

Ben Eggleston
University of Kansas, Fall 2016
Philosophy 880: Topics in Ethics
Law 994: Special Topics
August 16, 2016

Consequentialism and Legal Theory

description: This seminar will examine consequentialist moral philosophy and consequentialist approaches to judicial decision-making. We will spend the first several weeks studying consequentialist ethical theories. Our primary resource will be William H. Shaw's *Contemporary Ethics: Taking Account of Utilitarianism*, with additional readings from Peter Singer, Peter Railton, Philip Pettit, and Frances Kamm. After fall break we will turn to legal theory. Our main focus will be the leading consequentialist approach to judicial decision-making, legal pragmatism, with attention to arguments for and against it. Views to be considered include those of Richard Posner, Antonin Scalia, Ronald Dworkin, and Brian Tamanaha. Assignments will include a choice of either two 3,000-word scholarly papers or one 6,000-word scholarly paper, along with a 1,500-word response paper (with a revision in response to feedback), an in-class presentation, and class participation.

prerequisites: an advanced undergraduate course in contemporary ethical theory or the history of ethics, or permission of the instructor

class schedule: Tuesdays, 3:00–4:50, in 3097 Wescoe Hall
(class no. 25864 for Philosophy 880 or class no. 30632 for Law 994)

meeting with me and contacting me:

The location of my office is 3071 Wescoe Hall. I have office hours on Tuesdays from 2:00 to 2:50 and on Thursdays from 11:00 to 11:50, but you should feel free to come by my office at any time. In rare cases I may have to ask you to come back at another time, but in general I will be happy to speak to you at your convenience. You are also quite welcome to make an appointment with me. To do so, please send me an email (my email address is my last name (no capitalization necessary), followed by '@ku.edu') with a list of some times when you are available, and I'll find a time when we're both available and write back to you. Please note that I tend to use email only for scheduling appointments and handling logistical matters, not for substantive discussions of course material.

requirements/grading:

Here are the factors that will determine your overall grade, and their weights (in percentages):

<u>assignment</u>	<u>weight</u>
scholarly paper(s)	70
response paper	10
in-class presentation	10
attendance and participation	10

scholarly papers:

You can complete the “scholarly paper(s)” component of the course by writing either of the following:

- one paper of not more than 6,000 words
- two papers of not more than 3,000 words each

Any paper you turn in should be the kind of thing a responsible philosopher might submit for presentation at a professional conference or for publication in a reputable journal. Thus:

- It should offer an original contribution to the discussion of some important philosophical issue or text, and should be a finished, polished piece of writing.
- It should be written as if intended for the general philosophical reader (albeit one who, perhaps, specializes in ethics), not just for me or the members of this class.

when:

If you write 3,000-word papers, they will be due in October and December.

If you write a 6,000-word paper, it will be due in December. See details in the schedule, below.

advice and feedback:

I encourage you to talk to me at any point in the semester about your plans for your papers. I hope you will make your papers the culmination of gradual progress, rather than large burdens to be discharged at the last minute, under duress. I will gladly provide feedback on papers before final versions are due; again, see details in the schedule, below.

a note on word limits:

The word limits apply to every word in your papers, including footnotes. If the number of words in a paper is above the limit, then the paper’s score will be reduced proportionally.

deadlines:

Deadlines for turning in work will be strictly enforced: late papers’ scores will be reduced by 25 percentage points for each full or partial day of lateness.

formatting checklist:

- The following information is at the top of the first page: your name, the date when you are turning in the paper, and the paper’s word count.
- Each page has margins of at least 1.25 inches on all sides.
- To refer to other works, your paper has footnotes, parenthetical in-text citations along with a works-cited list, or both.
- Your paper has no endnotes.
- Your paper is saved as a Microsoft Word document.

turning in your papers:

Any paper you turn in should be submitted electronically, by emailing it to me.

other determinants of your grade:

response paper:

Early in the semester you will write a short paper responding to the reading assigned for a particular week. The instructions for this paper are the same as for the scholarly papers, with the following changes:

- It will have a limit of 1,500 words.
- I will give you feedback, and you will revise your paper.
- Due dates will vary among students and will be stated in class.
- You will be graded on the quality of your effort rather than the quality of your work. I expect most students – perhaps all students – to get a grade of 100% on this assignment.
- The purpose of this assignment is to give me an early look at your writing, and to give you an early look at my expectations of your writing. My feedback will be uncompromising.

presentation:

