



## **Jurisprudence**

Law 263  
Winter 2019

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### *Course overview*

This course will offer an in-depth analysis of select topics in jurisprudence, including the ontological question of the nature of law ('what is law?'), the relationship between law and morality (is there a moral duty to obey the law?), the nature of legal and moral rights (what are rights? can they be overridden?), the democratic justification of constitutionalism and institutions such as judicial review (is constitutionalism more political or legal in nature? is judicial review justifiable?).

### *Course objectives*

The aim of this course is to build on the skills and knowledge acquired in the first-year curriculum, primarily by reflecting on the philosophical foundations and normative implications of basic legal concepts and ideas. Specifically, students should develop an appreciation for philosophical questions regarding legal concepts, including the very 'concept of law' itself, and how these concepts relate to political institutions and practical reasons for action.

### *Course materials*

The course materials will either be sent out before class or posted to onQ.

### *Email policy*

Questions about the course materials should be raised in class, as discussion will be beneficial for all class members. If you nonetheless wish to email a question about the course, please ensure that the question is clearly formulated and that you propose your understanding of an answer. I may choose to address your question (without attribution) in class. Please do not send me a long list of questions.

Email is appropriate for questions concerning the reading schedule, problems with the website, personal issues that I should be aware of, etc.

### *Evaluation*

The course is evaluated by the following two components:

- Participation (30%). Seminar participation will be evaluated qualitatively, including by reference to the seriousness of preparation for discussion, participation in discussion, and the quality of the interventions.
- Term paper (70%). The term paper should be between 6,000 and 8,000 words, inclusive of footnotes. Economy of expression is encouraged. The term paper will satisfy the ‘substantive term paper’ requirement, if the Substantial Term Paper Form is completed according to the Faculty’s requirements. The paper is due, via email only, on Monday, April 23, 2019 by 12 noon. Please note that, with a request made in good time, an exceptional extension could be provided to April 26, 2019, but that I am dis-empowered from authorizing any further extension beyond that date.

### *Seminar schedule*

Our seminars are scheduled once per week on Thursday from 2.30 to 5.30 in Macdonald Hall, room 100.

### *Office hours*

My office is in Mack-Corry, room 521. I do not hold fixed office hours, but am available by appointment.

## Outline of readings

As a fun introduction to the questions we will address in the course please read Lon Fuller's science fiction narrative of the opinions of the "Supreme Court of Newgarth" in *The Case of the Speluncean Explorers*. The opinions of these fictional judges will be useful reference points throughout the course.

L.L. Fuller, *The Case of the Speluncean Explorers*, *Harvard Law Review*, Vol. 62, No. 4, February (1949), 616-645.

### Part I. What is Law?

#### A. *Law as a System of Rules or System of Morality?*

H.L.A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* (1958) 71 593 (and in his *Essays in Jurisprudence and Philosophy*, 49-87)

Lon Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" *Harvard Law Review* (1958) 71 630-672

Lon Fuller *The Morality of Law* (New Haven: Yale UP, 1964) Chapter 2

H.L.A. Hart "Lon L. Fuller: *The Morality of Law*" (selections from Essay 16 in his *Essays in Jurisprudence and Philosophy* 347-353)

### Part II. Law and Morality

#### A. *Law as Natural Morality or Interpretive Justification?*

St. Thomas Aquinas *Summa Theologica, prima secundae partis: quaestiones 90-96* (selections drawn from *Aquinas: Political Writings* 76-155)

John Finnis *Natural law and Natural Rights* (Oxford: Oxford UP, 2011) Chapter 1

Ronald Dworkin *Law's Empire* (Cambridge MA: Harvard UP, 1986) 1-20, 31-55, 65-76

#### B. *Law as Instrumental or Democratic Authority?*

Joseph Raz "The Problem of Authority Revisited" *Minnesota Law Review* (2006) 90

Jeremy Waldron 'Authority for Officials' in L. Meyer et al. (eds) *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP, Oxford: 2003)

Jeremy Waldron ‘Can there be a democratic jurisprudence?’ *Emory Law Journal* 58 pp. 675-712

### **Part III: Law and Rights**

#### *A. Legal Rights as Proportional or Absolute Relations of Justice?*

Grégoire Webber ‘Rights and Persons’ in Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley Miller, and Francisco Urbina, *Legislated Rights* (Cambridge: Cambridge UP, 2018)

Kai Möller, ‘Proportionality and Rights Inflation’ in Grant Huscroft, Bradley Miller, and Grégoire Webber (eds) *Proportionality and the Rule of Law* (Cambridge, 2014)

Francisco Urbina ‘The Need for Legal Direction in Adjudication’ in F. Urbina *A Critique of Proportionality and Balancing* (Cambridge, 2017)

### **Part IV. Law and Constitutionalism**

#### *A. Legal or Political Constitutionalism?*

Alexander Hamilton “No.78” and “No.81” in *The Federalist Papers* G. Carey and J. McClellan eds. (Liberty Fund, 2001) 401-408 and 417-425

Richard Bellamy *Political Constitutionalism* (Cambridge: Cambridge UP, 2009) (selections)

T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Cambridge University Press, 2001) (selections)

#### *B. Judicial Review or Judicial Domination?*

Samuel Freeman “Constitutional Democracy and the Legitimacy of Judicial Review” *Law and Philosophy* 9:4 (1990) 327-370

Jeremy Waldron, “The Core of the Case against Judicial Review” (2006) 115 *Yale Law Journal* 1346

Jeremy Waldron “Some Models of Dialogue Between Judges and Legislators” *The Supreme Court Law Review*, 23 (2004), 7-47