PHIL 168: Philosophy of Law
Fall 2015
Professor 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)
- John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980)
- Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2010).

These three books should also be on hard reserves at the library. Other readings can be found on Electronic Reserves [ER] or on the TED course website [TED]. Please note that the password necessary for accessing Electronic Reserves for this class is db168. 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. 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." 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. 2-4

2. HART'S MODEL OF RULES

Hart's *The Concept of Law* is a 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? How is Dworkin's distinction between concept and conception relevant here? 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? How does Berman's discussion of the relation between formalism and interpretivism in the jurisprudence of sports help shed light on the debate between Hart and Dworkin?

- Hart, *The Concept of Law*, ch. 7 (review)
- Ronald Dworkin, "The Model of Rules" [ER]
- Ronald Dworkin, "Constitutional Cases" [ER]
- Plessy v. Ferguson (1896) [ER]
- Brown v. Board of Education (1954) [ER]
- Mitchell Berman, "On Interpretivism and Formalism in Sports Officiating: From General to Particular Jurisprudence" [TED]

II. CONSTITUTIONAL JURISPRUDENCE

An important application 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?

5. 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]
- Obergefell v. Hodges (2015) [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?

6. THEORIES OF JUDICIAL REVIEW

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 contrast a traditional view of the Court's duty to protect individual constitutional rights with Ely's and Waldron's more skeptical attitudes toward judicial review.

- Ronald Dworkin, "Constitutional Cases" [ER] (review)
- John Hart Ely, *Democracy & Distrust*
- David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review" [ER]
- 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. Then we look at macro-level questions about mass incarceration and finally questions about individual responsibility and punishment.

7. 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]

8. MASS INCARCERATION

How much punishment does crime deserve? We will examine the growing consensus that the criminal justice system in the United States involves *mass incarceration* that is overly punitive and in need of reform. Part of the phenomena of mass incarceration involves trial and sentencing protocols that are overly punitive in apparently nondiscriminatory ways -- mandatory minimums, three-strikes laws, and the trend to try juveniles in adult criminal court. But we will also look at arguments that practices of arrest, prosecution, and sentencing systematically produce racially discriminatory punishment.

- David O. Brink, "Immaturity, Normative Competence, and Juvenile Transfer" [ER]
- David Cole, "Turning the Corner on Mass Incarceration?" [ER]
- Michelle Alexander, *The New Jim Crow*, esp. chs. 1-3.

9. RESPONSIBILITY, EXCUSE, AND INSANITY

We'll also look at issues of individual responsibility and punishment. The retributivist thinks that punishment is a fitting response to culpable wrongdoing. This explains the two main kinds of criminal defenses -- *justifications* deny wrongdoing, whereas *excuses* deny culpability or responsibility. After a brief look at the necessity defense as a form of justification, we will turn to issues about responsibility and excuse as reflected in debates about the insanity defense, concluding with a discussion of whether psychopathy should be excusing under the insanity defense.

- Regina v. Dudley and Stephens (1884) [ER]
- Peter Strawson, "Freedom and Resentment" [ER]
- Gary Watson, "Responsibility and the Limits 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]