**PHIL 168: Philosophy of Law**
**Spring 2013**
**Prof. 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)

Other readings can be found on Electronic Reserves [ER] or on the TED course website [TED]. 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?

- John Austin, *The Province of Jurisprudence Determined* ["Law as the Sovereign's Command"] [ER]
- H.L.A. 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?

- O.W. Holmes, "The Path of the Law" [ER]
- J.C. Gray, *The Nature and Sources of the Law* [ER]
- Hart, *The Concept of Law*, ch. 7.

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)
- Ronald Dworkin, “The Model of Rules” [ER]

- Plessy v. Ferguson (1896) [ER]
- Brown v. Board of Education (1954) [ER]

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?

- Ronald Dworkin, *Law's Empire*, esp. chs. 1-3 and 6-7
- Mitchell Berman, "On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence" [TED]
- 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 two main theories of judicial review, each with some skeptical implications.

- John Hart Ely, *Democracy & Distrust*
- Jeremy Waldron, "The Core of the Case Against Judicial Review" [ER]

Ely is skeptical about significant parts of substantive due process, such as privacy cases, but he 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. CRIMINAL JURISPRUDENCE

Here we look at the justification of punishment, focusing on retributivist conceptions that justify punishment as the appropriate response to culpable wrongdoing. Understanding culpable wrongdoing requires a conception of responsibility. We can test conceptions of responsibility, in part, by testing their implications for cases involving pathological or incomplete responsibility.

8. PUNISHMENT

Theories of punishment must explain why we should punish and whom we should punish. *Consequentialists* justify punishment by appeal to forward-looking considerations, such rehabilitation, deterrence, or the expression of community norms. Are such forward-looking rationales sufficient to justify punishment, or must punishment appeal to backward-looking considerations such as desert? *Retributivists* justify punishment as a fitting or deserved response to culpable wrongdoing. We will focus much of our attention on a form of retributivism that allows the state to punish in ways that deter, rehabilitate, and express community norms provided that they punish all and only those who deserve punishment for culpable wrongdoing and in proportion to their desert.

- Michael Moore, *Placing Blame*, ch. 2 [ER]
- Herbert Morris, "Persons and Punishment" [ER]

9. RESPONSIBILITY AND ITS LIMITS

Understanding culpable wrongdoing requires a conception of responsibility. We will explore a conception of responsibility grounded in norms about fair opportunity that holds agents responsible for their choices when they are normatively competent and possess situational control. Because excuses deny that the agent was responsible (culpable) for her wrongdoing, excuse provides a window onto responsibility. We can test conceptions of responsibility, in part, by testing their implications for cases involving pathological or incomplete responsibility. Here we will look at the evolution of the insanity doctrine and the application of responsibility concepts to psychopathy.

- Peter Strawson, “Freedom and Resentment” [ER]
- Gary Watson, “Responsibility and the Limit of Evil: Variations on a Strawsonian Theme” [ER]
- David Brink and Dana Nelkin, “Fairness and the Architecture of Responsibility” [TED]
- Cordelia Fine and Jeanette Kennett, "Mental Impairment, Moral Understanding, and Criminal Responsibility" [ER]