

PHIL 348 – Philosophy of Law 1
Fall 2020 – Monday, Wednesday and Friday 10:35-11:25
Remote Delivery

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Zoom ('office') Hour: Thursday 2:00-3:00 pm or by appointment

TAs: TBA

Course description

This course aims to provide students with a general overview of historical and contemporary debates in the philosophy of law. The course is divided into three sections. In the first, we will consider the main normative debates surrounding the philosophy of law which are concerned with defining what law is or ought to be. This section will allow us to survey the main theories of law: natural law theory, positivism, and interpretivism. Second, we will consider critical approaches to the practice of law by examining realist, racial, feminist, intersectional, and indigenous critiques of the law. Finally, we will consider general questions concerning the individual obligation to obey the law, the justification of punishment, and the (possible) connections between a society's morals and its laws.

Prerequisite and Background knowledge

All students are welcome in this class. Though we will discuss philosophical and legal concepts students are not expected to have extensive prior knowledge in either subject.

Readings

There will be no textbook to purchase for this class. The required readings will all be posted on MyCourses before the beginning of the semester.

Instructional method:

Please read this section very carefully. Given the ongoing pandemic, this class will be taught online through a combination of pre-recorded lectures and synchronous meetings through zoom¹. The class will be organized as follow:

Lectures: all the lectures will be pre-recorded and posted on MyCourses following the schedule detailed below. The lectures will be posted on Mondays, Wednesdays, and Fridays until conferences start (on September 18). The lectures will be made available under the 'Lecture Recordings' tab on MyCourses. Students are expected to read the assigned materials before watching the lectures. The only exception will be the very first lecture (given on September 2) that will be delivered synchronously at class time on zoom. This first lecture will be the occasion to meet each other, to go over the course outline and for me to answer any questions you may have about the course directly.

¹ If you are unfamiliar with zoom, you can find some useful information here: <https://www.mcgill.ca/tls/students/remote-learning-resources/learning-zoom>.

Conferences: Starting September 18 until December 3² the Friday lecture will be replaced by live conferences given by the TAs over zoom. Accordingly, as soon as registration opens, you must register for a conference to which you will be able to attend every week. Attendance is mandatory and will affect your participation grade (see below).

If it is impossible for you to register for a conference that is suitable to your time zone, make sure to contact me as soon as possible. Accommodations will be made only in exceptional circumstances. Conferences will not be recorded.

Q&A Sessions: I will be available every Monday (starting September 14) on zoom from 10:35 to 11:25 am and I will hold open Q&A sessions. This will be an opportunity for you to raise any questions you have about the material. If you have personal matters to discuss, please do so during my office hour or by appointment. These sessions are optional and will not be recorded.

Graded Coursework

- Conference participation: 10% (**Ongoing**)

In conferences, you will have the opportunity to raise questions, discuss, and refine your understanding of the material. There are 10 conferences overall. You will receive a grade of 1% for attending one conference and completing the requirement.

Conference requirement: you are expected to submit a short but thoughtful question or reaction on the forums on MyCourses for the week's lectures starting on the third week. To count, these questions should be about the material covered during the week and they should be posted on MyCourses by Thursday 5 pm (Montréal time).

For instance, for 1 participation point, you must submit a question or reaction about legal positivism during the third week before 5 pm on Thursday, September 17, and participate in the conference you are registered to on Friday, September 18.

- First essay: 20% (**due October 16**)

A short essay (1000 words) to be submitted on MyCourses. The prompts for the short essay will be posted on MyCourses two weeks before the due date (i.e. October 2nd). The prompts will cover the main normative theories of law we will discuss in class.

- Second essay: 30% (**due November 13**)

A short essay (1000 words) to be submitted on MyCourses. The prompts for the essay will be posted on MyCourses two weeks before the due date (i.e. October 30). The prompts will cover the critical approaches to the practice of law we will consider in class.

- Final paper: 40% (2500 words) (**due December 14**)

The topics for the final paper will be broader in scope to encourage the students to reflect on the material we have seen throughout the class. The topics will be posted on MyCourses approximately two weeks before the due date (i.e. November 27).

