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Ethics: ways to study

- looking at questions in class and creating answers
- making mind maps- topic analysis, brainstorming ideas and issues
- reviewing and summarising readings
- linking and reviewing topic questions with ideas and themes
- Undertaking further research into topics of interest- using references
- Creating a diagrammatic schema to be able to answer the questions- super glossary
- Reviewing and unpacking answers to questions- strategising and analysing collectively
- identifying relevant legislation and common law
- Definitions of concepts/theories and approaches
- Tabbings/ post-it notes
- Atticus Finch- put yourselves in the shoes of the examiner
- Most emphasis placed on themes, then subtopics, then different types of analysis of subtopics.
- Highlighting system is useful.

Every question- SIGNPOST THESE THINGS

- Introduction, thesis, discourse of and with evidence
- Short, concise answer.
- Authority states... “” ...
- At least one or two theories in each answer to support
- Work two theories and approaches into each answer
- Identify the themes (not necessarily just the topics listed!)

- Identify sub topics
- Identify the readings for each theme and sub topic
- Create definitions of theories and approaches (from readings)

SHORT ANSWER QUESTIONS

1. INTRODUCTION- What I think
2. THESIS- Why I think it
3. DISCOURSE- This shows you why.... (Evidence)

****If talking about one specific form of injustice: mention that you're talking SPECIFICALLY about it. Convey to the examiner exactly what you're going to talk about****

THE THEMES OF THE COURSE:

Types of justice:

- ✓ Access to justice
- ✓ Injustice
- ✓ Structural injustice
- ✓ Procedural injustice
- ✓ Retributive injustice
- ✓ Restorative injustice
- ✓ Distributive injustice
- ✓ The theories- Desert, Utilitarianism, Egalitarianism
- ✓ Alternative Dispute Resolution (ADR)
- ✓ Approaches
- ✓ Indigenous Issues

Ethics:

- ✓ Theories
- ✓ Rules
- ✓ Codes
- ✓ Duties
- ✓ Legal Players
- ✓ Approaches- virtue ethics

Profession:

- ✓ Firms
- ✓ Theories
- ✓ Rules

- ✓ Codes
- ✓ Duties
- ✓ Judges and juries
- ✓ Legal Players
- ✓ Colleagues and others
- ✓ Morals
- ✓ Billing Practices
- ✓ Approaches
- ✓ Challenges to the legal profession
- ✓ Types of lawyers
- ✓ Lawyering approaches
- ✓ Resilience

Ethics Law & Justice Exam

Theory of Law (James and Field, 56)

Theories of Justice (James & Field pg 407)

- Divine command
- Natural Law
- Positive Law
- Mutual agreement
 - Whatever the majority community agrees on
- Consequentialism (Pragmatic)
 - Decision that has to be the best consequences for total welfare

Order v Justice

- Order is negative peace, where there is absence of tension
- Justice is positive peace, where there is presence of justice

Access to Justice

Defining "Justice"

Justice is not easily definable concept, there are a number of ethical and moral approaches determining what justice may be. It is often used synonymously with the ideals of fairness, equity, objectivity and neutrality: a concern for the greater good. This may not be true in all cases. (James and Field)

Types of Justice

Theories of Justice

(James and Field, page 408)

- **Egalitarianism:** resources should be distributed equally within the group or community, either in terms of equality of opportunity or equality of outcome.
- **Desert theory:** resources should be distributed according to what each member of the group or community deserves, the basis of which is not equality but come other criterion such as need, talent or effort.
- **Utilitarianism:** resources should be distributed so as to maximise the total or average happiness or welfare across all members of the group or community.

Approaches

(James and Field, page 436-443, 456-468)

- **Virtue:** place emphasis on character rather than compliance with rules or the consequences of actions.
- **Deontological:** central principle lies in the conformity of an action to some rule or law.
- **Consequentialist:** focuses not on compliance with ethical rules but the consequences of actions and choice

Key Related Readings:

Chriss Merrit (2012) 'Contingency fees back on the agenda'

- Fairer method of payment
- Clients value certainty and the British system is moving towards a value based billing or fixed price regime for clients. The British contingency system is based on simplicity (page 123)
- Lawyers – seek to get fairly compensated for their work
- Broader society – should seek to ensure that the values of justice are being upheld for everyone.
- The best approach would be a hybrid arrangement to best suit individual matters. This would allow lawyers with a larger toll kit to distribute financial risk of a representation equitable between a lawyer and a client
- For example, in litigation a lawyer may choose to charge a flat fee for an appearance but an hourly fee for researching and writing a novel issue.

