

Sample Syllabus

3. Philosophy of Law—Proposal for Advanced Undergraduate Course

Course Description: The law plays a central role in structuring our lives as social creatures, determining how we may, or must, act in a huge range of circumstances. The law is also a place of contestation, as anyone who has followed the legal battles over abortion in the United States knows. How do judges determine what the law is when it is unclear? How do the dictates of law relate to the dictates of morality? Why should we obey the law if we find it morally repugnant? These are some of the questions that we will take up in this advanced course on the philosophy of law. We will approach them by considering influential debates about the nature of law in the Western philosophical tradition.

Part I: Realism, Formalism, and Positivism

We begin by thinking about what the law *is*. We ask about different perspectives one can take on the law and how this relates to our understanding of the law's nature. We ask, also, about the relationship between the normativity of law and the normativity of morality.

Readings: Holmes, "The Path of the Law"
 Austin, *The Province of Jurisprudence Determined*, Lecture 1
 Hart, *Concept of Law*, chapters 2–4
 Kelsen, *A Pure Theory of Law*, pages 193–214, 348–355
 Hart, "Positivism and the Separation of Law and Morals"
 Fuller, "Reply to Hart"

Optional: Kelsen, "The Concept of the Legal Order"; Raz, "Kelsen's Theory of the Basic Norm"

Part II: Rules, Principles, and Interpretation

With an understanding of positivism in hand, we turn to one of the most powerful critics of this tradition. Ronald Dworkin argues for the impossibility of neatly dividing between what the law requires and what morality requires. Our goal is to understand Dworkin's critique of positivism and his alternative view, which involves a moral-interpretive approach to applying legal principles.

Readings: Dworkin, "Model of Rules I"
 Riggs v. Palmer [U.S. Supreme Court]
 Dworkin, *Law's Empire*, chapters 1–2, 4, 6–7

Optional: Dworkin, *Taking Rights Seriously*, chapter 4; Dworkin, *Justice for Hedgehogs*, chapter 19; Coleman and Simchen, “The Meaning of Law”; Herschovitz, “The End of Jurisprudence”

Part III: Natural Law

The natural law tradition is associated with the evocative phrase “Unjust laws are not laws.” However, it is not perfectly clear how to spell out this idea, and it seems susceptible to a number of objections. Our goal is to understand classical natural law theory, as well as more modern approaches that try to handle positivist criticisms.

Readings: Dimock, “The Natural Law Theory of St. Thomas Aquinas”
Finnis, *Natural Law and Natural Rights*, chapters 1–2, 10, 12
Fuller, “The Morality that Makes Law Possible”

Optional: Hobbes, *Leviathan*, chapter 26; Murphy, “Hobbes (and Austin, and Aquinas) on Law as Command of the Sovereign”

Part IV: Authority and Practical Reasons

Law is supposed to be *normative* in the sense that it gives us reasons for action; it is supposed to be *authoritative* in the sense that these reasons are conclusive. But what is it to have a (conclusive) reason for action and how can law supply some further normative force on top of what we already have reason to do?

Readings: Raz, *The Morality of Freedom*, chapters 2–3
Raz, *Practical Reason and Norms*, chapters 1, 5, (2 recommended)
Raz, “Legal Positivism and the Sources of Law”

Optional: Raz, “Revisiting the Service Conception”; Shapiro, *Legality*, pages 150–153, 178–233; Shiffrin, *Democratic Law*, (all)

Part V: Law and Legitimacy in Modern Society

Most of the legal theory we have encountered is “analytical,” to a large degree setting aside issues of empirical social analysis. But, arguably, legal theory should take into account the problems of administering law and achieving compliance under the complex conditions of modern states. Jürgen Habermas offers a systematic approach to these problems of legal legitimacy for advanced democratic societies.

Readings: Habermas, *Between Facts and Norms*, chapters 1, 3–5, 9

Optional: Waldron, “Kant’s Legal Positivism”

Part VI: International Law

A simple positivist view holds that law is the command of the sovereign. Whatever other problems this simple positivism might have, it certainly cannot account for the existence of international law. We conclude by asking whether any of the approaches to law that we have surveyed in this class can make sense of law that applies to states rather than law that applies (merely) within states.

Readings: Dworkin, “A new philosophy for international law”
Payandeh, “The Concept of International Law in the Jurisprudence of H.L.A. Hart”

Optional: Levinson and Goldsmith, “Law for States”

Assignments

There will be five assignments for this class: three reading responses and two papers. The three reading responses will each count for 15% of the grade (45% in total). The first paper will count for 20% of the grade. The second paper will count for 25% of the grade. Participation will make up the remaining 10%.

The three reading responses will be on **Parts I, III, and VI**. [2 pages each]

The two papers will be on **Parts II and IV**. [5 pages and 7 pages]