

PHILOSOPHY 359: LAW AND PHILOSOPHY -- FALL 2012

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Welcome to Law and Philosophy!

Course Description: This course analyzes law and legal institutions from the perspective of moral and political philosophy, with particular attention to U.S. civil rights law in historical context. Topics studied in this course include methods of legal interpretation, equality and discrimination, democracy and voting rights, property rights and distributive justice, the tension between social control and liberty (including specific liberties, such as free exercise of religion), and the justification for punishing lawbreakers (or for imposing specific punishments, such as the death penalty). Readings will be drawn from historical figures (Locke, Hume, Bentham, Mill); from contemporary legal philosophers; from texts in legal history, criminology, or sociology; and from statutes and court decisions.

What you will learn: By the end of this course, you should be able to

- use two major methods in political philosophy--social contract theory, and utilitarianism--to evaluate legal and political arrangements
- write an argumentative paper
- analyse a legal opinion
- use different methods of constitutional and statutory interpretation to understand laws
- understand the different concepts of race and racism, the history of discrimination and antidiscrimination law in the U.S., and evaluate moral and legal arguments about laws and policies concerning group inequality.

Course Readings: The following books are stocked at the local textbook stores and required for purchase:

John Locke, *Second Treatise of Government* (Indianapolis: Hackett)

John Stuart Mill, *On Liberty* (Indianapolis: Hackett)

Elizabeth Anderson, ed., *Law and Philosophy* (Dubuque: Kendall Hunt) (I receive no royalties from sales of this text)

A few readings in this course are available *only* on CTools. The CTools site contains *all* of the readings for this course. However, some of the online readings, especially if they are in pdf format, may be longer than those in the *Law and Philosophy* text. *You are only responsible for the shorter readings in the Law and Philosophy text.*

Course Webpage: The Course Webpage has or will have links to valuable information, including:

- the syllabus
- links from the syllabus to course readings
- lecture outlines
- the two paper assignments made in lecture (a third will be assigned by your section instructor)
- announcements
- pages explaining course policies, etc.

Course Requirements:

There will be 3 short (1600 word, 6-7 page) papers and a final examination. Each paper and the final examination will count for 22.5% of your grade. Participation in discussion sections will count for 10% of your grade. *Receipt of a passing grade requires completion of the final examination, all 3 papers, and regular attendance in discussion sections.*

Two papers will be on assigned topics, listed in the Course Webpage.

The first paper is due Wednesday, Oct. 24.

The second paper is due Tuesday, Dec. 11.

Your third paper will be assigned by your discussion section instructor, at a time and format of her or his choice.

The final examination will take place Thursday, Dec. 20, 1:30 pm - 3:30 pm in the lecture hall where this class meets. Bring your own blue books. You will be held responsible for knowing all lecture material, and all reading assignments, whether or not they were explicitly covered in lecture.

Students with SSD recognized disabilities are entitled to reasonable accommodations in this course. Students needing such accommodations should make this known at the beginning of the course. Instructors will treat this information as private and confidential.

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Readings marked with a * are available *only* online.

1. THE AUTHORITY OF LAW: CONSENT THEORY

Wed., Sept. 5: Introduction to Law and Philosophy

Mon., Sept. 10: The Authority of Law: Social Contract (Consent) Theory
John Locke, [*Second Treatise of Government*](#) (1690), ch. [1,2](#), [3](#), [8](#), [9](#)

Wed., Sept. 12: Property, and some Puzzles about it
John Locke, *Second Treatise*, ch. [5](#)

Hernando de Soto, [The Other Path](#), in *Law and Philosophy*.

*Hernando de Soto, [The Mystery of Capital](#) (NY: Basic Books, 2000), pp. 39-40, 49-62.

Mon., Sept. 17: Consent Theory and the Construction of Social Class

John Locke, *Second Treatise*, ch. [4](#), [6](#), [7](#), [15](#)

John Locke, *First Treatise of Government*, [ch. 4](#), par. 41-3, in *Law and Philosophy*.

Wed., Sept. 19: Consent Theory and the Limits of State Power

John Locke, [Second Treatise](#), ch. 10-14, 16-19.

2. SOME PROBLEMS WITH CONSENT

Mon., Sept. 24: Theoretical Objections

David Hume, "[Of the Original Contract](#)," (1777), in *Law and Philosophy*.

Wed., Sept. 26: Can Consent Justify Suicide?

Dan Brock, "[Voluntary Active Euthanasia](#)," in *Law and Philosophy*.

U. S. Supreme Court, [Washington v. Glucksberg](#), in *Law and Philosophy*.

Mon., Oct. 1: Consent and Suicide, continued

David Velleman, "[Against the Right to Die](#)," in *Law and Philosophy*.

