



Answer Key Legal Theory – Fall Semester 2022

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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 is the difference between “competence” and “performance”? Why is this difference important for the study of the human mind? (10%)

Competence refers to our system of knowledge, providing us with the mental capacity to undertake certain tasks. *Performance* denotes the usage of this knowledge under specific conditions. The distinction between the two concepts is central insofar as performances (instances of use of knowledge) alone cannot be taken as providing sufficient data for identifying the scope and content of the respective competence (system of knowledge) on which they are based. This is due to the *possibility of performance errors*, rooted, e.g., in limited memory, emotions, prejudices or distractions. Because of the possibility of performance errors, the performances are by themselves not sufficient to fully reveal the respective underlying competence. Thus we cannot conclude from a given performance that certain structures of knowledge exist without taking into consideration other factors which could have an influence. Therefore, the distinction between competence and performance is crucial when studying the human mind.

Example of linguistics: The phenomenon of garden path sentences (e.g.: “The horse raced past the barn fell”) in linguistics shows that while we misunderstand the sentence due to its word order and thereby fall prey to a performance error, this does not yet imply that our linguistic competence is equally constrained. In this case, the performance does not adequately mirror the underlying linguistic competence.

Example of moral judgments: In the moral sphere, performance can be observed in moral judgments. However, non-moral factors (such as emotions, biases, or limited attention) can cloud such judgments: think of “I hate her so much that I think it is justified that she got a lower grade in the exam”. Thus, performances alone are not sufficient for discerning the underlying moral competence, i.e. the moral faculty. When studying the moral faculty, it is helpful to look at *considered judgements* (a term coined by J. Rawls), i.e. qualified moral judgements, which are reflective, dispassionate and not skewed by interest, passion or error of facts etc.

2. What is the problem of “mental causation”? Please provide an example. (10%)

Mental causation describes the causal effects of mental states of human beings. A mental state is subjective, qualitative, intentional and with causal power. Mental causation describes the observation that a mental state of a human being can be the reason to act (or not act) in a certain way. The problem with mental causation is the question *how* a mental state can have physical effects and whether there is a theory which can explain this reciprocity.

Possible example: Let's assume we accept the moral value of human life and therefore of Person A's life. This results in the moral obligation not to kill Person A. This moral obligation is a mental state. We don't kill Person A even if there are situations where this is possible. Hence, the mental state (the moral obligation) leads to a certain action (deciding not to kill Person A though we are able to). In fact, there may be situations where we would even decide to protect Person A's life if necessary and possible.

[In addition to the aforementioned explanations, remarks about the mind-body problem as phrased by R. Descartes were also possible.]

3. A famous distinction of current psychology is between “fast” and “slow” thinking.

a. Please explain the content of this distinction. Please provide examples. (10%)

The theory which proposes the distinction between “fast” and “slow” thinking is referred to as the *two-system-model of the mind* or *dual-process model of the mind* and was popularized by D. Kahnemann within the field of behavioural economics. The theory argues that the human mind and, consequently, the process of human decision-making is characterised by a fundamental dichotomy: one system is “fast”, the other system is “slow” thinking. Consequently, these two systems are each responsible for different modes of decision-making: the fast system refers to intuitions based on heuristics, biases and framing. It is associated with quick, emotional intuitions. This kind of thinking manages the tasks and challenges of everyday life. In contrast, the slow system can produce accurate and reliable judgements by conscious reasoning and critical reflection. It can act as a “corrective” to the fast system. These mechanisms are argued to be hard-wired in the brain, so that we cannot but use them and do so intuitively and unconsciously.

Possible example: One application of the two-system-model of the mind is the so-called “mental gizmo thesis”. It argues that deontological judgements are the product of fast thinking, whereas utilitarian expressions are the result of slow and proper rational thinking.

Possible example: An example for the influence of framing effects is the prospect theory. In experiments, people answered questions regarding a financial decision differently depending on how it was framed, even though the underlying risk calculations were the same (loss aversion). This showed that there can be large changes of preferences caused by inconsequential variations in the wording of a choice problem.

Possible example: An example of the influence of heuristics is the representativeness heuristic. People were asked which of two possible answers they would choose to be more probable, based on a description read before. Answers were often wrong due to representativeness heuristics and a conjunction fallacy (Linda example).

