Philosophy 338
Philosophy of Law
2017
Note Twelve

POST-TEST #1 REFLECTIONS

1. *Some general observations*

Although not everyone will have done as well as he or she hoped or expected to, yours was a very solid performance overall, albeit, with an exception here and there. Minus those scant exceptions, everyone had a decent command of the issues at hand in the questions to which they responded. This is, for Matthew and me, a very encouraging development, and our hats are doffed to you all. On the other hand, there were quite common deficiencies overall. Most of you answered questions too briefly and lightly, leaving behind details of material importance. Many of you got the general drift of things, but responded with insufficiently precise answers. There were solid indications of time-management difficulties, especially in how you handled your final question. A final fairly common difficulty was that in answering your questions, some parts of them weren't answered, either directly or at all. Let's turn now to specific comments about each of the six.

Question #1

Never mind that it's called that, *Edwards* 1929 is not a case about whether women are persons, but rather about whether they are "persons not qualified to hold public office." A number of you missed this distinction. Some of you misdescribed the "living tree doctrine", omitting to say that the tree of law must be seen as growing and changing within the limits of its nature. More of you missed the distinction between how the Privy Council may have understood the doctrine and how it could have been understood without impeding the decision the court arrived at or imposing the need for semantic coercion. In this very connection, a good number of you omitted consideration of the difference between a term's connotation and its denotation, and the like distinction between natural and forced meaning change. Nevertheless, the question was handled pretty well overall.

Question #2

Just about all of you answered the Morgentaler question, and here too to good effect overall. Still, there were deficiencies. By far the most prominent one was in your handling of the inconsistencies within the Wilson *ratio* and its inconsistency with the Dickson-Lamer *ratio.* This is tricky material, and anything less than a fine-grained command of it will fall short of the mark to some extent. Here, too, as with the Edwards case, it is difficult to keep present-day personal certainties from influencing your assessment of the matters in question here, as they were for the court's consideration in 1988.

Question #3

The adversarial issue was well-handled overall, and seems to have been a question that really attracted your interest. The harder part of the question bore on the extent, if any, to which the adversarial character of these proceedings trespass on cognitive reliability. You were more split on this question than those who answered question #6, where a clear majority thought the

law's definability problem was a cognitively damaging one. Here, however, opinions on the cognitive damage caused by adversariality were more evenly divided.

Question #4

Tsilqot'in 2014, although much more recent, also attracts already set opinions of the matters at hand, sometimes slighting your understanding of the particularities with which the court was preoccupied. Hardly any of you got around to saying what s. 35 actually says, as was the case with s7, 2a and 1 in *Morgentaler*, the section of the BNA excluding women from public office in *Edwards*, as well as the wording of the Law Lord's living tree doctrine. Sloppy documentation of matters vital to the questions posed is always a marks-loser. Even so, a pretty good effort overall.

Question #5

This was by far the toughest question to handle in fifteen minutes. The issues at hand are elusive and counterintuitive. The legal explanations of judge-made law is antagonistic and not quite up to the complexities involved. A first-class answer would have to call into play, at least the following questions: If judge-made law is a generalization from decisions on matters bearing a sufficiency of relevant similarity to the matters currently before the court, where's the harm in universalizing these generalizations? Where is the harm in codifying them in clear language? What role is played in these procedures by casuistic reasoning? If casuistic reasoning is case-to-case reasoning, how do unwritten nonuniversal generalizations come into play? How close is the similarity between casuistic reasoning and enthymematic reasoning, and what is the chief difference between them? Given their hiddenness from view, how are the law's practitioners to come to know what these principles of law are and what they mean? How does this bear on the question of implicit and tacit knowledge. What is the difference between them? [That's quite a lot to handle!]

Question #6

The most significant omissions here were not saying what establishment epistemology is, and what its component theories are. Also frequently missing were clear examples of EE norms or principles which the definability problem could reasonably be thought to have breached. Some few of you never got around to discussing all three of the examples you were asked to focus on. Most of you didn't answer the "why is it potentially problematic that they are undefined" question. Most of you took the position that undefinability is more than potentially problematic, but actually so if EE is true, without considering the possibility that it is EE itself that's problematic. Most of you omitted saying how it would matter if EE's dislike of undefined terms were actually sound. How would it matter for society?

2. *Closing remarks*

The class-average (which I haven't computed) is quite encouraging, and fully in line with past first-test performance in this course. There is some evidence that some few of you heeded the advice to "tape" the test in advance and to write full answers to the taped questions. There is a considerable advantage in having proceeded in this way if your guess was right. Not only would you be ready with full answers, but taped answers take less time to write down at test-time. All indications suggest that hardly any of you exercised this option. On the other hand, perhaps more of you did than you seem to have done, but either taped questions that weren't

asked, or prepared less than full answers if you guessed right. Of course, there are costs and benefits on both sides of the taping strategy, and I would never suggest that taping is the best way for everyone to go.