

PHIL 168: Legal Philosophy

UCSD; Winter 2008

TTH 9:30-10:50; CogSci Bldg 005

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- Final Exam: Tuesday, March 18, 8-11am

Legal philosophy is often divided into **analytical** and **normative jurisprudence**. Analytical jurisprudence examines the nature of law and legal reasoning, whereas normative jurisprudence examines moral issues that the law raises, such as the enforcement of morality, the scope and limits of freedom of expression, and the justification of punishment. The line between analytical and normative jurisprudence is not always very clear, especially when it comes to the interpretation of constitutional provisions that protect moral and political rights, such as the provisions of the Bill of Rights, the due process clause of the Fourteenth Amendment, and the equal protection clause of the Fourteenth Amendment. We will examine both sorts of issues.

We will begin by looking at issues in analytical jurisprudence about the **nature of law** and **legal interpretation**. What makes a social system a legal system? For instance, what distinguishes the law from etiquette or other social mores? We speak of both moral and legal rights, and the main legal branch of our government is the Department of Justice. What is 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. Which view is right? Moreover, 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 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. 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? We will also examine the implications of these interpretive issues for debates about the nature of constitutional interpretation and the role of **judicial review** within a constitutional democracy.

One area where analytical and normative jurisprudence become entangled is in assessing constitutional constraints, if any, on the legislative **enforcement of morality**. Does society have the right to legislate matters of personal morality -- for instance, to forbid homosexual sex -- if

enough people feel strongly enough about those matters? Or does moral legislation violate a personal right to privacy? If we recognize a constitutional right to privacy, what exactly is its scope, and what does this tell us about landmark cases such as Bowers v. Hardwick and Lawrence v. Texas or Roe v. Wade?

We will look at debates about the enforcement of morality as part of a larger set of issues in normative jurisprudence about the **nature and limits of the criminal law**. We'll begin by looking at a variety of issues about the **justification of punishment**. **Why** do we punish? **Consequentialists** defend punishment as a way to deter crime in general, or at least to prevent the particular offender from committing other crimes. But do we punish the right people if we punish all and only those whose punishment promotes deterrence? Some see **rehabilitation** as the function of punishment. Should the state function as therapist, and is our criminal justice system designed to carry out this rehabilitative function? **Retributivists** punish victims, because they deserve punishment. Can we justify ascriptions of desert, or is retribution a form of vengeance? Some justify punishment as an expression of the community's condemnation of crime. Is this expressive view really distinct from consequentialist and retributive conceptions? How plausible are these different rationales for punishment, and how are they related to each other? Even if we can justify punishment, how do we determine the severity of punishment? Should it be "an eye for an eye"? Different rationales for punishment may have different implications for the severity of punishment. We often learn most about something by studying its limits or pathologies. Time permitting, we may look at issues about partial or diminished criminal responsibility as they arise in debates within juvenile justice about punishing juveniles as adults or imposing the death penalty on juveniles.

Why and **how** we should punish are different questions from **what** we should punish. This last question raises issues about the moral uses and limits of the criminal law. We will approach this issue by looking at John Stuart Mill's famous defense of individual liberties against governmental interference in On Liberty (1859). There Mill distinguishes among different categories of liberty and restriction on liberty. He defends restrictions on liberty that prevent harm to others but condemns censorship, paternalism, offense legislation, and the enforcement of morality. We'll examine Mill's liberal principles and the way he applies them to different categories of legislation and test the adequacy of his categorical approach. To accept sensible limitations on the reach of the criminal law do we have to embrace the liberal claim that the criminal law should only be used to prevent harm to others?

FORMAT

Class meetings will involve lecture, seasoned with discussion. The lectures provide philosophical background and structure to the issues raised by the readings and will present and assess these issues in a fairly systematic way. I hope and expect students will be engaged by the material and feel free to ask question and make comments.

REQUIREMENTS

Work for the course will consist of five quizzes, two papers, and a final exam. The quizzes will be held every other week (generally on Thursdays). They will include true/false, multiple choice, and/or short answer questions. They should not be too difficult for students that are up-to-date with the readings and lectures. The first paper should be approximately 3-4 pages; it is currently scheduled to be due Tuesday, Jan. 22. The second paper is longer and is to be written in two drafts. The first draft is currently scheduled to be due Thursday, Feb. 21 and to be

returned with comments by Tuesday, Mar. 4. The revised and final version should be approximately 6-8 pages and will be due Tuesday, Mar. 11. Paper topics will be distributed at least one week before the due date. Students are encouraged to discuss paper topics and their plans for the paper with the TA or me. If students require an extension on a paper, they must get the extension approved in advance. Late papers (for which an extension was not approved in advance) will lose one fraction of a grade for every day late (e.g. a paper that would have received a B+ if handed in on time will receive a B- if handed in two days late). Study questions for the final exam will be distributed before the end of term (details later). The quizzes are worth 20% (collectively), the first paper is worth 15%, the second paper is worth 30%, and the final is worth 35% of your grade. All requirements must be completed to receive a passing grade. Students are not graded on a curve (that is, there is no fixed percentages for particular grades; there could in principle be a disproportionate share of As or Cs). Students can help their grades at the margins if their grades display linear progress or they are regular and constructive contributors in class.

BOOKS

The following three books have been ordered for the course and should be available at the University Bookstore:

- H.L.A. Hart, The Concept of Law, 2d ed. (Oxford Clarendon Press, 1994).
- Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986).
- John Stuart Mill, On Liberty (Indianapolis: Hackett, 1978) [other editions acceptable].

There is also a set of additional required readings that will be posted on Electronic Reserves.

READINGS

The reading assignments are listed on the Syllabus; 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.

WEBSITE

All class materials and handouts will be available on the course website (<http://philosophy.ucsd.edu/faculty/dbrink/courses/168-08>), which can also be accessed through the departmental website or my own website. Students will be expected to have electronic or hard-copy access to the handouts in class.