

PHIL420
Philosophy of Law
Distance Delivery
Lectures Nine & Ten

Legal Realism

First Analytical Paper

Your paper should be between 2000 and 3000 words.

Explain and critically assess the jurisprudential theories of legal positivism, natural law, and legal realism. Which approach to the nature of law has the most promise? Defend your answer.

Writing an analytical paper

- **Have a thesis**
- **Have an outline**
 - Explain legal positivism
 - Explain natural law
 - Explain legal realism
 - Explain and defend your thesis
- **Assume your reader is learning from you – you be the teacher**
- **Due Thursday 4/28**

Nature of Law

- **Natural law**
 - Traces back to the Greeks
- **Legal positivism**
 - Traces back to Bentham and Austin
- **Legal realism**
 - Traces back to Holmes (late 19th Century)
- **Plato, Aristotle, Aquinas, Bentham were philosophers**
- **Holmes and the realists were practioners**

Holmes and the "bad man"

- Growth of Nineteenth Century science
- Legal education as a "science"
- Legal reasoning as logic
- Holmes' skepticism about all this
- Perspective of the bad man
- Law as a slowly evolving social institution
- Judging as an art

Rule Skepticism

- General and abstract nature of rules
- Ambiguity and vagueness of legal language
- Legal formalism
 - Rule
 - Facts of the case
 - *Leads to* the decision
- Legal realism
 - Decision
 - Then comes language that "rationalizes" (using the language of rules) the decision

Critical Legal Studies

- Liberal society
- The rule of law
 - Neutral
 - Objective
- “Crits” skepticism
 - Share the basic skepticism from realism
 - Realism does not go far enough
 - All science is political
 - All law is political
- Rule of law is impossible