The grading criteria for each assignment will be presented in the lectures and posted on MyCourses.

² This is not a typo. Though December 3 is a Thursday, it follows a Monday schedule. As such, the last conference will take place on Thursday, December 3 and not on Friday, December 4. Also, please note that there will be a lecture on October 16 in place of the conference to make up for the lecture we lose on October 12 due to thanksgiving.

Please note that extensions will only be granted in exceptional cases. Justificatory documents (such as medical notes) will be required. If no extension is granted, late assignments will be penalized by 5% per late day.

Email policy

You are more than welcome to contact us directly by email if you have any questions concerning the course material, the grading criteria, or any administrative issues you may experience. However, I ask you to contact your TAs directly first if you have any questions concerning the course or to raise them during the public Q&A session. If your question is a conceptual or philosophical one, I encourage you to come during the Q&A session, to our office hours or to make an appointment with your TA.

If you contact me or your TA by email, we will do our best to answer within 48 (business) hours. If you have not received a response after 48h please send a short follow up. Make sure to check this syllabus and the course website for answers to your questions before emailing to ask them.

Content Warning

The study of Law necessarily involves considering hard and difficult subjects. For instance, in this class, we will consider the consequences of colonial violence against indigenous people, racism, the legal response (often inadequate) to sexual violence, and other delicate and potentially upsetting subjects. These questions take a particularly pressing and important place in today's politics and, as such, they must be dealt with sensitively, with respect and with due consideration. Accordingly, we expect students to be considerate of others at all times when dealing with these questions.

I also encourage students to survey the material and topics that we will be covering and to contact me confidentially if there is a need to make accommodation in specific cases with respect to some of these materials.

Accommodations

As the instructor of this course, I endeavour to provide an inclusive learning environment. However, if you experience barriers to learning in this course, do not hesitate to discuss them with me and the Office for Students with Disabilities (<http://www.mcgill.ca/osd>), 514-398-6009.

Topics and Schedule of Readings

Week 1 – Introduction and Preliminaries.

Readings:

Natalie Stoljar, “What Do We Want Law to Be? Philosophical Analysis and the Concept of Law”, in Wil Waluchow & Stefan Sciaraffa, *Philosophical Foundations of the Nature of Law*, Oxford: Oxford University Press, pp. 230-253.

Additional suggested readings:

Plato, *Crito*

Sophocles, *Antigone*

2 September: Introduction & Overview

4 September: Law, morality and politics

Topic 1 – Normative Theories of the Law:

Week 2 – Natural Law Theories.

Readings:

Keith C. Culver, “Chapter 1: Natural Law Theory”, in *Readings in the Philosophy of Law*, 2nd edition, Broadview. Required: pp. 25-31

Aquinas, excerpts from *Treatise on Law* (pp. 32-46 in Culver)

Additional suggested readings:

Keith C. Culver, “Chapter 1: Natural Law Theory”, in *Readings in the Philosophy of Law*, 2nd edition, Broadview. Suggested: pp. 46-66 [Excerpts from John Finnis’ *Natural Law and Natural Rights*]

7 September: No Lecture [Labour Day]

9 September: Law and Morality – The position of Thomas Aquinas

11 September: Is natural law theory still relevant today? The position of John Finnis

Week 3 – Legal Positivism.

Readings:

Jeremy Bentham, excerpts from *A Fragment on Government*

John Austin, excerpts from *The province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*.

Additional suggested readings:

Joseph Raz, “Legal Positivism and the Sources of Law”, in *The Authority of Law: Essays on Law and Morality*, Oxford University Press, pp. 40-55.

14 September: From Natural Law theory to Legal positivism
[N.B. – September 15: ADD/Drop Deadline]

16 September: Classical Legal positivism: The position of John Austin

18 September: Conferences Begin

Week 4 – Hartian positivism: The Hart-Fuller Debate.

Readings:

H. L. A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, vol. 71, no. 4, pp. 593-629.

Lon Fuller, excerpts from *The morality of Law*, pp. 33-41.

