Philosophy of Law

What is law?

1. Tuesday, January 16 OVERVIEW

After going over the course as a whole, I will say a bit about the first section, on the nature of law. What does it mean to ask "what is law?" and who would care about the answer?

2. Thursday, January 18 AUSTIN'S LEGAL POSITIVISM

John Austin's (1790-1859) version of legal positivism identifies laws as a sovereign's commands. His theory consists in a set of interlocking definitions. We are supposed to be persuaded by the way these definitions enable us to speak clearly about legal phenomena. Today's class will discuss the major parts of Austin's theory. Later, we will see how Hart developed *his* version of legal positivism by criticizing Austin's version. Read Austin, *The Province of Jurisprudence Determined*, pp. 9–33 and 193–200.[1]

3. Tuesday, January 23 LEGAL REALISM

According to Austin, the law is made by a sovereign legislator. Oliver Wendell Holmes (1841-1935) and Jerome Frank (1889-1957) think judges make the law. As they see it, people only ask the question "what is the law?" when they want a prediction about how judges will rule. What is the point to asking that except to understand how you would fare in a legal case? Read Frank, *Law and the Modern Mind,* chap. 5 and Holmes, "The Path of the Law," pp. 457-468.[2]

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[1] John Austin, *The Province of Jurisprudence Determined* (1832; London: Weidenfeld and Nicolson, 1955).

[2] Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann Publishers, 1930); Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457–78.

4. Thursday, January 25 **HART ON AUSTIN AND THE REALISTS**

H.L.A. Hart's (1907-1992) positivist theory develops out of criticisms of Austin and the realists. He maintains that there are significant examples of laws that do not fit Austin's model of commands and that the understanding of legal obligation shared by Austin and the realists is defective. These criticisms motivate Hart's own version of positivism, according to which the law is best understood as a system of rules. Read Hart, *The Concept of Law,* pp. 79-91.[3]

5. Tuesday, January 30 **HART'S POSITIVISM**

Hart's positivism holds that laws are rules. Austin's sovereign is replaced by what Hart 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. Read *The Concept of Law,* pp. 91-110.

6. Thursday, February 1 **HART ON JUDICIAL INTERPRETATION**

Hart's primary aim is to defend what he calls the separation of law and morality. This leads him into questions about how judges should behave. One question concerns the resolution of cases where the law is unsettled. Another question concerns what judges are supposed to do when they are called on to enforce immoral laws. Both questions seem to raise problems for legal positivism. The first suggests that the law is not a system of rules while the second seems to show that legal positivists would be complicit with immoral laws. Read Hart, "Positivism and the Separation of Law and Morals," sections 1, 3, and 4; we will *not* discuss sections 2, 5, or 6.[4]

7. Tuesday, February 6 **DWORKIN ON HART**

Ronald Dworkin (1931-2013) disputes Hart's positivism on the grounds that judges have to use what he calls "principles" in order to decide cases. Since principles are not like rules, according to Dworkin, Hart's claim that law is a system of rules must be mistaken. We will talk about exactly what

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3 H. L. A. Hart, *The Concept of Law*, 2nd ed. (1961; Oxford: Clarendon Press, 1994).

4 H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629.

principles are and whether Hart's system could accommodate them. Read Dworkin, "The Model of Rules," pp. 22-29 and 37-46.[5]

8. Thursday, February 8 **TEST DAY**

There will be an in-class test. You will be given passages from the reading and asked to explain their meaning and significance.

Applications

9. Tuesday, February 13 **THE SPELUNCEAN EXPLORERS**

Lon Fuller (1902-1978) presents a fictitious legal case in which five judges give different opinions. These opinions depend on each justice's view of the nature of the law. Today, we will discuss the opinions by Truepenny, Foster, and Tatting. Truepenny believes the law in this case is simple while Foster and Tatting think it is quite complicated. Hanging in the background is something they all agree on: the sentence is unjust. Read "The Case of the Speluncean Explorers," pp. 616–626.[6]

10. Thursday, February 15 **SPELUNCEANS: TWO MORE OPINIONS**

We continue with the unfortunate Spelunceans. This time, we will discuss Keen and Handy's opinions. Keen is a sophisticated advocate of using what he thinks of as purely legal reasoning. Handy takes the view that there is a moral and political component to judicial reasoning. Read "The Case of the Speluncean Explorers," pp. 626–645.

Note First paper topics distributed.

11. Tuesday, February 20 **SCALIA'S ORIGINALISM**

Antonin Scalia (1936-2016) makes the case for his "originalist" method of 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

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5 Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14–46.

