

## Philosophy of Law

### What is law?

1. *Wednesday, January 20.*      **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 25.*      **AUSTIN’S LEGAL POSITIVISM**  
Austin on law as command and the nature of legal obligation. Hart objects that some laws enable people to do things; they are not accurately construed as commands that prohibit behavior. He also accuses Austin of conflating legal obligations with being obliged to pay a gunman.  
Austin, Lecture I, pp. 55-65. Hart, pp. 68-74.
3. *Wednesday, January 27.*      **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 but there are some fairly obvious shortcomings of this approach, especially when the state changes over from one sovereign to another.  
Austin, Lecture VI, pp. 65-8.
4. *Monday, February 1.*      **HART’S POSITIVISM**  
What is the “rule of recognition”? How does it address the problems with Austin’s version of positivism?  
Hart, pp. 74-84.
5. *Wednesday, February 3.*      **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 8.*

HART ON JUDICIAL INTERPRETATION

The legal realists attacked positivists for maintaining that the law could consist in rules; this is the charge of “formalism,” that positivists mistakenly believe that the role of the judge can be reduced to the formal exercise of applying rules. Hart’s idea of a penumbra was meant to answer the charge. (This reading is a little confusing since it introduces a connection between law and morality that the realists we read denied exists. Hart was concerned that the realists’ attack on “formalism” might lead someone to deny the 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.) One question I would like to discuss is: what are the advantages and disadvantages of having judges make law?

H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review* 71 (1958), especially §III.

7. *Wednesday, February 10.*

SHORT TEST

There will be an in-class test today. You will be asked to identify and explain passages from the readings.

## Applications

8. *Monday, February 15.*

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.

9. *Wednesday, February 17.* 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.
10. *Monday, February 22.* 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.
11. *Wednesday, February 24.* THE SPELUNCEAN EXPLORERS II  
Continued discussion, this time focussed on Justice Keen and Justice Handy's opinions.  
Fuller, pp. 46-54.
12. *Monday, March 1.* 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.  
(1) Scalia, pp. 151-60. (2) The US Constitution.
13. *Wednesday, March 3.* 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 4.

## Rights

14. *Monday, March 8.*                    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 10.*            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 22.*                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.
  
17. *Wednesday, March 24.*            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.

*Note* Second paper topics distributed.

18. *Monday, March 29.*                    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.

## Liberty

19. *Wednesday, March 31.*            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.
20. *Monday, April 5.*                    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.
21. *Wednesday, April 7.*                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 8.

## Punishment and torture

22. *Monday, April 12.* 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.
23. *Wednesday, April 14.* THE EXPRESSIVE THEORY  
What is distinctive about punishment? Does it make sense?  
Feinberg, pp. 629-39.
24. *Monday, April 19.* 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.
25. *Wednesday, April 21.* 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.
26. *Monday, April 26.* MORE ON CRIMINAL ATTEMPTS  
We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that*?

Lewis, pp. 595-603.

27. *Wednesday, April 28.* TORTURE AND THE LAW: I  
Dershowitz argues that it would be desirable to determine exactly when torture is legally permissible.  
Dershowitz, pp. 497-508.
28. *Monday, May 3.* TORTURE AND THE LAW: II  
Waldron argues that there should be an absolute legal prohibition on torture.  
Waldron, pp. 509-29.
29. *Wednesday, May 5.* REVIEW  
What will be on the final exam.

## Goals

Students taking this course will learn how legal philosophers analyze important but poorly understood concepts such as “law,” “obligation,” and “rights.” They will also see how different positions on the nature of the law bear on concrete questions about how to resolve specific cases or how to think of the role of judges. Finally, they will discuss the justification for holding people responsible for the consequences of their behavior, engaging in paternalistic interference with individual liberty, punishing criminal infractions, and legally recognizing torture. Students should have significantly deeper understanding of the law as a social institution, the specific practices that I listed, and techniques of analysis and argument.

The course emphasizes arguments and writing. Students who successfully complete this course will learn how to construct arguments, how to interpret analytical writing, how to raise objections to arguments, and how to write extended analytical essays of their own. There will be extensive opportunities

to practice these skills through discussions during class sessions. Grades reflect how well these skills are exhibited in written papers and exams.

## 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 Thursdays, 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 held in class on February 10. The papers will be limited to 1800 words which is about five or six pages. They will be due on Thursday, March 4 and Thursday, April 8. The Final Exam is scheduled for Tuesday, May 11 at 9 am.

Seniors should make special arrangements to take the exam early. Your grades are due at noon on Friday, May 7.

### Grading policies

I am committed to seeing that my students are able to do very high quality work and that high quality work will be recognized. I do not employ a curve and there is nothing competitive about grading in my courses.

Grades apply to papers, not to people. They have no bearing on whether I like or respect you. Nor do they measure improvement or hard work, for two reasons. First, there is no fair way to assess these things. Second, it would be misleading since one may put a lot of effort into trying to make a bad idea work or produce a very good paper with ease. I think we make too much of grades, but they do communicate where written work stands on as objective a scale as we can devise. Just bear in mind that this is really all that they involve.

### What the grades mean

- A Work that is accurate, elegantly written, and innovative. It adds something original, creative, or imaginative to the problem under discussion. The grade of A is given to work that is exceptional.
- B Work that is accurate, well written, and has no significant problems. The grade of B is given to very good work. There is less of a difference between A and B work than you might think. Generally speaking, B papers are less innovative than A papers. This may be because the paper does not attempt to add much or because the attempt made is not fully successful.
- C Work that has problems with accuracy, reasoning, or quality of writing. The grade of C means that the paper has significant problems but is otherwise acceptable.

D Work that has severe problems with accuracy, reasoning, relevance, or the quality of writing. Papers with these problems are not acceptable college-level work. Some papers that are fine on their own are nonetheless irrelevant. A paper is not relevant to my evaluation of work for this particular course if it does not address the question asked or if it does not display knowledge of our discussions. This sometimes trips up those taking a course pass/no credit.

F Work that has not been completed, cannot be understood, or is irrelevant.

Final grades will be calculated using the College's 12 point scale as described on page 40 of the 2009-11 Catalog. The numerical average must be greater than half the distance between two grades in order to earn the higher grade.

Letter	Number	Range
A	12	$11.5 < A \leq 12$
A-	11	$10.5 < A- \leq 11.5$
B+	10	$9.5 < B+ \leq 10.5$
B	9	$8.5 < B \leq 9.5$
B-	8	$7.5 < B- \leq 8.5$
C+	7	$6.5 < C+ \leq 7.5$
C	6	$5.5 < C \leq 6.5$
C-	5	$4.5 < C- \leq 5.5$
D+	4	$3.5 < D+ \leq 4.5$
D	3	$2.5 < D \leq 3.5$
D-	2	$1.0 < D- \leq 2.5$
F	0	$0.0 < F \leq 1.0$

Letter and number grades

### Late papers and academic accommodations

Late papers will be accepted *without question*. They will be penalized at the rate of one-quarter of a point *per* day, including weekends and holidays. 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 is genuinely extremely unusual.

To request academic accommodations of a disability, please contact Dean Marcelle Holmes at 607-2147 or [mdco4747@pomona.edu](mailto:mdco4747@pomona.edu).

