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Spring 2012
Philosophy of Law

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Schedule

Books:

J. Rawls, A THEORY OF JUSTICE (TJ)
J. Rawls, POLITICAL LIBERALISM (PL)
R. Dworkin, TAKING RIGHTS SERIOUSLY (TRS)
D. O'Brien (ed.), JUDGES ON JUDGING (JJ)

On Moodle=[M];
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). Once on this webpage, go to AResearch Tools, and then to AElectronic 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

Part I. Theory: Legal Liberalism B Interpreting our Constitution

January 27 B Introduction

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? Why is the normative foundation (or structure) of a legal system important to the rule of law?

Lawrence Solum, *Legal Theory Lexicon 017: The Rule of Law*¹[M]

H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*²[O]

February 2--Legal Liberalism's Rule of Law B A Sophisticated Version of the Noble Dream

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

Ronald Dworkin, TRS, pp. 338-345

*Cohen v. California*³ [Harlan opinion] [M][O]

February 9 B Legal Liberalism B Basic Normative Theory I

John Rawls, PL, Introduction [xvii-xxix]

John Rawls, PL, [11-15, 133-140]

John Rawls, TJ, [Sections 1-6]

Richard Rorty, *The Priority of Democracy to Philosophy*⁴ [H][R]

¹http://solum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html

²11 Ga. L. Rev. 969 (1977).

³403 U.S. 15 (1970).

⁴THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, Chapter 10 (1988).

February 16B Legal Liberalism B Application of Normative Theory

John Rawls, TJ, [Sections 33-35]

John Rawls, PL, [pp. 173-176, 190-200, 212-216, 224-227]

*Christian Legal Society v. Martinez*⁵ [Ginsburg and Stevens opinions][M][O].

Stanley Fish, *Being Neutral Is Oh So Hard To Do*⁶[H][Optional]

Stanley Fish, *Is Religion Special?*⁷[H][Optional]

Stanley Fish, *Serving Two Masters: Shariah Law and the Secular State*⁸[H][Optional]

Stanley Fish, *Religion and the Liberal State Once Again*⁹[H][Optional]

Burleigh Wilkins, *A Third Principle of Justice*¹⁰[H][Optional]

⁵130 S.Ct. 2971 (2010).

⁶N.Y Times, July 19, 2010.

⁷N.Y. Times, July 26, 2010.

⁸N.Y. Times, October 25, 2010.

⁹N.Y. Times, November 1, 2010.

¹⁰1 Journal of Ethics 355 (1997).

February 23B Legal Liberalism--Originalism as Constitutional Interpretation.

Justice Antonin Scalia, *Originalism: The Lesser Evil*, JJ, Chapter 21

Randy Barnett, *Scalia=s Infidelity: A Critique of Faint-Hearted@ Originalism*¹¹[O]

Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*¹²[O]

Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right=s Living Constitution*¹³ [O][Recommended]

Chief Justice William Rehnquist, *The Notion of a Living Constitution*, JJ, Chapter 16 [Recommended]

Ronald Dworkin, *The Constitutional Drama*¹⁴ [R] [Recommended]

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

Eric Schnapper, *Affirmative Action and the Legal History of the Fourteenth Amendment*¹⁵ [O] [Optional]

H. Jefferson Powell, *The Original Understanding of Original Intent*¹⁶ [O] [Optional]

March 1B The New Originalism: An Example

Jack Balkin, *Framework Originalism and the Living Constitution*¹⁷[O]

*McDonald v. City of Chicago*¹⁸[O] [excerpts]

¹¹75 U. Cin. L. Rev. 7 (2006).

¹²<http://ssrn.com/abstract=1825543>

¹³75 FORDHAM L. REV. 545 (2006).

¹⁴LIFE=S DOMINION, Chapter 5.

¹⁵71 VA. L. REV. 754 (1985).

¹⁶98 Harv. L. Rev. 885 (1985).

¹⁷103 Nw. U. L. Rev. 549 (2009).

¹⁸130 Sup. Ct. 3020 (2010).

Part II. Critical Legal StudiesBOne (Constructive) Version of the Nightmare

March 8BCritical Legal Studies: The Rule of Law and Critical Theory

David Luban, *Legal Modernism*¹⁹ [O]

J. M. Balkin, *Ideology as Constraint*²⁰ [1133-1145] [O][Optional]

Judge Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, JJ, Chapter 7 [Optional]

Paul Carrington, *Law and the River*²¹ [O] [Optional]

Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*²² [O] [Optional]

*R.A.V. v. City of St. Paul*²³ [2541-2561] [O][M] [Optional]

*Virginia v. Black*²⁴ [1-17][O][M] [Optional]

Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*²⁵ [O][Optional]

March 15BCritical Race TheoryBA Version of Critical Legal Studies

Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*²⁶ [O]

Mari Matsuda, *Public Response to Racist Speech: Considering the Victim=s Story*²⁷ [O]

¹⁹84 MICH. L. REV. 1656 (1986).

²⁰43 STAN. L. REV. 1133 (1991).