6 Lon L. Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62 (1949): 616–45.

would have been *understood* at the time. Read Scalia, "Common-Law Courts in a Civil-Law System," 16-47.[7]

12. Thursday, February 22 **DWORKIN VS. SCALIA**

Dworkin proposes a series of distinctions concerning the meaning of originalism and argues that Scalia faces a dilemma: he can reach conservative conclusions only by adopting the less attractive way of understanding originalism. Scalia insists that he accepts "semantic" originalism as opposed to "expectation" originalism and that his version is "abstract" rather than "concrete." Where Dworkin and Scalia come apart is on the question of whether the original meaning of the Constitution should be understood in what Dworkin calls a "principled" way or whether it is "dated." Read Dworkin's "Comment on Scalia," Scalia's "Response," and the section of Dworkin's "The Moral Reading of the Constitution" titled "The Moral Reading" (pp. 4-6).[8]

Note Paper drafts due Saturday night.

13. Tuesday, February 27 **THE LIVING CONSTITUTION**

David Strauss defends the idea of a living Constitution. As he sees it, the meaning of the US Constitution is settled by common law methods of interpretation rather than its original meaning. In the first chapter we will read, Strauss explains how common law interpretation works and how it applies to Constitutional law. In the second chapter, he shows that most of what we take for granted about the interpretation of the First Amendment to the Constitution comes from judges rather than the original meaning of the amendment. Read Strauss, *The Living Constitution,* chaps. 2-3.[9]

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7 Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 3–47.

8 Ronald Dworkin, "Comment," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 115–27; Antonin Scalia, "Response: The Role of United States Federal Courts in Interpreting the Constitution and the Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 129–49; Ronald Dworkin, "The Moral Reading of the Constitution," *New York Review of Books*, 1996.

9 David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010).

Punishment

14. Thursday, March 1 **RETRIBUTIVISM AND CONSEQUENTIALISM**

Immanuel Kant (1724-1804) gives a classic statement of the retributivist view that punishment is justified if and only if it is deserved. Jeremy Bentham (1748-1832) articulates the consequentialist position that punishment is justified if and only if it augments the total happiness of the community. Joel Feinberg (1926-2004) offers his assessment of the strengths and weaknesses of the classic views on punishment. There are especially significant problems with each view's sufficient condition for justified punishment: retributivists think we should punish the deserving even at great cost and consequentialists have trouble explaining what is wrong with punishing the innocent. Read Kant, selections from *The Metaphysics of Morals,* Bentham, selections from *An Introduction to the Principles of Morals and Legislation,* and Feinberg, "The Classic Debate."[10]

Note First papers due Saturday night.

15. Tuesday, March 6 **HART'S COMBINED THEORY**

Neither consequentialism nor retributivism seems capable of standing on its own. Consequentialists give too little weight to desert and retributivists give too little weight to costs. Hart suggests that they are most compelling as answers to different questions about punishment. If so, they might be combined. His idea is that consequentialism explains why we have a system of punishment at all while retributivism explains how the system should work. Read Hart, "Prolegomenon to the Principles of Punishment."[11]

16. Thursday, March 8 **CRITICISM OF COMBINED VIEWS**

The problem with combining very different philosophical views is usually that you wind up with an incoherent mess. Alan Goldman

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[10] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Mark C. Rooks, British Philosophy: 1600-1900 (1789; Charlottesville, VA: InteLex Corporation, 1993); Joel Feinberg, "The Classic Debate," in *Philosophy of Law*, ed. Joel Feinberg, Jules Coleman, and Christopher Kutz, 9th ed. (Belmont, CA: Wadsworth, 2010), 766–71; Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991).

[11] H. L. A. Hart, "Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society*, New series, 60 (1959): 1–26.

argues that attempts to combine retributivism and consequentialism face this problem. In particular, he believes, the goal of deterrence can only be met by inflicting penalties that are out of proportion to the offense. If so, we cannot pursue the utilitarian general aim of punishment while also adhering to the retributivist's rules about mistreating the innocent. Read Goldman, "The Paradox of Punishment."[12]

17. Tuesday, March 20 HAMPTON'S EDUCATIONAL THEORY

Jean Hampton believes that if punishment can be justified, it is because it communicates a message to the offender. The point is to educate the offender. If punishment did not improve the offender, it would merely involve the infliction of harm and that, she believes, is never justified. Read Hampton, "The Moral Education Theory of Punishment," pp. 208-21 and 235-38.[13]

Responsibility

18. Thursday, March 22 COMPATIBILISM AND INCOMPATIBILISM

It is generally accepted that punishment presupposes freedom: the person who is punished had to have freely committed the crime. But crimes are actions, actions are physical events, and physical events are determined by a chain of cause and effect that extends beyond anything we could be meaningfully said to control. If our actions are caused, how could they be free enough for punishment to make sense? John Bramhall (1594-1663) maintains that free will and determinism are incompatible: punishment makes sense, according to Bramhall, only if human actions are free from causal determination. Thomas Hobbes (1588-1679) takes the less intuitive position that freedom of action is compatible with causal determination. Read selections from Hobbes and Bramhall

[12] Alan H. Goldman, "The Paradox of Punishment," *Philosophy & Public Affairs* 9 (1979): 42–58.
[13] Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy & Public Affairs* 13 (1984): 208–38.

published under Hobbes's name as *Of Liberty and Necessity* and *The Questions Concerning Liberty, Necessity, and Chance*.[14]

Note Second paper topics distributed.

