



Answer Key Legal Theory – Fall Semester 2023

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This solution is not meant to include the only possible answers to the exam questions. Moreover, students were not expected to write such a detailed text; instead, they should recognize the core aspects of the questions and express their thoughts in an accurate and coherent manner, supported by convincing arguments.

1. What are core theses of “ontological dualism” in the theory of mind? What speaks for, what against this theory? (10%)

A theory of mind formulates a paradigm about the existence and function of the human mind. One version entails the notion of ontological dualism, which refers to the assumption that the mind and body are separate entities, each with a distinct set of qualities, that exist in a fundamentally different way. The notion of ontological dualism is supported insofar as it is unclear how the mind and body are connected: How can a mental state have physical effects? Mental states seem to be qualitatively different than physical states: they are subjective, qualitative, and intentional, whereas actions of our body are caused by factors which are subject to the law of physics. It is therefore difficult to grasp the connection between these different processes.

However, a deeper analysis of the so-called *mind body problem*, which was prominently addressed by R. Descartes, shows that the theory of the mind and body being completely separated and existing in fundamentally different ways cannot be upheld plausibly. By method of cartesian doubt, Descartes found that the body and the self (i.e. mind) form a unit and must somehow be intermingled, e.g. because the manipulation of nerves can produce phantom sensations. This would result in a qualified dualism, upholding fundamental differences between the body and mind, but acknowledging a causal connection between the two. Moreover, based e.g. on the case of Phineas Gage, physical damage to the brain seems to have a direct influence on mental states and therefore the behaviour of a person. This suggests that there is a connection between the brain and the mind and that a total independence of the mind and body is not plausible.

In light of such considerations, a mentalist approach to the mind body problem seems more convincing. This approach considers subjective experience as part of the fabric of the world and recognises the distinction between the mind and the body as a terminological device to distinguish various aspects of the natural world.

[Further remarks on Descartes notes on the different qualities of the mind and body, the case of Phineas Gage or other remarks and examples for qualities of mind/body were also considered.]

2. Currently, the meaning of international humanitarian law is very contested. The same holds for the ethical limits of military action. What speaks against studying human moral cognition by analysing these debates? Which other approach is preferable and why? (10%)

One aspect of properly reflecting and studying the human moral cognition is the analysis of moral judgements, which may indicate properties of an underlying, arguably inborn moral faculty. This implies the necessity of distinguishing between a *competence* and the *performance* of that competence. In the case of morality, this means that there is a human moral cognition as a competence and moral judgements as a performance of that competence. It also implies the possibility of performance errors, which means that performance does not necessarily reflect the competence perfectly.

Currently, there are a lot of debates regarding the moral content of recent military actions taken by various individuals, meaning it is (more or less explicitly) discussed whether certain military actions are morally bad, justified or even obligatory. However, within these debates, specific actions are regularly judged by many different aspects which are not all morally relevant, in particular the interest and practical perspectives in the conflict. Furthermore, the circumstances of the people involved are extreme and some decisions are and may be morally questionable, if not wrong. In that sense, the current debates about international humanitarian law and ethical limits of military actions debate the actual moral performance of certain agents. However, performance can be flawed and does not necessarily imply the lack or faultiness of moral competence. In light of the theoretical approach to studying the human moral cognition, these debates don't serve as a reliable basis for a profound analysis of such a human moral cognition.

A better way to do so is to make use of *considered judgements*. A considered judgement is a moral judgement exempt from (practically very important) influences like personal interests and emotions. A considered moral judgement should be based on a clear perception of the facts of the case and consider various perspectives of different agents. It is clear that agents who are involved in practical decisions regarding military actions may not fulfil these requirements. Considered judgments are therefore an instrument of analysis that should help create a theory of moral cognition (i.e. competence) through the accurate analysis of moral judgements by providing the needed data for a moral theory. They are a practical tool, creating a specific, artificial thoughtline that permits accurate description of moral judgement.

[Appropriate examples of current discussions and moral judgements were considered as well to some extent.]

3. What speaks for, what against the thesis that moral judgement is the expression of emotions? (25%)

Neuroscientific evidence is invoked to support the thesis that moral judgement is the expression of emotions. This is also called *neuroethical emotivism*.

