

Law 328/Environmental Studies 419
Seminar in Environmental Law and Policy: Green Legal Theory

Course Outline – Spring 2012

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Class Time and Location: Monday 3:30-6:20; Rm.142 Fraser Building.

Office hours: Monday, 1:00-3:00, or by appointment

Course Objectives: This course is an exploration of green legal theory (GLT), a concept that is not fully articulated in the legal literature. Unlike Environmental Law (which is a subset of state law) GLT emanates from a broader perspective on law and social organization as encompassing various modes of social regulation beyond formal ('legal') law. It will do this by exploring the dynamics of those institutions--capitalist economics, the democratic state--and the associated cultural forces that provide real and effective sources of collective regulation. They provide the defining context for the operation and potential of environmental law which, as a result, has not been able to halt large-scale environmental decline, let alone create a green society. For those seeking such outcomes, this presents a quandary that we must inevitably *move beyond*. The course will focus on group research projects and individual papers that elucidate the nature and operation of these dynamics in creating the multi-faceted 'constitution' of modern society. Theoretical and research-oriented, the course will reward those excited to explore the foundations of the environmental/legal problematic and its implications for transformative theory/practice. The course emanates from a critical tradition, its specific task being a detailed collective investigation, articulation and assessment of a new socio-ecological conception of 'social regulation'.

Course Structure: The class will meet weekly in a seminar. It will be highly participatory, with students collectively developing the format of, and helping to lead, each seminar (beginning with Class 5). The central goal of each class, and student research, will be to develop understandings of various aspects of social regulation beyond legal law. Every student will work as part of a collective of 3 or 4 students.

Readings: Student readings are assigned for the first 4 seminars. A broad list of readings are appended which may be drawn upon (in part) for the subsequent classes. The actual selections will be made by the students leading each seminar, in consultation with the Instructor. Copies of the readings will then be made available to the class.

Student Evaluation: Grades will be allocated as follows:

- (A) **Attendance and Participation (15%).** Regular attendance is expected at the seminar, and all students will be expected to participate in the discussions having read the materials for the week. The success of a seminar, and the enjoyment of it by everyone involved, is greatly affected by the advance preparation of all students in working through and thinking about the assigned readings. In this regard, the Instructor will take note of students who have not done the assigned readings in response to questions; lack of preparation will translate into one's assessment. Participation should be consistent, balanced, thoughtful and respectful.

NOTE: All of the following evaluations (85% of the final grade) relates to work undertaken individually and collectively that will be useful for the research papers. The course is designed to allow students to dig deeply into an area of both import and interest, and to do so in a manner that will allow the completion of the paper in a timely and enjoyable fashion. Delay in beginning one's research will be counter-productive.

- (B) **Annotated Bibliography (15%).** As part of the preparation for the individual research, collective class presentations, and papers, students will compile bibliographies to aid in conceptualizing 'rules' for their area of research. A preliminary bibliography will be prepared for the student's seminar presentation, and will be submitted (as a draft) to the Instructor at the time of the class presentation. The final bibliography will be submitted when the topic is reconsidered in the last two classes of the course. Each bibliographic entry should include a short commentary (up to 100 words) that explains the article's relevance to the course themes. These commentaries should be written at the time you read each article so that they elicit (and encompass) your thinking on its relevance. Each student will be responsible for 10-20 articles/chapters, with special emphasis on articles focused on the course theme and not already identified in the syllabus.
- (C) **Presentation (20%).** As of February 1, class members will lead the seminars. In consultation with the Instructor, the group will develop the structure for doing so. One week prior to the seminar, the group that is presenting will select the student readings (approximately 60-80pp) and make them available to class members with, accompanied by a set of questions to guide student reading. Readings must be on reserve or otherwise be available to students at least one full week ahead of the seminar. The *preparation* of the seminar will be assessed at both an individual and group levels. The *execution* of the seminar will be assessed on the individual contribution of each student and of the effectiveness of the collective; the Instructor will be actively involved in the execution of the seminar (as needed). Seminars will be some combination of over-arching treatments, and treatments specific to each student's research. **In every seminar, the student presenters must present a short, oral precis of each reading that is being considered that week. This précis will be handed into the Instructor.**
- (D) **Final Paper (50%).** The final paper (approximately 3500 words in length) will build on the work done by each student for their seminar. It will be a theoretical paper **explicating the nature of social regulation**, rather than a policy paper, case study, practical proposal, or sectoral assessment. The topic will be worked out in consultation with the Instructor as part of the development of the seminar. Hard copies of the paper will be handed in to the Instructor at his office no later than **4:00 PM, Friday, April 6, 2011**. Late papers will be penalized at the rate of 5%/day.