Your presentation will consist of your leading a short discussion of a paper you plan to write. The process will begin, a few days earlier, with your providing the class with a brief prospectus of a paper. This document will have a word limit of 10 percent of the word limit for the paper itself, and will be due – that is, sent to the class email distribution list – not later than 6 a.m. on the Friday before the class period in which it will be discussed. In that class period, there will be comments and questions, to which you will respond. (You do not need to prepare anything more for the class period; you just need to be prepared to discuss your prospectus.) The last two class periods have been set aside for these discussions, and we may also use some or all of the antepenultimate class period, and/or parts of other class periods, as necessary.

attendance and participation:

Your attendance and participation grade will be based, mainly, on the following considerations. First, you can miss up to two class periods at your discretion, without providing an excuse for your absence; if you have more than two absences, you should be prepared to provide excuses for all except two of them. I do not want to encourage you to come to class when you are ill and might infect others. If you have a contagious illness, please protect your classmates from the risk of catching it from you. Absences in such circumstances will be excused and there will be no adverse effect on your attendance and participation grade.

Second, in this class, good class participation will consist of being prepared to provide, when called upon, answers to any of the reading questions associated with the reading for any class period (unless you are absent from that class period with a good excuse). Correct answers are not required, but incorrect answers (as well as correct ones) must be based on textual or other evidence that contributes to the discussion and resolution of the matter in question.

Third, good class participation consists of offering intelligent, relevant, and helpful comments and questions. You should be an active discussant and should feel free to introduce your own perspective and concerns into the discussion; at the same time, however, you should not think that more participation is always better. Ideal class participation not only involves being willing and able to contribute; it also involves being respectful of others' time and interests, being aware of what concerns are already under discussion and unresolved at any particular point, and being aware of those occasions when a particular topic or thread that interests you would be more appropriately pursued later in the discussion or outside of class.

standing policies:

my grading scale:

At the end of the course, I'll give you a grade between A and F. The grades A, B, C, and D are given specific interpretations in KU's University Senate Rules and Regulations, which I adhere to. Article 2 of those rules and regulations – “Academic Work and Its Evaluation” – contains a section called “The Grading System” (at <http://policy.ku.edu/governance/USRR#art2sect2>), which says that an A should be given for achievement of outstanding quality, a B for achievement of high quality, a C for achievement of acceptable quality, and a D for achievement that is minimally passing, but of less than acceptable quality.

What letter grade I give you will depend on the final average of the scores you get on the various assignments in the course. I'll use the following scale to convert your final average to a letter grade. (For an explanation of how I arrived at these numbers, see the “Plus/Minus Grading” document on my website.)

<u>final average</u>	<u>letter grade</u>
93.50 and above	A
90.00 through 93.49	A-
86.50 through 89.99	B+
83.50 through 86.49	B
80.00 through 83.49	B-
76.50 through 79.99	C+
73.50 through 76.49	C
70.00 through 73.49	C-
66.50 through 69.99	D+
63.50 through 66.49	D
60.00 through 63.49	D-
59.99 and below	F

Many (if not all) assignments will be graded numerically, rather than with letter grades, and you can also use this scale to interpret the numerical scores you get in this course during the semester.

disability accommodation:

If you have a disability for which you may be requesting special services or accommodations for this course, be sure to contact the Academic Achievement and Access Center (AAAC), at 22 Strong Hall or at 864-2620 (V/TTY), if you have not already done so, and give me a letter from that office documenting the accommodations to which you are entitled. Please also see me privately, at your earliest convenience, so that I can be aware of your situation and can begin to prepare the appropriate accommodations in advance of receiving that letter. For more information, see <http://access.ku.edu>.

academic misconduct:

I take academic misconduct, especially cheating on tests and plagiarizing papers, extremely seriously, and am generally disposed to impose the harshest available penalties when it occurs. KU's policy on academic integrity is in article 2, section 6 of the University Senate Rules and Regulations (<http://policy.ku.edu/governance/USRR#art2sect6>).

changes of plans:

This syllabus is not a contract; it is a snapshot of my plans for this course at a particular time. Statements about what I will do or what will happen are not promises, but expressions of my current intentions. The requirements and other provisions stated in this syllabus are subject to revision.

course materials and resources:

textbook:

Contemporary Ethics: Taking Account of Utilitarianism, by William H. Shaw
(Blackwell Publishing, 1999)

New copies of this book are expensive. I have been buying inexpensive used copies to sell students at cost; contact me about this.

course website:

Some course documents, including this syllabus, will be available on the website for the course, the URL of which is

<http://www.benegg.net/courses/conseq4>

(If you don't want to type in this whole thing, you can stop after 'net' – at which point you'll be at my personal website – and then follow the links to the website for this particular course.)

course Blackboard site:

Several of the readings mentioned below are marked '(BLACKBOARD)'. Files containing these readings will be provided on the course Blackboard site.

email distribution list:

I've set up an email distribution list for the course. In general, I'll try to mention everything important (whether substantive or procedural) in class. But at times, I may use the email distribution list to send you information that you will be responsible for having or acting on, so it is your responsibility to make sure that you read mail that I send to this list, by checking the email account that goes with the email address that you have on record with KU.

