

Jurisprudence

Professor Emily Kidd White



Osgoode Hall Law School

Fall 2021

Course Outline

1. Jurisprudence (2720.03)

2. Course Instructor: Professor Emily Kidd White, ekwhite@osgoode.yorku.ca

Office Hours:	Tuesdays 2pm-3:00pm, on zoom, by appointment.
Office Location:	3033
Assistant:	Angela Monardo, amonardo@osgoode.yorku.ca , Room 4050 B, T 416.736.2100, ext 33102

3. Course Information:

This is a course in the philosophy of law that approaches its subject matter through the lens of political philosophy. It is a course for students interested in developing their legal reasoning skills and fine-tuning their ability to construct and deconstruct legal arguments and analogies (a vitally important cognitive skill for future litigators). It is a course designed for students interested in raising questions about the legitimacy of law and legal practice. There are no prerequisites for this course. Prior work in philosophy, or legal philosophy, is useful but not at all required.

Our classes will involve critical discussion of classic issues and texts in political and legal philosophy from the 17th century to the present. The organizing topics are: legitimacy, justice, and the nature and moral significance of law. Special emphasis will be placed on the ways in which philosophical conceptualizations of the human person intersect with various justifications for political and legal arrangements, including distributions of rights, goods, and powers. The philosophy of human rights will be explored in depth. The format of the course will be a mix of lectures and seminar-style discussion.

Lecture Recordings: Kindly note that you do not have permission to record our lectures. Most classes will consist for two forty-five-minute lectures on the material, with a break in between. For the most part, these will be recorded and made available on our course site.

- a. **Timing** – The course will take place over Zoom (link to be provided on course website), on Tuesdays from 10:30am-1:20pm.
- b. **Learning Objectives** -- This course has several learning objectives:
 - 1) Students will develop tools for critical reading. In so doing, they will develop a level of competence and facility over several historically influential texts in legal philosophy.

- 2) Students will sharpen their analytical, argumentative, and critical reasoning skills.
- 3) Students will analyze methods of analogy construction and deconstruction in arguments about legitimacy and justice. Students will learn to map common argumentative forms, break down complex arguments, and critically assess premises.
- 4) Students will learn to develop, evaluate, and critically reflect upon normative arguments about the law.
- 5) Students will learn to identify and address various forms of ethical and political argumentation in a legal context
- 6) Students will work to understand the limits to their own knowledge and how this might influence their analyses and interpretations of legal materials, or materials about the law, legitimacy and justice.

c. Evaluation

Evaluation: 70% final examination, 20% participation, 10% two short reaction papers (300-400 words each). **Option:** You may choose to write and submit answers to up to three Write-Your-Own Exam Questions.

Please feel free to email the Professor to set up a zoom meeting to discuss how you are doing in the class, or to receive feedback on the final examination.

i) Reaction Papers

At the start of term, in class, students will sign up to write two reaction papers during the course. Each reaction paper will be approximately 300-400 words in length (no exceptions). Reaction papers should critically engage with one or two issues raised by the assigned readings. Reaction papers are to be emailed to the course instructor by 12:00pm sharp on the Monday before Tuesday's class (late response papers will not be accepted). If circumstances require you to change the week in which you are writing a response paper, please email the Professor as soon as possible. Authors of the reaction papers should be prepared to discuss their contribution with the class.

ii) Participation

It is extremely important that you attend our online lectures. There is an expectation that your camera will be on, though it will be fine if this is not always possible. Attending our online classes will result in a B level participation grade (missing one lecture will not impact your grade).

There are many ways to raise this grade. You might choose to raise questions in class or in a break-out group, answer questions posed by the instructor, speak to your reaction papers in class, participate in break-out groups, report on the work done in break out groups, write an additional response paper, speak to the Professor about the course material in office hours, or send comments/reactions/questions concerning the course materials to the Professor over email (unless otherwise stated, these will be anonymously posed and answered in class). The Professor is open to discussing other forms of participation (introducing a reading, and other forms of responding to the course materials).

iii) Examination

Our final examination is worth 70% of your final grade. Our open-book, online, examination will take place on **Wednesday, December 15, 2021**. The examination will consist of seven questions, with students required to answer **THREE** of them. Students will have 3 hours and 15 minutes to write this exam. The questions will be weighted equally.

iv) OPTIONAL: Write-Your-Own Exam Questions (with 800–1200-word answers)

You may choose to submit up to three Write-Your-Own Exam Questions. The Professor will provide an example of a past exam question on our course website and will speak to this optional assignment in class. You may elect to draft an examination question, have it approved by the Professor (by emailing the Professor directly on or before the last day of classes), and by answering it. There is a strict word limit of 800-1200 words (exam question not included in word count, footnotes included in the word count).

