

JURISPRUDENCE AND CRITICAL PERSPECTIVES
LAW 300.04
FALL 2020, Peter A. Allard School of Law

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Monday/Wednesday 2.00-3.30PM (by zoom).

GENERAL APPROACH:

As a law student you may feel that the question “what is law?” is too abstract, speculative, or obvious to merit attention. After all, aren’t you already supposed to be learning law in order to become a legal professional and practice it in the Real World? This course will work on the assumption that the question “what is law?” is neither abstract, nor speculative, nor obvious, but unavoidable and practical. In fact, depending on how you respond to it, even if you do so unreflectively and without much attention in your daily routines, the kind of law that you will be able to learn, imagine, and practice—let alone criticize and reform—will change as well. This is the real and matter-of-fact question that our class in jurisprudence will try to address.

During your first-year Law School, you have probably been exposed to a large number of rules, principles, and institutions. Law is, in addition to all these, a world in which we live. As students of jurisprudence we will explore the rich amalgam of narratives and social imaginaries that enliven the world of law and make it meaningful. We will pursue the inquiry with the help of writers and thinkers that have addressed these questions directly or indirectly, engaging with relevant primary texts. We will learn from key jurisprudential schools (natural law, legal positivism, realism, interpretivism, CLS), but we will also inquire into the cultural life of law, different legal traditions, the constitutive role of legal language, the nature and purpose of legal education, the role of perspective-taking, emotions, race, and sexual difference in adjudication, the development of legal consciousness, and questions of justice and injustice.

Because jurisprudence is not simply a form of abstract theorizing, but also a set of activities and practices by which we bring law to life, the course will include regular writing exercises and responses designed to activate your own critical and reflective abilities and to draw from your experience as law students, practitioners, and legal thinkers.

I. COURSE OBJECTIVES AND LEARNING OUTCOMES

(1) Objectives:

- To introduce students to diverse and theoretically-informed approaches to law.
- To provide first-hand engagement with the work of legal theorists.
- To create opportunities for personal reflection and creative engagement with legal-theoretical questions.
- To activate student ability to draw from their experiences as legal thinkers.

(2) Outcomes:

- After this course, you will be able to identify some of the major participants and schools, as well as different styles of theorizing and approaches to law.
- You will develop a more thorough understanding of what it means to theorize and why it matters.
- You will be able to develop your own personal reflections and perspectives on law.

COURSE MATERIALS: READINGS AND INTERVIEWS

(1) Required Readings: A list of required readings is provided at the end of this document and in canvas, with all the readings available in pdf format. You will be expected to have read ALL the required readings and to develop familiarity with the ideas, arguments, and lines of thought they contain. This list is the minimum amount of readings required to do well in the course.

Read and prepare the reading: underline the important passages, key concepts, and main ideas—and those others that you find unclear, challenging, or worth commenting. Be ready to share your questions, concerns, or critical comments with the rest of the class. (You should post at least 3 questions about the readings in the discussion section in canvas). Do not feel discouraged if you haven't understood everything, or if there are moments where you feel a bit lost. This is what the class discussion is for.

(2) Interviews: In addition to the required readings, I have prepared seven interviews with contemporary legal theorists whose work you will encounter (these are accompanied by 1-page short descriptions of the authors). These “Conversations with Legal Thinkers” have been specifically designed for this class and they are meant to make up for our socially-distanced environment of COVID-19 and offer an opportunity to hear directly from the authors whose work you will encounter in paper!

You should watch these at home by the day marked in the calendar and prepare a very short take away in writing. As an activity, I will ask each of you to prepare one question and/or comment for at least two (2) of the interviews to upload in the discussion section in canvas. We will devote part of the class to discuss the content of the interviews and your responses in class.

* **Further Additional Readings:** a list of further readings will be provided after each unit. These readings are not required and will not be discussed in class, but they expand on the topics covered and can be useful towards writing your final essays. You can find them in the library.

* **Manual:** Because I want you to engage with the work of legal theorists first-hand, we will **NOT** follow any manual, which typically offers second-hand explanations in a condensed manner. If you feel that you need a bit more of background or context for the various jurisprudential schools, I recommend Margaret Davies, *Asking the Law Question*, 4th ed, 2017.

ACTIVITIES: Attendance and participation, Note-Taking (Rapporteurs) and group activities.

Attendance and Participation: Attendance is required, while recognizing that technical and personal barriers may make this more challenging during the pandemic. Preparation is essential to the fruitfulness of the class and the intellectual vibrancy of our virtual community. The course will be meaningful in direct proportion to your level of engagement.

Active participation may be more challenging in the online environment, but there is more than one way to participate and not all require speaking in front of the large class. Participation can also be engaged by uploading thoughtful comments and reflective questions to the readings and interviews, or by actively participating in the smaller groups.