I've set up the list so that not only I, but also you, can send messages to it, which you will need to do in order to complete certain requirements of the course. Here is its address:

phil880{25864}fa16@ku.edu

Note that sending a message to this address is not sufficient for KU's distribution-list service to send that message to everyone on the distribution list. The message must also come from an approved account or, at least, an approved "From:" address. This could be relevant if you send the message from an email account other than the one you have in KU's Outlook system. For more information about this issue, see section 1 of the following web page:
<http://technology.ku.edu/how-use-ku-group-lists-distribute-email>.

Schedule:

<i>some dates from the academic calendar:</i>	
Monday, August 22	first day of classes
Monday, September 5	no classes (Labor Day)
Monday–Tuesday, October 10–11	no classes (fall break)
Wednesday–Friday, November 23–25	no classes (Thanksgiving break)
Thursday, December 8	last day of classes
Friday, December 9	Stop Day
Monday–Friday, December 12–16	final exams

August 23: course introduction

Consequentialism

August 30: introduction to utilitarianism and well-being

Shaw, chapter 1, “Introducing Utilitarianism”
and chapter 2, “Welfare, Happiness, and the Good”

September 6: arguments and objections

Shaw, chapter 3, “Arguing for Utilitarianism”
and chapter 4, “Objections to Utilitarianism”

September 13: forms of utilitarianism and political issues

Shaw, chapter 5, “Refining Utilitarianism”
and chapter 6, “Rights, Liberty, and Punishment”

September 20: economic issues

Shaw, chapter 7, “Justice, Welfare, and Economic Distribution”

Peter Singer, “Famine, Affluence, and Morality” (*Philosophy & Public Affairs* vol. 1, no. 3
[Spring 1972], pp. 229–243) (BLACKBOARD)

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. What is the assumption Singer says he begins with? 2. What are Singer’s two principles (or two versions of one principle) about preventing bad things from happening? How are they different? Are there sacrifices that might be required by one principle (the strong one) that might not be required by the other one (the moderate one)? (You might want to | <p>answer this question in connection with question 6, below.)</p> <ol style="list-style-type: none"> 3. One objection to those principles has to do with their “refusal to take proximity or distance into account” (p. 232.2). How does Singer defend this aspect of these principles? 4. Another objection to those principles is based on the argument that purports to |
|--|---|

- show that since there would be enough aid if everyone in circumstances like his were to give £5, he has no obligation to give more than £5. What does Singer say is wrong with this argument?
5. Near the top of p. 235, Singer begins a discussion of “our traditional moral categories.” What does he mean when he says “The traditional distinction between duty and charity cannot be drawn, or at least, not in the place we normally draw it.” In what (new) place does he say we ought to draw it?
 6. In the middle of p. 235, Singer gives a (possible) example of the distinction between sacrificing something of moral significance and sacrificing something of no moral significance. What is this example?
 7. How does Singer respond to the objection that his position is “too drastic a revision of our moral scheme” (p. 236.3)?
 8. Singer also appears to anticipate the objection that his view would resemble utilitarianism in requiring everyone to devote all their energies toward maximizing overall well-being. What is Singer’s response to this objection?
 9. On p. 239, Singer considers some “practical” points. The first is the claim that widespread support of privately run charities would allow governments to escape their responsibilities. How does he respond to this point?
 10. The second practical objection Singer considers is that famine relief might do more harm than good by leading to unsustainable population increases and more starvation in the future. How does he respond to this point?
 11. The third practical objection Singer considers is that giving money to famine relief will detract from economic growth. How does he respond to this point?

