

Philosophy of Law

What is law?

1. *Wednesday, January 23* OVERVIEW
After a brief overview of the course, we will get started on the “what is law?” section: what does the question mean and why does it matter? In particular, we will present the natural law theories that our next authors, the legal positivists, wished to replace.
Handout, distributed in class.
2. *Monday, January 28* AUSTIN’S LEGAL POSITIVISM
Austin’s version of legal positivism identifies laws as a sovereign’s commands. Today’s class concerns how Austin tried to define the major terms of his theory. Next time, we will see how Hart developed *his* version of legal positivism out of criticisms of Austin’s version.
Austin, Lectures I & VI, pp. 55–68.
3. *Wednesday, January 30* HART’S CRITICISMS OF AUSTIN
Hart argues that, contrary to Austin’s view, laws are not commands. He maintains that there are significant examples of laws that do not fit the model and that Austin’s understanding of legal obligation is defective. These criticisms motivate Hart’s own version of positivism, according to which the law is best understood as a system of rules.
Hart, pp. 68–74.
4. *Monday, February 4* HART’S POSITIVISM
Hart’s positivism holds that laws are rules. In place of Austin’s sovereign, Hart has what he calls the rule of recognition. The idea is that this rule will indicate which other rules are laws and which ones are not. We will talk about what the rule of recognition is and whether it addresses the problems with Austin’s version of positivism.
Hart, pp. 74–84.

5. *Wednesday, February 6* LEGAL REALISM

Holmes and Frank describe the “what is the law?” question as a request for a prediction. This leads to their answer, that law is whatever judges say it is. We will talk about the reasoning that leads them to this position and the chief objection to it, that judges are supposed to interpret the law, not make it.

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

6. *Monday, February 11* HART ON JUDICIAL INTERPRETATION

If Hart were right that laws are rules, then we would expect that judges would have a fairly simple job: they would apply the rules to specific cases. But judges frequently have to go beyond the written rules in order to decide cases. This observation supports two different alternatives to Hart’s legal positivism. Natural law theorists think it shows that judges have to consider how the law ought to be in order to reach decisions about what the law is. Legal realists think it shows that judges make the laws. Hart tries to chart a path between these two opponents.

H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review* 71 (1958), §§ 1–3. (Sakai)

7. *Wednesday, February 13* 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 18* 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. (Sakai)
9. *Wednesday, February 20* 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. (Sakai)
Note First paper topics distributed.
10. *Monday, February 25* 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 27* THE SPELUNCEAN EXPLORERS II
Continued discussion, this time focussed on Justice Keen and Justice Handy's opinions.
Fuller, pp. 46-54.
12. *Monday, March 4* 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. There is a twist: it's not the original *intent* of the authors of the Constitution that matters. Instead, it's how the Constitution would have been *understood* at the time. Clever!
(1) Scalia, pp. 151-60. (2) The US Constitution (Sakai).

13. *Wednesday, March 6* DWORKIN VS. SCALIA
Ronald Dworkin distinguishes two different kinds of “originalism” and argues 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 Friday, March 8.

Rights

14. *Monday, March 11* MORAL RIGHTS AND THE LAW
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. (Sakai)
15. *Wednesday, March 13* HART’S THEORY OF RIGHTS
Hart tries to show what is distinctive about rights. His question is: 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 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.

17. *Wednesday, March 27* **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, 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?
(1) Feinberg, pp. 351-7. (2) A postscript. (Sakai)

Privacy

19. *Wednesday, April 3* **PRIVACY AND THE PRIVATE LAW**
Warren and Brandeis argue that what they call the common law recognizes a right to privacy. Their argument for this conclusion rests on judicial decisions. They argue that the decisions make sense only if there is a right to privacy since contractual and property rights cannot explain why judges reached the conclusions that they did.
Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review*, 4 (1890), pp. 193-220. (Sakai)
20. *Monday, April 8* **PRIVACY AND CONSTITUTIONAL LAW**
We will read parts of several Supreme Court decisions that find a right to privacy in the US Constitution. Our aim will be to describe what the authors of the decisions meant by the term "privacy" and their reasons for thinking that the Constitution protects it.
Selections from *Olmstead v. United States*, *Griswold v. Connecticut*, and *Roe v. Wade* (Sakai).

