THE VALUE OF CASE LAW IN TEACHING PHILOSOPHICAL ETHICS

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INTRODUCTION

The growth of ethics as a distinct academic and professional field over the last thirty years or so has been generally beneficial to those of us who teach ethics regularly from a variety of disciplinary perspectives. Among other things, this growth has meant a concomitant increase in both the amount and kind of materials available for classroom use, which can be seen in even a rough survey of the many ethics anthologies in philosophy alone. Like many other ethics teachers, I’m inclined to think that “more is better” insofar as the contents of one’s bag of teaching tools is concerned. But this increase in materials for teaching ethics itself raises a question: if, as seems plausible, some materials work better in the classroom than others, which are those and why?

In this paper, I try to provide a limited answer to this question. I begin by considering the reasons why the use of cases or case studies is of pedagogical value as a general teaching tool. I then argue that case law or written judicial opinion has unique advantages in teaching ethics from the perspective of analytic moral philosophy. Using several judicial opinions as examples, I discuss two advantages to the use of such opinions: first, the philosophical method and content of case law; and second, the moral and political value of case law in teaching ethics. Although I must of necessity consider these issues from my particular disciplinary perspective, I believe that the main points apply to other social science and humanities disciplines as well.

THE USE OF CASES IN TEACHING ETHICS

Although reflection on one’s own classroom experience provides the most immediate evidence for the effectiveness of cases as a pedagog-
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McKeachie identifies the use of cases as an element of the general category of problem-based learning (which also includes role-playing, games, and simulations), and regards it as “one of the most important developments in contemporary higher education” (McKeachie 1999, 175). It is based on two assumptions: human beings have evolved as motivated problem-solvers, and that as such, they will “seek and learn whatever knowledge is needed for successful problem solving” (McKeachie 1999, 176). The use of cases as a general teaching strategy originated in the fields of law, medicine, and business, all of which are clearly professions where ethical issues play an especially visible and central role. It isn’t very surprising, I think, that those fields are three of the most developed areas of applied professional ethics among academic analytic philosophers. Since those fields are themselves the professional goal of many of our students, those of us in the traditional humanities and social science disciplines are well-advised to lay the groundwork for students by introducing them to this method in our own classrooms. Since the use of cases tends to produce “good student involvement,” both teachers and students benefit from the use of this method (McKeachie 1999, 177).

McKeachie characterizes the learning outcomes of case methods as developing the student’s ability to “… solve problems using knowledge, concepts, and skills relevant to a course. Cases provide contextualized learning, as contrasted with learning disassociated from meaningful contexts” (McKeachie 1999, 177). As I shall show, cases drawn from the American legal system provide a learning context that is intrinsically philosophical in at least two different respects, and therefore, such cases are a useful tool for demonstrating to students that the problems of “real life” can be solved by the skills acquired in philosophy. Thus, far from being completely detached from the world, philosophy’s critical thinking skills are essential to the functioning of our democratic society.

If cases are pedagogically valuable because they provide a context in which to acquire and hone essential human problem-solving skills, then good cases will be those that maximize the potential for the student to acquire those skills. But how do we tell which cases meet this standard? Barbara Gross Davis offers both a useful description of the case method, and a list of features of “good cases” in her book (Davis 1993).
In the case method, Davis says, “students are presented with a real-life problem that has been addressed by scholars, researchers, or practitioners. A good case study presents a realistic situation and includes the relevant background, facts, conflicts, and sequences of events—up to the point requiring a decision or action. As students analyze and discuss the case, they retrace and critique the steps taken by the key characters and try to deduce the outcome” (Davis 1993, 159). She further cites research identifying the following as elements of good case studies (Davis 1993, 162):

- Tells a “real” story
- Raises a thought-provoking issue
- Has elements of conflict
- Promotes empathy with the central characters
- Lacks an obvious or clear-cut right answer
- Encourages students to think and take a position
- Demands a decision
- Is relatively concise

