic institutions, but the exercise of political power is fully legitimate.

So a well ordered society will be a well constituted polity, but not necessarily the reverse. The nature of the parties. The two moral powers. And in addition, I want to say, since we're talking about the political decision making process, we assume not only that the parties have a determinate conception of the good and a sense of justice. We also should assume that they have a determinate conception of justice and the public good, and that they are motivated to promote and realize this conception of justice through the political process, whatever that political process would look like.

Knowledge and beliefs. Veil of ignorance, as usual. Rationality of the parties. Mutual disinterest, in the sense that they aren't moved by envy and altruism. They're moved by their share of primary goods, in particular for this problem the political liberties, but not necessarily exclusively. It's unclear to me whether the maximum criterion applies because Rawls uses it really in the context of the equal liberties principle. It's unclear to me whether it applies, but perhaps something like it does. And then the same formal conditions of universality, generality, publicity, ordering, and finality, of course.

So we have two original positions. And the one is the old one, the standard one. We're going to get the two principles. But then at least I don't want to say prior to it or after it, but next to it we have this special session. What in particular are the terms of the government's moral right to rule? And I think, as I said before, that we'll get a substantive condition as well as a procedural condition.

So the procedural condition, something like the principle of participation, equal standing in the political process. But then also, since it strikes me first of all intuitively that no government can have the right to slaughter an ethnic minority no matter how democratic it might be, that we should have these substantive constraints. And I on that point see no reason for the parties in the original position to sacrifice the equality of the original position that they enjoy. So I think they would put that as a determinant requirement.

Again, it may be possible to add other requirements. The liberal principle. Fine, whatever. I'm quite taken to a principle excluding the private domain in some way from the authority of the government. I don't think a law requiring people never to wear mismatched socks or to not drink cappuccino in the afternoon or to-- what was the other one-- oh, never serve red wine with fish-- I don't think there's a legitimate law [INAUDIBLE] Stick to your business. That's making rules for the public domain. This is like a bizarre intrusion into my affairs. That's a rough intuition. I don't know how to defend it.

Nevertheless, I think there are going to be lots of injustices that are compatible with legitimacy. The government may restrict the range of occupational choices that are available to all people in an unjust way. So there are lots of occupations that might become effectively illegal-- a prostitute, a pimp, a pornographer, a drug dealer, an executioner, a mercenary, a gladiator. You're not allowed to be a gladiator in this country. Jeez.

A whaler. A wing walker. An elephant hunter. A bullfighter. A bear baiter. A foot binder. A practitioner of euthanasia. Or a blood letter. Or perhaps a butcher. We live in a majority vegetarian society and the sale of meat is no longer legal. I think that would be legitimate, as far as I can tell. Maybe it would be unjust.

More generally, there's the question of how the equal liberties principle might be violated. Rawls has these two ways. You can have an unequal liberty. I think that would be illegitimate. But you could have a less extensive liberty. And that might be unjust. But so far as has been said, I think that would be legitimate with possible exceptions.

So if I conjecture that legitimacy takes lexical priority over these other elements of justice, what does that look like? Well, first of all, it could be full priority. All the requirements of legitimacy take priority over other requirements of justice. Or it could simply be partial priority. Maybe there's something like the core elements of legitimacy have this priority, but the peripheral elements do not.

If pushed, I'll fall back to the partial priority view, but I want to see-- I want to give the full priority view as much-- a run for its money. But whatever the case, we need a context, what I call a context of conflict. We need a context where a demand of justice conflicts with a demand of legitimacy. It's very natural to think of that. In the aftermath of decision making, what do I do when this law has been passed? It seems to be a legitimate law, but it's unjust. Do I obey it? Do I disobey it?

I think it's a mistake to think about the issue of lexical priorities decided in that context because I think that is just going to tell you the substantive content of your theory of legitimacy, not its relative priority to other elements of justice. So we can have a different specification of the Hohfeldian incidents, as I've said. It need not be true that legitimacy-- the right rule imposes a duty to obey a legitimate law. Perhaps it's the higher duty of fidelity to law or the duty to respect law as you engage in civil disobedience.

And secondly, we could have a more or less expansive content to the requirements of legitimacy. For instance, if legitimacy is just co-extensive with justice, then your reaction to an unjust law isn't, oh, my gosh, this is a conflict between legitimacy and justice. It would be, well, this isn't a legitimate law because it's not just.

So I think instead, the best way of looking at the potential for conflict is in the context of decision making itself. Suppose you have an option, option A, which violates the principle of legitimacy, or option B, which violates an important demand of justice that isn't also a requirement of legitimacy, a denial of an important personal liberty across the board, perhaps.

So you could have full lexical priority and say legislators must always choose be in that context no matter what the content of the options. Or you could have partial priority. They must always choose B as long as the threatened element of legitimacy as a core element. Or the third option is just a denial of lexical priority and a view that says, well, we need to weigh it up, look at the content of the two options and see which one seems more pressing.

So two kinds of arguments about the full lexical narrative of legitimacy. And the first is a consideration of the nature of the criteria of political legitimacy, which I want to say are the moral rules for political decision making. It's by following the moral rules of political decision making that you acquire the moral right to rule.

And what a rule is in a cooperative scheme-- a genuinely cooperative scheme-- is a norm that other participants in that scheme have the standing to demand you comply with. And if something isn't a norm that other participants in that scheme have the standing to demand you comply with, then it isn't one of the rules of that activity. It isn't, in this case, one of the rules of political decision making.

So what we have here is not simply a conflict between two different important values or two different kinds of losses. What we have is a conflict between something that the other members of political decision making have the standing to demand you not do, and a bad thing that the other members of the political decision making do not have the standing to demand that you don't do. So there's a fundamental different deontic role played by the notions of legitimacy and justice in the context of political decision making.

So just as an example, I use the case of the Confederate battle flag. And this draws on another paper I've done on compromises on racial equality and political legitimacy, essentially setting the parameters for morally impermissible compromises. So assume the Confederate flag is a racist symbol of nostalgia for slavery and Jim Crow segregation, which I think it is.

It follows that you cannot have an official endorsement of that flag that isn't an endorsement of racism. Racism is a denial of the equal status of citizens, so any official display of that flag is illegitimate. There may be important gains in justice, and even the justice of the equal liberty principle, that we could get by a compromise agreement that would allow the Confederate flag.