September 27: personal character

Shaw, chapter 8, “Virtue, Personal Life, and the Demands of Morality”

Peter Railton, “Alienation, Consequentialism, and the Demands of Morality” (*Philosophy & Public Affairs* vol. 13, no. 2 [Spring 1984], pp. 134–171), sections I–VII (pp. 134–160)
(BLACKBOARD)

- I. John and Anne and Lisa and Helen
No questions for this section.
- II. What’s Missing?
 1. In what way, according to Railton, does morality, or the moral point of view, seem to run the risk of entailing a certain kind of alienation? What are some of the things Railton mentions that morality, or the moral point of view, might alienate one from?
- III. The Moral Point of View
- IV. The Paradox of Hedonism
 2. How, according to Railton, can one have a commitment to an end as such without that commitment being overriding?
3. What does Railton mean by subjective hedonism, objective hedonism, and sophisticated hedonism?
4. What is the counterfactual condition that Railton says a sophisticated hedonist’s motivational structure should meet?
- V. The Place of Non-Alienation Among Human Values
- VI. Reducing Alienation in Morality
 5. What is the counterfactual condition that Railton suggests Juan’s motivational structure meets?
 6. What does Railton mean by subjective consequentialism, objective consequentialism, and sophisticated consequentialism?
 7. How can the distinction between a theory’s truth-conditions and its

<p>acceptance-conditions in particular contexts be understood in terms of the distinction between a criterion of rightness and a decision procedure?</p> <p>VII. Contrasting Approaches</p> <p>8. When Railton discusses act vs. rule consequentialism, does he say that he has been discussing an act-consequentialist form of objective consequentialism, a rule-consequentialist form of objective consequentialism, or a form of objective</p>	<p>consequentialism that is neutral between act consequentialism and rule consequentialism?</p> <p>9. How, according to Railton, can an act consequentialist use the objective/subjective distinction to capture some of the intuitions that have made rule consequentialism compelling?</p> <p>VIII–IX</p> <p><i>These sections are optional.</i></p>
--	--

October 4: consequentialism and its rejection

Philip Pettit, “Consequentialism” (in Peter Singer [ed.], *A Companion to Ethics* [Blackwell Publishing, 1991], pp. 230–240) (BLACKBOARD)

<p>i. The definition of consequentialism</p> <p>1. What is one of Pettit’s examples of the distinction between honoring and promoting a value?</p> <p>2. How does Pettit use the notions of promoting and honoring to define consequentialism (and the rejection of that view)?</p> <p>ii. Once more, with some formality</p> <p>3. What is the difference between an option and a prognosis?</p> <p>4. How does Pettit use the notions of options and prognoses to define consequentialism?</p> <p>5. What is the first of the two varieties of non-consequentialism that Pettit distinguishes?</p> <p>6. What is the second variety of non-consequentialism that Pettit distinguishes?</p>	<p>iii. The main argument against consequentialism</p> <p>7. What does Pettit say is behind the charge, against consequentialism, that it “would make nothing unthinkable”?</p> <p>8. What reply to that charge does Pettit say can be found in the work of writers such as Austin and Sidgwick?</p> <p>9. What question does Pettit say “consequentialists have been slow to tackle, at least until recently”?</p> <p>10. What answer does Pettit say is “usually offered by consequentialists nowadays”?</p> <p>11. Does Pettit think that answer is on the right track, or the wrong track?</p> <p>iv. The main argument for consequentialism</p> <p>12. What is the first way in which, according to Pettit, consequentialism is simpler than non-consequentialism?</p> <p>13. What is the second way?</p> <p>14. What is the third way?</p>
--	--

Frances Kamm, “Nonconsequentialism” (in Hugh LaFollette and Ingmar Persson [eds.], *The Blackwell Guide to Ethical Theory*, 2nd ed. [Blackwell Publishing, 2013], pp. 261–286), to p. 276 (BLACKBOARD)

<p>Introduction</p> <p>1. How does Kamm use the Kantian notion of persons as ends-in-themselves to</p>	<p>express the rejection of consequentialism?</p>
--	---

Contemporary Nonconsequentialism
Outlined

2. What does Kamm mean by the term ‘prerogatives’?
3. What does Kamm mean by the term ‘constraints’?

Prerogatives

4. In this section Kamm surveys several possible bases for prerogatives. Is there one that she seems to favor over the others?

Constraints

5. What “view of separate persons” does Kamm say is captured by “The moral distinction between killing and letting die”? Why is the clause ‘when the aid does not merely counteract their initial threat’ included in Kamm’s statement of that view?
6. Although Kamm believes there is a distinction to be drawn between intending harm and foreseeing harm, she does not endorse the way that distinction is expressed in the Doctrine

of Double Effect. What is one of her objections to that view?

Complications on the Simple Constraints

Notice the Principle of Permissible Harm, which is Kamm’s proposed replacement for the Doctrine of Double Effect. You do not have to grasp the intricacies of that principle, and you can skip the rest of this section.