- Questions must be approved by the Professor. Candidate questions must be received by the Professor on or before December 3rd, at 3:30pm. No late questions will be accepted. Questions may be approved at any time in the term, the earlier the better. Please email the Professor your question proposals.
- Answers to your Write-Your-Own Exam Questions are due on the day of the examination by 3:30 p.m. Papers must be submitted electronically through the online drop box.
- If you choose to submit one Write-Your-Own Exam Question, your final exam will consist of four equally weighted answers. If you choose to submit two Write-Your-Own-Exam Questions, your final exam will consist of five equally weighted answers. If you choose to submit three Write-Your-Own-Exam Questions, your final exam will consist of six equally weighted answers.

4. OSGOODE and YORK ACADEMIC POLICIES

a. Academic Honesty and Integrity

Osgoode students are required to maintain high standards of academic integrity and are subject to the York Senate Policy on Academic Honesty and the relevant Osgoode Academic Rules. The Senate Policy can be found at <https://secretariat-policies.info.yorku.ca/policies/academic-honesty-senate-policy-on/> The York University academic integrity website can be found at <http://www.yorku.ca/academicintegrity>

The Senate Policy and Osgoode Academic Rules are also found in the Student Handbook, which is available on the MyOsgoode website, under the Documents and Publications tab.

b. Religious Observance

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates relating to examinations or assignments for this course pose such a conflict for you, please let Assistant Dean, Students, Mya Rimón know within the first three weeks of class.

c. Students with Disabilities and Accommodation Needs

York University has a range of resources to assist students with physical, mental, and learning disabilities/challenges in achieving their educational objectives. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to York's Student Accessibility Services office (N110, Bennett Centre for Student Services or 416-736-5297) or Osgoode's Office of Admissions & Student Services as soon as possible. Students seeking accommodation in experiential education settings are encouraged to read the *Accommodation Information for Clinical & Intensive Program* handout provided to them with their enrolment offer. All requests for accommodation will be kept confidential.

Requests for accommodation for in-term work must be made, in writing, to either the instructor or to the Assistant Dean, Students, Mya Rimón. Such requests must be made as soon as the need for accommodation arises and, barring exceptional circumstances, in advance of the deadline for the work.

Requests for accommodation for final examinations and final papers may only be made to and approved by the Assistant Dean, Students, Mya Rimón and must be made in advance of the examination date or final paper due date.

d. Other York University Policies, including Ethics Review Process

Further information concerning relevant York University academic policies, such as the Ethics Review Process for research involving human participants is available on the webpage of the University Secretariat (see Policies, Procedures and Regulations) <https://secretariat.info.yorku.ca/>

Jurisprudence Reading List

Unless marked optional, the readings listed below are mandatory. Please come prepared to discuss them each class. 20% of your mark will depend on your participation in the course. Each three-hour session will consist of a lecture and a seminar discussion, in which students will discuss with the instructor the day's materials.

Ordered Books:

The following books have been ordered to our campus book store. Second-hand copies should also be readily available for each of these required texts from bookstores around town. Some of these texts, Locke's *Second Treatise of Government*, for example, are available online through the Osgoode Hall Library. These books have also been placed on reserve in the Osgoode Hall Law Library.

Hobbes, *Leviathan* (Penguin Classics; Introduction by C.B. Macpherson)
Locke, *Second Treatise of Government* (Hackett)
Hume, *Political Writings* (Hackett)
Rousseau, *Of the Social Contract* (Hackett)
Hart, *The Concept of Law*, 2nd ed. (Oxford)
John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press)

Notes:

Some readings for the course are open access, with the link provided in the reading list below. Some readings will be available in .pdf format on the Course Website (CW) in accordance with York's Copyright Policy. In other cases, the link will be provided to the article on the CW that will enable you to access the article online using your library access permissions.

In the aims of building on some of the interests and philosophical and legal concerns of the class, the instructor may revise some of the course materials. Should this occur, the instructor will endeavor to give as much notice as possible to the class. **Please check in with our course site weekly.** PDFs of the Prezi lectures will be available at the end of each week.

