

Spring 2009  
Philosophy of Law\_  
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### **Schedule**

Books:

R. Dworkin, TAKING RIGHTS SERIOUSLY (TRS)  
D. Kairys (ed.), THE POLITICS OF LAW (PL)  
D. O'Brien (ed.), JUDGES ON JUDGING (JJ)

Court opinions on Blackboard=[B];  
Handouts=[H]  
Materials on Reserve=[R]

Materials available online (WESTLAW or HeinOnLine)=[O]  
(To get articles on HeinOnLine, first go to the law school library webpage ([www.umt.edu/law/library](http://www.umt.edu/law/library)). Once on this webpage, go to "Research Tools," and then to "Electronic Resources." HeinOnLine is listed as one of the Electronic Resources and contains the full text of law review articles in PDF format.)

Any problems getting materials, email Tom at [tom.huff@umontana.edu](mailto:tom.huff@umontana.edu)

### **Part I. Theory: Legal Liberalism–Interpreting our Constitution**

January 29–Introduction

Richard Rorty, *The Priority of Democracy to Philosophy*<sup>1</sup> [R]

Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*<sup>2</sup> [O]

H. L. A. Hart, THE CONCEPT OF LAW, excerpts on internal/external distinction [H]

In this first class, we will review the idea of the rule of law from the ancients to the moderns with a focus on legal liberalism. What is legal liberalism's conception of the rule of law, and what is the nature of the criticisms brought by the legal realists and the critical legal studies movement against legal liberalism's rule of law/? Finally, why is the normative structure of law important to the rule of law?

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<sup>1</sup>THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, Chapter 10 (1988).

<sup>2</sup>14 WOMEN'S RTS. L. REP. 297 (1992).

February 5–Legal Liberalism–Originalism in Constitutional Interpretation

Justice Antonin Scalia, *Originalism: The Lesser Evil*, JJ, Chapter 18

Chief Justice William Rehnquist, *The Notion of a Living Constitution*, JJ, Chapter 13

Randy Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted" Originalism*<sup>3</sup>

Laurence Tribe, *THE INVISIBLE CONSTITUTION*, 59-64 [H]

Ronald Dworkin, *The Constitutional Drama*<sup>4</sup> [R]

Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*<sup>5</sup> [O]

Ronald Dworkin, *Constitutional Cases*, TRS, Chapter 5 [Optional]

Eric Schnapper, *Affirmative Action and the Legal History of the Fourteenth Amendment*<sup>6</sup> [O] [Optional]

H. Jefferson Powell, *The Original Understanding of Original Intent*<sup>7</sup> [O] [Optional]

February 12--Legal Liberalism's Rule of Law–A Sophisticated Version

Ronald Dworkin, *Hard Cases* [80-94 101-107], TRS, Chapter 4

Ronald Dworkin, TRS, pp. 338-345

Ronald Dworkin, *Natural Law Revisited*<sup>8</sup> [165-173] [O]

*Cohen v. California*<sup>9</sup> [Harlan opinion] [B]

February 19–Legal Liberalism–Basic Normative Theory

John Rawls, *POLITICAL LIBERALISM*, excerpts [H]

Transcript of Oral Argument in *Lawrence v. Texas*<sup>10</sup>

February 26–Interpreting an Abstract Concept–“Liberty” in the Due Process Clause (Part I)

*Corfield v. Coryell*<sup>11</sup>[B]

*Slaughter-House Cases*<sup>12</sup> [majority, Bradley, and Field opinions] [B]

*Hurtado v. California*<sup>13</sup> [majority opinion][B]

*Allgeyer v. Louisiana*<sup>14</sup>[majority opinion][B]

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<sup>3</sup>25 U. Cin. L. Rev. 7 (2006).

<sup>4</sup>LIFE'S DOMINION, Chapter 5.

<sup>5</sup>75 FORDHAM L. REV. 545 (2006).

<sup>6</sup>71 VA. L. REV. 754 (1985).

<sup>7</sup>98 Harv. L. Rev. 885 (1985).

<sup>8</sup>34 FLA. L. REV. 165 (1982).

<sup>9</sup>403 U.S. 15 (1970).

<sup>10</sup>Oyez Website.

<sup>11</sup>6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>12</sup>83 U.S. (16 Wall) 36 (1873).

<sup>13</sup>110 U.S. 516 (1884).

