

Philosophy of Law

Philosophy 34
Spring 2007

Schedule

WHAT IS LAW?

Tuesday, 16 January

OVERVIEW

Overview of the course in general and the “what is law?” section in particular. What does the question mean and why does it matter? Presentation of different natural law views.

READING: None

Thursday, 18 January

AUSTIN’S LEGAL POSITIVISM

Austin on law as command and the nature of legal obligation. Hart’s objections. First, some laws enable people to do things; they are not accurately construed as commands that prohibit behavior. Second, Austin conflates legal obligations with being obliged to pay a gunman.

READING: Austin, pp. 24-33, Lecture I. Hart, pp. 36-41.

Tuesday, 23 January

AUSTIN ON SOVEREIGNTY

If laws are commands, the sovereign is the one who issues them. But how do we identify the sovereign? It can’t be by some other command. Austin relies on habits of obedience to identify the sovereign. Hart notes the shortcomings of this, especially when the state changes over from one sovereign to another. The new sovereign precedes any habits.

READING: Austin, pp. 33-35, Lecture VI. Hart, pp. 41-5.

Thursday, 25 January

HART’S POSITIVISM

What is the “rule of recognition”? How does it address the problems with Austin’s version of positivism?

READING: Hart, pp. 45-50.

Tuesday, 30 January

LEGAL REALISM

Holmes and Frank describe the question “what is the law?” as a predictive one. Why? The main objection to this view is that judges are supposed to interpret the law, not make it. Why?

READING: Holmes, pp. 119-24. Frank, pp. 125-7.

Thursday, 1 February

HART ON JUDICIAL INTERPRETATION

How does Hart answer the charge that judges “make” law when they go beyond the letter of the laws they interpret?

READING: Hart, pp. 50-60, especially § III. *Test distributed.*

Monday, 5 February

TEST DUE.

APPLICATIONS

- Tuesday, 6 February* THE SEPARATION OF LAW AND MORALITY
How should we regard people who took advantage of morally bad laws? For instance, should the Allied administrators have respected Nazi laws after World War II?
READING: Hart, pp. 60-6, §§ 4-6.
- Thursday, 8 February* FULLER ON HART AND NAZI LAW
Does Fuller successfully answer Hart?
READING: Fuller, pp. 70-80, §§ 3-6.
- Tuesday, 13 February* THE SPELUNCEAN EXPLORERS
Fuller presents a fictitious case that has reached the highest court. He gives four different opinions on how to resolve the case. These depend on each justice's view of the nature of the law. Today, we will discuss Justice Truepenny, Justice Foster, and Justice Tatting's opinions.
READING: Fuller, pp. 142-50. *First paper topics distributed.*
- Thursday, 15 February* THE SPELUNCEAN EXPLORERS II
Continued discussion, this time focussed on Justice Keen and Justice Handy's opinions.
READING: Fuller, pp. 150-6.
- Tuesday, 20 February* JUSTICE SCALIA'S ORIGINALISM
Scalia interprets laws for a living: he's an Associate Justice of the Supreme Court. In today's reading, he makes the case for his "originalist" method for interpreting the law.
READING: Scalia, pp. 187-95.
- Thursday, 22 February* GEO. WASHINGTON'S BIRTHDAY.
No class today.
READING: None
- Monday, 26 February* FIRST PAPER DUE
- Tuesday, 27 February* DWORKIN VS. SCALIA
What are Ronald Dworkin's objections to Scalia's position? How does Scalia reply? Who is right?
READING: Dworkin and Scalia, pp. 196-203.
- Thursday, 1 March* MUST WE OBEY THE LAW?
We have looked at how *judges* think about the "what is the law?" question. What about the citizen's perspective? In today's reading, Socrates argues that he has a very strong obligation to obey the law.
READING: Plato, pp. 204-12.

Tuesday, 6 March

THE CASE FOR CIVIL DISOBEDIENCE

Martin Luther King, Jr. had a different view of the obligation to obey the law. In this reading, he makes the case for civil disobedience, that is, disobeying some laws. Smith denies that there is any significant obligation to obey the law in general. We will read the last part of his article, in which he tries to answer an objection. It is that if the citizens of a good state have no obligation to obey its laws then there would no distinction between the authority of a good and a bad state. Since there is such a distinction, the objection goes, it follows that there must be an obligation to obey the law.

READING: King, pp. 213-21; Smith, pp. 232-3, §5.

RIGHTS

Thursday, 8 March

RIGHTS

Dworkin argues that there are moral rights that no law can limit. This article tries to show what taking rights seriously involves. The normal justification for state action is that it will improve the common good. But that isn't enough when the action would infringe moral rights, according to Dworkin.

READING: Ronald Dworkin, "Taking Rights Seriously", in: *Taking Rights Seriously* (Harvard University Press, 1977).

13-15 March

SPRING BREAK

No class

READING: none

Tuesday, 20 March

HART'S THEORY OF RIGHTS

Hart tries to show what is distinctive about rights. What do rights add that could not be fully described by listing people's duties? His answer is that rights give those who have them control over the liberty of those who bear the duties. He argues for his "choice" theory of rights by contrasting it with the "benefit" theory, according to which having a right involves being the person who will benefit from the performance of a duty.

READING: H.L.A. Hart, "Are there any natural rights?", *Philosophical Review* 64 (1955), pp. 175-82.