I suspect that if we all gathered up the cases we have used in teaching ethics over the years, close examination would provide inductive evidence for the claim that the cases that really “work” in the classroom are those with precisely the features that Davis suggests. Moreover, if we exclude the first of these requirements (telling a “real” story), these are useful normative criteria for assessing both real and hypothetical cases. One hypothetical case that works so well because it has so many of these features is Judith Thomson’s famous example of the Kidnapped Violinist in “A Defense of Abortion.” This case provides a thought-provoking context in which students are required to reflect on the nature of and relationship between the right to life and the right to bodily autonomy, an issue which is otherwise seen as dauntingly abstract. Since the example is constructed to test students’ intuitions about a particular argument for the impermissibility of abortion, it also provides an opportunity to enhance the students’ ability to grasp and apply important principles of argument evaluation.

However, the inclusion of “real” stories among the criteria for good cases points to an important difference between the use of real and hypothetical cases in teaching philosophical ethics. When using a case such as Thomson’s, or any of the other hypothetical cases which pervade the philosophical literature, students frequently ask why it is legitimate to use
such cases to reflect on “real life” issues to which the cases are (or at least, seem to students to be) completely unrelated: what does an ailing violinist, kidnapped by fanatical members of the Society of Music lovers, have to do with the permissibility of abortion? Of course, the legitimacy of using our intuitions about hypothetical cases (especially the very far-out or implausible ones) in moral judgment is itself a significant pedagogical and philosophical issue, and arises in both applied and theoretical ethics. But since the issue is really meta-philosophical, discussion of it during class time may not be very productive, particularly at the introductory level. Thus, the use of real cases is of particular pedagogical value because they allow us to avoid this problem entirely by turning the student’s view on its head: rather than being completely disassociated from real life, philosophy is thoroughly enmeshed in real life and is the source of life-enhancing critical thinking skills. I now turn to the features of case law or written judicial opinion that so vividly illustrate philosophy’s connection to “real life,” and therefore demonstrate the value of this kind of case in teaching philosophical ethics.

JUDICIAL OPINIONS AND PHILOSOPHICAL ETHICS

If these reflections help explain in a general way the pedagogical effectiveness of using cases in teaching ethics, then the next stage of inquiry will involve drawing out any particular advantages to the use of case law. Two advantages in particular seem worthy of further exploration: first, case law is itself philosophical in both its content and its method; secondly, the use of case law allows the instructor to illustrate the morally and politically essential capacity for deliberation as a core requirement of citizenship in liberal democratic states. I want to demonstrate these advantages by discussing two pairs of cases: Griswold v. Connecticut and Bowers v. Hardwick (U.S. Supreme Court cases dealing with the right to privacy); and Cohen v. California and the Village of Skokie v. National Socialist Party of America (cases dealing with freedom of expression). This discussion requires a brief summary of the key points of these cases.

Case Summaries

Griswold v. Connecticut (United States Supreme Court, 1965)

The state of Connecticut had a statute which criminalized the use of contraceptives for preventing conception. Two members of the Planned Parenthood League of Connecticut were arrested and fined $100 as
accessories to the violation of this statute. In his majority opinion, Justice Douglas argues that the specific provisions of the Bill of Rights have “penumbras” which protect various “zones of privacy.” Marital privacy is one such form of protected association, and the right to it protects a couple’s decision whether to use contraceptives. Concurring opinions argued that the statute violated the Due Process Clause of the 14th Amendment (which prohibits states from depriving citizens of life, liberty, or property without due process of law). Since the statute infringes upon a fundamental liberty, it triggers the application of “strict judicial scrutiny,” which places the burden of justifying the statute on the state, via the “compelling interest test.” The dissenting opinion rejected both of these arguments in claiming (1) that the specific guarantees in the Bill of Rights do not add up to a general right of privacy; and (2) that the lack of any objective notion of “fundamental liberties” means that courts can use the appeal to due process to invalidate any legislation the majority happens not to like.

