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### PHIL 395.01: Philosophy of Law

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SCHEDULE

Books:

Important:

- J. Rawls, A THEORY OF JUSTICE (TJ)
- R. Dworkin, TAKING RIGHTS SERIOUSLY (TRS)
- M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (TAL)
- A. Scalia, A MATTER OF INTERPRETATION (MI)

Less Important:

- D. Kairys (ed.), THE POLITICS OF LAW (PL)
- K. Bartlett & R. Kennedy (eds.), FEMINIST LEGAL THEORY (FLT)

Articles and court opinions on reserve in law library=[R]

Articles and court opinions on law school web site=[W]

<http://www.umt.edu/law/class/class.htm>

**Part I. Theory: Legal Liberalism and Critical Legal Studies**

January 27–Introduction

John Rawls, *The Idea of the Overlapping Consensus*<sup>1</sup> [R]

In this first class, we will review the idea of the rule of law from the ancients to the moderns. Part I will focus on: What is legal liberalism, what is its conception of the rule of law, and what is the nature of the criticisms brought by the critical legal studies movement, generally, and critical race theorists and feminist legal theorists, more specifically, against legal liberalism's "rule of law."

February 3–Legal Liberalism–Basic Theory I

John Rawls, TJ, *Sections 1-6, 10-15*

February 10–Legal Liberalism–Basic Theory II

John Rawls, TJ, *Sections 22, 24, 25, 32-38*

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<sup>1</sup>7 OXFORD JOURNAL OF LEGAL STUDIES 1 (1987).

February 17--Legal Liberalism's Rule of Law I--The Sophisticated Version

Ronald Dworkin, TRS, Chapter 4, *Hard Cases* [80-94 101-123]

Ronald Dworkin, TRS, pp. 338-345

Ronald Dworkin, *Natural Law Revisited*<sup>2</sup> [165-173] [R]

February 24 & March 2--The Rule of Law is a Myth--The Role of Political and Economic Events and the Response of Legal Realism

Morton Horwitz, TAL

*Slaughter-House Cases*<sup>3</sup> [57-83], [R][W]

*Bradwell v. Illinois*<sup>4</sup> [136-142], [R][W]

*Lochner v. New York*<sup>5</sup> [52-65 74-76], [R][W]

*United States v. Carolene Products Co*<sup>6</sup> [144-152 esp J. Stone's footnote 4], [R][W]

*Griswold v. Connecticut*<sup>7</sup> [Skip opinions of Goldberg and Black], [R][W]

*Bowers v. Hardwick*<sup>8</sup> [R][W]

Sylvia Law, *Homosexuality and the Social Meaning of Gender*<sup>9</sup> [R]

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<sup>2</sup>34 FLA. L. REV. 165 (1982).

<sup>3</sup>83 U.S. (16 Wall) 36 (1873).

<sup>4</sup>83 U.S. (16 Wall)130 (1873).

<sup>5</sup>198 U.S. 45 (1905).

<sup>6</sup>304 U.S. 144 (1938).

<sup>7</sup>381 U.S. 479 (1965).

<sup>8</sup>478 U.S. 186 (1986).

<sup>9</sup>1988 Wis. L. REV. 187.

March 2 & 9–Critical Legal Studies (aka Neo-Realism): The Rule of Law is a Myth

David Luban, *Legal Modernism*<sup>10</sup> [R]

J. M. Balkin, *Ideology as Constraint*<sup>11</sup> [1133-1145] [R]

*Griswold v. Connecticut*<sup>12</sup>[R][W]

*Bowers v. Hardwick*<sup>13</sup> [R][W]

*Romer v. Evans*<sup>14</sup>[R][W]

*Saenz v. Roe*<sup>15</sup>[R][W]

*Armstrong v. State*<sup>16</sup>[R][W]

*State v. Siegal*<sup>17</sup>[R][W]

*U.S. v. Depew*<sup>18</sup>[R][W]

*U.S. v. Kyllo*<sup>19</sup> [R][W]

*U.S. v. Kyllo*<sup>20</sup>[R][W]

Andrew Altman, *Critical Legal Studies v. Liberalism*<sup>21</sup> [R] [OPTIONAL]

Elizabeth Mensch, *The History of Mainstream Legal Thought*, Chapter 1, PL [OPT]

Paul Carrington, *Law and the River*<sup>22</sup> [R] [OPTIONAL]

D. Kennedy, *Legal Education as Training for Hierarchy*, Chapter 2, [54-66], PL [OPT]

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<sup>10</sup>84 MICH. L. REV. 1656 (1986).

<sup>11</sup>43 STAN. L. REV. 1133 (1991).

<sup>12</sup>381 U.S. 479 (1965).

<sup>13</sup>478 U.S. 186 (1986).

<sup>14</sup>517 U.S. 620 (1996).

<sup>15</sup>119 S. Ct. 1518 (1999).

<sup>16</sup>1999 WL 980365 (Mont.).

<sup>17</sup>934 P.2d 176 (1997).

<sup>18</sup>992 F.Supp. 1209 (D.Mont. 1998).

<sup>19</sup>140 F.3d 1249 (9<sup>th</sup> Cir. 1998).

