PHL 492.01: Philosophy of Law

Soazig Le Bihan

University of Montana - Missoula, soazig.lebihan@umontana.edu

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LAW 664, PHILOSOPHY OF LAW (SPRING 2018)
Tue. & Thu., LAW 215; Prof. Johnstone (Rm. 312) & Prof. Lebihan (with Prof. Huff)

In the practice of law, according to Karl Llewellyn, “Ideals without technique are a mess. But technique without ideals is a menace." This course aims to provide a vocabulary of ideals to help answer a question that arises throughout the practice of legal technique: What is Law? The course begins with a short history of the rule of law as an ideal in the United States. It turns to the development of various theories of law, framed as a continuing debate among competing conceptions of law. It then integrates the application of legal theory to legal practice in several areas of student interest. In addition to seminar discussion, students produce short commentaries on current issues and a research paper or other project.

Objectives. Students should develop a practical understanding of: the leading theories of American jurisprudence, their role in structuring the development of American law, and the use and misuse of theory in legal practice. Skills emphasized: problem solving, legal analysis and reasoning, legal research, communication, and ethics. Values emphasized: promotion of justice and improvement of the profession.

Readings & Class. The book is Feinberg, Coleman, Kutz, PHILOSOPHY OF LAW (9th ed. 2014). You may rent the book here: www.cengagebrain.com/course/2712454. Readings are denoted by number from the book, and page counts (without endnotes) indicated in parenthesis. Introductory readings at the beginning of each part are noted when available. In addition, starting the second class, please read each week’s commentaries on Moodle and be prepared to engage them. To encourage class discussion, laptops are discouraged in class.

Questions. Prof. Johnstone is generally available on Mondays, Wednesdays, and Fridays, or by appointment. Prof. Lebihan holds office hours on Friday afternoons from 1:00 to 5:30 in LA 153 (there are sign-up sheets posted on the office door). Please post general questions on Moodle so your colleagues can benefit.

Assessment. Your grade has three components: discussion (20%), commentaries (30%), and paper (50%). Discussion measures ongoing constructive engagement in class discussion. Commentary measures the research, analysis, and writing two exchanges of comments (750 wds.) applying one or more ideas advanced in the reading to an actual or hypothetical case. Each student should select one class for an opening (posted on Moodle by 8pm two days before class) and one class for a response (posted on Moodle by 8pm one day before class), with no more than one comment in each part of the course. All commentators for a given class should select a single case together; commentary day selections are final. Contact the instructors to discuss case ideas. Paper measures the research, analysis, and writing of a paper (3000 wds.) considering a question relevant to the course; students may expand their commentary for the paper. Students also may satisfy their Advanced Writing Requirement (5000 wds.) according to the Student Handbook; see Prof. Johnstone by Feb. 9.

Academic Honesty. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code of the University of Montana. Law students should also be familiar with the Law School Honor Code in the Law Student Handbook.

Disabilities. Students with disabilities may request reasonable modifications by contacting one of the instructors. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. “Reasonable” means the University permits no fundamental alterations of academic standards or retroactive modifications.

The syllabus is subject to change depending on course and legal developments._______
Course Rubric

**Discussion (10 x 2 pts.)**

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<td>Disengaged: counter-productive.</td>
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<td>Minimal engagement: leaves discussion where it stood.</td>
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<td>Significant engagement: advances the discussion.</td>
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**Opening Commentary (1 x 15 pts.)**

Research: Originality, Background, Coverage, Depth (5 pts.)
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)
Communication: Organization, Format, Clarity, Style (5 pts.)

**Response Commentary (1 x 15 pts.)**

Research: Originality, Background, Coverage, Depth (5 pts.)
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)
Communication: Organization, Format, Clarity, Style (5 pts.)