But if the full lexical priority goes through, then in the choice between the two, it is categorically impermissible to accept the Confederate battle flag. And I want to say that, no matter what the content of the other option, as long as the other option is not also in itself in some way a requirement of legitimacy, which of course it may be. If it's better access to the polls for people, then that would be part of legitimacy.

And the second argument-- let me just be brief-- is an extrapolation of Rawls' discussion of the highest order interest in having the freedom to revise your conception of the good. That's a very important interest that plays a huge role in the priority of liberties, of course.

And I want to say that that transfers to the decision making process itself, that we have a highest order interest in ensuring that the decision making of our society is free in the sense that the legitimate exercise of political power is unimpeded by norms that are external to legitimacy, even if those norms are important norms of liberty and justice.

So to paraphrase Franklin, those who are willing to sacrifice legitimacy for the sake of liberty should not expect to enjoy either. Thank you.

[APPLAUSE]

**CYNTHIA
STARK:**

Is this on? OK. Hi, folks. I just want to say a few things, and then Lori is going-- I'm sorry-- Christie is going to read my presentation because I want to save my voice for the Q&A. This couldn't possibly be the worst timing for someone to lose their voice. It's just remarkable. Anyway. So first, I do want to acknowledge the traditional custodians of the land we're on today, the Monacan Nation, and pay respect to their elders past, present, and emerging.

Of course, I also want to thank our hosts Micah, Lori, and Blain and all the staff people who helped make this conference run smoothly. It's been really fantastic. I've enjoyed it so much, and I'm really delighted that I was included in it. So having said that, since I'm the last person to go, I want to ask everyone to join me in applauding the efforts of the people who made this conference possible. So let's give [INAUDIBLE]

[APPLAUSE]

So I'm going to turn it over to Christie.

CINDY:

So Cindy's objective is to assess the adeptness of Rawls' theory of justice in theorizing structural injustice. And this is important because much of the injustice that people suffer is structural in nature. Here are her theses. One, that features of Rawls' argument that the basic structure of society is the proper subject of justice warrants and interpretation of his theory as a theory of structural class justice.

Two, attempts by Shelby and by Watson and Hartley to deploy the principle of fair equality of opportunity to address existing structural racial and gender injustice are limited. That approach cannot ameliorate the status aspects of structural injustice. And three, addressing the status aspect of structural injustice may require liberals to stop treating status hierarchies as the inevitable result of liberty and treat them instead as the outcome of independently undesirable social conditions that can and should be prevented.

So to start with the idea of structures, a structure, following Haslanger, is a network of practices or institutions which are themselves composed of schemas and resources. A schema is a culturally shared script, concept, norm, convention, category, et cetera, that individuals internalize and through which they enact and reproduce practices. A resource is a thing or human capacity seen as valuable.

Structures typically affect individuals in the following ways. They constrain and enable action. They create and allocate social positions, which often map onto power differentials. They are apt to produce unintended outcomes, and they tend to mask themselves. Here is an example of a structure-- housing markets.

They contain the practices of selling, buying, renting, building, refinancing, et cetera. They're configured by formal and informal rules governing the distribution and production of the resource of housing, such as zoning laws and shared assumptions about which housing types are desirable. They allocate social positions attached to power differentials, such as landlord and renter. They produce unintended consequences, such as homelessness. And they tend to mask their influence, as when someone does not realize that her decision to live in a certain type of neighborhood is influenced by racist assumptions.

We can understand structural injustice as injustice that cannot be adequately explained without appeal to structures. It cannot be explained by appeal to discrete individual wrongful actions or to unfair policies. So as an example of structural injustice, consider a housing shortage. And this is Young's example. Sandy is a working class single mother who was forced to move out of her apartment on short notice because her landlord is selling the building to a developer who plans to convert it into condominiums.

She finds that there are few rentals near her place of work and that affordable rental units large enough for her family are located in unsafe neighborhoods. So she settles for a studio apartment far from her job where she will sleep in the living room and buys a used car to get to work, only to realize that she owes two months rent plus a security deposit to secure the apartment, which she cannot afford. Sandy is thus apt to become homeless.

Now that we know what structures are and what structural injustice is, Cindy makes the case that Rawls can be understood as a theorist of structural class injustice. So start with the idea of the basic structure of society. And this is a quote from Rawls. "The way in which the major social institutions fit together into one system and how they assign fundamental rights and duties and shape the division of advantages that arise through social cooperation. Thus, the political constitution, the legally recognized forms of property, and the organization of the economy and the nature of the family all belong to the basic structure."

This account fits with Haslanger's account of structures. The basic structure is made up of a complex network of structures which contain networks of practices whose purpose is to distribute a set of resources or valued items. The way in which Rawls describes the institutions in the basic structure suggests that he recognizes the informal dimension of practices, and hence the role of schemas in constituting them.

For instance, he speaks of the nature of the family, referring presumably in part to the culturally shared, internalized norms and conventions that determine its configuration, such as parenting ideals. Here is a reason the basic structures should be subject to-- should be the subject of justice. Quote, "Suppose we began with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at.

Straight away, we need an account of when agreements are free and the social circumstances under which they are reached are fair. In addition, while these conditions might be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements together with social trends and historical contingencies are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for fair and free agreements no longer hold.

The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves."

The reason that an initially just social process will cease to be just, Rawls says, is that, quote, "the great variety of associations and modes of cooperation may form depending upon what individuals actually do and what agreements are reached," unquote. Cindy reads him as saying here that a great variety of structures may form depending on what individuals actually do, some of which will be just, for example, because they concentrate-- some of which will be unjust, for example, because they concentrate power and influence in one's social group.

And so this ends Cindy's argument that Rawls should be seen as giving us a theory of structural class justice. And now consider the usefulness of Rawls' theory in addressing existing racial and gender structural injustice. So first, Shelby on structural racial injustice. One, past racial injustice has concentrated people of color into the lowest socioeconomic positions. Assume this is a structural injustice.

Two, in a well-ordered society where the basic liberties are guaranteed, this structural injustice can be ameliorated through Fair Equality of Opportunity, FEO. FEO can work here because its implementation would require dramatic social change, a drastic redistribution of wealth, significant expansion of education and employment opportunities for persons of color, and aggressive enforcement of discrimination in housing and lending.