19. Tuesday, March 27 MODERN INCOMPATIBILISM

Joshua Greene and Jonathan Cohen maintain that developments in neuroscience will force us to abandon the understanding of responsibility necessary for retributive theories of punishment. In essence, they are modern versions of Bramhall. Read Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything."[15]

20. Thursday, March 29 MODERN COMPATIBILISM

Steven Morse doubts that advances in neuroscience require any new thinking about the criminal law. He has basically two arguments. First, he maintains that the law does not require freedom from causal determination. It only requires the rational ability to control one's actions. Second, he denies that neuroscience has undermined any commonsense ideas about responsibility. Read Morse, "Scientific Challenges to Criminal Responsibility."[16]

Note Second paper draft due Saturday night.

21. Tuesday, April 3 TEST CASE

We will talk about a real case today as presented by the radio show Radiolab (http://www.radiolab.org/story/317421-blame/). Here is their summary: "Kevin is a likable guy who lives with his wife in New Jersey. And he's on probation after serving time in a federal prison for committing a disturbing crime. … Kevin's doctor, neuroscientist Orrin Devinsky, claims that what happened to Kevin could happen to any of us under similar circumstances – in a very real way, it

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[14] Thomas Hobbes, *Of Liberty and Necessity*, ed. Mark C. Rooks, British Philosophy: 1600-1900 (1645; Charlottesville, VA: InteLex Corporation, 1993); Thomas Hobbes, *The Questions Concerning Liberty, Necessity, and Chance*, ed. Mark C. Rooks, British Philosophy: 1600-1900 (1656; Charlottesville, VA: InteLex Corporation, 1993).

[15] Joshua Greene and Jonathan Cohen, "For the Law, Neuroscience Changes Nothing and Everything," *Philosophical Transactions of the Royal Society* 359 (2004): 1775–85.

[16] Stephen J. Morse, "Scientific Challenges to Criminal Responsibility," in *Philosophy of Law*, ed. Joel Feinberg, Jules Coleman, and Christopher Kutz, 9th ed. (Belmont, CA: Wadsworth, 2010), 839–53.

wasn't entirely his fault. But prosecutor Lee Vartan explains why he believes Kevin is responsible just the same, and should have served the maximum sentence." The case exposes a difference between two different standards for criminal liability. According to the M'Naghten Rule, only knowledge of the law is necessary for rationality and thus criminal liability. But the American Law Institute holds that the ability to control one's behavior is also a necessary condition. There is a broader question as well: if an identifiable brain defect excuses a crime like this, what are we going to say about other people who commit the same crime without having undergone surgery. Do we really think that their brains are not *also* the cause of their behavior? Listen to the Radiolab program and read the M'Naghten Rule and the American Law Institute's statement on the insanity defense.[17]

22. Thursday, April 5 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? The law does both of these things. Sandford Kadish and and Stephen Schulhofer make a case for punishing mere attempts and drawing a distinction between mistakes of fact and mistakes of law. Then they raise a powerful objection against their own position. Read Kadish and Schulhofer, "The Case of Lady Eldon's Lace."[18]

Note Second papers due Saturday night.

23. Tuesday, April 10 LEWIS ON CRIMINAL ATTEMPTS

We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that*? David Lewis argues that we can by comparing the system of punishment with a lottery. The person who attempts a

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[17] American Law Institute, "The Insanity Defense," in *Philosophy of Law*, ed. Joel Feinberg, Jules Coleman, and Christopher Kutz, 9th ed. (Belmont, CA: Wadsworth, 2010), 836–39; House of Lords, "The M'Naghten Rules," in *Philosophy of Law*, ed. Joel Feinberg, Jules Coleman, and Christopher Kutz, 9th ed. (Belmont, CA: Wadsworth, 2010), 835–36.

[18] Sanford H. Kadish and Stephen J. Schulhofer, "The Case of Lady Eldon's French Lace," in *Criminal Law and Its Processes* (Boston: Little Brown and Company, 1989), 699–75.

