

## Law 327 Jurisprudence

**Term:** Fall 2010

**Credit:** 1.5

**Class Times:** Friday 9:00 am – 11:50 am

**Professor:** Dr. Colin Macleod

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**Office Hours:** Monday 10:00 am -12:00 pm and by appointment

### **Course Description:**

This course provides a critical examination of some central problems in the jurisprudence concerning the nature of law and the relevance of legal theory to legal practice. We will give special attention to the relation between law and political morality. Are there correct answers to legal controversies? If so, what role do value judgements about justice, rights, fairness, equality and liberty have in correctly resolving legal controversies? If not, how should the resolution of legal disputes be understood? What standards of political morality are relevant to the evaluation of laws and legal systems? Does law necessarily embody principles of justice? Do judges and lawyers ever confront a choice between fidelity to law and fidelity to justice? If so, how should they respond to such a dilemma? How should one's commitment to a particular conception of political philosophy (e.g., to a variety of feminism) affect the way one interprets and practices law? In pursuing these questions, we will study some influential conceptions of justice and general theories the nature of law including traditional and contemporary variants of natural law theory, legal positivism, American legal realism, feminist analyses of law and material from the Critical Legal Studies movement. We will explore this material both by exploring primary sources which are expressly theoretical and by considering specific jurisprudential issues concerning the interpretation of values that arise in legal cases.

Students who wish to write their Major Research Paper (for Law 399) in the course may discuss the matter with me. If the proposed topic is within my areas of expertise and if my schedule permits, I am willing to supervise Major Research Papers.

### **Teaching Methodology:**

I will begin most classes with a lecture on themes arising from the assigned readings that is intended to set the stage for discussion and questions from the members of the class. Towards that end, I expect that students will have read the assigned material and are prepared to engage in discussion about it.

### **About Colin Macleod**

Colin Macleod B.A. (Queens), M.A. (Dalhousie), Ph.D. (Cornell) is an Associate Professor of Philosophy and Law. He has been at University of Victoria since 1998. His research focuses on issues in contemporary moral, political and legal theory with a special focus on the following topics: (1) distributive justice and equality (2) children, families and justice and (3) democratic ethics. He is the author of *Liberalism, Justice, and*

*Markets: A Critique of Liberal Equality* (OUP 1998) and co-editor with David Archard of *The Moral and Political Status of Children* (OUP 2002). His articles have appeared in journals such as *The Chicago-Kent Law Review*, *Theory and Research in Education*, *Politics and Society*, *The Canadian Journal of Philosophy*, *The Canadian Journal for Law and Jurisprudence*, *Law and Philosophy*, and *Dialogue*. He is an associate editor of the . He is one of the founders of the Consortium on Democratic Constitutionalism (Demcon) and the Victoria Colloquium in Political, Social and Legal Theory [<http://www.law.uvic.ca/demcon/>]. When he is not engaged in philosophical discussion and argument, he enjoys playing hockey and tennis and strumming his guitar while jamming with his musical friends.

**Required Texts:**

*Readings in the Philosophy of Law*. Second edition. Edited by Keith Culver (Broadview Press 2007).

Additional material will be placed on reserve or will be available online.

**Some Other Useful Texts:**

H.L.A. Hart, *The Concept of Law*

Ronald Dworkin, *Taking Rights Seriously*

Ronald Dworkin, *Law's Empire*

Ronald Dworkin, *Justice in Robes*

John Rawls, *A Theory of Justice*

M.P. Golding and W.A. Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory*

J. Bickenbach, *Canadian Cases in the Philosophy of Law*

Patricia Smith, *Feminist Jurisprudence*

Catherine MacKinnon, *Feminism Unmodified*

Richard Posner, *Economic Analysis of Law*

Robert Nozick, *Anarchy, State and Utopia*

Will Kymlicka, *Contemporary Political Philosophy*

Susan Okin, *Justice, Gender and the Family*

Andrew Altman, *Arguing about Law*

**Formal Course Requirement**

Work for the course consists 1 term paper, a class presentation, and regular class participation. The term paper is worth 60% of the final grade. Students will have an opportunity to choose from a variety of term paper topics. The approximate length of the term paper is 3,000 words. The presentation is worth 25% of the course grade. 15% of the final grade will be based on participation in class discussion. The evaluation of the class participation grade will be based on the presentation and submission of up to 10 very brief written quote, comment and critique assignments (no more than 1 or 2 paragraphs) that take up an issue raised in one of the assigned readings.