Simon Mogilla (2013) 'Legal aid in chronic decline'

- Strength of legal aid:
 - Is the free information, advice, duty lawyer and legal representation services (page 132)
 - Under takes law reform to fix problems with the law (page 132)
- Weakness:
 - Due to funding shortages legal aid representation is generally limited to those on very low incomes who need help with serious criminal matters, family matters involving child welfare (page 132)
 - The legal aid test is set at a level that only allows the poorest to be eligible 98% of legal aid recipients receive an income that is considered below the poverty lines. The leaves the majority of Australia in eligible for legal aid and unable to afford a lawyer. (page 132).

Community Law Australia (2012) 'Unaffordable and out of reach'

- *"our goal is to raise awareness of the problems and promote action to ensure that every Australian can access law, regardless of their financial situation, social circumstances or geographic location"*
- Language and literacy barriers impeding access to legal information and support services:
 - No written information is available in different languages
 - Low levels of literacy may mean that translated material is still misunderstood (higher incidence in women) (Page 176)
 - Inadequate explanation of legal terms/ legalese (e.g. words such as bail)
 - Difficulty in obtaining an interpreter for ethnic dialects:
 - Interpreters straying in advice giving
 - Interpreters not understanding legal concepts

Marina Georgiou (2013) 'Access to Justice: case studies of the role of community'

- Legal aid organisations such as CLC and the provision of legal aid is subsidized by the government. Therefore, funding is based on need according to issues in the wider community. Due to this economic reality individual legal needs often fall behind educational, medical and infrastructure requirements of the community. Unlike healthcare and

education the government provides no safety net for individuals that miss out on legal care for serious rights breaches.

- However, CLC's have cost benefit ratio of 1:18 meaning that they are incredibly beneficial for the government to fund (page 149)

Mirko Bagaric and Penny Dimopoulos (2003) 'Legal ethics is (just) normal ethics'

- Favour turned into obligation (page 142)
- The obligation that lawyers should undertake legal work is so engrained that in VIC law firms tendering work for the government must perform a certain amount of legal work. As private lawyers are able to do as much legal work as they feel is desirable but the lines between obligation and choice should not be blurred.

Caroline Heske (2008), 'Interpreting Aboriginal Justice in the Territory'

- For many Indigenous Australians the justice system is "a system alien not only in concept but in language" (page 157)
- "No legal rule that requires a court interpreter to be accredited to any particular standard" (page 159) – there should be a policy in place to protect the needs of the Indigenous Australians.

Table based of question 8 of week 4 seminar

	Strength	Weakness	Perspective on torturing terrorists
Virtue ethics- principles of the individual	Committed	Selfish/self-interest	Wrong/illegal Unjust/privilege
Deontological- judgment based on adherence to rules	Fair	Rigid	Wrong/not fair No exceptions
Consequentialist- end justifies the means	Holistic, all-encompassing	Doesn't consider the ethics of the means	Torture is justified, innocent over guilty, torture worked

(James & Field pg 408)

Distributive

- Egalitarianism -> Distributed equally
- Desert theory - >Distributed to what a person or community deserves
- Utilitarianism -> Distributed to maximise total happiness (**not individualistic**)

Procedural

- When a person receives a fair hearing or trial, upheld by safeguards in legal system

Retributive

- Desert theory -> Punishment decided according to what offender deserves
- Utilitarianism ->Punishment is justified if it maximises overall welfare of community

Access to Justice

- Access to justice goes beyond courts and lawyers (although these are important too). It incorporates everything people do to try to resolve the

disputes they have, including accessing information and support to prevent, identify and resolve disputes.

Economic Issues

➤ **Equitable access to justice** Baron and Corbin pg. 206

- Important to providing justice
- Enhances the legitimacy of the government
- Improves ability to create social change and facilitates economic development
- The current legal framework has been designed by and for lawyers, too little effort has been made to ensure that it is fair or even comprehensible to the average claimant Rhode, 2003-4

➤ **Achieving equitable access to justice** Baron and Corbin pg. 208

- Equality of access to legal services
- National equity
- Equality before the law

➤ **Causes of inequitable access to justice** Baron and Corbin pg. 209

- **Nature of legal proceedings**
- Adversarial nature and procedural rules cause delays and costs
- **Economics of lawyering**
- A function of an ordinary economic response, lawyers gravitate towards the corporate sphere and away from the individual sphere
- Court fees *Community Law Australia* \$74,000 – \$84,000 Federal court \$2370 for lawyer to help plead guilty in criminal court \$11,290 for five days in County Court

Social factors

- Cultural understandings/language barriers
- Rural regions
- Conflict issues may be problem in areas with a small amount of lawyers
- **Influence of neo-liberalism** (Baron & Corbin)
- o The notion of minimal role of government and arrangements that seek to ensure efficiencies. Inefficiencies are to be used as motivations for individuals to get more creative and innovative to close these inefficiency gaps. However, the previous 3 discussed factors stop this from happening

➤ **Proposed solutions to inequitable access to justice** (Baron and Corbin pg