Based on a dual process model of the mind which links “fast thinking” to emotions resp. emotional reactions, the mental gizmo thesis argues that there is neuroscientific evidence that moral judgements are the product of “fast thinking” and therefore of emotions. In an experiment, when people were asked to evaluate the trolley problem in the “bystander/switch” and “footbridge” scenarios, only the footbridge-scenario seemed to be consistently prohibited (pushing the man off the bridge to stop the train), but not the bystander/switch-scenario. To explain this difference, it was argued that the bystander/switch was an “unpersonal” scenario and the footbridge a “personal” scenario. While deciding the two problems, the brain activity of participants was measured by fMRI. The images showed that while deciding the “personal” footbridge-scenario, a certain brain area associated with

emotional decision-making (VMPFC) was active, whereas it wasn't while deciding the "impersonal" bystander/switch-scenario. Furthermore, the judgements which resulted from the scenarios were said to not only differ in terms of "personal/impersonal" but were also classified as consequentialist (bystander/switch) and deontological (footbridge). This analysis of the trolley problem based on the conducted experiment led to the following conclusions: Deontological judgements as executed in the footbridge-scenario are driven by emotional responses and carried out by the fast-thinking system of the mind. Consequentialist judgements are driven by cognitive processes and carried out by the slow thinking system of the mind. More general, according to this theory, moral judgements are only ex-post-rationalisations since human decisions are already determined by emotional states. From this point of view, it is an act of self-deception to talk of rational evaluation of cases as well as principles that could determine moral behaviour.

This thesis is controversial and can be contested on different levels. With regards to the neuroscientific evidence, there are methodological problems to consider, such as reverse inference: from the fact that a brain region is active when performing a certain task one cannot conclude that whenever this brain region is active, this specific cognitive task is performed. Further, the thesis as described above is – arguably – self-refuting: the foundational principle of utilitarianism is the equality of persons since the happiness of everybody counts equally. The equality of persons is itself deontological principle, meaning utilitarianism relies on the normative precondition that the equality of people is to be respected. Utilitarianism is therefore no alternative to deontology as the latter is the foundation of utilitarianism. Consequently, either deontology is fast thinking, then utilitarianism is fast thinking, too, as utilitarianism relies on deontological principle of equality, or utilitarianism is slow thinking, then deontology is slow thinking, too, because it is the basis of utilitarianism. Therefore, the distinction between the two modes leads to entanglement in self-contradictions.

As for an alternative approach on the role of emotions in moral judgement, it is correct to say that they play an important role in the life of sentient beings, being the *product of moral evaluation* and, as a heuristic tool, enabling an agent to understand what his actions might imply for other persons. However, they do not constitute the evaluation itself: Moral judgements may be traced back to an adequate description of a specific action and the structural analysis of the elements that define an act as a possibly moral one. As the guiding principles are of a cognitive character, moral judgements show cognitive content as well.

[More detailed remarks on the dual process model of the mind as well as on other connections of morality and emotions were considered to a certain extent.]

4. Humans develop a "sense of justice". What does this mean concretely? What is known about the development of this faculty during childhood? (25%)

A "sense of justice" refers to certain specific, arguably innate, foundational principles which (among others, such as principles of altruism) guide moral judgement and can be conceptualised as part of human moral cognition. *Justice* refers foremost to principles of distribution (and restitution in the case of disturbed distribution); it consists in the application of equal standards of distribution of goods in the cases which are essentially equal. If the distribution is based on a reasonable criterion, it has to be proportional to the actual value of the criterion itself. If no reasonable criterion exists, an equal distribution is a just distribution.

There are different studies which try to find out how such principles of moral judgements are developed by children during the course of time. One famous example is the Helper-Hinderer experiment. Further, it can be argued that children "intuitively" know what is morally right or morally wrong (or just / unjust) without being taught, because it can be observed that from a very early age

children can differentiate between moral norms and conventional norms (the former having volitional consequences and – in case of violation – leading to feelings such as guilt or shame). Children seem to entertain not only their own well-being, but also that of others, and can be observed helping others even if they are not watched. Most importantly, such capacities develop even though it is impossible to teach children the exact content of a moral principle (such as the principles of justice as mentioned above). It is therefore not plausible to conclude that children acquire these complex capacities by being taught or instructed. This line of argumentation is referred to as the *poverty of stimulus argument*, which upholds that what cannot be learned, must be inborn.

