

# Philosophy of Law

Legal Studies 106  
Spring 2018

Prof. Christopher Kutz  
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Office hours: Tentatively, Weds., 2:10-4pm

Class meetings: MWF 12-1pm  
Room: 222 Wheeler

**Graduate Student Instructor:**  
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## Required Texts:

Coleman, Feinberg, Kutz, *Philosophy of Law* (Cengage custom printed edition with only the selected texts), available through the campus book store. Alternatively, you can buy or rent the full text, 9<sup>th</sup> edition, through Amazon.

## Secondary reading

To be posted on bCourses. Readings are also listed below within the syllabus.

## Course Description

This course explores a number of philosophical themes bearing on the nature of the law and its relationship to morality: e.g., What is law—does its claim rest only on social processes or does law necessarily embody moral claims? Do we have an obligation to obey the law? What are the moral limits of legal punishment? In addition to engaging these and related substantive issues, the course also attempts to sharpen students' skills in practical reasoning through the analysis of logical argument. The materials for the course consist of readings from the assigned text, and additional readings available on bCourses. The format of the course will be a combination of lecture and classroom discussion, with a substantial number of ungraded group in-class exercises (debates and simulations).

## Learning objectives:

This course has three principal goals. The first is for you to learn what the essential conceptual and normative elements of law arg. The second is to learn how to read long and complex arguments, to understand their strengths, and to identify their argumentative vulnerabilities. Third, we aim to help you develop your skills in writing analytical and argumentative essays, as a general model for producing well-reasoned analytical prose

## Attendance and classroom policies:

You are required to attend lectures as well as discussion sections, and are expected to participate actively in both. You are permitted three unexcused absences from lecture, and one unexcused absence from section; any further absences will require justification from the Tang

Center or another educational authority. Observance of religious holidays will also, of course, be honored. You are responsible, however, for any material covered in class, whether or not your absence is excused.

Those with conflicting extra-curricular commitments (e.g., performance, athletics) will need to make specific arrangements, per the campus guidelines. In particular, you need to notify me as early as possible, and ideally in the first few weeks of class, with a proposed solution to any conflict with deadlines. The solution may involve an earlier deadline or test time.

The lecture meeting will make use of an exciting strategy for peer-to-peer and student-to-instructor active engagement and continuous self-assessment: listening and speaking. This will require your full attention to the words of each other and the instructor, as we discuss readings and topics. I will cold-call you on occasion as well.

In order to facilitate this classroom strategy, I have a no-technology policy. Cell phones are to be put away, and texting during class is not allowed. (If you are responsible for a dependent during class hours, emergencies can be accommodated.)

Unless you have a DSP accommodation (see below), or otherwise instructed by me, **laptops are not allowed.** Instead, you will take notes with pen and paper, old school. Recent research confirms that not only does this avoid distractions, but that you retain more and better from the class when writing by hand. For some recent empirical research supporting this policy, see <https://sites.udel.edu/victorp/files/2010/11/Psychological-Science-2014-Mueller-0956797614524581-1u0h0yu.pdf>.

In general, you should try to do all the readings for the week in advance of the Tuesday lecture, unless otherwise indicated in the syllabus. (I will adjust the syllabus over the semester as I gain an appreciation of the proper pace for work.)

### **DSP Accommodation:**

If you have specific needs due to documented disabilities, we will make every effort to accommodate these needs, in collaboration with the Disabled Student's Office. For information on University policies regarding students with disabilities, and federal and state laws affecting people with disabilities, contact: <http://access.berkeley.edu/>. Please convey your DSP accommodation letter to your GSI early in the semester so that the teaching staff can make all appropriate arrangements.

### **Requirements and Grading**

Your grade will be based on the following components: three 4-5 page papers, due in class on **February 16<sup>th</sup>, March 19<sup>th</sup>, and April 25<sup>th</sup>**; a comprehensive final exam; and section participation. You are also required to do an in-class, peer-reviewed shadow midterm, on **Wednesday, April 6<sup>th</sup>**. You will not be graded on the midterm itself, but you will be graded on the quality of the effort you

put into peer-reviewing the exams of 3 of your classmates. That peer-review is due **Friday, April 8<sup>th</sup>**. Your final exam is Wednesday, May 9<sup>th</sup>, 3-6pm.

Your attendance at lecture is expected, as is your prior completion of the reading assignments. (Although some of the reading assignments do not involve many pages, the readings are often very condensed, and will require re-reading for comprehension.) Attendance and participation at weekly section meetings are required, and will be recorded. You may be asked to complete brief written assignments for specific section meetings. Section discussions will often cover assigned course materials not discussed in lecture.

**Please note carefully:** you cannot pass the course without completing all written assignments (including the peer review), or if you have missed more than 30% of your section meetings. No papers will be accepted late without **prior** permission from the instructor.

University policies on plagiarism will be strictly enforced. Plagiarism consists in offering work as your own for a grade without acknowledging its source. Self-plagiarism, or offering your own work submitted for grading in another course, is also prohibited. This is the University policy:

*All written work submitted for a course, except for acknowledged quotations, must be expressed in the student's own words. It must also be constructed upon a plan of the student's own devising. Work copied without acknowledgement from a book, from another student's paper, from the internet, or from any other source is plagiarized. Plagiarism can range from wholesale copying of passages from another's work to using the views, opinions, and insights of another without acknowledgement, to paraphrasing another person's original phrases without acknowledgement. The submission of such work will, under University rules, render the offending **student** subject to an F grade for the work in question or for the entire course, at the discretion of the instructor, and will also make the student liable for referral to the SJA.*

Students who for any reason need special arrangements for exams are responsible for notifying me or the GSIs at the beginning of the semester. Students who notify us immediately prior to or after an exam cannot be accommodated.