Note-taking/Rapporteurs: On a rotating basis, a group of two or three students will be responsible for taking notes on what went on class. The point is to free the rest of the class from taking notes, so people can concentrate on the discussion. Notes should not a maximum of 2-3 single-space pages (12 Times New Roman) and uploaded to canvas 4 days after the class (for Monday classes on the next Friday; for Wednesday classes by Sunday).

Notes should reflect the main ideas, questions, and passages discussed. They may also include full references to the additional readings suggested. Notes are not a transcript, but should be written with sufficient detail to enable students who were absent in class to identify the key issues and arguments developed. Although notes will be available to all students at the end of the course, they do not in any way substitute for the individual task of reading the materials and preparing your own summaries.

Group Activities: Technology permitting, the class will be regularly divided into groups of 5 students each. The purpose is to develop connection with your peers and work in common assignments, discussions, activities, etc. To foster an atmosphere conducive to learning, it is important that we maintain respectful interactions with other members of the group—and of course with the rest of the class.

ASSESSMENT: Assessment: active engagement and participation (15%), personal reflections (25%), and final essay (60%).

(1) Participation and engagement: 15%: In addition to the expectation to actively participate in the class and group activities, there will be additional moments for monitored participation.

(a) Reading Questions: there will be a section in canvas to post questions about each reading. You should post at least three (3) questions/times throughout the semester.

(b) Interview questions: There will be a section in canvas to post questions and comments about the interviews. You should post a question for at least 2 interviews.

(2) Personal Reflections (25%): each student will write 2 personal reflections (1000 words each) on the topics covered. The deadline for each assignment is marked in the syllabus. Reflections must be handed out in order to complete the course. Late assignments will be penalized. The grade will be cumulative, with an overall grade.

(3) Final Essay: (60%). Students will choose a topic and develop their own jurisprudential essay (4,000 words).

This is an opportunity to engage reflectively with the course-materials. I will value original and well-crafted papers that present thoughtful and insightful arguments: no bullet-point summaries or parroting the views of others. You should be able to go deeper than a superficial engagement with the authors and topics covered, and to draw comparisons and critical questions. The development of a personal and reflective voice will be highly valued, as long as you present your arguments in a convincing and justified manner. As a formal requirement, the paper must include more than a passing reference to at least 5 of the readings.

Assessment criteria in increasing order of difficulty (from lower to higher).

1. Structure and coherence of the paper.
2. Knowledge of the basic concepts and theories.
3. Depth of engagement with the materials.
4. Originality of the writing topic and arguments.
5. Development of a personal voice and theorizing.

Paper should be uploaded in canvas by **Wednesday December 16.**

ACADEMIC INTEGRITY AND PLAGIARISM: All UBC law students are subject to the University's rules on [Academic Misconduct](#) and they are expected to act with academic integrity at all times. Academic honesty is governed by the university's [Academic Honesty and Standards policy](#) Please familiarise yourself with these provisions.

Students should be especially aware of the University's rules in relation to [plagiarism](#). If you plagiarize, you may be subject to penalties set out in the UBC calendar. If you would like to learn more about academic misconduct, visit the UBC Library's website on [academic integrity](#) Examples of academic misconduct can also be found in the [UBC Annual Report on Student Discipline](#). Plagiarism is a serious academic offence that the Law Faculty and the University take very seriously.

NETIQUETTE GUIDELINES FOR COMMUNICATION AND PARTICIPATION

- Remember to practice respect and inclusivity, both in large or small group discussions.
- Do not post or share inappropriate material.
- Once our Zoom session starts, use the chat function for material related to class only.
- Please login to the session on time. Because the class will be taught primarily in a synchronous mode, you are expected to arrive on time.
- Please mute your microphone when you are not speaking, and have your camera on by default unless you have an accommodation relating to these norms. Being present visibly encourages interaction and will help us form a cohort.

STUDENTS WITH DISABILITIES AND ACCOMMODATION NEEDS

If you need some accommodation please contact me so I can better assist you.

ACADEMIC CALENDAR

WEEK 1 Introduction: Thinking jurisprudence (and jurisprudentially)

SEPT 9:

- James Boyd White, “The Study of Law as an Intellectual Activity: A Talk to Entering Law Students,” in *Heracles’ Bow*, 1985, pp. 49-59.
- Val Napoleon, “What is Indigenous Law? A Small Discussion,” University of Victoria Indigenous Law Research Unit, pp. 1-4.

WEEK 2 Historicizing Jurisprudence

SEPT 14:

- Julen Etxabe, “Introduction: Writing a Cultural History of Law in Antiquity,” in Etxabe ed., *A Cultural History of Law*, vol. 1. (2019), pp. 1-20.

SEPT 16

- Michael Hoeflich, “Law & Geometry: Legal Science from Leibniz to Langdell,” *The American Journal of Legal History* 30:2 (1986), pp. 95-121.

