

Philosophy of Law

What is law?

1. *Wednesday, January 21.* **OVERVIEW**
Overview of the course then start on the “what is law?” section. What does the question mean and why does it matter? Presentation of different natural law views.
Handout, distributed in class.
2. *Monday, January 26.* **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.
Austin, Lecture I, pp. 55-65. Hart, pp. 68-74.
3. *Wednesday, January 28.* **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.
Austin, Lecture VI, pp. 65-8. Hart, pp. 74-8.
4. *Monday, February 2.* **HART’S POSITIVISM**
What is the “rule of recognition”? How does it address the problems with Austin’s version of positivism?
Hart, pp. 78-84.
5. *Wednesday, February 4.* **LEGAL REALISM**
Holmes and Frank describe the “what is the law?” question as a request for a prediction. Why? The main objection to this view is that judges are supposed to interpret the law, not make it. Why?

(1) Frank, pp. 117-9. (2) Holmes, pp. 120-6.

6. *Monday, February 9.* HART ON JUDICIAL INTERPRETATION
Hart shares quite a lot with the legal realists. But he is concerned that the realists' attack on "formalism" might lead someone to think that there is no distinction between law and morality. The idea is that since judges have to revert to what is right, fair, or socially advantageous in order to decide some cases, it seems that some of these moral ideas are necessarily part of the law.
H.L.A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* 71 (1958), especially §III.
Note Test distributed.

Applications

7. *Wednesday, February 11.* SEPARATING LAW AND MORALITY
How should we regard people who took advantage of morally bad laws? For instance, how should judges treat people who took advantage of Nazi laws during World War II?
Hart, "Positivism and the Separation of Law and Morals", §§ 4-6.
Note Test due Friday, February 13.
8. *Monday, February 16.* FULLER ON HART AND NAZI LAW
Hart maintains that it's important to distinguish law and morality in part on the grounds that morality is more important than law. So what should a judge do when law and morality diverge, as in the Nazi case?
Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" *Harvard Law Review* 71 (1958), §§ 3-6.
Note First paper topics distributed.
9. *Wednesday, February 18.* THE SPELUNCEAN EXPLORERS

Fuller presents a fictitious case whose resolution depends on each justice's view of the nature of the law. Today, we will discuss Justice Truepenny, Justice Foster, and Justice Tatting's opinions.

Fuller, pp. 37-46.

10. *Monday, February 23.* THE SPELUNCEAN EXPLORERS II
Continued discussion, this time focussed on Justice Keen and Justice Handy's opinions.
Fuller, pp. 46-54.
11. *Wednesday, February 25.* THE US CONSTITUTION
Our next two readings are about the proper way to interpret the US Constitution. What's in it? What isn't?
(1) The US Constitution. (2) Laurence Tribe *The Invisible Constitution* (Oxford University Press, 2008), selections.
12. *Monday, March 2.* JUSTICE SCALIA'S ORIGINALISM
Justice 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.
Scalia, pp. 151-60.
Note Ronald Dworkin lecture at UCLA, 5 pm.
13. *Wednesday, March 4.* DWORKIN VS. SCALIA
Ronald Dworkin distinguishes two different kinds of "originalism," maintaining that Scalia's conclusions follow only from the less attractive one. How does Scalia reply? Who is right?
Dworkin and Scalia, pp. 161-9.
Note First paper due on Thursday, March 5.

Rights

14. *Monday, March 9.* 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.

Ronald Dworkin, "Taking Rights Seriously" in *Taking Rights Seriously* (Harvard, 1977), pp. 184-205.

15. *Wednesday, March 11.* 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.
Hart, pp. 368-72.
16. *Monday, March 23.* NO CLASS
17. *Wednesday, March 25.* 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.
Hart, pp. 372-76.
18. *Monday, March 30.* 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.
Feinberg, pp. 347-51.
19. *Wednesday, April 1.* HOW IMPORTANT IS CLAIMING?

Feinberg holds 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. But why isn't criticizing good enough for self-respect? Also, are all rights claims, in Feinberg's sense of the term?

Feinberg, pp. 351-7.

Note Second paper topics distributed.

Liberty

20. *Monday, April 6.*

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.

Mill, pp. 251-63.

21. *Wednesday, April 8.*

PATERNALISM

Gerald Dworkin thinks it can make sense to prohibit people from doing things for their own good, aside from whether the interests of others are involved. He also proposes a test for determining when paternalistic interference is legitimate. It is legitimate whenever a rational person would consent to it.

Dworkin, pp. 281-91.

22. *Monday, April 13.*

HARMLESS IMMORALITY

Dworkin questions whether the harm principle is the right way to defend tolerance for behavior that some regard as immoral even though no one is harmed.

Gerald Dworkin, "Devlin was right," *William & Mary Law Review* (1999) 40:927-46.

Note Second paper due Thursday, April 16.

Wrongs, punishment, and torts

23. *Wednesday, April 15.* 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?
Feinberg, pp. 624-629.
24. *Monday, April 20.* THE EXPRESSIVE THEORY
What is distinctive about punishment? Does it make sense?
Feinberg, pp. 629-39.
25. *Wednesday, April 22.* THE RIGHT TO PUNISHMENT
Morris argues that punishment has a surprising rationale. It is an expression of respect for the person being punished.
Morris, pp. 641-55.
26. *Monday, April 27.* CRIMINAL ATTEMPTS
Should we punish those who think they are breaking the law when, in fact, they aren't? Is there a difference between mistakes of fact, such as believing that the empty gun is loaded before pulling the trigger, and mistakes of law, such as believing that dancing on Saturdays is illegal while going to the sock hop?
Kadish and Schulhofer, pp. 590-5.
27. *Wednesday, April 29.* NO CLASS
28. *Monday, May 4.* MORE ON CRIMINAL ATTEMPTS
We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that*?
Lewis, pp. 595-603.
29. *Wednesday, May 6.* WRONGFUL LIFE SUITS

These suits involve claims that a person was harmed by being born. That strikes many people as paradoxical. We'll also use this day to review for the exam.

Becker v. Schwartz, pp. 799-808.

Materials

Most of the readings are taken from the eighth 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. Everything else will be available electronically.

Comments on lectures, announcements, and readings will be available through the Sakai website for this course: <http://sakai.claremont.edu>

Instructor

My name is Michael Green. My office is 207 Pearsons. My office hours are Tuesdays, 2-4. My office phone number is 607-0906. 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). The short test will be a take home exam; it will be distributed on Monday, February 9 and due on Friday, February 13. The papers will be limited to 1800 words which is about five or six pages. They will be due on Thursday, March 5 and Thursday April 16. The Final Exam is scheduled for Friday, May 15 at 2 pm.

Seniors should make special arrangements to take the exam early. Your grades are due at noon on Friday, May 8.

Late papers will be accepted *without question*. They will be penalized at the rate of one-quarter of a point *per* day, with grades based on the College's twelve point scale. Exceptions will be made in extremely unusual circumstances. Please be mindful of the fact that maturity involves taking steps to ensure that the extremely unusual remains extremely unusual.