21. *Wednesday, April 10* DOUBTS ABOUT THE RIGHT TO PRIVACY
Judith Jarvis Thomson disputes Warren and Brandeis's view. She holds that what we call the right to privacy is just another way of referring to other, more basic rights. So it is these other rights that are fundamental.
Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs*, 4:4 (1975), pp. 295-314. (Sakai)
Note Second paper due Friday, April 12.
22. *Monday, April 15* ECONOMIC ANALYSIS OF PRIVACY
Judge Posner argues that judges decide most privacy cases as if the law was designed to bring the economic system closer to the results that would be produced by competitive markets. He believes this shows that the chief value of privacy is instrumental: it is mostly valuable insofar as it produces results that are valuable for other reasons rather than being of much value by itself.
Richard Posner, "The Right to Privacy," *Georgia Law Review*, 12 (1978), pp. 393-422. (Sakai)

Responsibility and punishment

23. *Wednesday, April 17* RESPONSIBILITY IN THE LAW
Hart and Honoré describe how responsibility is understood in the law. They are particularly concerned with showing that some prominent understandings of causality are inappropriate for legal uses.
Hart and Honoré, pp. 545-558.
24. *Monday, April 22* RETRIBUTIVISM VS. CONSEQUENTIALISM
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.

25. *Wednesday, April 24* THE EXPRESSIVE THEORY
Feinberg's question is: what is distinctive about punishment? Punishment involves something more than a legal penalty, like a fine. But what is it? Feinberg argues that what sets the acts of punishment apart is the way they express social disapproval. Then he uses this theory to solve several problems.
Feinberg, pp. 629-39.
26. *Monday, April 29* THE RIGHT TO PUNISHMENT
Morris argues that punishment has a surprising rationale. It is an expression of respect for the person being punished. The only alternative to punishment is to treat people as if they were not responsible for their behavior.
Morris, pp. 641-55.
27. *Wednesday, May 1* 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?
(1) Kadish and Schulhofer, pp. 590-5. (2) Handout on how attempts are treated in the law.
28. *Monday, May 6* MORE ON CRIMINAL ATTEMPTS
We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that*? Lewis argues that we can by comparing the system of punishment with a lottery. The person who attempts a crime voluntarily runs the risk of suffering the harsher punishment. Those who fail in their criminal attempts "win" the punishment lottery. But Lewis worries that the system is, nonetheless, unfair.
Lewis, pp. 595-603.
29. *Wednesday, May 8* 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.” We will discuss different views on the nature of the law, paying special attention to their implications for judges. We will examine the moral, legal, and economic dimensions of a right to privacy. Finally, we will look at punishment, addressing questions about the justification of punishment and the propriety of punishing merely attempted crimes. Those who complete the course 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: <https://sakai.claremont.edu>

Instructor

My name is Michael Green. My office is 207 Pearsons. My office hours are Fridays, 10–12. My office phone number is 607-0906.

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 13. The papers will be limited to 1800 words which is about five or six pages. They will be due on Friday, March 8 and Friday, April 12. The Final Exam is scheduled for Wednesday, May 15 at 2 pm.

Seniors should make special arrangements to take the exam early. Your grades are due at noon on Friday, May 10.

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: one may put a lot of effort into trying to make a bad idea work or produce a very good paper with ease. Grades communicate where written work stands on as objective a scale as we can devise. That is all that they involve, so don't make too much of them.

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. A paper that is fine on its own may nonetheless be 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 in the Pomona College Catalog.¹ The numerical average must be greater than half the distance between two grades in order to earn the higher grade.

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 Dan Tzuang at 607-2147 or dan.tzuang@pomona.edu.

¹ Search for "Letter Grades" here: <http://catalog.pomona.edu/>

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

