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Philosophy of Law: An Overview

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There are many issues related to law that philosophers study. This essay provides an overview of common topics in *philosophy of law*.^[1]

1. Analytic Jurisprudence

For much of the twentieth century, philosophy of law in the English-speaking world focused primarily on the following questions:

- What is law?
- What is the relationship between law and morality?

Philosophical debates about these questions are sometimes classified as “analytic jurisprudence.”^[2]

Natural law theorists claim that what makes something law is, in some sense, dependent on moral facts.^[3]

In contrast, *legal positivists* deny that something’s status as law depends on moral facts. Legal positivists claim that law’s status as law depends only on facts about how a society distributes power and authority.

Thus, natural law theorists sometimes deny that immoral laws are truly laws at all, while legal positivists tend to think that immoral laws are truly laws, which can still be criticized as morally bad.

Notable natural law theorists include St. Thomas Aquinas (1225 – 1274) and John Locke (1632–1704). Notable legal positivists include John Austin (1790 – 1859) and H.L.A. Hart (1907-1992).^[4]

2. Criminal Law

Criminal law is the branch of law in which the state uses legal procedures to make certain acts crimes

and to punish persons found guilty of doing those acts.

Central questions in the philosophy of criminal law include: When, if ever, is the state justified in punishing people for engaging in criminal acts, and why?

There are four dominant theories of criminal punishment:^[5]

- *Deterrence theories*, where punishment aims at discouraging others from engaging in future criminal wrongdoing;
- *Rehabilitation theories*, where punishment aims at turning criminals into people who can successfully operate in society without committing crimes;
- *Retribution theories*, where punishment aims at giving criminals what they deserve; and
- *Restoration or restitution theories*, where punishment aims, as best as possible, at restoring the well-being of victims of crime.^[6]

There are also related questions about what punishments are fair and how punishment can be administered fairly and without bias.^[7]

Many questions in the philosophy of criminal law are closely tied to questions in ethics about when we should be held morally responsible and/or morally blameworthy for our actions.^[8]

These include questions about which mental states may need to accompany an act in order for that act to properly be subject to criminal punishment. To be found guilty of many crimes, the state must prove both that you committed the wrongful act (the *actus reus*) and that you had a culpable mental state when committing the act (the *mens rea*).^[9]

Other questions in the philosophy of criminal law are closely tied to questions in epistemology.^[10] These include questions like:

- When should something be admitted into or excluded from evidence during a trial?
- Is it ever permissible to convict someone based only on statistical evidence about the likelihood they committed a crime?

- How should conventional standards of proof like “beyond a reasonable doubt” be interpreted and applied?

Such questions are part of the growing field of *legal epistemology*.^[11]

3. Legal Interpretation

There has been a lot of debate over the best way to interpret laws. The two most prominent debates are between (1) *purposivist* and *textualist* theories for interpreting laws, and (2) *originalist* and *living constitutionalist* theories of constitutional interpretation.^[12]

Purposivism and textualism each constitute a family of views. Purposivists emphasize determining what reasonable purpose a legislative body would have had in passing a law and interpreting the law accordingly. Textualists emphasize determining the meaning of the text’s words and interpreting the law accordingly, even if such an interpretation seems incongruent with what might be considered the most reasonable purpose of the law.

For example, in interpreting a law that reads “No vehicles allowed in the park,” a purposivist might give priority to the purpose that the law was meant to serve in deciding what counts as a “vehicle,” while a textualist might give priority to what they think the ordinary language meaning of “vehicle” is in the relevant community.^[13]

Purposivism and textualism can be understood as occupying different ends of a spectrum. In practice, many judges and lawyers are pluralists who rely on both purposivist and textualist reasoning, depending on the case and text under consideration.

Originalism and living constitutionalism also each constitute a family of views. Originalists prioritize the meaning of the constitution at the time of ratification.^[14] Living constitutionalists prioritize the ways in which the meaning of the constitution may evolve with other changes (such as moral, social, or linguistic changes) over time.^[15]

For example, in interpreting the Eighth Amendment of the U.S. Constitution’s ban on “cruel and unusual punishment,” an originalist likely would seek to determine what was meant by cruel and unusual in the 1790s, while a living constitutionalist would likely seek to determine what is considered cruel and unusual today.

4. Liberty, Rights, and Justice

There are also many philosophical questions connecting law with the philosophical study of just governments and social orders. These include questions about the nature of liberty and about the best way to conceptualize legal rights in relation to other types of rights.

These questions can be applied in a variety of contexts. For example, philosophers debate the following:

- What theory, if any, best justifies private property rights?^[16]
- What is the scope and justification for the right to contract?^[17]
- How should the law balance the promotion of liberty and equality?^[18]
- What makes something a human right? Who has duties to enforce such rights?^[19]
- What acts of expression should be protected under freedom of speech?^[20]

Philosophers and legal scholars also critique ways the law fails to provide justice. Prominent examples include critical race theory, which examines how law perpetuates systemic racism, and feminist philosophy of law, which examines the influence of patriarchy on legal systems.^[21]

5. Conclusion

Philosophy of law provides a valuable way of examining and critiquing law and legal systems. Unlike other forms of legal reasoning—which often require reasoning from unquestioned underlying assumptions about the law and its operation—philosophy of law permits one to question even such underlying assumptions, using a wide variety of philosophical ideas to do so.

Notes

[1] This essay adopts a broad conception of what counts as part of philosophy of law.

[2] See, for example, Donelson 2021 and Himma 2001.

[3] For more on natural law theory, see [Because God Says So: On Divine Command Theory](#) by Spencer Case.

[4] For more information see Himma 2001 and Green and Adams 2019.

[5] For an introduction to theories of punishment, see Theories of Punishment by Travis Joseph Rodgers.

[6] Some philosophers might deny that restoration theory is about *punishment* but argue instead that this is a way of responding to crimes that focuses on the victims.

[7] For discussions of these kinds of questions and related ones see Butler 2010, Huemer 2021, and season 4 of the HI-Phi Nation Podcast.

[8] See, for example, Lefkowitz 2015 and Lacey and Pickard 2015.

[9] See Legal Information Institute (n.d.).

[10] For an introduction to epistemology, see Epistemology, or Theory of Knowledge by Thomas Metcalf.

[11] See, for example, Gardiner 2019, Littlejohn 2020, and Jorgensen Bolinger 2021.

[12] See, for example, Greenberg 2021.

[13] The “No vehicles in the park” case is based on a popular example from Hart 1958.

[14] See, for example, Scalia 2018.

[15] See, for example, Strauss 2010.

[16] See Waldron 2020.

[17] See Markovits and Atiq 2021, Encarnacion 2018.

[18] See, for example, Nozick 1974, G.A. Cohen 2009, Anderson 2015.

[19] See, for example, Nickel 2021, Kim 2012.

[20] For an introduction to freedom of speech, see Free Speech by Mark Satta. See also West 2012, Waldron 2014, Strossen 2018, Satta 2021.

[21] See, for example, Crenshaw et al 1995, Francis and Smith 2021.

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For Further Reading

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