

Law, Language and Values SF-J (Fall 2013)
Professor Ronald Garet

Assignment for the first day of class

All readings are included in your photocopied course materials. Please purchase your copy of the materials in CopyVision, room 18 in the Lower Level of the law school. The materials will be available on Friday, August 23, and the purchase price is \$20.00 cash and \$22.50 for check or credit card.

Please read the Table of Assignments and other course information on this website.

A PDF of the required readings for the first day of class, Tuesday August 27, can be found [here](#).

Please come to class prepared to discuss the exercise, "Walk a mile in my shoes."

Thank you.

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Table of Assignments

The number to the left of each entry in the reading assignments column corresponds to the reading number at the left margin of the Table of Contents of your course materials. For each assignment designated "Exercise," be prepared to state and analyze the issues presented in the exercise, and to state and offer reasons for your conclusions. You will find it very helpful, in preparing each Exercise, to write out a short answer. The Exercises are similar to the "fact pattern" questions on final exams. They enable you to apply the skills and concepts that we are learning.

<p><i>We begin by noticing the value choices or moral decisions that actors face in legal roles such as client, lawyer representing client, and judge. Each actor brings to those choices his or her own personal goals and preferences. In what ways, if any, does the nature of the legal role rightly constrain or shape the actor's pursuit of those goals? In what ways does the fashioning of arguments - about what the law means (questions of law) and about the interpretation of what happened (questions of fact) - activate a lawyer's powers of moral reasoning? Our first exercise raises those questions in connection with a hearing (trial) in a case arising under a statute (statutory interpretation case). Our first case, <u>Smith</u>, also inquires into the relation between moral and legal reasoning in statutory interpretation: but because the case is in an appellate court (U.S. Supreme Court), the focus is solely on the law (what does the statute mean), not on the facts (which have already been ascertained at trial). Our second exercise, like the first, asks us to consider how the legal role (here, prosecutor) constrains or shapes the actor's pursuit of his or her personal goals and preferences. As compared to our first exercise and to <u>Smith</u>, both of which are statutory interpretation cases, what difference does it make that the issues in the second exercise are questions of constitutional interpretation? Does a lawyer embrace a statute's - or the Constitution's - principles and purposes as her own? (How does one know what those principles and purposes are?)</i></p>			
1	Tuesday, Aug 27	Introduction to Law, Language and Values, pp. vii-xi. Exercise: Walk a mile in my shoes, pp. 525-528.	The exercise is based on Lucie White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G," 38 Buffalo Law Review 1-58 (1990).
2	Thursday, Aug 29	Statutory Interpretation and Legal Reasoning I.A. The formal (X/Y) issue formulation 1. Textual interpretation in legal reasoning, pp. 1-3. 2. Notes and questions on textual interpretation in legal reasoning, pp. 3-5. I.B. Linguistic and normative grounds of decision 3. <i>Smith v. United States</i> , pp. 5-13. 4. Notes and questions on <i>Smith v. United States</i> , pp. 13-17.	
3	Tuesday, Sept 3	I.C. The level of generality (choice of description) problem 5. Note on levels of generality, pp. 17-22. I.D. Initial comparison between common law, statutory interpretation, and constitutional interpretation, in relation to representative democracy 6. "Legislative overruling" and three kinds of adjudication, pp. 22-26. Exercise: If this be treason, pp. 518-521.	
<p><i>Now we look more closely at theories and methods of statutory interpretation. Our goal is to equip ourselves for a world in which not only the meaning of particular statutory words and phrases, but the whole enterprise of interpreting statutes, is unsettled and contested. Our case, <u>Weber</u>, and our third exercise, help us consider the merits and limits of competing theories and methods of statutory interpretation. We focus especially on claims about legislative intent. But the larger question, held over from our first cases and exercises, remains: what is the connection, if any, between what a law means and what it should mean? Who, acting in which legal roles, determines what a statute means and should mean?</i></p>			
4	Thursday, Sept 5	I.E. Textualism, intentionalism, and purposivism 7. Garrett, "Legislation and Statutory Interpretation," pp. 27-34. 8. Notes and questions on Garrett, pp. 34-35. 9. <i>United Steelworkers of America v. Weber</i> , pp. 35-45. 10. Notes and questions on <i>United Steelworkers v. Weber</i> , pp. 46-49.	
5	Tuesday, Sept 10	Inquiring Further into Legal Reasoning 19. The meaning of words in legal rules, pp. 107-117. 124. Note on overinclusiveness and underinclusiveness, pp. 558-559. Exercise: <i>Inmates v. Warden Grim</i>, pp. 534-535.	

