Line-Drawing

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Law professors often ask: "Where do you draw the line?" This essay offers a guide to what is in play when professors ask their favorite question. It identifies the assumptions about legal education and the legal system that lead professors to see line-drawing as important. It explores why students may see line-drawing as superficial and small-minded. And it concludes with practical tips for students on how to respond when professors ask them where they would draw the line.

Introduction

Law professors love line-drawing. By line-drawing, I don't mean using a pencil to trace a path. Rather, I mean choosing which specific legal test should be used to solve a legal problem. Law students experience it in class like this: You're in a long discussion about different ways to think about a tough legal issue. The professor tosses out a few perspectives. Your classmates raise their hands and offer their views. And then the professor asks: "So, where do we draw the line?"

This essay considers why law professors focus on line-drawing. It exposes the assumptions that make line-drawing seem important. It asks what those assumptions say about American legal education and American law. It also addresses objections to line-drawing that it is small-minded and superficial. And it offers advice to law students about how to reply and how to listen when a professor invites students to say where they would draw the line. The essay does not aim either to defend line-drawing or to criticize it. Instead, it hopes to explain the assumptions held by law professors who see line-drawing as central to legal education as well as those who see line-drawing as problematic.

When professors ask where the line should be drawn, the essay argues, they are really asking students to identify the values they see at stake in a legal problem and to then craft a rule that best protects and advances those values. Drawing lines means picking the best legal rule. And identifying the best legal rule requires making hard choices about what is important and how the law can best achieve it. Professors often ask about line-drawing to show how different students with different values will see and defend different rules as the best ones.

On the flip side, line-drawing has important limitations. It can come off as narrow-minded and technical. It invites different perspectives without choosing among them. It leaves the professor in a position of studied neutrality, not saying what is right and what is wrong. Although that disagreement can foster a deeper understanding of the stakes of legal problems, it also can leave students disoriented and confused about how to think of the law and what choices should be made.

This essay has five parts. It starts with two hypotheticals about group decision-making to frame the problem. It then turns to why law professors often see law as requiring hard choices among competing values. It next introduces the role of line-drawing as a way to push students to see and defend that choice. After that, the essay turns to the institutional question of "who decides" and its impact on where lines are drawn. It then explores the major objections to line-drawing. The conclusion offers four suggestions for law students about how to react when their professor asks, "Where do you draw the line?"

I. A Group Decision

I can frame the subject best with a hypothetical. Imagine a group of people is tasked with coming up with a set of laws. The group must try to agree on which law is best. Before deciding on the best law, members of the group go around the room and voice their concerns about what the law should achieve and what it should avoid. Each person in the group speaks up about a particular goal they want to achieve, or problem they wish to avoid, in creating this new law.

Let's make this concrete with two examples. In our first example, the group has to design a system of government unemployment benefits. Many people will lose a job and need help making ends meet while they are looking for new employment. The group must design a legal system that answers when benefits are provided, how they are provided, and what the benefits are.

Members of the group go around the room. The first person wants to make sure the benefits are generous enough to help those in need. The second person wants to make sure the benefits are awarded fairly. A third person chimes in that benefits should be simple to administer so benefits can be calculated and distributed easily. A fourth person wants to maintain incentives to go back to work. And a fifth person wants to make sure the benefit system is not so costly that the government can't afford it.

In a perfect world, the group could perfectly satisfy all five interests at once. They could ideally design a system that is generous, fair, easily administered, affordable, and that creates ideal incentives. But it's easy to see that these interests will clash. The more generous the benefit, the harder it will be to afford. Ideal fairness may require case-by-case treatment that is hard to administer. No perfect system can achieve all five goals.

Next, give the group a different problem. This time, the group is asked to design a law on when the police should be able to pull over a car to enforce traffic laws. Cars can be very dangerous if not driven safely, and every state has traffic regulations on how cars must be driven and which safety features cars must have in working order. The group is tasked with devising rules on when the police should be able to stop drivers on the road to investigate or address safety violations.

Once again, the members go around the room and voice their concerns. The first person wants to make sure police have enough power to protect safety by enforcing all traffic safety rules. The second person hopes that the police can use traffic stops to get drunk drivers and other dangerous drivers off the road. The third person expresses concern that the police will use traffic-stop powers to target minority drivers and discriminate against minority groups. The fourth person argues that allowing traffic stops is dangerous because stops can lead to police uses of violent force. And a fifth person chimes in that the rule needs to be clear so the police can know what they're allowed and not allowed to do.

In a perfect world, the group could satisfy all five interests at once. They could ideally design a system that enforces all safety rules, protects the public from dangerous drivers, does not permit targeting minority groups, does not lead to uses of force, and is clear and easy to administer. But again, these interests can clash. Empowering the police to investigate any traffic offense may require allowing them to use force if a person refuses to stop. A rule that prevents targeting minority drivers may require a rule based on an officer's subjective intent that is difficult to know, making the rule difficult to administer. There is no perfect system that achieves all five goals.

