

BHP 130: Theories of Justice and the American Common Law

Fall Semester 2006 Tuesdays/Thursdays 3:30 – 5:00 PM

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Course Description

Justice and its practice are inevitably based on basic assumptions concerning human nature, the relationship between the individual and society, the mechanisms that hold society together, and the nature of the challenges individuals and societies confront. This course will examine some of the 'perennial' theories of justice, both classical and modern, that have left their marks on the evolution of the Western concepts of justice. Among these will be included the debate about right v. might (starting in the Greek tradition as exemplified by Plato), the conservative tradition (starting with the Protagoras), the 'natural rights' tradition (starting with the Roman jurists), Utilitarianism (Jeremy Bentham and J. S. Mill), and the theory of distributive justice (John Rawls). The practical implications of such theories and the two way traffic between them and social realities will be explored through the analysis of their application by American courts in their published opinions. In addition to actual cases, you will participate in the adjudication of theoretical cases, both hypothetical and taken from contemporary realities.

Course Objectives

This class will participate in the Baccalaureate Honors Program assessment project. The BHP Program Goals on which this class will focus are listed below in **bold**.

1. As a BHP Student you should be able to demonstrate sophisticated and intellectually engaged critical thinking.

- a. In this class, you will be challenged to consider the differences and similarities between diverse meanings of justice (fairness) taken from different vantage points, as exemplified by the writings of leading thinkers.
- b. You will learn to ask critical questions that enable you to evaluate the justice (fairness) of diverse laws and public policies.
- c. You will apply the notion of fairness to concrete 'test cases' and thereby hone your analytical skills and ability to develop clear and logical arguments.
- d. You will gain a sense of the considerations that may sway judges in actual court cases, as they struggle to decide difficult cases justly (fairly).
- e. You will be challenged to evaluate competing policies and alternative laws, applying some of the basic analytical skills used by lawyers and judges in actual cases.

2. As a BHP student you also should be able to connect concepts drawn from multiple disciplines.

- a. In this class, you will learn to connect up abstract philosophical concepts of justice, enunciated in the writings of leading philosophers and political theorists, with concrete rules of law, as reflected in the reported decisions of our American courts (known collectively as the American common law).
- b. As you read and analyze court decisions, you will learn to ascertain whether or not an identifiable, recognized theory of justice is embodied in the court's opinion, and to evaluate whether the decision may be deemed just (fair) under the standards of fairness embodied in one or more of those recognized theories of justice.

Readings

1. Introduction – the concept of justice.

In preparation for the first class session, read the December 13, 2002, interview of Senator John McCain by Journalist Bill Moyers, and the excerpt from Moyers' 2000 interview on the same subject with Lawrence Graz, both of which are posted on this course's BlackBoard site under "Course Documents." As you read these interviews, ask yourself : for the McCain Interview , "Does might make right?" Can America be a "just" society if the facts brought out in this interview are true? Is it "fair" to permit those with the most money to have the loudest say in the creation of American public policy? What are the arguments against this being fair and just? For the Graz Interview : The two speakers (Moyers and Graz) base their discourse on different concepts of fairness. What are they and on what are they based? Who, in your view, is right ? Why? Can you make a strong case for the concept you consider "wrong " ?

- Is there a difference between "fair" and "just"? (Can something be fair but unjust...or just but unfair?)
- Where should people look for guidance in answering these questions? (Personal conscience? Community values? History? The constitution and laws? Religion?)

At the end of this class, you will receive an edited version of the court's opinion in the first case we'll ask you to consider: *United States v. Worcester*, 190 F. Supp. 548 (D. Mass. 1961). The complete court opinion is posted under "Course Documents" on this class's BlackBoard site.

2. The essential problem : is justice absolute or relative?

a. Might v. right

Read The Republic, pp. 14-53

Thrasymachus and Glaucon present two versions of the 'might is right' thesis. The former simply makes the argument that justice is what those who have the ability to impose their will declare it to be (i.e. whatever serves their interest). The question raised is –what ARE the interests of the strong, and what happens should they misidentify them? Glaucon offers a version of 'justice as the interest of the strong' by postulating a coalition of the weak many, intended to incapacitate the strong. Hence, precisely those who could lead society are brought down to the average.

b. Justice as social equilibrium

Read The Protagoras, pp. 88-99, and Ralf Dahrendorf, "In Praise of Thrasymachus", Essays in the theory of justice, pp. 129- 50.

In the Protagoras , Socrates brings forward the view that what serves the community serves each of its members and hence justice is what brings benefit to the community itself . In such terms , all objective observers would be able to identify what IS a just law or policy . The question is how to reveal such justice, where all members seek their own good . Dahrendorf points the fact that what we have here is a classical –and probably first – expression of what is today called conflict theory vs. equilibrium theory approaches . The two serve as the bases of our considerations of justice to this very day, especially in the USA , where much of the legal tradition is influenced by classic Liberal theory of individual rights +social Darwinism . The tradition of the 'new deal' however pointedly derives from equilibrium theories .

c. The 'in-between' option :conservative justice (Greek style)

Read The Protagoras, pp. 48-61.