**Bowers v. Hardwick (United States Supreme Court, 1986)**

The state of Georgia has a statute which punishes acts of sodomy (defined as “any sexual act involving the sex organs of one person and the mouth or anus of another”) with a jail term of one to twenty years. An officer delivering a warrant for Michael Hardwick’s arrest on a separate matter discovered him engaged in oral sex with another man in the bedroom of his home. Although the state chose not to prosecute Hardwick, he claimed that his Constitutional rights were violated, and cited past privacy cases (including *Griswold*) as applicable precedents. Rejecting this claim, Justice White argues for the majority that past privacy decisions have concerned “marriage, family, and procreation” and that Hardwick’s case does not fall under any of these categories. White further argues that since nearly half the states have anti-sodomy statutes, it is not the place of the Court to dictate moral judgments to the citizens of those states. The dissenting opinion claims that the Court’s past privacy decisions have protected both spatial and decision-making aspects of privacy (certain decisions are left to the individual and certain conduct is protected from government intrusion in places such as one’s own home), and that Hardwick’s case involves both of these aspects of privacy.
Cohen v. California (United States Supreme Court, 1971)

Paul Cohen was arrested on grounds of “maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct,” when he appeared in a California courthouse wearing a jacket with the words “Fuck the Draft” appearing on it. In his majority opinion, Justice Harlan overturns Cohen’s conviction on the following grounds: the conviction was based on the content of the message, rather than Cohen’s conduct, and therefore is incompatible with the First Amendment; the message in question does not constitute “fighting words” which might permissibly be suppressed, and that although speech may sometimes be suppressed when it invades the sanctuary of the home and/or when the audience is captive, the courthouse is a public place and those present could simply have averted their eyes. Harlan also argues that the case must be decided against the “constitutional backdrop” of the right to freedom of expression: although our exercise of this right may result in “verbal cacophony,” this is a necessary side effect of the “broader values which the process of open debate permits us to achieve.” The First Amendment gives American citizens the right to engage not only in “informed and responsible criticism” but also “to speak foolishly and without moderation.”


Upon notice that the National Socialist or Nazi Party plans a protest march in the predominantly Jewish village of Skokie, which includes wearing the Nazi uniform and swastika armband, the village requested that the court exercise prior restraint in prohibiting the display of the swastika, or else run the risk of a violent counter-demonstration by the citizens of Skokie (many of whom are Holocaust survivors). Citing Cohen v. California, the court argues that clothing can constitute political speech deserving of First Amendment protection. The court also argues that (a) display of the swastika does not fall within the category of “fighting words” and (b) the “fighting words” doctrine does not justify prior restraint on the display of the swastika, since the citizens of Skokie had advance notice of the demonstration and could therefore simply avoid it.
The Intrinsic Philosophical Nature of Case Law

My first claim is that judicial opinions are philosophical both in terms of their content and their method, which is one reason to use them when teaching philosophical ethics. Even a brief summary of cases such as the above makes clear at a glance that judicial opinions frequently turn on the nature of fundamental theoretical or abstract concepts that must be understood using non-empirical methods, which is to say that they involve discussions of concepts that are intrinsically philosophical. For example, *Griswold* and *Bowers* both raise the issue of the nature and extent of individual privacy and its relation to the liberties guaranteed in the Bill of Rights. Appeals to the Due Process Clause of the 14th Amendment involve the concept of fundamental liberty; such liberties are claimed to be deserving of the stronger evidentiary requirement inherent in the concept of “strict scrutiny,” which requires a state to show that the statute at issue is both required to advance a legitimate interest of the state, and that no less intrusive measure will realize that interest. Both *Cohen* and *Skokie* require us to think about the philosophical ground for our right to freedom of expression, its role in a democratic society, and the criteria that must be met for speech to receive Constitutional protection.