Here is Cindy's response to Shelby. FEO cannot address the non-socioeconomic elements of structural injustice such as stigma, which can be understood as a kind of diminished social standing, which is a wrong in itself independent of any harms it causes. And here is a car trouble example from Elizabeth Anderson. Quote, "One night in 2007, I was driving in Detroit when my oil light came on.

I pulled into the nearest gas station to investigate the problem when a young Black man approached me to offer help. Don't worry, I'm not here to rob you, he said, holding up his hands, palms flat at face level, gesturing his innocence. Do you need some help with your car?" This encounter illustrates the public standing of racial stereotypes as default images that influence the interactions of Black and white strangers in unstructured settings, even when both parties are prepared to disavow them. A little ritual must be performed to confirm that both parties do disavow the stigma so that cooperative interaction may proceed.

A similar problem plagues the attempt to rely on FEO to ameliorate structural gender injustice. Here I argue against a view presented by Watson and Hartley. So Watson and Hartley on the gender division of labor. One, when women have fewer opportunities than men to participate in civil society, the labor market, and the political sphere, they are less than equal citizens.

Two, when they are forced by structural factors to do most domestic and caring labor in the home, women have fewer opportunities than men to participate in civil society, the labor market, and the political sphere. Three, therefore when women are forced by structural factors to do most domestic and carrying labor in the home, they are less than or equal citizens.

Four, fair equality of opportunity therefore is required for women to be equal citizens. Five, FEO can work here because its implementation would require dramatic social change-- universal free daycare and after school care, generous paid parental leave for mothers and fathers, and flexible work arrangements. Once these things are in place, women's extra labor in the household, such as it is, is optional.

And here is Cindy's response to Watson and Hartley. Fair equality of opportunity cannot address the non-socioeconomic elements of the gendered division of labor, which can be seen as a kind of diminished social standing that consists in the expectation that mothers and not fathers are ultimately responsible for the care and well-being of their children. This expectation of sacrifice is a wrong in itself independent of any harms it might cause.

Haslanger offers this example of parental leave. Larry and Lisa are employed at the same company and make the same salary. They have a child, Lulu. They desire to be equal co-parents of the child. However, Lisa is eligible for paid maternity leave, and Larry is not eligible for any paid parental leave. They cannot afford to have Larry take unpaid leave. Lisa takes parental leave, and because of her experience in the first three months, she becomes the primary caregiver.

When she returns to work, she chooses a more flexible schedule. 10 years later, Larry's salary is significantly higher than Lisa's, which gives him more power in the marriage and in the workplace. This example suggests three things, all of which are, in my view, incorrect. One, the chief problem with the gendered division of labor is the power and income inequality-- is the power and income inequality it creates.

Two, an adjustment in the basic structure in the form of paid parental leave for fathers can help eradicate this inequality in a significant way. And three, Lisa became the primary parent because she and not Larry had paid parental leave. If Larry and Lisa's situation is typical, then Lisa was bound to become the primary parent due to the prevalence of the idea that women are responsible for the care of children. This idea is widely accepted even if unconsciously enforced, and exerts pressure on women regardless of whether they and their partners disavow it.

Two aspects of being the primary parent. One, carrying the mental load, the invisible work involved in managing a family, such as organizing birthday parties, shopping for school supplies, preparing for holidays, et cetera. Two, being the default parent, being ultimately responsible for the care of children. These are related as follows. If someone is ultimately responsible for the well-being of children, they will end up carrying the mental load. The idea that women should make the necessary sacrifices to ensure their children's well-being is a status wrong. Women's interests don't matter that much.

So a thought on liberalism and informal status wrongs. Rawlsians accept on faith Rawls' claim that illiberal ideas and ideologies, beliefs, and status hierarchy are bound to arise in liberal societies as a result of liberal freedoms. What is the status of this claim and what is the evidence for it? A different proposal. Illiberal ideas arise in liberal societies due to the exercise of liberty in the context of existing structural injustice that is typically caused by past non-structural injustice-- sorry, caused by past nonstructural injustice such as enslavement, rape, genocide, segregation, et cetera.

Liberals should not be complacent about these illiberal ideas, but rather search for ways to address the social conditions that perpetuate them. Example. One, standard liberal question. What efforts can the state legitimately take to prevent people from believing in male supremacist religions? Default answer-- none, except for maybe civic education.

Two, better question. What social conditions cause people to believe in male supremacist religions? What efforts can a state legitimately take to prevent those conditions from arising or persisting?

[APPLAUSE]

BLAIN NEUFELD: OK. So thanks very much for those papers. We have about 45 minutes for questions and answers. I see one hand. Is it Nate? Yeah. So while Nate asks his question, I'll take other-- I'll form a queue.

NATE: Thanks to the panel for their papers. Simon, you'll be shocked to hear that this question is for you. So my worry is that the contractarian setup includes principles of legitimacy. And so the original position stuff assumes principles of legitimacy. And then when you work it through, voila, it turns out everyone has to be free and equal and we have to give everyone terms that political power has to be exercised according to freedom and equality.

So it looks-- one way of thinking about it is the original position is itself a decision making procedure that happens under certain constraints. And then you're telling me that we get decision making procedures under certain constraints as the output of that. So aren't you just smuggling in the legitimacy principle from the outside?

SIMON MAY: Yeah. So this is a familiar type of criticism. Essentially, I want to say no, it's not, with a couple of provisos. Firstly, the term legitimacy can be a fuzzy term. And you Rawls talks about legitimate expectations. That is a notion of legitimacy that has nothing to do with legitimacy in my sense.

So you can talk about legitimacy as a basic foundational or higher order type of idea without that being a claim about the moral right to rule. And my interest here is in nothing but the moral right to rule. What are the terms of that? Does it encompass all of justice or some of justice? And if so, what's the relationship between the ordering- - between the parts?

Second point is this will get into interpretive questions about *Political Liberalism* which, since I haven't read *Political Liberalism* in a while, I'm going to be a bit rusty on. But of course, you could select a constraint in the original position about constitutions or constitutional essentials such that they have to be justifiable in a certain kind of way. Well, what ultimately justifies a constitution of a particular form in a Rawlsian picture? Well, something about the original position.