* **INTERVIEW:** Prof. Mark Antaki, McGill University.

WEEK 3 Classical Jurisprudence I: Pure Theory and Realism

SEPT 21:

- Hans Kelsen, “The Pure Theory of Law,” *Law Quarterly Review* 50 & 51 (1934-1935), pp. 477-491; and 517-522.
- Margaret Davies, “Second Philosophical thesis: The Earth is (also) flat” in *Asking the Law Question*, Third. Ed., 2008, 6-9.

SEPT 23:

- O. W. Holmes Jr., “The Path of the Law,” *Harvard Law Review* 10 (1897) 1-20.

WEEK 4 Classical Jurisprudence II: Hartian Positivism

SEPT 28:

- Hart, “Law as the Union of Primary and Secondary Rules,” in *The Concept of Law* 70-99.
- Margaret Davies, “Law, Knowledge, and Identity,” in *Asking the Law Question* 15-21.

SEPT 30:

- Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958), **ONLY** pp. 593-624.

WEEK 5 Classical Jurisprudence III: Fuller’s and Dworkin’s Objections

OCT 5:

- Lon Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71 (1958) pp 630-672.

OCT 7:

- Ronald Dworkin, “Hard Cases,” in *Taking Rights Seriously* (1977), pp. 81-94; 101-130.

* **INTERVIEW:** Prof. William MacNeil, Southern Cross University, Australia.

WEEK 6 A New Departure: Law as Normative World

<<<OCT 12: FIRST PERSONAL REFLECTION DUE>>>

OCT 14:

- Robert Cover, “Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983) **ONLY** pp. 4-44.

WEEK 7: Pluralism and the Politics of Judgment

OCT 19:

- Robert Cover (cont’d), “Nomos and Narrative,” pp. 44-68
- Julen Etxabe, *The Normative Universe After Robert Cover*, *Law & Humanities* 4:1 (2010), pp. 115-147.

OCT 21:

- Panu Minkkinen, “‘Enemies of the People?’ The Judiciary and Claude Lefort’s ‘Savage Democracy’” in Arvidsson, Bränström and Minkkinen eds, *Edinburgh*, 2020.

* **INTERVIEW:** Prof. Panu Minkkinen, University of Helsinki Faculty of Law.

WEEK 8 The Cultural Life of Law I: Legal consciousness and race

OCT 26:

- Patricia Ewick and Susan Silbey, *The Social Construction of Legality*, in *The Common Place of Law*, 1998, pp. 33-53 + Chapter One: Millie Simpson, pp 3-14.

OCT 28:

- Patricia Williams, *Alchemy of Race and Rights* (1991), pp. 44-51.
- *R. v. R. D. S.*, [1997] 3 S. C. R. 484 [excerpts]

WEEK 9 The Cultural Life of Law II: Children stories and gendered bodies/spaces

NOV 2:

- Desmond Manderson, “From Hunger to Love: Myths of Sources, Interpretation and Constitution of Law in Children Literature,” *Law and Literature* 15 (2003) pp. 87-141.
- **VIDEO:** *Where the Wild Things Are* (in canvas).

NOV 4:

- Rebecca Johnson, “Blurred Boundaries: A Double-Voiced Dialogue on Regulatory Regimes and Embodied Spaces,” *Law, Text, Culture* 9 (2005), pp. 157-176.

* **INTERVIEW:** Prof. Rebecca Johnson, University of Victoria.

WEEK 10 Law as Tradition and Traditions of Law

NOV 16:

- Patrick Glenn, “Doin’ the Transsystemic: Legal Systems and Legal Traditions,” *McGill Law Journal* 50 (2005), pp. 864-898.

NOV 18:

- John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education,” *McGill Law Journal* 61:4 (2016) 795-846.

NOVEMBER 20: SECOND PERSONAL REFLECTION DUE

WEEK 11 Reconceptualizing Law: Rights and Obligations

NOV 23:

- Jennifer Nedelsky, Reconciving Rights and Constitutionalism, chapter 6 of *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011), pp 231-276.

* **INTERVIEW:** Prof. Jennifer Nedeslky, Osgoode Hall Law School.

NOV 25:

- Scott Veitch, Introduction, in *Obligations: New Trajectories in Law*, forthcoming in Routledge, 2020).

* **INTERVIEW:** Prof. Scott Veitch, University of Hong Kong.

WEEK 12: Law and Globalization: The Emancipatory Potential of Law?

NOV 30:

- Boaventura de Sousa Santos, "Can Law be Emancipatory?" in *Toward a New Legal Common Sense*, Second ed. 2002, pp. 465-495.

DEC 2: * **INTERVIEW:** Prof. James Boyd White, University of Michigan.

DECEMBER 16: FINAL PAPER DUE