

Rule-Following in Legal and Political Thought

LJST-253 (FALL 2011), MONDAYS, 2–4 P.M., CLARK 100

Instructor: *Don Tontiplaphol**

Current as of September 8, 2011[†]

1 Course Description

What does it mean *to follow a rule*? Can we understand rule-following in purely behavioral terms? Or must we make reference to mental states or intentions? What sets the standard for correctness in applying rules to particular instances? Or in deliberating and acting in the light of a rule? Wittgenstein’s so-called “rule-following considerations” have inspired many different responses to these questions; and his thought has fueled divergent positions in moral and legal theory. This course will examine the role of rules and principles in deliberation as well as the scope of interpretation in legal theory: in particular, we shall discuss “moral particularism” and the question of “legal indeterminacy.” We shall also explore the application of Wittgensteinian reflections to contemporary legal cases.¹

Requisite: LJST-110 or consent of the instructor. Limited to 15 students. Writing attentive.

2 Texts

The only texts that you must purchase are the following:

- Ludwig Wittgenstein, *Philosophical Investigations*, trs. Anscombe, Hacker, and Schulte, edd. Hacker and Schulte, revised fourth edition (Wiley-Blackwell, 2009 [1953]);²

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[†]A few changes and specifications may arise as the term proceeds.

¹For ease in handling, I’ve altered slightly the description that appears in the course catalog.

²This edition of the text is recommended but not required; nor is a bilingual edition required.

- Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics*, tr. Anscombe, edd. von Wright, Rhees, and Anscombe, revised edition (MIT Press, 1978 [1967]);³
- H.L.A. Hart, *The Concept of Law*, second edition with postscript (Oxford UP, 1994 [1961]).⁴

Most of our other readings will be accessible via the Amherst library’s electronic resources; those readings so unavailable will be given either by the course’s e-reserves or in class, in hard copy, ahead of time.

Unless instructed otherwise, students should bring their copies of Wittgenstein’s *Philosophical Investigations* to each class meeting. Moreover, students must bring the relevant **printouts** to class; the use of computers (including “smart” phones) will not be allowed in seminar, except in cases of documented disability.

3 Requirements

Your course grade is a function of four requirements:

(i) Participation (including weekly discussion questions): 20%. Active and regular participation is required; unfamiliarity with our texts or a lack of engagement in the seminar discussion counts against your participation grade. Note that faithful attendance by itself warrants no higher than a {C} for participation; an unexcused absence triggers a $\frac{1}{3}$ penalty against your participation grade (e.g., {B⁺} → {B}). (Absences will be excused only for reasons of medical emergency or religious observance.) This component also includes weekly discussion questions: each week, you must send me two or three discussion questions via e-mail **by 8 p.m. on the Saturday before the relevant class meeting**, starting with Meeting 3. Each set of questions should be, in its entirety, no longer than 250 words; the questions will be graded for clarity and incisiveness.

(ii) Presentation: 15%. Once during the term, starting with Meeting 4, each student must introduce our discussion for the week by presenting some thoughts on a *subset*⁵ of the relevant batch of readings: questions and answers, suggestions and provocations. (Questions are not enough; the presenter must offer suggestions for resolving her chosen difficulties.) The presentation should last no more than eight minutes, and the *prose* text of which should be sent to me via e-mail **by 2 p.m. on the Sunday before the relevant class meeting**. The text of the presentation should be around 500 words long. Again, clarity and incisiveness are key.

³The *revised* edition of the text is required, since it contains important material not previously printed; note, too, that Wittgenstein’s *Remarks on the Foundations of Mathematics* and his *Lectures on the Foundations of Mathematics* are different texts.

⁴This second edition is necessary, in light of Hart’s posthumous postscript on his conception of rules.

⁵Do not try to summarize or synthesize all of a week’s readings; this will make you prone to superficiality.