The intrinsic philosophical content of judicial opinions allows for an unusually high degree of pedagogical flexibility, for they provide a locus for the intersection of the abstract or theoretical and the concrete. Using cases as a starting point, an instructor can easily turn class discussion in either a more theoretical or practical direction. For example, when discussing privacy cases such as *Griswold* and *Bowers*, one might take a theoretical focus and consider questions like these: does Douglas’ penumbra argument confuse negative liberty or freedom and privacy? It might be argued that the Amendments Douglas cites protect liberty, since the statutes that have been overturned on grounds of violating these Amendments have prohibited certain actions. Privacy, on the other hand, seems to involve information, and the right to privacy protects us from unjustified or wrongful disclosures of personal information. Or we might ask why the Court requires the strict scrutiny of statutes that appear to infringe on fundamental liberties, and what makes a liberty “fundamental” for purposes of triggering the heightened evidentiary requirement that strict scrutiny reflects. But an instructor might also turn the discussion in a more concrete direction by looking at the practical implications. The definition of sodomy in *Bowers* would also criminalize oral sex between married heterosexuals. Does Georgia’s right to “maintain a decent society”
allow them to regulate such conduct, or can they legitimately enforce this law only against homosexual males who (may) offend our notions of morality? Should a state be able to regulate any consensual sexual activity between adults? What implications might that question have for the legality or morality of prostitution? These practical questions themselves lead naturally into a further discussion of key themes in liberal political theory, such as whether we can describe a sphere of conduct that is in principle immune from government or legal regulation, as Mill's Harm Principle attempts to do.

The Cohen and Skokie speech cases allow for similar flexibility. Harlan's positive argument in Cohen about the "constitutional backdrop" of the case is a perfect opportunity for discussing Mill's arguments for freedom of thought and expression. Is there a particular view of what human beings are like that grounds the claim that certain expressions cannot be prohibited by the government? What role does a protected right to freedom of speech or expression play in a democratic society? Can "mere words" really cause harm from which citizens should be protected or can they only "offend" and so not be regulated? If speech can cause harm, how should we balance the need for protected speech against the potential for harm? These are only a few of the numerous theoretical questions raised by free speech cases.

On the practical side, instructors can encourage students to explore other forms of expression that have engaged the First Amendment, including pornography, campus codes restricting hate speech, and burning the American flag (a question students might find especially relevant given the events of September 11). Cases involving free speech, particularly a case like Skokie, serve as a valuable "intuition pump" on ideas that students are used to taking for granted. My teaching experience suggests that American students have a strong tendency to take their First Amendment rights for granted, in the sense that they often fail to see a genuine issue in cases like Skokie, or cases involving hate speech or pornography. Their tendency is just to cite the First Amendment as a "discussion closer." Their right to freedom of expression has become, in Mill's words, a "dead dogma:" a truth whose meaning isn't constantly discussed or debated in the marketplace of ideas, and thus a truth whose real meaning is lost to the very citizens who take it for granted.

A brief classroom anecdote provides a vivid illustration of this: my university attracts many students from Canada, where freedom of expression is not protected in the same way it is in the United States. One semester when I discussed Skokie in conjunction with Mill in my Intro-
duction to Philosophy course, my American students were inclined to be pretty dismissive of the position of the village, even though they knew that many Skokie residents were Holocaust survivors. One of my Canadian students was appalled by this, and couldn’t see why on earth the other students wanted to protect speech that was clearly designed to threaten a specific group of people. (In their demonstration, the Nazi party planned to carry banners reading “White Free Speech,” “Free Speech for the White Man,” and “Free Speech for White America.”) The choice of Skokie as the location of the demonstration was not accidental, this student argued, but rather clearly designed to terrify the Jewish population of the village, and therefore lacking any genuine political value.9 The moral outrage of this single student forced my American students to think more carefully about the justification of our First Amendment rights, and why it’s true (if it is true) that we have to protect even the most morally outrageous speech. The result was a much livelier and informed discussion of the issues than I think would have occurred otherwise.

The fact that the philosophical content of judicial opinions provides alternative pedagogical uses for them is one of the main sources of their classroom effectiveness. Since cases such as the ones I’ve discussed can be used to facilitate both theoretical and practical discussions, they represent “real life” applications of theoretical debates in a particularly vivid way, and thus demonstrate the application of skills of philosophical analysis to the solution of “real life” problems.