Inviolability

7. How does Kamm characterize the “paradox of deontology”?
8. Why, according to Kamm, is it impermissible to kill one person in violation of the Principle of Permissible Harm even when that is the only way to prevent five people from being killed in violation of that same principle?
9. What is Kamm’s reply to the counter-argument that, if people could choose from behind a veil of ignorance, they would reject Kamm’s strict view (about the inflictions of harms and rights violations) in favor of a more permissible one?

additional readings on consequentialism:

If you wish to pursue issues in consequentialism further, the following are good resources:

- Walter Sinnott-Armstrong, “Consequentialism” (*Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/consequentialism>)
- Stephen Darwall (ed.), *Consequentialism* (Blackwell Publishing, 2003)
- Samuel Scheffler (ed.), *Consequentialism and Its Critics* (Oxford University Press, 1988)

October 11: no class (fall break)

October 16: due date for 3,000-word papers submitted for feedback before grading

If you are writing two 3,000-word papers for this seminar and would like for me to send you comments on your first paper before you turn in the version that will be graded, the deadline is the end of Sunday, October 16. I will try to send you comments by the end of Thursday, October 20.

Legal Theory

October 18: Posner's pragmatic adjudication

Richard A. Posner, "Pragmatic Adjudication" (*Cardozo Law Review* vol. 18, no. 1 [September 1996], pp. 1–20) (BLACKBOARD)

- | | |
|--|--|
| <p>I</p> <ol style="list-style-type: none"> 1. What does Posner say about deriving pragmatic adjudication from philosophical pragmatism? 2. How does Posner use the attitude of being concerned with securing consistency with past enactments to distinguish between legal positivism and pragmatic judging? <p>II</p> <ol style="list-style-type: none"> 3. Why, according to Posner, is the pragmatist interested in past decisions, statutes, and other conventional sources of law? 4. How, according to Posner, does pragmatic adjudication better explain (than positivistic adjudication does) the U.S. Supreme Court's decisions about jurisdiction and deciding cases on their merits? 5. What is Posner's oil-and-gas argument for the superiority of pragmatic to positivistic adjudication? 6. How does Posner suggest a pragmatist would approach the question of the enforceability of contracts of surrogate motherhood? 7. What does Posner say the pragmatist's attitude towards past decisions would be in cases in which he or she lacked confidence about what the best decision would be? | <p>III</p> <ol style="list-style-type: none"> 8. Why does Posner feel comfortable with judges' deciding novel cases on the basis of "unstructured intuition based on personal and professional (but nonjudicial) experiences, and on character and temperament, rather than on disciplined, rigorous, and articulate inquiry"? 9. Does Posner believe the pragmatic principle of avoiding outrageous results is recognized to any degree by orthodox (i.e., positivist or nonpragmatic) judges? 10. How does Posner rate the value of information about the laws or widely held opinions of other countries? 11. Does Posner distrust emotional reactions to cases, or does he credit them with having some value? 12. What is the ambiguity in the term "forward-looking" that Posner identifies? 13. What does Posner say is the greatest danger of judicial pragmatism? 14. What is Posner's example of what he calls "myopic pragmatism"? <p>IV</p> <ol style="list-style-type: none"> 15. Why, in Posner's opinion, is the case for pragmatic adjudication weaker in a parliamentary system than in a U.S.-style checks and balances system? <p>V</p> <ol style="list-style-type: none"> 16. Does Posner hold that legal pragmatism is dictated by philosophical pragmatism? |
|--|--|

Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999), chapter 4: "Pragmatism," pp. 240–255, but you can skip the section numbered '3' that is on pp. 245–246 (BLACKBOARD)

Be prepared for the pages from the book to be somewhat repetitive of the law-review article. Normally I would not assign readings that overlap this much, but the law-review article is freestanding in a way that the book pages are not, while the book pages provide

added value with (1) some reconsideration and illuminating restatement of the earlier text and (2) some additional points that go beyond the earlier text.

