PHIL 168: Philosophy of Law
Fall 2017; UCSD
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. I assume you will secure your own access to John Stuart Mill's *On Liberty* and Michelle Alexander's *The New Jim Crow*, though there may be copies available on Electronic Reserves (both were ordered from the bookstore, and inexpensive used copies should be available online). Most of the readings for the course will be electronic and will be posted on Electronic Reserves [ER]. Perhaps a few will be posted on the course website [TED]. If so, this will be reflected on a future version of the Syllabus. Please note that the password necessary for accessing ER for this class is db168.

Though you should do the readings in the order in which they appear here, I have not broken down the assignments by dates. Though I have written about and/or taught each of these topics before, I have not taught this particular configuration before, and I want to proceed at a pace adequate to the issues and our discussion of them, rather than at some preconceived pace. I will regularly indicate where we are on the Syllabus (remind me if I don't). It is very important to read the assignments on time.

I. Legal Interpretation and Judicial Review

Here we focus on the nature of law and legal interpretation and related questions about the justification of judicial review within a constitutional democracy.

A. Legal Interpretation

H.L.A. Hart presents a familiar picture of the nature of law as a system of rules that have a certain kind of institutional pedigree. Courts exist to adjudicate controversies over the existence and implications of the legal rules. However, legal rules are often unclear in some of their applications. What is it to interpret a legal standard, such as a statute or constitutional provision, and where does legal interpretation leave off and judicial legislation begin? Presumably, legal interpretation involves ascertaining the meaning of the words in which the legal standard is expressed. Does the semantic content of a legal standard settle its 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 in such circumstances we should appeal to the intentions or purposes of the framers of the legal rules. 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. What do these two conceptions of the intent of the framers imply about the role of judges and the place of moral and political values in legal interpretation? Hart distinguishes between easy and hard cases and defends the commonsense view that the law is determinate in easy cases but that judges must exercise judicial discretion in deciding hard cases. Plausible as this might sound, it's been challenged both by the Legal Realists, who recognize less determinacy in the law, and by Ronald Dworkin, who argues that there is more determinacy in the law than this. In particular, Dworkin raises interesting questions about Hart's assumptions about interpretation.

1. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chs. V and VII [ER].
2. Oliver Wendell Holmes, "The Path of the Law" *Harvard Law Review* 10 (1897) [ER].
3. John Chipman Gray, "The Judge as Law-Giver" *The Nature of Law*, ed. M. Golding (New York: Random House, 1966), pp. 187-99 [ER].

4. Ronald Dworkin, "The Model of Rules" *University of Chicago Law Review* vol. 35, no. 1 (1967): 14-46 [ER].

B. Equal Protection and Substantive Due Process (* = may be skimmed)

These issues about legal interpretation have a direct bearing on debates about the nature of constitutional interpretation and the limits of judicial review. To provide context to those debates, we need to know some important constitutional history involving individual rights. We will look at some landmark Supreme Court cases involving equal protection and due process, focusing on the rise and fall of the doctrine of substantive due process, epitomized by Lochner v. New York (1905).

1. The United States Constitution and Amendments. Pay special attention to Article III and Amendments I-IX and XIV [ER].
2. Plessy v. Ferguson, 163 U.S. 537 (1896) [ER].
3. Brown v Board of Education, 347 U.S. 483 (1954) [ER].
4. The Slaughter-House Cases 83 U.S. 36 (1873) [ER].*
5. Lochner v New York, 198 U.S. 45 (1905) [ER].
6. Nebbia v. New York, 291 U.S. 502 (1934) [ER].*
7. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) [ER].*
8. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) [ER].*
9. Palko v. Connecticut, 302 U.S. 319 (1937) [ER].*
10. Griswold v. Connecticut, 381 U.S. 479 (1965) [ER].

C. Constitutional Interpretation and Judicial Review

Now we can address issues about constitutional interpretation and judicial review. How should we interpret broad normative language in the Constitution, especially its Amendments, such as "freedom of speech," "unreasonable search and seizure," "due process," "just compensation," "cruel and unusual punishment," and "equal protection of the laws?" Moreover, how, if at all, can we justify judicial review, because that doctrine allows unelected members of the judiciary to overrule the will of a democratic majority? Constitutional rights protect against tyranny of the majority, and it seems to be the judiciary's job to protect constitutional rights. But isn't judicial review undemocratic, and is the judiciary the best institution to protect individual rights? We will contrast three different views — Dworkin's moral reading of the constitution, Antonin Scalia's originalism, and John Hart Ely's representation-reinforcing theory — and their implications for our understanding of constitutional interpretation and judicial review. One central question is whether constitutional interpretation can avoid substantive and potentially controversial normative commitments.

