

LAW 664, PHILOSOPHY OF LAW (SPRING 2018)

Tue. & Thu., LAW 215; [Prof. Johnstone](#) (Rm. 312) & [Prof. Le Bihan](#) (with Prof. Huff)

In the practice of law, according to Karl Llewellyn, “Ideals without technique are a mess. But technique without ideals is a menace.” This course aims to provide a vocabulary of ideals to help answer a question that arises throughout the practice of legal technique: What is Law? The course begins with a short history of the rule of law as an ideal in the United States. It turns to the development of various theories of law, framed as a continuing debate among competing conceptions of law. It then integrates the application of legal theory to legal practice in several areas of student interest. In addition to seminar discussion, students produce short commentaries on current issues and a research paper or other project.

Objectives. Students should develop a practical understanding of: the leading theories of American jurisprudence, their role in structuring the development of American law, and the use and misuse of theory in legal practice. *Skills emphasized:* problem solving, legal analysis and reasoning, legal research, communication, and ethics. *Values emphasized:* promotion of justice and improvement of the profession.

Readings & Class. The book is Feinberg, Coleman, Kutz, PHILOSOPHY OF LAW (9th ed. 2014). You may rent the book here: www.cengagebrain.com/course/2712454. Readings are denoted by number from the book, and page counts (without endnotes) indicated in parenthesis. Introductory readings at the beginning of each part are noted when available. In addition, starting the second class, please read each week’s commentaries on Moodle and be prepared to engage them. *To encourage class discussion, laptops are discouraged in class.*

Questions. Prof. Johnstone is generally available on Mondays, Wednesdays, and Fridays, or by appointment. Prof. Le Bihan is available during office hours on Friday afternoons, 1:00-5:30, or by appointment. Her office is located in LA 153. Please post general questions on Moodle so your colleagues can benefit.

Assessment. Your grade has three components: *discussion* (20%), *commentaries* (30%), and *paper* (50%). *Discussion* measures ongoing constructive engagement in class discussion. *Commentary* measures the research, analysis, and writing two exchanges of comments (750 wds.) applying one or more ideas advanced in the reading to an actual or hypothetical case. Each student should select one class for an *opening* (posted on Moodle by 8pm two days before class) and one class for a *response* (posted on Moodle by 8pm one day before class), with no more than one comment in each part of the course. All commentators for a given class should select a single case together; commentary day selections are final. Contact the instructors to discuss case ideas. *Paper* measures the research, analysis, and writing of a paper (3000 wds.) considering a question relevant to the course; students may expand their commentary for the paper. Students also may satisfy their *Advanced Writing Requirement* (5000 wds.) according to the Student Handbook; see Prof. Johnstone by Feb. 9.

Academic Honesty. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code of the University of Montana. Law students should also be familiar with the Law School Honor Code in the Law Student Handbook.

Disabilities. Students with disabilities may request reasonable modifications by contacting one of the instructors. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. “Reasonable” means the University permits no fundamental alterations of academic standards or retroactive modifications.

The syllabus is subject to change depending on course and legal developments.

Course Rubric

Discussion (10 x 2 pts.)				
0 <i>Disengaged; counter-productive.</i>	1 <i>Minimal engagement; leaves discussion where it stood.</i>	2 <i>Significant engagement; advances the discussion.</i>	1	6
			2	7
			3	8
			4	9
			5	10
Opening Commentary (1 x 15 pts.)				
Research: Originality, Background, Coverage, Depth (5 pts.)				
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)				
Communication: Organization, Format, Clarity, Style (5 pts.)				
Response Commentary (1 x 15 pts.)				
Research: Originality, Background, Coverage, Depth (5 pts.)				
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)				
Communication: Organization, Format, Clarity, Style (5 pts.)				
Paper (50 pts.)				
Research (20 pts.) Originality (adds perspective to course material) Background (develops relevant factual and procedural background) Coverage (covers relevant legal authorities) Depth (explores focused topic deeply relative to paper length)				
Analysis (20 pts.) Balance (addresses arguments on both sides) Accuracy (correctly relies on relevant authority) Synthesis (synthesizes legal principles in application) Conclusion (supports brief conclusion with arguments)				
Writing (10 pts.) Organization (structures content effectively at all levels) Format (professional in type, grammar, punctuation, and spelling) Clarity (reads well as legal prose) Style (conveys content with rhetorical effect)				
TOTAL (100 pts.)				

AWR Planning Guide (Suggested for Papers)

Please consult the student handbook for details.