<p>Pragmatic Adjudication Defined [etc.]</p> <ol style="list-style-type: none"> 1. What, according to Posner, are some of the potential bad consequences of departing from precedents and other conventional sources of law? 2. In regard to hypothetical jurisdiction, which U.S. Supreme Court justice does Posner mention as reasoning pragmatically? 3. How does Posner suggest that the issue of prospective overruling should be considered? 4. What does Posner (in this 1999 book) identify as the weightiest reason for 	<p>courts to consider in regard to same-sex marriage?</p> <p>Pragmatic Adjudication: Objections and Limitations</p> <ol style="list-style-type: none"> 5. How does Posner contrast his and Dworkin’s levels of interest in consequentialist and nonconsequentialist considerations? 6. How, in Posner’s opinion, did the U.S. Supreme Court’s decision in <i>Roe v. Wade</i> preclude a potentially useful “experimental” approach to the issue of abortion?
--	--

In the pages from the book, Posner discusses same-sex marriage, and his remarks may seem surprisingly conservative. Note that the book was published in 1999. For more recent accounts of his views, see the following (optional) articles:

– August 27, 2014: David Lat, “Judge Posner’s Blistering Benchslaps At The Same-Sex Marriage Arguments”
[\(http://abovethelaw.com/2014/08/judge-posners-blistering-benchslaps-at-the-same-sex-marriage-arguments/\)](http://abovethelaw.com/2014/08/judge-posners-blistering-benchslaps-at-the-same-sex-marriage-arguments/)

– September 5, 2014: Mark Joseph Stern, “Judge Posner’s Gay Marriage Opinion Is a Witty, Deeply Moral Masterpiece”
http://www.slate.com/blogs/outward/2014/09/05/judge_richard_posner_s_gay_marriage_opinion_is_witty_moral_and_brilliant.html

October 25: Scalia’s originalism

Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws” (in Scalia *et al.*, *A Matter of Interpretation: Federal Courts and the Law* [Princeton: Princeton University Press, 1997], pp. 3–47) (BLACKBOARD)

reading questions:

<p>The Common Law</p> <ol style="list-style-type: none"> 1. What short phrase does Scalia use to define or characterize common law? 2. How does Scalia use the case of <i>Hadley v. Baxendale</i> to illustrate common-law judging? <p>Democratic Legislation</p> <ol style="list-style-type: none"> 3. Why, according to Scalia, is common-law lawmaking undemocratic? 	<ol style="list-style-type: none"> 4. Which activity does Scalia say is most of the work of federal judges – making common law or interpreting text? <p>The Science of Statutory Interpretation</p> <p><i>No questions for this section.</i></p> <p>“Intent of the Legislature”</p> <ol style="list-style-type: none"> 5. What is one of Scalia’s “theoretical” reasons (a category he mentions near the end of this section) for rejecting legislative intent as the key to statutory interpretation?
--	--

6. What does Scalia say is the practical danger of using legislative intent as a principle of statutory interpretation?

Church of the Holy Trinity

7. How, according to Scalia, does the U.S. Supreme Court's decision in the *Church of the Holy Trinity* case illustrate the danger of interpretation guided by legislative intent?
8. Why does Scalia say that nontextualism should not be acknowledged and rationalized, but abandoned?

Textualism

9. How, according to Scalia, is the difference between textualism and strict constructionism illustrated by the case that involved the phrase 'uses a gun'?

Canons and Presumptions

10. Does Scalia express any doubt about the authority of courts to impose many of the standard presumptions and rules of construction?

Legislative History

11. Why does Scalia object to the use of legislative history on principle?
12. Why, according to Scalia, is legislative history a bad indicator of legislative intent?

13. How, according to Scalia, has the use of legislative history "facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law?"

Interpreting Constitutional Texts

14. How does Scalia reconcile his consultation of writings such as *The Federalist Papers* with his rejection of the relevance of legislative intent?
15. What does Scalia regard as "The ascendant school of constitutional interpretation"?

Flexibility and Liberality of the Living Constitution

16. How, according to Scalia, has interpretation of the Constitution as "evolving" led to a trend of undemocratic decisions over a period of several decades?
17. What is an example of a right or liberty that Scalia says has been reduced due to interpretation of the Constitution as "evolving"?

Lack of a Guiding Principle for Evolution

18. What are some of the guiding principles for Living Constitutionalism that Scalia contemplates?
19. What point does Scalia use the example of women's suffrage to make?

optional further reading:

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Minn.: Thomson/West, 2012), "Introduction" (pp. 1-46) (BLACKBOARD)

October 26: due date for 3,000-word papers

If you are writing two 3,000-word papers for this seminar, the first one is due at the end of Wednesday, October 26.

November 1: Dworkin and law as integrity

Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), selections from the introduction, "Law and Morals," and chapter 2, "In Praise of Theory" – see details in the reading questions, below: (BLACKBOARD)

Introduction: Law and Morals
(untitled opening section)

1. What does Dworkin say is "our main question"?

A Brief Catalogue of Possible Intersections

2. How, according to Dworkin, might moral considerations influence the interpretation of a series of judicial opinions such as opinions about cases in which people are injured by others?

