

Philosophy 348

Philosophy of Law

Professor : Daniel M. Weinstock

New Chancellor Day Hall, Office 505

Tel.: 514 398 2372

Email: daniel.weinstock2@gmail.com

Office hours: Monday 10 - 12, or by appointment

Course Objectives

The principal aim of this course is to introduce students to some of the basic philosophical questions that arise in the law, understood both as a *practice* and as a *theoretical construct*. We will consider both questions to do with the nature of law, and of its relation to other normative systems, in particular *morality*. We will also consider ways in which particular domains of law (constitutional, criminal, tort) are conceptualized. Finally, we will study alternative approaches to the law, that seek to critique the way in which a Western liberal-democratic such as Canada has institutionalized law, and to set up distinct ways of conceptualizing it. In particular, we will attend to the Anishnaabe ethical and legal tradition, and its relation to Canadian law and Canadian constitutionalism.

A subsidiary aim of the course is to introduce students to the nature of legal reasoning, and to compare it to philosophical reasoning. Though the readings will principally be made up of philosophical texts, we will also be reading excerpts of legal judgments, drawn mostly from the Supreme Court of Canada.

Course Requirements

Students will be graded on the basis of the following 4 elements:

- 1) Beginning in week 3, I will at the end of each week submit a question that will require of students that they reflect on that week's material (readings, lectures, and class discussion are all included within the extension of "that week's material"). Over the course of the semester, each student must write short (2-3 pages) answers to two of these questions. This component will be worth 30% of the final grade.
- 2) Each student will write a "case analysis". By mid-term, I will distribute a list of eligible cases. Each student will select one case, read it in its unabridged form, and write a 5 – 7 page analysis that will set out to identify the way in which the argument for the conclusion of the judicial argument "works" – what its premises are, what the nature (legal, moral) of these premises is, how sound the inferences around which the conclusion is built are, etc. Each student must at least two weeks before the deadline submit a one page précis of their analysis, and come to see me at office hours to discuss

it. This analysis (encompassing both the précis and the final paper) will be worth 30% of the final grade. The deadline for the paper will be Dec. 15.

- 3) There will be a final take-home worth 30% of the final grade. Questions will be handed out at the last lecture (Dec. 3) and answers will be due no later than 11:59PM on Dec. 5.
- 4) There will be a 10% participation grade, which will be based on attendance, and on the quality of participation in – and level of preparedness for – class and conference discussions.

Readings

The vast majority of readings will be drawn from the following three books, all available at Librairie Paragraphe, 2220 McGill College ave. *Arguing about Law* will also be placed on reserve at McLellan library.

Aileen Kavanagh and John Oberdiek (eds.) *Arguing about Law* (Routledge 2009) **AL**

J.E. Bickenbach, Keith Culver and Michael Giudice (eds.), *Canadian Cases in the Philosophy of Law*, 5th edition, (Broadview 2018) **CC**

John Borrows, *Law's Indigenous Ethics*, (University of Toronto Press, 2019). **LIE**

Language

In accord with McGill University's Charter of Students' Rights, students in this course have the right to submit any written work that is to be graded. in English or in French.

General Academic Policies at McGill

McGill University values academic integrity. Therefore all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures. (See <http://www.mcgill.ca/integrity> for more information).

If you have a disability or require any accommodation, please contact the instructor to arrange a time to discuss your situation. It will also be helpful to contact the Office for Students with Disabilities at 398-6009.

Additional policies governing academic issues which affect students can be found in the *McGill Charter of Students' Rights/Charte des droits de l'étudiant* (online at <http://ww2.mcgill.ca/students-handbook/chapter1.html>).

Trigger Warning

The study and practice of Law often involve coming to terms with some of the darker aspects of human nature. We will at times be dealing in this class with, for example, the consequences of colonial violence against indigenous people, the legal response (often inadequate) to sexual violence, and aspects of human behavior (sex work, drug use, physician-assisted death) that some people find upsetting. There can be no question of not addressing these kinds of issues in

the study of Law. However, they must be dealt with sensitively and with respect and due consideration both by the instructor, and by students when discussing them in class (or indeed outside of it). I encourage students to survey the material and topics that we will be covering, and to contact me confidentially if there is need to make accommodation in specific cases with respect to some of these materials. At all times, class discussions of these topics must be engaged in respectfully and sensitively.

Land Acknowledgement

McGill University is located on land which has long served as a site of meeting and exchange amongst Indigenous peoples, including the Haudenosaunee and Anishinabeg nations. McGill honours, recognizes and respects these nations as the traditional stewards of the lands and waters on which we meet today.

Technology

Though I am by no means a technophobe, I have come to the conclusion, both through my own personal experience and by attending to empirical studies, that classroom technologies tend to be a hindrance rather than a help to the attainment of pedagogical objectives. I do not use PowerPoint or any other kind of visual aid because a) it creates the wrong kinds of expectations among students (“it’s all there in the PowerPoints”) b) it makes for bad lectures (“I’ll just read my PowerPoints”) and c) it inhibits productive digression. I don’t like students using laptops because a) accessing social media may prove an irresistible temptation when the prof is going over the final points of legal positivism, and b) research suggests that students listen more actively when they take notes with pen and paper. Here is an interesting NPR report on that research: <https://www.npr.org/2016/04/17/474525392/attention-students-put-your-laptops-away>

I can’t really see any reason, moreover, for students needing to look at their phones in class. I thus have a strong preference for our classroom being a technology-free zone. Though I would rather not ban laptops outright, I strongly encourage students to consider putting laptops (and phones!) away for the (short!) duration of the class.

