

Midterm Review for Philosophy of Law

Spring 2007

The midterm will contain some questions drawn from the pool below. I may combine several questions into one or only ask a part of a question, but if you know all of the answers to the questions below you will easily receive an A on the midterm. Some of the questions may come from parts of the assigned reading not covered in lecture.

A. Natural Law, Austin, and Hart's criticism

- (1) What is the natural law theory?
- (2) What is Blackstone's argument for Natural Law Theory?
- (3) What is the separability thesis?
- (4) What is Austin's definition of law?
- (5) Explain each of the following concepts used by Austin: (a) command, (b) sovereign, and (c) habitual obedience.
- (6) Explain the two types of generality required by Austin. Why is each needed?
- (7) How does Austin distinguish the law from (a) customs, (b) rules of fraternal organizations, (c) moral rules, and (d) religious commands.
- (8) Who would Austin say was the sovereign in the U.S.? Explain why.
- (9) Explain each of the following objections offered by Hart: (a) wills and jurisdictional laws, (b) other regarding laws, (c) continuity of sovereignty, (d) continuity of laws, (e) identifying the sovereign, (f) internal/external distinction about laws, and (g) internal/external distinction about the sovereign. Be able to list all of these objections if asked.
- (10) Hart considers two responses to his wills objection. Explain the responses and Hart's answers to them.
- (11) Hart considers one response to his other-regarding-laws objection. Explain the response and Hart's answer to it.
- (12) Hart considers tacit agreement as a way to save Austin from his continuity of sovereignty objection. Explain this response and Hart's answer to it.
- (13) What is the difference between a fine and a tax? Explain how this is relevant to material we discussed.
- (14) What is the example of the bank robber? Explain how this is relevant to material we discussed.
- (15) What is the difference between a rule and a habit?
- (16) What does Hart say about laws that are not usually followed and not usually punished? How is this a response to Austin?

B. Hart's Positive Account

- (1) What are primary rules? Secondary rules? How do they differ and how are they similar?
- (2) Be prepared to give an example of a primary rule and a secondary rule.
- (3) What are the problems for societies with only primary rules? Name and explain each.
- (4) Name the secondary rules adopted to solve for each of the problems described. Explain how they solve for these problems.
- (5) What are the two features of legal obligation which Hart thinks makes the law unique?
- (6) Give a simple example of each type of secondary rule.

- (7) How does one identify the primary rules in a given society? Secondary rules (in particular the rule of recognition)? The officials?
- (8) Suppose you come upon a new society. How will you identify the legal system (if one exists)?
- (9) How does Hart distinguish a legal system from (a) custom, (b) rules of fraternal organizations, (c) moral norms, and (d) religious commands.
- (10) Explain how Hart avoids each of the objections he levels against Austin.
- (11) Which account do you think is better, Hart or Austin? Explain why.
- (12) Explain the “no vehicles in the park” law. What's the point of this example for Hart?
- (13) What is the “open texture” of law?
- (14) What is judicial activism? Judicial restraint?
- (15) What is formalism? Is it more like judicial activism or restraint? How is it similar and different from each?
- (16) What is rule skepticism? Is it more like judicial activism or restraint? How is it similar and different from each?
- (17) What are Hart's objections to formalism?
- (18) What is Hart's example of the game Scorer's Discretion? How is it similar and different from baseball? What is this example supposed to show?
- (19) According to Hart, what do judges do in easy cases? Hard cases?
- (20) Explain how Hart is different from and similar to rule skepticism and formalism.
- (21) What do judges do in deciding hard cases? What sorts of considerations factor into their decisions?

C. Dworkin

- (1) Describe each of the following cases (a) Elmer's case (Riggs), (b) Henningsen (c) Snail Darter, (d) McLoughlin, and (e) Brown. Describe how each provides a problem for Hart.
- (2) What, according to Dworkin, are the three tenets of positivism? Briefly describe each one.
- (3) How does Dworkin agree or disagree with each of the three tenets?
- (4) What are principles for Dworkin? How are they similar and different from Hart's rules?
- (5) For each of the cases listed in (1), be able to explain what principles were used and how they were used in deciding the case.
- (6) What is the problem of disagreement (aka the semantic sting)? How is this a problem for Hart? For Austin?
- (7) What, according to Dworkin, do judges do in cases that Hart considers hard cases? How does this differ from Hart?
- (8) Does Dworkin think there is a distinction between hard and easy cases (similar to Hart)? Why or why not?
- (9) What is conversational interpretation? What is the primary goal of this type of interpretation? Give an example of using conversational interpretation as a method for interpreting a piece of art.
- (10) Describe each of the following objections to using conversational interpretation in law: (a) access to intentions, (b) later agreement, (c) contradictory intentions, and (d) corporate intentions. Which of these four is Felini's *La Strada* supposed to illustrate?
- (11) Describe “constructive interpretation”. How is it different from conversational interpretation? Describe how it avoids each of the problems provided for conversational interpretation.
- (12) Describe each of the three stages of interpretation for Dworkin. What happens at each stage? Give a unique example where you go through these stages (by “unique” I mean not offered in

- class or in the text).
- (13) Describe the example of courtesy Dworkin uses. Show how he interprets this practice and what he does at each stage.
 - (14) In what ways is Dworkin similar to Natural Law Theory? How is he different?
 - (15) Who is Hercules (for Dworkin)? What is he trying to do?
 - (16) What is the chain novel? How is it supposed to be analogous to judges behavior?
 - (17) Dworkin has Hercules consider six interpretations for deciding McLoughlin. Describe each and also describe why Hercules rejects each of the first four. How will Hercules decide between five and six?
 - (18) What is the problem of subjectivism? How does Dworkin respond to this problem?
 - (19) Who is Hermes (for Dworkin)? What is he trying to do? How is he different from Hercules?
 - (20) What are the three big questions for the conversational interpretation Dworkin gives on pg. 316? How does Hermes go about answering each of these questions?
 - (21) Why does Hermes' method eventually become almost identical to Hercules?
 - (22) The problem of contradictory intentions arises again in the context of Senator Smith. Describe this example and how Hermes attempts to resolve the problem.
 - (23) Dworkin considers counting either hopes or expectations as a legislator's intention. What are each of these and what is the problem with using each?
 - (24) What types of intentions does Hermes use instead of hopes or expectations? How does Hermes find these intentions?
 - (25) What is the "counterfactual test" for intentions that Dworkin rejects?
 - (26) If two interpretations both fit a particular statute, will Hercules decide which one to use based only on his own political convictions? If no, what will he use instead?
 - (27) What is the supposed difference between Liberal and Conservative judges? How does Dworkin respond to it?
 - (28) What is the supposed difference between Interpretative and Non-Interpretative judges? How does Dworkin respond to it?
 - (29) What is Passivism? How does Dworkin respond to it?
 - (30) What is Historicism? How does Dworkin respond to it?
 - (31) What are the three interpretations Hercules considers for the fourteenth amendment? Describe each one and which way each says Brown should be decided. Which does Hercules reject first and why?
 - (32) Describe the situation surrounding Bakke.
 - (33) How are the two remaining interpretations different with respect to Bakke?
 - (34) Which interpretation does Hercules choose? Why?