***** In accordance with the University of Victoria's Waste Management Policy, students are encouraged to print all assignments on double-sided or re-used paper.**

Important Dates: Week of Jan 23—Selection of topics

Feb 3--Midterm Break—no class.

April 6--Final paper due.

PART ONE: BACKGROUND

Class 1: January 9 Introduction

This class will review the Course Outline and consider, in a preliminary fashion, the need for a green legal theory.

- Slavoj Zizek, "Can you give my son a job?", Book Review of Richard McGregor, *The Party: The secret world of China's Communist Rules*, in London Review of Books, 21 October, 2010.

Class 2: January 16 The liberal limits of environmental law

This class will assess the contradictions that underlie environmental law, and how these contradictions have been manifested in a diversity of sectors. Through a number of case examples, the class will assess the successes of EL, its limits, and its real potential.

CLASS HYPOTHESIS: The potential of EL can be understood only by explicating the contradictions inherent in the context(s) in which it operates.

READING QUESTIONS: How might we think about EL as 'formal law'? As politics? As economics? As culture? What sorts of contextual factors affect the functioning and effectiveness of EL as formal law? How do these factors play out in different environmental/resource sectors? Are there common patterns? What sorts of challenges do these factors/patterns pose to achieving a sustainable world?

- Michael M'Gonigle and Louise Takeda, "The Liberal Limits of Environmental Law" (draft for submission)

Class 3: January 23 **Ecological modernization, liberalism, and environmental law**

This class will examine in more detail the underlying justifications of environmental law through the paradigm of ecological modernization, the relationship between this paradigm and liberal economies, and the implications of ecological modernization for liberal democracy and the managerial state.

CLASS HYPOTHESIS: EL embodies a layered set of assumptions about liberal economics and the democratic state that are inadequate for achieving ecological governance.

READING QUESTIONS: What is 'ecological modernization'? What assumptions do EL and ecological modernization share? How are these assumptions embedded in liberal law and democracy? What limits and contradictions do these activities point to?

- Sean Coyle and Karen Morrow (2004) "Introduction" in *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*. pp 1-8
- Matthew Alan Cahn 1995. Ch. 1 "The political economy of liberal public policy" in *Environmental Deceptions* pp. 4-11.
- Geoffrey Leane 1998. "Environmental Law's Liberal Roots: (Not) a Green Paradigm" in N. Rogers (ed) *Green Paradigms and the Law*. Lismore, Australia: Southern Cross University Press pp 1-31
- Timothy Luke 2006. "The system of sustainable degradation." *Capitalism Nature Socialism* 17(1): 99-112

Class 4: January 30 **Theory, law and social regulation**

This class will examine the nature of theory, consider new forms of critical and cultural knowledges, and develop an understanding of their 'regulatory' nature (as compared to legal law). It will then provide a summary overview of green legal theory as we will consider it in the course.

CLASS HYPOTHESIS: To develop effective environmental action, the understanding of 'law' must be expanded beyond legal law to include the four forms of law considered in the rest of this course: the 'power logics' of capitalism and the sovereign state, culture codes, and those 'legal' processes elucidated by the natural law tradition.

READING QUESTIONS: What is 'theory', and what does it do? Why does it matter? Why should we be concerned about 'regimes of truth'? What does it mean to speak of a 'mode of regulation'? What is implied by the reliance on environmental 'rights'? What new directions for social 'regulation' might be implied by 'green legal theory'?