Additional suggested readings:

Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart”, *Harvard Law Review*, vol. 71, no. 4, pp. 630-672.

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

21 September: Hartian Positivism: Hart’s critique of Austin’s theory.

23 September: The Hart-Fuller debate.

Week 5 – Dworkin’s interpretivist theory of law.

Readings:

Ronald Dworkin, excerpts from *Law’s Empire*

Riggs v. Palmer [Legal case]

Dudley v. Stephens [Legal Case]

Additional suggested reading:

Ronald Dworkin, “Law as Interpretation”, *Texas Law Review*, Vol. 60, pp. 527-550.

28 September: Dworkin’s interpretivist theory of law: A critique of Hartian positivism.

30 September: Dworkin’s interpretivist theory of law (continued)

[Prompts for the first essay will be published on MyCourses on October 2nd]

Topic 2 – Critical approaches to the Law.

Week 6 – Legal Realism

Readings:

Brian Leiter, “American Legal Realism”, *Public Law and Legal Theory Research Paper* No. 042.

Oliver Wendell Holmes, Jr, “The Path of the Law”, *Harvard Law Review* (1897)

Additional suggested readings:

Jerome Frank, "Legal Realism", in *Law and the Modern Mind*, pp. 46-52.

5 October: Legal Realism: a new approach to the Law.

7 October: Legal Realism: influences and limits.

Week 7 – Critical Race Theory

Readings:

Kimberlé W. Crenshaw, "Race, reform, and Retrenchment: Transformation and legitimation in Antidiscrimination Law", *Harvard Law Review*, vol. 101, no. 7 [The text appears long but you can skip the footnotes]

Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism", *Stanford Law Review*, vol. 39, no. 2 [The text appears long but you can skip the footnotes]

Additional suggested reading:

Richard Delgado, "About Your Masthead: A Preliminary Inquiry into the compatibility of Civil Rights and Civil Liberties", *Harvard Civil-Rights-Civil Liberties Law Review*, Vol. 39, no. 1.

12 October: No Class (Thanksgiving)

14 October: Critical Race Theory: an introduction

16 October: Critical Race Theory and discrimination: does discrimination requires intent to discriminate?

[No Conferences this week]

[First Paper due October 16]

Week 8 – Feminist critiques of the Law

Readings:

Catherine A. MacKinnon, "The Liberal State", in *Toward a Feminist Theory of the State*, Harvard University Press, pp. 155-170.

Kathleen A. Kenealy, "Sexual Harassment and the Reasonable Woman Standard", *The Labor Lawyer*, vol. 8, no. 2, pp. 203-210.

Additional suggested reading:

Elison v. Brady [Legal Case]

Lavalée v. The Queen [Legal Case]

19 October: Radical feminism and the liberal state

21 October: The Reasonable Woman standard

Week 9 – Intersectionality and the law

Readings:

Kimberlé W. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum*, vol. 1989, no. 1, **pp. 139-146** [Required]

Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity”, *Queen’s Law Journal* [Excerpts]

Additional suggested reading:

Kimberlé W. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum*, vol. 1989, no. 1, **pp. 146-167** [Optional]

26 October: Intersectionality and the law: *DeGraffenreid v General Motors* and *Moore v Hughes Helicopter*.

28 October: Intersectionality and the law: equality and social identities.

[Prompts for the first essay will be published on MyCourses on October 30]

Week 10 – Indigenous perspectives on Canadian Law:

Readings:

Excerpts from John Borrows’ *Law’s Indigenous Ethics*. More precisely ch. 3, “Niso-Miigewewin: Soongide’iwin/Bravery: Challenging the Durability of Terra Nullius” (pp. 88-113), and ch. 7, “Niizhwaaso-Miigewewin: Mannaji’idiwin/Respect: Residential Schools, Responsibilities for Past Harms” (pp. 216-237)

Additional suggested reading:

Tsilhqot’in Nation v British Columbia (Excerpts) [Legal Case] Suggested: pp. 4-8, 20-29 (i.e. section V. “Is Aboriginal Title Established?”), 29-34 (i.e. Section VI. “What Rights Does Aboriginal Title Confer?” subsection A-C).