The philosophical nature of judicial opinions is not limited to their content, however; it extends to their method as well. In both law and philosophy, careful argument plays a central role, but judicial opinions are examples of argumentative prose that are typically shorter and more manageable for students than philosophical literature. One feature of case law that increases its manageability is the fact that it tends to be pretty formulaic, which makes it easier to provide multiple examples of a common reasoning process and mode of exposition. Written opinions typically follow a pattern of presenting (1) the facts of the case and its legal history (who did what, when, and the history of the case through the court system); (2) the holding of the court, which is the application of a principle of law to a case (for example, in Griswold it was held that the Connecticut statute violated a Constitutional right to privacy); and (3) the reasoning used in both arriving at the holding and in disagreeing with it (the majority and dissenting opinions, respectively). An awareness of
this pattern in judicial opinions makes it much easier for an instructor to tell students what to look for when they read a case.

The variety of reasoning patterns in judicial opinions enhances students’ critical thinking skills by requiring them to differentiate kinds of arguments. For example, Douglas’ penumbra argument in *Griswold* is very different from White’s argument in *Bowers* regarding the relevance of the prior privacy cases. Douglas is offering his own (positive) Constitutional argument for the right to privacy, while White is responding to the argument made by Hardwick’s lawyers that the prior privacy cases effectively decide Hardwick’s. Students thus see the difference between a positive argument that establishes a claim on its own merits, so to speak, and a negative argument that essentially responds to and analyzes another argument. It helps reinforce the logical difference between an argument for the claim that \( p \), and an argument for the claim that the reasoning in support of \( p \) should be rejected.

It’s worth mentioning that this particular logical distinction between kinds of arguments is itself embedded in the structure of the United States court system. The judicial opinions of appellate courts (including the Supreme Court) are responses to arguments presented to the appellate court in appealing the decision of lower court (the lower court may itself be an appellate court or it may be the trial court). Because of this, the reasoning in judicial opinions typically addresses the arguments presented to it by each of the parties in the dispute. A given opinion includes not only the arguments the judge found persuasive (including their own arguments, those of the lawyers, and those of amicus curiae or “friends of the court”), but also the arguments that were rejected, along with the reasons for the rejection. In *Griswold*, for example, the statute is viewed as infringing on a fundamental liberty, and the burden of proof is on the state of Connecticut to show that it has a compelling interest which survives the strict scrutiny imposed on the statute. This requires the students to attend to the reasons Connecticut has given in support of the statute, and also the argument of the Court that those reasons do not hold up. In *Cohen*, the court considers possible reasons in support of California’s conviction of Cohen, and rejects these reasons. Thus, reading case law requires sensitivity to the dialectical role of a claim, just as reading philosophy does.

Moreover, the reasoning given in support of a particular holding often relies on appeals to precedent cases, and thus is analogical in nature. A judge who decides the case before him or her by appealing to the precedent of another case (or a lawyer who appeals to a precedent in
a brief or at oral argument) is committed to the claim that the case at bar is like the precedent case in the relevant respects. Claims of similarity between cases have argumentative force in the American legal system because of our acceptance of the principle of *stare decisis* ("let the decision stand") which can be seen as the ‘legal’ version of treating like cases alike. This requires students to become more sensitive to the similarities and differences between cases, and the ways in which these claims can affect the strength of the argument. For example, White claims in *Bowers* that the prior privacy cases protect ‘marriage, family, and procreation,’ and that Hardwick’s act of consensual homosexual sodomy does not fall under these rubrics. This raises the issue of *what exactly Hardwick’s case is a case of* in a pretty dramatic fashion: is the common feature of the prior cases that they all concern marriage, family, and procreation (as White claims), or is it that they all involve decisions about intimate relationships that are the province of the individual rather than the state (as the dissent claims)? In *Skokie*, the court regards *Cohen v. California* as an applicable precedent, opening the door for an instructor to ask students about the similarities between the two cases: why does the court in *Skokie* think that *Cohen* is relevant? What specific feature of the *Cohen* case is triggering its applicability to *Skokie*? In general, students can see that both cases involve the question of whether words or emblems displayed on an article of clothing count as protected free speech under the First Amendment.

