

Philosophy of Law

Philosophy 34—Revised
Spring 2008

Schedule

WHAT IS LAW?

Wednesday, January 23 OVERVIEW
Overview of the course in general and the “what is law?” section in particular. What does the question mean and why does it matter? Presentation of different natural law views.

READING: None.

Monday, January 28 AUSTIN’S LEGAL POSITIVISM
Austin on law as command and the nature of legal obligation. Hart’s objections. First, some laws enable people to do things; they are not accurately construed as commands that prohibit behavior. Second, Austin conflates legal obligations with being obliged to pay a gunman.

READING: Austin, Lecture I, pp. 55–65. Hart, pp. 68–74.

Wednesday, January 30 AUSTIN ON SOVEREIGNTY
If laws are commands, the sovereign is the one who issues them. But how do we identify the sovereign? It can’t be by some other command. Austin relies on habits of obedience to identify the sovereign. Hart notes the shortcomings of this, especially when the state changes over from one sovereign to another. The new sovereign precedes any habits.

READING: Austin, Lecture VI, pp. 65–8. Hart, pp. 74–8.

Monday, February 4 HART’S POSITIVISM
What is the “rule of recognition”? How does it address the problems with Austin’s version of positivism?

READING: Hart, pp. 78–84.

Wednesday, February 6 LEGAL REALISM
Holmes and Frank describe the question “what is the law?” as a predictive one. Why? The main objection to this view is that judges are supposed to interpret the law, not make it. Why?

READING: Frank, pp. 117–9. Holmes, pp. 120–6.

Monday, February 11 HART ON JUDICIAL INTERPRETATION
Does the realists’ attack on “formalism” mean that there is no distinction between law and morality? Since judges have to revert to what is right or fair in order to decide indeterminate cases, it seems that morality is necessarily part of the law. We will talk about why Hart disagrees.

READING: H.L.A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* 71 (1958), especially §III. *Test distributed.*

APPLICATIONS

- Wednesday, February 13* THE SEPARATION OF LAW AND MORALITY
How should we regard people who took advantage of morally bad laws? For instance, should the Allied administrators have respected Nazi laws after World War II?

READING: Hart, "Positivism and the Separation of Law and Morals", §§ 4-6.
- Thursday, February 14* TEST DUE.
- Monday, February 18* FULLER ON HART AND NAZI LAW
Does Fuller successfully answer Hart?
READING: Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" *Harvard Law Review* 71 (1958), §§ 3-6. *First paper topics distributed.*
- Wednesday, February 20* THE SPELUNCEAN EXPLORERS
Fuller presents a fictitious case that has reached the highest court. He gives four different opinions on how to resolve the case. These depend on each justice's view of the nature of the law. Today, we will discuss Justice Truepenny, Justice Foster, and Justice Tatting's opinions.

READING: Fuller, pp. 37-46.
- Monday, February 25* THE SPELUNCEAN EXPLORERS II
Continued discussion, this time focussed on Justice Keen and Justice Handy's opinions.

READING: Fuller, pp. 46-54.
- Wednesday, February 27* JUSTICE SCALIA'S ORIGINALISM
Scalia interprets laws for a living: he's an Associate Justice of the Supreme Court. In today's reading, he makes the case for his "originalist" method for interpreting the law.

READING: Scalia, pp. 151-60.
- Monday, March 3* DWORKIN VS. SCALIA
What are Ronald Dworkin's objections to Scalia's position? How does Scalia reply? Who is right?

READING: Dworkin and Scalia, pp. 161-9.
- Wednesday, March 5* MUST WE OBEY THE LAW?

We have looked at how *judges* think about the “what is the law?” question. What about the citizen’s perspective? In today’s reading, Socrates argues that he has a very strong obligation to obey the law.

READING: Plato, pp. 206–14.

Thursday, March 6 FIRST PAPER DUE

Monday, March 10 WHAT IS CIVIL DISOBEDIENCE?

King makes the case for civil disobedience, which he describes as a kind of law breaking that expresses a kind of respect for the law. How should we fill in those “kind of’s”? What is the difference between civil disobedience, ordinary crime, and outright rebellion?

READING: King, pp. 231–40.

RIGHTS

Wednesday, March 12 RIGHTS

Dworkin argues that there are moral rights that no law can limit. This article tries to show what taking rights seriously involves. The normal justification for state action is that it will improve the common good. But that isn’t enough when the action would infringe moral rights, according to Dworkin.

READING: Ronald Dworkin, “Taking Rights Seriously” in *Taking Rights Seriously* (Harvard, 1977), pp. 184–205.

March 17–19 SPRING BREAK

No class.

READING: None.

Monday, March 24 HART’S THEORY OF RIGHTS

Hart tries to show what is distinctive about rights. What do rights add that could not be fully described by listing people’s duties? His answer is that rights give those who have them control over the liberty of those who bear the duties. He argues for his “choice” theory of rights by contrasting it with the “benefit” theory, according to which having a right involves being the person who will benefit from the performance of a duty.

READING: Hart, pp. 368–72.

Wednesday, March 26 NATURAL RIGHTS

Hart uses his theory of rights to argue that there is at least one natural right: the equal right to be free. A natural right is a right that exists independently of any human interactions or institutions. Hart claims that some of the rights that we recognize make sense only if there is an equal natural right to be free.