So is the original position consistent with the constraint that you've selected in the original position? That's an absolutely coherent question to ask. And if that's the way you've set it up, you have to answer yes. Otherwise, you have a self-defeating theory. So the application of a principle of legitimacy to the original position itself does not mean that we do not need to come up with the principle of legitimacy in the original position.

But again, that's interpretive stuff about *Political Liberalism*, and a couple of people around here-- I think probably most people around here may differ with me on that. Fine. Whatever. I'd be perfectly happy to concede that for present purposes as a claim about political legitimacy in *Political Liberalism*.

But third, perhaps most important of all, I take the original position to be a divisive representation to specify the terms of cooperation between free and equal persons in a society for mutual advantage. I think that divisive representation can be used for society as a whole. I think it can be used for part of society. I think it can be used for a couple of people going down to choose a film to see. We're going to the movies. What should we see?

Maybe it's not particularly good in that context. Maybe there are better ways of doing it. But it's a device of fairness, fundamentally. And then the question arises for me is, what are the fair terms of political decision making such that if they were followed, then some entity would have the right to rule? How do I answer that question?

Well, as a Rawlsian of-- even if I'm a black sheep Rawlsian-- I'm going to be uncertain in a certain way by looking at the original position, but with the provisos that, of course, the way we derive a theory has to be modified to fit the task at hand. And I think we need certain kinds of modifications or additional specifications in an original position device to have a satisfactory answer for the fair terms of cooperative political decision making.

Let me just add in one thought. It's always struck me as a little bit odd that the constitutional convention we-- to select a constitution that satisfies the equal liberal-- equal liberties principle and then consists of all the constitutional forms that satisfy that principle, we're to choose the one that is most likely to issue in just arrangements.

And I'm-- it's not that I want to necessarily reject that out of hand. But it does raise a question about fairness to alternative conceptions of justice. We could build a constitutional system that's consistent with the equal liberties and is extremely likely-- is structured in a way that will get us to justice as fairness better than any other alternative. Perhaps that is justifiable. But there is a question of fairness to different political parties with different conceptions of justice, whether we're rigging the game for our particular view.

Now, I think you can only satisfactorily answer that question of fairness by something like a contractualist divisive representation about the fair terms of political cooperation.

BLAIN So the next question is from Simone.

NEUFELD:

SIMONE: [INAUDIBLE] Is this working? Yeah. So it's also for Simon. So maybe this is just a question of clarification of your terminology. So I come from a political science department. So there is an ongoing debate between what people talk about the descriptive concept of legitimacy coming out of Weber and the normative concept of legitimacy, which is what you're talking about.

And I was very struck when you said that-- so I'm not so concerned about legitimacy and justice as when you said legitimacy and justification are two different things. And here, that seems to parallel what we would discuss as the difference between an empirical descriptive versus a normative view of legitimacy. So place like China, you could maybe, using opinion polls, see that most people actually think that the regime is legitimate. And why do they think-- what are the reasons? What justifies it? It has outcome-- they like the outcomes. They might not like the fact that there's no democracy, but outcome legitimacy.

So then you can also ask the second normative question of, ought those to be good enough reasons? And you go to some place like Myanmar or maybe now in Afghanistan where most people think these regimes are not legitimate because they don't have justification. So you seem to be using the term-- when you said that they're not the same justification as really referring to just ad hoc, just the reasons that happen to be there for power, but not whether they're good or not.

But it seems to me that legitimacy can be understood, and I guess this is, I think, the Rawls in *Political Liberalism*, that legitimacy is about the justification of rule. And you can have just the empirical justifications that are given and people's descriptions of [INAUDIBLE] And then you can have arguments for what actually are the proper conditions when you say this really is a justification that has the strength of good reasons and so on and so forth.

So your distinction between legitimacy and justification seemed to me to be a distinction really between the empirical and descriptive view versus a normative view. And both views really are about what justifies power and the kinds of reasons we would give and the procedures under which we would think real justification is going on for everybody.

SIMON MAY: Yeah. Thanks. So I understand legitimacy, justice, and justification to all be moral notions. There is an interesting question about the relationship between moral legitimacy, the moral legitimacy of the government and its descriptive legitimacy. Does a government lose the moral right to rule if most people just don't like it or something? And that is an interesting question.

But fundamentally, I'm interested in moral legitimacy as the moral right of the government to rule. So two points. If we take something like Brexit, I think Brexit is unjustified. I think it's bad for Britain, bad for Europe, and powered by all sorts of nativist assumptions. Maybe I'm wrong about that, but I think it's unjustified.

But I also think it's, as far as I can see, totally legitimate. The Westminster Parliament totally has the right to withdraw Britain from the European Union. It's a dumb decision. It's an unjustified decision. It may even be an unjust decision if it involves some violation of the rights of people in Britain or Europe. But as far as I can see, it's totally legitimate, morally legitimate.

And when I say morally legitimate, it's within the Westminster Government's right to make that decision, not merely a descriptive claim. I do think that legitimacy has something to do with justification, apart from both of them being moral notions, insofar as there's a substantive condition on legitimacy, it not being purely procedural.

So if we have a criterion that says a law can only be legitimate if it respects the equal status of citizens but we discover that such and such a law or an ordinance-- closing down the swimming pools or selling off the public facilities-- is a decision that was taken on the basis of or justified for reasons of racism, then we may have grounds to conclude that's not a legitimate decision for that town council, city council to make.

So there can be any connection-- any type of connection you like between legitimacy and justification if the terms of legitimacy impose restrictions on the kinds of justifying reasons. So as I understand the political liberals, it's a criterion of legitimacy that at least constitutional essentials or matters of basic justice be justified in a certain kind of way, by appeal to public values.

And that's fine as a theory of legitimacy. And they're still going to have space for unjust decisions or unjustified decisions, but they'll be legitimate as long as they're justified in a certain kind of way. I have a broader notion of legitimacy. But I think all of us have to have, at some point, a conception of the moral right to rule and what kinds of government decisions we have to regard as legitimate, even if they're dumb, stupid, unjustified, wrong.

BLAIN So the next person on the queue-- I saw a hand at the back. Yes, you. Sorry, I don't know your name.

NEUFELD:

SAM: I'm Sam. Hi. Hi. Thanks. So this is a question for Simon again, and it builds off the last two. And I will email you to read this paper in full because it's weird and interesting.

SIMON MAY: I'm sorry. Say that again.

