

LGST 921 FOUNDATIONS OF BUSINESS LAW

Professors Eric W. Orts and Amy J. Sepinwall

Ph.D. course - Spring 2011

[some readings and course topics subject to change]

Description: This course provides a Ph.D.-level introduction to a range of topics relevant to a theoretical understanding of academic and jurisprudential approaches to law. Topics are selected in part with consideration for “business relevance” and in part for general relevance to the field from an academic perspective with the development of future scholarship and teaching in mind.

Formal requirements: The primary formal assessment of course performance will be based on a *final term paper of 12-15 pages* – double-spaced, including single-spaced footnotes or endnotes. (A single-spaced bibliography may also be appended, if sources are not fully cited in notes. It would count in terms of the page limits.) *The paper topic must be discussed with both professors and approved in advance. A short, written proposal for the paper should be submitted as part of this process (but will not be graded).* In case of conflict, an average of the assessments of the final paper by both professors will determine the final grade. In addition, students will be asked to write *one-page response papers* (double-spaced, two pages maximum) to the readings for each week. Response papers should highlight particular ideas, concepts, or questions of interest (or puzzlement) for class coverage, discussion, and analysis. The quality and regularity of class participation and response papers may be taken into account to increase or decrease a student’s final grade by one-half step (e.g., B+ to A- or vice versa).

Class 1: **Introduction: Law and Legal Reasoning [EO]**

Jan. 12

Reading:

Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Law and Legal Reasoning* (Harvard University Press 2009), especially chapters 1, 2, 3, 6, 8 and 10.

Class 2: **The Relationship of Law and Ethics [EO]**

Jan. 19

Readings:

- Oliver Wendell Holmes, “The Path of the Law,” 10 Harvard Law Review 457 (1897). [*Readings in the Philosophy of Law* (Coleman ed. 1999), pp. 1-22; electronic copy available through library].
- H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 71 Harvard Law Review 593 (1958). [*Readings in the Philosophy of Law*, pp. 23-59; also available at <http://www.unr.edu/philosophy/pdf/320-Hart.pdf>].
- Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” 71 Harvard Law Review 630 (1958), also available at <http://www.unr.edu/philosophy/pdf/fuller.pdf>.

- Ronald Dworkin, "The Model of Rules," 35 University of Chicago Law Review 14 (1967) [*Readings in the Philosophy of Law*, pp. 60-92; electronic copy available through library].
- John Finnis, "On the Incoherence of Legal Positivism," 75 Notre Dame Law Review 1597 (2000) [electronic copy available through library].
- Schauer, *Thinking Like a Lawyer*, chapter 10.

Class 3: **Rights [AS]**

Jan. 26

Readings:

- Joseph Raz, "Legal Rights," 4 Oxford Journal of Legal Studies 1 (1984) [electronic copy available through library].
- H.L.A. Hart, "Are There Any Natural Rights?" 64 Philosophical Review 175 (1955). [*Readings in the Philosophy of Law*, pp. 209-25; electronic copy available through library].
- Joel Feinberg, "The Nature and Value of Rights," 4 Journal of Value Inquiry 243 (1970). [*Readings in the Philosophy of Law*, pp. 227-41; print version available through library].
- David Lyons, "Utility and Rights," in *Ethics, Economics and the Law* (Pennock and Chapman ed. 1982). [*Readings in the Philosophy of Law*, pp. 233-74].
- Jeremy Waldron, "A Right To Do Wrong," 92 Ethics 21 (1981) [electronic copy available through library].

Class 4: **Critical Approaches to Jurisprudence [AS]**

Feb. 2

Readings:

Rights Critique:

- Mark Tushnet, *An Essay on Rights*, 62 Texas Law Review 1363, 1381-93 (1984).
- Morton J. Horwitz, *Rights*, 23 Harvard Civil Rights-Civil Liberties Law Review 393 (1988) [electronic copy available through library].

Critical Legal Studies:

- Roberto Unger, *The CLS Movement*, 96 Harvard Law Review 561-73; 665-75 (1983).
- Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Florida State University Law Review 195, 198-215 (1987).

Identity-Based Critiques:

- Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 1-7 (Yale University Press 1975)
- Catherine MacKinnon, "Sex Equality: On Difference and Dominance," in *Toward a Feminist Theory of the State* 215-34 (Harvard University Press 1991)

Post-Modern Critique:

- Michel Foucault, *The Order of Things, and Archaeology of Human Sciences*, Introduction, p. xv-xvii (New York: Vintage Books, 1970)
- Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* 46-60 (Harvard University Press 1988).

Class 5: Property and Ownership [EO]

Feb. 9

Readings:

- Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 Harvard Law Review 1089 (1972).
- Selections from *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press 2005), pages 45-57 and 81-95.
- A.M. Honoré, "Ownership" [*Readings in the Philosophy of Law*, pp. 557-97].