*Lochner v. New York*<sup>15</sup> [majority opinion and Holmes dissenting] [B]

March 5–Interpreting an Abstract Concept–“Liberty” in the Due Process Clause (Part I)

*United States v. Carolene Products Co*<sup>16</sup> [only J. Stone's footnote 4][B]

*West Coast Hotel v. Parrish*<sup>17</sup> [majority opinion][B]

*Palko v. Connecticut*<sup>18</sup> [majority opinion] [B]

*Adamson v. California*<sup>19</sup> [majority opinion and Black and Frankfurter dissenting] [B]

*Poe v. Ullman*<sup>20</sup> [Harlan dissent, Part Two: “Constitutionality” 539-555] [B]

*Griswold v. Connecticut*<sup>21</sup> [plurality opinion and Harlan concurring] [B]

*Duncan v. Louisiana*<sup>22</sup> [White Opinion] [B] [Optional]

*Moore v. City of East Cleveland*<sup>23</sup> [Powell and White opinions] [B] [Optional]

March 12–Interpreting an Abstract Concept–“Liberty” in the Due Process Clause (Part III)

*Bowers v. Hardwick*<sup>24</sup> [White and Burger opinions] [B]

*Michael H. v. Gerald D*<sup>25</sup> [plurality opinion and Brennan dissenting] [B]

*Washington v. Glucksberg*<sup>26</sup> [plurality opinion and Souter concurring] [B]

*Lawrence v. Texas*<sup>27</sup> [majority opinion (again) and Scalia dissenting] [B]

*Planned Parenthood v. Casey*<sup>28</sup> [plurality opinion] [Optional]

Judge Robert Bork, *Tradition and Morality in Constitutional Law*, JJ, Chapter 16

Judge William Justice, *The Two Faces of Judicial Activism*, JJ, Chapter 24

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<sup>14</sup>165 U.S. 578 (1897).

<sup>15</sup>198 U.S. 45 (1905).

<sup>16</sup>304 U.S. 144 (1938).

<sup>17</sup>300 U.S. 379 (1937).

<sup>18</sup>302 U.S. 319 (1937).

<sup>19</sup>332 U.S. 46 (1947).

<sup>20</sup>367 U.S. 497 (1961).

<sup>21</sup>381 U.S. 479 (1965).

<sup>22</sup>391 U.S. 145 (1968).

<sup>23</sup>431 U.S. 494 (1977).

<sup>24</sup>478 U.S. 186 (1986).

<sup>25</sup>491 U.S. 110 (1989).

<sup>26</sup>521 U.S. 702 (1997).

<sup>27</sup>539 U.S. 558 (2003).

<sup>28</sup>505 U.S. 833 (1992).

## Part II. The CLS/Liberalism Debate

March 19–Critical Legal Studies: The Rule of Law is a Myth (aka The External Perspective)

David Luban, *Legal Modernism*<sup>29</sup> [O]

J. M. Balkin, *Ideology as Constraint*<sup>30</sup> [1133-1145] [O]

Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*<sup>31</sup> [O]

D. Kennedy, *Legal Education as Training for Hierarchy*, Chapter 2, [54-66], PL

Judge Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, JJ, Chapter 6

Andrew Altman, *Critical Legal Studies v. Liberalism*<sup>32</sup> [R] [Optional]

Paul Carrington, *Law and the River*<sup>33</sup> [O] [Optional]

Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*<sup>34</sup> [O] [Optional]

*R.A.V. v. City of St. Paul*<sup>35</sup> [2541-2561] [B] [Optional]

*Virginia v. Black*<sup>36</sup> [1-17][B] [Optional]

David Kairys, *Freedom of Speech*, Chapter 8, PL [Optional]

Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*<sup>37</sup> [O]  
[OPTIONAL]

Cass Sunstein, *Preferences and Politics*<sup>38</sup> [O] [Optional]

March 26–Interpreting Statutes: The Myth (and Truth) of Following the Law

Ronald Dworkin, *Hard Cases* [107-110], TRS, Chapter 4

*U.S. v. Barragan-Mendoza*<sup>39</sup> [B]

*Coalition of Montanans Concerned v. Gallatin*<sup>40</sup> [B]

*Montana Wilderness v. U.S. Forest Service*<sup>41</sup> [B]

Briefs and Order in *U.S. v. Howick* [B]

Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, JJ, Chapter 25

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<sup>29</sup>84 MICH. L. REV. 1656 (1986).

<sup>30</sup>43 STAN. L. REV. 1133 (1991).

<sup>31</sup>87 MICH. L. REV. 2320 (1989).

<sup>32</sup>Altman, CRITICAL LEGAL STUDIES, Chapter 1.

<sup>33</sup>34 J. LEGAL EDUC. 222 (1984).

<sup>34</sup>22 HARV. C.R.-C.L. L. REV. 401 (1987).

<sup>35</sup>505 U.S. 377 (1992).

<sup>36</sup>538 U.S. \_\_\_\_ (2003).

<sup>37</sup>103 ETHICS 654 (1993).

<sup>38</sup>20 PHILOSOPHY AND PUBLIC AFFAIRS 3 (1991).

<sup>39</sup>1999 WL 221857 (9<sup>th</sup> Cir. (Mont.)).

<sup>40</sup>957 F.Supp. 1166 (1997).

<sup>41</sup>146 F.Supp.2d 1118 (2001).

