Philosophy of Law

What is law?

Tuesday, January 18 **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?

Thursday, January 20 **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*, lectures I (pp. 18-37) and VI (pp. 164-71).[1]

Tuesday, January 25 **LEGAL REALISM**

According to Austin, the law is made by a sovereign legislator. Oliver Wendell Holmes (1841-1935) and Jerome Frank (1889-1957) think that a more realistic theory would put more emphasis on the role of judges in making the law. They believe that people only ask the question "what is the law?" when they want a prediction about how the law will be applied; judges are the ones who apply the law. They also maintain that legislation often does not determine an answer to a particular case and, consequently, judges make decisions based on their social views. Read Frank, *Law and the Modern Mind,* chap. 5 and Holmes,

[1] John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (1832; Cambridge: Cambridge University Press, 1995).

"The Path of the Law," pp. 457-468. Note: we will not read the last ten pages of Holmes's essay.[2]

Thursday, January 27 **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]

Tuesday, February 1 **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.

Thursday, February 3 **FULLER ON LAW AND MORALITY**

The positivists identify law through formal or procedural means. In Hart's case, if a rule was adopted following the rule of recognition, then it is a law. Lon Fuller (1902-1978) argues that this is not enough as there are substantive constraints on what could count as a law that he calls the law's "inner morality." As he sees it, a rule that was adopted by an appropriate positivist procedure might still fail to be law if it did not conform to the inner morality of the law. Read Fuller, *The Morality of Law,* pp. 33-46.[4]

Tuesday, February 8 **HART ON JUDICIAL INTERPRETATION**

Hart's primary aim in this essay 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

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[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.

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

[4] Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969).

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 but rather operates more as the realists say it does, with judges basing their decisions on their views of social policy. The second seems to support a position like Fuller's. Read Hart, "Positivism and the Separation of Law and Morals," sections 1, 3, and 4; we will *not* discuss sections 2, 5, or 6.[5]

Thursday, February 10 **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 principles are and whether Hart's system could accommodate them. Read Dworkin, "The Model of Rules," pp. 22-29 and 37-46.[6]

Tuesday, February 15 **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

Thursday, February 17 **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 and Foster. 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 Fuller, "The Case of the Speluncean Explorers," pp. 616–626.[7]

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5 H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629.
6 Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14–46.
7 Lon L. Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62 (1949): 616–45.

Tuesday, February 22 **MORE SPELUNCEANS**

We continue with the unfortunate Spelunceans. This time, we will discuss Tatting, Keen, and Handy's opinions. Tatting searches for an answer in past court decisions and fails. Keen is a sophisticated advocate of using what he thinks of as purely legal reasoning. Handy takes the view that the judges should think more like politicians. Read "The Case of the Speluncean Explorers," pp. 626–645.

Thursday, February 24 **SCALIA'S ORIGINALISM**

Antonin Scalia (1936-2016) makes the case for his originalist method of interpreting the law. There is a twist. It is not the original *intent* of the authors of the Constitution that matters but how the Constitution would have been *understood* at the time it was written. Read Scalia, "Common-Law Courts in a Civil-Law System," 16-47.[8]

Note First paper topics distributed.

Tuesday, March 1 **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).[9]

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[8] 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.

[9] Ronald Dworkin, "Comment," in *A Matter of Interpretation*, 115–27; Antonin Scalia, "Response: The Role of United States Federal Courts in Interpreting the Constitution and the Laws," in *A Matter of Interpretation*, 129–49; Ronald Dworkin, "The Moral Reading of the Constitution," *New York Review of Books*, 1996.

Thursday, March 3 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.[10]

Note Paper drafts due Saturday night.

Punishment

Tuesday, March 8 RETRIBUTIVISM AND CONSEQUENTIALISM

Immanuel Kant (1724-1804) gives a 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."[11]

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

[11] 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).

Thursday, March 10 **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 answers the question "why we have a system of punishment at all?" while retributivism answers the question "how should punishment be distributed?" that is, "who should be punished and how much?" Read Hart, "Prolegomenon to the Principles of Punishment."[12]

Note First papers due Saturday night.

Tuesday, March 22 **CRITICISM OF COMBINED VIEWS**

Alan Goldman argues that retributivism and consequentialism cannot be combined. 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."[13]

Thursday, March 24 **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.[14]

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

[13] Alan H. Goldman, "The Paradox of Punishment," *Philosophy & Public Affairs* 9 (1979): 42–58.

[14] Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy & Public Affairs* 13 (1984): 208–38.

Responsibility

Tuesday, March 29 **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? That is the problem of free will. Today's class will be devoted to laying out the contending sides. Compatibilism is the view that two things can be true at the same time: (i) we can be responsible for our actions (ii) our actions are determined by causes outside of our control. In other words, responsibility is compatible with causal determination. Incompatibilism is the view that if our actions are determined by causes outside of our control then we cannot be held responsible for what we do. In other words, the causal determination of our actions is incompatible with our being responsible for our actions. Read Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything," sections 1-3, pp. 1775-78.[15]

Thursday, March 31 **MODERN INCOMPATIBILISM**

Joshua Greene and Jonathan Cohen maintain that developments in neuroscience will force us to abandon our commonsense understanding of responsibility. Once we do that, they think, we will also have to abandon retributive theories of punishment. In essence, they are modern versions of Bramhall because they think that the causal determination of our behavior is incompatible with our being responsible for our actions. Read Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything," (sections 4-9), pp. 1778-85.[16]

Note Second paper topics distributed.