Class 6: Eminent Domain and Public Welfare [AS]

Feb. 16

Readings:

- Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harvard Law Review 1165 (1967).
- Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 410 Mich. 616 (1981)
- Kelo v. City of New London, 545 U.S. 469 (2005), *available at* <http://www.law.cornell.edu/supct/html/04-108.ZS.html>

Class 7: Contracts [EO]

Feb. 23

Readings:

- Anthony Kronman, "Contract Law and Distributive Justice," 89 Yale Law Journal 472 (1980) [*Readings in the Philosophy of Law*, pp. 598-637].
- Arthur A. Leff, "Unconscionability and the Code – The Emperor's New Clause," 115 University of Pennsylvania Law Review 485 (1967).
- Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press 1981), pp. 1-27.
- Seana Shiffrin, "The Divergence of Contract and Promise," 120 Harvard Law Review 708 (2007).

Class 8: **Corporate Law and Governance [EO]**

Mar. 9

Readings:

- Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) *available at* https://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0518_ZC1.html.
- H.L.A. Hart, "Definition and Theory in Jurisprudence" in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983), pp. 21-48.
- Michael C. Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function," 12 *Business Ethics Quarterly* 235 (2002) [available on JSTOR].
- Margaret M. Blair and Lynn A. Stout, "A Team Production Theory of Corporate Law," 85 *Virginia Law Review* 248 (1999).

Class 9: **Commercial Constitutional Law [AS]**

Mar. 16

Readings:

- Herbert Wechsler, "Toward Neutral Principles in Constitutional Law," 73 *Harvard Law Review* 1 (1959)
- Citizens United v. FEC, 130 S. Ct. 876 (2010)
- Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 *Michigan Law Review* ____ (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620576
- Deborah Hellman, *Money Talks But It Isn't Speech*, 95 *Minnesota Law Review* ____ (forthcoming, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586377

Class 10: **Corporate Criminal Liability [AS]**

Mar. 23

Readings:

- United States v. Hilton Hotel, 467 F.2d 1000 (9th Cir. 1972), *available at* <http://openjurist.org/467/f2d/1000/united-states-v-hilton-hotels-corporation>
- Exxon Valdez: Corporate Recklessness on Trial, in *Business Ethics: Policies and Persons* (McGraw-Hill/Irwin, 4th ed., 2005).
- Model Penal Code sect. 2.07.
- William S. Laufer, "Corporate Bodies and Guilty Minds," 43 *Emory Law Journal* 647 (1994).
- Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 *Boston University Law Review* 307 (1991)

Class 11: **Securities Regulation and Insider Trading [EO]**

Mar. 30

Readings:

- Basic v. Levinson, 485 U.S. 224 (1988).
- SEC v. Texas Gulf Sulphur, 401 F.2d 833 (2d Cir. 1968).
- United States v. O'Hagan, 521 U.S. 642 (1997).
- Alan M. Strudler and Eric W. Orts, "Moral Principle in the Law of Insider Trading," 78 Texas Law Review 375 (1999).
- Excerpt from executive summary of Dodd-Frank financial regulation

Class 12: **Torts [AS]**

Apr. 6

Readings:

- Jules Coleman and Arthur Ripstein, *Mischief and Misfortune*, 41 McGill Law Journal 91 (1995).
- Ernest Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inquiry in Law 1 (2000), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1000&context=til> and Westlaw.
- Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).
- Alan Strudler, *Mass Torts and Moral Principles*, 11 Law and Philosophy 297 (1992) [available on JSTOR].
- Gregory Keating, "Strict Liability and the Mitigation of Moral Luck," 2 Journal of Ethics and Social Philosophy 1 (2006) [available on Westlaw].

Class 13: **International Law [AS]**

Apr. 13

Readings:

- Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 Harvard Law Review 815 (1997).
- Ann-Marie Slaughter, "The Real New World Order," Foreign Affairs, Sept./Oct. 1997.
- John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, excerpts available at <http://198.170.85.29/Ruggie-report-2010.pdf>.
- Doe v. Unocal, 248 F.3d 915 (9th Cir. 2002) available at http://www.haguejusticeportal.net/Docs/NLP/US/Unocal_Burma_Court_of_Appeal_Decision_18-09-2002.pdf.
- Andre Nollkaemper, "Internationally Wrongful Acts in Domestic Courts," 101 American Journal of International Law 760 (2007) [available on Westlaw].
- Medellin v. Texas, Syllabus only, 552 U.S. ____ (2008) available at <http://www.scotusblog.com/wp-content/uploads/2008/03/06-984.pdf>.

- Carlos Manuel Vázquez, “Less than Zero?” 102 American Journal of International Law 563 (2008) [available on Westlaw].

Class 14: **Administrative and Environmental Law [EO]**

Apr. 20

Readings:

- Richard B. Stewart, “The Reformation of American Administrative Law,” 88 Harvard Law Review 1669 (1975) [available on JSTOR and Westlaw].
- Hardin, “The Tragedy of the Commons,” 162 Science 1243 (1968) [available on JSTOR].
- Eric W. Orts, “Reflexive Environmental Law,” 5 Business Ethics Quarterly 789 (1995).
- Eric W. Orts, “Climate Contracts” [working paper].