

## **LGST 109-01 LEGAL THEORY**

The purpose of this class is to introduce students to legal theory, understood as philosophy of law, and to examine some of its theoretical debates, including the connection between law and morality, the nature of hard cases, how judges do (and should) decide cases, the character of legal rules and principles, legal formalism, legal realism, critical legal studies, feminist and critical race perspectives on the law, constitutional interpretation and construction, originalism, and the justification of punishment. We'll cover what we can, realistically, given the length of the summer session, and not rush through material that is important.

Although I have not assumed that any of you plan to attend law school, you will have to keep up with all of the reading, attend class, and pay close attention, to do well in the course. This course is not easy because some and perhaps many of the concepts are difficult. Legal theory is all about nuance and fine points. It is not enough just to skim the reading to get the gist of it, as if you were reading a blog. The skills that you will begin to develop are applicable to any profession that requires critical thinking, careful analysis, effective communication, clear writing, and the ability to defend a conclusion. This course should also deepen your understanding of the judicial process, the role of law and the judiciary in American society, and the nature of legal argumentation in a common law system like our own. The in-class examinations, lectures, and class discussions are designed to contribute to this end.

This class is not a spectator sport. In the classroom, I prefer to use a semi-Socratic method. As such, I expect you to be prepared for every class and to be willing to participate. This expectation means that you have not only completed the reading assignments but that you have read them carefully and have reflected upon the issues that have been raised. You should annotate or make notes when you read a case so that you can recall its details on the day of the class. My teaching philosophy is predicated on the belief that active learning on the part of the students is the most appropriate way to study legal theory. I do not want to be treated as an authority. Rather, my role in class is to provide a theoretical background for the material and to facilitate discussion among equals. When appropriate, I will lecture. But when I pose a question to the entire class, I expect someone to try to answer it to get the ball rolling so to speak.

In this class, I will treat you like an adult, whether you deserve to be treated like that or not. That means that I will not give you pop quizzes to induce to do the required reading. Nor will I bring brownies to class to bribe you to read what you're supposed to read in the first place. My wife does make delicious brownies and other assorted baked goods but that is beside the point. How much you learn in this class will be up to you yet my expectation is that you will become more familiar with the ongoing debates within legal theory and how they may shape judging and legal practice more generally. Believe me, the more effort you put into this class, the more that you'll get out of it, as corny as that may sound.

I want you to pay close attention to what we are doing in every single class. The questions on the midterm and final exams will come right out of what we cover in class. If you do all of the reading, do it carefully, reflect on what you've read, participate in our discussions, and ask questions, you'll probably earn a much higher grade than you would if you take a passive approach to your education. And you'll learn a lot more. It's really as simple as that.

Above all, when class starts, don't be distracted. Please do not play computer games on your laptop, watch UFC fights, check your phone messages, text your friends (if you have any), update your Facebook status, or think about that hot guy (or gal) sitting in front of you. You can do all of the above before class, at the break, or after class. I promise that if you do your part, I'll do mine, and you'll find that becoming more aware of how legal theory may affect you is rewarding even if you do not go to law school. I encourage you to speak to me before class, during the break, after class (office hours) when you have questions. Please do not hesitate to contact me if any problems arise. For me, honesty is always the best policy. There are only so many grandmothers that can die in a five-week summer session. I check my e-mail (denotter@calpoly.edu) regularly and will respond promptly. Also, I encourage you to speak to me before class, after class, or to attend office hours when you have questions. I am always available after class. Do not hesitate to contact me if any problems arise. I won't know what's going on unless you let me know sooner rather than later.

The class is only five weeks... so buckle your seatbelts... full speed ahead!

Instructor: Dr. Ronald C. Den Otter  
denotter@calpoly.edu

Office Hours: T Th. (immediately after class)

Class Hours: T Th. 1:00pm-4:30pm  
J Baskin Engineering 165

### **ATTENDANCE POLICY:**

I don't take attendance but if you care about learning something and your grade, you shouldn't miss class. I understand that things come up and you may not be able to make it to every single class but it behooves you to be responsible. Be here as often as possible, even if you have to arrive late or leave early, which is preferable to not showing up at all. If you are going to miss a class, please send me an e-mail beforehand. I would appreciate your doing so.

### **GRADING:**

My grading policy is very simple: the better the work, the better the grade. Your final grade will be broken down into the following components:

In-Class Midterm Examination: 50%

In-Class Final Examination: 50%

### **EXTRA CREDIT:**

I may offer some extra credit in the event that some of you are interested in doing some extra work to boost your final grade. Perhaps a short paper? We can talk about the possibility as a class in the near future. Just remind me if it slips my mind.

### **REQUIRED TEXT:**

Feinberg, Coleman, and Kutz, *Philosophy of Law*, 9<sup>th</sup> ed. (Wadsworth, 2014).

All readings are from the text.

### **COURSE SCHEDULE:**

#### **First Week: Introduction, Classical Natural Law Theory (Aquinas), and Legal Positivism (Austin and Austin)**

“The Nature and Value of Law,” pp. 1-7.

Saint Thomas Aquinas, “Selections from *On Law, Morality, and Politics*,” pp. 52-57.

John Austin, “A Positivist Conception of Law,” pp. 74-87

H.L.A. Hart, “Law as a Union of Primary and Secondary Rules,” pp. 87-97.

H.L.A. Hart, “The Foundations of a Legal System,” pp. 98-103.

#### **Second Week: The Return of Natural Law (Fuller and Dworkin) and the Positivist Response to Neo-Natural Law Challenges**

Lon Fuller, “Eight Ways to Fail to Make a Law,” pp. 8-12.

Ronald Dworkin, “The Model of Rules I,” pp. 103-123.

Ronald Dworkin, “Integrity in Law,” pp. 158-174.

Jules Coleman, “Negative and Positive Positivism,” pp. 123-139.

#### **Third Week: Legal Realism, Critical Legal Studies, Race, and Gender**

Jerome Frank, “Legal Realism,” pp. 147-150.

Karl Llewellyn, “Ships and Shoes and Sealing Wax,” pp. 150-157.

Robert W. Gordon, “Critical Legal Histories,” pp. 194-210.

Cheryl Harris, “Whiteness as Property,” pp. 229-250.

Robin West, “From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights,” pp. 210-229.

\*\*\*IN-CLASS MIDTERM\*\*\* August 14, 2014

#### **Fourth Week: Constitutional Interpretation (Originalist and Non-Originalist Approaches)**

Antonin Scalia, “Common Law Courts in a Civil Law System,” pp. 175-184.

Ronald Dworkin, “Comment,” pp. 185-190.

Scalia, "Response to Dworkin," pp. 190-193.

**Fifth Week: Crime and Punishment**

Joel Feinberg, "The Classic Debate," pp. 766-771.

Jeffrie Murphy, "Forgiveness and Resentment," pp. 815-825.

\*\*\*IN-CLASS FINAL EXAMINATION\*\*\* August 28, 2014