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[15] Joshua Greene and Jonathan Cohen, "For the Law, Neuroscience Changes Nothing and Everything," *Philosophical Transactions of the Royal Society* 359 (2004): 1775–78 (sections 1-3).

[16] Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything," 1778–85 (sections 4-9).

Tuesday, April 5 MODERN COMPATIBILISM

Stephen Morse doubts that advances in neuroscience require any new thinking about the criminal law. He has 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."[17]

Thursday, April 7 TEST CASE

We will talk about a real case today as presented by the radio show Radiolab. 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 while 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.[18]

Note Second paper draft due Saturday night.

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[17] 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.

[18] Radiolab, "Blame" (September 12, 2013); 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.

Tuesday, April 12 CRIMINAL ATTEMPTS

Should we punish those who think they are breaking the law when, in fact, they aren't? If we do, 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 punishes people for acting in ways that, given the facts, cannot amount to a completed crime. It does not punish people whose intend to commit crimes but fail because they are mistaken about the law while it does punish those who fail because they are wrong about the facts. 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."[19]

Thursday, April 14 LEWIS ON CRIMINAL ATTEMPTS

We punish successful attempts more harshly than unsuccessful ones. Can we make sense of *that?* David Lewis (1941-2001) 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. Read Lewis, "The Punishment That Leaves Something to Chance."[20]

Note Second paper due Saturday night.

Privacy

Tuesday, April 19 PRIVACY AND THE PRIVATE LAW

According to Samuel Warren (1852-1910) and Louis Brandeis (1856-1941), there is a common law right to privacy. Their argument for

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[19] 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.

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

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."[21]

Thursday, April 21 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 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.[22]

Tuesday, April 26 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."[23]

Thursday, April 28 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."[24]

Tuesday, May 3 REVIEW

We will talk about the final exam. The exam itself is scheduled for Thursday, May 11 from 2:00 - 5:00 P.M.. A short writing assignment will be given for those who mean to use the course to satisfy the writing intensive overlay requirement.

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[21] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–220.
[22] Richard A. Posner, "The Right to Privacy," *Georgia Law Review* 12 (1978): 393–422.
[23] Judith Jarvis Thomson, "The Right to Privacy," *Philosophy & Public Affairs* 4 (1975): 295–314.
[24] Thomas Scanlon, "Thomson on Privacy," *Philosophy & Public Affairs* 4 (1975): 315–22.

MATERIALS

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

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.

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%).

INSTRUCTOR

My name is Michael Green. My office is 207 Pearsons. My office hours are Thursdays 11-12; any changes will be posted on the Sakai site. My office phone number is 607-0906 and my email address is available through the Sakai site.

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 do not make too much of them.

GRADE CALCULATIONS

Table 1 gives Pomona College's four point scale. Table 2 shows how numerical averages will be converted to final letter grades.

Letter Grade	*Number Grade*
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D+	1.33
D	1.00
D-	0.67
F	0.00

Table 1 Point Scale

Lowest Number		*Letter Grade*		*Highest Number*
3.835	<	A	≤	4.000
3.495	<	A-	≤	3.835
3.165	<	B+	≤	3.495
2.835	<	B	≤	3.165
2.495	<	B-	≤	2.835
2.165	<	C+	≤	2.495
1.835	<	C	≤	2.165
1.495	<	C-	≤	1.835
1.165	<	D+	≤	1.495
0.835	<	D	≤	1.165
0.165	<	D-	≤	0.835
0.000	≤	F	≤	0.165

Table 2 Numerical Thresholds

WHAT THE GRADES MEAN

The grade of A is given to work that is accurate, elegantly written, and innovative. It adds something original, creative, or imaginative to the problem under discussion. A papers are exceptional.

The grade of B is given to work that is accurate, well written, and has no significant problems. B papers are very good and 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.

The grade of C is given to 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.

The grade of D is given to work that has severe problems with accuracy, reasoning, relevance, or the quality of writing. Papers with these problems are not acceptable college-level work. Note that 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.

The grade of F is given to work that has not been completed, cannot be understood, or is irrelevant.

WRITING HELP

I should be your primary resource for help with your papers. That is 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.

In addition, there are some very good options outside the class. To begin with, the Philosophy Department has arranged for experienced philosophy student to

work as what it calls writing mentors. There will be an announcement about this program early in the term. In addition, the College's Writing Center offers free one-on-one consultations at any stage of the writing process. You can make appointments through the Portal (look for "Writing Center" under "Academics") or by email (writing.center@pomona.edu).

LATE PAPERS AND ACADEMIC ACCOMMODATIONS

Late papers will be accepted without question. They will be penalized at the rate of 0.083 points 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.