JURISPRUDENCE
Spring 2019

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I.   COURSE DESCRIPTION AND LEARNING OBJECTIVES

In Jurisprudence (or "Philosophy of Law"), we will examine some of the theoretical questions that underlie our legal system and society's relationship to and practice of law.

We will begin by considering fundamental questions about why we have courts, and how judges do or should make decisions. We will question the pros and cons of our system of common law and making decisions based on precedent. Over the remainder of the semester, we will cover some of the main schools of legal theory, including formalism, legal realism, natural law theory, legal positivism, and law and economics, and some of the modern critical theories like critical legal studies, critical race theory, or feminist legal theory. Coverage of the various theories will depend on our pace through the material.

The goal of the course is to enrich your skills as a lawyer by encouraging you to think critically about why our legal system is structured the way it is, how law is practiced, how judges decide cases, how the public perceives the legal system, and many other basic structures and practices of our society.   My hope is that over the course of the semester, you will gain some insight into the practical application of jurisprudential theory to our world today.

The learning objectives for the course are:

- Knowledge of:
    - building block concepts (why we have courts; what are common law and precedent; what is a conceptual theory).
    - basic arguments/claims of legal theories covered in course (*e.g., Formalism, Legal Realism, Natural Law, Legal Positivism, Law & Economics, Critical Race Theory; possibly Critical Legal Studies, Feminist Legal Theory, others*).
    - primary theorists associated with legal theories covered in course.

- Ability to:
    - contrast various legal theories covered in the course.
    - critique legal theories covered in the course.
    - apply various legal theories to a factual situation or argument.

II.   REQUIRED TEXTS

Brian Bix, *Jurisprudence: Theory and Context*, 7th ed. (Carolina Academic Press, 2015).

Other assigned readings will be available without charge through the Internet and, if necessary, through purchase of photocopied or other relatively low-cost materials.

III.   COURSE ASSIGNMENTS

In general, we will proceed through the units below over the course of the semester. Please note that the units we cover, and the readings associated with those units, are subject to change. For that reason, you may not want to get too far ahead in your reading.

Unit 1 --   The Development of Courts and the Role of the Judge (2 classes):

Readings:

Richard Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049 (2006).

Richard E. Messick, *The Origins and Development of Courts*, 85 Judicature 175 (2002).

Excerpts from Chad M. Oldfather's "Materials for Judging and the Judicial Process" (attached and available on TWEN).

The Posner and Messick readings are available through Westlaw, Lexis, etc.

Questions for Reflection:

- Why do we have judges or courts? What social needs do they serve?
- Are there other ways of fulfilling the social needs?
- What are the key elements of a court as opposed to mediation?
- What role does the state play in dispute resolution? Is it necessary that the state be involved? Why?
- What role do the "prevailing norms" of society play in the decisions of courts or judges? What role should they play? How do we know what they are?
- How does Judge Posner think that judges make decisions? Do you agree with him?

Response Paper Assignment:

Please prepare a short response paper (no more than 250 words) that describes your view of the judicial role. Please upload your response paper to the Assignment Drop Box on TWEN by **Monday, January 7th at 12pm**, and please bring a hard-copy to use in class.

Please comply with the following requirements in preparing your response paper:

- please submit in Microsoft Word (not in PDF);
- please put your name on the Word document; and
- please include a word count.

Considering the questions below may help you structure your response, but feel free to improvise.

- What are the qualities of an ideal judge? Does your answer differ depending on whether the judge serves in a trial or an appellate court?
- What are undesirable qualities in a judge?
- How should a judge approach a case or an issue? How should a judge make a decision?
- Should a judge's personal beliefs be involved in the judicial process?
- What ensures that judges make decisions in the way that society expects them to?
- What do you value more in a judge – common sense, or technical legal proficiency?

Other:

Please also be prepared to discuss any experiences you have had with judges or the judicial system, and any significant impressions regarding the judicial process that those experiences have left on you.

Unit 2 --   Common Law Reasoning (1-2 classes)

Readings:

Bix, pp. 155-160 on Common Law Reasoning and Precedent

Frederick Schauer, *The Failure of the Common Law*, 36 Ariz. St. L.J. 765 (2004).

Questions for Reflection:

- What is a "common law legal system"?
- Does a judge create law or discover law in a common law legal system?
- How does the common law deal with shifts in social norms?
- What are the pros/cons of a common law legal system?

Unit 3 --   Precedent (1 class)

Readings:

Review Bix, pp. 155-160 on Common Law Reasoning and Precedent

Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

Section 14 – The Realist Critique of Formalism – Llewellyn's Two Views of Precedent on pp. 5-7 of the Materials from Chad Oldfather on Formalism and Precedent posted on TWEN.

