

Jurisprudence
Law 350-001 (23547)

Prof. Claeys
Spring 2023

Syllabus
Current as January 13, 2023

Meeting Times: Tuesday, 1:50 – 3:50 p.m.

Exam: No exam. This course will be graded by a paper. (See below.)

Office hours and contact information

My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site. Please register for the TWEN site; it is my primary medium for group communications with students.

This semester, I will hold office hours Mondays 1-2 p.m. and Tuesdays 4-5 p.m. These are “drop-in” hours, meaning that I do not have any other appointments during them. If I need to cancel an office hour I’ll let you know the week before and I’ll schedule a different open office hour that week.

When I have office hours, you are free to come to my office without appointment, I will also have my Zoom program on, I will have my Personal Meeting Room open, and you may virtually-join my meeting room. However, I am happy to schedule appointments if you have a conflict during office hours or if you prefer for other reasons.

Course coverage

“Jurisprudence” possesses at least three different specialized meanings. In some contexts, it refers (1) to the field of knowledge explaining what law is, how it operates, and what concepts are important for a practicing lawyer to understand to be fluent in legal reasoning and argument. (“The jurisprudence of estates law in Virginia.”) In other contexts, it refers (2) to a body of work by a judge or several judges. (“The jurisprudence of Justice Brennan,” or “the jurisprudence of the Traynor Court in California.”) In still-other contexts, it refers (3) to the specialized study of what law and legal decision making are by application of philosophical methods. (“Positivism and natural law are theories of jurisprudence.”)

This seminar is NOT about senses 1 or 2. It studies jurisprudence in sense (3). Although philosophical studies of jurisprudence can proceed in many dimensions, one of the most important divisions in such studies focuses on the content of law. In this line of division, there are two basic alternatives, and they differ on the question whether law and particular legal directives are constituted (on one hand) only by social facts or (on the other hand) by some combination of social facts and moral directives. As a very rough cut, “positivism” holds that

law consists only of social facts, and “natural law” theories hold that law has some necessary relation to morality.

That being so, this course has five aims. The first and broadest aim is to help students think carefully about what it takes for a directive to constitute “law.”

The second is to give students perspective—for history and concrete legal examples that may help them understand the relevant philosophical issues.

A third aim to familiarize students with the major contributors to debates about natural law and positivism—especially, Aquinas, Austin, Hart, Dworkin, Raz, Finnis, and Murphy.

The fourth aim, and the last teaching aim, is to familiarize participants with the arguments and methods that positivists, natural lawyers, and different subgroups of each most frequently rely on.

Students will get a grade on the basis of papers they write under my supervision. So one final aim is for students to get practice writing and making rigorous arguments in writing.

Cancellations and make-up classes

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of our classroom, and I will send an email to the class via the course TWEN page’s email system.

Class reading

Reading will average 80 pages per week and 2-hour class session. I’ve assigned three books about jurisprudence. There will also be a series of course supplements.

Class attendance

Regulation 4.1 in the law school’s Academic Regulations requires that students attend class at our law school on a regular basis. The same regulation specifically states: “If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course.” For a 13-class-session course like Jurisprudence, AR 4.1 requires that students not be absent for more than 3 classes. I do not enforce this requirement when I need to reschedule class due to illness or non-GMU commitments. Otherwise, however, I do follow this regulation, and I administer it by asking you to sign an attendance sheet during class.

AR 4.1 applies to absences “for any reason.” In other words, it is your responsibility to keep track of your absences. It is also your responsibility to anticipate possible absences. You may decide you need to be absent to explore professional opportunities, to observe holidays in your religion, or to take care of personal matters. It is your responsibility to limit the number of class

days for which you're absent for such reasons, and also to factor in the possibility that you may be absent from class unexpectedly for illnesses or personal emergencies.

I do not need to be notified in advance if you're going to be absent. Ordinarily, over the course of the semester, I communicate with you about the number of classes for which you've been absent. In such correspondence, I am not interested in knowing the grounds for absences; my intention is to administer AR 4.1, and that being so my intention is simply to get on the same page with a student about the number of class-hours attended and missed.