Sorenson's Case

3. In Sorenson's case, does Dworkin describe Sorenson's lawyers as making a claim about what the law is or only a claim about what the law should be?

The Semantic Stage

You can skip this section.

The Jurisprudential Stage

4. What ideal does Dworkin say must figure prominently in any adequate account of the values of legality and the rule of law?

The Doctrinal Stage

5. What does Dworkin state as his criterion for the truth of a proposition of law?
6. What are the two rival justifications of negligence law that Dworkin mentions?
7. What are the two dimensions for measuring the success of a proposed justification that Dworkin mentions?
8. Does Dworkin hold that if a statute clearly implies that Mrs. Sorenson has no right to damages, then the legal conclusion does not depend on moral considerations?

The Adjudicative Stage

9. How does Dworkin distinguish the adjudicative stage from the doctrinal one?
10. What does Dworkin mean when he says "For us, a theory of doctrine is an indispensable part of, and nearly exhausts, a theory of adjudication"? What stance toward adjudication does he have in mind?
11. What kind of thinking does Dworkin describe as making the adjudicative stage "entirely independent" of earlier stages?

Legal Pragmatism

12. For what sort of reason, according to Dworkin, does pragmatism require that "judges [. . .] on the whole obey the legislature and keep faith with past judicial decisions"?
13. How does Dworkin summarize first summarize the approach he attributes to Richard Posner?

You can stop reading at the bottom of p. 24, and then skip to the "Legal Philosophy" section (which begins on p. 33).

Legal Philosophy

14. What topics for jurisprudence classes does Dworkin say have fallen out of favor?

Chapter 2, "In Praise of Theory"

Introduction

15. What two general answers to the question of how to reason or argue about the truth of claims of law does Dworkin present?

The Embedded View

16. On the embedded view (which is Dworkin's view), how do we justify legal claims?
17. What does Dworkin mean by the phrase 'justificatory ascent'?

Hercules and Minerva

18. Why, according to Dworkin, is his view of legal reasoning and of the basis for the truth of claims about law not also necessarily a view about the responsibilities of judges?

The Chicago School

19. In what two ways, according to Dworkin, does his theory-embedded approach to legal reasoning presuppose objectivity rather than being compatible with metaphysical skepticism?
20. In what way, according to Dworkin, is his theory-embedded approach consequentialist rather than deontological?

- 21. In what way, according to Dworkin, is his theory-embedded approach not utilitarian?
- 22. Why, according to Dworkin, is the question of what “works” unhelpful and unintelligible as a criterion or guideline for adjudication?

You can skip the “PROFESSIONALISM” subsection (pp. 65–72).

Summary: In Defense of Theory

- 23. How does Dworkin reply to the objection that “not all judges are trained in philosophy”?

November 8: Tamahana and the rule of law

Brian Z. Tamahana, “How an Instrumental View of Law Corrodes the Rule of Law” (*DePaul Law Review* vol. 56, no. 2 [Winter 2007], pp. 469–505) (BLACKBOARD)

Introduction

- 1. What two ideas does Tamahana say are fundamental in U.S. legal culture and in some tension with each other?

II. Legal Instrumentalism and Moral Relativism in the Academy

- 2. This section alludes to, but does not explicitly characterize, a view that legal instrumentalism displaced. What hints of this earlier view can be found in this section, particularly on p. 472?

III. Collapse of Higher Law, Deterioration of the Common Good

- 3. How, according to Tamahana, did judges’ belief in higher limits on law influence their decisions about the validity of statutes passed by legislatures?
- 4. How, according to Tamahana, do Constitutional limits on lawmaking differ from the “higher” or “natural law” limits that judges used to believe in?
- 5. What does Tamahana say is lost in judges’ rejection or disregard of “higher” or “natural law” limits on lawmaking?
- 6. What does Tamahana say is the “negative corollary of the assertion that legal power is legitimate only when used to further the common good”?
- 7. What kinds of decisions by judges does Tamahana say led to their losing

credibility as arbiters of the legitimacy of the purposes of legislation?

- 8. What rationales does Tamahana mention as encouraging political combatants to believe that pursuing their own agenda promotes the common good?

IV. The Threat to Legality

- 9. How does Tamahana use the example of a person signing a contract with unfavorable terms to illustrate the conflict between striving for purposes and being rule-bound?
- 10. How does Tamahana say the current “mishmash of [judges’] contrasting orientations” affects the predictability of the legal system?

You can skip sections D and E; resume at section F.