- Eagleton, T. (1990). "The Significance of Theory". *The Significance of Theory*. T. Eagleton (ed.) Cambridge, Basil Blackwell Inc. 8pp
- Hunt, A. (1993). "Law as a Constitutive Mode of Regulation". *Explorations in Law and Society: Toward a Constitutive Theory of Law*. A. Hunt. New York, NY, Routledge: 301-333 (5 pages omitted within text)
- **(Preview)** Michael M'Gonigle (2011) Green Legal Theory (Selections from draft paper)

*****NOTE:** One or two students could choose to work in the area of this topic if there are sufficient students to cover this once the other topic areas are covered (as set out below). Given the early timing of this class, these students would have to offer a different form of class presentation (to be developed). Useful topics here would address the anthropological debates on how law is defined/understood, as well as the literature (associated with philosophical anarchism) on non-state forms of social regulation.

PART TWO: POWER LOGICS/CULTURE CODES

In this second part of the course, we shift to co-operative student-run seminars. At least two students will work together to select the readings for each seminar, and participate in running the seminar individually and collectively. The design of the seminar will be developed with the Instructor sufficiently in advance of the class to allow for fine-tuning and revisions. Materials, and associated questions, will be made available to the class one week in advance of the seminar.

Each class will be oriented to developing an understanding of the specific nature of the social regulation in the subject area of that class.

NOTE: Readings are set out at the end of the syllabus for the initial guidance of the student presenters. A more extensive (if somewhat dated) bibliography is also available upon request. Each student should ensure that their research identifies the most current discussions in the field so as to bring the class up to date on the state-of-the-art of the theoretical understandings, and then to be able to build on this in class discussions. The seminar preparations should be designed to help the presenter develop their 'rules' and the associated argument for their research papers.

Class 5: February 6 Power logics I: Capitalism

This class will examine both the mainstream and critical literatures on capitalism to develop an understanding of the (*de facto* regulatory) logics of capital that has socially constitutive effects. (Min: 2 students; coordinating with 2 students in Class 12)

CLASS HYPOTHESIS: Capitalism embodies a (socially regulatory) set of 'power logics' that has led to specific forms of economic development and socio-ecological devastation.

POTENTIAL APPROACH: To explain the power logic(s) of capital from the traditional perspective of the economist (the cheerleader perspective) and the critical perspectives of Marxists and ecologists (the r-evolutionary perspective).

February 13 Reading Break/No Class

Class 6: February 20 Power Logics II: The sovereign state

This class will examine the power logics that are inherent to 'sovereignty' and the centralized state. (Min: 2 students, coordinating with 2 students in Class 12)

CLASS HYPOTHESIS: A (relatively) recent historical innovation, the sovereign state encompasses power logics that inherently tend to constitute specific forms of economic, political and cultural organization that are ecologically problematic.

POTENTIAL APPROACH: To examine various aspects of the character of the sovereign state that, by its nature, imposes a set of dynamics that are socially constitutive in specific ways. This includes (i) the nature of 'sovereignty', (ii) the state's spatial orientation to 'the local' and to its own forms of bureaucratic centralization, (iii) its exclusive control over territory, (iv) the potential and limits of democracy. One potential area for student research is the explication of the 'environmental justice' and 'climate justice' movements for their relevance to the understanding of economic and state power logics.

Class 7: February 27 Culture Codes

This class will consider 'culture' as a regulatory force ('culture codes') that help to 'constitute' social norms (Min: 3 students, coordinating with 2 students in Class 11)

CLASS HYPOTHESIS: Systemic change must address the ways in which cultural codes both limit and liberate social agency at individual and collective levels.

POTENTIAL APPROACH: To develop a culturally-based approach to understanding “modes of regulation”, the class might consider culture and culture/law generally, and then look at the contributions of specific authors (I would suggest three: Foucault, Bourdieu, Plumwood) whose work is particularly relevant to culture-as-regulation.

PART THREE: NATURAL LAW

In this part of the course, we address the unique (transformative) approach offered by GLT. Three classes will address the historic tradition of natural law, the potential of a ‘new naturalism’ that goes beyond historical and contemporary thinking about both positivism and natural law, and the potential for a natural law rooted in immanent nature (as manifest, for example, in deep ecology and personhood).

Class 8: March 5 Natural law I: The tradition

This class will address the long history of the “natural law” tradition (including non-Western understandings) to discern its changing character. (Min: 2-3 students)

CLASS HYPOTHESIS: The (discredited) natural law tradition puts us in touch with a level of collective social accountability (that reaches beyond the merely social) that is unavailable to positivist lawyers.