1. *The Federalist Papers* #78 from *The Federalist Papers*, ed. T. Ball (New York: Cambridge University Press) [ER].
2. Ronald Dworkin, "Constitutional Cases" in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), ch. 5 [ER].
3. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press1997), pp. 3-47 [ER].
4. John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), chs. 1 and 4 [ER].
5. David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review" *Philosophy & Public Affairs* 17 (1988): 105-48 [ER].

II. Liberty and Its Limits

One important question within normative jurisprudence concerns what the limits of the law should be. The liberal tradition recognizes that individuals have rights against each other and the

state that constrain how they may be treated. Liberalism, so understood, is an important part of our legal tradition, and John Stuart Mill (1806-73) was an influential proponent of liberal principles. On a common reading of Mill, he embraces the *harm principle* which says that individual liberty can only be restricted when doing do is likely to prevent harm to others. The harm principle explains Mill's eloquent defense of freedom of expression and his skepticism about offense regulation, paternalism, and moral legislation. But this kind of libertarian reading of Mill has some controversial implications and doesn't always fit everything he says. We will explore rival conceptions of liberalism and interpretations of Mill by looking more closely at some issues involving freedom of expression and hate speech, anti-paternalism and nudges, public nuisances and offense regulation, and the legislative enforcement of morality.

A. Mill's Liberalism

1. John Stuart Mill, *On Liberty*. In addition to being available at the bookstore, there are various electronic editions available online, including the edition that is part of Mill's *Collected Works*, vol. XVIII <http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-xviii-essays-on-politics-and-society-part-i>. But that can be difficult to navigate, so you may want to purchase your own copy or use one of the other online editions.

B. Freedom of Expression and Hate Speech

1. National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) [ER].
2. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) [ER].
3. David O. Brink, "Millian Principles, Freedom of Expression, and Hate Speech" *Legal Theory* 7 (2001): 119-57 [ER].

C. Paternalism and Nudges

1. Cass Sunstein, *Why Nudge?* (New Haven: Yale University Press, 2014), Introduction, pp. 1-23 [ER].
2. Gerald Dworkin, "Paternalism" *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/paternalism>.

D. Offense Regulation

1. Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), chs. 7-8 pp. 1-49 [ER].

E. Moral Legislation

1. Bowers v. Hardwick, 478 U.S. 186 (1986) [ER].
2. Lawrence v. Texas, 539 U.S. 558 (2003) [ER].
3. Obergefell v. Hodges, 576 U.S. ____ (2015) [ER].

III. Punishment, Responsibility, and Mass Incarceration

Finally, we turn to issues within criminal jurisprudence about punishment, responsibility, and mass incarceration. We'll begin by contrasting *forward-looking consequentialist* justifications of punishment, which appeal to rehabilitation, deterrence, or the expression of community norms, and *backward-looking retributive* justifications of punishment, which appeal to desert. Purely forward-looking rationales are problematic, but mixed rationales that incorporate desert — understood in terms of culpable or responsible wrongdoing — can explain the justification of blame and punishment. If 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.

But how much punishment does crime deserve? We will examine the growing consensus that the criminal justice system involves *mass incarceration* that stands 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 current practices of arrest, prosecution, and sentencing systematically produce racially discriminatory punishment.

A. Punishment and Responsibility

1. Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), ch. 2 [ER].
2. Herbert Morris, "Persons and Punishment" *The Monist* 52 (1968): 475-501 [ER].
3. David O. Brink and Dana K. Nelkin, "Fairness and the Architecture of Responsibility" *Oxford Studies in Agency and Responsibility* 1 (2013): 284-313 [ER].

B. Mass Incarceration

1. David O. Brink, "Immaturity, Normative Competence, and Juvenile Transfer" *Texas Law Review* 82 (2004): 1555-1585 [ER].
2. Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2010). Available in the bookstore and ER.
3. James Forman, "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow" *New York University Law Review* 87 (2012): 101-46 [ER].
4. Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge: Harvard University Press, 2016), ch. 8 [ER].