

PHIL 168: Philosophy of Law
Fall 2011; David O. Brink
Syllabus

Here is a list of topics and readings for the course. Within a topic, it's important to do the readings in the order in which they are listed. Some readings can be found in the required texts.

- H.L.A. Hart, *The Concept of Law*, 2d ed. (Clarendon Press, 1994)
- Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986)
- John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980)
- John Stuart Mill, *On Liberty* (Hackett, 1978) [other editions also acceptable]

Other readings can be found on Electronic Reserves [ER]. There may be slight modifications in the assigned readings during the term; you should check periodically to make sure that you have the current version of the Syllabus.

I. ANALYTICAL JURISPRUDENCE

Here we look at what distinguishes laws from other social rules, how law is related to morality, the determinacy of law, and the nature of legal interpretation and adjudication.

1. AUSTIN AND LEGAL POSITIVISM

Austin offers a very natural view of the law as a body of coercive commands enacted by the state. He claims that law is a command of the sovereign backed by threat of sanction for noncompliance. This depends on the notions of a command and a sovereign. Austin claims that a person (or group) is sovereign if and only if others are in the habit of obedience to him (or it) and he (or it) is not in the habit of obedience to others. Austin also sees the command theory as supporting a certain view about the relation between law and morality. The natural law tradition claims that there is an essential connection between law and morality, whereas legal positivism denies this. Austin believes that the command theory supports legal positivism, showing that "the existence of law is one thing, its merit or demerit another". Why? The command theory provides a reasonably good fit with certain kinds of legal systems -- such as monarchies -- and with certain areas of law -- such as criminal law or tort law. But is it plausible as a general theory of law? Can Austin's sovereign be bound by law, and can we make sense of democratic sovereigns? Do all laws create duties, or do some (Hart's power-conferring rules) create options? Can the command theory explain the transition of authority within legal systems and the continuity of a system's laws during changes of sovereignty? Must all law be coercive?

- Austin, *The Province of Jurisprudence Determined* ["Law as the Sovereign's Command"] [ER]
- Hart, *The Concept of Law*, chs. 2 and 3

2. HART'S MODEL OF RULES

Hart's *The Concept of Law* is a (contemporary) classic of analytical jurisprudence. He thinks that seeing law as the union of primary and secondary rules is the key to the science of jurisprudence. Primary rules regulate conduct. By contrast, secondary rules of recognition, adjudication, and change address limitations in a system of primary rules. What limitations in a system of primary rules do secondary rules address and how? Hart thinks that the addition of secondary rules to a system of primary rules marks the step from the pre-legal world into the legal world. He also thinks that his model of rules supports legal positivism. Why? What does the model of rules tell us about the nature of judicial reasoning? Do judges always apply law, or must they sometimes make law? Unlike some Legal Realists, Hart thinks that judges can and do sometimes apply pre-existing law, but he also claims that the "open texture" of legal language ensures that hard or controversial cases are legally indeterminate and call for the exercise of judicial discretion, which is a quasi-legislative capacity.

- Hart, *The Concept of Law*, chs. 5, 6, and 9

3. LEGAL REALISM

Hart's own views about legal reasoning and judicial discretion are best understood in the wake of his criticism of legal realism. Holmes and Gray offer somewhat different versions of legal realism. Holmes suggests that we take "the bad man's point of view" and concludes that laws are predictions of what courts will decide. Gray says that the law is only what the court says it is. In what sense are these views realistic? Both Gray and Holmes are skeptical about the existence of legal rules. Can you find arguments for this skepticism? Are these good arguments for global skepticism, or only for a more selective kind of skepticism?

- Holmes, "The Path of the Law" [ER]
- Gray, *The Nature and Sources of the Law* [ER]
- Hart, *The Concept of Law*, ch. 7.
- Brink, "Legal Interpretation, Objectivity, and Morality" [ER], §§1-2

4. INDETERMINACY, JUDICIAL DISCRETION, AND LEGAL INTERPRETATION

How are Hart's views about the need for judicial discretion related to his own assessment of legal realism? What is Hart's argument for judicial discretion? What are Dworkin's criticisms of the model of rules, and how do they affect Hart's argument about judicial discretion? Hart's argument relies on claims about the "open texture" of language. Is the meaning or extension of a term indeterminate where there is no consensus about its meaning or extension? In any case, does the semantic content of a legal standard settle its proper interpretation? For instance, should a judge follow the meaning of a legal provision if the language of that provision applies to a novel case with absurd results? Some suggest that judges should appeal to the purposes or intentions of the framers of the provision in interpreting it. But the purposes of the framers can be characterized in two quite different ways. The interpreter can look only to the specific activities that the framers sought to regulate -- specific intent -- or she can look to the abstract values and principles that the framers had in mind -- abstract intent -- and then rely on her own collateral views about the extension of these values and principles. How do these two conceptions of the intentions of

the framers differ, and which is more plausible? How does our view on this issue affect our view about the relation between law and morality?