(iii) Paper 1: 25%. An essay of 1200–1750 words, **due in hard copy at the start of Meeting 6**, in response to a topic drawn from a set of prompts. Paper policies and a writing guide will be distributed alongside your paper prompts.

(iv) Paper 2: 40%. An essay of 2400–3000 words, **due via e-mail at 5 p.m. on December 19**, in response to a topic drawn from a set of prompts, or in consultation with me.

N.B.: Each of requirements (ii), (iii), and (iv) must be completed for you to pass the course.

4 Schedule

Let me note that I reserve the right to make changes to this schedule as our interests and needs develop over the term. (Nevertheless, the changes will be minor, and I will never significantly increase your reading load.) Our material will fall under four heads: (i) Introduction; (ii) Foundations in Wittgenstein, Rawls, and Hart; (iii) Moral Particularism and Deliberative Practices; and (iv) Interpretation and Legal Indeterminacy.

Those readings marked with an asterisk (*) will be provided in PDF by the course Web site's e-reserves; aside from the readings drawn from our *purchased* texts, all other readings will be given via the library's electronic resources, also linked on the course's Web site. The purchased texts will also be on reserve in hard copy at the library.

I. Introduction

Meeting 1. September 7 (special schedule: Wednesday, 2 p.m.):

Mechanics and overview.

Course content. — Syllabus and logistics. — Reading and discussion (in-class): passages from Wittgenstein and on Hart's case of the "vehicle in the park."

OPTIONAL. As you prepare for Meeting 1, you should consider reading (i) and (ii) from the list below, under Meeting 2.

Meeting 2. September 12: Why Wittgenstein?

REQUIRED.

- (i) David H. Finkelstein, "Rule-Following," in Hogan (ed.), *Cambridge Encyclopedia of the Language Sciences* (Cambridge UP, 2011), 723–24.*⁶
- (ii) David M. Finkelstein,⁷ "How To Do Things with Wittgenstein: The Relevance of Wittgenstein's Later Philosophy to the Philosophy of Law," *The Journal Jurisprudence* 8 (2010): 647–75.⁸
- (iii) Scott Hershovitz, "Wittgenstein on Rules: The Phantom Menace," *Oxford Journal of Legal Studies* 22.4 (2002): 619–40.
- (iv) Frederick Schauer, "Rules and the Rule-Following Argument," *Canadian Journal of Law and Jurisprudence* 3.2 (1990): 187–92.

OPTIONAL.

- (v) Selections from Part II [on Wittgenstein and legal theory] of Campbell, O'Rourke, and Shier (edd.), *Law and Social Justice* (MIT Press, 2005), 213–50.* [Short articles by Lind, Bix, Patterson, and Sebok.]

⁶Free on the Web at

<<http://philosophy.uchicago.edu/faculty/files/finkelstein/rule%20following.pdf>>.

⁷Note that the two Finkelsteins here are distinct persons, though, interestingly, one (DMF) was a graduate student of the other (DHF).

⁸Free on the Web at

<<http://www.jurisprudence.com.au/juris8/F.pdf>>.

NOTE. In many ways, the topics discussed above will set the agenda for much of the remainder of the course. Read those texts with an eye toward pursuing later on the categorizations and lines of thought raised there.

OPTIONAL. As you prepare for Meeting 2, consider following up the references to Wittgenstein's *Philosophical Investigations* made in the above articles, for the sake of adding context.

II. Foundations in Wittgenstein, Rawls, & Hart

II-a. Wittgenstein

Meeting 3. September 19: RFCs, I.

REQUIRED.

- (i) Selections from Arif Ahmed, "Introduction," in Ahmed (ed.), *Wittgenstein's Philosophical Investigations: A Critical Guide* (Cambridge UP, 2010), 1–4.*
- (ii) Wittgenstein, *Philosophical Investigations*, Part I, §§138–202. [Ca. 20 pp.]
- (iii) Norman Malcolm, "Following a Rule," in Malcolm, *Nothing Is Hidden* (Blackwell, 1986), 154–81.*
- (iv) David H. Finkelstein, "Wittgenstein on Rules and Platonism," in Crary and Read (edd.), *The New Wittgenstein* (Routledge, 2000), 53–73.*⁹

RECOMMENDED.