Although I have thus far discussed the philosophical content and method in case law as separate features, I think that there is an essential connection between them, which can be expressed this way: judicial opinions are essentially pieces of conceptual analysis of the same kind found in analytic moral philosophy. Conceptual analysis in philosophy typically has two main features: first, setting out the necessary and sufficient conditions for the application of the concept; and second, indicating the relationships between the concept being analyzed and other concepts. In judicial opinions, students can see that legal concepts are analyzed in essentially the same way. One clear illustration of this is in *Cohen*, in which Harlan carefully discusses the conditions under which speech can legitimately be restricted, and argues that Cohen’s jacket doesn’t satisfy any of them. This part of the *Cohen* decision is thus a conceptual analysis of the First Amendment’s free speech clause. Other Amendments in the Bill of Rights are treated the same way in judicial opinions. For example, Fourth Amendment cases offer an analysis of the concept of an “unreasonable search and seizure.” Eighth Amendment cases discuss the conditions under which a punishment is “cruel or
unusual,” and Fourteenth Amendment cases analyze the concepts of “due process of law” and “equal protection of the law.” Since the teaching of philosophical ethics also involves introducing students to conceptual analysis, I think it follows that the reading of case law is pedagogically valuable in this regard.¹⁰

All of this argumentative complexity is heightened by the fact that a written judicial opinion frequently contains the reasoning of more than one judge. Judges who agree with the holding may write separate concurring opinions containing different arguments; one or more judges may in addition write dissenting opinions explaining why they disagree with the majority. A thorough understanding of the case therefore requires students to understand all of the pieces of the decision and how they fit together. But a moment’s reflection is enough to see that reading a piece of philosophical literature requires precisely the same thing: we generally have to tell students to distinguish between (for example) the view the author actually holds and the views held by those who object to the author’s view. It’s no accident that law schools strongly emphasize the critical reading skills that philosophy provides, and for these very reasons. The idea that studying philosophy provides good training for the study of law is not a new claim; what I have tried to show is that the converse is true as well, in virtue of elements common to both philosophical and legal reasoning.

My thesis in this section has been that because case law is intrinsically philosophical in both content and method, legal cases are a particularly effective mechanism for teaching philosophical ethics. This is, however, a claim about features of both law and philosophy that are essentially internal to those disciplines, which should move us to ask whether there might be an external source of support for the effectiveness of case law as a method of teaching ethics. In the next section, I explore the idea that case law as a pedagogical strategy is uniquely suited to realizing an ideal of ethics education that is inherently political, and focuses on the role of education generally in producing citizens of a certain kind.

Critical Thinking, Ethics Education, and Good Citizenship

In liberal democracies, the connection between ethics education and citizenship is pretty direct, since no democracy can function successfully without an educated citizenry. Only citizens who can engage in critical deliberation, both privately and publicly, will be able to produce and reproduce a society that respects the intrinsic moral worth and dignity of
the individual. Amy Gutmann develops this idea in considerable detail in her book *Democratic Education*, beginning with a statement of the principle underlying what she calls “deliberative democracy:”

A guiding principle of deliberative democracy is reciprocity among free and equal individuals; citizens and their accountable representatives owe one another justifications for the laws that collectively bind them. A democracy is deliberative to the extent that citizens and their accountable representatives offer one another morally defensible reasons for mutually binding laws in an ongoing process of mutual justification.\(^{11}\)

The most reasonable way of making mutually binding decisions, according to Gutmann, is via a decision-making process in which the decision makers are accountable to those affected by their decisions. This in turn requires citizens “…whose education prepares them to deliberate, and to evaluate the results of the deliberations of their representatives.” Although Gutmann takes these points to show that instilling “the skills and virtues of deliberation” is a primary goal of compulsory public education, her remarks also apply to college or university level education.

