

PHIL 222 – Philosophy of Law
Syllabus – keep handy for reference

Spring 2024

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Office hours: M10-11; TR 11-12; or by appointment

Texts:

“Philosophy of Law” course pack available at BSU bookstore.

There will be additional readings either posted online or distributed in class. All readings mentioned are required unless otherwise noted. I will also assign some films to be viewed at home – these may be the subject of exam questions and hence required unless noted otherwise.

Overview and objectives:

This course is an exploration of a variety of philosophical issues pertaining to law. We will be looking at both theoretical writing about law, as well as actual laws, court decisions, and the Constitution in the course of our investigations. Philosophy of Law, like the “philosophy of” other things, is concerned with (a) the theoretical underpinnings of our subject; (b) ontological, epistemological, and ethical ramifications or presuppositions of our subject; (c) questions of justification. More specifically, we will examine questions such as: What *is* law? Where does it come from? What is the nature of legal and judicial reasoning? What grounds legal authority? How are rights understood in the law? How shall we understand the relation between morality and law? What is the grounding of a system of punishment? What is responsibility in the law? Our objectives for this semester are to look at some of the main philosophical theories pertaining to these questions, get a better sense of what law is and what legal systems are, and to learn to think philosophically about these issues. Although this class is beneficial to the pre-law student, its essence is philosophy.

Requirements:

First of all, please note that you are required to do all assigned readings and viewings, whether from the texts, on handouts, or on the internet, and to be prepared to comment on them in class, as we will combine lecture with discussion. Repeated unpreparedness indicates that you are not taking the class seriously and will result in grade reduction as appropriate. Also, regular attendance is a requirement of the class. This is a reflection of the fact that the primary vehicle for learning the material is the class itself, of which you should see yourself as an important part. Obviously there is such a thing as a good reason to miss class, but be sure you limit your absences to such occasions, as absences in excess of three will result in reduction of overall grade no matter what your average is. Similarly, everyone is late once in a while, but chronic lateness will count as one or more absences. If you do have to miss class, it is your responsibility to get the notes, and any announcements or additional assignments, from a classmate. In general, try to observe some of the ground rules of civilized society: Anything with an off switch should be off, eat and drink quietly and discreetly, don’t do homework for another class, don’t go to sleep. You are not to use your phone, laptop, or tablet during class. Disruptive behavior will result in your being asked to leave. Conversely, constructive participation will be rewarded. Philosophy has, as its essence, the idea of conversation. There will be some lecturing as I

introduce you to material, but you should feel free to ask questions -- of me, and of your classmates -- and to agree or disagree as you see fit. However, you must strive to maintain an atmosphere of civil discourse. There is a difference between philosophical argument (which is cooperative and constructive) and belligerent bickering. Also, please note that this course deals with issues that are always provocative and controversial. A requirement of the class is a willingness to listen to and debate others' points of view and a commitment to freedom of expression. There is no requirement to accept any view, but toleration is crucial. If you are not comfortable with lively and vigorous debate in which your views will be challenged and in which you may freely challenge others' views (including the professor's), you should not take this class. The willingness to engage in critical examination and critical re-thinking of what you think you know and what others think they know to be true is a central prerequisite for the class.

Subject to adjustments as noted above, your grade will primarily be calculated thus: 2 shorter exams @15% each, midterm exam @30%, final exam @40%. Dates for all tests are on the syllabus. Cheating on tests is a violation of BSU's academic integrity policy and will result in an F and possible expulsion.

If you are having trouble with the material, by all means ask me during class to slow down or explain something a different way. Do not feel embarrassed to ask a question like that; odds are someone else was wondering the same thing. Also, do not hesitate to take advantage of office hours. It is not a burden or imposition on me for you to come to office hours with additional questions.

Outline:

The course is divided into several distinct but often related topics. I've allotted 4-6 classes for each unit, plus we have days set aside for visiting speakers.

Unit 1 is on the nature of law. What is law? What makes a valid law valid? What is the "natural" in "natural law"? Where does law come from?

Unit 2 is concerned with theories of interpretation, some of which you may have heard of: formalism, originalism, realism, critical theory, and so on.

Unit 3 will be an exploration of the evolution of law and legal systems, including a look at the idea of polycentric law.

Unit 4 is devoted to several philosophical problems in the law: the nature of punishment, criminal justice reform, rights theory, and civil disobedience theory. If time permits we will discuss all four of these.