[Other examples were possible, e.g. ultimatum game]

b. Are human rights the product of “fast thinking”, as some argue? What are arguments for this thesis, what are arguments against it? (20%)

It is argued that human rights are the product of “fast thinking”. This is due to the assumption that human rights are based on deontological (moral) judgements, which are – according to the mental gizmo thesis – the product of emotions, i.e. “fast thinking”. The theory is argued to be buttressed by *evidence from neuroscience*. 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. As human rights are based on deontological judgements, they are argued to be a product of “fast thinking”.

Nevertheless, this can be criticised on different levels. With regards to the neuroscientific evidence supporting the thesis, methodological problems occur 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.

[Other remarks about the content of human rights as a bundle of *normative positions*, justified by principles of justice, altruism and non-instrumentalization as the product of conscious reasoning and therefore slow thinking, as well as remarks about alternative approaches such as a mentalist theory of the human mind, were possible to some extent.]

4. Which are the preconditions for an action to be “altruistic”? Please provide an example. (20%)

There is a distinct moral dimension of human cognition (distinguished e.g. from aesthetics). Agency is a constitutive and necessary precondition for a moral evaluation. There is a limited class of possible objects of moral evaluation, including voluntary acts of agents with consequences for the well-being of sentient beings. The direct intention to foster the well-being of another person is a necessary, but not sufficient precondition for moral acting. Therefore, an act that is only performed with an oblique intention to foster the well-being of another person (e.g. when the promotion of one’s self-interest constitutes the direct intention) is not a morally good act, even if it leads to beneficial outcomes. On the other hand, an action that is performed with the direct intention to benefit another person but results in harmful consequences is not a morally good action – whereas the intention as such would still be classified as morally good. An action therefore is altruistic if an agent has the direct intention to foster the well-being of a patient of action, for the sake of the interests of the patient of the action alone, and the outcome is in fact beneficial.

Possible examples: Person A gives her lecture notes to Person B, who needs them, to help Person B.

- If Person A has the direct intention to benefit Person B, for the sake of B's success alone, the act is morally good. A direct intention to foster the well-being of a patient of action is a necessary but not a sufficient precondition of moral action.
- If Person A has the direct intention to benefit Person B, but the notes are bad and B fails the exam, the intention is morally good, but the action is not. A direct intention to foster the well-being of a patient of action is a necessary and sufficient precondition of the moral rightness of this intention; an intention can be morally good, though the action is not morally good.
- If Person A has the intention to get Person B's lecture notes from another course in return, the act is morally neutral, since self-interest neutralises moral acting.
- If Person A gives the lecture notes to B just to feel good about oneself, the act is morally neutral. A direct – not only oblique intention – of fostering the well-being of another person is a precondition of moral acting.
- If Person A has the intention harm Person B, the act is morally bad, regardless of the outcome; an action is not morally good, if the intention is bad, even if the results are beneficial for another person

[Other examples – and different examples for different preconditions – were possible as well.]

5. What evidence is there that fundamental elements of morality are the product of innate mental structures? (20%)

Fundamental elements of morality include e.g. principles of altruism and justice. It is contested whether such fundamental elements of morality are the product of innate mental structures, and to what degree, or whether they are learned. This debate is also referred to as the “nature and nurture” debate. A crucial methodological tool to assess whether a cognitive structure is learned or inborn is the so-called *poverty of stimulus argument*, framed by Noam Chomsky to explain the cognitive structure of language and establish the universal grammar theory. The poverty of stimulus argument holds that if a capacity cannot be acquired through experimental input (such as learning) alone, it must be inborn. This argument, however, does not imply that an inborn capacity must already be fully established at the time of birth – specific developmental triggers may very well be needed for a capacity/property to evolve into its mature form. The poverty of stimulus argument only posits the innateness of the disposition. With regards to morality, the hypothesis of the universal moral grammar assumes that a set of principles, which generate an indefinite number of moral judgements, is inborn in every human being (in analogy to the theory of universal grammar). These principles are supposed to be universal and uniform across the species, even though the concrete outcomes vary. The hypothesis is based on the poverty of stimulus argument.

