

## Philosophy of Law

### What is law?

1. *Tuesday, January 21*      OVERVIEW  
After going over the course as a whole, I will say a bit about the first section, on the nature of law.
  
2. *Thursday, January 23*      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, "A Positivist Conception of Law." (Textbook)
  
3. *Tuesday, January 28*      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, "Law as the Union of Primary and Secondary Rules."  
(Textbook)
  
4. *Thursday, January 30*      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, "The Foundations of a Legal System." (Textbook)

5. *Tuesday, February 4*      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?  
Holmes, “The Path of the Law;” Frank, “Legal Realism.”  
(Textbook)
6. *Thursday, February 6*      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 have to decide cases where the rules alone do not determine an answer. The critics of Hart’s approach think that judges must look for the law in sources other than rules. Hart believes that judges do not find the law in cases like this but that they make it.  
Hart, “Positivism and the Separation of Law and Morals,” sections 1 and 3. We will not discuss sections 2, 4, 5, or 6. (Sakai)
7. *Tuesday, February 11*      DWORKIN ON HART  
Dworkin 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 principles are and whether Hart’s system could accommodate them.  
Dworkin, “The Model of Rules I.” (Textbook)
8. *Thursday, February 13*      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 18*      SPELUNCEAN EXPLORERS 1  
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 and Justice Foster's opinions.

Fuller, "The Case of the Speluncean Explorers," pp. 36-41.  
(Textbook)

10. *Thursday, February 20* SPELUNCEANS 2

Continued discussion, this time focussed on Justice Tatting and Justice Keen's opinions.

Fuller, "Speluncean Explorers," pp. 41-48. (Textbook)  
*Note* First paper topics distributed.

11. *Tuesday, February 25* SPELUNCEANS 3

The first four judges try to stick to purely legal reasoning in their opinions. Our last justice, Handy, takes the view that there is a moral and political component to judicial reasoning. In addition to discussing the particulars of Handy's opinion, we will discuss the broader themes about where the law is found, the role of judges, and the relationship between law and morality.

Fuller, "Speluncean Explorers," pp. 48-52. (Textbook)

12. *Thursday, February 27* 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!

Scalia, "Common-Law Courts in a Civil Law Society." (Textbook)

13. *Tuesday, March 4* 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, "Comment;" Scalia "Response to Dworkin." (Textbook).

## Punishment

14. *Thursday, March 6*      **RETRIBUTIVISM AND CONSEQUENTIALISM**  
 Kant gives a classic statement of the retributivist view that punishment is justified if and only if it is deserved. Bentham articulates the consequentialist position that punishment is justified if and only if it augments the total happiness of the community.  
 Kant, "The Right to Punish" (Textbook); Bentham, *An Introduction to the Principles of Morals and Legislation*, chs. 13-14 (Sakai).  
*Note* First papers due Friday, March 7.
15. *Tuesday, March 11*      **RETRIBUTIVISM VS. CONSEQUENTIALISM**  
 Feinberg 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. What if we combined their necessary conditions on the justification of punishment?  
 Feinberg, "The Classic Debate." (Textbook)
16. *Thursday, March 13*      **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, "The Expressive Function of Punishment." (Textbook)
17. *Tuesday, March 18*      **SPRING BREAK**
18. *Thursday, March 20*      **SPRING BREAK**
19. *Tuesday, March 25*      **THE EDUCATIONAL THEORY OF PUNISHMENT**  
 Morris argues that we should think of punishment in the criminal justice system by analogy with the way parents use punishment to raise their children. Punishment is, in an indirect way, good for the person being punished.  
 Morris, "A Paternalistic Theory of Punishment." (Sakai)

20. *Thursday, March 27* A DEFENSE OF RETRIBUTIVISM

Lewis argues that various attempts to move away from retributivism to more humane seeming systems of social control are a mistake. The humanitarian systems open people up to endless interference; it's far better to just take an appropriate punishment.

Lewis, "The Humanitarian Theory of Punishment." (Sakai)

*Note* Second paper topics distributed.

## Responsibility

21. *Tuesday, April 1* DETERMINISM AND COMPATIBILISM

It is generally accepted that punishment presupposes liberty: 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 stretches well beyond the human scale. If our actions are caused, how could they be free enough for punishment to make sense? Bramhall took the position that free will and determinism are incompatible: punishment makes sense, according to Bramhall, only if human actions are free from causal determination. Hobbes, on the other hand, maintained that freedom of action is compatible with causal determination.

Bramhall, "Discourse of Liberty and Necessity;" Hobbes, "Of Liberty and Necessity." (Sakai)

22. *Thursday, April 3* MODERN INCOMPATIBILISM

Greene and 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.

Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything." (Sakai)

23. *Tuesday, April 8* MODERN COMPATIBILISM

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; the M'Naghten Rules are an illustration.

Second, he denies that neuroscience has undermined any commonsense ideas about responsibility.

Morse, "Scientific Challenges to Criminal Responsibility;"  
House of Lords, "The M'Naghten Rules." (Textbook)

24. *Thursday, April 10* 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, "The Case of Lady Eldon's French Lace." (Sakai)

*Note* Second papers due Friday, April 11.

25. *Tuesday, April 15* LEWIS 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, "The Punishment that Leaves Something to Chance."  
(Sakai)

## Privacy

26. *Thursday, April 17* 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.

Warren and Brandeis, "The Right to Privacy." (Sakai)

27. *Tuesday, April 22* 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)

28. *Thursday, April 24* 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.

Thomson, “The Right to Privacy.” (Sakai)

29. *Tuesday, April 29* 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.

Posner, “The Right to Privacy,” pp. 393-409. We will not discuss section II. (Sakai)

30. *Thursday, May 1* 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.

Nissenbaum, “A Contextual Approach to Privacy Online.” (Sakai)

31. *Tuesday, May 6* REVIEW

We will talk about the final exam. The exam itself will be scheduled during exam week. It will not be given on this day.

## 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 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 marked (Textbook) are taken from the ninth edition of the collection *Philosophy of Law*, edited by Jules Coleman and Christopher Kutz (Wadsworth, 2010). It is available from the Huntley Bookstore.

Comments on lectures, announcements, and readings marked (Sakai) 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 Wednesdays, 2-4. 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 Thursday, February 13. The papers will be limited to 1800 words which is about five or six pages. They will be due on Friday, March 7 and Friday, April 11. The Final Exam is scheduled for Thursday, May 15 at 2 pm.



Seniors should make special arrangements to take the exam early. Your grades are due at noon on Friday, May 9.

### 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.<sup>1</sup> 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 speak with me and Dean Collin-Eaglin at 621-8017. This is never a problem, but it is best taken care of in advance.

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

## Full citations

- Austin, John. "A Positivist Conception of Law." In *Philosophy of Law*, edited by Joel Feinberg, Jules Coleman, and Christopher Kutz, 74-87. 9th ed. Boston: Wadsworth, 2010.
- Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. New York: Hafner Press, 1948.
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- . "The Model of Rules I." In *Philosophy of Law*, edited by Joel Feinberg, Jules Coleman, and Christopher Kutz, 103-122. 9th ed. Boston: Wadsworth, 2010.
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- . "The Questions Concerning Liberty, Necessity, and Chance." In *The English Works of Thomas Hobbes of Malmesbury*, edited by William Molesworth. Vol. 5. London, 1839.
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- Roe v. Wade, 410 U.S. 113 (1973).
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