Thursday, 22 March

NATURAL RIGHTS

Hart uses his theory of rights to argue that there is at least one natural right: the equal right to be free. A natural right is a right that exists independently of any human interactions or institutions. Hart claims that some of the rights that we recognize make sense only if there is an equal natural right to be free.

READING: Hart, pp. 183-91.

Tuesday, 27 March

THE VALUE OF RIGHTS

This is Feinberg's attempt to answer the question about what is distinctive about rights. According to Feinberg, rights give us the ability

to make claims. What does that mean? Feinberg also thinks that this distinctive feature of rights explains their value as well. We will look at that next time.

READING: Feinberg, pp. 304-12. *Second paper topics distributed.*

Thursday, 29 March

HOW IMPORTANT IS CLAIMING?

According to Feinberg, the ability to make claims is necessary for self-respect. Claiming is something that only a particular person can do; criticizing, by contrast, is something that anyone can do. Why isn't criticizing good enough for self-respect? Also, are all rights claims, in Feinberg's sense of the term?

READING: Feinberg, pp. 308-12. Selections from: H. L. A. Hart, "Legal Rights", in: *Essays on Bentham* (Oxford University Press, 1982).

LIBERTY

Tuesday, 3 April

MILL'S HARM PRINCIPLE

Mill claims that society is justified in regulating behavior only for the purpose of preventing harm. He argues for this on the grounds of utility: we will be better off, on the whole, if we follow this rule than if we allow exceptions to it.

READING: Mill, pp. 267-78; Feinberg, pp. 379-81, §1

Thursday, 5 April

REGULATING OFFENSIVE BEHAVIOR

Feinberg challenges the harm principle. He describes a range of cases in which someone's behavior is offensive. He maintains that it can make sense to prohibit offensive behavior even if it is not harmful.

READING: Feinberg, pp. 278-93.

Tuesday, 10 April

PATERNALISM

Here is another challenge to the harm principle. Dworkin presents cases in which it seems to make sense to prohibit people from doing things for their own good, aside from whether the interests of others are involved.

READING: Dworkin, pp. 293-298, §§1-5.

Thursday, 12 April

DWORKIN'S POSITIVE PROPOSAL

Dworkin proposes a test for determining when paternalistic interference is legitimate. It is legitimate whenever a rational person would consent to it.

READING: Dworkin, pp. 299-303, §6.

Friday, 13 April

SECOND PAPER DUE

PUNISHMENT

Tuesday, 17 April

PUNISHMENT

Why is it appropriate to punish those who violate the criminal law? Retributivists hold that criminals deserve punishment. But is that anything more than the desire for vengeance? Consequentialists or utilitarians hold that punishment is needed for the social good. But that doesn't explain why we restrict punishment to those who are guilty of crimes. Would combining these two views address each one's weak points?

READING: Feinberg, pp. 799-804.

Thursday, 19 April

THE RIGHT TO PUNISHMENT

Morris argues that punishment has a surprising rationale. It is an expression of respect for the person being punished. Today, we will concentrate particularly on Morris's first two points: that there is a right to punishment and that this right is derived from the right to be treated as a person.

READING: Morris, pp. 819-27, §§1-2.

Tuesday, 24 April

PUNISHMENT AND HUMAN RIGHTS

Morris's third and fourth points: that the right to be treated as a person is an inalienable human right and that the only way to deny it would be to deny the existence of all human rights.

READING: Morris, pp. 827-31, §§3-4.

Thursday, 26 April

VICTIMS

Victims of crimes do not control decisions about prosecuting the people who violated them. In this way, the criminal law is different from the civil law. Should victims have any role at all in determining the punishment of criminal offenders?

READING: Murphy, pp. 842-51.

Materials

Most of the readings are taken from the seventh edition of the collection: *Philosophy of Law*, edited by Joel Feinberg and Jules Coleman (Wadsworth, 2004). Readings identified with a name and page numbers are in this book. It is available from the Huntley Bookstore.

The following articles will be made available through the library reserve system: Ronald Dworkin, "Taking Rights Seriously" (March 8); H.L.A. Hart, "Are There Any Natural Rights?" (March 20-22); and H.L.A. Hart, "Legal Rights" (March 29).

I will make extensive use of the Sakai site for this course. For instance, comments on lectures, grading policies, and announcements will be posted there.

Instructor

My name is Michael Green. My office is 207 Pearsons. I will hold office hours every Tuesday and Thursday between 3:30 and 5. If my office hours are inconvenient, we can easily make alternative arrangements.

My office phone number is 607-0906. Life seems to go better if I answer email only once a day. I will reply, but if you need an answer quickly, you're probably best off calling.

Assignments

Grades will be based on four assignments: one short test (worth 10% of the final grade), two papers and a final exam (worth 30% each).

The short test will be a take home exam; it will be distributed on Thursday 1 February and due on Monday, 5 February. Papers will be 1800 words long, that is, around five or six pages. They will be due on Monday, 26 February and Friday 13 April. The Final Exam is scheduled for Tuesday, 8 May at 9 am.

Seniors will have to make arrangements to take the exam early. Grades for them are due on Friday, 4 May.

All assignments must be completed in order to pass the course. Late papers will be accepted *without question*. They will be penalized at the rate of one-quarter of a point *per* day. Grades are based on the College's twelve point scale. Exceptions will be made in extremely unusual circumstances; suffering from writer's block is, alas, too common to qualify. The penalty is extremely mild. Just turn it in the next day.