I reserve authority to take measures reasonably appropriate to ensure compliance with the law school's attendance requirements. If a student misses more classes than allowed by AR 4.1-1, the student is not eligible to sit for this course's examination. In extraordinary circumstances, I reserve discretion to have a student ineligible for the exam under AR 4.1-1 perform substitute work equivalent to class attendance ... as long as the student does not miss more than 30% of classes (meaning four (4) 2-hour class sessions total). Students who believe they are eligible for this exception should petition me in writing and explain why (AR 4.1-2) they "have merit" in their request to substitute work for class lectures missed over the 6-class limit.

If a student misses more classes than allowed by AR 4.1-1, and does not receive the benefit of an exemption consistent with AR 4.1-2, I notify the law school's administration and the student is not eligible to sit for this course's final examination.

Class preparation and participation

I expect you to be prepared for class. This class will have small attendance, so I expect the students who sign up to discuss actively. If I can get class discussion running by Socratic questioning, that's what I'll do. If not, I'll lecture.

I strongly prefer not to modify final grades up or down on the basis of class participation. That said, I reserve the right to increase a student's grade one third letter grade up if the final paper does not adequately reflect mastery demonstrated in class discussion. And I also reserve the right to decrease a student's grade one third letter down if the student participates barely or not at all in class discussions.

Classroom decorum

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

I reserve the authority to take actions reasonably appropriate to ensure compliance with the participation and decorum policies discussed in this section. In particular, if a student refuses on several occasions to participate in class when called on, that refusal may justify lowering the student's final grade below the grade earned on the final examination.

This respect and courtesy also extend to dress. (I'm sorry I need to raise the subject, but it became an issue with online teaching.) Please dress in a manner appropriate for a classroom setting. Some examples: Please be clothed as fully as you'd be if going to an ordinary store or office. Please avoid attending class (in person or virtually) in sleep wear, gym wear, or beach wear. I reserve the authority to ask students to leave class if they are dressed inappropriately (with appropriate repercussions following for class attendance).

Virtual Classroom Management and Logistics

As I write this syllabus, I understand that our class is going to be in-person. In a world with COVID, however, I can't rule out the possibility that I may be directed to teach you remote or hybrid. Herewith some policies for online or virtual learning:

- I prefer not to teach hybrid. Students get the most out of the class if we're all in class together and participating actively in class discussions. That being so, when class is meeting in person, I will teach hybrid (and turn on the Zoom link) only for students who are barred by University policy from attending class in person. In other words, if you get a "red" or "yellow" card some class day from the University because you have COVID or COVID-like symptoms, I'll teach hybrid. If you're sick but not with COVID symptoms, or if you're traveling for work, or if you're tied down at home, there aren't grounds for me to teach hybrid.
- If I need to teach on Zoom (meaning, I need to be remote), I'll let you all know in advance. You have permission to link in on Zoom wherever you like. (You may link in in our regular classroom, but you do not need to.)
- Whenever you log in on Zoom, on your videoconference platform account, please make sure that your first name, last name, and school profile picture are all uploaded.
- *If you are attending on line*, when class is in session, you are expected to have your computer camera ON and your microphone OFF. (Of course, please do turn your microphone on when you participate in class discussion.)
- If you're attending in person and have something to say, please put your hand up.
- If you're attending on line and have something to say, please send me a message via Zoom's chat function. I prefer that you send a short message that you have a question, and that you ask the question orally. (If you don't, I'll read your question back to the class anyway before answering it.)
- You are encouraged (though not mandated) to use a microphone or earphone/mike headset during class.
- To a large extent, we'll need to play things by ear if we need to go to remote learning for the whole class. That said, it is very likely that, for reading assignments that DON'T

already have problems assigned, I'll construct problems in advance of class and we'll discuss those in addition to the materials assigned in the reading schedule below.

Recording classes

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded. I like to encourage free and frank discussions of class materials, and in my experience the recording of class tends to chill discussions. However, I will grant permission in specific cases when a student can demonstrate a special need. If you think you have such a need, please inquire.

How you should inquire depends on the nature of the need. If your need is COVID-related, please let me know a.s.a.p. I'll record class and make the lecture available.