Judge Frank Easterbrook, *What Does Legislative History Tell Us?*, JJ, Chapter 26

March 30-April 3–Spring Break

April 9–Hard and Soft Politics in the Interpretation of Tort Law and the Normative Structure of Tort Law

Ronald Dworkin, *Hard Cases* [110-123], TRS, Chapter 4

*State Ex. Rel. Oatl v. Sheward*<sup>42</sup> [B]

Charles Fried and David Rosenberg, *Presentation*<sup>43</sup> [O]

David Vladick, *Defending Courts: A Brief Rejoinder*<sup>44</sup> [O]

Robert Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*<sup>45</sup> [O]

Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*<sup>46</sup>

*Estate of Strever v. Cline*<sup>47</sup> [B]

*Lakin v. Senco Products, Inc.*<sup>48</sup> [B]

*Hern v. Safeco Ins. Co. Of Illinois*<sup>49</sup> [Court's discussion of Issue 3. and Justice Gray's dissent] [B]

Richard Abel, *Torts*, PL

Harry Philo, *Problems and Potentialities of Safety Standards in Tort Litigation Codes and Practices* [B]

April 16–Gender Equality: Equal Treatment, Special Treatment, and Feminist Theory

*Bradwell v. Illinois*<sup>50</sup> [136-142] [B]

*California Federal S. & L Assn. V. Guerra*<sup>51</sup> [274-292][B]

Christine Littleton, *Reconstructing Sexual Equality*<sup>52</sup> [O]

*Michael M v. Sonoma Co.*<sup>53</sup> [466-476][B]

Tracy E. Higgins, "By Reason of Their Sex:" *Feminist Theory, Postmodernism, and Justice*<sup>54</sup> [O]

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<sup>42</sup>715 N.E.2d 1062 (Ohio 1999).

<sup>43</sup>31 Seton Hall L. Rev. 625 (2001).

<sup>44</sup>31 Seton Hall L. Rev. 631 (2001).

<sup>45</sup>31 Seton Hall L. Rev. 672 (2001).

<sup>46</sup>ASSAULTS ON THE JUDICIARY: ATTACKING "THE GREAT BULWARK OF PUBLIC LIBERTY," PAPERS OF THE ROSCOE POUND FOUNDATION 49 (1998).

<sup>47</sup>278 Mont. 165 (1996).

<sup>48</sup>987 P.2d 463 (Or. 1999).

<sup>49</sup>329 Mont. 347 (2005).

<sup>50</sup>83 U.S. (16 Wall)130 (1873).

<sup>51</sup>479 U.S. 272 (1987).

<sup>52</sup>From FEMINIST LEGAL THEORY (eds. Bartlett and Kennedy), Chapter 3. Originally in 75 Calif. L. Rev. 1279 (1987).

<sup>53</sup>450 U.S. 464 (1981).

<sup>54</sup>80 CORNELL L. REV. 1536 (1995).

Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, PL, Chapter 16 [B][Optional]  
Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*<sup>55</sup> [Parts I, II, IV, and V] [O][Optional]

April 23 –Individual Liberty and the Radical Version of Critical Feminist Theory: Free Speech, Pornography, and Child Pornography

Catharine MacKinnon, *Pornography: On Morality and Politics*<sup>56</sup> [R]

*American Booksellers v. Hudnut*<sup>57</sup> [B]

Excerpts from *New York v. Ferber*<sup>58</sup> [753-766] [B] and *Osborne v. Ohio*<sup>59</sup> [106-111][B]

*United States v. Hilton*<sup>60</sup> [67-73] [B]

*United States v. Acheson*<sup>61</sup> [648-653][B]

*The Free Speech Coalition v. Reno*<sup>62</sup> [1086-1097][B]

*Ashcroft v. Free Speech Coalition*<sup>63</sup> [1-21] [B]

Justice Robert H. Jackson, *The Supreme Court in the American System of Government*, JJ, Chapter 2

### Part III. Rule of Law in Practice

April 30–To be Arranged:

Possibilities:

Critical Legal Theory in Law Practice

Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*,<sup>64</sup> [O]

Regina Austin, *Sapphire Bound!*<sup>65</sup> [O]

Professionalism and the Rule of Law:

Torture memos [R]

Jack Goldsmith, THE TERROR PRESIDENCY

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<sup>55</sup>42 Stan. L. Rev. 581 (1990).

<sup>56</sup>TOWARD A FEMINIST THEORY OF THE STATE, Chapter 11.

<sup>57</sup>771 F.2d 323 (7<sup>th</sup> Cir. 1985).

<sup>58</sup>458 U.S. 747 (1982).

<sup>59</sup>495 U.S. 103 (1989).

<sup>60</sup>167 F.3d 61 (1<sup>st</sup> Cir. 1999).

<sup>61</sup>195 F.3d 645 (11<sup>th</sup> Cir. 1999).

<sup>62</sup>198 F.3d 1083 (9<sup>th</sup> Cir.1999).

<sup>63</sup>535 U.S. \_\_\_\_ (2002).

<sup>64</sup>38 Buffalo L. Rev. 1 (1990).

<sup>65</sup>1989 WIS. L. REV 539.