Gutmann claims that deliberation “is not a single skill or virtue” but includes both “skills of literacy, numeracy, and critical thinking” as well as the virtues such as “veracity, nonviolence, practical judgment, civic integrity, and magnanimity.” Citizens who have the virtues and skills of deliberation are able to consciously and continuously reproduce their democratic society through participation in a variety of political processes. In liberal democracies, there are three key values that our political structures and processes, including the judiciary, tend to reflect: liberty, justice, and equality.\(^{12}\) Since liberals identify the human capacity to reason as the essential feature of our political agency, these three values can be seen as arising from a fundamental moral belief in the intrinsic worth and dignity of the individual that is itself grounded in a capacity to reason that we all have in more or less equal measure. As rational beings, we each have the capacity to arrive at an uncoerced determination of the nature of the good life for ourselves, but since the resources necessary for a good life are scarce, we need a mechanism to ensure that our pursuit of the good life does not unfairly deprive others of the opportunity to pursue theirs.\(^{13}\) Enter the state, as the neutral enforcer of the rules necessary for the pursuit of the good life by individuals with widely divergent views on its nature. The value of liberty, understood as non-interference with
one’s actions, is reflected in the decisions we make about those areas of life that the state may legitimately regulate and those it may not. The value of equality is reflected in our commitment to democracy itself: if we all possess the capacity for reason, then our political arrangements must reflect this fact, which excludes political structures in which power is arbitrarily exercised over any group of citizens. The value of distributive justice is reflected in the state’s (just) distributions of social benefits and burdens, such as the benefit of free speech and the burden of paying taxes, while the value of retributive justice can be seen in our commitment to such legal principles as the presumption of innocence, the right to counsel, and Miranda warnings.

If we combine these elements of political liberalism with Gutmann’s claims about the requirements of education in democratic societies, it follows that the liberal values of liberty, equality, and justice will be among the most important objects of deliberation for the citizens of liberal democracies. If that is so, then our pedagogical reflection should focus on which teaching methods are likely to be successful in cultivating deliberation about these values in our students. The content of judicial opinions shows them to be particularly helpful in this regard. The role of careful argument in case law is itself an illustration of precisely the sort of public justification for binding laws that Gutmann discusses. The philosophical content of case law reveals the ongoing public discussion of the key liberal values of justice, equality, and liberty. A couple of examples will illustrate this point.

The principle of strict scrutiny, for example, illustrates the very high value Americans place on individual liberty by articulating a presumption in its favor that must then be defeated by the state. The value of liberty can also be seen in the liberal insistence that the state (as an impartial enforcer of the rules of social cooperation) must be neutral about the variety of conceptions of the good life that its citizens possess; it is because of this neutrality constraint that speech cannot be regulated just because some of us dislike its content, and that the state may not tell a couple whether they may prevent the birth of child by using contraceptives. No state could enforce decisions in these areas without showing an illegitimate preference for certain conceptions of the good life over others.

The normative status we accord to the values of equality and justice are illustrated in cases that invalidate discriminatory legislation of different kinds. This is perhaps most obvious in key civil rights cases such as Brown v. Board of Education, (1954) involving the desegregation of public
schools, and *Loving v. Virginia*, (1967) which overturned a Virginia law prohibiting marriages between whites and “colored” persons. *Brown* is of particular interest in this context, since the role of education in citizenship was one of the main arguments for the decision. More recently, the public judicial debate on the value of equality has centered on the topics of affirmative action, sexual harassment, and whether or not sexual orientation is a legitimate ground for discrimination of various kinds.

These examples sufficiently illustrate, I think, that having students read and discuss judicial opinions is an unusually direct and forceful mechanism for cultivating Gutmann’s virtue of deliberation. Judicial opinions are models of the very sort of deliberation we should want educated citizens to undertake themselves. Allowing students the opportunity in the classroom to critique the reasoning given in an opinion is a great way to instill in students the confidence and commitment required to critically examine whether or not we, as a society, are really living in accordance with the values to which we profess deep attachment. Students who have read, reflected on, and discussed judicial opinions such as the one’s summarized earlier in this paper have a better understanding of the political culture in which they do or might claim membership (whether temporary or permanent). Such an understanding is an essential part of the virtue of deliberation on which the reproduction and improvement of their democratic society rests.