<p>Now we pause to take stock of what we have learned. What is an issue (what are the parties arguing about); what is the difference between questions of law and questions of fact; what reasons and evidence are responsive to such questions, and why? Our main case, <i>Ulane</i>, returns us to the trial court. Which value judgments, if any, does the law require (permit, prohibit) the judge to make when reaching conclusions of law and findings of fact? Are a lawyer's arguments convincing because they are morally persuasive or for some other reason?</p>		
6	Thursday, Sept 12	126. Note: choosing between rules and standards, pp. 575-576. 125. The legal syllogism, pp. 559-580.
7	Tuesday, Sept 17	I.G. Hard questions of law and fact <i>In preparation for our discussion, represent Judge Grady's legal reasoning as a double syllogism deciding questions of law and fact.</i> 16. Introduction to <i>Ulane v. Eastern Airlines</i> , pp. 80-81. 17. <i>Ulane v. Eastern Airlines</i> , (version distributed in class), pp. 1-9. 18. Notes and questions on <i>Ulane</i> , pp. 100-106.
<p>When carrying out legal reasoning within legal roles (such as lawyer representing client, judge presiding at trial, juror, appellate court), who is authorized to engage or activate his or her own life experiences, moral beliefs, beliefs about the way that the world works, preferences, hopes? When carrying out legal reasoning in the law classroom, is the student required (permitted, prohibited) to apply, reassess, or express her values?</p>		
8	Thursday, Sept 19	Group Identity, Personal Values, and Legal Reasoning VII.A. Social roles, outsider identities, and the struggle for authenticity 107. Montoya, "Máscaras, Trenzas, y Greñas," pp. 403-420. 108. Notes and questions on Montoya, pp. 421-423.
9	Tuesday, Sept 24	VII.B. Does life experience legitimately inform legal judgment? 109. Identity, empathy, and legal reasoning: the Sotomayor confirmation hearings, pp. 424-429. 110. Notes and questions on identity, empathy, and legal reasoning, pp. 429-430. 114. Notes and questions on authority, authenticity, and objectivity, note #9, pp. 440-442.
10	Thursday, Sept 26	VII.D. Does life experience supply articulable legal reasons? 115. What is the relation between the "big I" of personal identity and the "little i" of the issue? pp. 443-444. 116. Bravin, "Lt. Colonel Stuart Couch: The Conscience of the Colonel," pp. 444-453. 117. Notes and questions on "The Conscience of the Colonel," pp. 453-455.
<p>So far, we have asked: which actors, in which legal roles, are required (permitted, prohibited) to engage value questions? Now we begin to sort out three different (though related) ways to engage value questions. (1) Ask who one is and ought to be, and choose in such a way as to be that person. We will call this the ethics of character. We begin by seeing this ethics in action in the <i>Phillip Becker</i> case, and notice how legal reasoning frames good (and bad) character by storytelling (narrative). (2) Ask which of the available options (or rules) will achieve the greatest social benefit net of costs going forward. We will call this economic analysis or cost-benefit analysis. (3) Ask which