<sup>20</sup>190 F.3d 1041 (9<sup>th</sup> Cir. En Banc 1999).

<sup>21</sup>Altman, CRITICAL LEGAL STUDIES, Chapter 1.

<sup>22</sup>34 J. LEGAL EDUC. 222 (1984).

## Part II. The CLS/Liberalism Debate in Constitutional Law—Two Examples

### March 16—Legal Liberalism and Critical Race Theory on Hate Speech

*Cohen v. California*<sup>23</sup> [15-26] [R][W]

Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*<sup>24</sup> [R]

Cass Sunstein, *Preferences and Politics*<sup>25</sup> [R]

Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*<sup>26</sup> [R]

Stanley Fish, *There's No Such Thing as Free Speech*<sup>27</sup> [R]

*R.A.V. v. City of St. Paul*<sup>28</sup> [2541-2561] [R][W]

David Kairys, *Freedom of Speech*, Chapter 11, PL [OPTIONAL]

Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*<sup>29</sup>  
[R] [OPTIONAL]

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<sup>23</sup>403 U.S. 15 (1970).

<sup>24</sup>87 MICH. L. REV. 2320 (1989).

<sup>25</sup>20 PHILOSOPHY AND PUBLIC AFFAIRS 3 (1991).

<sup>26</sup>103 ETHICS 654 (1993).

<sup>27</sup>THERE'S NO SUCH THING AS FREE SPEECH, CHAPTER 8.

<sup>28</sup>505 U.S. 377 (1992).

<sup>29</sup>22 HARV. C.R.-C.L. L. REV. 401 (1987).

March 30—Critical Feminist Theory and the Constitution

*California Federal S. & L Assn. V. Guerra*<sup>30</sup>[R][W]  
Christine Littleton, *Reconstructing Sexual Equality*,<sup>31</sup> Chapter 3, FLT

April 6—Radical Feminist Theory: Pornography and Child Pornography

Catharine MacKinnon, *Pornography: On Morality and Politics*<sup>32</sup> [R]  
*American Booksellers v. Hudnut*<sup>33</sup>[R][W]  
Excerpts from *New York v. Ferber*<sup>34</sup> [W] and *Osborne v. Ohio*<sup>35</sup>[W]  
*United States v. Hilton*<sup>36</sup>[R][W]  
*United States v. Acheson*<sup>37</sup>[R][W]  
*The Free Speech Coalition v. Reno*<sup>38</sup>[R]

Tracy E. Higgins, “By Reason of Their Sex:” *Feminist Theory, Postmodernism, and Justice*<sup>39</sup> [R] [OPTIONAL]

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<sup>30</sup>479 U.S. 272 (1987).

<sup>31</sup>75 Calif. L. Rev. 1279 (1987).

<sup>32</sup>TOWARD A FEMINIST THEORY OF THE STATE, Chapter 11.

<sup>33</sup>771 F.2d 323 (7<sup>th</sup> Cir. 1985).

<sup>34</sup>458 U.S. 747 (1982).

<sup>35</sup>495 U.S. 103 (1989).

<sup>36</sup>167 F.3d 61 (1<sup>st</sup> Cir. 1999).

<sup>37</sup>195 F.3d 645 (11<sup>th</sup> Cir. 1999).

<sup>38</sup>1999 U.S. App LEXIS 32704 (9<sup>th</sup> Cir. 1999).

<sup>39</sup>80 CORNELL L. REV. 1536 (1995).

### Part III. Practical Implications of the CLS/Liberalism Debate

April 13—Legal Scholarship and Legal Practice

Regina Austin, *Sapphire Bound!*<sup>40</sup> [R]

Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*,<sup>41</sup> Chapter 18, FLT

### Part IV. Statutory Interpretation—The Issue of Plain Meaning

April 20—Interpreting Statutes: Cases and Scalia v. Dworkin

*U.S. v. Barragan-Mendoza*<sup>42</sup>[R][W]

*Coalition of Montanans Concerned v. Gallatin*<sup>43</sup>[R][W]  
Wilderness case

Antonin Scalia, A MATTER OF INTERPRETATION [3-47]

Ronald Dworkin, MI, *Comment* [115-127]

Antonin Scalia, MI, *Response* [144-149]

Robert Post, *Justice for Scalia*<sup>44</sup> [R]

### Part IV. Common Law Interpretation—Courts, Legislatures, and Policy

April 27—Normative Structure of Tort Law

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

Richard Abel, *Torts* [R][PL]

Jules Coleman, *The Mixed Conception of Corrective Justice*<sup>45</sup>[R]

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<sup>40</sup>1989 WIS. L. REV 539

<sup>41</sup>38 Buffalo L. Rev. 1 (1990).

<sup>42</sup>1999 WL 221857 (9<sup>th</sup> Cir. (Mont.)).

<sup>43</sup>957 F.Supp. 1166 (1997).

<sup>44</sup>NEW YORK REVIEW OF BOOKS, July 11, 1998.

<sup>45</sup>77 Iowa L. Rev. 427 (1992).

May 4—Contemporary Politics and Policy of Tort Law

Issues and cases in Tort Reform Debat