AWR Step (deadline)	Date
Topic Selection (by Feb. 9)	
Bibliographic Essay (by Mar. 2)	
Complete First Draft (by Apr. 2)	
Draft to Classmate (by Apr. 27)	
Oral Presentation: Law-Lapalooza (Tue., May 1)	
Final Draft with Self-Assessment (by May 18)	

PART I: The Nature and Value of Law*Cf.* pp. 1-7**1. Introduction to the Rule of Law: Why philosophy of law?**

Tue Course introduction

1/23 Lecture by Prof. Huff on the history and meaning of the rule of law

2. The Rule of Law (24): What legitimates law?Thu 1. Lon L. Fuller, *Eight Ways to Fail to Make Law* (1964) (4)1/25 2. Jeremy Waldron, *The Rule of Law and the Importance of Procedure* (2011) (15)3. H.L.A. Hart, *Laws and Morals*, THE CONCEPT OF LAW (1961) (5)**Opening:** _____ **Response:** _____**3. Natural Law (37): How may reason legitimate law?**Tue 5. Lon L. Fuller, *The Case of the Speluncean Explorers* (1949) (16)

1/30 6. Saint Thomas Aquinas, SUMMA THEOLOGICIAE (1265-74) (5)

7. John Finnis, *Natural Law and Natural Rights* (1980) (16)**Opening:** _____ **Response:** _____**4. Legal Positivism (32): How may practice legitimate law?**Thu 4. Jeremy Bentham, *Principles of Morals and Legislation* (1843) (3)2/1 8. John Austin, *A Positivist Conception of Law* (1832) (13)9. H.L.A. Hart, *Law as the Union of Primary and Secondary Rules* (11) and
The Foundation of a Legal System, THE CONCEPT OF LAW (1961) (5)**Opening:** _____ **Response:** _____**5. Legal Interpretivism (39): How may integrity legitimate law?**Tue 10. Ronald Dworkin, *The Model of Rules I* (1967) (5)2/6 15. Ronald Dworkin, *Integrity in Law*, LAW'S EMPIRE (1986) (17)11. Jules L. Coleman, *Negative and Positive Positivism* (1982) (17)**Opening:** _____ **Response:** _____**6. Legal Realism (16): How may policy legitimate law?**Thu 12. O.W. Holmes, Jr., *The Path of the Law* (1897) (6)2/8 13. Jerome Frank, *Legal Realism* (1930) (3)14. K.N. Llewellyn, *Ships & Shoes & Sealing Wax*, THE BRAMBLE BUSH (1951) (7)**Opening:** _____ **Response:** _____**7. Critical Legal Theory I (35): How may power (de)legitimate law?**Tue 18. Robert W. Gordon, *Critical Legal Histories* (1984) (16)2/13 19. Robin West, *From Choice to Reproductive Justice* (2009) (19)**Opening:** _____ **Response:** _____**8. Critical Legal Theory II (27): How may critique (re)legitimate law?**Thu 20. Cheryl I. Harris, *Whiteness as Property* (1993) (21)2/15 *Note: Getches *et al.*, *Santa Clara & Feminist Legal Theory* (2011) (6)**Opening:** _____ **Response:** _____

9. Is There an Obligation to Obey the Law? (34): (If so, where is it from?)

- Tue 21. Plato, *Crito* (360 B.C.E.) (8)
 2/20 22. Martin Luther King, Jr., *Letter from Birmingham Jail* (1963) (10)
 23. M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?* (1973) (16)

Opening: _____ Response: _____

PART II: The Political Morality of Law

Cf. pp. 359-370

10. Justice & Equality I (37): What kind of justice is (our) law for?

- Thu 42. John Rawls, *A Theory of Justice* (rev. ed. 1999) (20)
 2/22 43. Robert Nozick, *Wilt Chamberlain*, ANARCHY, STATE, AND UTOPIA (1974) (8)
 46. Robert P. George, *Public Reason & Political Conflict*, pts. I & IV (1997) (9)

Opening: _____ Response: _____

11. Justice & Equality II (40): What kind of equality is (our) law for?

- Tue 44. Harry Frankfurt, *Equality as a Moral Ideal*, pts. I & VII (1987) (6)
 2/27 45. Elizabeth S. Anderson, *What Is the Point of Equality?* (1999) (34)

Opening: _____ Response: _____

12. Law & Economics (33): What kind of fairness is (our) law for?

- Thu 48. Louis Kaplow & Steven Shavell, FAIRNESS VS WELFARE (2002) (15)
 3/1 49. Jules L. Coleman, *The Grounds of Welfare* (2003) (18)

Opening: _____ Response: _____

13. What Are Rights? (32): How do rights work?

- Tue 32. Joel Feinberg, *The Nature and Value of Rights* (1970) (10)
 3/6 33. H.L.A. Hart, *Are There Any Natural Rights?* (1955) (9)
 34. Jeremy Waldron, *A Right to Do Wrong* (1981) (12)