- (v) John McDowell, "Meaning and Intentionality in Wittgenstein's Later Philosophy," reprinted in McDowell, *Mind, Value, and Reality* (Harvard UP, 1998), 263–78.*

Meeting 4. September 26: RFCs, II.

REQUIRED.

- (i) Wittgenstein, *Philosophical Investigations*, Part I, §§201–259. [Ca. 10 pp.]
- (ii) Paul Boghossian, "The Rule-Following Considerations," *Mind* 98.392 (Oct., 1989): 507–549.¹⁰
- (iii) John McDowell, "Wittgenstein on Following a Rule," *Synthese* 58.3 (1984): 325–63.

OPTIONAL.

- (iv) Warren Goldfarb. "Kripke on Wittgenstein on Rules," *The Journal of Philosophy* 82.9 (Sep., 1985): 471–88.
- (v) Michael Kremer, "Wilson on Kripke's Wittgenstein," *Philosophy and Phenomenological Research* 60.3 (May, 2000): 571–84.

⁹Free on the Web at

<http://philosophy.uchicago.edu/faculty/files/finkelstein/Wittgenstein_on_Rules.pdf>.

¹⁰Free on the Web at

<<http://fas.nyu.edu/docs/I0/1153/rulefollowingconsiderations.pdf>>.

NOTE. Topics for Paper 1 distributed at the end of this class.

Meeting 5. October 3: RFCs, III.

REQUIRED.

- (i) Selections from Wittgenstein, *Remarks on the Foundations of Mathematics*. [Ca. 20 pp.]
- (ii) Selections from Hilary Putnam, “On Wittgenstein’s Philosophy of Mathematics—I,” *Proceedings of the Aristotelian Society, Supplementary Volumes* 70 (1996): 243–65.
- (iii) Selections from the reply to Putnam in James Conant, “On Wittgenstein’s Philosophy of Mathematics—II,” *Proceedings of the Aristotelian Society* 97 (1997): 195–222.
- (iv) John McDowell, “Are Meaning, Understanding, etc., Definite States?” reprinted in McDowell, *The Engaged Intellect* (Harvard UP, 2009), 79–95.*

OPTIONAL.

- (v) Marie McGinn, “Wittgenstein and Naturalism,” in De Caro and Macarthur (edd.), *Naturalism and Normativity* (Columbia UP, 2010), 322–51.*

MIDTERM BREAK

II-b. *Rawls*

Meeting 6. October 17: Actions and practices.

REQUIRED.

- (i) Rawls, “Two Concepts of Rules,” *The Philosophical Review* 64.1 (Jan., 1955): 3–32.
- (ii) Stanley Cavell, “Rules and Reasons” [chapter XI], in Cavell, *The Claim of Reason*, new edition (Oxford UP, 1999 [1979]), 292–312.*

OPTIONAL.

- (iii) Selections from Part Three of Michael Thompson, *Life and Action* (Harvard UP, 2008).*

NOTE. Paper 1 due in hard copy at the start of this class.

II-c. *Hart*

Meeting 7. October 24: General jurisprudence.

REQUIRED.

- (i) Selections from Hart, *The Concept of Law*.
- (ii) Selections from Peter Winch, *The Idea of a Social Science*, second edition (Routledge, 1990 [1958]).* [Ca. 15 pp.]¹¹

¹¹For background, consider the 2007 edition of Winch’s book, which contains a new introduction by Raymond Gaita.

- (iii) Ronald Dworkin, “The Model of Rules,” *The University of Chicago Law Review* 35.1 (1967): 14–46.
- (iv) Case: *Smith v. US* (508 US 223 (1993)).
OPTIONAL.
- (v) Timothy Endicott, “Are There Any Rules?” *The Journal of Ethics* 5.3 (2001): 199–220.