Week 1: Introduction to Legal Theory/Grotius

August 31, 2021

- Grotius, Prolegomena to the first edition of *The Rights of War and Peace*. (Chapter: Of War Book I, Chapter I). Please use the PDF excerpt available on e-Class. Otherwise available online through the Osgoode Library:
<https://heinonline.org/HOL/P?h=hein.hoil/riwnlan0001&i=27&a=eW9ya3UuY2E>
- Robert Cover, "Violence and the Word", *Yale LJ*, 95. **Please read 1601-1618 (Sections I and II)**. Available online at the Yale Law School Scholarship Repository:
http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3687&context=fss_papers
- **Background reading (not required):** Jeremy Waldron, "Legal and Political Philosophy" in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford, Oxford University Press). Available online through the Osgoode Library:
<http://www.oxfordhandbooks.com.ezproxy.library.yorku.ca/view/10.1093/oxfordhb/9780199270972.001.0001/oxfordhb-9780199270972-e-9>

Week 2: Hobbes - Arguments about Human Nature, Power and Legitimacy

September 7, 2021

- Thomas Hobbes, *Leviathan*, Chapters 13-20, 26, 29-30. Any copy of the text will do; it is also available online. I will refer to passages by chapter and paragraph number. The Penguin Classics edition with an introduction by C.B. Macpherson is a good option.
- Patricia Williams, "The Raw and the Half-Cooked." in *The Humanities and Public Life*, edited by Brooks Peter and Jewett Hilary, 75-82. New York: Fordham University, 2014.
<http://www.jstor.org/stable/j.ctt13x04xg.9>. (CW)
- Maksymilian Del Mar, "Thought Experiments in Law: Practice and Theory". Available online at: <https://junkyardofthemind.com/blog/2017/7/17/thought-experiments-in-law-practice-and-theory>

Week 3: Locke - Arguments about Human Nature, Land, and Ownership

September 14, 2021

- John Locke, *Second Treatise of Government*, Preface, chs 1-10. There are copies of this text available in our library. It is also available online through the Osgoode Library at <https://www.library.yorku.ca/find/Record/1553251>
- Robert Nozick, *Anarchy, State, and Utopia*, Chapter 1, pages 3-10, Chapter 7, sec.1. This text is available in our library. It is also available online. Chapter 7 was published with just a few revisions in the *Philosophy and Public Affairs Journal*, which we have access through via JSTOR. Here is the citation: Robert Nozick, "Distributive Justice", *Philosophy and Public Affairs*, Vol. 3, No. 1. (Autumn, 1973), pp. 45-126. (Read only pp. 45-78).
- John Borrows, "Indian Agency: Forming First Nations Law in Canada", *Political and Legal Anthropology Review*, Vol. 24, No. 2 (November 2001), pp. 9-24 (See in particular, pages 16-19). (CW)

Week 4: Hume – The Value Skeptic, The Broom of the System

September 21, 2021

- David Hume, *A Treatise of Human Nature*, Bk III, Pt II, Sect. I-IV. The text is available online through the Osgoode Library: <https://www-heinonline-org.ezproxy.library.yorku.ca/HOL/Page?handle=hein.beal/trhumn0001&id=1&size=2&collection=animal&index=animal>
- Wallace Stevens, "The Man on the Dump" from *Collected Poems*. Copyright 1923, 1951, 1954 by Wallace Stevens. Available [here](#) via the Poetry Foundation.

Week 5: Rousseau - Public Ideas of Justice

September 28, 2021

- Rousseau, *Of the Social Contract*. Books I & II.
- Charles W. Mills, *The Racial Contract* (Cornell University Press, 1997). “Introduction” and “Overview”.

Week 6: Marxist Critiques of Law

October 5, 2021

- [Hunt, Alan, “Law, State, and Class Struggle” \(1976\)](#)
- [Hunt, Alan, “Marxist Theory of Law” \(1999\)](#)
- For the first hour of class, we will watch: LPE Project - "Revival and Renewal of Marxist Approaches" <https://www.youtube.com/watch?v=2Jua-aA-RU0&t=1s>

Speakers: Nate Holdren (Drake University), Robert Knox (University of Liverpool School of Law and Social Justice), Tor Krever (University of Warwick School of Law), Mai Taha (Goldsmiths University of London School of Law), and Ntina Tzouvala (Australian National University College of Law).

Week 7: Law and Morality I: Legal Positivism

October 12, 2021

- H.L.A. Hart, *The Concept of Law*, Chapters 1-10.

Week 8: Law and Morality II: Ronald Dworkin, Law as Interpretation

October 19, 2021

- Ronald Dworkin, "Justice as Interpretation" *Critical Inquiry* 1982. (CW).
- Ronald Dworkin, "The Moral Reading of the Constitution", *New York Review of Books* (March 21, 1996).
- Ronald Dworkin, "Law from the Inside Out", *New York Review of Books* (November 7, 2013). Available online: <http://www.nybooks.com/articles/2013/11/07/law-inside-out/>

Week 9: The Rule of Law, A Substantive Good?

