

Fall 2023

Jurisprudence

STEPHEN E. SACHS

Harvard Law School

HLS 2140

M 3:45–5:45
(Room TBD)

<https://bit.ly/44BVk86>

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Welcome! This reading group offers a brief introduction to jurisprudence and the philosophy of law. Central questions include the nature of law and legal obligation, the relationship between law and morals, and the role that philosophical issues can or should play in the actual practice of law.

The jurisprudence literature is vast, and there's only so much we can cover in a single-credit reading group. We'll begin with the competing theories of H.L.A. Hart and Ronald Dworkin, which continue to play a central role in Anglo-American jurisprudential debates. We'll then discuss three alternative legal theories: natural law, legal realism, and critical legal studies. Finally, we'll discuss a topic on which American judges and lawyers have openly discussed questions of general jurisprudence, namely the role of unwritten law in the federal courts. (Other subject-specific topics, such as contract theory or the philosophy of criminal law, will have to wait for future coursework.)

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READINGS

There are two required texts: H.L.A. Hart, *The Concept of Law* (3d ed. 2012), and Ronald Dworkin, *Law's Empire* (1986). Additional readings are available online and in a printed coursepack. (Please bring the relevant readings with you to each class session.) The readings average roughly 140 pages per session, so please look ahead to plan your allocation of time!

Optional readings are marked in gray. You aren't expected to read these for the course; they're purely for enrichment, to be read in your copious free time. (Preferably in a good armchair by the fire, a snifter of brandy and your loyal spaniel at your side.)

OFFICE HOURS

Please feel free to attend my office hours! A sign-up sheet is available on the course website. If those times don't work for you, just contact me, and we can try to make other arrangements. You should also feel free to sign up in groups, invite in other students during your reserved block, and so on.

Also: HLS will pay for lunches for faculty members and groups of four students or more. While you should feel *no* obligation to see any more of me than is required by the prescribed number of credit-hours, I'm always happy to meet for lunch. Just email me to propose a time.

MEETINGS

Meetings will be held on alternate Monday afternoons, per the schedule below. Each student should participate fully in discussions, but there are no response papers or other assignments. (In case of illness, emergency, or other special circumstances, please just email me.)

Aug. 30 (M schedule): No class

Sep. 4: No class

Sep. 11: No class

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| 1 | Sept. 18: Introduction; Hart on laws and orders (128 pages) | |
| 1.1 | Scott J. Shapiro, <i>Legality</i> ch.1 (2011) | 9 |
| 1.2 | Oliver Wendell Holmes, Jr., <i>The Path of the Law</i> , 10 Harv. L. Rev. 457 (1897) | 51 |
| 1.3 | Hart, <i>Preface to The Concept of Law</i> (pp. vi–vii) | |
| 1.4 | Hart, <i>The Concept of Law</i> chs. 1–4 (pp. 1–78) | |

Optional:

- John Austin, *The Province of Jurisprudence Determined* (1832)
- Leslie Green, *Introduction to Hart, The Concept of Law* (pp. xv–lv)

Sept. 25: No class

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| 2 | Oct. 2: Hart on laws and rules (118 pages) | |
| 2.1 | Hart, <i>The Concept of Law</i> chs. 5–7 (pp. 79–154) | |
| 2.2 | Matthew D. Adler, <i>Interpretive Contestation and Legal Correctness</i> , 53 Wm. & Mary L. Rev. 1115 (2012) | 57 |
| 2.3 | William Baude & Stephen E. Sachs, <i>The Official Story of the Law</i> , 43 Oxford J. Legal Stud. 178 (2023) | 75 |

Optional:

- John Gardner, *Legal Positivism: 5½ Myths*, 46 Am. J. Juris. 199 (2001)
- Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979)
- Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NYU. L. Rev. 1109 (2008)
- Scott J. Shapiro, *Was Inclusive Legal Positivism Founded on a Mistake?*, 22 Ratio Juris 326 (2009)

Oct. 9: No class

3 Oct. 16: Dworkin (164 pages)

3.1 Dworkin, Law's Empire chs. 1–3, 7 (pp. 1–113, 225–75)

Optional:

- Hart, *Postscript to The Concept of Law* (pp. 238–76)
- Ronald Dworkin, *Taking Rights Seriously* (1978)
- Hart's *Postscript: Essays on the Postscript to The Concept of Law* (Jules Coleman ed., 2d ed. 2001)