3. INDIVIDUAL LIBERTY VS. STATE AUTHORITY

Wed., Oct. 3: Liberal Theory

John Stuart Mill, from [On Liberty](#) (1859), ch 1 par. 9-13; ch. 4; ch. 3 par. 1-14.

Mon., Oct. 8: The Constitutional Right to Privacy and Gay Rights

U.S. Supreme Court, [Griswold v. Connecticut](#), in *Law and Philosophy*.

U.S. Supreme Court, [Bowers v. Hardwick](#), 478 U.S. 186 (1986), in *Law and Philosophy*.

U.S. Supreme Court, [Lawrence v. Texas](#), 123 S. Ct. 2472 (2003), in *Law and Philosophy*.

Vermont Supreme Court, [Baker v. State](#), 170 Vt. 194 (1999), in *Law and Philosophy*.

Arizona Court of Appeals, [Standhardt v. Arizona](#), in *Law and Philosophy*.

Wed., Oct. 10: Conservative Critiques of Privacy and Liberal Constitutionalism

James F. Stephen, "[The Doctrine of Liberty in its Application to Morals](#)" from *Liberty, Equality, Fraternity* (1873), in *Law and Philosophy*.

*Robert Bork, "The Case [Against](#) Political Judging" *National Review*, 12-08-89, pp. 23-28.

John Hart Ely, from [Democracy and Distrust](#), in *Law and Philosophy*.

Mon., Oct. 15: Fall Study Break--No Class

4. MULTICULTURALISM AND RELIGION

Wed., Oct. 17: Multiculturalism and Claims to Accommodation for Minority Cultures

Michael McConnell, "[Believers as Equal Citizens](#)," in *Law and Philosophy*.

Brian Barry, [Culture and Equality](#), in *Law and Philosophy*.

Mon., Oct. 22: Multiculturalism and the Free Exercise Clause of the First Amendment

U.S. Supreme Court, [Braunfeld v Brown](#), 366 US 599 (1961), in *Law and Philosophy*.

U.S. Supreme Court, [Sherbert v. Verner](#), 374 US 398 (1963), in *Law and Philosophy*.

U.S. Supreme Court, [Wisconsin v. Yoder](#), 406 US 205 (1972), in *Law and Philosophy*.

U.S. Supreme Court, [Employment Division v. Smith](#), 494 US 872 (1990), in *Law and Philosophy*.

Wed., Oct. 24: What Does the Prohibition on Establishment Mean?

First paper assignment due.

U.S. Supreme Court, [Lemon v. Kurtzman](#), 403 US 602 (1971), in *Law and Philosophy*.

U.S. Supreme Court, [Lynch v. Donnelly](#), 465 US 668 (1984), in *Law and Philosophy*.

U.S. Supreme Court, [Rosenberger v. University of Virginia](#), 515 U.S. 819 (1995), in *Law and Philosophy*.

5. RACE, RACISM, AND EQUALITY UNDER THE LAW

Mon., Oct. 29: What is "Race"? What is "Ethnicity"?

*Gloria Marshall, "[Racial Classifications: Popular and Scientific](#)," in Sandra Harding, ed., *The "Racial" Economy of Science* (Indiana U P, 1993), pp. 116-127.

Jacqueline Stevens, [excerpts from Reproducing the State](#), in *Law and Philosophy*.

Wed., Oct. 31: The Legal Construction of "Race" in the United States after Emancipation

U.S. Constitution, [articles and amendments pertaining to race and equality](#)

*U.S. Supreme Court, [Slaughterhouse Cases](#), 83 U.S. 36 (1873).

*U.S. Supreme Court, [Civil Rights Cases](#), 109 U.S. 3 (1883).

*U.S. Supreme Court, [Plessy v. Ferguson](#), 163 U.S. 537 (1896).

*U.S. Supreme Court, [Brown v. Board of Education](#), 347 U.S. 483 (1954).

James Falkowski, "[Special Legal Doctrines Used by the United States to Restrict the Right of Indian Peoples to Own Land and Be Self-Governing](#)," in

Indian Law/Race Law (New York: Praeger, 1992), pp. 95-122.

*Elizabeth Anderson and Jeff Jones, [The Geography of Race in the United States](#) (tool around this site)

Mon., Nov. 5: Continuing Causes of Racial Disadvantage

*Elizabeth Anderson, "[Racial Segregation and Material Inequality in the U.S.](#)," from *The Imperative of Integration* (Princeton: Princeton University Press, 2010).

Barbara Reskin, "[The Proximate Causes of Employment Discrimination](#)," in *Law and Philosophy*.