outcome vindicates the rights of the parties under whatever principle best fits and justifies the law under which the parties make their claims. We will call this rights-based reasoning. Our cases and exercises for the remainder of the course ask us to consider not only <u>whether</u> legal reasoning engages values, and <u>whose</u> legal reasoning engages values, but <u>what kind of value reasoning</u> is most responsive to the issues under dispute and why? We will practice not only making but critically evaluating arguments that sound in all three kinds of value reasoning.</p>		
11	Tuesday, Oct 1	The Story in Which We Find Ourselves VIII.A. Narrative as a form of justification 118. Narrative, character, and normative reasoning, p. 456. 119. <i>Guardianship of Phillip Becker</i> , pp. 457-470. 120. Notes and questions on <i>Phillip Becker</i> , pp. 470-472.
12	Thursday, Oct 3	II.B. Three theories of adjudication 20. Three theories of adjudication: legal formalism, legal realism, and natural law, pp. 117-132. Exercise: <i>United States v. Diamond</i>, pp. 509-515.
	Tuesday, Oct 8	Class does not meet (mid-semester break)
13	Thursday, Oct 10	Economic Analysis 40. Introduction to normative reasoning, p. 188. IV.A. Cost-Benefit Analysis 41. Introduction to cost-benefit analysis, pp. 188-195. 42. Notes and questions on cost-benefit analysis, pp. 195-196. 43. Valuing nonmonetary costs and benefits, pp. 196-198. 44. Notes and questions on valuation, p. 198. 45. Introduction to oral argument in <i>Entergy v. Riverkeeper</i> , p. 198. 46. Oral argument in <i>Entergy v. Riverkeeper</i> , pp. 198-200. 47. Notes and questions on <i>Entergy v. Riverkeeper</i> , p. 200.
14	Tuesday, Oct 15	IV. E. Information 61. Jackson et al. on moral hazard, adverse selection, and the principal-agent problem, pp. 241-248 (top of page). 62. Notes and questions on moral hazard, adverse selection, and the principal-agent problem, question #1 (p. 253) and note #3 (p. 254). Exercise: <i>State v. Pauper</i>, pp. 553-557.
15	Thursday, Oct 17	48. Utilitarianism, economic analysis, and the redistribution of income, pp. 200-204. 49. Questions on utilitarianism, economic analysis, and the redistribution of income, p. 204. IV.C. Externalities 53. Butler & Drahozal, "Externalities," pp. 214-222. 54. Notes and questions on externalities, pp. 222-223.
16	Tuesday, Oct 22	IV.D. The Coase Theorem 56. Barnes & Stout, "The Coase Theorem and the Efficient Exchange of Rights," p. 227. 57. Polinsky, "The Coase Theorem," pp. 227-237. 58. Notes and questions on the Coase Theorem, pp. 237-238. Exercise: <i>Los Paisanos</i>, pp. 529-531.
17	Thursday, Oct. 24	Review the Coase Theorem and <i>Los Paisanos</i> . 55. The prisoner's dilemma, collective action, and free riding, pp. 223-226.
18	Tuesday, Oct 29	Rights V.A. Instrumentalism, rights and ordinary understanding 65. Introduction: anti-instrumentalism, pp. 274-275. 66. <i>Lindh v. Surman</i> , pp. 275-281. 67. Kull, "The Simplification of Private Law," pp. 282-287. 68. Two conceptions of private law, pp. 287-288. 69. Questions on Lindh and Kull, pp. 289-292. 72. "Corrective justice" and "private law," pp. 295-297. 73. Questions on Kull, p. 297.

