POLS 8090 Office: 404 Baldwin

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*Legal Theory*

Why do judges and legal practitioners disagree about the proper approach to reasoning about the law? What standard should judges apply when interpreting contested questions of law? If judges are not bound by the literal terms of statutory law, do they then possess unfettered discretion to amend the law?

In this course, we will focus on the question of how to identify and interpret the rules and standards governing legal questions. This task is often difficult. Even when a statute or precedent clearly governs the facts, the **fit** of law to facts is often ambiguous. In many cases, the law contained in statutes and precedent does not clearly govern the facts presented. Finally, judges and courts often disagree regarding both the law that should govern a particular controversy and the interpretation of relevant legal doctrine.

In order to address these interpretive problems, this course will focus on the form of reasoning that judges employ in deciding cases. The course aims to provide students with an understanding of some of the major issues and controversies faced by courts in interpreting and evaluating legal arguments. We will discuss the major schools of contemporary legal theory: positivism, integrity in law, law and economics, critical legal studies and feminist legal theory. Students should complete the course with the ability to read, follow, and discuss intelligently the evolution of contemporary legal doctrine.

*These texts are available at the University Bookstore:*

Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press)

Ronald Dworkin, *Law's Empire* (Harvard University Press)

H. L. A. Hart, *The Concept of Law* (Oxford University Press)

A packet of supplemental readings will be available at Beljeans after the midpoint of the semester.

*Assignments*

*I. Positivism: H. L. A. Hart*

Jan 13 Introduction

Jan 20 *The Concept of Law:* 1-29, 42-71, 79-96

Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 37-77.

Raz, Joseph, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970), pp. 5-43.

Enoch, David, “Reason-Giving and the Law,” in Green, L. and B. Leiter (eds.), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford: Oxford University Press, 2011), pp. 1-38.

\*Greenberg, Mark, “The Standard Picture and Its Discontents,” in Green and Leiter (eds.), pp. 39-106.

Greenberg, Mark, “How Facts Make Law, in S. Hershovitz (ed.), *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2006), pp. 225-313.

II. *The Seamless Web: Ronald Dworkin*

Jan 27 *The Concept of Law:* 100-136

*Taking Rights Seriously*: 1-31

Soper, Philip, “The Obligation to Obey the Law,” in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford: Clarendon Press, 1987), pp. 127-192.

Raz, Joseph, *The Morality of Law*, pp. 78-102, 146-62.

\*Coleman, Jules, “Incorporationism, Conventionality, and the Practical Difference Thesis,” in J. Coleman (ed.) *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press,

2001), pp. 99-149.

Shapiro, Scott J., “On Hart’s Way Out,” in Coleman (ed.), pp. 149-92.

Dworkin, Ronald, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), pp. 140-86.

Feb 3 *Taking Rights Seriously*: 31-45, 81-100

\*Dworkin, Ronald, *Justice in Robes*, pp. 117-39.

\*Articles and chapters marked with an asterisk will be discussed in the lecture. Other articles and chapters (not included in the principal assignment) are

recommended and may be the focus of a seminar presentation.

Feb 10 *Taking Rights Seriously*: 101-49

\*Hurley, Susan, “Coherence, Hypothetical Cases, and Precedent,” in

Hershovitz (ed.), pp. 69-102.

Feb 17 *Law's Empire*: 1-48

Fleming, James E., “The Place of History and Philosophy in the Moral Reading of the American Constitution,” in Hershovitz (ed.), pp. 23-40.

\*Endicott, Timothy A. O., “Herbert Hart and the Semantic Sting,” in

Coleman (ed.), pp. 39-59.

Feb 24 *Law's Empire*: 48-65

\*Howarth, David, “Making Sense Out of Nonsense,” in Gross, H. and R. Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992), pp. 29-54.

Mar 3 *Law's Empire*: 65-86

*Taking Rights Seriously*: 150-168

Marmor, Andrei, *Interpretation and Legal Theory* (Oxford: Oxford University Press, 1992), pp. 35-84.