The basic outline, mapped onto a calendar, will be as follows:

Week of: Topic, reading assignment for that week; other notes:

Jan 18	Intro to course
Jan 23-25	Begin Unit 1
Jan 30-Feb 1	
Feb 6	Guest speaker, class meets in DMF120
Feb 8	Unit 1 concludes, 1 st shorter exam
Feb 13-15	Begin Unit 2
Feb 20-22	
Feb 27	Unit 2 concludes
Feb 29	Midterm exam
Mar 5-7	Spring Break, BSU closed, no class
Mar 12	Guest speaker, class meets in DMF120
Mar 14	Begin Unit 3
Mar 19-21	
Mar 26-28	Unit 3 concludes Th; 2 nd shorter exam
Apr 2	Begin Unit 4
Apr 4	Guest speaker, class meets in DMF120
Apr 9	No class today
Apr 11	Continuing Unit 4
Apr 16-18	
Apr 23-25	Th is last day for T/R classes
Apr 30	Reading Day
May 2	Final exam, 11:00 AM – 1:00 PM

The above calendar is subject to change, to allow us some flexibility.

Course Outline with readings:

Selections with an asterisk are not in the course pack as they are available online. I will post the URLs for these selections in Blackboard. Other selections may be handed out or posted.

Jan 23-Feb 8: The nature of law

1. H.L.A Hart, *The Concept of Law* (Oxford UP, 1961) , pp. 77-96
2. *Thomas Aquinas, *Summa Theologica*, questions 90-97
3. Lon Fuller, *The Morality of Law* (Yale UP 1964), pp. 33-38
4. *Frederic Bastiat, *The Law* (FEE, 1987 (1850))
5. Friedrich Hayek, *The Constitution of Liberty* (U of Chicago Press, 1960), pp. 148-175
6. Friedrich Hayek, *Law, Legislation, and Liberty* (U of Chicago Press, 1973), pp. 35-54, 72-144

Feb 13-27: Legal interpretation

1. Two Handouts
2. Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve University Law Review*, v. 37 (1987), pp 179ff
3. John Hasnas, "The Myth of the Rule of Law," *Wisconsin Law Review*, vol 1995 no. 1, pp. 199ff

Mar 14-28: Polycentrism and the evolution of law

1. Bruce Benson, "Are Public Goods Really Common Pools? Considerations of the Evolution of Policing and Highways in England," *Economic Inquiry* XXXII (April 1994), pp. 249-271

2. Joseph R. Peden, "Property Rights in Celtic Irish Law," *Journal of Libertarian Studies* 1 (1977), pp. 81-95
3. David Friedman, "Private Creation and Enforcement of Law – A Historical Case," *Journal of Legal Studies* 8 (1979), pp. 399-415
4. Paul Milgrom, Douglass North, and Barry Weingast, "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs," *Economics and Politics* 2 (1990), pp. 1-23
5. Bruce Benson, "Legal Evolution in Primitive Societies," *Journal of Institutional and Theoretical Economics* 144, 5 (1988), pp. 772-788
6. Terry L. Anderson and P.J. Hill, "An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West," *Journal of Libertarian Studies* 3, 1 (1979), pp. 9-29.
7. Harold Berman, *Law and Revolution* (Harvard UP, 1983), pp. 520-558
8. *Randy Barnett, "Pursuing Justice in a Free Society," Part One (*Criminal Justice Ethics* Summer-Fall 1985); Part Two (*Criminal Justice Ethics* Winter-Spring 1986)

Apr 2-25: philosophical issues in the law

1. *Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books 1988), pp. 170-188
2. *Immanuel Kant, "On the Right to Punish," *The Metaphysics of Morals* (Cambridge UP, 1991), pp. 140-144
3. John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955), pp. 3-13
4. Herbert Morris, "Persons and Punishment," *The Monist* (1968)
5. Plato, "Crito," in *Five Dialogues*, ed. G.M.A. Grube (Hackett 1981), pp. 45-56
6. *Thoreau, "Civil Disobedience"
7. John Rawls, "Legal Obligation and the Duty of Fair Play," in S. Hook, ed., *Law and Philosophy* (NYU Press 1964), pp. 3-18
8. A. John Simmons, "The Principle of Fair Play," *Philosophy and Public Affairs*, vol 8, no 4 (1979), pp. 307-337
9. Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* vol 2 (Jan 1973)
10. *Criminal Justice Reform online forum
11. *Thomas Jefferson, Declaration of Independence
12. Rights theory handout

Films assigned for home viewing may include: *12 Angry Men*, *Breaker Morant*, *A Man for All Seasons*, *Judgement at Nuremberg*, *The Castle*, *Billy Budd*, *Gideon's Trumpet*, *Unalienable*.

Useful online resources:

<http://www.supremecourtus.gov/opinions/opinions.html> -- The US Supreme Court
<http://www.constitution.org/liberlib.htm> -- Historical legal writings (includes US Constitution)
<http://www.constitution.org/mil/ucmj19970615.htm> -- Military law
<http://www.law.harvard.edu/library/> -- Harvard Law Library
<http://www4.law.cornell.edu/uscode/> -- Searchable US Code
<http://www.findlaw.com> -- all-purpose resource
http://lsolum.typepad.com/legal_theory_lexicon/ -- Legal Theory Lexicon