The views of the famous philosopher and mathematician, as recorded by Socrates , lead us to the first example of conservatism. One reason he is better treated than Trasymachus is that we have here a mid-range doctrine, between the conflict and the equilibrium ones. According to this , society itself produces justice as a result of its definition of what it considers of utility in its peculiar circumstances. Such justice is transmitted by socialization to become part and parcel of society's identity, differentiating it from other societies on the one hand, and from mere congeries of unrelated individuals on the other.

d. The second 'in between' : Distributive justice (Greek style)

Read Aristotle, The Nicomachean Ethics, pp.102-14.

Aristotle produces the first systematic view of justice as a question of distribution (and hence at bottom a link between economics and politics). The basic premise is that in a world governed by scarcity, where resources are limited, equals should receive equal shares. The question however is how is equality to be measured, where all people are different. Answer lies in the type of justice system the lawmakers seek to produce and the kind of economy they consequently seek to encourage. Aristotle however suggests a middle class based justice as best. This is a difficult piece , but I think rewarding , because so much of our own system is really based on distributive ideas –most of which actually came from Aristotelian sources via the English law , which itself was impacted by the medieval sources that directly drew from Aristotle.

3. Rome and the tradition of justice as entitlement

Read fragments from Cicero and Marcus Aurelius , in Michael Curtis, The Great Political Theories Vol.1

Whereas the Roman jurists did not add much philosophically, what is of interest is their attempt to wrestle with the problem of the demise of the city state. What was needed was a criterion of justice that would serve the peoples all over the empire, regardless of where they lived. The result was a doctrine of 'the law of Nature' that should apply to all by dint of their humanity. This is actually the first effort to create a theory of justice as based on human criteria, regardless of the turf on which it is to be applied. Should we decide to offer a historical dimension to the course, we could offer here a reading on the link between this and the Christian thought on Justice. The combinations of the two served not only as the bases for the medieval concepts but more importantly of the Contractualist school.

a. The contractualist refinement

Read fragments from John Locke, Two Treatises on Government, Curtis, vol.1., pp. 373-89 and Rousseau, The Social Contract, vol. 2, pp. 18-34.

The contractualists offered both a method of analyzing the concepts of justice and of supplying an 'objective' basis for their results. The basic assumption of the Roman thinkers is retained, that there is a 'law of nature' (jus gentium) and that it should serve basis for the Civic law in its various local applications. However, added here is the use of the state of Nature theory (first made use of by Plato in the Republic. More recently, by Thomas Hobbes) to generate human rights that should set limits to the pursuit of power. The result was the definition of justice by the use of human 'entitlements', most famously Locke and the rights to pursue property.

b. David Hume and the critique of justice as entitlement : return to theory ?

Read David Hume, Treatises on Human Nature, Part II, sections I-IV, VI.

David Hume is important both because his attack on the traditions of perceiving justice as "giving each what he deserves" had a tremendous impact on the theory of justice, creating the space into which utilitarianism stepped in, and because much of his argument against the contractualist way of thought is valid as an attack on utilitarianism itself. In fact, his analysis influenced the attack on the legal traditions of Britain and the USA by John Rowels. The core of the argument is that there is no such thing as justice that derives from objective nature, which restricts the role of theory to inquiry how it is to be carried out, but rather that all such criteria is artificial and a product of theory itself. In these terms we return to the concept of justice as artificial convention and the quest is of rational decisions of what we would like society to be.

d. Utilitarianism

Read fragments from Bentham, Introduction to the principles of Morals and Legislation; James Mill, Essay on Government, John Stuart Mill, Essay on Utilitarianism, in M.Curtis, The great Political Theories, vol 2, pp.117-29; Edward Mcchesney Sait, Masters of Political Thought, pp.366-83.

Utilitarianism constitutes, in our opinion, the most singly important impact on British, and by extension, American conceptions of justice. Much of the legislation in both countries is based on the premise that justice—and the law—should reflect the greatest pleasure principle. The bases of the two are a theory of human equality, the attribution of human

motivation to the pleasure /pain equation , and the principle of the 'greatest pleasure to the greatest numbers. In both countries this was modified by the acceptance of the human rights tradition. However, as recently exemplified by the 'eminent domain', the 'intuitive attack' on it (e.g. the claim that the principle regards only material benefits but happiness has an important qualitative attribute, or the argument that according to the 'greater number' principle the enslavement, say, of the minority could be defined as justice) confronts us with serious problems and need of reassessment.

4. John Rawls and the attack against Utilitarianism

Read Samuel Gorowitz, "John Rawls : A theory of justice", in A. de Crespigny, K. Minogue, Contemporary Political Philosophers, pp. 272-90.

A brilliant statement of the critique of Utilitarianism by Rawls and the logical & methodological basis of his alternative version of distributive justice . Rawls' own writings are far too difficult for any non MA class, but this renders them accessible. The question that should be raised is HOW an application of his principles could change our basic laws. This is really a theoretical exercise, i.e. how will a panel of Rawlsian lawyers defend /prosecute actual cases that could be brought before them.

In addition to these core readings you will be given edited court opinion and hypothetical cases throughout the semester. These will set up the situations for debate and discussion.

Do not let the amount of reading frighten you. We will move through this material as a class at the pace which proves to be appropriate, completing as much of it as we can, but focusing on the quality of our discourse, rather than the quantity of material that is covered.

EVALUATION

Your grade for this course will have the following components:

30% class participation and oral presentations

20% short peer-graded position paper

20% midterm assignment

30% final assignment