\*Hershovitz, Scott, “Integrity and Stare Decisis,” in Hershovitz, (ed.), pp. 103-18.

Ackerman, Bruce, *We the People: Foundations* (Cambridge, MA: Harvard/Belknap, 1991), pp. 131-62.

Fish, Stanley, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989), pp. 87-11.

Mar 17 *Law's Empire*: 151-75—Paper Proposal Due

Gardner, John, “Law’s Aims in Law’s Empire,” in Hershovitz (ed.), pp. 207- 225.

\*Marmor, Andrei, “Legal Conventionalism,” in Coleman (ed.), pp. 193-219.

Mar 24 *Law's Empire*: 176-219 (skim 220-24)

\*Green, Leslie, “Associative Obligation and the State,” in J. Burley

(ed.), Dworkin *and His Critics* (Oxford: Blackwell, 2004), pp. 267-84.

Raz, Joseph, “Speaking With One Voice,” in Burley (ed.), pp. 285-90.

Perry, Stephen, “Associative Obligation and the Obligation to Obey the Law,” in Hershovitz (ed.), pp. 183-206.

III. *Law and Economics*

Mar 31 Posner (packet): 81-102

Dworkin (packet): 237-66

\*Coleman, Jules, *Markets, Morals, and the Law* (Oxford: Oxford University

Press, 1998), pp. 67-132.

Apr 7 Coleman (packet): 1-22

Fletcher (packet): 248-54, 275-84

*Law's Empire*: 225-250

*IV. Originalism*

Apr 14 *Law's Empire*: 355-79, 387-92—Paper Draft Due

Scalia, Bork (packet)

Brettschneider, Cory*, Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2007), pp. 136-59.

Fabre, Cecile, “A Philosophical Argument for a Bill of Rights,” *British Journal of Political Science* 38 (2000): 77-98.

\*Amar, Akhil Reed, *America’s Constitution: A Biography* (New York, NY: Random House, 2005), pp. 207-45.

Tribe, Lawrence H., *The Invisible Constitution* (Oxford: Oxford University Press, 2008), pp. 25-104.

Breyer, Stephen, *Active Liberty: Interpreting Our Democratic Constitution* (New York, NY: Alfred A. Knopf, 2005), pp. 39-114.

Fallon, Richard, *Law and Legitimacy in the Supreme Court,* pp. 47-105

Segall, Eric, *Originalism as Faith,* pp. 56-122

V. *Critical Legal Studies*

Apr 21 Dworkin (packet)

Tushnet, D. Kennedy (packet): 157-178; 36-55 (skim)

Waldron, Jeremy, “Did Dworkin Ever Answer the Crits?”, in Hershovitz, (ed.), pp. 155-82.

\*Leiter, Brian, “Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis,” in Coleman (ed.), pp. 355-71

Apr 28 Minow, Nussbaum (packet): 56-76, 167-188

Monday, May 9—FINAL PAPER DUE

*Requirements*

The course will be conducted in a seminar format. It is imperative that students come to class well-prepared to discuss the readings. The grade will be based on class participation (including one presentation) (20%), weekly submission of research issues, and a 15-25 page paper (80%), due the last class meeting, and addressing issues discussed in the course and readings. A paper proposal will be due on March 19; and a draft should be submitted for comments on April 16.

**The course syllabus is a general plan for the course; deviations announced to the class by the instructor may be necessary.**

*Grades*

The paper will constitute 80% of the course grade. Participation in discussion will constitute 20% of the grade. The instructor reserves the right to raise the letter grades of students who have participated exceptionally well over the course of the semester. Attendance is mandatory, and the instructor reserves the right to make up to a ten percent reduction in the overall paper grade in the case of poor attendance. Assignments handed in late will be subject to significant grading penalties.

Finally, you are bound by the University's conduct regulations concerning academic honesty. In the context of this course, the inaccurate presentation of written materials as your original work would constitute academic dishonesty. All academic work must meet the standards contained in a culture of honesty. Students are responsible for informing themselves about those standards before performing any academic work.