
SEMINAR IN PHILOSOPHY OF LAW (7926): HART AND HIS CRITICS

[last revised: December 15, 2006]

Prof. Edmundson

Fall 2006

Thursdays 4-5:40

Room 653

Discussion list e-mail: law7296wae.200608@gsulaw2.gsu.edu

The late H.L.A. Hart is thought by many to have been the greatest legal theorist of the 20th century, and perhaps the greatest legal philosopher of all time. His reputation rests largely (but hardly exclusively) upon what he accomplished in one book, *The Concept of Law*, first published in 1961. In this seminar we will explore in depth the doctrines Hart put forward in that book and in other writings, with specific reference to the criticisms they attracted, some of which attained have a celebrity of their own, such as the “Hart-Fuller debate,” the “Hart-Devlin debate,” the “Hart-Dworkin debate.” Open to J.D. and M.A. candidates by permission of the instructor; contact wedmundson@gsu.edu. An undergraduate background in philosophy would be highly advantageous, but there are no prerequisites. E-mail the instructor if you have questions.

First assignment

“Definition and Theory in Jurisprudence” (handout on 3d floor shelving)
CL ch. I

Required texts

H.L.A. Hart. 1994. *The Concept of Law*, 2d ed. with Postscript edited by P. Bulloch and J. Raz. Oxford U.P. (ISBN: 0198761236) (hereinafter: “*CL*”)

Recommended

Coleman, Jules, ed. 2001. *Hart’s Postscript: Essays on the Postscript to The Concept of Law*. Oxford U.P. (ISBN: 019924362X)

Coleman, Jules, Scott Shapiro, and Kenneth Einar Himma, eds. 2002. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford U.P. (ISBN: 019927097X)

Golding, Martin P. and William A. Edmundson, eds. 2004. *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Blackwell Publishing. (ISBN: 0631228322)

Lacey, Nicola. 2004. *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*. Oxford U.P. (ISBN: 0199274975)

On reserve

All of the above, plus:

H.L.A. Hart. 1984. *Essays in Jurisprudence and Philosophy*. Oxford U.P.

H.L.A. Hart. 1982. *Essays on Bentham*. Oxford U.P.

H.L.A. Hart. *Punishment and Responsibility*. Oxford. U.P.

H.L.A. Hart. 1994. *Law, Liberty, and Morality*. Stanford U.P.

Hart, H.L.A. and Antony Honore. 1985. *Causation in the Law*. Oxford U.P.

MacCormick, Neil D. 1981. *H.L.A. Hart*. Stanford U.P.

E-mail Discussion List

There is an e-mail discussion list for the seminar. You are already subscribed, but you may change the e-mail address to which postings are directed by going to:

<http://gsulaw.gsu.edu/cgi-bin/emailupdater>

The WWWeBBB Forum address is:

<http://gsulaw.gsu.edu/wedmundson/forums/law7296wae/>

There, you can view prior discussion threads and compose and post messages as well. (In a pinch, you can also post via e-mail: e-mail: law7092wae@gsulaw.gsu.edu ; but your message will appear on the Forum as a single, unbroken line.)

The Grading System Explained

There will not be a final examination. A final paper of 12-20 (typed, double-spaced) pages will be required. Your grade will be based upon class participation and your paper. A first draft of the paper will be due in class on November 16; and the final paper will be due at before midnight on the last day of the exam period. *All* drafts, preliminary and final, *must* be submitted electronically.

Attendance policy

Roll will be taken at each class meeting. Two or more unexcused absences will be grounds for the assignment of a failing grade. Please also note that class nonparticipation may influence your final grade. Because absences due to illness or conflicting family, legal, military or business duties are routinely excused, you need not telephone me to ask that such an absence be excused.

Office Hours

To make an appointment, e-mail: wedmundson@gsu.edu .

