

POL 192b: Legal Theory

Spring 2015

Mandel G10

W 2:00 – 4:50PM

Professor Jeffrey Lenowitz

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Olin-Sang 206

Office Hours: Mondays, 1:30 - 3:30

Course Description:

This is a course in legal theory and philosophy. It does not focus on case law, the techniques of a lawyer, or the structure of any particular legal system. Rather, we will focus on the deep conceptual and normative assumptions upon which any legal system or action ultimately rests. We will be looking at jurisprudential debates that began in the ancient world and continue to this day. In the first two thirds of the course we will focus on the most general questions: What is law? What is the relationship between legality and morality? Does a law have to be moral? Should governments attempt to legislate morality? What do or should judges do? What does it mean to interpret the law? In the final part of the course we will narrow down to more specific but nonetheless fundamental questions: Why do we punish lawbreakers? Are legal systems inherently biased or oppressive? Can we justify capital punishment? Is assisted suicide legally or morally permissible?

Prerequisites:

This seminar is designed for advanced undergraduates and graduate students. The readings are challenging and numerous, the subject matter complex, and students will engage with ideas and arguments drawn from the history of political thought, political theory, legal theory, and moral philosophy. As such, students should have a foundation in political theory, philosophy, or law, meaning that they have taken two courses in these areas. Students who do not have this base but still wish to take the course may email me and we can discuss the possibility of an exception.

Requirements and Grading:

Students are expected to complete all assigned readings in accordance with the class schedule and to be prepared to **discuss them in depth**. This course combines lectures with vigorous discussion, mainly latter, and neither of which will be useful unless all material is read ahead of time. Attendance is mandatory unless accompanied by a **legitimate** explanation. We meet only once per week, thus the threshold for what makes an explanation legitimate will be quite high.

Undergraduate Students:

- Seminar Participation, 15% [attendance and active participation]
- In-class Presentation, 10% [prepare 20 minutes of material, with a handout]

- Final paper (2000 – 2500 words), 30% **Due, May 1, noon**
- One short paper (1250 – 1500 words), 20% **Due: February 23, noon.**
- One take-home late midterm, 25% **Due: April 9, noon.**

Graduate Students:

- In-class Presentation, 10%
- Seminar Participation, 20%
- Term paper (20-25 pages), 70%

**Please note that if you are a student with a documented disability on record at Brandeis University and wish to have a reasonable accommodation made for you in this class, please see me immediately.

Academic Integrity:

All students are expected to be familiar with and to follow the University's policies on academic integrity (see <http://www.brandeis.edu/studentlife/sdc/ai>). Faculty may refer any suspected instances of alleged dishonesty to the Office of Student Development and Conduct. Instances of academic dishonesty may result in sanctions including but not limited to, failing grades being issued, educational programs, and other consequences.

Technology Policy:

No phones or computers should be visible during the class. Checking either of them will result in a reduced participation grade. However, if there are exceptional circumstances that require you to use a computer, come talk to me and we can see about the possibility of an exception.

Class Schedule:

January 14: Introduction and Organizational Meeting

- Lon Fuller, "The Case of the Speluncean Explorer"

January 21: Natural Law Theory and Command Theory (Imperativism)

- Thomas Aquinas, *Summa Theologiae*. Selections
- John Austin, *The Province of Jurisprudence Determined*, 10-37, 211-241

January 28: Hart's Criticism

- Hart, H.L.A., *The Concept of Law*, Chapters 1-4

February 4: Hart's Theory and Beginning of Dworkin

- H.L.A. Hart, *The Concept of Law*. Chapters 5-6
- Ronald Dworkin, *Taking Rights Seriously*. Chapter 2.

February 11: **Dworkin Continued**

- Ronald Dworkin, *Taking Rights Seriously*, Chapter 4
- Ronald Dworkin, *Law's Empire*, Chapter 7.

February 25: **Hart versus Fuller**

- H.L.A. Hart, *The Concept of Law*, Chapter 9
- Lon Fuller, *The Morality of Law*, 33 - 107

March 4: **New Natural Law Theory**

- John Finnis, *Natural Law and Natural Rights*, chapters 1, 2, 10, 12

March 11: **Devlin, Hart, Homosexuality**

- Lord Patrick Devlin, "Morals and the Criminal Law."
- H.L.A. Hart, "Social Solidarity and the Enforcement of Morality," *The University of Chicago Law Review* 35, No. 1 (Autumn, 1967).

March 18: **Moral Limits on Criminal Law**

- John Stuart Mill, *On Liberty*, Selections
- Joel Feinberg, "Legal Paternalism"
- Gerald Dworkin, "Paternalism," *The Monist* 56, no. 1 (1972): 64 – 84.
- Richard J. Arneson, "Mill versus Paternalism," *Ethics* 90, no. 4 (1980): 470 – 489

March 25: **Critical Perspectives on the Law**

- Duncan Kennedy, "The Critique of Rights in Critical Legal Studies"
- Martha Albertson Fineman, "Gender and Law: Feminist Legal Theory's Role in New Legal Realism"
- Mark Tushnet, "An Essay on Rights," *Texas Law Review* 62, no. 8 (May 1984).

April 1: **Punishment 1**

- Hampton, Jean and Jeffrie Murphy. *Forgiveness and Mercy*. Introduction and chapters 2, 4.

April 15: **Punishment 2**

- Shafer-Landau, Russ. "The Failure of Retributivism." *Philosophical Studies: An International Journal for Philosophy* 82, no. 3 (Jun., 1996).
- Hart, H.L.A, "Prolegomenon to the Principles of Punishment"

April 22: **Punishment: The Death Penalty**

- Michael Davis, "The Death Penalty, Civilization, and Inhumaneness," *Social Theory and Practice* 16, no. 2 (1990): 245 – 259
- Jeffrey Reiman, "The Death Penalty, Deterrence, and Horribleness: Reply to Michael Davis," *Social Theory and Practice* 16, no. 2 (1990): 261 – 272
- Van den Haag, Ernest. "The Death Penalty Once More." *U.C. Davis Law Review*, 957 (1984-1985)
- Bedau, Hugo A. "A Reply to Van den Haag"