1. **Intentionalism, Textualism, and Purposivism**

1. Prof. Garrett’s topic in the assigned reading is statutory interpretation. Accordingly, she focuses on the merits and deficiencies of intentionalism, textualism, and purposivism as theories or methods of statutory interpretation. However, all three of these theories or methods are also applicable to constitutional interpretation.

2. Our learning objective in regard to intentionalism, textualism, and purposivism is threefold.

   - When your client makes a claim under a statute, you want to be able to make persuasive arguments, and anticipate counterarguments, within any and all of these three theories or methods. Example: if you were representing Watson, you want to be able to make the textualist argument that one who trades drugs for a firearm is “using” the drugs, not the firearm, in that transaction.

   - You want to be able to make arguments, and anticipate counterarguments, for the method of statutory interpretation that you are employing in your persuasive argument. Example: as counsel for Watson, you not only make the textualist argument above; you also argue that for various reasons, including the rationale for decision in Smith, words and phrases in criminal statutes should be given their ordinary language meanings.

   - You want to be able to recognize and respond to the normative or “should” question that arises in some or all cases of statutory interpretation. (After everything has been said about the relevant linguistic facts and the relevant historical facts, is there still a “should” question in Smith? Watson? Weber? What is your role as a lawyer in relation to that “should” question?)

3. Purposivism differs from both intentionalism and textualism in that it affirms that judicial determination of a moral or normative question in statutory interpretation cases is both desirable and inevitable. Dworkin, pp. 47-49, illustrates this position. His view is that a statute should be interpreted in light of the principles or policies that supply to the statute its “best justification” (see first paragraph of the quote from Dworkin at p. 47).

4. Proponents of textualism offer both ex post (backward-looking) and ex ante (forward-looking) justifications for giving statutory words and phrases their ordinary language meaning. Prof. Garrett explains how political scientists and economists cast doubt on the forward-looking justification for textualism. If their critiques are sound, might textualism still be plausible on the strength of its backward-looking justification?
Lawyers often have to make hard judgment calls. Sometimes knowledge and skill is enough to help us make these decisions wisely. But sometimes we need to rely also on our character and integrity. (Moral discernment is perhaps a kind of knowledge, and good moral reasoning is perhaps a kind of skill; but having the courage of one’s convictions sometimes tests not only our knowledge and skills but also our character.)

Two kinds of hard judgment calls
1. Choices that are difficult because we don’t know all the facts; because we don’t know how others will react. [what card to play in bridge or hearts or poker; whether to throw a fastball or curveball, etc.]
2. Choices that are hard because the judgment calls for some difficult moral deliberation. [whether to keep one’s child home from school one day; he or she is not feeling well.]

Both judgment calls are “should” questions: “what should I do?”

We will call the second kind of “should” question a “value” or “normative” question.

Your decision whether to charge Consolidated with treason is a hard judgment call. Is it only a type 1 call or is it also a type 2 call that requires you to think through and decide a value or normative question?

We need knowledge, skill, and character/integrity to do a good job of making the hard judgment calls. (And sometimes we need them to follow through on the hard judgment calls even once we’ve decided them)

Sometimes we resist this awareness. We focus on the client’s question – can I deduct this expense from my taxes; how much prison time will I face if I’m convicted, etc. – and because that question seems like a factual question or one about prediction, it might seem that all we need is knowledge (not skill or character) – knowledge of the right answer.

But we see that the client’s question, the bottom line question, opens a door into questions of law and fact, some of which depend on the making of judgment calls. Lucy’s question, “Do I have to pay the money back, do I have to do without my next two welfare stipends,” → Question of Law: Are items of clothing worn for religious purposes “life necessities” within the meaning of the statute?

MAYBE the judge must make a judgment call of type 2 in order to answer that question of law. That is contested. BUT THE LAWYERS AND JUDGES MUST ALMOST CERTAINLY MAKE A JUDGMENT CALL OF TYPE 2 JUST IN ORDER TO FRAME THE QUESTION THAT NEEDS ANSWERING.

(What judgment call did the lawyers and judges in Smith need to make when they framed the question of law presented by Smith’s appeal? How did the way that they made that judgment call affect Watson?)