If you think you have a disability-related need, please contact GMU's [Office of Disability Services](#). ODS has a process for administering disability-related requests for accommodations, and in that process ODS serves as a go-between between a student-applicant and that student's instructor.

If your need is neither COVID- nor disability-related, you are free to ask me in personal communication or to ask me anonymously. To make an anonymous request, please contact Annamaria Niels, Associate Dean for Student Affairs (aniels@gmu.edu). Deans Niels and Malone will be happy to explain the basis for a recording request to me while leaving a student's identity out of the request.

Grading

The grade for this class will be based on a paper. Students must pre-clear paper topics with me, by submitting paper proposals before spring break. I will give students comments on first drafts if they submit said drafts before the end of classes. Final papers will be due the last day of spring exams. Papers can be shorter or longer if they are substantial enough, but students should strive to write papers of approximately 5000 words.

Per the discussion of class participation above, I reserve the right to revise grades upward if student papers don't adequately reflect student comprehension of the material via class participation and downward if students don't participate whatsoever in class. Again, however, I expect to apply such discretion rarely.

Course materials

We will rely on 3 course books. There will also be a course supplement, made available in installments. The first installment will be available by Thursday, January 12, in the area outside the faculty suite on the third floor of the law school. (Across from the Records Office.) Please get it before the first day of class. The supplement materials will also be available on the course TWEN site.

The books:

H.L.A Hart, *The Concept of Law*, 1961. 3rd edition, Leslie Green intro. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-964470-4.

Ronald Dworkin, *Law's Empire*, 1986. Cambridge, Mass.: Harvard University/Belknap Press 1986. ISBN: 0-674-51836-6.

Mark C. Murphy, *Natural Law in Jurisprudence and Politics*. New York: Cambridge University Press, 2006. ISBN: 978-0-521-10808-9.

Reading schedule

For our session on January 17 (session 1), please read these materials in the Course Supplement:

Some examples showing why jurisprudence might matter in practice:

Supp. 1. The Bible, 2 Samuel 11-12. (The parable of the rich man, the poor shepherd, and the sheep, told by Nathan to King David.)

Supp. 2. Excerpts from Sophocles, *Antigone*.

Supp. 3-4. Excerpts from *Calder v. Bull* (1798).

Supp. 5-7. *Cernauskas v. Fletcher* (Ark. 1947).

Supp. 8-10. *Swift v. Tyson* (1842).

Supp. 11-13. *Erie Railroad Co. v. Tompkins* (1938).

Supp. 14-25. Opening statement of Justice Robert Jackson before the Nuremberg International Military Tribunal, Nov. 21, 1945.

Supp. 26-36. Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (1946).

Supp 37-61. *R (Miller) v. Prime Minister* (U.K. S. Ct., 2019).

Session 2. January 24: St. Thomas's natural law thesis

Supp. 62-65, 68-81. St. Thomas Aquinas, *Summa Theologiae*, part I-II, QQ 90, 94-96.

Supp. 82-85. Dhar & Giuliani, "Laws of Biology: Why So Few?" *Syst. Synth. Biol.* (2010). You don't need to read all of this article or understand its argument. Read as much as you need to in order to answer: How do the authors use and understand the phrases "laws of biology," "laws of physics," and "laws of chemistry"?

Supp. 86. Chappelow, “Natural Law” *Investopedia* (2018).

Supp. 87-90. Excerpts from Martin Luther King, Jr., “Letter from a Birmingham Jail” (April 16, 1963).

Supp. 91-93. Excerpts from *Carter v. Carter Coal Co.* (1936).

Supp. 94-95. Excerpts from *Ghen v. Rich* (D. Mass. 1881).

Session 3. January 31: Natural law in American practice, and natural law in Blackstone.

Supp. 96-120. Blackstone, *Commentaries on the Laws of England* (1765), Volume I, Introduction, Section 2.

Supp. 121-23. Excerpts from Blackstone, *Commentaries*, Volume IV, ch. 4, Volume IV, ch. xvi, and Volume I, ch. 1.

Supp. 124-27. Excerpts from *Pierson v. Post* (N.Y. 1805).

