

PHIL 168: Philosophy of Law Winter 2008; David O. Brink Syllabus

Here is a list of topics and readings. 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. (Oxford: Clarendon Press, 1994) [first edition also acceptable]
- Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986)
- John Stuart Mill, On Liberty (Indianapolis: 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.

1. AUSTIN AND LEGAL POSITIVISM

Austin claims that law is a **command of the sovereign** backed by threat of sanction for noncompliance. How do you tell if someone is the 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. 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 the sovereign be bound by law, and can we make sense of democratic sovereigns? Do all laws create duties, or do some (so-called 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 prelegal 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** -- 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]
- 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. 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 theory 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
- The Fugitive Slave Laws [ER]

6. JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

When the judiciary exercises judicial review it invalidates democratic (state or federal) legislation as unconstitutional. Judicial review 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 (functions)? But, 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. But what is to count as constitutional interpretation? This question is often debated in the context of assessing **substantive due process review**. Some criticize substantive due process as noninterpretive review, whereas others defend it as noninterpretive review. Are these the only options? That depends on how we understand interpretive review. Many assume that constitutional adjudication must be uncontroversial and/or value free; they claim that it should be guided by the plain meaning of explicit constitutional language or the (specific) intentions of the framers. Do these assumptions make sense in light of our earlier discussion? Bork defends Brown as good interpretive review but criticizes Griswold as imposing extraconstitutional values. Do his claims reflect a coherent jurisprudence?

- The United States Constitution [ER]
- Federalist Papers #78 [ER]
- Plessy v. Ferguson (1896) [ER]
- Brown v. Board of Education (1954) [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]
- John Hart Ely, Democracy and Distrust [ER], chs. 1 and 3
- Robert Bork, The Tempting of America [ER], chs. 6-7
- Brink, "Legal Interpretation, Objectivity, and Morality" [ER], §§10-14.

7. CRIME AND PUNISHMENT

Theories of punishment must explain why we should punish and whom we should punish. **Consequentialists** often defend punishment as a form of **deterrence** (both general and specific). But do we punish the right people if we punish all and only those whose punishment promotes deterrence? Consequentialist views may be both under-inclusive and over-inclusive in their accounts of who should be punished. 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? Theories of punishment must also explain how much we should punish those that we punish. Should deterrence be our measure, or should desert? We often learn a lot about some phenomenon by studying its limits or pathologies. Time permitting, we might 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.

- Bentham, An Introduction to the Principles of Morals and Legislation [ER], chs. xii-xiv
- Rawls, "Two Concepts of Rules" [ER]
- Morris, "Persons and Punishment" [ER]
- Nozick, Philosophical Explanations [ER], pp. 363-80
- Brink, "Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes" [ER]

8. THE MORAL LIMITS OF THE LAW

With a somewhat better understanding of the nature and justification of punishment, we are in a better position to explore the moral limits of the law, especially the criminal law. We'll do this by reconstructing and assessing J.S. Mill's classic defense of individual liberties from governmental interference 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 Mill defend these **categorical** claims? His discussion of freedom of expression occupies a central place in On Liberty. 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

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.

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? 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? Is that plausible? Consider his discussion of incendiary speech (iii 1). Mill’s defense of freedom of expression has important echoes in First Amendment jurisprudence. But First Amendment jurisprudence does not treat all forms of speech and censorship the same. It distinguishes between **high value** and **low value** speech and is more protective of high value speech. What would Mill think of these aspects of First Amendment jurisprudence? What would Mill’s attitude be toward the regulation of discriminatory speech or, more narrowly, hate speech?

- Brink, “Millian Principles, Freedom of Expression, and Hate Speech” [ER]

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 profound offense, especially his interesting discussion of the Bus Rides. Which bus rides are the most offensive? Feinberg defends 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? Feinberg contrasts these legitimate types of nuisance legislation with legislation designed to prevent profound offense. How does profound offense differ from nuisance?

- Feinberg, Offense to Others [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 over-ruled 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 (at least legal moralism that cannot be subsumed under the harm principle). Is this right? In particular, must the liberal reject legal moralism, as Mill does? Consider Moore's defense of legal moralism. He argues 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. Moore shows how one might defend liberal conclusions (defending Lawrence) while rejecting Mill's categorical framework.

- Devlin, The Enforcement of Morality [ER]
- Bowers v. Hardwick (1986) [ER]
- Lawrence v. Texas (2003) [ER]
- Moore, Placing Blame [ER], ch. 16