Schedule

| Date | Topic and Reading |
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| 8/24 | <u>Hart's background and ambitions: law, coercion, and morality</u> Reading: "Definition and Theory in Jurisprudence" handout <i>CL</i> ch. I |
| 8/31 | <u>Hart's targets I: John Austin: Law as Sovereign Command</u> <i>CL</i> chs. II-IV |
| 9/7 | <u>Hart's Theory: Law as Union of Primary and Secondary Rules</u> <i>CL</i> chs. V-VI |
| 9/14 | <u>Hart's targets II: American Legal Realism</u> <i>CL</i> ch VII |
| 9/21 | <u>Obligation and Morality</u> <i>CL</i> chs VIII-X |
| 9/28 | <u>Hart v. Fuller: the Separation of Law and Morality</u> Hart, "Positivism and the Separation of Law and Morals," <i>Harv. L. Rev.</i> 71 (1957-8) 593. Fuller, Lon (1958). "Positivism and Fidelity to Law: a Reply to Professor Hart," 71 <i>Harvard Law Review</i> 630. Kramer, Matthew, "Scrupulousness without Scruples: a Critique of Lon Fuller and his Defenders" <i>Oxford J. Legal Studies</i> 1998 18: 235-264 [Postema, Gerald J. 1998. <i>Norms, reasons, and law</i> . In <i>Current Legal Problems</i> 1998, M.D.A. Freedman, ed. Oxford: Oxford University Press] |
| 10/5 | <u>Hart v. Dworkin I</u> Dworkin, Ronald, "The Model of Rules I," <i>Taking Rights Seriously</i> 14-45 Dworkin, Ronald, "The Model of Rules II," <i>Taking Rights Seriously</i> 46-64 Dworkin, Ronald, <i>Law's Empire</i> (1986) 225-66 |
| 10/12 | <u>Hart v. Dworkin II</u> Coleman, Jules. 1982. "Negative and Positive Positivism," <i>Journal of Legal Studies</i> 9:139-64. <i>CL</i> Postscript Murphy, Liam, "The Political Question of <i>The Concept of Law</i> " |
| 10/19 | <u>Hart v. Raz: Hard Positivism and Law's Guidance</u> Raz, Joseph, "Authority, Law, and Morality" Coleman, Jules. from <i>The Practice of Principle</i> [Shapiro, Scott, "Law, Morality, and the Guidance of Conduct," <i>Legal Theory</i> 6 (2000): 127-70] [Himma, Kenneth I. (2001). "The Instantiation Thesis and Raz's Critique of Inclusive Positivism," 20 <i>Law and Philosophy</i> , pp.61-79] |

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| 10/26 | <u>Hart v. Finnis: Methodological Positivism and Natural Law</u> Finnis, John, <i>Natural Law and Natural Right</i> 1-19 Perry, Stephen, "Hart's Methodological Positivism" |
| 11/2 | <u>Hart v. Devlin: Legislating Morality</u> Devlin, Patrick. <i>The Enforcement of Morals</i> . [1-25,] 124-39 Hart, <i>Law, Liberty, and Morality</i> Dworkin, Gerald, "Devlin Was Right," 40 <i>Wm. & Mary L. Rev.</i> 927-46. |
| 11/9 | <u>Hart v. Rawls, Nozick, Simmons: Fairness and Obligation</u> Hart, "Are There Any Natural Rights?" Hart, "Legal Duty and Obligation" in <i>Essays on Bentham</i> Simmons, A. John. 1979. <i>Moral Principles and Legal Obligations</i> 101-08; 114-42. |
| 11/16 | <u>Hart on Punishment</u> Hart, 1968. "Prolegomenon to the Principles of Punishment" in <i>Punishment and Responsibility</i> 1-27 Honderich, Ted. 2006. <i>Punishment: The Supposed Justifications Revisited</i> 163-76 Primoratz, Igor. 1989. <i>Justifying Legal Punishment</i> 111-12, 118-28, 137-54 Moore, Michael S. 1984. <i>Law and Psychiatry</i> 238-43. |
| 11/23 | No class – Thanksgiving holiday |
| 11/30 | TBA |

Deviations from this schedule are bound to occur.

If time permits:

Hart v. Kelsen: Rule of Recognition v. Grundnorm

Kelsen, Hans. 1949. *General Theory of Law and State* 3-5.

Kelsen, Hans. 1967. *Pure Theory of Law* 33-37, 193-205, 348-52.

Hart, "Kelsen Visited," *UCLA L. Rev.* 10 (1963) 709.

Hart v. Wooton: Responsibility and Excuses

Hart, Review of Wooton, *Crime and the Criminal Law* (1963) 74 *Yale. L.J.* 1325 (1965)

Hart and Honore on Causation

Hart and Honore, *Causation in the Law* (excerpts)

Sosa, Ernest and Michael Tooley eds. 1993. *Causation* (Oxford Readings in Philosophy)