Questions for Reflection:

- What is the role of precedent in a common law legal system?
- What is *stare decisis*?
- Does precedent constrain judicial decisions? If so, is this a good or a bad thing?
- What are the benefits/detriments to society of a system of binding precedent?

Unit 4 --   What is a Conceptual Theory? (1 class)

Readings:

Bix, Chapter 2 – Legal Theory: General Jurisprudence and Conceptual Analysis, pp. 9-29.

Questions for Reflection:

- What is a conceptual claim or theory? Can you prove it?
- How does a conceptual theory differ from a scientific theory?
- How do you critique a conceptual theory? How do you say whether it is good or bad, right or wrong?
- Is it a useful exercise to try to define a concept like "law"? What are some reasons for doing this?
- What are some of the problems of trying to come up with a universal definition or general theory of law?
- Is it useful to try to come up with a theory of law that is timeless, or are there benefits to making the theory specific to a particular time (and/or place)?
- How does language itself complicate conceptual analysis or legal theory generally?

Unit 5 --   Formalism (1-2 classes)

Readings:

Bix, pp. 197-199 on formalism (Chapter 17-2).

Dennis Patterson, *Langdell's Legacy*, 90 Nw. U. L. Rev. 196 (1995).

Materials from Chad Oldfather on Formalism and Precedent posted on TWEN. You can begin on p. 2 of these materials, under the heading "The Substantive Aspect – Formalism/Legalism".

Questions for Reflection:

- How would you define formalism?
- What does it mean for law (or other fields like economics) to be a "science"?
- If law is not a science, what is it?
- How does the formalist theory treat precedent?
- Is formalism concerned with ensuring that justice is done in a case? Should that be a concern of judges or the legal system?
- What social goals are prioritized under the theory of formalism, and which are deemphasized? Do you agree with this prioritization?
- What are some of the pros and cons of a formalist approach to legal reasoning?
- Do you think that formalist ideas are influential today? In what circles?
- What does the theory of formalism suggest about the judicial role and the desirable qualities in a judge?
- Are you persuaded by the theory of formalism?

Unit 6 --   American Legal Realism (2-3 classes)

Unit 6(a)

Readings:

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

Bix, Chapter 17 (American Legal Realism), pp. 195-206.

The Path of the Law is viewed as a transitional piece, showing the move from formalism to legal realism.

In your reading of *The Path of the Law*, please be alert to the following themes, and be ready to discuss them in class.

- The role of logic in the development of the law.

- The relationship between law and morality.
- How Holmes recommends learning the law and reforming it.
- Holmes' view of the "bad man" and what law *really* is.

<u>Questions for Reflection:</u>

- What are the legal realists reacting to?
- What problems would Holmes have with Langdell's view of law as a science, and the educational reforms of Langdell?
- What role does Holmes say history plays in studying the law?
- What do you think Holmes' goals were in *The Path of the Law?*
- Based on *The Path of the Law*, why do you think Holmes is considered to be a precursor to the legal realists?

Unit 6(b):

<u>Readings:</u>

Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 Columbia Law Review 431 (1930). (Available through the HeinOnline database that is accessible through the library's electronic resources. Instructions for accessing materials through HeinOnline are posted in the Course Materials folder on TWEN.)

Be aware that this is a pretty challenging reading, so expect it to take a while to understand and internalize.

<u>Questions for Reflection:</u>

- Does law align with morality for Llewellyn?
- How does Llewellyn tweak Holmes' thesis that law is the prophecies of what the courts will do?
- What is Llewellyn's vision of law as a science?
- For Llewellyn, what are "real rules" and "paper rules"?
- What is essential to Llewellyn in evaluating what the law is or should be?
- Can you identify ways in which Llewellyn builds on the ideas Holmes' expressed in *The Path of the Law?* How are the two pieces similar and different?

Unit 7 -- [Critics of Legal Realism – 2 classes]

Unit 7(a):

<u>Readings:</u>

Lon L. Fuller, *American Legal Realism*, 82 University of Pennsylvania Law Review 429 (1934). (Available through HeinOnline).

Questions for Reflection:

- Be alert to some of the terminology Fuller uses. What do you think he is referring to when he uses the terms "traditional method", "conceptualism", "nominalism" and the "institutional approach"?
- What does Fuller think about acknowledging the role that policy considerations play in legal decision-making?
- What does Fuller think influences human behavior – legal norms or social norms? How do his views on this relate to Llewellyn's?
- What does Fuller think about the Realists' focus on behavior as a good way of interpreting how people understand the law? Does he think an analysis solely of behavior gives a complete picture?
- Does Fuller think societal behavior patterns should be reflected in the law?
- What does Fuller think the Realists' goals are?
- What are Fuller's objections to the Realists and their claims? Where does Fuller agree with the Realists?