SAM: It's weird and interesting as a paper, and I'm going to email you to read it.

SIMON MAY: Weird and interesting. [CHUCKLES] That's [INAUDIBLE]

SAM: And this is going to be a weird question. So at one point during your presentation, you made a comment that you weren't sure how to justify the legitimacy of particular types of laws. And then you started listing particular types. And this made me wonder whether what you might be talking about is a Williams style basic legitimacy demand for reasonable persons.

And if that's the case, then I wonder what this gets us in terms of a conversation about legitimacy, because if it's a comment on what type of legitimacy takes place inside of Rawls' ideal state in terms of ideal compliance, I think that's fun, and then I think it also raises a question about realist legitimacy and ideal/non-ideal theory and the types of compliance that would be associated with it.

And so I guess this is-- I'm asking you as an opportunity to talk more about the purpose of conceptualizing legitimacy in this way and whether the Williams style argument here, even though it's clearly not about actual politics and the realist paradigm doesn't work in what you're talking about, whether the structure of this sort of claim might help to explain some of the comments that were raised by the previous two question askers.

SIMON MAY: Not only am I not a Williams style realist, I don't understand realism. And I've had Enzo Rossi try explain it to me, and I still don't understand it.

[LAUGHTER]

It's something like there's this other norm that isn't a social norm or a moral norm or a legal norm. It's just a political norm. I don't understand that. I'm happy that there are moral conditions for legitimacy that are descriptive in the sense of you actually have to be in power. You can't be the legitimate Polish government in London anymore if you're not actually exercising power. Maybe that's true. Maybe it's not. I don't know.

So what is the point of having this moral notion of legitimacy if it's not justice? Was that the question apart from the realism? Just if you could clarify the question.

SAM: I wonder if the topic is too narrow in some sense about what legitimacy would be like in the original position for reasonable people engaging in politics, like "reasonable people" as a technical term, engaging in politics from behind the veil of ignorance.

SIMON MAY: Yes. So it's a question about what, from the perspective of the original position, we would select as the moral rules governing this particular fundamental activity we do, which is making the fundamental laws and decisions for our society. It's much narrower than the perspective of the original position in general because that's all of soc-- or at least all of the basic structure of society.

And what is the point of that, folks? I grew up under an illegitimate government. Someone in Britain right now is under a legitimate government. They don't like theirs. I didn't like mine. But we have a fundamentally different position regarding those governments that isn't merely South Africa in the 1980s was a more unjust society than Britain in the 2020s. It's not just a matter of degree. There's a fundamental difference in the type of government we lived under.

So I take that to be a profoundly interesting question that animated quite a few people in the tradition, as distinct from justice. I'm not saying that this distinction goes all the way back, but the right of the government to decide what I may not do is-- yeah, that's-- that in itself is not a question about the justice of the decisions that the government reaches about what I may do. That's all I can say about that without trying to get to first axioms. Yeah. Thank you.

SAM: Thanks.

BLAIN NEUFELD: I just want to mention I have six people on the queue, and we have just about half an hour, so that conveniently divides into five minutes.

SIMON MAY: Maybe you should prioritize people.

BLAIN NEUFELD: Simon's recommending a prioritarian--

[LAUGHTER]

Well, we'll just see-- Lori, you wanted to say something, and then--

LORI: [INAUDIBLE]

CINDY: Turn it on.

SUBJECT 3: [INAUDIBLE]

LORI: Hi, little Andrew up there. I wanted to say you're just a tiny little Andrew. I very much enjoyed your paper, and I didn't find a lot to disagree with. But I'll make an effort. And this is just something I'm curious about your take on. So think about this Rousseauian moment where we have the reciprocal recognition and our amour-propre is triggered. And it grows, though. I don't just want your reciprocal recognition as an equal. I want this irrational thing, for you to prefer my own-- me to you.

So I'm just wondering if you see anything-- I think there's something kind of compelling about that account of human moral psychology, maybe under conditions of corruption and intense dependency that Rousseau thought we live in, and it seems like we do in fact live in. Do you see anything in either your account or Rawls' that blocks that growth of, like, I'm into reciprocity. I'm into reciprocity. Oh wait, I can do better, which is--

And now I'm talking about the account of moral psychology, not the moral demands. Now I want you to prefer my good to your own. And that strikes as a moment. I'm going to take up dominating postures and try to get you under my power. And I just wondered, if you find that account of human nature compelling, what do we say or how does that shift our thinking? So hopefully that's clear.

And then I had a question for Cindy. I think-- I liked your paper very much and I learned a lot from it. I want to read it more carefully. I wonder whether or not maybe you're not sympathetic enough to the idea that some of the policy prescriptions have a symbolic power, beyond the material consequences that would be direct, to reshape the environment.

So I think one of the things, for example, that would fall under parental leave policies, where men may be required to or contingent-- women get the amount they get only if men do, so that men are forced to do it-- would have symbolic power, but also address what I think is one of the greatest gender injustices observing all my mother friends with children, is the time deficit that they lack compared to their male counterparts.

Even when they're married to like good feminist men, they're managing and think-- their mental activity is taken up with managing the home life in a way that-- the men will do the things they assign to them, but they just never thought of them in the first place. And I think there's an injustice there. But I do think something like a really substantive, fair equality of opportunity of providing the conditions for things like leisure time to read novels because it's connected to the two moral powers and part of securing-- maybe the fair value of opportunity would be a better way of putting that.

So those are my thoughts. Thank you for all of the papers. Simon, I'll grill you later.

[LAUGHTER]

**ANDREW
LISTER:**

So my turn to reply? I think recognition can be reciprocal but unequal. But I take it that Rousseau's ideal is of a relationship of equal and reciprocal recognition, so a kind of egalitarian amour-propre. So it makes me think, though, that what you said could be the basis of an objection to my view, or an addition. We could think about a fourth concept of reciprocity, not a strategy or a duty or even a limiting condition, but an ideal, an ideal of a particular kind of relationship.

And then I guess my question would be, about that concept of reciprocity, what's the content of-- what work is the word "reciprocity" doing here? Could we eliminate the notion of reciprocity? Could we think about-- could we talk just in terms of equality, liberty, and universal recognition of equality and liberty? And wouldn't that abandon the-- what specific work is the idea of reciprocity doing?