**Grading:**

All assignments will be marked on a percentage basis, with the percentile mark for the course being converted to a letter grade on the following basis:

Percentage	Grade
90 - 100	A+
85 – 89	A
80 – 84	A-
75 – 79	B+
70 – 74	B
65 – 69	B-
60 – 64	C+
55- 59	C
50 – 54	D
Below 50	F

### **Late assignments/missed tests**

Unless you provide me with a written note that provides a compelling reason (e.g., documented medical problem) for granting an extension or for missing an exam, I will not change the due date of assignments nor will I reschedule exams for you. I will accept, without grade penalty, essays that are submitted up to one week after the due date. However, essays that are submitted in this period will not receive any comments. After this grace period unexcused essays will not be accepted. For other information with regards to missing deadlines, etc. please see the UVic University Calendar. Information regarding Religious Observance can also be found in the University Calendar.

### **Due Dates for Assignments:**

Brief Commentaries (15%): throughout the term  
 Term paper (60%) due: December 15<sup>th</sup>.  
 Presentation (25%): throughout the term.

### **Appropriate Academic Conduct**

Students are expected to understand and abide by the University regulations concerning academic misconduct - e.g., plagiarism, cheating etc. For further information about these matters students can consult the University Calendar. If you are unsure what constitutes plagiarism consult me before submitting an assignment.

### **Reading Schedule**

Note: This is a provisional reading schedule. Adjustments may be made during the term.

### **Some Stage Setting Material**

Please peruse the following web sites:

The Fugitive Slave Act of 1850:

[http://avalon.law.yale.edu/19th\\_century/fugitive.asp](http://avalon.law.yale.edu/19th_century/fugitive.asp)

Human Rights in Canada: A Historical Perspective:

<http://www.chrc-ccdp.ca/en/browseSubjects/humanRights.asp>

**Week of September 6**

**Introduction – Some Questions about Justice, Law, and Morality**

*Riggs v. Palmer* (C)

**Week of September 13 – Contemporary Theories of Justice – Utilitarianism and Liberal Equality**

Will Kymlicka, 'Utilitarianism' (on reserve)

Will Kymlicka, 'Liberal Equality' (on reserve)

**Week of September 20 – Contemporary Theories of Justice – Feminism and Libertarianism**

Susan Okin, 'Justice and Gender' *Philosophy and Public Affairs* (vol. 16, #1, 1987 pp. 42-72) available on online via UVIC library.

Robert Nozick, 'The Entitlement Theory' excerpted from *Anarchy, State, and Utopia* (on reserve)

**Week of September 27 – Traditional Natural Law Theory**

St. Thomas Aquinas, excerpts from *Summa Theological*, Questions 90-91, 94-96 (C)

Norman Kretzmann, 'Lex Iniustia Non Est Lex: Laws On Trial in Aquinas' Court of Conscience' *American Journal of Jurisprudence* (vol. 33, 1988) available online at via UVIC law library.

John Finnis, *Natural Law and Natural Rights* (C)

**Week of October 4 – Early Legal Positivism and The Separation Thesis**

John Austin, excerpts from *The Province of Jurisprudence Determined* (C)

H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (C)

**Week of October 11 – Contemporary Legal Positivism**

H.L.A. Hart, excerpts from *The Concept of Law* (C)

Wil Waluchow, 'The Many Faces of Legal Positivism' *University of Toronto Law Journal*, vol. 48. 1998. (Available online via Law Library)

**Week of October 18 – Rules and Principles: A Critique of Legal Positivism**

Ronald Dworkin, 'The Model of Rules I' (C)

*Riggs v. Palmer* (Reread)

H.L.A. Hart Excerpt from Postscript to 2<sup>nd</sup> of *The Concept of Law* (on reserve)

**Week of October 25 – Contemporary Natural Law Theory**

Ronald Dworkin, 'Integrity in Law' from *Law's Empire* (C)

Ronald Dworkin, 'Natural Law Revisited' *University of Florida Law Review*, (vol. XXXIV, no. 2, 1982) on reserve and available online via Law Library catalogue.

