Philosophy of Law

What is law?

1. Tuesday, January 20 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 22 AUSTIN'S LEGAL POSITIVISM

Austin's version of legal positivism identifies laws are a sovereign's commands (Austin 1955, 9–33 and 193–200). 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.

3. Tuesday, January 27 HART'S CRITICISMS OF AUSTIN

Hart argues that, contrary to Austin's view, laws are not commands (Hart 1994, 79–99). 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.

4. Thursday, January 29 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 (Hart 1994, 100–110). 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.

5. Tuesday, February 3 LEGAL REALISM

Holmes (Holmes 1897) and Frank (Frank 1930, 42–47) 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? We will only discuss pp. 457-468 of the Holmes article.

6. Thursday, February 5 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 1958, sect. 1 and 3). (We will not discuss sections 2, 4, 5, or 6)

7. Tuesday, February 10 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 (Dworkin 1967). We will talk about exactly what principles are and whether Hart's system could accommodate them.

8. Thursday, February 12 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 17 THE SPELUNCEAN EXPLORERS

Fuller 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 first three opinions: Truepenny's, Foster's, and Tatting's (Fuller 1949, 616–26). 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.

10. Thursday, February 19 SPELUNCEANS: TWO MORE OPINIONS

Continued discussion, this time focussed on Justices Keen and Handy's opinions (Fuller 1949, 631–45). 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.

Note First paper topics distributed.

11. Tuesday, February 24 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 1997a, 16–47). 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!

12. Thursday, February 26 DWORKIN VS. SCALIA

Ronald Dworkin distinguishes two different kinds of "originalism" and argues that Scalia's conclusions follow only from the less attractive one (Dworkin 1997, 115–27). How does Scalia reply (Scalia 1997b, 144–49)? Who is right?

Punishment

13. Tuesday, March 3 RETRIBUTIVISM AND CONSEQUENTIALISM

Kant gives a classic statement of the retributivist view that punishment is justified if and only if it is deserved (Kant 1991, 140–45). Bentham articulates the consequentialist position that punishment is justified if and only if it augments the total happiness of the community (Bentham 1993, chs. 13–14). Feinberg offers his assessment of the strengths and weaknesses of the classic views on punishment (Feinberg 2010). 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.

14. Thursday, March 5 HART'S COMBINED THEORY

Neither consequentialism nor retributivism seems capable of standing on its own. So it is tempting to try to combine them. That is what Hart proposes (Hart 1959).

Note First papers due Saturday, March 7.

15. Tuesday, March 10 CRITICISM OF COMBINED VIEWS

The problem with combining very different philosophical views is usually that you wind up with an incoherent mess. Goldman 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 (Goldman 1979).

16. Thursday, March 12 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? He 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 1965).

17. Tuesday, March 24 HAMPTON'S EDUCATIVE THEORY

Hampton expands on the idea that punishment is meant to be expressive. As she sees it, punishment primarily communicates a message to the offender. The point of communicating is education to make the offender a better person. If punishment did not improve the offender, it would merely involve the infliction of harm and that, she believes, is never justified (Hampton 1984).

Note Second paper topics distributed

Responsibility

18. Thursday, March 26 COMPATIBILISM AND INCOMPATIBILISM

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 (Hobbes 1993a; Hobbes 1993b).

19. Tuesday, March 31 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 (Greene and Cohen 2004). In essence, they are modern versions of Bramhall.

20. Thursday, April 2 MODERN COMPATIBILISM

Morse doubts that advances in neuroscience require any new thinking about the criminal law (Morse 2010). 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.

21. Tuesday, April 7 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 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 (House of Lords 2010). But the American Law Institute holds that the ability to control one's behavior is also a necessary condition (American Law Institute 2010). 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?

22. Thursday, April 9 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 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 (Kadish and Schulhofer 1989).

Note Second papers due Saturday, April 11.

23. Tuesday, April 14 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 (Lewis 1989). 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.

Privacy

24. Thursday, April 16 PRIVACY AND THE PRIVATE LAW

Warren and Brandeis argue that what they call the common law recognizes a right to privacy (Warren and Brandeis 1890). 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.

25. Tuesday, April 21 DOUBTS ABOUT THE RIGHT TO PRIVACY

Judith Jarvis Thomson disputes Warren and Brandeis's view of privacy (Thomson 1975). 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.

26. Thursday, April 23 SUPPORT FOR THE RIGHT TO PRIVACY

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 (Scanlon 1975).

27. Tuesday, April 28 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 1978, 393–409). (We will not discuss section II.)

28. Thursday, April 30 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 (Nissenbaum 2011). She also proposes a set of rules for consent and disclosure that offer more realistic protection for privacy than current practices do.

29. Tuesday, May 5 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

Comments on lectures, announcements, and all of the 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 posted on the Sakai site. My office phone number is 607-0906.

Assignments

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

The Final Exam is scheduled for Wednesday, May 13 at 9 am. Seniors should arrange to take the exam in the last week of classes; I have to submit your grades by noon on Friday, May 8.

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.[1] 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.

[1] Search for "Letter Grades" here: http://catalog.pomona.edu/

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.

Sources

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