- 11. What, according to Tamahana, is the difference between subconscious influences on judging and willful judging?
- 12. Why, according to Tamahana, does the present threat to the rule of law stem not from the unavailability of subconscious influences but from what judges believe about the possibility of being rule-bound?

V. Conclusion

(no questions)

November 15: more on Posner's pragmatic adjudication

Richard A. Posner, "Tribute to Ronald Dworkin: And a Note on Pragmatic Adjudication" (*New York University Annual Survey of American Law* vol. 63, no. 1 [2007], pp. 9–13)

(BLACKBOARD)

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. What anti-positivist claim about the practice of American judges does Posner say he and Dworkin agree on? 2. What does Posner say is the fundamental difference between Dworkin and himself? | <ol style="list-style-type: none"> 3. How, according to Posner, does a pragmatic perspective help judges decide cases when they have shared premises and when they do not? |
|--|---|

Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), selections from chapter 7, "Coping Strategies for Appellate Judges II: Interpretation," and the conclusion, "Realism, the Path Forward" – see details in the reading questions, below:

(BLACKBOARD)

- | | |
|---|---|
| <p>Introduction</p> <p>chapter 7, "Coping Strategies for Appellate Judges II: Interpretation"</p> <p>The Spirit Killeth, but the Letter Giveth Life</p> <ol style="list-style-type: none"> 1. What passage from a classic literary work does the title of this section allude to? What is Posner's purpose in his alteration of it? 2. How, according to Posner, do Scalia and Garner interpret the rule "No person may bring a vehicle into the park" as applying to "an ambulance that enters the park to save a person's life"? 3. How does Posner explain his claim that "textualism is conservative"? What kind of conservatism does Posner have in mind? 4. What does Posner say is the "decisive objection to the quest for original meaning"? 5. What does Posner mean by "law office history"? 6. What consideration that Posner recommends for use in adjudication does he explain with reference to <i>Kennedy v. Louisiana</i>, <i>Heller</i>, <i>McDonald</i>, <i>Zelman</i>, and <i>Kelo</i>? 7. Why, according to Posner, is <i>Brown v. Board of Education</i> "A profound embarrassment for textual originalism"? | <p><i>Starting in the middle of p. 199, Posner goes into the factual details of several cases. Feel free to skim this material, resuming close reading near the bottom of p. 204.</i></p> <ol style="list-style-type: none"> 8. How does Posner use the canon of construction that involves the phrase 'of the same kind' to illustrate his claim that Scalia and Garner are not firm textualists? 9. What does Posner say is the "deepest fallacy" of textual originalism? 10. What point about Scalia and Garner's canons of construction does Posner illustrate with the canon "A statute should be interpreted in a way that avoids placing its constitutionality in doubt"? 11. What political (rather than interpretive) function does Posner say is served by the "rule of lenity"? 12. What remarks from Scalia and Garner cited by Posner explicitly acknowledge "policy" (as opposed to just "meaning") as a basis for principles of interpretation? 13. What does Posner say has been the effect, on the law, of the canons of construction? <p>Dreaming a Constitution</p> <p><i>You can skip this section.</i></p> |
|---|---|

Opposites Attract and Repel

You can skip this section.

Realist Interpretation

14. What does Posner say is the value of interpretive theories in constraining judicial discretion?

15. How does Posner summarize the “realist judge’s approach”?

conclusion, “Realism, the Path Forward”

16. What improvements in legal realism does Posner say would enable it to meet contemporary circumstances?

17. Does Posner wish for law to become a natural science, become a social science, or remain a humanity?

18. How, according to Posner, would lawyers’ arguments change if they were better able “to see their cases from the judges’ perspective”?

Starting in the middle of p. 358, Posner critiques a particular theory of tort law. Feel free to skip this material, resuming close reading at the last paragraph of the book.

November 22: in-class presentations

November 29: in-class presentations

December 4: due date for papers submitted for feedback before grading

If you are writing two 3,000-word papers for this seminar and would like for me to send you comments on your second paper before you turn in the version that will be graded, the deadline is the end of Sunday, December 4. I will try to send you comments by the end of Thursday, December 8.

The same dates apply if you are writing a 6,000-word paper for this seminar.

December 6: reserve

December 14: due date for papers

If you are writing two 3,000-word papers for this seminar, the second one is due at the end of Wednesday, December 14.

This is also when 6,000-word papers are due.

end-of-semester information:

The papers due on December 14 are the last assignments of the course. There is no final exam.

If you have any work that is not returned to you within a reasonable interval of time beyond the end of the semester, please retrieve it by December 31, 2017. After that date, I may discard unclaimed work from this semester.