**Week of November 1 – Feminist Conceptions of Law**

Patricia Smith, 'Feminist Jurisprudence and the Nature of Law' (C)

Catherine MacKinnon, 'Toward Feminist Jurisprudence' (C)

Patricia Smith, 'Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity, and Denial' (on reserve).

### **Week of November 8 – American Legal Realism & Critical Legal Studies**

Jerome Frank, 'Legal Realism' and 'Preface to 6<sup>th</sup> Edition of *Law and the Modern Mind* (C)

O.W. Holmes, 'The Path of the Law' (C)

Andrew Altman, 'Legal Realism, Critical Legal Studies and Dworkin' *Philosophy and Public Affairs* (vol. 15, #3 1986) available online via UVIC library.

### **Week of November 15 – Presentations**

No reading assignment but you may complete a quote and comment assignment on the following essay: Duncan Kennedy, 'Legal Education as Training for Hierarchy' (on reserve).

### **Week of November 22 – Presentations**

## **Class Presentation Assignment - Evaluating the Work of Judges**

The rulings made by judges often generate controversy. Sometimes rulings are criticized on the grounds that they involve some mistake about what the law actually requires or permits. Sometimes disputes centre on the moral justifiability of a law. (Here the critic may accept a decision as legally valid but argue that the law is a bad law which should be changed or reformed.) And sometimes legal rulings are criticized as legally defective because they involve mistaken interpretations of moral standards embedded in the law. In this assignment, I would like you to adopt the perspective of a critic of a legal decision. You must identify a recent legal case that interests you and which you believe presents a ruling that is, in some important respect, defective or displays a problem concerning the moral adequacy of the law. **No less than 2 days** before your presentation, you should circulate to the members of the class a **3 page (absolute maximum)** summary of your critique that includes a very succinct summary of key facts, issues and how the case was decided. In your presentation, you should clearly identify the central issue that is the focus of your critical discussion, you should explain the decision in the case (including the argument used to support the ruling) and you should develop an argument that presents a criticism of some aspect of the decision or the controversy surrounding it. You should ensure that the character of your criticism is made clear - i.e., whether you are challenging the ruling on purely legal grounds, moral grounds, or on the grounds that there is a legal mistake in the ruling which is traceable to misinterpretation of some legally relevant moral standard. You should be prepared to offer some reflections on what your analysis of the case tells us about the relationship between sound adjudication and

considerations of political morality. The presentation should take between 5-10 minutes and you should be prepared to answer questions from the members of the class.

The assignment is worth 25% of the course grade. Presentations will be scheduled in consultation with the instructor.

### **Quote, Comment and Critique Assignment Instructions**

In order to receive marks for the quote, comment and critique assignment you must submit to me a typed version of the remarks you present in class. Your remarks should **never** exceed a single, double-spaced piece of paper. Your name and the course title should be clearly indicated at the top of the page. You should also identify the reading to which you are responding. You should identify a brief passage in the reading which raises an issue or point you wish to discuss. (It is helpful if you actually include the brief quotation before your remarks.) Offer a brief explanation of what issue or point you find interesting (or contentious or confusing etc.) and then provide a brief response – e.g., a criticism or comment or constructive question – about the issue at stake. One purpose of this assignment is stimulate class discussion so in addition to presenting your remarks, you should be prepared to respond to question or comments from other members of the class. I will assign full marks to any assignment that reflects a good faith effort to engage the material in a thoughtful way.

## Guide To Marginal Notations

? = the significance or relevance of a point is unclear or obscure

^ = missing word(s)

BX = be more explicit; develop the point you are making more fully

C = confusing passage;

CIT = incomplete or incorrect or missing citation

G = garbled; you have not effectively conveyed your point

I = incomplete analysis; you have not adequately explained your point

K = awkward or ungrammatical sentence construction

M = misleading

NA = needs argument; you have not developed your argument sufficiently

O = omit; you could have omitted this chunk of text

PT = poor thesis statement

QL = quoted passage is unnecessarily long

RF = ambiguous or unclear referent

RS = run on sentence

SE = supporting evidence is needed to substantiate a claim

TI = tense inconsistency; you have switched tenses in a confusing fashion

U = sentence or phrase does not clearly communicate your point

VA = vague

W = poor or incorrect choice of words