Unit 7(b):

Readings:

Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, The American Historical Review, Vol. 75, No. 2 (Dec. 1969). (Available through JSTOR database in the library's electronic resources).

The Purcell piece gives a nice historical overview of the Realist movement and its critics, which should help you see the big picture themes after focusing on individual pieces by Llewellyn and Fuller.

Questions for Reflection:

- What is "ethical relativism"?
- How was the Legal Realism movement viewed as undermining democracy?
- What historical events contributed to this view of the Legal Realists?
- Was the debate between Legal Realism and Natural Law followers one of science versus religion?
- Why were Catholic legal scholars so against Legal Realism? Do you agree with their position?
- What connections do you see between this article and our world today?

Unit 8 -- Classical Natural Law Theory – Thomas Aquinas (2 classes)

Readings:

Bix, pp. 69-76.

Susan Dimock, *The Natural Law Theory of Thomas Aquinas.* Link to SSRN version of article available on TWEN.

> *You will need to download this reading from SSRN, which will require you to create a free account with them. If you have not used this resource before, the Social Science Research Network (SSRN) is an excellent resource in which academic papers in multiple disciplines are posted and made freely available to the public.*

Questions for Reflection:

- Based on Question 90, what is Thomas' definition of law? What attributes does law have?
- What does it mean for a law to serve the common good? How might a law fail to serve the common good? How do we identify just what is the common good?
- Is it in any way useful to read Thomas' theory of natural law? Does it have any relevance for today?
- What is the goal of natural law?
- How do we know what the natural law is? How do we know what is good and what is evil?
- How does natural law theory address the differences in moral codes among different societies? Or even the differences in moral codes within a single society?
- What is human law? Why is it necessary if there is a natural law?
- What if the human law does not align with natural law? Are we obligated to follow it? Overturn it?
- How do we know *whether* human law aligns with natural law?
- Should all vices be subject to human law – punishable by the force of the sovereign?
- Should human law require goodness or just prohibit badness? Or are the two the same? Is failure to perform a good act the same as committing a bad act?

Unit 9 -- Modern Natural Law Theory (2 classes)

Readings:

Bix, Brian, Natural Law Theory: The Modern Tradition. OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, Jules L. Coleman & Scott Shapiro, eds., Oxford University Press, 2002.
  - Please read pp. 62-76, 82-93, and 98-100. Please also skim pp. 77-82 on Lon Fuller.
  - This assignment is available at SSRN: http://ssrn.com/abstract=199928.

- *You will need to download this chapter from SSRN, which will require you to create a free account with them. If you have not used this resource before, the Social Science Research Network (SSRN) is an excellent resource in which academic papers in multiple disciplines are posted and made freely available to the public.*

Questions for Reflection:

- How do different theories of natural law determine what is natural or good?
- Why do you think many modern natural law theorists insist that God does not play a part in their theories?
- How could natural law or natural rights theories be useful in the area of international law?
- What would be the consequences to society if individuals did not follow human laws that they considered to violate the natural law?
- Does a theory that says that we know what is good by how humans behave offer room for improvement in our society? Just because we "are" a certain way, does that mean we "should be" that way, or should we strive for better?
- How do modern natural law theorists argue that natural law theories are superior to positivist theories? Do you agree?
- What are Finnis' 'basic goods'? Do you agree with Finnis that we value these for their own sake? Do you agree that there is no objective hierarchy of how the basic goods should be ranked in importance?
- What are Finnis' 'basic requirements of practical reasonableness'? How are these requirements meant to be used by a person? Would you add or subtract anything from Finnis' list?
- Do you think Finnis' basic goods and basic requirements of practical reasonableness can guide a person in leading a moral life?

Unit 10 -- Classical Legal Positivism – John Austin (1 class)

Readings:

Sections 2-5 of Brian Bix, "John Austin," *The Stanford Encyclopedia of Philosophy,*http://plato.stanford.edu/entries/austin-john/

Questions for Reflection:

- What kinds of questions was Austin seeking to answer? Are these questions worth answering?
- What is Austin's "command theory" of law?
- Who is the "sovereign" under this theory? What are "commands" under this theory?

- What motivates people to comply with the law under the "command theory"? Does this resonate with you? What are other reasons why people might choose to comply with the law?
- Does the "command theory" of law align with how you envision law working in a democracy like ours?
- What have been some of the criticisms of Austin's theory? Do you agree or disagree with them?