POTENTIAL APPROACH: To provide overview assessments and, from the above perspective, to review/assess some of the classic writings of natural law from ancient Greece to today (distinguishing 20th century developments).

Class 9: March 12 Natural law II: A New Naturalism

This class will examine the potential of a ‘new’ natural law (however we define it) to understand its relevance for today’s ecological (and associated) challenges. This constitutes the ‘turning point’ in the class where we begin to consider the foundations for a r-evolutionary ‘green legal order’. (Min: 2 students)

CLASS HYPOTHESIS: The natural law tradition is an essential foundation for the achievement of an ecological (cultural and material) order.

POTENTIAL APPROACH: Building on Class 8, to review the ‘new’ natural law literature in two ways--as it minimally exists in Western thinking today, and as it might be gleaned from solid literature on indigenous traditions. This could entail a detailed consideration of “wild law/earth jurisprudence”, as well as current writings on indigenous governance and legal traditions.

Class 10: March 19 Natural law III: Immanence and Personhood

This class will delve into a more specific understanding of ‘immanent’ (ie non-material) nature insofar as it can be understood in writings from science, religion, philosophy, indigenous studies, and deep ecology. This research would engage particularly with relevant writings in the personhood literature. (Min: 3 students)

CLASS HYPOTHESIS: An attention to Natural law, as modified by a non-modernist understanding of natures’ immanence, can restore meaning and agency to the world by infusing the social in way that, inherently, set social regulatory boundaries to human action and, in so doing, allow for human and ecological health and flourishing

POSSIBLE APPROACH: Review a diverse literature, with special focus on the personhood literature, that addresses non-human/non-material ‘equivalences’ to human self-consciousness, spiritual powers (non-religious), different sciences and ‘ways of knowing’ etc. The goal would be to understand how such an attention to immanent nature might provide a now missing level of social accountability to a ‘non-human reality’ by taking the processes of collective self-constitution beyond present positivist constructions.

PART FOUR: EARTH RULES

In this concluding part of the course, we address the prospective lessons of the previous classes for creating new culturally and materially constitutive modes of regulation ('earth rules').

Class 11: March 26 Green culture codes

In this class, students will report on the state of the art in envisioning new forms of cultural self-constitution. (Min: 2 students, coordinating with Class 7 students)

CLASS HYPOTHESIS: Following from a new natural law perspective, new culture codes must be embedded through new practices so that they can foster a (post legal) eco-cultural constitution.

POSSIBLE APPROACH: Working with Group 7 students, to explore those writings, examples, stories that elucidate the relationships between physical/experiential conditioning and material practices that will allow for human/non-human flourishing. These, in turn, would be explored for how they could foster new normative embodiments and new cultural modes of self-regulation to emerge that will lead to 'healthy' forms of cultural evolution.

Class 12: April 2 Green Constitutionalism

In this class, students will develop 'earth rules' for political and economic organization. (Min: 2-3 students, coordinating with Class 5 and 6 students)

CLASS HYPOTHESIS: Given the history and present practices of capitalism/sovereign state, an ecological r-evolution may be necessary but cannot succeed by taking over the state or reforming its economic management. Similarly, many diverse new forms of economic organization and practice could be drawn upon for ecological change but are marginalized because of their incompatibility with today's dominant structures of power. Instead, we must develop new 'earth rules' to 'constitute' new power logics to replace/re-invent both the economy and the state.

POSSIBLE APPROACH: To develop new power logics, conduct a review of theorists (anarchist, indigenous, confederalists, bioregionalists, green economists) that address the appropriate character and scale of political and economic governance, and of the networked relations to sustain them. Perhaps a detailed review of examples (re the state: Arendt, Castells, Switzerland, others; re the economy: Milani, others)

NOTE: All papers are due April 6.

INTRODUCTORY BIBLIOGRAPHY

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- David Harvey 1993. "From space to place: Reflections on the condition of post-modernity" in Jon Bird et al. *Mapping the Futures: Local Cultures, Global Change*. London and NY: Routledge
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Power Logics II: The Sovereign State

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- Kara Shaw 200?
- Mick Smith, *Against Ecological Sovereignty*
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Culture Codes

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Natural Law I

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