Yeah, that's just what your question makes me think of. But I may have missed the point about domination.

LORI:

Well I think it's the tendency for it to outgrow itself, is the concern Rousseau has. So there's this moment. We're walking along. We engage in reciprocal recognition. And it's like this internal hunger to be the first among equals.

ANDREW Oh, OK. Right.

LISTER:

LORI: And once we've developed a moral psychology that thinks in that way, we're doomed until we get the right kind of social contract and the right kind of civic virtue and the right kind of civic education, because we will always have these corrupt characters that-- so it's like reciprocity goes bad real quick. And I just wondered, do you see a blocking mechanism or something of that nature? If that's a roughly accurate account of our moral psychology.

ANDREW Right. So taking pride in being perceived to be better than others at something or richer than others and-- yeah.
LISTER: That's a good point. I guess we need the social basis of self-respect, effective equal basic liberties, the absence of intergenerational transmission of systematic inequalities, and inequalities between social positions that evidently raise the lowest position. I don't know. That's-- I'll have to think about that.

CINDY: OK. Lori, I want to answer your question by asking you a question. So you said something about the symbolic power of certain policies and so on. And I don't disagree with that. That's why I did a land acknowledgment. I think it's actually really important as a matter of recognition and respect. But my question was, was your point that symbolic--

So my worry is you can change certain material conditions, but you can't change the etiological factors. And so my question is, was your point that symbolic gestures have a special way of affecting ideological elements of structural injustice?

LORI: I was trying to suggest that they could, and that if you-- maybe something like the fair value of opportunity is a better way of putting the principle. But it would mean that things like time deficits, which are the result of the ideological, would also be corrected. This is to go beyond the socioeconomic claim that we can only address that. But those things in turn, it's a feedback loop that elevates status and then elevate material condition, status, material condition.

CINDY: So it's a feedback loop. OK, so it's like a looping effect. Yeah. OK. I think I can-- so I want to treat that as a sort of friendly amendment that tells me I have to make my claim a little bit weaker about the ability of fair equality of opportunity to affect ideological factors. But I nevertheless-- and I don't exactly know how I would defend this except from looking around at the world-- think that they are not--

That changing the material conditions is not going to be sufficient to erode certain ideological elements, including that time deficit that you're talking about, because-- and I'll just say the quiet part out loud-- so much of the belief in women's responsibility for children and their special roles vis-a-vis caring is embedded in the major religions.

BLAIN So the next question is of Greg.

NEUFELD:

GREG: [INAUDIBLE]

BLAIN Oh, OK. So Katherine?

NEUFELD:

KATHERINE: [INAUDIBLE] OK, there we go. So my question is for Cindy. And Cindy, I think this might be asking you to elaborate on something that maybe is in the paper but wasn't in the talk. So I'm looking at your response to Watson and Hartley on the handout. And here, when you're describing the non-socioeconomic elements of the gender division of labor, you say they can be understood as a kind of diminished social standing consisting in the expectation that mothers, not fathers, are ultimately responsible. And this expectation is wrong in itself, independent of its consequences.

So I'm having trouble seeing how that expectation on its own could constitute a diminished social standing. Don't we have to add something about how that work is socially valued or how that role is socially valued? And if so, then I'm wondering if the expectation is wrong or if the way that we value the roles that we're expecting from different people, if that's what they're wrong is.

And then, just to add on, when you say that it's wrong in itself independent of the harms, I take you to mean not just that it's morally wrong given the talk-- it's unjust. It's something.

CINDY: Yeah. Sorry.

KATHERINE: OK. I just wanted that clarificatory point, but thanks.

CINDY: Thanks. That's a great question. I don't think that-- there is the issue of the way in which caring labor and so on is socially valued-- devalued. That's something that feminists who work on the gender division of labor talk about regularly.

I am simply making the point that when, at the end of the day, it's women who have to make whatever sacrifices are necessary to care for children and men are not expected to do that, that basically what's entailed by that or underneath it is that women's interests that aren't bound up with parenting and caregiving, their independent interests, don't matter as much as the independent interests that men have, their interests that aren't bound up with caregiving and parenting. And I think that is a form of diminished status in itself.

BLAIN Gina? We're moving at a brisk pace here.

NEUFELD:

GINA: My question is for you too, Cindy, but do you want to-- I can just ask you some other time if your voice is bothering you.

CINDY: No, it's fine.

GINA: OK. So I had a question about how you were diagnosing a couple of your cases. I had a question about how you were diagnosing a couple of your cases. So so first, the Sandy case. This is the case of the woman who's vulnerable to homelessness. So you say that-- in the paper, you say the injustice that she's experiencing, most theories of justice you say aren't equipped to theorize her case, for most do not regard the mere fact of an individual's deprivation as an injustice. And you include Rawls in that category.

But I was thinking-- I was thinking that the basic needs principle would regard this as an injustice, and that that's the most important one. Without any explanation of the structures that lead to it or anything, just that level of deprivation is always an injustice. I just wondered if you maybe thought that could play a role here.

And then the other case was-- so you talk about car trouble in the context of your case against Shelby. And I wondered here whether there's something he might have to say in response. So I had thought that Shelby's argument is that justice as fairness can address the most important dimensions of racial injustice, and fair equality of opportunity has a really important role to play in that.

But when it comes to stigma, I would have thought that the social bases of social and mutual respect would do more of the work. And so even a fair equality of opportunity can't get us all we should want in terms of our capacity to impugn racial injustice. The theory as a whole would be able to. And then there will still be individual racist beliefs.

But my sense of Shelby's argument is that he's going to say that's not a social injustice, except insofar as the racist beliefs rise to the level where we have a status problem. And then we have a case where the material bases of people's social and self-respect are jeopardized. So just wondered what you would say about those possible defenses on behalf of the two accounts.

CINDY: Thanks. Those are both really good points. So I'll do the last one first. So is your point that-- so is your point that if the base-- if it's a well ordered society and if the basic liberties are secured, then we don't need fair equality of opportunity to eradicate stigma because that's taken care of by other aspects of Rawls' principles? Is that what your question is?

GINA: No. I think-- well, let me put it this way. I was thinking what we wanted to know was whether his theory is adequate to help us diagnose the injustices in our society, the structural injustices in our society. And you say, well, Shelby tries to say yes, but his answer, his yes answer, doesn't work because fair equality of opportunity can't criticize social stigma like what we see in the case of car trouble.