- Hart, *The Concept of Law*, ch. 7 (review)
- Dworkin, "The Model of Rules" [ER]
- Plessy v. Ferguson (1896) [ER]
- Brown v. Board of Education (1954) [ER]
- Brink, "Legal Interpretation, Objectivity, and Morality" [ER], §§3-9

5. CONSTRUCTIVE INTERPRETATION, LEGAL POSITIVISM, AND NATURAL LAW

In *Law's Empire* Dworkin argues that law is an "interpretive concept" and defends an interpretive approach to the law that he calls "law as integrity," which involves what he refers to as constructive interpretation -- the task of showing previous legal practice in its best light. What exactly is constructive interpretation, and how does one determine when one interpretation is better than another? Dworkin likens the process of legal interpretation to the process of contributing to a chain novel. Is this an appropriate model for legal interpretation? What, if anything, does this conception of legal interpretation imply about the debate between legal positivism and natural law? Natural Law asserts and Legal Positivism denies that there is an essential connection between law and morality. This debate is sometimes understood as a debate about whether wicked rules, otherwise like laws, could count as genuine laws. One way to focus discussion is by looking at the Fugitive Slave Laws that required escaped slaves to be returned to their owners. Are such laws valid, and should they be binding on the courts? How might legal positivists and natural lawyers analyze judicial decisions involving these laws? Which view seems more plausible?

- Dworkin, *Law's Empire*, esp. chs. 1-3 and 6-7
- Moore, "Four Reflections on Law and Morality," pp. 1525-38 [ER]
- The Fugitive Slave Laws [ER]

II. CONSTITUTIONAL JURISPRUDENCE

An important application of many of these issues of legal interpretation involves judicial review. When the judiciary exercises judicial review it invalidates democratic (state or federal) legislation as unconstitutional. One central function of judicial review is to enforce individual rights that are constitutionally protected against tyranny of the majority. But this involves politically unaccountable officials telling democratically elected and accountable officials what they can and cannot do. Isn't this undemocratic, and doesn't it violate the separation of governmental powers?

6. JUDICIAL REVIEW AND SUBSTANTIVE DUE PROCESS

We will begin our discussion of judicial review by looking briefly at the introduction of the doctrine. As Chief Justice Marshall (in *Marbury v. Madison*) and Alexander Hamilton (in *Federalist* #78) argue, the separation of powers assigns the judiciary the institutional role of interpreting the law, and in a constitutionally limited democracy, there are constitutional constraints on what legislatures may do. It seems to follow that it is the institutional role of the judiciary to measure legislation against its interpretation of the Constitution to see if the legislature has heeded its constitutional constraints.

- *The United States Constitution* [ER]
- *Federalist Papers #78* [ER]

But what is to count as constitutional interpretation for purposes of judicial review? This question is often debated in the context of assessing so-called substantive due process review. To understand that debate, we need to understand some aspects of the history of substantive due process.

- *Slaughter-House Cases* (1873) [ER]
- *Lochner v. New York* (1905) [ER]
- *West Coast Hotel v. Parrish* (1937) [ER]
- *Williamson v. Lee Optical* (1955) [ER]
- *Palko v. Connecticut* (1937) [ER]
- *Griswold v. Connecticut* (1965) [ER]
- *Bowers v. Hardwick* (1986) [ER]
- *Lawrence v. Texas* (2003) [ER]

Nowadays many people criticize substantive due process. They usually have in mind *Lochner*-era substantive due process. It's important to understand the rise and fall of economic substantive due process. But what exactly was wrong with *Lochner*? On some conceptions, substantive due process is non-interpretive review. If all non-interpretive review is problematic, then these interpretive assumptions imply that substantive due process, as such, is problematic. But one might question whether substantive due process requires non-interpretive review. Perhaps *Lochner* reflects an interpretive mistake about which interests and liberties are fundamental and deserving of constitutional protection. On this alternative conception, the problem with *Lochner* was not substantive due process but which constitutional rights were recognized. Which criticism of *Lochner* accords better with the history of substantive due process?

7. JUDICIAL REVIEW: THEORIES & SKEPTICISM

With this understanding of some of the relevant constitutional history, we are in a better position to evaluate some theories about judicial review. Theories typically blend both accommodation and reform – justifying some aspects of judicial review and criticizing others. Both accommodation and reform are matters of degree. At some point, reform begins to look like skepticism. We will discuss three main theories of judicial review, each with some skeptical implications.

- Robert Bork, “Neutral Principles and Some First Amendment Problems” [ER]
- John Hart Ely, *Democracy & Distrust*
- Jeremy Waldron, “The Core of the Case Against Judicial Review” [ER]

Bork accepts judicial review of the sort in *Brown* but rejects privacy cases, such as *Griswold*. Is there a consistent jurisprudence embracing *Brown* and rejecting *Griswold*? Ely agrees with Bork in some of his skepticism about substantive due process but offers a proceduralist alternative that he calls the representation-reinforcing theory of judicial review. Do we need

to avoid substantive due process, and can Ely distinguish substance and process, as he claims? In some ways, Waldron's skepticism runs the deepest. He shares Ely's democratic worries about judicial review but also raises the worry that the judiciary might not be the most effective way of protecting constitutional rights. However, his skepticism about judicial review is conditional. Do you think that all the conditions for his skepticism are met?