2 November: Terra Nullius: courts and Canadian colonialism.

4 November: Constitutionalism and reconciliation: the case of Canadian residential schools.

Topic 3 – Obedience, Punishment, and Morals:

Week 11 – Do we have an obligation to obey the law?

Readings:

Joseph Raz, “The Obligation to Obey: Revision and Tradition”, *Notre Dame Journal of Law, Ethics & Public Policy*, vol. 1, no. 1, pp. 139-155.

John Rawls, “The Justification of Civil Disobedience”, in *John Rawls: The Collected Papers*, S. Freeman (ed.), Harvard University Press, pp. 176-189.

Additional suggested reading:

Martin Luther King, “Letter from Birmingham Jail”

Candice Delmas, “Uncivil Disobedience”, in *Protest and Dissent, Nomos LXII*, Melissa Schwartzbert (ed.), pp. 9-44.

9 November: Do we have any reasons to obey the law?

11 November: Justifying civil disobedience in a liberal state.

[Second Paper due November 13]

Week 12 – Justifying Punishment.

Readings:

Joel Feinberg, “The Expressive Function of Punishment”, *The Monist*, vol. 49, no. 3, pp. 397-423.

Jean Hampton, “The Moral Education Theory of Punishment”, *Philosophy & Public Affairs*, vol. 13, no. 3, pp. 208-238.

Additional suggested reading:

Jeremy Bentham, “Of the Proportion Between Punishments and Offences”, in *An Introduction to the Principles of Morals and Legislation*, pp. 140-146.

16 November: Justifying punishment I: The expressive theory of punishment.

18 November: Justifying punishment II: Deterrence theory and rehabilitation.

Week 13 – Society, Morals, and the Law

Readings:

Lord Patrick Devlin, “Morals and the Criminal Law”, in *Law and Morality*, D. Don Welch (ed.), Fortress Press, pp. 24-48.

Ronald Dworkin, “Liberty and Moralism”, in *Taking Rights Seriously*, Harvard University Press, pp. 240-258.

23 November: Morals and the Law: The position of Lord Devlin

25 November: Morals and the Law: Dworkin’s response to Lord Devlin

[Prompts for the final essay will be published on MyCourses on November 27]

Week 14 – Conclusion: Law beyond the state

Readings:

H. L. A. Hart, “International Law”, in *The Concept of Law*, Clarendon Press, pp. 213-237.

Neil MacCormick, “On Sovereignty and Post-Sovereignty”, in *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, pp. 123-136.

30 November: Is international law *Law*? The position of H. L. A. Hart.

2 December: International law beyond the sovereign state.

3 December: Final Conference [Monday Schedule]

Final paper due Friday December 14, 11:59pm on MyCourses

Language of Submission

“In accord with McGill University’s Charter of Students’ Rights, students in this course have the right to submit in English or in French any written work that is to be graded. This does not apply to courses in which acquiring proficiency in a language is one of the objectives.”

« Conformément à la Charte des droits de l’étudiant de l’Université McGill, chaque étudiant a le droit de soumettre en français ou en anglais tout travail écrit devant être noté (sauf dans le cas des cours dont l’un des objets est la maîtrise d’une langue). »

Academic Integrity

“McGill University values academic integrity. Therefore, all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures” (see McGill’s guide to academic honesty - <http://www.mcgill.ca/students/srr/honest/> - for more information).).

« L'université McGill attache une haute importance à l'honnêteté académique. Il incombe par conséquent à tous les étudiants de comprendre ce que l'on entend par tricherie, plagiat et autres infractions académiques, ainsi que les conséquences que peuvent avoir de telles actions, selon le Code de conduite de l'étudiant et des procédures disciplinaires (pour de plus amples renseignements, veuillez consulter veuillez consulter le guide pour l'honnêteté académique de McGill - <http://www.mcgill.ca/students/srr/honest/>).