And I was suggesting that fair equality of opportunity doesn't exhaust the resources that Shelby could draw on to try to make his case that--

CINDY: I see.

GINA: --justice as fairness--

CINDY: Fair enough.

GINA: --criticizes the social stigma that we see in car trouble. So you put the restatement in terms of the ideally just basic structure, and I just don't-- I wouldn't translate it that way. But it probably doesn't matter.

CINDY: OK. So your point is that there are other resources within Rawls' theory besides fair equality of opportunity to deal with stigma. Like social bases of self-respect was one thing you mentioned.

KATHERINE: And I think that that-- I feel like social bases of self-respect is a little fraught, because there are Black theorists who have argued that we shouldn't think of these material bases as being crucial to self-respect because we can develop healthy self-respect absent them. But I was thinking more like the social bases of reciprocal respect or something like that, which also seems a part of justice as fairness. But maybe both.

CINDY: Good. So the second one, the second of your questions, I think that now that I understand it I have to think about it more. I read Shelby as saying that you could apply fair equality of opportunity, and you would essentially have then a racially just society by applying that principle. It's how I read that particular essay. But anyway, thank you, because I will think about that.

So then the previous question was about Sandy. Yeah. So you'll notice that I did not include any of that section of my paper you're asking me about in the presentation because I actually think that section is wrong. So I need to rethink it. I think there is a question in theories of structural injustice that needs to be sorted out, and that is, what is unjust when there's structural injustice? Is it the structures? Or is it what the structures cause?

And I think there's an ambiguity in the literature on this. And I have a view, which is it has to be the structures and not the things that the structures cause. And I was trying to get at that in the discussion. But on reflection and given some feedback that someone else gave me, I realized that that section as I wrote it is wrong, I really think is wrong. But I still think that question needs to be addressed. Does that help at all? But I think you're right about Rawls and the basic needs.

BLAIN So the next question is Celine.

NEUFELD:

SUBJECT 4: So this is actually just a follow-up on this exchange, and it may be obviated by the fact that you no longer agree with what you said in the Sandy section. So you were just suggesting now in your exchange with Gina that what you want is to locate the injustice in the structures and not in its harmful consequences.

And I was wondering whether you might not consider the possibility that the harm is part of the explanation for why those structures are unjust, not because of the mere fact of the harm, but because it's evidence that the structures failed to be regulated by the right moral principle. So it's not that they are intentionally trying to bring about some kind of harm, but there's a kind of negligence in the structure that's unjust.

And so at times in this passage at the top of page 7, you seem to think that-- there's a way of reading it where it seems like what you want is for there to be an intentional wrong. So you disting-- you talk about how, if you can't stipulate that an unintentional harm caused by social processes are unjust while unintentional harms caused by natural processes are not--

And I think you could defend that position, though, because it may be that systematic vulnerability to homelessness might be unintentional, but that might still be objectionable because-- as a kind of negligence, as a kind of moral, institutional negligence. So that was just a suggestion. And then one other just tiny remark about the Sandy example. I always find this example really frustrating to deal with as an example of structural injustice because it seems like there are multiple examples of wrongs.

CINDY: Yes.

SUBJECT 4: And so I wonder if there might be something else. So even just the requirement that you pay two month's rent and a security deposit-- in Ontario, that's illegal, probably because it's really exploitative. And so just maybe there's another way of dealing with that example.

CINDY: So I agree. That Sandy example is not helpful because it's way too messy. So it's not really isolating the things you want it to isolate to understand structural-- employment markets are wrong on this. There's sexism. She claims that no one does anything individually wrong, but then she talks about stereotypes of single mothers. It's a really complicated example.

So I'm sure this is going to answer your question, but I'm just going to say two things. So I think there's two kinds of cases of structural injustice. There's the kind that Rawls is worried about, which emerges organically when no one does anything wrong and there's not any past injustice. And that is what he thinks can happen in markets. So that's what he's saying in that quote about the basic structure about individual transactions starting out as justified and then those transactions ending up unjust because the conditions that made them just have disappeared.

That's one kind of case, and I think that's the case for class injustice as far as Rawls sees it. There's another kind of structural injustice which is much more common, which is the structural injustice gender and racial injustice that we have now and I think is clearly caused by past injustice. It doesn't emerge organically, like just because we're having individual transactions we end up having racism. Racism comes from past, non-structural injustice.

So I think there's two different types. In one case-- in both cases, the structures are unjust. In one case, they become unjust organically, and their injustice is explained by the outcomes that they then produce, which is the fact that the transactions can no longer be considered just. That's one kind of case. And then the other kind of case is where the structures are unjust because they're caused by past injustice, like for example the wealth gap between white people and Black people is an example of that. I don't know if that helps.

SUBJECT 4: So I guess I was just suggesting a way of interpreting maybe the first example as not merely arising organically or inevitably from transactions, but just from a failure to regulate. It's the difference between being completely accidental and happenstance, and then negligence, which you might think is [INAUDIBLE]

CINDY: OK, but that's just to repeat Rawls' point that you have to regulate that. You have to regulate those background conditions. If you don't, then you're in essence being negligent.

SUBJECT 4: Yeah. And so it was just a suggestion for re-thinking the top of page 7. It doesn't matter whether the harm is unintentional or not. What we care about is what's the-- so a harm can be problematic because it issues from someone acting on a malicious or objectionable principle, and it also might be problematic because someone fails to act on the right principle.

CINDY: Sure. Yeah. No, I agree. Sorry. Yeah.

BLAIN NEUFELD: So we have about five minutes left and two more people on the queue. So Charles and then Tony.

CHARLES: This is a question for Simon. It's not an objection at all. It's more like a suggestion [INAUDIBLE] Early on-- [INAUDIBLE] Early on in response to a point that Simone made, you seemed to agree that there were two senses of legitimacy, a descriptive and a normative. But you said you were interested only in investigating the normative sense of legitimacy.

But my question is, is there really a descriptive sense of legitimacy at all? Is there a coherent one? It's often said to be, but I think it's a good question-- real question whether there is one. Paradigmatically, when one talks about a descriptive use of the legitimacy notion, one means the following kind of situation.