19	Thursday, Oct 31	<p>V.D. Mandating vaccination: utility, natural right and fairness 81. Mandatory vaccination, health and civil liberties, pp. 316-318. 82. <i>Jacobson v. Commonwealth of Massachusetts</i>, pp. 318-321. 83. Notes and questions on <i>Jacobson</i>, pp. 321-322. 84. Legal developments subsequent to <i>Jacobson</i>, pp. 322-323. V.E. Philosophical justifications relevant to mandatory vaccination, p. 323. 85. Nozick, "Moral Constraints and the State," pp. 323-331. 86. Nozick and vaccination, pp. 332-333. 87. Comments and questions on Nozick, pp. 333-334.</p>	
20	Tuesday, Nov 5	<p>Continue discussion of readings ##85-87. 88. Mandating vaccination: equal right and fair play, pp. 334-337. 89. Mandatory vaccination and fair play, pp. 337-338. 90. Comments and questions on Rawls, pp. 338-340. Exercise: <i>The Gould virus</i>, pp. 542-543.</p>	
<p><i>Recall that actors offer legal reasons within roles. Because statutory interpretation is so pervasive in law today, we have focused primarily on legal reasoning within statutory interpretation roles (such as lawyer representing client in a case in which the outcome depends on which interpretation of a statute the court adopts). Now we turn our attention to legal reasoning in the common law. What makes one interpretation of a common law case, or line of cases, better than a competing interpretation? What value judgments enter into that determination of which is better? As before, we apply the ethics of character, economic or cost-benefit analysis, and rights-based reasoning, and consider which (if any) of these modes of thought are responsive to the legal reasoning tasks in hand. For synthesis and review, we then compare and contrast the role of value judgments and moral reasoning in statutory interpretation and the interpretation and application of the common law. Are the two roles strikingly different (as Scalia argues) or perhaps rather similar (as Dworkin suggests)?</i></p>			
21	Thursday, Nov 7	<p>Legal Reasoning in Common Law Adjudication III.A. Interpreting a holding 28. Introduction to common law reasoning, pp. 157-158. 29. <i>Boyd v. Coca Cola Bottling Works</i>, pp. 159-161. 30. Notes and questions on <i>Boyd</i>, p. 161. 31. <i>Liggett & Myers Tobacco Co. v. Cannon</i>, pp. 161-165. 32. Notes and questions on <i>L&M Tobacco</i>, p. 165. 35. <i>Pillars v. R. J. Reynolds Tobacco Co.</i>, pp. 168-170. 36. Notes and questions on <i>R. J. Reynolds</i>, pp. 170-171.</p>	
22	Tuesday, Nov 12	<p>102. Dworkin, "How law is like literature," pp. 377-382. III.B. The problem of retroactive lawmaking 37. <i>Macpherson v. Buick Motor Company</i>, pp. 171-181.</p>	
23	Thursday, Nov 14	<p>21. (From II.C) Two theories of law: positivism and anti-positivism, pp. 132-134. 38. Note: "A brooding omnipresence in the sky," pp. 182-183. 39. Note: The distinction between law and fact, pp. 183-187. Exercise: <i>Soaring over North Virginia</i>, pp. 548-549.</p>	
24	Tuesday, Nov 19	<p>VI.A. Dworkin: Natural law across the board 100. Dworkin, "Hard Cases," pp. 361-373. 101. Notes on the distinction between principles and policies, pp. 373-377.</p>	
25	Thursday, Nov 21	<p>103. Notes and questions on Dworkin, pp. 382-387. VI.B. Scalia: realism for common law, formalism for statutory & constitutional cases 104. Scalia, "Common-Law Courts in a Civil-Law System," pp. 387-394. 106. Notes and questions on Scalia, pp. 400-402.</p>	
26	Tuesday, Nov 26	<p>Review: Normative reasoning and statutory interpretation: Exercise: <i>Cleaner Skies</i>, pp. 539-541.</p>	
	Thursday, Nov 28	Class does not meet (Thanksgiving break)	
<p><i>We conclude by asking what, if anything, a lawyer must or should believe in, if he or she is to be a good lawyer. Is there, as Fuller claims, a "morality that makes law possible"? If so, what is that morality; and must a lawyer embrace that morality as her own? We consider that not only as a "big picture" question about our lives in the law, but also as a skills question about which reasons and evidence in our concluding exercise (a statutory interpretation case) are most persuasive and why.</i></p>			
27	Tuesday, Dec 3	<p>VIII.B. The ideal of the rule of law; fidelity to law 121. Note on the ideal of the rule of law, pp. 472-480.</p>	
28	Thursday, Dec 5	<p>Review: 126. Note: choosing between rules and standards, pp. 575-576. Exercise: <i>In re Akers-Baker transfer</i> (revised version distributed in class). Auden, "Law Like Love," with notes and questions (distributed in class).</p>	

