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)

Court opinions on Blackboard=[B];
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 “Research Tools,” and
then to “Electronic 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 – Interpreting our Constitution

January 30–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 law important to the rule of law?

February 6--Legal Liberalism's Rule of Law–A Sophisticated Version

Ronald Dworkin, *Hard Cases* [80-94 101-107], TRS, Chapter 4
Ronald Dworkin, TRS, pp. 338-345
*Cohen v. California*¹ [Harlan opinion] [B]

February 13–Legal Liberalism–Basic Normative Theory I

Richard Rorty, *The Priority of Democracy to Philosophy*² [R]

February 20–Legal Liberalism–Basic Normative Theory II

John Rawls, *A Theory of Justice*, [Sections 1-6, 10-11]

February 27–Legal Liberalism–Basic Normative Theory III


March 6–Legal Liberalism–Application of Basic Normative Theory


March 13–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*³

Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*⁴ [O]


Ronald Dworkin, *The Constitutional Drama*⁵ [R] [Recommended]

Laurence Tribe, *The Invisible Constitution*, 59-64, 74-77 [H] [Optional]

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

Eric Schnapper, *Affirmative Action and the Legal History of the Fourteenth Amendment*⁶ [O] [Optional]

H. Jefferson Powell, *The Original Understanding of Original Intent*⁷ [O] [Optional]

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⁵ 5Life’s Dominion, Chapter 5.
Employment Division v. Smith® [O][Scalia and O’Connor opinions]
Burleigh Wilkins, A Third Principle of Justice⁹
Christian Legal Society v. Martinez¹⁰ [O][Ginsburg and Stevens opinions].
Lawrence v. Texas¹¹ [majority opinion] [B]
Part II. The CLS/Liberalism Debate

March 27–Critical Legal Studies: The Rule of Law is a Myth (aka The External Perspective)

David Luban, Legal Modernism12 [O]
Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method13 [O]

Mari Matsuda, Public Response to Racist Speech: Considering the Victim’s Story14 [O]
J. M. Balkin, Ideology as Constraint15 [1133-1145] [O]
D. Kennedy, Legal Education as Training for Hierarchy, Chapter 2, [54-66], PL [Recommended]
Judge Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, JJ, Chapter 7 [Recommended]
Andrew Altman, Critical Legal Studies v. Liberalism16 [R] [Optional]
Paul Carrington, Law and the River17 [O] [Optional]
Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights18 [O] [Optional]
R.A.V. v. City of St. Paul19 [2541-2561] [B] [Optional]
Virginia v. Black20 [1-17][B] [Optional]
David Kairys, Freedom of Speech,” Chapter 8, PL [Optional]
Robert Post, Managing Deliberation: The Quandary of Democratic Dialogue21 [O] [Optional]

April 3–Spring Break

Part III. Professionalism and the Rule of Law

April 10–Role of Professionalism in the Rule of Law

Postmistress Case [H]
United States v. Larson22 [B]

16Altman, Critical Legal Studies, Chapter 1.
Justice Robert H. Jackson, *The Federal Prosecutor* [H]
Jack Goldsmith, *The Terror Presidency*, Chapters 1 & 5 [H]
David Cole, *The Torture Memos: The Case Against the Lawyers* [H]
Brady/Giglio Cases
[Optional]
Regina Austin, *Sapphire Bound!* [O] [Optional]
Part IV. Topics in the Rule of Law

April 17—Interpreting Statutes: The Myth (and Truth) of Following the Law

Ronald Dworkin, *Hard Cases* [107-110], TRS, Chapter 4
*U.S. v. Barragan-Mendoza*²⁶ [B]
*Coalition of Montanans Concerned v. Gallatin*²⁷ [B]
*Montana Wilderness v. U.S. Forest Service*²⁸ [B]
Briefs and Order in *U.S. v. Howick* [B]

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]

²⁶ 1999 WL 221857 (9th Cir. (Mont.)).
April 24–Gender Equality: Equal Treatment, Special Treatment, and Feminist Theory
(Judge Molloy away)

*Bradwell v. Illinois*\(^{29}\) [136-142] [B]
*California Federal S. & L Assn. V. Guerra*\(^{30}\) [274-292][B]
Christine Littleton, *Reconstructing Sexual Equality*\(^{31}\) [O]
*Michael M v. Sonoma Co.*\(^{32}\) [466-476][B]

Tracy E. Higgins, “By Reason of Their Sex:” *Feminist Theory, Postmodernism, and Justice*\(^{33}\) [O] [Optional]
Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*\(^{34}\) [Parts I, II, IV, and V] [O][Optional]

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2983 U.S. (16 Wall)130 (1873).
May 1 –Hard 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* [35] [B]  
Charles Fried and David Rosenberg, *Presentation* [36] [O]  
David Vladick, *Defending Courts: A Brief Rejoinder* [37] [O]  
Robert Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform* [38] [O]  
Harry Philo, *Problems and Potentialities of Safety Standards in Tort Litigation Codes and Practices* [B]  
*Estate of Strever v. Cline* [39] [B]  
*Lakin v. Senco Products, Inc.* [40] [B]  

*Hern v. Safeco Ins. Co. Of Illinois* [41] [Court’s discussion of Issue 3. and Justice Gray’s dissent] [B] [Optional]  
Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?* [42] [Optional]  
Richard Abel, *Torts, PL* [Optional]  

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35715 N.E.2d 1062 (Ohio 1999).  
3831 Seton Hall L. Rev. 672 (2001).  
40987 P.2d 463 (Or. 1999).  