

Jurisprudence Seminar  
Law 435-001 (83735)

Prof. Claeys  
Fall 2024

Syllabus  
Current as August 12, 2024

Meeting Times: Thursday, 4 – 6 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](mailto: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 Wednesdays, 4-5 p.m. These are “drop-in” hours, meaning that I do not have any other appointments during them. 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 prescriptions. As a very rough cut, “positivism” holds that law consists only of social facts, and “natural law” theories hold that law consists both of social facts and moral prescriptions.

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, Coleman, 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*

I will be in Europe the week of September 16, 2024 and will need to cancel and reschedule our session Thursday, September 19. I will discuss the rescheduling possibilities with you all in the first two weeks of the semester.

If I need to cancel any other 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 (like the class making up for the regularly-scheduled class September 19). 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 3-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 graded paper.

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 circulate discussion questions 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](mailto: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 the end of fall break. (Meaning, before midnight at the end of Monday, October 14, 2024.) I will give students comments on first drafts if they submit said drafts before the end of classes (before midnight at the end of Friday, November 22, 2024). Final papers will be due the last day of the fall exam period. (Before midnight at the end of Wednesday, December 18, 2024). 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 Friday, August 9, 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:

Aquinas, *Treatise on Law*, Richard J. Regan trans. Hackett Publishing Co., 2000. ISBN: 978-0872205482.

H.L.A Hart, *The Concept of Law*, 1961. 3<sup>rd</sup> 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.

### *Reading schedule*

Session 1, August 22. Aquinas's Natural Law Thesis (session 1).

Aquinas, *Treatise of Law*, Questions 90, 91, 92, 93, and 94. We will focus primarily on Question 90. Read QQ 91-94 asking what further light they shed on the definition of law in Q. 90.

Read all of the below materials asking: Which elements of Aquinas's definition of "law" do the below examples strain? (So, you don't need to master the fine points of the article on biology or the blog post on soccer; read enough to understand the character of "laws of biology" and "laws of soccer.")

Supp. 1. Chappelow, "Natural Law" *Investopedia* (2018).

Supp. 3-9. Dhar & Giuliani, "Laws of Biology: Why So Few?" *Syst. Synth. Biol.* (2010).

Supp. 10. "Privilegium" definition, *Black's Law Dictionary*.

Supp. 11-15. Mount Lebanon Soccer Association, "The 17 Laws of Soccer Explained."

Supp. 16. H. Con. Res. 57 (2023) on the United States' support for Israel.

Supp. 17-19. Excerpts from *Carter v. Carter Coal Co.* (1936).

Supp. 20. Excerpts from Lon Fuller, *Anatomy of the Law* (1976).

Session 2. August 29. Aquinas's Natural Law Thesis (session 2).

Aquinas, *Treatise of Law*, Questions 95, 96, and 97.

Supp. 21-23. *State v. Schaeffer* (Ohio 1917).

Supp. 24-26. Ohio Rev. Stat. § 4511.21 (West 2024).

Supp. 27-30. Martin Luther King, Jr., "Letter from a Birmingham Jail" (April 16, 1963).

Supp. 31-33. Lisa Lindquist Dorr, "Why Prohibition Failed," *We're History*, Dec. 4, 2015.

Supp. 34-38. Summary (and translation) of Judgment of July 27, 1949, Oberlandesgericht, Bamberg in SJZ, 1950.

Supp. 39-41. *Cernauskas v. Fletcher* (Ark. 1947).

Supp. 42. Leon Aron, Letter to Editor, *Wall Street Journal*, June 2022.

Supp. 43-48. Excerpts of Hernando de Soto, *The Mystery of Capital* (2000).

Supp. 49-51. Excerpts of *Coffin v. Left Hand Ditch Co.* (Colo. 1882).

Session 3. September 5. Natural law in Blackstone and in early U.S. practice

Supp. 53-77. Excerpts from Blackstone, *Commentaries on the Laws of England* (1765), Volume I, Introduction, Section 2.

Supp. 78-80. Excerpts from Blackstone, *Commentaries*, Volume IV, ch. 4 & V. I, ch. 1.

Supp. 81-83. Excerpts from *Swift v. Tyson* (1842).

Supp. 84-85. Excerpts from *Johnson v. M'Intosh* (1823).

Supp. 86-88. Excerpts from *Hinman v. Pacific Air Transport* (1936).

Supp. 89-96. Excerpts from *Somerset v. Stewart* (K.B. 1772), *Commonwealth v. Jennison* (Mass. 1783), and *The Antelope* (1825).

Supp. 97-98. Excerpts from *Calder v. Bull* (1795).

Supp. 99-101. Excerpts from *Sweeny v. Old Colony & Newport Railroad Co.* (1865).

Session 4. Austinian Command Positivism.

{Supp. \_\_\_\_} Excerpts from Jeremy Bentham, *A Fragment on Government* (1776), pp. i-x, xxv-xxx. (Note: the pdf file available on the TWEN site covers more pages than the range assigned and included in the hardcopy supplement. You do not need to read all the pages in the TWEN pdf.)