The poverty of stimulus argument is especially important for the study of moral cognition because it is an argument for the theory of universal moral grammar. The universal moral grammar is an analogous construction to the theory of universal grammar of language. The proponents of this theory argue that the universal moral grammar is an inborn, universal, and uniform moral faculty across the species, which contains a set of principles that can generate an infinite number of moral judgements.

[Other examples of ethical learning were possible. Remarks about the structure and other principles of moral judgements as well as further remarks on the poverty of stimulus argument were considered to a certain extent.]

5. Has neuroscience proven that humans do not enjoy free will? (20%)

Neuroscientific research sometimes claims that humans do not act based on decisions made freely according to one's own will, but that the brain determines the course of an action that is somehow genetically hard-wired, while the awareness of a decision and action is only a post-hoc phenomenon. In the background lie the philosophical discussions on the subject of the free will, which are coined by three major schools of thought.

Determinism holds that the existence of a free will is not possible because everything, including every human action is caused. It is assumed that the brain is a physical entity and therefore is subject to the laws of physics which are deterministic. Furthermore, the activity of the brain is responsible for enabling the human mind and in consequence determines every human action. In this conception, freedom can only be imagined as random behaviour. Proponents of *indeterminism* believe that it is possible to make free choices that determine our actions, maintaining that human beings are the authors of their own actions and are not simply determined by causes. They are only inclined, but not determined to act by motives, reasons etc. The theory of *compatibilism* holds that determinism is compatible with the idea of human freedom. It is argued that even when choices are determined, the freedom remains intact. However, compatibilism is only concerned with the freedom of action (acting according to one's will) and not with the question whether the choice to act a certain way was determined or not, therefore not providing a satisfying answer for the problem of free will. Determinism and compatibilism are not reconcilable with ideas of guilt, responsibility, and various empirical phenomena, like different kinds of intentions.

With regards to neuroscientific evidence, there are many different studies which try to find out about the existence or possibility of a free will. Most prominently, the Libet experiment is regarded as the paradigmatic example for examining that question with neuroscientific methods. However, the experiment did not prove the non-existence of a free will. Moreover, Benjamin Libet assumed that participants in his study can veto a decision (a "free won't"). Furthermore, indeterminism does not claim that every mental process is based on conscious decision. A deterministic theory with sufficient explanatory power has not been developed yet.

It is not plausible to rule out a priori the possibility of an indeterministic theory which would account for a core aspect of human experience, namely autonomous decision making. It is one of the central



lessons of the history of science not to make any a priori assumptions about the structure of the world. Therefore, a scientific world view speaks rather for than against indeterminism.

[Remarks on other neuroscientific evidence was considered and alternative conclusions were possible, if well-founded.]

6. What is – in your view – the importance of moral psychology for the understanding of the foundations of law? (10%)

The legitimation, interpretation and application of laws depend on ethical principles. Moral psychology sets out to find out more about the workings and details of such principles in various circumstances but also importantly as part of a theory of the human mind. It is therefore important to understand which normative principles are legitimate and whether they are rooted in human psychology. The first question is a question of normative theory, the second of *empirical (not normative) science*. Some ethical principles, e.g. the principles of justice, are – arguably – rooted deeply in human cognition in the form of a specific moral faculty. The findings of a theory of mind are especially relevant in the sphere of human rights. Principles such as justice arguably provide the foundational cognitive component of human rights which makes the theory of mind highly relevant for the law as well. Moreover, human rights being based on innate cognitive elements of human beings in general, indicates universal epistemic access to the idea of human rights.

However, the importance of the theory of mind for law does not imply that there is a shortcut from the former to the latter. The description of the structure of the human mind, perhaps containing an innate moral faculty with substantive foundational principles, does not in itself provide a justification for the *normativity* of such principles. When it comes to concrete moral or legal norms, there is necessarily constructive work involved, starting from such foundational principles. There is thus no naturalistic fallacy involved when looking at how the structure of human mind influences ethical and legal theory.

The psychological theory can help us in at least three important ways:

1. Deepen our understanding of the cognitive foundations of ethics and law
2. Enable us to critique flawed psychological theories, sometimes with normative implications
3. Tell us something about our own human identity.

[Different answers were considered, provided that the elements of an individual viewpoint were presented clearly and coherently.]