III. NORMATIVE JURISPRUDENCE

Our discussion of constitutional jurisprudence focused on whether and, if so, how the judiciary should enforce constitutional rights. But this raises the normative jurisprudence question about just which individual rights the constitution should recognize. This is really the question what rights individuals have against each other and the state.

8. MILL'S LIBERAL PRINCIPLES

This was the focus of Mill's classic defense of individual liberties in *On Liberty* (1859). On one reading, Mill claims that liberty can be restricted if and only if this is necessary to prevent harm to others. Mill endorses the harm principle but rejects paternalism, offense legislation, legal moralism, and censorship. How does he defend these categorical claims? We'll begin by reconstructing his anti-paternalism. Limitations in his explicit anti-paternalist arguments lead us to his discussion of freedom of expression, which is meant to explain the importance of expressive liberties and provide a more general defense of individual liberties. What are his arguments against censorship, and what insight do they provide into his more general defense of individual liberties of thought and action? What value does Mill assign basic liberties? Are they instrumental goods, intrinsic goods, or necessary conditions for pursuit of higher forms of happiness? What limitations does Mill recognize on the scope of his defense of basic liberties?

- Mill, *On Liberty*

9. REFINING MILL'S PRINCIPLES

A proper assessment of Millian principles requires a careful examination of his categorical approach. Mill himself qualifies his categorical claims in certain ways, and we might be tempted to introduce other qualifications. We will look at each of his main categories in turn – his defense of the harm principle and his rejection of paternalism, censorship, offense legislation, and legal moralism. If time is tight, we may need to be selective in this re-evaluation.

A. The Harm Principle. Is harm always sufficient to justify restricting liberty, or are there cases where harmful behavior nonetheless ought not to be regulated? Is harm necessary to justify restricting liberty? What about Good Samaritan laws (OL I 11) or legislation aimed at providing public goods?

B. Paternalism. Mill himself qualifies his blanket prohibition on paternalism by defending prohibitions on selling oneself into slavery (OL V 11). Why is this a legitimate exception to the usual prohibition on paternalism? Is Mill expressing sympathy for autonomy-enhancing forms of paternalism? Mill says that the reasons for allowing paternalism in this "extreme case" are "evidently of far wider application" (V 11). What other forms of paternalism might be justified in this way?

C. Censorship. Does Mill believe that censorship is never permissible and that freedom of speech is absolute? Does this mean that Mill believes speech can never be harmful ("Sticks

and stones can break my bones but words can never hurt me.")? Is that plausible? Consider his discussion of incendiary speech (III1). Mill would seem to accept censorship to prevent a "clear and present danger". What about other aspects of First Amendment jurisprudence? What would Mill make of the Court's distinction between high-value and low-value speech, its views about campaign finance restrictions, or its attitude toward the regulation of fighting words or discriminatory speech.

D. Offense Legislation. Mill himself qualifies his blanket prohibition on legislation designed to prevent mere offense when he endorses the regulation of (otherwise self-regarding) drunkenness when done in public (V 7). Should we allow offense legislation and, if so, under what conditions? Consider Feinberg's discussions of nuisance and offense, especially his interesting discussion of the Bus Rides. Which bus rides are the most offensive? (You may need to consult a dictionary to understand some of them!) Feinberg defends appeal to a balancing test that balances the seriousness of the offense caused and the importance of the expressive interests that would be restricted. Does he measure these two sets of interests in reasonable ways? Are these the only important factors to be balanced? Feinberg contrasts these legitimate types of nuisance legislation with legislation designed to prevent profound offense. How does profound offense differ from nuisance, and why should a Millian liberal regulate nuisance but not profound offense?

- Feinberg, *Offense to Others*, pp. 1-24 [ER]

E. Legal Moralism. Mill appears to reject all forms of legal moralism that cannot be subsumed under the harm principle. Are there any forms of immorality that are not harmful? If so, can legal moralism ever be defended? We might start by looking at the debate between Lord Devlin and Millians. Devlin thinks that it is permissible for society to engage in moral legislation if a majority feels sufficiently strongly about it. He thinks that legislation prohibiting homosexual sodomy is a case in point. What are his arguments? Does he recognize a right to privacy? These issues were addressed in constitutional setting initially in *Bowers v. Hardwick* (1986) where the Court denied that such legislation infringes a right to privacy. Can the Court justify restricting the scope of privacy in this way? The Court revisited and overruled the *Bowers* decision in *Lawrence v. Texas* (2003), effectively expanding the scope of a right to privacy. Is the *Lawrence* decision good constitutional jurisprudence? It is common to think that a liberal or civil libertarian position should defend the result in *Lawrence*, condemn Devlin, and reject legal moralism per se. Is this right? Must the legal moralist think that all immorality must be legally regulated, or could she claim that immorality always creates a prima facie or pro tanto case for restricting liberty but one that may be outweighed by various costs associated with legislative interference? If so, liberal conclusions might not require rejecting legal moralism.

- Devlin, *The Enforcement of Morality* [ER]