**Paper (50 pts.)**

Research (8 pts.)
- Originality (adds perspective to course material)
- Background (develops relevant factual and procedural background)
- Coverage (covers relevant legal authorities)
- Depth (explores focused topic deeply relative to paper length)

Analysis (8 pts.)
- Balance (addresses arguments on both sides)
- Accuracy (correctly relies on relevant authority)
- Synthesis (synthesizes legal principles in application)
- Conclusion (supports brief conclusion with arguments)

Writing (4 pts.)
- Organization (structures content effectively at all levels)
- Format (professional in type, grammar, punctuation, and spelling)
- Clarity (reads well as legal prose)
- Style (conveys content with rhetorical effect)

**TOTAL (100 pts.)**

**AWR Planning Guide (Suggested for Papers)**

Please consult the student handbook for details.

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<tr>
<th>AWR Step (deadline)</th>
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<td>Topic Selection (by Feb. 9)</td>
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<td>Bibliographic Essay (by Mar. 2)</td>
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<td>Complete First Draft (by Apr. 2)</td>
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<td>Draft to Classmate (by Apr. 27)</td>
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<td>Oral Presentation: Law-Lapalooza (Tue., May 1)</td>
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<td>Final Draft with Self-Assessment (by May 18)</td>
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## PART I: The Nature and Value of Law

*Cf. pp. 1-7*

1. **Introduction to the Rule of Law:** *Why philosophy of law?*
   - Tue: Course introduction
   - 1/23: Lecture by Prof. Huff on the history and meaning of the rule of law

2. **The Rule of Law** *(24): What legitimizes law?*
   - Thu: Lon L. Fuller, *Eight Ways to Fail to Make Law* (1964) (4)

3. **Natural Law** *(37): How may reason legitimate law?*
   - Tue: Lon L. Fuller, *The Case of the Speluncean Explorers* (1949) (16)

4. **Legal Positivism** *(32): How may practice legitimate law?*

5. **Legal Interpretivism** *(39): How may integrity legitimate law?*

6. **Legal Realism** *(16): How may policy legitimate law?*
   - Thu: O.W. Holmes, Jr., *The Path of the Law* (1897) (6)
   - 2/8: Jerome Frank, *Legal Realism* (1930) (3)

7. **Critical Legal Theory I** *(35): How may power (de)legitimate law?*

8. **Critical Legal Theory II** *(27): How may critique (re)legitimate law?*

9. **Is There an Obligation to Obey the Law?** *(34): (If so, where is it from?)*
   - Tue: Plato, *Crito* (360 B.C.E.) (8)
   - 2/20: Martin Luther King, Jr., *Letter from Birmingham Jail* (1963) (10)

## PART II: The Political Morality of Law

*Cf. pp. 359-370*

10. **Justice & Equality I** *(37): What kind of justice is (our) law for?*
11. Justice & Equality II (40): What kind of equality is (our) law for?

12. Law & Economics (33): What kind of fairness is (our) law for?


14. Law and Liberty (and Morality) (38): (When) can law limit rights?

15. The Limits of Freedom of Expression (33): (When) can law limit speech?

16. The Limits of Freedom of Expression (18): Why (not) limit speech?

17. International Law (40): What is international law, or a human right?

**PART II: Philosophy and the Law (Topics)**

Cf. pp. 689-703

18. Responsibility (54): What are persons responsible for?

19. Punishment I (30): Why may law punish persons?
Tue 4/3 53. Cesare Beccaria, *Of Crimes and Punishments* (1764) (3)
4/3 54. Immanuel Kant, *The Right to Punish* (1798) (4)

20. Punishment II (35): How may law punish persons?

21. Tentative Guest:
Tue 4/10 Hon. Russell Brown, Supreme Court of Canada
22. **Criminal Law I (19): What is a guilty mind?**
   Thu 61. House of Lords, *Daniel M’Naghten’s Case* (1843) (1)

23. **Criminal Law II (45): What is a guilty act (or omission)?**

24. **Private Law I (43): What is the nature and value of property?**
   67. David Hume, *Of the Origin and Justice and Property* from *Treatise* (1739) (10)

25. **Private Law II (50): What is the nature and value of contract?**

26. **Private Law III (21): What is the nature and value of tort liability?**

For Philosophy students:
5/1 Law-Lapalooza – presentations
5/3 Feedback on presentations
5/10 Final Draft of Paper due.