II. Why Law Requires Trade-offs

Law can't be perfect, the example above suggests. This section says more about why. The reason is not just that imaginary people in forced hypotheticals happen to have different views. Instead, there are two recurring concerns driving the sense that legal perfection is impossible. The first is that hard problems are hard because they require choices among competing concerns. And the second is the scale of law creates trade-offs about how law can protect values. Let's consider each in turn.

The first reason perfection is impossible is that hard problems—the ones we talk about in law school—are hard because they involve competing needs. If a problem is easy, the best rule will be clear. But problems are hard when they raise competing legitimate claims. In the unemployment benefits hypo, for example, all of the different voices were trying to help people in different ways. One person wanted to help those in need by making benefits generous. Another person wanted to help those in need by keeping incentives to return to work. We will of course have our own views of which concerns are most pressing. But the key idea, for now, is that a group decision means a decision that has to make hard choices among competing but legitimate views. Problems become

difficult when hard choices must be made, and it's those problems that law professors focus on in class.

The second reason that perfect law seems impossible is the scale of law. Once created, legal rules typically will apply to many people over a long period. Every person is unique. But we can't design a different law for each person. Instead, we need to come up with a general approach that will apply for many years to potentially millions of different and unknown people. The scale of law creates inevitable trade-offs.

The starting point here is simple. When you write a law, you are creating a general rule that will apply to a large number of very different people over time. This requires you to think at scale. You start with some general category of people you are trying to regulate. You then imagine a bunch of situations that group might be in when they encounter your rule. You then consider how the members of the group might respond to different legal rules you might adopt. When you are designing your rule, you need to think at scale about the impact of the rule on everyone.

Return to our two problems. In a typical year, governments pay out more than thirty billion dollars in unemployment benefits to millions of people.[1] Many more are eligible for benefits but don't apply.[2] A legal rule would have to account for that scale's many situations, needs, and costs. Similarly, a legal rule about traffic stops will set terms of conduct for a lot of people. There are hundreds of thousands of police officers who have the legal authority to make traffic stops. And police in the United States currently make more than 50,000 traffic stops on a typical day.[3] Any legal rule we create has to account for different kinds of police officers, stops for violations of different traffic laws, and effects on different communities policed.

The scale of law means that decision-makers create generalized rules with limited information. If the law applied to just one person, we could create a rule custom-designed for that individual. But when law is at scale, it becomes impossible to know exactly who is being regulated, what their situation is, and what they might do in response to different rules. We have to create rules for some often-unknown group of people based on our predictions about what the net effect of a given rule might be. Trade-offs are inevitable. If we try a tailored approach where application of the law is very case-specific, then we need to figure out who determines the facts of each case and how that case-specific

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1   *See Total Unemployment Benefits Paid in the U.S. 2019-2020*, Statista Research Department (Feb. 1, 2021), https://www.statista.com/statistics/284857/ total-unemployment-benefits-paid-in-the-us/.

2   *See Most Unemployed People in 2018 Did Not Apply for Unemployment Insurance Benefits*, United States Bureau of Labor Statistics (Oct. 1, 2019), https://www.bls.gov/opub/ted/2019/ most-unemployed-people-in-2018-did-not-apply-for-unemployment-insurance-benefits. htm?view_full.

3   *See* The Stanford Open Policing Project, https://openpolicing.stanford.edu/ (last visited Dec. 30, 2021) ("On a typical day in the United States, police officers make more than 50,000 traffic stops.").

determination is made. That can get complicated and expensive quickly. If we try a blunt rule that is simple to apply, them the law is easy to administer but can often misapply, regulating too tightly for some and too loosely with others.[4] Again, no approach is perfect.

III. The Role of Line-drawing

This brings us to the reason law professors love line-drawing. When professors ask, "Where do you draw the line?"—henceforth WDYDTL—they want students to think about how different legal rules might accommodate the different interests. WDYDTL effectively asks students this question: "Which specific legal rule would best accommodate the different legitimate interests based on your own priorities and experiences?"

Put another way, WDYDTL is a way to see and choose among trade-offs. It asks students to consider how different rules will sacrifice different interests in favor of others, and to see how their values may play into their choices of which interests to favor. It is easy for students to declare the abstract goals they want the law to serve. Pushing students to draw a particular line makes students confront trade-offs. WDYDTL pushes students to see how pressing one interest might sacrifice another, and to reflect on how they might justify that choice.