Course Outline and Readings

Week 1 (Sept.2) : Syllabus and Preliminaries

Natalie Stoljar, “What Do We Want Law to Be? Philosophical Analysis and the Concept of Law”, in Wil Waluchow and Stefan Sciaraffa (eds.), *Philosophical Foundations of the Nature of Law*. (Available as an ebook through Oxford Scholarship Online).

Week 2 (Sept. 9): Law and Morality 1: Positivism and its Critics

Joseph Raz, “Legal Positivism and the Sources of Law” (AL)

Robert P. George, “Natural Law and Positive Law” (AL)

Ronald Dworkin, “Law as Interpretation” (AL)

John Gardner, “Legal Positivism: 5 ½ Myths” (AL)

Week 3 (Sept 16): Law and Morality 1: The Hart – Fuller Debate

H.L.A. Hart, “Positivism and the Separation of Law and Morals” (AL)

Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (AL)

Week 4 (Sept. 23): Law and Morality 2: Is there a Duty to Obey the Law?

Joseph Raz, “The Obligation to Obey: Revision and Tradition” (AL)

John Rawls, “The Justification of Civil Disobedience” (AL)

Martin Luther King, Jr, “Letter from a Birmingham Jail” (AL)

Week 5 (Sept. 30): Law and Morality 3: The Legal Enforcement of Sexual Morality

John M. Finnis, “Law, Morality, and “Sexual Orientation”” (AL)

Stephen Macedo, “Against the Old Sexual Morality of the New Natural Law” (AL)

R. v. Butler (CC)

Little Sisters Book and Art Emporium v. Canada (CC)

Reference Re. ss. 193 and 195.1 (1) (c) of the Criminal Code (Man.) (CC)

Canada (Attorney General) v. Bedford (CC)

Reference re. Same Sex Marriage (CC)

R. v. Sharpe (CC)

Week 6 (Oct. 7) Constitutionalism 1 Interpretation

Andrei Marmor, “Constitutional Interpretation” (AL)

Antonin Scalia, “Interpreting Constitutional Texts” (AL)

Ronald Dworkin, “Law as Interpretation” (AL)

Reference Re Resolution to Amend the Constitution of Canada (CC)

Edwards v. Attorney-General of Canada (CC)
Reference Re Manitoba Language Rights (CC)
Reference Re Secession of Quebec (CC)

Week 7 (Oct. 14) Constitutionalism 2 Rights

Ronald Dworkin, “Rights as Trumps” (AL)
Joseph Raz, “Rights and Individual Well-Being” (AL)
Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (AL).
Cécile Fabre, “The Dignity of Rights” (AL)

Week 8 (Oct. 21) Constitutionalism 3 Applying Rights

R. v. Oakes (CC)
R v. Big M Drug Mart Ltd (CC)
R. v. Keegstra (CC)
Chaoulli v. Quebec (CC)
Winnipeg Child and Family Services v. G. (CC)
Carter v. Canada (CC)

Week 9 (Oct. 28) Criminal Law

Daniel T. Farrell, “The Justification of General Deterrence” (AL)
John Gardner, “Crime: In Proportion and in Perspective” (AL)
R.A. Duff, “Penal Communities” (AL)

R. v. Lavallée and R. v. Mallot (CC)
Perka v. The Queen (CC)
Kindler v. Canada (CC)
R. v. Proulx (CC)

Week 10 (Nov. 4) Tort Law

Tony Honoré, “The Morality of Tort Law” (AL)
Stephen R. Perry, “On the Relationship Between Corrective and Distributive Justice” (AL)

Cook v. Lewis (CC)
Marconato and Marconato v. Franklin (CC)
Norberg v. Wynrib (CC)
Crocker v. Sundance Northwest Resorts (CC)

Week 11 (Nov. 11) Critical Perspectives

Roberto Mangabeira Unger, “The Critical Legal Studies Movement” (AL)
Richard Delgado, “The Ethereal Scholar” (AL)

Anne Phillips, “Feminism and the Politics of Difference” (AL)

Week 12 (Nov. 18) Indigenous Perspectives on Law (1)

John Borrows, *Law’s Indigenous Ethics*, chs. 1 – 2.

Ktunaxa Nation v. British Columbia (CC)

Week 13 (Nov. 25) Indigenous Perspectives on Law (2)

John Borrows, *Law’s Indigenous Ethics*, chs. 3 – 4

Tsilhqot’in Nation v. British Columbia (CC)

Week 14 (Dec. 2) Indigenous Perspectives on Law (3)

John Borrows, *Law’s Indigenous Ethics*, ch. 7.

Final Report of the Truth and Reconciliation Commission of Canada (excerpts)