{Supp. \_\_\_\_} Excerpts from John Austin, *The Province of Jurisprudence Determined* (1832).

{Supp. \_\_\_\_} Excerpts from Hans Kelsen, *A General Theory of Law and State* (1945).

Session 5. American Legal Realism.

{Supp. \_\_\_\_} Oliver Wendell Holmes, “The Path of the Law,” 10 *Harvard Law Review* 157 (1897).

{Supp. \_\_\_\_} Excerpts from Karl Llewellyn, *The Bramble Bush* (1930), Steve Sheppard ed. (2008), ch. 1, pp. 3-18.

{Supp. \_\_\_\_} Felix S. Cohen, “Transcendental Nonsense and the Functional Approach,” 35 *Columbia Law Review* 809 (1935).

{Supp. \_\_\_\_} Excerpts from *Erie Railroad Co. v. Tompkins* (1938).

{Supp. \_\_\_\_} Excerpts from *United States v. Carolene Products* (1938).

{Supp. \_\_\_\_} Excerpts from *United States v. Causby* (1946).

{Supp. \_\_\_\_} Excerpts from *Griswold v. Connecticut* (1965).

{Supp. \_\_\_\_} Excerpts from *Rowland v. Christian* (Cal. 1968).

Optional: {Supp. \_\_\_\_} Frederick Schauer, *Thinking Like a Lawyer* (2009), ch. 9.

Session 6. Hartian Positivism (session 1).

Hart, *The Concept of Law*. Chs. 1-5 (pp. 1-99).



Session 7. Hart: Analytical Legal Positivism (session 2).

Hart, *The Concept of Law*. Ch. 6 (100-23), Ch. 7 (124-54), Ch. 8, intro. & secs. 2-3 (155-57, 167-84), Ch. 9 (185-212).

{Supp. \_\_\_\_} Excerpts from John Finnis, “Natural Law: The Classical Tradition,” in *The Oxford Handbook of Philosophy of Law and Jurisprudence*, Jules L. Coleman et al. eds. (2002) (Sec. 7 of the chapter.)

Session 8. Dworkin: Constructive Interpretation (session 1).

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

{Supp. \_\_\_\_} *Riggs v. Palmer* (NY 1889).

{Supp. \_\_\_\_} Excerpts from *TVA v. Hill* (1978).

Session 9. Dworkin: Constructive Interpretation (session 2).

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

{Supp. \_\_\_\_} Excerpts from *McLoughlin v. O’Brian*, 1 A.C. 410 (H.L. 1983).

{Supp. \_\_\_\_} Charles Silver, “Elmer’s Case: A Legal Positivist Replies to Dworkin,” 6 *Law & Philosophy* 381 (1987).

{Supp. \_\_\_\_} Optional: Scott J. Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed,” in *Ronald Dworkin*, Arthur Ripstein ed. (2012).

Session 10. Exclusive Legal Positivism.

{Supp. \_\_\_\_} Excerpts from Joseph Raz, *The Authority of Law* (chs. 3 & 4, pp. 37-77).

{Supp. \_\_\_\_} Andrei Marmor, “Legal Conventionalism,” 4 *Legal Theory* 509 (1998).

{Supp. \_\_\_\_} X (Twitter) thread by Scott Shapiro criticizing inclusive legal positivism (2021).

{Supp. \_\_\_\_} Excerpts from John Finnis, “Natural Law: The Classical Tradition.” (Sec. 3 of the chapter.)

Session 11. Inclusive Legal Positivism.

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

{Supp. \_\_\_\_} Jules Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," 4 *Legal Theory* 381 (1998).

{Supp. \_\_\_\_} Excerpts from Wil Waluchow, *Inclusive Legal Positivism* (1998). Pp. 142-65.

{Supp. \_\_\_\_} Excerpts from John Finnis, "Natural Law: The Classical Tradition." (Sec. 4 of the chapter.)

{Supp. \_\_\_\_} Optional: Jules Coleman, "Inclusive Legal Positivism," *Journal of Legal Studies* (1982).

Session 12. Modern Natural Law: The "legal point of view" argument.

{Supp. \_\_\_\_} John Finnis, *Natural Law and Rights* (2d ed., 1980/2011), Chs. 1 (in full) and 10 and 12 (selections).

{Supp. \_\_\_\_} Excerpts from Brian Leiter, *Naturalizing Jurisprudence* (2007), pp. 162-70.

{Supp. \_\_\_\_} Excerpts from Julie Dickson, *Evaluation and Legal Theory* (2001), pp. 64-69, 73-78.

Session 13. Modern natural law: the artifact/function and speech act arguments.

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

{Supp. \_\_\_\_} Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Scepticism," 31 *Oxford Journal of Legal Studies* 663 (2011), pp. 664-67.

{Supp. \_\_\_\_} Scott J. Shapiro, *Legality* (2011), pp. 27-30, 408-09 n. 28.