Philosophy of Law
Winter 2015

Course Overview

Time and Location

Class Meetings: Tu/Th 12:50-2:05
Room: 460-301

Instructors

Instructor: Samuel Asarnow
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  Office Hours: Th, 2:30-4:00 (or by appt)
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TA: Kelvin Yang
  Office: 90-92H
  Office Hours: Tues, 2:30-4:00 (or by appt)
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NB: Though there is a TA for this course, there are no discussion sections!

About the Course

One of the most distinctive features about our way of life is that we are governed by the law. We live our lives within a legal system, which impacts the incentives and disincentives that structure almost every part of our lives. The law governs how our food is manufactured and served, the quality of the air we breathe, what we can do to our children when they misbehave, how fast we can drive our cars, and whether we need to shovel the snow off the sidewalks in front of our houses. The law also conveys great benefits on us: the enforcement of contracts makes it possible for us to earn a living by working; the enforcement of criminal laws makes it possible for us to walk on the street at night without fear of being killed (at least, in many places); the system of taxation provides us with roads on which to drive, a military force with which to repel intruders, and even fireworks shows on the fourth of July.
In this course we will consider a variety of philosophical questions raised by life within a legal system. The first half of the course will consider questions in so-called “analytical jurisprudence” about the nature of law and the legal system. What makes a system of rules and an associated enforcement mechanism a legal system? Almost everyone would agree that the United States features a legal system, and that the US Constitution (for example) has the status of law. But other organizations that have similar powers, for example the group calling itself the Islamic State (aka ISIS or ISIL) also imposes rules and sometimes levies what look like taxes over large areas. Has this group succeeded in establishing laws? Or do it merely issue commands which it is prepared to back up with deadly force? Is there anything more to a system of law—for example, a concern with justice—than its being a set of commands backed up with deadly force?

In the rest of the course, we will consider philosophical questions in “normative jurisprudence,” which asks not “what is law?” but “what should the law be?” In particular, we will consider a variety of common doctrines within contract law, criminal law, tort law, and the law of evidence. In each case, we will consider whether these doctrines are philosophically and morally defensible. Are they well-motivated and do they stand up to critical reflection? Or are they regrettable artifacts of a long history of political compromise? Here is one example to focus your attention: whenever the state criminalizes a type of action, it also criminalizes attempting that type of action. But in order to determine whether you are guilty of, e.g., attempted murder, the state must make a judgment about the contents of your mind: with what intention were you acting? Is it morally defensible for the state to criminalize, as it were, states of mind in this way? Is this a necessary means to the end of a peaceful society, or is it an objectionable doctrine of thought crime?

Throughout the course special attention will be paid to connections between the philosophical basis of the legal doctrines we study and central debates in the moral philosophy, the philosophy of mind and action, and epistemology. As we will see, the law is often forced to make decisions that have the effect of picking sides in controversial philosophical debates, and such cases often have the effect making those debates vivid in a helpful way.

**Readings**

There are no required books for this course. All readings will be posted to the CourseWork site (http://coursework.stanford.edu). If you find that you cannot access the CourseWork site, please let me know immediately.

On some days, the syllabus includes optional readings. I’m not trying to fool you here: these readings really are optional, in the sense that you don’t have to do them. These readings will typically not be discussed in class (though I may include details from them in lecture), but they
may be interesting fodder for final paper projects. Frequently these articles will be interesting recent papers that engage with older, classic texts that we read.

**Assignments and Grading Basis**

*Attendance and Participation (10%)*

This class will often be lecture-style, but there will still be plenty of opportunities for participation. You are expected to attend every class, and to participate when appropriate. What counts as participation? Certainly, asking questions and responding to questions that the instructor asks. But so does listening thoughtfully to the conversations that develop in class. Conversations in office hours with the instructor and teaching assistant also count as participation.

*Daily Reading Reactions (15%)*

Every day before class (by noon), you are responsible for emailing us a short (1-3 paragraph) reading reaction. In your reading reaction, pick one or two of the readings for that day and tell us some of your thoughts about it. The goal is for you to be thinking actively about the reading before class begins. Here are some good things to do in a reading reaction: raise a question about a difficult part of the reading; try to answer a question the author of an article asks; criticize an argument from the reading; summarize an especially difficult passage from the reading; explain why you don’t understand something from the reading. *Send your reaction paper to asarnowphilosophy@gmail.com with the subject line “Reading Reaction.”*

*Midterm Assignment (30%) (Due Wednesday, February 11)*

In week 5, we will distribute several prompts about the readings so far, focusing on questions in analytical jurisprudence. You will write a short paper of no more than 1600 words responding to the prompt. The prompts will be highly structured, to encourage you to think about the material in a particular way.