Evidence supporting the universal moral grammar theory includes studies with children, such as the “Helper-Hinderer-Experiment”. This is a famous experiment conducted to study the moral sphere of infants, carried out with toddlers who showed a preference towards helping characters as opposed to hindering characters. Other studies discovered that children act morally, even if they aren't observed. Furthermore, there are moral concepts which children seemingly understand without being taught, e.g.:

- Children are taught to behave according to certain foundational principles of morality such as the principles of justice. But they aren't taught the principles of justice as such.
- Children seem to understand the concept of agency (or lack thereof: “don't be mead at him, he did not mean to hurt you”), even though it is difficult or even impossible to teach the concept

of agency. They (and their parents) presuppose the relevance of the concepts for moral evaluation.

- Children are taught to care for others, but they aren't taught the principles of altruism (direct/oblique intention, intended/foreseen effects) and why altruism is moral after all.
- Children differentiate between moral and conventional norms, even though they aren't taught what the moral sphere is.

[With regard to the poverty of stimulus argument, remarks about the application in other than moral spheres such as the examples of bee-orientation or visual cognition (Kanizsa-Triangles) were possible as well.]

6. Recent research suggests that hunter-gatherers did not live in small groups but populated large shared cultural spaces with substantial geographical mobility. Why are such findings important for understanding the evolution of moral cognition? (10%)

Such findings are important because they challenge moral theories which assume that hunter-gatherers lived in small groups and therefore conclude that only *small-group-morality* provides for an accurate evolutionary explanation of morality. The theoretical framework underlying this explanation of the evolution of human cognition is the influential approach of *evolutionary psychology*. It tries to explain cognitive evolution within the framework of the theory of evolution by natural selection. The central aspect is the process of natural selection; the genes with highest reproductive fitness will be favoured by the evolutionary process. Further, according to the thesis of *adaptationism*, organisms only have traits which are adaptive. In the same way, evolutionary psychology tries to identify social behaviour as a product of evolution. Based on those principles, evolutionary psychology holds that organisms perform acts of altruism to protect and promote the reproduction of their genes, even if the bearer of a gene dies (e.g. antelopes that sacrifice themselves to ensure the survival of their kin). Organisms therefore supposedly only act beneficial to others if the being in question shares its genes, i.e. is closely enough related (its "kin"). This is also called *kin selection*. Incidentally, the thesis that morality is only explainable in small groups challenges the idea of universal human rights and vice-versa, since the human rights idea entails the notion that each human being must be respected as equal and as an end in him- or herself and this respect is not restricted only to closely affiliated beings.

This theory can be criticised on multiple levels. One important point of criticism is the problem of the *functionalist fallacy of adaptationism*. This refers to the problem that not every trait is necessarily designed for function; simply because a trait has a certain function, one cannot conclude that an organisms must possess that trait. Organisms may also possess traits that are not directly benefitting reproduction of one's genes. The answer to the empirical question what properties an organism has is a *precondition* of an answer to the question how those properties evolve – not the other way around. The functionalist fallacy also applies to the thesis of *small-group-morality*, because it assumes that morality only makes evolutionary sense in small groups, rather than describing morality in all its dimensions properly first. As new evidence suggests, it is far from clear whether humans used to live in small groups. On the contrary, there is substantial evidence that hunter-gatherer societies were spread over large cultural, social and geographical spaces and that there was remarkable mobility among them. As a consequence, there was great substantial genetic heterogeneity. But even if humans did live in small groups, that wouldn't necessarily make small-group-morality an adequate explanation for moral cognition either. So what is the right account of the evolution of the human species, including the human mind and moral cognition? *Evolutionary pluralism* accounts for various aspects of the evolutionary process. For example, there can be non-adaptive mutations and non-adaptive side effects of adaptive properties. Also, natural selection may be an important, but not the only factor which plays into evolution. Other factors may be of importance as well, such as architectural constraints or natural laws as physics and chemistry. There is also the possibility of new traits without



precedence, and not all possible developmental paths are necessarily explored. Overall, evolution might in many aspects be better explained as a *stochastic process*.

The explanation of the evolution of moral cognition is especially difficult since the exercise of almost all cognitive abilities do not leave traces. Additionally, it is unclear who the exact predecessors of human beings were and how their mental capacities must be classified; furthermore, human beings lack close evolutionary relatives. But there is no reason that underlying cognitive properties of human nature cannot exist. Morality may just as well be explained as being more than just a tool for cooperation, but a precondition for a highly qualified kind of cooperation. As a result, the argument that the human mind isn't adapted to the concept of universal human rights loses its foundation, ultimately strengthening the human rights idea.