III. Moral Particularism and Deliberative Practices

Meeting 8. October 31: Wittgenstein and particularism.

REQUIRED.

- (i) Cora Diamond, “Rules: Looking in the Right Place,” in Phillips and Winch (edd.), *Wittgenstein: Attention to Particulars* (Macmillan, 1989), 12–34.*
- (ii) McDowell, “Non-Cognitivism and Rule-Following,” reprinted in McDowell, *Mind, Value, and Reality*, 198–218.*
- (iii) Additional article: [TBD].

OPTIONAL.

- (iv) The exchange between Garrett Cullity and Richard Holton, “Particularism and Moral Theory,” *Proceedings of the Aristotelian Society, Supplementary Volumes* 76 (2002): 169–209.¹²

Meeting 9. November 7: Legal deliberation, I.

REQUIRED.

- (i) Articles on Thomas Morawetz’s Wittgensteinian conception of legal practices in the symposium in *Philosophical Investigations* 29.2 (2006): 111–97. [Articles by Levvis, Eisele, Patterson, and Morawetz.]
- (ii) Case: *PGA v. Martin* (532 US 661 (2001)).

OPTIONAL.

- (iii) Bruce Markell, “Bewitched by Language: Wittgenstein and the Practice of Law,” *Pepperdine Law Review* 32 (2004–05): 801–845.

Meeting 10. November 14: Legal deliberation, II.

REQUIRED.

- (i) Selections from Frederick Schauer, *Playing by the Rules* (Oxford UP, 1993).*
- (ii) Dworkin, “The Model of Rules” [see Meeting 7].
- (iii) Dennis Patterson, “Law’s Pragmatism: Law as Practice and Narrative,” *Virginia Law Review* 76 (1990): 937–96.
- (iv) Case: [TBD].

OPTIONAL.

¹²Only for the very ambitious; this exchange contains significant patches of logical symbolism.

- (v) Thomas Morawetz, “The Epistemology of Judging: Wittgenstein and Deliberative Practices,” *Canadian Journal of Law and Jurisprudence* 3.2 (1990): 35–59.

THANKSGIVING BREAK

IV. *Interpretation and Legal Indeterminacy*

Meeting 11. November 28: Interpretation, I.

REQUIRED.

- (i) Brian Bix, “The Application (and Mis-Application) of Wittgenstein’s Rule-Following Considerations to Legal Theory,” *Canadian Journal of Law and Jurisprudence* 3.2 (1990): 107–121.
- (ii) Martin Stone, “Focusing the Law: What Legal Interpretation Is Not,” in Marmor (ed.), *Law and Interpretation* (Oxford UP, 1995), 31–96.*
- (iii) Andrei Marmor, “No Easy Cases?” *Canadian Journal of Law and Jurisprudence* 3.2 (1990): 61–79.

Meeting 12. December 5: Interpretation, II.

REQUIRED.

- (i) Jules Coleman and Brian Leiter, “Determinacy, Objectivity, and Authority,” *University of Pennsylvania Law Review* 142.2 (Dec., 1993): 549–637.
- (ii) Ahilan T. Arulanantham, “Breaking the Rules?: Wittgenstein and Legal Realism,” *The Yale Law Journal* 107.6 (Apr., 1998): 1853–83.
- (iii) Case: *Curran v. Mount Diablo Boy Scouts* (17 Cal. 4th 670 (1998)).

Meeting 13. December 12: Interpretation, III; and conclusion.

REQUIRED.

- (i) Bix, “Questions in Legal Interpretation,” in Marmor (ed.), *Law and Interpretation*, 137–54.*
- (ii) Endicott, “Putting Interpretation in Its Place,” *Law and Philosophy* 13.4 (1994): 451–79.

NOTE. Paper 2 due at 5 p.m. on December 19 via e-mail.