Go back to the traffic example. The first person wanted to make sure police have enough power to protect safety by enforcing all traffic safety rules. Certainly a fair goal. But the problem becomes harder if that person has to draw a line on exactly when the law should allow officers to make a stop. A rule that the police can pull over any car at any time for any reason would certainly help the police protect public safety. But articulating that rule exposes a major problem: The rule also gives officers untrammeled power to target minority drivers, harass individuals, and otherwise use their powers for nefarious reasons.

This lesson can be generalized. Drawing a line means making choices, and making choices shows the interests that person would value and also those that would be left underaddressed or cast aside entirely. In the traffic problem, for example, another person feared that traffic stops would necessarily lead to police uses of violent force. This is surely an important concern. But imagine this person wants the opposite rule. Instead of allowing traffic stops at any time, this person would say stops for traffic violations should *never* be allowed. This greatly lessens the risk of police violence. But articulating that rule exposes its own major problem. If officers have no power to pull over those violating traffic laws, does that mean there is no way to stop dangerous driving such as those speeding excessively in residential neighborhoods or those driving drunk? Maybe there are answers to this puzzle, of course. But

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4   This is the well-known rules-versus-standards debate. *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

it's hard to appreciate the puzzle, and look for answers, unless you go beyond generalities and start considering specific rules.

Two corollaries emerge. The first is that drawing a line should make students slightly uncomfortable. When professors ask WDYDTL, students should have the sinking feeling that they are walking into a trap. In a sense, they are. Drawing a line makes you take a position that exposes the interests that you either haven't thought much about or don't value as much as others might. It explores what you value more and what you value less. It discloses to the class what you think the law should prioritize, and what, in the mix, should be left behind.

The second corollary is that WDYDTL works most effectively when students voice a range of answers. The professor will want to show how different perspectives influence choices about what legal rule seems best. The best way to do that is for students to answer WDYDTL differently. A wide set of answers, articulately defended, shows the rest of the class how different perspectives inform the different choices. The range of answers teaches the lesson about how different people will have different priorities that translate into different possible rules.

IV. The Institutional Question: Who Decides?

Until now, an abstract entity—some designated group—was tasked with making the legal rule. In the real world, of course, legal rules are created by specific institutions. They are created by legislatures, courts, and agencies. The institutions might operate as part of the federal government, or as part of state or local governments. They might even be international tribunals. The existence of different institutions creates a second set of questions for WDYDTL to address: Which institutions should draw the line, and how does the choice of institution influence the line-drawing?

This matters because institutional choices often alter how law professors think about line-drawing. The conventional account is that rule-makers draw their legitimacy from the consent of the governed. Elected legislatures, especially at the state level, are thought to have general power to adopt the legal rules that they want.[5] Their choices are largely free of institutional concerns. But when questions are no longer up to state legislatures, institutional concerns creep in. Legitimacy concerns can impose constraints on where each institution draws the line.

The judiciary is the obvious example. The standard view is that judges are constrained decision-makers.[6] Judge are not free to announce the rule they want just because they like it. Instead, they have to write opinions deriving

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5   This is in contrast to the federal government, which has at least some limits. *See* U.S. v. Lopez, 514 U.S. 549 (1995).

6   *See, e.g.*, Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

their rules from a range of generally accepted legal authorities. Put another way, when judges draw a line, they have to deal with legitimacy constraints. When interpreting a statute, judges will engage in line-drawing within the bounds of accepted methods of statutory interpretation such as textualism or intentionalism. When interpreting the Constitution, they will try to fit their line-drawing within bounds of accepted practices in constitutional interpretation, such as relying on precedent or arguments based on originalist methods or the perceived purposes of constitutional texts.[7]

Of course, these limits are themselves contested. More on that in the next section. What matters for now is that the institutional question adds a set of possible constraints on WDYDTL. When law professors discuss what a particular legal institution should do—where that institution should draw the line—the normative question can be supplemented, or even in some cases replaced, by answers based on perceived legitimacy constraints. Some will disagree with the constraints and continue to look for the ideal normative rule. But others may see the constraints as important or determinative, and they will answer WDYDTL by reference to legitimacy constraints instead of policy.

Recall the earlier traffic-stop problem on when the police should be authorized to pull over a car for traffic violations. That question ordinarily comes up in a class discussion about the Fourth Amendment's prohibition of unreasonable searches and seizures.[8] Pulling over a car is a seizure, and the question is when that seizure is constitutionally reasonable.[9] In deciding where to draw the line, a student might have views about what Fourth Amendment means that are separate from policy views about the ideal rule. For example, one might believe that the ideal rule is not to permit any traffic stops but conclude that the correct interpretation of "reasonable" in the Fourth Amendment rules out such a strict approach. If the question is what line the Constitution allows, WDYDTL might be based on a person's best sense of the Constitution's meaning instead of ideal policy.