Oct. 23: No class

4 Oct. 30: Natural law (148 pages)

- 4.1 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) 99
- 4.2 Brian Bix, *Natural Law Theory, in A Companion to Philosophy of Law and Legal Theory* 209 (Dennis Patterson ed., 1996) 109
- 4.3 John Finnis, *Natural Law and Natural Rights* 3–22 (2d ed. 2011) 117
- 4.4 John Finnis, *On the Incoherence of Legal Positivism*, 75 Notre Dame L. Rev. 1597 (2000) 137
- 4.5 Mark Greenberg, *The Moral Impact Theory of Law*, 123 Yale L.J. 1288 (2014) 153
- 4.6 Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 Am. J. Juris. 17 (2003) 191
- 4.7 Daniel Wodak, *What Does 'Legal Obligation' Mean?*, 99 Pac. Phil. Q. 790 (2018) 219

Optional:

- Hart, *The Concept of Law* chs. 8–9 (pp. 155–212)
- Mitchell Berman, *Of Law and Other Artificial Normative Systems*, in *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* 137 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019)
- Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 *Harv. J.L. & Pub. Pol’y* 103 (2022)
- Ronald Dworkin, *Justice for Hedgehogs* 400–16 (2011)
- Scott Hershovitz, *The End of Jurisprudence*, 124 *Yale L.J.* 1160 (2015)
- Stephen E. Sachs, *According to Law*, 46 *Harv. J.L. & Pub. Pol’y* (forthcoming 2023), <http://ssrn.com/id=4457086>
- Jeremy Waldron, *Jurisprudence for Hedgehogs* (N.Y.U. School of Law Public Law & Legal Theory Working Paper No. 13-45, July 2013), <http://ssrn.com/id=2290309>

Nov. 6: No class

5 Nov. 13: Legal realism and critical legal studies (136 pages)

- 5.1 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913).....247
- 5.2 John C. P. Goldberg & Benjamin C. Zipursky, *Hohfeldian Analysis and the Separation of Rights and Powers*, in *Wesley Hohfeld A Century Later* 366 (Shyamkrishna Balganes, Ted M. Sichelman & Henry E. Smith eds., 2022)253
- 5.3 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809 (1935).....269
- 5.4 Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 *Colum. L. Rev.* 16 (2000)311

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| 5.5 | Duncan Kennedy, <i>A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation</i> , in <i>Legal Reasoning: Collected Essays</i> 153 (2008)..... | 337 |
| 5.6 | Brian Leiter, <i>Legal Realism and Legal Positivism Reconsidered</i> , 111 <i>Ethics</i> 278 (2001) | 359 |

Optional:

- Matthew X. Etchemendy, *Legal Realism and Legal Reality*, 88 *Tenn. L. Rev.* 399 (2021)
- Leslie Green, *Positivism, Realism and Sources of Law*, in *The Cambridge Companion to Legal Positivism* 39 (Torben Spaak & Patricia Mindus eds., 2021)

Nov. 20: No class

6 Nov. 27: Jurisprudence and unwritten law (156 pages)

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| 6.1 | A.W.B. Simpson, <i>The Common Law and Legal Theory</i> , in <i>Legal Theory and Legal History</i> 359 (1987)..... | 383 |
| 6.2 | <i>Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.</i> , 276 U.S. 518 (1928) | 409 |
| 6.3 | <i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938) | 417 |
| 6.4 | <i>Guaranty Trust Co. v. York</i> , 326 U.S. 99 (1945)..... | 423 |
| 6.5 | Judith S. Kaye, <i>State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions</i> , 70 <i>N.Y.U. L. Rev.</i> 1 (1995)..... | 427 |
| 6.6 | <i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004) | 435 |
| 6.7 | Steven Walt, <i>Why Jurisprudence Doesn't Matter for Customary International Law</i> , 54 <i>Wm. & Mary L. Rev.</i> 1023 (2013)..... | 469 |
| 6.8 | Stephen E. Sachs, <i>Finding Law</i> , 107 <i>Calif. L. Rev.</i> 527 (2019) | 483 |

Optional:

- Hart, *The Concept of Law* ch. 10 (pp. 213–37)
- Allan Beever, *The Declaratory Theory of Law*, 33 *Oxford J. Legal Stud.* 421 (2013)
- 1 William Blackstone, *Commentaries on the Laws of England* *63–80
- Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 *Wm. & Mary L. Rev.* 921 (2013)
- Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813 (2012)
- Frederick Schauer, *The Jurisprudence of Custom*, 48 *Tex. Int'l L.J.* 523 (2013)
- Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10:1 *J.L. Econ. & Pol'y* 17 (2013)
- Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 *Va. J. Int'l L.* 365 (2002)

