

JURISPRUDENCE

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Required Texts:

H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, 1994) [CL]
Course Reader [CR].

Course Description: An examination of classic jurisprudential questions in and around the theory of adjudication: the theory of how judges actually do decide cases and how they ought to decide them. These questions include: Do legal rules really constrain judicial decision-making? What makes a rule (or norm) a rule of the legal system? Are principles of morality legally binding even when such principles have not been enacted into a law by a legislature? (Relatedly, are there objective principles of morality?) Where no legal norm controls a case, how ought judges to decide that case? Can there be "right" answers to legal disputes, even when informed judges and lawyers disagree about the answer? Are there principles or methods of legal reasoning that constrain judicial decision-making, or is legal reasoning essentially indeterminate, such that a skillful judge can justify more than one outcome for any given dispute? Is judicial decision-making really distinct from political decision-making of the sort legislators engage in? Readings drawn exclusively from major twentieth-century schools of thought, especially American Legal Realism (e.g., Karl Llewellyn, Jerome Frank), Natural Law (e.g., Ronald Dworkin, John Finnis), and Legal Positivism (e.g., H.L.A. Hart, Joseph Raz). No familiarity with either jurisprudence or philosophy will be presupposed, though some readings will be philosophically demanding, and the course will sometimes venture in to (and explain) cognate philosophical issues in philosophy of language and metaethics as they are relevant to the core jurisprudential questions.

Course Requirements: (1) A take-home, type-written final exam: one essay (not more than 1750 words), 8 hours to complete exam; (2) Attendance the first day of class; (3) *Regular* attendance thereafter (one or two absences are acceptable, but please notify me in advance). **Please note that there will be no classes on Friday, March 29 and April 5. Make-ups will be scheduled in consultation with the class.**

Office Hours: Regular office hours will be Thursdays from 1:30 to 3 pm, but feel free to e-mail me to make an appointment for a different time.

Reading Assignments: The syllabus is aspirational. Each class tends to spend more time on certain issues than others, so it may be necessary to make adjustments during the term.

I. A Realistic Look at Adjudication

Topic 1: Formalism, Realism, and Legal Indeterminacy

Readings on Formalism, in CR.

Excerpt from Karl Llewellyn, *The Bramble Bush*, pp. 69-76, in CR.

Llewellyn, "Remarks on the Theory of Appellate Decision," in CR.

Excerpt from *New York v. United States*, in CR.

Topic 2: How *Do* Judges Really Decide Cases?

Excerpt from Herman Oliphant, "A Return to Stare Decisis," in CR.

Max Radin, "The Theory of Judicial Decision," in CR.

Felix Cohen, excerpt from "Transcendental Nonsense...," pp. 843-846, in CR.

Jerome Frank, excerpt from *Law and the Modern Mind*, pp. 100-117, in CR.

Jerome Frank, excerpt from "Are Judges Human?" in CR.

Topic 3: How *Ought* Judges Decide Cases?

Excerpt from Holmes, "The Path of the Law," in CR.

Excerpt from Posner, *The Problematics of Moral and Legal Theory*, pp. 240-242, in CR.

Excerpt from Judge Frank's concurring opinion in *Ricketts v. Pennsylvania R. Co.*, in CR.

Excerpt from Uniform Commercial Code, in CR.

II. Law as a System of Rules

Topic 4: The Critique of Legal Realism; Legal Indeterminacy

Hart, CL, Ch. VII ("Formalism and Rule-Scepticism").

Topic 5: Hart's Positivism: Methodology, the Critique of John Austin

Hart, CL, Preface, Ch. I, Sec. 3 ("Definition").

Hart, CL, Chs. II, III & IV.

Topic 6: Hart's Positivism: Rules and "Social Rules"

Hart, CL, Chs. V & VI.

Excerpt from Dworkin, "The Model of Rules II," in CR.

III. Adjudication, Moral Principle, and the Obligation to Obey the Law

Topic 7: Positivism and Natural Law Theory

Hart, CL, Ch. IX ("Laws and Morals").