Supp. 128-29. Excerpts from *Johnson v. M’Intosh* (1823).

Supp. 130-31. Excerpts from *Somerset v. Stewart* (K.B. 1772), *Commonwealth v. Jennison* (Mass. 1783).

Supp. 132-37. Excerpts from *The Antelope* (1823).

Supp. 138-69. R.H. Helmholz, *Natural Law in Court* (2015), ch. 6.

Session 4. February 7. Austinian Command Positivism.

Supp. 170-94. Excerpts from Jeremy Bentham, *A Fragment on Government* (1776), pp. i-x, xxv-xxx. (Warning: This reading is considerably shorter than it seems. You only need to read the text “above the line,” *i.e.* above the margin separating text from footnotes. In the text assigned, more than half of the material is “below the line” and you don’t need to read any of the footnotes. The footnotes are fun reading—Bentham was snarky—but we won’t cover them in class.)

Supp. 195-242. Excerpts from John Austin, *The Province of Jurisprudence Determined* chs. & 6 (1832).

Supp. 243. One more snippet from Austin, *The Province of Jurisprudence Determined*.

Session 5. February 14. Hart: Analytical Legal Positivism (session 1).

Hart, *The Concept of Law*. Ch. 1 (1-17), Ch. 2 (18-25), Ch. 3 (26-49), Ch. 3, introduction (50-51), Ch. 5 (79-99).

Session 6. February 21. Hart: Analytical Legal Positivism (session 2).

Hart, *The Concept of Law*. Ch. 6 (100-23), Ch. 8, intro. & secs. 2-3 (155-57, 167-84), Ch. 9 (185-212).

Session 7. February 28. Dworkin: Constructive Interpretation (session 1).

Dworkin, *Law's Empire*, Chs. 1 & 2 (pp. 1-86).

Riggs v. Palmer (NY 1889).

Excerpts from *TVA v. Hill* (1978).

The supplement will include two optional articles. You do not need to read them. But they may help you appreciate the issues between Dworkin and Hart. The articles are: Charles Silver, "Elmer's Case: A Legal Positivist Replies to Dworkin," *Law and Philosophy* (1987), and Rodger Beehler, "Legal Positivism, Social Rules, and *Riggs v. Palmer*," *Law and Philosophy* (1990).

Session 8. March 4. Dworkin: Constructive Interpretation (session 2).

Dworkin, *Law's Empire*, Chs. 3 (pp. 87-113) & 7 (pp. 225-75).

Excerpts from *McLoughlin v. O'Brian*, 1 A.C. 410 (H.L. 1983).

March 14. SPRING BREAK.

Session 9. March 21. Inclusive Legal Positivism.

Jules Coleman, "Inclusive Legal Positivism," *Journal of Legal Studies* (1982).

Hart, *The Concept of Law*, Postscript, sections Intro., 1 & 2. (Pp. 238-54.)

Vaughan v. Menlove (C.C.P. 1837).

U.S. Const. Amend. XIV sec. 1.
Excerpts from *Montana v. Stanko* (Mont. 1998).
Session 10. March 28. Exclusive Legal Positivism.

Joseph Raz. *The Authority of Law* (1979). Chs. 2, 3, 4, provided via excerpts.

Session 11. April 4. Natural Law (session 1).

John Finnis, *Natural Law and Rights* (1980/2011), Chs. 1 & 2, provided via excerpts.

Session 12. April 11. Natural Law (session 2).

Mark Murphy, *Natural Law in Jurisprudence and Politics* intro & chs. 1-2 (2006), pp. 1-60.

Session 13. April 18. Legal Skepticism.

You have a choice. We can read either

Richard Posner, “The Problematics of Legal Theory,” *Harvard Law Review* (1998),

Matthew Adler, Review of “Problematics” (2000),

and 2 pages from John Finnis “Natural Law: The Classical Tradition” (2002), on
pragmatism and Posner;

Or

Roberto Unger, “The Critical Legal Studies Movement,” *Harvard Law Review* (1983).

And excerpts from John Finnis, “On the ‘Critical Legal Studies Movement’,” *American Journal of Jurisprudence* (1985).