*Final Paper (45%) (Due Wednesday, March 18)*

The major assignment for the class will be a final paper of approximately 3000 words. We will distribute a number of prompts, but you should also feel free to pick your own topic. If you choose to pick your own topic, you will be asked to check in with Sam or Kelvin beforehand to make sure your idea is appropriate in topic and scale. Some of the paper topics may ask you to draw on optional readings listed below (though it is OK if you didn’t do the optional reading during the week it was assigned).
Students with Disabilities

Students who may need an academic accommodation based on the impact of a disability should initiate the request with the Student Disability Resources Center (SDRC) located within the Office of Accessible Education (OAE). SDRC staff will evaluate the request with required documentation, recommend reasonable accommodations, and prepare an Accommodation Letter for faculty dated in the current quarter in which the request is being made. Students should contact the SDRC as soon as possible since timely notice is needed to coordinate accommodations. For more information please see http://studentaffairs.stanford.edu/oae.

Please also feel free to contact me at any time if there is anything I can do to make the course more accessible for you.

Honor Code and Plagiarism

You have all taken the Stanford Honor Code, of which plagiarism is a violation. Plagiarism will not be tolerated. If you are under a lot of stress and feel that you cannot complete your work in the time allotted, please contact me and we will work out an arrangement if possible.

Provisional Nature of the Syllabus

I reserve the right to alter the syllabus at any time. Alterations will be announced via e-mail. There is a chance I will be required to travel unexpectedly during the quarter, missing a day of lecture. If that happens, the reading schedule may shift by a day and a revised syllabus will be distributed via e-mail.

Topics and Readings

Week 1

Tuesday 1/6: Introduction to Philosophy of Law

What is the philosophy of law? What is law? What should our laws be?

Thursday 1/8 What Is Analytic Jurisprudence? What is law?

- Scott Shapiro, Legality, Chapters 1-2
- Optional: HLA Hart, The Concept of Law, Chapter 1
Week 2

Tuesday 1/13: Legal Positivism

- Scott Shapiro, *Legality*, Chapters 3-4
- Optional: HLA Hart, *The Concept of Law*, Chapters 5-6
- Optional: Janet Dickson, “Is the Rule of Recognition Really a Conventional Rule?”

Thursday 1/15: No Class (Sam in Ohio)

Week 3

Tuesday 1/20: Legal Interpretivism

- Ronald Dworkin, “Hard Cases”
- Optional: Ronald Dworkin, “The Model of Rules I”
- Optional: Barbara Baum Levenbrook, “The Sustained Dworkin”

Thursday 1/22: Legal Realism

- Brian Leiter, “American Legal Realism”
- Derrick Bell, “Racial Realism”
- Optional: Janet Dickson, “On Naturalizing Jurisprudence”
- Optional: Brian Leiter, “Naturalizing Jurisprudence: Three Approaches”

Week 4

Tuesday 1/27: Law and Morality

- John Gardner, “Law and Morality”

Thursday 1/29: Law and Economics

Week 5

Tuesday 2/3: Contracts and Promises

- Seana Shiffrin, “Are Contracts Promises?”
- Optional: Richard Posner, “The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood”

Thursday 2/5: Unconscionable Contracts

- Seana Shiffrin, “Paternalism, Unconscionability Doctrine, and Accomodation”
- Optional: Nico Cornell, “Contract and Complaint”

Week 6

Tuesday 2/10: Justifying Criminal Punishment

- Stanford Encyclopedia of Philosophy, “Legal Punishment”

Wednesday 2/11: Midterm Paper Due 11:59pm

Thursday 2/12: The Expressive Theory of Punishment

- Joel Feinberg, “The Expressive Function of Punishment”
- Optional: Andrew Altman, "Expressive Meaning, Race, and the Law"

Week 7

Tuesday 2/17 Contractarianism about Punishment

- Claire Finkelstein, “Punishment as Contract”

Thursday 2/19 Restorative Approaches to Punishment

- Heather Strang and Lawrence Sherman, “Repairing the Harm: Victims and Restorative Justice”
- FAMM, “Alternatives to Incarceration in a Nutshell”

Week 8

Tuesday 2/24 Mens Rea and Criminal Attempts

- Gideon Yaffe, “Trying, Acting, and Attempted Crimes”

Thursday 2/26 Negligence in Tort Law

- Optional: Stanford Encyclopedia of Philosophy, “Theories of Tort Law”

Week 9

Tuesday 3/3 Evidence Law

- Judith Jarvis Thomson, “Liability and Individualized Evidence”

Thursday 3/5 Freedom of Expression

- Optional: Ishani Maitra and Mary Kate McGowan, “The Limits of Free Speech: Pornography and the Question of Coverage”

Week 10

Tuesday 3/10: Flex Day!

- (Readings TBD)

Thursday 3/12: Wrap-Up

Wednesday 3/18: Final Papers Due 11:59pm