READING: Hart, pp. 372–76.

Monday, March 31 THE VALUE OF RIGHTS

This is Feinberg's attempt to answer the question about what is distinctive about rights. According to Feinberg, rights give us the ability to make claims. What does that mean? Feinberg also thinks that this distinctive feature of rights explains their value as well. We will look at that next time.

READING: Feinberg, pp. 347–51. *Second paper topics distributed.*

Wednesday, April 2

HOW IMPORTANT IS CLAIMING?

According to Feinberg, the ability to make claims is necessary for self-respect. Claiming is something that only a particular person can do; criticizing, by contrast, is something that anyone can do. Why isn't criticizing good enough for self-respect? Also, are all rights claims, in Feinberg's sense of the term?

READING: Feinberg, pp. 351–7.

LIBERTY

Monday, April 7

MILL'S HARM PRINCIPLE

Mill claims that society is justified in regulating behavior only for the purpose of preventing harm. He argues for this on the grounds of utility: we will be better off, on the whole, if we follow this rule than if we allow exceptions to it.

READING: Mill, pp. 251–63.

Wednesday, April 9

PATERNALISM

Dworkin presents cases in which it seems to make sense to prohibit people from doing things for their own good, aside from whether the interests of others are involved.

READING: Dworkin, §§1–5, pp. 281–7.

Monday, April 14

DWORKIN'S POSITIVE PROPOSAL

Dworkin proposes a test for determining when paternalistic interference is legitimate. It is legitimate whenever a rational person would consent to it.

READING: Dworkin, §6, pp. 287–91.

Wednesday, April 16

LIBERTARIAN PATERNALISM

Sunstein and Thaler draw on psychological research to argue for what they call "libertarian paternalism". Their ideas are worth discussing in their own right and because they touch on areas of the law that we would otherwise pass over.

READING: Cass Sunstein and Richard Thaler, "Libertarian Paternalism Is Not An Oxymoron" *University of Chicago Law Review* 70 (2003).

Thursday, April 17

SECOND PAPER DUE

PUNISHMENT

Monday, April 21

PUNISHMENT

Why is it appropriate to punish those who violate the criminal law? Retributivists hold that criminals deserve punishment. But is that anything more than the desire for vengeance? Consequentialists or utilitarians hold that punishment is needed for the social good. But that doesn't explain why we restrict punishment to those who are guilty of crimes. Would combining these two views address each one's weak points?

READING: Feinberg, pp. 624–629.

Wednesday, April 23

THE EXPRESSIVE THEORY OF PUNISHMENT

What is distinctive about punishment and does it make sense?

READING: Feinberg, pp. 629–39.

Monday, April 28

CRIMINAL ATTEMPTS

Why not punish those who think they are breaking the law when, in fact, they aren't?

READING: Kadish and Schulhofer, pp. 590–5.

Wednesday, April 30

MORE ON CRIMINAL ATTEMPTS

We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that*?

READING: Lewis, pp. 595–603.

TORTS

Monday, May 5

THE DECLINE OF CAUSE

How should we assign responsibility for harms that come about as a result of a long chain of events? The law's answer is not the intuitive one.

READING: *Palsgraf v. Long Island Railroad Co.*, pp. 767–74.

Wednesday, May 7

WRONGFUL LIFE SUITS

These suits involve claims that a person was harmed by being born. That strikes many people as paradoxical.

READING: *Becker v. Schwartz*, pp. 799–808.

Wednesday, May 14

FINAL EXAM, 9AM

Materials

Most of the readings are taken from the eight edition of the collection: *Philosophy of Law*, edited by Joel Feinberg and Jules Coleman (Wadsworth, 2008). Readings identified with a name and page numbers are in this book. It is available from the Huntley Bookstore.

The following articles will be made available through the library reserve system: H.L.A. Hart, "Positivism and the Separation of Law and Morals" (Feb 11–13); Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (Feb 18); Ronald Dworkin, "Taking Rights Seriously" (March 12); and Sunstein and Thaler, "Libertarian Paternalism Is Not An Oxymoron" (April 16).

Comments on lectures and announcements will be posted on the web at the Sakai site for this course.

Instructor

My name is Michael Green. My office is 207 Pearsons. My office hours are Wednesdays, 2:30–4. My office phone number is 607-0906. I have decided that my life will be much better if I only answer email once a day. I will reply, but if you need an answer quickly, you're probably best off calling or dropping by my office.

Assignments

Grades will be based on four assignments: one short test (worth 10% of the final grade), two papers and a final exam (worth 30% each).

Note: some of the dates on the syllabus I distributed on the first day of class were inaccurate.

The short test will be a take home exam; it will be distributed on Monday, February 11 and due on Thursday, February 14. The papers will be limited to 1800 words which is about five or six pages. They will be due on Thursday, March 6 and Thursday April 17. The Final Exam is scheduled for Wednesday, May 14 at 9 am.

Seniors will have to make arrangements to take the exam early. Grades for them are due on Friday, May 9.

Late papers will be accepted *without question*. They will be penalized at the rate of one-quarter of a point *per* day. Grades are based on the College's twelve point scale. Exceptions will be made in extremely unusual circumstances; suffering from writer's block is, alas, too common to qualify. The penalty is extremely mild. Just turn it in the next day.