Most people in society support a government or whatever. They comply with its rules. And that makes this, you might say, government descriptively legitimate, whether or not it's actually justified in its rule. However, the people we're talking about don't support the government because they support the government, clearly. They support the government to the extent that they do because they think that the government is justified in doing what it's doing.

So the people in question are operating with a normative conception of legitimacy. So that statement, the statement of the supposedly descriptive notion of legitimacy, that this government is descriptively legitimate because most people support it, is a statement made from some standpoint other than the standpoint of the people themselves.

And moreover, it's a statement it doesn't say simply, well, from the outside I notice that most people in the society support the government. It rather says, because most people in this society support the government, the government is legitimate. In which case, this is another, a different normative conception of legitimacy that that statement embodies, not the same conception supposedly as the people we were talking about in the first place, but now it's a different one.

So why can't you just make it real easy and say there's only the normative conception of legitimacy? Of course, some of these conceptions may be false, could be unjustified. But whenever we're talking about legitimacy, we're talking about a notion having to do with justification. They're not two senses.

SIMON MAY: Yeah, I would be happy with that, to think of legitimacy as an essentially normative notion. I don't want to pick a fight with Max Weber. [LAUGHS]

CHARLES: [INAUDIBLE]

SIMON MAY: Or if it is, if it isn't. I don't-- we can have whatever sociological category we like when, as a descriptive fact about a society, x number of people have x beliefs, including moral beliefs, and keep that to be a purely descriptive notion. And call it whatever you like. I'm not going to get into fights with sociologists.

I totally agree that a lot of what people mean by descriptive legitimacy is something like this-- because the people there accept the authority of the government, that means that outsiders are morally bound to not interfere or to defer or so on, in which case you have a moral notion of legitimacy that just simply has a criterion like, do the people support the government? And if they do, then fine.

If that's what's going on when people talk about descriptive legitimacy, then they're implicitly importing a moral notion, and I would want to push back against that. But if they're scrupulous about being purely descriptive, then I'm not going to get into an argument about what category they use, what term they use.

BLAIN Simone, you look like you really wanted to say something.

NEUFELD:

SIMONE: I-- oops. Sorry. I agree that they're both normative in a sense. But the question for the descriptive, the ultimate question is a question of stability. And that is not really a normative question versus the question of, are there good reasons? So even though it is true that citizens-- like in China, they think that they ought-- it's normative for them. They think it's legitimate.

But Weber's point was, what are the conditions of stability, not what are the conditions of moral justify them?

SIMON MAY: Yeah. I'm totally fine with that.

BLAIN So the final question goes to Tony.

NEUFELD:

TONY: So I have a question for Cindy, but first I have a comment to Lori that your friend's husbands are not feminist men.

[LAUGHTER]

And feminists should hold men to a higher standard. [LAUGHS] And on that note-- so I was thinking about the gender division of labor cases. And I think you're right that the stigma stuff really matters, and it matters in part because it produces these time lag differences. So there's a extra burden on women when they're expected to be the primary caregivers. And even if the caregiving time is equal, the attention time isn't equal, and so that--

CINDY: Yes.

TONY: But then, I wonder if you're doing this thing that we all do on occasion, and it's a very tempting thing to do with Rawls, which is to think of the two principles as policies. And so there's this argument that people make all the time, which is, well, you apply fair equality of opportunity, and then there's this remaining injustice that looks like an inequality of opportunity, so clearly the principle is insufficient.

But that's got the argument backwards, that fair equality of opportunity is a standard of justice. Then the question is, what policies do we need to produce it? And if it turns out that equalizing parental leave will still leave women carrying a time burden that disadvantages them in the workplace and having opportunity for positions and powers, what that means is that to achieve fair equality of opportunity, we need to dismantle ideological things or we have to make men do an extra amount of the work because they're going to-- that'll compensate for the women's things.

So it may be that fair equality of opportunity is a fine standard to get at exactly what you want, but a principle-- a policy of fair equality of opportunity, whatever that means, will be insufficient to get there. And I make this mistake all the time. People make this mistake all the time with Rawls. And it's just-- you have to just remember it's a standard, not a policy.

CINDY: OK. So you might need a policy that doesn't have to do with fair equality of opportunity to achieve an outcome that's fair equality of opportunity.

TONY: You need inequality of opportunity to get-- a policy of equality of opportunity to get fair equality of opportunity because you have to overcome ideological whatever.

CINDY: Yeah. Good this is Christie and Lori's fault, though.

[LAUGHTER]

SUBJECT 5: That's what I said. [INAUDIBLE] said that.

CINDY: that was your point?

SUBJECT 5: Yeah.

CINDY: I'm not sure I'm seeing them as the same points. But in any case-- OK. So I was responding to what I thought was an argument that Lori and Christie were giving, which was that you use fair equality of opportunity to ensure equal citizenship for women. And there are certain policies, specific policies that you use to create this fair equality of opportunities that can have equal citizenship, I may be misunderstanding their argument.

And the policies they list are things like parental leave, after school care, universal pre-K, all those kinds of things. Now, whether those-- I don't know what to call them-- whether those are-- am I making the mistake then that you're describing by calling them fair equality of opportunity policies? They're just policies that end up giving women fair equality of opportunity, opportunities to run for office and--

TONY: Well, I would say they're policies that increase women's opportunities. And your point is-- the way to make your point is to say because of the ideological stigma stuff, they are insufficient to arrive at fair equality of opportunity, so more would be needed. And then there's a question of what that is.

CINDY: my point.

TONY: So I would make it that way as opposed to, this shows that fair equality of opportunity is an inappropriate or insufficient standard to get us to structural justice--

CINDY: the point now.

TONY: --of the sort you want.

CINDY: good. Thanks. That's super helpful.

LORI: [INAUDIBLE] do you have an et cetera?

[LAUGHTER]

CINDY: I would have added the "et cetera" when I was-- if I were delivering it.

LORI: Well, just meaning that we aren't saying those are sufficient.

CINDY: know you aren't.

BLAIN NEUFELD: Speaking of et cetera, I have to-- sorry Greg, I'm going to have to call it off here, since the shuttle is coming in 10 minutes and I have to catch a cab in 10 minutes, so-- plenty-- 10 minutes, though, to talk more. But thanks very much for all the panelists and to Andrew in Ottawa. Thank you for joining us.

[APPLAUSE]