Topic 8: The Critique of Legal Positivism I: Dworkin and Hart's Rejoinder

Dworkin, "The Model of Rules I," in CR

Hart, CL, Postscript, pp. 250-254, 259-276

Topic 9: Hard Positivism: Raz

Raz, "Authority, Law, and Morality," in CR.

Topic 10: Dworkin's "Natural Law" Theory

Excerpt from Dworkin, *Law's Empire* (1986), pp. 225-266, in CR.

Excerpt from *Bowers v. Hardwick*, in CR.

Topic 11: The Problem of Theoretical Disagreement

Excerpt from Dworkin, *Law's Empire*, pp. 3-11, 15-20

Leiter, "Explaining Theoretical Disagreement" (available here:

http://lawreview.uchicago.edu/issues/archive/v76/76_3/Leiter.pdf)

Toh, "Legal philosophy a la carte," in CR (excerpts)

Topic 12: The Critique of Legal Positivism II: Natural Law Theory

Excerpt from Mark Murphy, "Natural Law Theory," in CR (pages to be announced).

Topic 13: Is There an Obligation to Obey the Law?

Leslie Green, "Law and Obligations," in CR.

Recommended Secondary Sources:

Students interested in doing additional reading in jurisprudence--or simply seeking useful commentaries on the primary texts--might find the following secondary materials of value. *Do not rely on secondary sources not listed here, unless you speak with the instructor about them.* There is much unreliable material on "jurisprudence" available. An excellent on-line resource is the *Stanford Encyclopedia of Philosophy* at <http://plato.stanford.edu/contents.html>, which has many useful entries on topics in legal philosophy.

(1) Marshall Cohen (editor), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1983). Essays by P. Soper, J. Coleman, and D. Lyons defend Soft Positivism; essays by J. Mackie and J. Raz are important, early criticisms of Dworkin.

(2) Robert George (editor), *Natural Law Theory: Contemporary Essays* (Oxford, 1992), esp. the essays by N. MacCormick, J. Finnis, and M.S. Moore.

(3) Andrei Marmor (editor), *Law and Interpretation: Essays in Legal Philosophy* (Oxford, 1995), esp. the essays by Stephen Perry and Coleman & Leiter. These essays are more difficult than some of the other material listed here.

(4) Neil MacCormick, *H.L.A. Hart* (Stanford, 1981).

(5) Joseph Raz, *The Authority of Law* (Oxford, 1979), esp. Chapters 3 and 4.

(6) Joseph Raz, *Ethics in the Public Domain* (Oxford, 1994), esp. Chapters 10 and 13.

(7) Jules Coleman (editor), *The Postscript: Essays on Hart's Postscript to The Concept of Law* (Oxford, 2001). The essay by S. Shapiro presents an important *new* argument for Hard Positivism based on the concept of what it is to be guided by a rule. Essays by Leiter, S. Perry, and Raz deal with various meta-theoretical and methodological issues in analytic jurisprudence.

(8) Jules Coleman & Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, 2002). Many useful essays for students in this course, including two on natural law theory (B. Bix, J. Finnis), and other essays on hard positivism (A. Marmor), soft positivism (K. Himma), and authority (S. Shapiro). Leiter's essay on "Law and Objectivity" may be useful for those especially interested in the metaethical questions as they intersect with legal theory.

(9) Martin Golding & William Edmundson (eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell, 2005). Essays helpful for this course are: Natural Law Theory (M. Murphy) (which we will read in part), American Legal Realism (B. Leiter), Legal and Moral Obligation (M. Kramer).

(10) Mark Murphy, *Philosophy of Law: The Fundamentals* (Blackwell, 2006). Both a highly competent introductory text to jurisprudence and a kind of sustained brief for a natural law theory approach to the problems of legal philosophy.

(11) Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law I* (Oxford, 2011). The essay by D. Enoch is an important account of the idea of the normativity, or reason-giving, character of the law and legal positivism; the paper by K. Toh examines the role of non-cognitivism in Hart's theory of law.