Glenn Loury, "[The Anatomy of Racial Inequality](#)," in *Law and Philosophy*.

Wed., Nov. 7: Should Discrimination Require Intent? Comparing Discrimination by Race and Disability

U.S. Supreme Court, [Washington v. Davis](#), 426 U.S. 229 (1976), in *Law and Philosophy*.

U.S. Supreme Court, [Griggs v. Duke Power Co.](#), 401 U.S. 424 (1971), in *Law and Philosophy*.

U.S. Supreme Court, [Alexander v. Choate](#), 469 U.S. 287 (1985), in *Law and Philosophy*.

Mon., Nov. 12: Some Arguments for Race-Conscious Affirmative Action

U.S. Supreme Court, [U.S. Steelworkers v. Weber](#), 443 U.S. 193 (1979), in *Law and Philosophy*.

U.S. Supreme Court, [City of Richmond v. Croson](#), 488 U.S. 469 (1989) (O'Connor), in *Law and Philosophy*.

U.S. Supreme Court, [Grutter v. Bollinger](#), 123 S. Ct. 2325 (2003) (O'Connor), in *Law and Philosophy*.

Robert Post, "[Introduction: After Bakke](#)," in *Law and Philosophy*.

*Barbara Reskin, [The Realities of Affirmative Action in Employment](#) (Washington, D.C.: American Sociological Association, 1998), pp. 32-3.

Gertrude Ezorsky, [Racism and Justice](#), in *Law and Philosophy*.

Wed., Nov. 14: Some Arguments against Race-Conscious Affirmative Action

U.S. Supreme Court, [Adarand v. Peña](#), 515 U.S. 200 (1995), in *Law and Philosophy*.

U.S. Supreme Court, [City of Richmond v. Croson](#), 488 U.S. 469 (1989) (Scalia), in *Law and Philosophy*.

U.S. Supreme Court, [Parents Involved in Community Schools v. Seattle School District No. 1](#) (2007) (Thomas), in *Law and Philosophy*.

Louis Pojman, "[The Moral Status of Affirmative Action](#)," in *Law and Philosophy*.

6. SEX EQUALITY, LIBERTY, AND THE LAW

Mon., Nov. 19: What's Wrong with Sexual Harassment?

U.S. Supreme Court, [Meritor Savings Bank v. Vinson](#), 477 U.S. 57 (1986), in *Law and Philosophy*.

Catharine MacKinnon, [Sexual Harassment of Working Women](#), in *Law and Philosophy*.

U.S. Supreme Court, [Oncale v. Sundowner](#), 523 U.S. 75 (1998), in *Law and Philosophy*.

Wed., Nov. 21: Sexual Harassment and Free Speech

Kingsley Browne, "[The Silenced Workplace: Employer Censorship under Title VII](#)," in *Law and Philosophy*.

Jack Balkin, "[Free Speech and Hostile Environments](#)," in *Law and Philosophy*.

7. THE JUSTIFICATION OF PUNISHMENT

Mon., Nov. 26: What Is Punishment? and Retributive Theory

Joel Feinberg, "[The Expressive Function of Punishment](#)," in *Law and Philosophy*.

*Andrew Oldenquist, from "[An Explanation of Retribution](#)," *Journal of Philosophy* 85 (1988): 464-478.

Wed., Nov. 28: Deterrence Theory (Utilitarianism) and Rehabilitation

Jeremy Bentham, "[Of the Proportion between Punishments and Offenses](#)," (1789), in *Law and Philosophy*.

Jean Hampton, "[The Moral Education Theory of Punishment](#)," in *Law and Philosophy*.

Mon., Dec. 3: Should Punishment be Degrading or Humiliating?

James Q. Whitman, from *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, in *Law and Philosophy*.

Dan Kahan, "[What Do Alternative Sanctions Mean?](#)," in *Law and Philosophy*.

James Q. Whitman, "[What is Wrong with Inflicting Shame Sanctions?](#)," in *Law and Philosophy*.

Wed., Dec. 5: The Case for the Death Penalty

John Stuart Mill, "[Speech in Favor of Capital Punishment](#)," before the House of Commons, 1868, in *Law and Philosophy*.

Ernest van den Haag, "[On Deterrence and the Death Penalty](#)," in *Law and Philosophy*.

Mon., Dec. 10: The Case Against the Death Penalty, and Concluding Remarks

*Stephen Nathanson, from [An Eye for an Eye? The Immorality of Punishing by Death](#) (Roman & Littlefield, 1987).

*Scott Turow, "[To Kill or Not to Kill: Coming to Terms with Capital Punishment](#)," *The New Yorker*, Jan. 6, 2003, pp. 40-47.

Tues., Dec. 11: Final paper assignment due.