

Session 13 Kaplan, “Decision Theory and the Factfinding Process”

Decision Theory: employs the notion of *expected utility* to come to conclusions about the rational, or optimal, decision to make under conditions of uncertainty.

- When we’re faced with deciding whether to find a defendant guilty/liable, we’re always under conditions of uncertainty.
- Kaplan examines the idea that our decision, in such cases, should be guided by the norms of decision theory – should reflect an expected utility calculation – and argues that it should, and that the assumption that it does can explain a number of features of our criminal justice system.
- We might think, instead, that our *aim*, as jurors or judges, is to get at *the truth*, not to maximize utility. If I’m a judge, or sitting on a jury, I want my verdict about a case to reflect *what actually happened*. But my aim is more complicated than this, because (i) there is always a possibility of my going wrong; and (ii) there are always two ways in which I could go wrong: I could mistakenly convict/find for the plaintiff, or I could mistakenly acquit/find for the defendant.
- Depending on the kind of case at issue, my goal may not be simply to minimize mistakes; I may care more about some kinds of mistakes than others, and so be willing to tolerate mistakes of one kind in order to more surely avoid mistakes of the other. This reflects differences in the *disutility* I assign to different kinds of mistakes.

What is *expected utility*?

- *Subjective* probability
- “Utility” very broadly understood – no assumption of utilitarianism, or even of a “good prior to right” version of consequentialism. But some assumption of numerical value-assignments and interpersonal comparisons.

Kaplan’s formula:

- *Convict/find for the plaintiff* if probability of guilt/legal responsibility is at least P , where $P D_g > (1-P) D_i$ (where D_g is the disutility of acquitting a guilty person and D_i is the disutility of convicting an innocent person).
- Solving for P : $P > 1/(1 + D_g/D_i)$

Why treat civil and criminal cases differently?

- Some differences between civil and criminal liability:
 - The latter, but not the former, is about establishing blameworthiness (or at least more about that?).

- We can think it appropriate to hold people civilly liable for providing compensation for harms they caused, even when they are not blameworthy for having caused them
 - Strict liability
 - “Necessity” a defense against criminal charges, but not against civil liability (e.g., *Vincent v. Lake Erie Transportation Co*)
- We think the duty to compensate can appropriately be paid by a third party (an insurance company or a generous donor), unlike the serving of a criminal sentence.
- In the case of civil liability, where the question is how to distribute costs, rather than whether to punish, there is no way of *not* distributing costs at all (by contrast, we can decide, if we have insufficiently conclusive evidence of guilt, e.g., simply not to punish).
 - Consider what happens if we decide not to award compensation because of insufficient evidence in a tort case – that means we’ve decided to let the plaintiff bear the costs alone.
 - But if we decide not to punish in a criminal case, we aren’t then punishing anyone else...
 - We’re concerned, in the tort case, not with *blame* but with *who is out of pocket for the costs*. In criminal cases, we have the option of *not blaming anyone*. In tort cases, once the harm has been done, we don’t have the option of leaving *no one* out of pocket for the costs.

Is “preponderance of the evidence” the right standard for civil cases? Why or why not?

- Is it clear that plaintiffs and defendants have the same to gain/lose from adverse verdicts?
 - Should we be asking this question on a case-by-case basis?
 - Kaplan – in some cases where more is at stake (fraud findings, denaturalization), the standard is higher: clear-and-convincing evidence.
 - Might there be cases where we can’t find preponderance of evidence but should still hold someone liable (e.g., Cohen’s fence-jumpers case – We’ll talk more about this next time with Thomson’s *Tice* case...)? Sindell?
 - When in non-legal cases is preponderance of evidence the right standard? (e.g. hiring a possible child-molester to teach...)
 - What kinds of factors weigh in? (Publicity...)

Is “beyond reasonable doubt” the right standard for criminal cases?

- Is it much worse to convict an innocent man than let a guilty one go free? Why?
- Should we expect the cost of letting a guilty person off for a particular crime to go up when the cost of convicting an innocent person of that crime goes up?
- What kinds of factors effect the calculation in criminal cases?
 - Severity of sentence (e.g. Three Strikes Laws)
 - Likelihood of recidivism
 - Age?

- Cost to defendant of being found guilty (reputation?)
- Should these considerations affect the burden of proof?
 - Kaplan seems inconsistent on this question:
 - He argues that it's a good thing that jurors are (often) prevented from hearing about a defendant's criminal record, even though this would rationally affect their expected utility calculations, because it might lead them to convict an innocent man.
 - But he argues that it's a bad thing that jurors aren't informed if a defendant faces a mandatory minimum sentence, because this information is relevant to the expected utility calculation in a clear and readily comprehensible way, and all such information should be made available to jurors.
 - *What do you think?*

What do these standards *mean*?

- Contextualism about knowledge...
- Kaplan asks why jurors aren't instructed to e.g. convict when $P > .995$... Says:
 - That's like telling them to convict one guilty man in 200.
 - But also, "in any rational system the utilities (or disutilities) that determine the necessary probability of guilt will vary with the crime for which the defendant is being tried, and indeed with the particular defendant." ... Is the suggestion that what counts as "reasonable" doubt will therefore also vary?
- Contextualism about reasonable doubt? (sensitive to the stakes...)
 - Consider whether we'd say the jurors had reasonable doubt if our question is *not* whether the defendant should be convicted (maybe we're instead deciding whether to hire her...)
- Seems less likely that "preponderance of the evidence" could be context-sensitive...

Reasons for concern about the decision-theoretic approach...

- Danger of providing wrong answer at least if taken case-by-case (e.g., convicting known innocent man... if $D_i > 0$)
- Right solution from decision-theoretic point of view often not available (can't find someone partly liable, proportional to likelihood of guilt)
- Need to think about repeated applications of the decision procedure, and its effect on the system as a whole (Rawls)...

Finally: 95% of all criminal convictions in the US are the result of *plea bargains* – defendants don't wait for a jury's verdict. Similarly, 97% of civil cases are settled before the judge/jury rule.

- These decisions very likely reflect expected utility calculations. But likely different ones from those that would motivate jurors (e.g., a plea-bargaining criminal defendant isn't interested in whether *an innocent person* will be convicted or a guilty person let free, but in whether *she* will be convicted...)

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