October 26, 2021

- Jeremy Waldron, "The Concept and the Rule of Law," 43 GA. L. REV. 1 (2008). (CW)
- John Gardner, "The Virtue of Justice and the Character of Law", *Current Legal Problems*, Volume 53, Issue 1, 1 January 2000, Pages 1–30, <https://doi.org/10.1093/clp/53.1.1> (CW)
- Joseph Raz, "The Law's Own Virtue", available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262030; also (CW).
- Shane Chalmers & Sundhya Pahuja, "(Economic) Development and the Rule of Law" in *The Cambridge Companion to the Rule of Law*, eds. [Jens Meierhenrich](#), [Martin Loughlin](#) (Cambridge University Press, 2021). Available online through the Osgoode Library.
- Anne Orford, "A Global Rule of Law" in *The Cambridge Companion to the Rule of Law*, eds. [Jens Meierhenrich](#), [Martin Loughlin](#) (Cambridge University Press, 2021). Available online through the Osgoode Library.

NO CLASS ON NOVEMBER 2 – UPPER YEAR READING WEEK

Week 10: John Rawls - On Justice as Fairness; On Empathy and Imagination in the Construction of Law

November 9, 2021

- John Rawls, *A Theory of Justice* Chapters II (skim) and III.
- Iris Murdoch (1961), 'Against Dryness: A Polemical Sketch', *Encounter* 16 (1). (CW)
- Major Jackson, 'Ferguson (a poem)', *Boston Review*. Available online at: <http://bostonreview.net/poetry/major-jackson-ferguson>
- Maksymilian Del Mar (2017), 'The Legal Imagination', *Aeon*. Available online at: <https://aeon.co/essays/why-judges-and-lawyers-need-imagination-as-much-as-rationality>
- Liberalism After Rawls, with Katrina Forrester (An interview with Nick Serpe in *Dissent*) https://www.dissentmagazine.org/online_articles/liberalism-after-rawls-with-katrina-forrester

Week 11: Anger, Exit, & Violence - Civil Disobedience in the Story of Law's Legitimacy

November 16, 2021

- John Rawls, "A Theory of Civil Disobedience", chapter VI of *A Theory of Justice*.
- Martin Luther King, Letter from a Birmingham Jail. Available online via the The Martin Luther King, Jr. [Research and Education Institute](https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail) (audio available): <https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail>
- Amia Srinivasan, *Would Politics Be Better Off Without Anger?* *The Nation* (November 30, 2016). Available online at: <https://www.thenation.com/article/a-righteous-fury/>
- Rocio Lorca, "Punishing the Poor and the Limits of Legality." *Law, Culture, and the Humanities* (CW)
- Jedidiah Purdy: Laundered Violence <https://nplusonemag.com/online-only/online-only/laundered-violence/>
- Elizabeth Hinton speaking to her book, *America on Fire: The Untold History of Police Violence and Black Rebellion Since the 1960s* at Politics and Prose Bookstore with Nikole Hannah-Jones <https://www.politics-prose.com/video/america-fire-elizabeth-hinton>

Week 12 The Concept of Dignity in the Philosophy of Law

November 23, 2021

- Jeremy Waldron, *Dignity, Rank and Rights* (Meir Dan-Cohen ed., OUP 2012). Chapter 1, “Dignity and Rank” Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220
- Denise Réaume (2013), 'Dignity, Choice and Circumstances', in Christopher McCrudden (ed.), *Understanding Human Dignity* (Oxford: Oxford University Press). Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315177
- Peggy C. Davis, ‘Responsive Constitutionalism and the Idea of Dignity’, 11 U. Pa. J. Const. L. 1373 (2009). (CW)
- *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 54. Headnote, and excerpts that refer to dignity.
- Optional: Paul Daly, “An Age of Facts? R. v. Smith, 2015 SCC 34” Admin Law Matters Blog (June 23, 2015). Available online at: <http://www.administrativelawmatters.com/blog/2015/06/23/an-age-of-facts-r-v-smith-2015-scc-34/>
- Optional: Susan Marks’s Hersch Lauterpacht Memorial Lectures at Cambridge University. If pressed for time, watch the third lecture. <https://www.lcil.cam.ac.uk/lectures-events/hersch-lauterpacht-memorial-lectures>

Week 13: Revision Class for the Final Examination

November 30, 2021

This will be a review class. The instructor will once again clarify the expectations for our final examination. Examples of examination questions will be provided. Together, we will review key themes that emerged over the course. Students are encouraged to bring questions on the course material to this session.