Unit 11 --   Modern Legal Positivism (H.L.A. Hart) (2 classes)

Readings:

Chapter 3 of Bix – H.L.A. Hart and Legal Positivism, pp. 33-49 (don't start 3-7).

Questions for Reflection:

- What is "legal positivism"? What are the claims of the theory?
- What is the point of describing a concept without critiquing it?
- Why has legal positivism been viewed as controversial?
- What is the "separability thesis"?
- What were Hart's criticisms of Austin's command theory of law?
- How does Hart distinguish between rules and habits, and why is the distinction worth making?
- What are "rules of recognition" for Hart? What are some examples of rules of recognition in our own legal system? What purpose do rules of recognition serve within a legal system? Can you have a legal system without them?
- What is Hart's "internal aspect" of rules or law? What does Hart think is lost from a theory of law by neglecting the "internal aspect"? How is this related to the ideas of legal realism?
- What does Hart mean by the "open texture" of law? How does this idea relate to our earlier discussions of the indeterminacy of language or rules?
- What is the "minimum content of natural law" for Hart?

Unit 12 --   [Lon Fuller (1 class)]

We will look at Lon Fuller's challenges to Hart's version of Legal Positivism, gaining exposure to his twist on traditional Natural Law theory. You will remember Lon Fuller from his earlier critiques of Legal Realism.

Readings:

Chapter 6 of Bix: "Understanding Lon Fuller".

Questions for Reflection:

- How does Fuller's theory of natural law differ from the "traditional" natural law theories of Aquinas and Finnis?
- What does Fuller see as the "ideal" or goal of law? Why is it important to him to view law as having a goal?
- What is Fuller's definition (or conceptual theory) of law?
- What does Fuller think the relationship is between a lawmaker and those governed by the law? How does this differ from Legal Positivism's view of the relationship?
- What is Fuller's "internal morality" of law? Do you agree with his use of the term "morality" here?
- Do you agree with Fuller that a legal system that follows his "principles of legality" is likely to produce more moral laws?

Unit 13 -- Law and Economics (2 classes)

Readings:

Chapter 18 of Bix, pp. 207-223; 228-234. (skip 18-6 and 18-7).

Questions for Reflection:

- How is law and economics similar to Utilitarianism?
- How does law and economics determine what people want, and what people's priorities are?
- What does it mean for a transaction to be 'Pareto superior'?
- How is 'Kaldor-Hicks' analysis used to justify government action that helps some and harms others?
- What are 'externalities'? Why might it be fair for a business to bear its own 'externalities'?
- What is Coase's idea about the 'reciprocity of causation'? Is this idea persuasive to you?
- What are 'transaction costs'? Why does Coase argue that the initial distribution of entitlements does not affect the final distribution of entitlements a world without transaction costs?
- According to Coase, how do transaction costs affect the final distribution of entitlements?
- Given transaction costs, should the government act to affect the final distribution of entitlements? What principles should guide government actions here?
- Do you agree with Posner that judges should use societal wealth maximization as a guide to making decisions? How would judges know what would maximize wealth?
- Why does Posner think wealth maximization is a better guide to judges than the principles of utilitarianism?

- Why do some critics of law and economics call it "reductive"? Do you agree with this critique?
- What would Justice Holmes and the legal realists think of law and economics?

Unit 14 --   Critical Legal Studies (1-2 classes)

Readings:

To come

Questions for Reflection:

To come.

Unit 15 --   Critical Race Theory (2 classes)

Readings:

Bix, Chapter 19: sections 19-1, 19-3, 19-5.

Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. Ill. L. Rev. 893 (1995). (Available through Hein Online).

Questions for Reflection:

- How do Bell and Bix define critical race theory (CRT)? What are some of its characteristics?
- What is the goal or agenda of CRT?
- What role does resistance play in CRT?
- Are laws written from a neutral perspective? Can they be? What does Charles Lawrence say about this? How has Lawrence argued that a neutral-sounding commitment to "free speech" may not actually be neutral?
- What role does narrative or storytelling play in CRT? Is this an effective technique?
- What does "passing" mean in the story from Cheryl Harris in the Bell article? Why is "passing" significant? What does it reveal about a society in which is it practiced?
- What is Bell's objective in discussing the slave Spirituals in Part III of his article?
- Who has credibility to identify and discuss race issues? Must one be a member of the particular group to even discuss or attempt to resolve these issues?
- Are there problems with treating people of a particular race alike – assuming that they all face the same problems or challenges?

Unit 16 -- [Feminist Legal Theory (1-2 classes)]

<u>Readings:</u>

To come.

<u>Questions for Reflection:</u>

To come.