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**NOTES**

1 Several articles in this journal highlight the idea that the knowledge necessary for moral problem solving cannot be reductively identified with a student’s cognitive grasp of the objective content of moral theory (e.g., that Aristotle and not Mill is associated with the concept of *eudaimonia*). Clearly, moral reasoning as a specific form of problem-solving requires the acquisition of a skill set which isn’t limited to this kind of content. On this point, see Ozar 2001, Newton 2001, and Leever 2001. If moral problem solving isn’t simply a matter of having a cognitive awareness of moral principles, then the applications of skills that the use of cases represents is not simply a helpful pedagogical trick, but rather an essential element in the teaching of moral reasoning.

2 Since its original appearance in the first issue of *Philosophy and Public Affairs* in 1971, Thomson’s paper has become classic required reading in the abortion lit-
stance, and thus is reprinted in an overwhelming number of anthologies for introductory ethics courses.

3 While the students’ question illustrates the pedagogical import of a case such as Thomson’s on this issue, its philosophical relevance has been explored in the feminist literature on abortion. For example, Sally Markowitz claims that the right to autonomy that drives the Violinist case is a gender-neutral right that feminists ought to regard as suspect, since it overlooks that which a feminist defense of abortion must explicitly attend to: women’s oppression in a sexist society (Markowitz 1990).

4 All of these cases are drawn from Feinberg and Gross (1995), but can also be found in other anthologies in philosophy of law. Several anthologies in contemporary moral problems also contain judicial opinions (though not necessarily the opinions of the cases discussed here). Olen and Barry (1998), Arthur (2001), and Sterba (2000) are all good examples. Judicial opinions are also available on the Web; see Adams (2000) for a list of Internet resources.

5 The definition of philosophy (or a philosophical problem) at work here is from Mark Woodhouse’s book *A Preface to Philosophy*, and is one that both I and my students have found especially useful: “Philosophical problems involve questions about the meaning, truth, and logical connections of fundamental ideas that resist solution by the empirical sciences” (Woodhouse 1994, 2).

6 I am grateful to Audre Brokes for pointing out that the pedagogical flexibility of using case law can be seen in terms of the multiple directions for class discussion.

7 A great discussion of this argument is in “Privacy, Homosexuality, and the Constitution” in Arthur (2001).

8 As canonical philosophical texts go, I’ve found that *On Liberty* is hard to beat in terms of students coming to see that philosophy matters to their lives. I suspect this is due not only to the text itself, but to Mill’s own political activities.

9 The idea that not all speech is of equal political value and therefore not equally deserving of First Amendment protection has its adherents in the philosophical literature, particularly the literature on racist hate speech and campus speech codes. See Sunstein (2000) for an example of this.

10 However, conceptual analysis in law has one important advantage over its counterpart in moral philosophy. The acceptance of *stare decisis* means that conditions for the application of a legal concept are to a large extent set by precedent in a way which has no clear counterpart in philosophical ethics.

11 Gutmann 1999, xii. The emphasis is mine. All references to Gutmann are to Gutmann 1999, xii-xiii.

12 This way of formulating liberalism’s “big three” values, and the following remarks on liberal political theory are drawn from Jaggar, 1983.

13 More precisely, liberals tend to assume not only that resources are scarce, but that we are essentially self-interested, and want as large a share of the resources as possible. See Jaggar 1983, 31, for a discussion of liberalism’s assumption of universal egoism.
This point itself, however, leads to a deeper discussion of the role of the judiciary in our liberal democracy, for our Supreme Court justices are neither chosen by us nor accountable to us in the way that the members of the legislative branch are. This provides an ideal opportunity for students to reflect on a key issue in American political history: the legitimacy of judicial review.

REFERENCES