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. Read Lewis, "The Punishment That Leaves Something to Chance."[19]

Privacy

24. Thursday, April 12 **PRIVACY AND THE PRIVATE LAW**

Samuel Warren and Louis Brandeis argue that there is a common law 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. Read Warren and Brandeis, "The Right to Privacy."[20]

25. Tuesday, April 17 **DOUBTS ABOUT THE RIGHT TO PRIVACY**

Judith Jarvis Thomson disputes Warren and Brandeis's view of privacy. 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. Read Thomson, "The Right to Privacy."[21]

26. Thursday, April 19 **SUPPORT FOR THE RIGHT TO PRIVACY**

Thomas Scanlon describes what he sees as our interest in privacy. He also argues against Thomson that there is a right to privacy that is not derived from other rights. Read Scanlon, "Thomson on Privacy."[22]

27. Tuesday, April 24 **ECONOMIC ANALYSIS OF PRIVACY**

Richard 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

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[19] David Lewis, "The Punishment That Leaves Something to Chance," *Philosophy & Public Affairs* 18 (1989): 53–67.

[20] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–220.

[21] Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs* 4 (1975): 295–314.

[22] Thomas Scanlon, "Thomson on Privacy," *Philosophy & Public Affairs* 4 (1975): 315–22.

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. Read Posner, "The Right to Privacy," 393-409; we will not discuss section II.[23]

28. Thursday, April 26 PRIVACY ONLINE

Computers and the internet raise a host of novel privacy issues. Helen Nissenbaum argues that we can only make sense of them if we accept that there is a right to privacy over information that is public. She also proposes a set of rules for consent and disclosure that offer more realistic protection for privacy than current practices do. Read Nissenbaum, "A Contextual Approach to Privacy Online."[24]

29. Tuesday, May 1 REVIEW

We will talk about the final exam. The exam itself is scheduled for Friday, May 11 from 2-5 p.m. Seniors should make arrangements to take the exam this week; your grades are due Friday, May 4 at noon.

GOALS

Students taking this course will learn how legal philosophers analyze important but poorly understood concepts in the law. We will discuss different views on the nature of the law, paying special attention to their implications for judges. We will look at punishment, addressing questions about the justification of punishment, the impact of scientific advances on our understanding of responsibility, and the propriety of punishing merely attempted crimes. Finally, we will examine the moral, legal, and economic dimensions of a right to privacy. 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

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[23] Richard A. Posner, "The Right to Privacy," *Georgia Law Review* 12 (1978): 393–422.

[24] Helen Nissenbaum, "A Contextual Approach to Privacy Online," *Daedalus* 140 (2011): 32–48.

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

The readings for the class will be available in the resources section of the Sakai site for this class. You will also find notes on each class session there.

ASSIGNMENTS

Grades will be based on four assignments: one short test (worth 16% of the final grade), two papers, and a final exam (each worth 28%).

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 is less ambitious or because it 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

Final grades will be calculated using the College's 12 point scale: 12 (A), 11 (A-), 10 (B+), 9 (B), 8 (B-), 7 (C+), 6 (C), 5 (C-), 4 (D+), 3 (D), 2 (D-), 0 (F). I will use this table to convert the numerical score to a letter grade.

11.5	<	A	≤	12
10.5	<	A-	≤	11.5
9.5	<	B+	≤	10.5
8.5	<	B	≤	9.5
7.5	<	B-	≤	8.5
6.5	<	C+	≤	7.5
5.5	<	C	≤	6.5
4.5	<	C-	≤	5.5
3.5	<	D+	≤	4.5
2.5	<	D	≤	3.5
1.0	<	D-	≤	2.5
0.0	<	F	≤	1.0

Grade Calculation Table

INSTRUCTOR

My name is Michael Green. My office is 207 Pearsons. My office hours are Wednesdays 1:30-3:30; any changes will be posted on the Sakai site. My office phone number is 607-0906.

WRITING HELP

I should be your primary resource for help with your papers. That's my job! That said, talking about academics with your peers is an extremely valuable part of the college experience. So I highly recommend discussing your papers with other members of the class.

If you want to go outside the class, the Philosophy Department has arranged for experienced philosophy student to work as what it calls writing mentors. Look for a poster outside of Pearsons 208 or sign up at https://tinyurl.com/ydehrofy. In addition, the College's Writing Center offers free, one-on-one consultations at any stage of the writing process. They have a Multilingual Specialist, Jenny Thomas, who is available to work with international and multilingual students. The Writing

Center offers drop-in hours Sundays — Thursdays from 8-10pm and appointments through http://writing.pomona.edu.

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 speak with me and the associate dean in charge of disability in the Dean of Students office. This is never a problem, but it is best taken care of in advance.