V. A Critical View of Line-drawing

So far I have offered a positive case for line-drawing. But others will disagree. They will see line-drawing as a superficial, small-minded, and unimaginative frame in which to talk about law. From the critical perspective, line-drawing ignores what really matters. Line-drawing shows legal education's lack of ambition and failure to grapple with law's failures. This section explores these objections and shows the assumptions on which they rest.

The first objection to line-drawing is rooted in its small-mindedness. Start with just the form. WDYDTL frames legal decision-making as a technocratic

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7   *See* Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1984) (describing the various "modalities" of constitutional argument).

8   *See* U.S. Const. Amend. IV.

9   *See* Brendlin v. California, 551 U.S. 249 (2007) (pulling over a car seizes the driver and any passengers).

exercise. The options are reduced to various lines. A debate over values is presented as merely a choice as to which line to draw. No matter the real-world stakes of the question, reducing the search for an answer to mere line-drawing makes the issues seem technical and small. It's as if one were at a restaurant choosing an entrée. Would you like the chicken or the fish? When you put it that way, can the choice really matter?

More broadly, line-drawing encourages a procedural worldview. When professors focus on WDYDTL, they seek to accommodate different perspectives without saying which are right and which are wrong. A wide range of perspectives is deemed legitimate, and choices among them are merely a matter of perspective. But this is false, critics will respond. Some perspectives are right and other perspectives are wrong. Instead of teaching a modest procedural lesson about how different people might want different rules, professors should teach a more meaningful substantive lesson about which perspective is correct and how law can advance it.[10]

From this perspective, WDYDTL hides from the big issues. It doesn't confront such questions as: What is justice? What is morality? What do we owe others? How should we order society? Professors may raise these questions briefly, of course. And the answers to them may change where a particular person draws the line. But WDYDTL mostly treats these questions as matters of opinion—as matters of mere politics or ideology—rather than as matters of truth.[11]

By refusing to search for what is true, WDYDTL also fails to acknowledge what is false. From the critical perspective, WDYDTL allows perspectives that masquerade as good-faith concerns to compete for attention and authority with genuine efforts to pursue justice. Illegitimate perspectives and bad-faith arguments are given equal credibility as simply different reasons to draw the line differently.

We can imagine how this plays out with the unemployment benefits problem from earlier. The first person wanted benefits to be generous enough to truly help those in need. The last person wanted to make sure the benefits program was not so expensive that the government could not afford it. The line-drawing perspective treats these as both fair concerns. That framing may suggest a middle-ground rule, in which benefits should be generous enough to help but not so generous that they break the bank.

Perhaps. But what if you think the budgetary concern is a smokescreen? A tax increase on the wealthy could pay for very generous unemployment benefits. If you believe that budgetary concerns are merely a feint—a convenient claim some trot out to block programs they dislike—then WDYDTL's modesty ends up catering to false arguments as if they are real.

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10   *Cf.* Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998).

11   *Cf. id.* at 60–61.

This objection also comes up in response to institutional answers to WDYDTL. Institutional claims rely on purported constraints derived from the legitimacy of institutions as a reason to trump the policy question. "I personally support affirmative action as a policy matter," a person might claim, "but I don't think the Equal Protection Clause allows it." Or, "I personally favor abortion rights, but I don't think the Constitution protects it." If you believe these claimed constraints are fake—that they are false objections based on assertions of nonexistent constraints—then you may blame WDYDTL for giving credence to illegitimate arguments.

Conclusion

These perspectives suggest a few practical lessons for law students. In class, when your professor asks, "Where do you draw the line?" students might consider four suggestions:

(1) Your professor is pushing you to translate your values into a legal rule. Think about what really matters to you and come up with a rule that best accommodates the values that you think are important. Realize that your rule can be tentative, as coming up with the best legal rule is challenging for anyone. No professor expects you to come up with a perfect answer on the fly. Your in-class rule is just your starting point.

(2) If your professor pushes you to defend your line-drawing, explain why you see your rule as the best way to accommodate the interests you value. If the professor brings up a consequence of your line that you didn't see, take that as helpful advice. Your professor is helping you see something you missed so you can see it better next time. But recognize that no legal line is perfect, and the professor's pushback can but need not change your mind. If you still see your approach as the best option, stick to your guns.

(3) Listen to how your classmates justify the lines they draw, especially when their lines are very different from your own. Try to figure out what values your classmates are bringing to the problem and to see why those values might (in their mind) justify their rules. Your goal in listening isn't to necessarily agree with them. Often, you won't. Instead, try to understand how different perspectives influence perceptions about which rule seems best.

(4) Realize that line-drawing doesn't have to be small. What looks technocratic is just a reflection from a deeper process about values. WDYDTL is a platform for you and your classmates to debate what matters and how the law should address it. By offering the platform, your professor may be opening the door to a wide range of perspectives. But an open door doesn't require you to accept everything that comes through it. Listen to your classmates but defend your values.

Good luck!