

PHIL 168: Philosophy of Law
Spring 2019; MWF 10-10:50am; Sequoia 147
Professor David O. Brink

Office: H&SS 8016

Office hours: M 11am-noon, F 1-2pm, and by appointment

Email: dbrink@ucsd.edu

This is an upper-division introduction to some central issues in philosophy of law or jurisprudence. We will focus on three main kinds of issues — issues in *analytical jurisprudence* about the nature of law and legal interpretation, issues in *constitutional jurisprudence* about the nature of constitutional interpretation and judicial review, and issues in *criminal jurisprudence* about the justification of punishment and the nature and limits of responsibility. We will explore these issues by reading and discussing a variety of classic and contemporary texts and cases.

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, and what distinguishes the law from etiquette or other social norms? 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. The natural law tradition seems to view law in aspirational terms, whereas legal positivism treats law as a social artifact. 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. 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 can see the evolution of this conception of judicial review by looking at the rise and fall of substantive due process. How different would our legacy of individual rights look without our doctrine of judicial review? Under what conditions is that doctrine justified?

We'll also look at some foundational issues about punishment and responsibility. We'll begin by looking at a variety of issues about the justification of punishment. *Consequentialists* justify punishment by appeal to forward-looking considerations, such as 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.

The criminal law agrees with the retributivist insistence that desert is an essential part of the justification of blame and punishment. 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 practices of arrest, prosecution, and sentencing systematically produce racially discriminatory punishment.

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 the insanity defense, concluding with a discussion of whether psychopathy should be excusing under the insanity defense.

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 that students will be engaged by the material and ask questions and make comments.

Students are expected to come to lecture regularly and be prepared. Attendance will not be taken, but students who attend lectures and participate in discussion do better on class assignments.

REQUIREMENTS

Students registered for the course will take five bi-weekly quizzes and write two papers. The successful completion of each of these three requirements is a condition of passing the course. There will be no final exam.

- **Quizzes.** The quizzes will be held every other week (on Fridays), beginning April 12. They will include true/false, multiple choice, and/or short answer questions and take less than 10 minutes. All quizzes count, and you can miss no more than one quiz and still pass the course. Collectively, the quizzes will be worth 35% of your overall grade.
- **First Paper.** The first paper should be four double-spaced pages (+/-). It will be due in class Monday, April 29. The first paper will be worth 25% of your overall grade. Paper topics will be distributed at least 10 days in advance of the due date.
- **Second Paper.** The second paper should be eight to nine double-spaced pages (+/-). It will be due by 5pm, Monday, June 10. The second paper will be worth 40% of your overall grade. Paper topics will be distributed at least two weeks in advance of the due date.
- **Submission of Papers.** Students will be expected to submit papers electronically, via turnitin.com on the course website.
- **Late Papers.** If students require an extension on the first paper, they must request and justify an extension in advance via email. Late papers (for which an extension was not approved in advance) will lose one full grade for every day (24-hour period) late. For instance, a paper that would have received an A- if handed in on time will receive a C- if handed in two days (more than 24 hours and not more than 48 hours) late.
- **Grade Breakdown.** As percentages of your total grade: quizzes = 35%, first paper = 25%, second paper = 40%.
- **Plagiarism.** Students should note that plagiarism is a violation of the Principles of Academic Integrity (<http://senate.ucsd.edu/manual/appendices/app2.htm>). Anyone determined to have violated these principles will fail the assignment and the course and will be reported to the Office of Academic Integrity. If you have any doubts about what constitutes plagiarism or other academic misconduct, please consult with me *in advance*.
- **Recording.** Students may not record (audio or video) in this class except in accordance with ADA accommodations. Any recordings made in connection with a disability accommodation are for the student's personal academic use only and may not be distributed in any manner to any other individual.

BOOKS

I have not ordered any books for the course, because all the readings will be available on the course website on TritonEd (TED). We will read a fair amount in two books, and some students may wish to purchase hard copies online (e.g. through Amazon).

- H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford: Clarendon Press, 1994). Any of the three editions is acceptable; all else being equal, the second or third edition would be preferable.
- John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

I have posted a pdf of the Hart book under the Readings heading in left-hand column of the TED course website. All other readings will be posted on the main content page on the TED website.

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 course materials and handouts will be available on the course website available at TED (<https://ted.ucsd.edu>). Students enrolled in the course should have automatic access to the website. You will be expected to have access to print or electronic versions of these handouts during class. You should check periodically to make sure that you have current versions of all the handouts (which are revised or updated periodically).