Your final grade will be determined on roughly the following basis:

papers: 20% each  
peer graded midterm: 5%  
section participation: 10%  
final exam: 25%.

Note: The grade for the midterm assignment, which counts as 5% of your overall grade, is based on the effort you put into your peer grading effort, not the result of your own exam.

Your participation in lecture is strongly encouraged. As you read the assignments, think about what questions the authors were attempting to answer. What answers do the authors suggest, and what arguments presented to support these answers? Ask yourself whether you agree with the answers: why or why not?

**Course outline and readings:**

[Unless otherwise noted, all readings are from the course textbook, with the reading number in brackets.]

**Jan. 17: Meeting 1** Introduction

I: What is Law?

**Jan. 19, 22, 24: Meetings 2–4** What is the difference between laws and commands?

Reading:

[8] Austin, John. Selections from Lectures I, V, and VI of "The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence."

[9] Hart, H. L. A. "Law as the Union of Primary and Secondary Rules."

**Jan. 26, 29: Meetings 5-6** How do we determine the content of laws? Do laws have moral content?

Reading:

[10] Dworkin, Ronald. Selections from Chapters 2 and 4 of "Taking Rights Seriously"; "Hard Cases - excerpt" (Bcourses).

**Jan. 31, Feb. 2: Meetings 7-8** How should judges interpret the law?

Reading:

[16] Scalia, Antonin. "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws."

[17] Dworkin, Ronald. "Comment."

II: The Obligation to Obey the Law and its Limits

**Feb. 5, 7: Meetings 9-10** Is there an obligation to obey the law? Skepticism about political obligation.

Reading:

[21, 23] Socrates, Crito; Smith, M. B. E. "Is There a Prima Facie Obligation to Obey the Law?"

**Feb. 9, 12: Meetings 11-12** Optimism about political obligation/Catch up

Reading:

Dworkin, Ronald. Selections from Law's Empire. [Bcourses]

**Feb. 14, 16: Meetings 13-14** Should we sometimes disobey the law? The specific problem of racial justice.

Reading:

[22] King, M.L. "Letter from Birmingham Jail"

Shelby, Tommie. "Justice, Deviance, and the Dark Ghetto." *Philosophy and Public Affairs* (2007) [Bcourses]

**First paper due, online and in hard copy in class, February 16<sup>th</sup>.**

**Feb. 21, 23: Meetings 15-16** What if the Rule of Law is a system of racial oppression?

Reading:

[20] Harris, Cheryl, "Whiteness as Property"; Delgado, Richard, "The Ethereal Scholar" [Bcourses].

III: Responsibility and Punishment

**Feb. 26, 28: Meetings 17-18** When exactly does an act cause harm?

[50, 51] "Responsibility for harm": Feinberg, Kutz,

**Mar. 5, 7: Meetings 19-20** Where does the burden of proof lie? And what counts as evidence?

Reading:

Kaplan, John. "Decision Theory and the Factfinding Process." [Bcourses]

Thomson, Judith J. "Liability and Individualized Evidence." [Bcourses]

**Mar. 9, 12, 14: Meetings 21-23** What, if anything, justifies punishment of offenders by the state?

Reading:

[53-55] Excerpts from Cesare Beccaria, Immanuel Kant, and Joel Feinberg.

**Mar. 16, 19: Meetings 24-25** Is it appropriate to punish acts that "successfully" cause harm (e.g., murder, vehicular manslaughter) more severely than similar acts which, merely as a matter of good luck, do not?

Reading:

[52] Nagel, Thomas. "Moral Luck"

Cushman, Fiery. "Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment." [Bcourses]

**Second paper due, online and in hard copy in class, March 19<sup>th</sup>.**

IV: Harm, Liberties, and the Law

**Mar. 21, 23: Meetings 26-27** When is the state justified in interfering in the lives of its citizens?

Reading:

[35] Mill, John Stuart. "The Liberal Argument from *On Liberty*."

[37] Devlin, Patrick. "Morals and the Criminal Law."

**[March 26, 28, 30: Spring Break!]**

**Meeting 28: April 2:** Recap/Review discussion

**Meeting 29: April 4:** In class shadow midterm. **Bring your laptops!**

**Meeting 30: April 6: No class.** Peer review exercise due by end of class, online.

**April 9, 11, 13: Meetings 31-33** What are the justifications for and limits of freedom of speech?

Reading:

[40] Scanlon, T.M., "Freedom of Expression and Categories of expression."

[41] Post, Robert, "Religion and Freedom of Speech: Portraits of Muhammad."

**April 16, 18: Meetings 34-35** When can the state protect people from their own choices?

Reading:

Shiffrin, Seana. "Paternalism, Unconscionability Doctrine, and Accommodation."

[Bcourses]

V: Philosophical Questions within Contract Law

**April 20, 23: Meetings 36-37** Does law expect us to be moral?

Reading:

Kaplow, Louis & Shavell, Stevens, excerpt from *Fairness versus Welfare* [Bcourses]

[71] Kronman, Anthony, "Specific Performance"

[72] Shiffrin, "The Divergence of Contract and Promise."

**April 25, 27: Meetings 38-39** Taking Stock/Review

**Third paper due, online and in hard copy in class, April 25th.**

**RRR week: extra office hours TBA**

**Final exam, Weds., May 9<sup>th</sup>, 3-6pm.**