Opening: _____ Response: _____

14. Law and Liberty (and Morality) (38): (When) may law limit rights?

- Thu 35. John Stuart Mill, *The Liberal Argument*, ON LIBERTY (1859) (13)
 3/8 36. Gerald Dworkin, *Paternalism* (1971) (11)
 37. Lord Patrick Devlin, *Criminal Law*, THE ENFORCEMENT OF MORALS (1965) (11)
 38. H.L.A. Hart, *Immorality and Treason* (1959) (3)

Opening: _____ Response: _____

15. The Limits of Freedom of Expression (33): (When) may law limit speech?

- Tue 39. Joel Feinberg, *Offensive Nuisances*, OFFENSE TO OTHERS (1985) (17)
 3/13 40. Robert Post, *Religion & Freedom of Speech: Portraits of Muhammad* (2007) (16)

Opening: _____ Response: _____

16. The Limits of Freedom of Expression (18): Why (not) limit speech?

- Thu 41. T.M. Scanlon, Jr., *Freedom of Expression & Categories of Expression* (1978) (18)
 3/15

Opening: _____ Response: _____

17. International Law (40): What is *international* law, or a *human* right?

- Tue 24. Allen Buchanan, *The Legitimacy of International Law* (2010) (13)
 3/20 25. Oona Hathaway & Scott J. Shapiro, *Outcasting* (2011) (16)
 26. James W. Nickel: *Human Rights & Challenge of Cultural Diversity* (2007) (13)

Opening: _____ Response: _____

PART III: Philosophy and the Law (Topics)

Cf. pp. 689-703

18. Responsibility (54): What are persons responsible for?

- Thu 50. Joel Feinberg, *Action and Responsibility* (1970) (16)
 3/22 51. Christopher Kutz, *Responsibility* (2004) (30)
 52. Thomas Nagel, *Moral Luck* (1991) (8)

Opening: _____ Response: _____

3/27

[Spring Break]

3/29

19. Punishment I (30): Why may law punish persons?

- Tue 53. Cesare Beccaria, *Of Crimes and Punishments* (1764) (3)
 4/3 54. Immanuel Kant, *The Right to Punish* (1798) (4)
 55. Joel Feinberg, *The Classic Debate* (2004) (5)
 56. R.A. Duff, *Responsibility, Restoration, and Retribution* (2003) (18)

Opening: _____ Response: _____

20. Punishment II (35): How may law punish persons?

- Thu 57. Joel Feinberg, *The Expressive Function of Punishment* (1970) (12)
 4/5 58. Herbert Morris, *Persons and Punishment* (1968) (14)
 60. Stephen Nathanson, *Should We Execute Those Who Deserve to Die?* (1987) (9)

Opening: _____ Response: _____

21.

Guest:

- Tue **Justice Russell Brown, Supreme Court of Canada**
 4/10

22. Criminal Law I (19): What is a guilty mind?

- Thu 61. House of Lords, *Daniel M'Naghten's Case* (1843) (1)
 4/12 62. American Law Institute, *The Insanity Defense* (1956) (3)
 63. Stephen J. Morse, *Scientific Challenges to Criminal Responsibility* (2014) (15)

Opening: _____ Response: _____

23. Criminal Law II (45): What is a guilty act (or omission)?

- Tue 64. Gideon Yaffe, *Attempts* (2014) (19)
 4/17 65. Liam Murphy, *Beneficence, Law, & Liberty: Required Rescue* (2000) (26)

Opening: _____ Response: _____

24. Private Law I (43): What is the nature and value of property?

- Thu 69. A.M. Honoré, *Ownership* (1961) (21)
 4/19 66. John Locke, *Of Property*, THE SECOND TREATISE OF GOVERNMENT (1690) (8)
 67. David Hume, *Of the Origin and Justice and Property* from TREATISE (1739) (10)
 68. Jeremy Waldron, *Two Worries About Mixing One's Labour* (1983) (5)

Opening: _____ Response: _____

25. Private Law II (50): What is the nature and value of contract?Tue 70. Charles Fried, *CONTRACT AS PROMISE* (1981) (16)4/24 71. Anthony T. Kronman, *Specific Performance* (1978) (12)72. Seana Valentine Shiffrin, *The Divergence of Contract and Promise* (2007) (22)**Opening:** _____ **Response:** _____**26. Private Law III (21): What is the nature and value of tort liability?**Thu 73. Jules L. Coleman, *Doing Away with Tort Law* (2008) (11)4/26 74. Jules L. Coleman, *Corrective Justice and Wrongful Gain* (1982) (10)**Opening:** _____ **Response:** _____