²¹34 J. LEGAL EDUC. 222 (1984).

²²22 HARV. C.R.-C.L. L. REV. 401 (1987).

²³505 U.S. 377 (1992).

²⁴538 U.S. ____ (2003).

²⁵103 ETHICS 654 (1993).

²⁶14 WOMEN=S RTS. L. REP. 297 (1992).

²⁷87 MICH. L. REV. 2320 (1989).

Part III. Topics in the Rule of Law

March 22B Individual Liberty and the Radical Version of Critical Feminist Theory: Free Speech, Pornography, and Child Pornography

Catharine MacKinnon, *Pornography: On Morality and Politics*²⁸ [R]
*American Booksellers v. Hudnut*²⁹ [Easterbrook opinion][O][M]

Excerpts from:

*New York v. Ferber*³⁰ [753-766] [O][M]

*Osborne v. Ohio*³¹ [106-111][O][M]

*United States v. Hilton*³² [67-73][O][M]

*United States v. Acheson*³³ [648-653][O][M]

*The Free Speech Coalition v. Reno*³⁴ [1086-1097][O][M]

*Ashcroft v. Free Speech Coalition*³⁵ [1-21][O][M]

18 USCA ' 2256 [O][M]

New Jersey Acultural defense@ Case[TBA][Optional]

²⁸TOWARD A FEMINIST THEORY OF THE STATE, Chapter 11.

²⁹771 F.2d 323 (7th Cir. 1985).

³⁰458 U.S. 747 (1982).

³¹495 U.S. 103 (1989).

³²167 F.3d 61 (1st Cir. 1999).

³³195 F.3d 645 (11th Cir. 1999).

³⁴198 F.3d 1083 (9th Cir.1999).

³⁵535 U.S. ____ (2002).

March 29 BLiberty and Harmless Immoralities

Poe v. Ullman [Harlan opinion]³⁶[O][M]
*Griswold v. Connecticut*³⁷[Douglas and Harlan opinions][O][M]
Transcript of Oral Argument in *Lawrence v. Texas*³⁸ [M]
*Lawrence v. Texas*³⁹ [majority opinion][O][M]

April 5 BSpring Break

April 12 BRole of Professionalism in the Rule of Law

Jeremy Waldron, *The Concept and the Rule of Law*⁴⁰[H]
Justice Robert H. Jackson, *The Federal Prosecutor* [H]
Postmistress Case [H]
*United States v. Larson*⁴¹ [O][M]
Jack Goldsmith, THE TERROR PRESIDENCY, Chapters 1 & 5 [H]
Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*,⁴² [O][M]

Regina Austin, *Sapphire Bound!*⁴³ [O] [Optional]

³⁶367 U.S. 497 (1961).

³⁷381 U.S. 479 (1965).

³⁸Oyez Website.

³⁹539 U.S. 558 (2003).

⁴⁰72 New York University Alumni Magazine 2009.

⁴¹558 F.Supp.2d 1103 (2008).

⁴²38 Buffalo L. Rev. 1 (1990).

⁴³1989 WIS. L. REV 539.

April 19B Interpreting Statutes: The Myth (and Truth) of Following the Law

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

*U.S. v. Barragan-Mendoza*⁴⁴[O][M]

*Coalition of Montanans Concerned v. Gallatin*⁴⁵[O][M]

*Montana Wilderness v. U.S. Forest Service*⁴⁶[O][M]

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

Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, JJ, Chapter 29

[Optional]

Judge Frank Easterbrook, *What Does Legislative History Tell Us?*, JJ, Chapter 30

[Optional]

⁴⁴1999 WL 221857 (9th Cir. (Mont.)).

⁴⁵957 F.Supp. 1166 (1997).

⁴⁶146 F.Supp.2d 1118 (2001).

April 26BHard 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*⁴⁷ [O][M]

Charles Fried and David Rosenberg, *Presentation*⁴⁸ [O]

David Vladick, *Defending Courts: A Brief Rejoinder*⁴⁹ [O]

Robert Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*⁵⁰ [O]

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

*Estate of Strever v. Cline*⁵¹ [O][M]

*Lakin v. Senco Products, Inc.*⁵² [O][M][Optional]

*Hern v. Safeco Ins. Co. Of Illinois*⁵³ [Court=s discussion of Issue 3. and Justice Gray=s dissent][O][M] [Optional]

Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*⁵⁴ [Optional]

⁴⁷715 N.E.2d 1062 (Ohio 1999).

⁴⁸31 Seton Hall L. Rev. 625 (2001).

⁴⁹31 Seton Hall L. Rev. 631 (2001).

⁵⁰31 Seton Hall L. Rev. 672 (2001).

⁵¹278 Mont. 165 (1996).

⁵²987 P.2d 463 (Or. 1999).

⁵³329 Mont. 347 (2005).

⁵⁴ASSAULTS ON THE JUDICIARY: ATTACKING A THE GREAT BULWARK OF PUBLIC LIBERTY, @ PAPERS OF THE ROSCOE POUND FOUNDATION 49 (1998).