1. Text and syllabus

All readings are included in your photocopied course materials. Scroll up to see a Table of Assignments that shows the reading assignments for each day of class. This table also includes links to other materials such as handouts.

2. Office hours and lunches

Office hours: Tuesdays and Thursdays I'll stay after class in room 3 to answer your questions. I'll also be available in my office (452) on Mondays, 10:45-11:45. Please send me email if you'd like to make an appointment to meet with me at another time.

Lunches: As we move into the semester I'll post sign-up sheets for lunches.

3. Class preparation and study

You may find it helpful to read a whole week's assignment once through, then reread each day's assignment before class. Be prepared to pursue your ideas and questions in class discussion. I also look forward to further discussion during office hours - please come by with any questions you may have.

4. Learning goals

Learning goals for each segment of the course are set out in the Table of Assignments, above. The course's learning goals are further outlined in the reading, "*Introduction to Law, Language and Values*," at the front of your course materials and assigned for the first class hour.

5. Teaching method and class participation. Laptop policy.

I do not do much lecturing in class; the introductory "lectures" are mostly contained in the course materials. Most of the class hours are devoted to discussion of issues - to uncovering the questions that surface when lawyers try to predict how legal decision-makers will

decide these issues, and to working through the reasons that lawyers give when trying to be persuasive about how these issues should be resolved. Some of the issues we will discuss in class have not yet been definitively resolved. This is because much of your work as a lawyer will involve pressing on, needing to make a decision, precisely where there is some doubt about what the legal decisionmakers (e.g. judges, juries) will decide to do. Thus as to some of the topics under discussion, reasonable minds can and do differ. In many ways, what we are learning to do is to carry out a certain kind of reasonable disagreement (named “legal reasoning”) within the language and framework of the rule of law.

Because the “lectures” are contained in the reader, the class hour is not for taking notes but for thinking through problems, attaining preliminary views on the matters under discussion, and engaging your own values, convictions, and life commitments.

Laptops, iPads, cellphones and similar devices may not be used during class for notes or other purposes. While in class, you should focus on thinking, not note taking. To make most note taking unnecessary, I will both post and distribute all handouts. Moreover, the audio recording for each class hour is posted to the Law Portal, facilitating review.

6. Reasonable disagreement and mutual respect

Disagreements (even reasonable disagreements) about what the law means, and about what result the law demands or permits given some set of facts, can implicate our sense of right and wrong and our convictions about the meaning and worth of our lives. A main goal of our class is to find ways of having reasoned disagreements, ways to make reasonable arguments, precisely at the many points in which the application of the law to the facts exposes unresolved issues and touches nerves. We will try to be good friends to one another by offering arguments and counter-arguments in such a way that disagreement becomes a sign of respect. As William Blake wrote, “Opposition is true friendship.”

7. Participation points and the “Socratic method”

I award participation points to recognize especially diligent preparation and especially valuable contributions to class discussion. Most students’ final grade will not be affected by these points. In some cases, the course grade will differ from the final exam grade by one tenth of a point (i.e., one grade interval) when the participation points are included.

If, at any time, you are feeling uncomfortable with some subject under discussion, or for any other reason you would prefer not to be called on in class on a given day or days, please let me know before class begins (e.g., by sending me an email or calling me). I will always honor that request. You do not need to explain why you would prefer not to be called on. Your asking not to be called on will have no effect on participation points. Though the so-called “Socratic method” can cause some anxiety, I use this method despite that effect, not because of it. I use this method to model and stimulate legal reasoning – especially to model the kind of legal reasoning that takes place at oral argument in appellate courts, when judges ask counsel to explain which interpretations of the law are plausible (and of those interpretations, which is best and why).

8. Exercises

The assignments for the semester include ten exercises that provide opportunities for applying concepts and skills. They are exercises because they supply you with some law and some facts (a “fact pattern”), and ask you to identify the resulting issues, analyze them, and recommend a solution to them. Answering questions of the fact-pattern type “exercises” your growing skills in legal reasoning. The best way to get that exercise (a kind of legal-reasoning workout), and the best way to prepare for the final exam, is to write out your answers. Writing out your answers will help you whether or not you are cold-called in class on the day that the exercise is discussed.

Though you are not required to write and submit answers to the exercises, I offer you the following contract. In exchange for your writing out answers to (up to) three exercises and giving them to me to read, I will read your answers and offer you feedback on them. Details of this contract offer will be specified in class!

9. Final exam

The final exam will include one or two fact-pattern essay questions, and a non-essay component (multiple choice, and possibly also some short-answer questions). Most of the eleven exercises are structured as fact-pattern essay questions, but two are structured as short-answer questions.

10. Class begins promptly.

Since late arrivals cause a distraction to fellow students, please be on time.

Thank you! Welcome to the USC Law School. It is a privilege to be your LL&V teacher.