

PHILOSOPHY OF LAW
PHIL 350-01, FALL 2010
MW 2:00 – 3:15 p.m.
DAVIDSON 107

Instructor: Avery Kolers

Office: Humanities bldg., room 314

Office hours: M, W 12:00 – 1:30, and by appointment

Phone: 852-0453

email: akolers@louisville.edu

web: <https://blackboard.louisville.edu>

Curricular role: this course fulfills an upper-division Humanities elective in the College of Arts & Sciences. **Philosophy majors:** this course fulfills a 300-level requirement in the major.

What this course is about:

A philosophy of law is a philosophy of the nature and justification of a certain form of institution, one which is so pervasive that it is hard to step back and consider it in the abstract. For instance, some people have held that all laws are rules. But even if this is true, not all rules are laws. What does a rule have to be like in order to be a rule of law? Must it just be declared by the strongest person around, and accompanied by a threat of punishment for noncompliance? Must it be part of a set of rules unified by some basic underlying rule or principle? Must laws be just to be valid? Or is it even accurate to speak of the law as a freestanding phenomenon, over and above the political, social, and sometimes arbitrary psychological features of societies and particular persons? These are the core questions of what is often called “analytic jurisprudence,” the theory of the nature of law and legal systems.

Analytic jurisprudence is therefore our first focus in this course: the nature of law and legal validity; the value of the rule of law; and the relationship between law and morality. We will do this by looking at classic and contemporary versions of the main traditional schools of thought regarding the nature of law: positivism, natural law theory, Dworkin’s “third way,” and legal realism and its descendants.

Having surveyed the major theories of analytic jurisprudence we move to “normative jurisprudence”: the consideration of the moral acceptability of legal structures. Such consideration must be undertaken piecemeal, focusing on particular areas of law. In the second part of the course we survey three areas of normative jurisprudence: constitutionalism and judicial review; criminal law; and international law. These brief surveys should give you a sense of the main questions and theories in each area, but, being surveys, they do not permit much deeper consideration. In the third part of the course we therefore go deeper in one area of normative jurisprudence: environmental law. There are many reasons for this focus, among which is the intrinsic philosophical interest in the debate about the relationship between people and the natural environment. But another reason is that the global environment is currently screaming under the impact of human activities, and as we all know, generating an increasing amount of blowback. How might we use the law to articulate and address environmental problems? Can legal fixes lead, or must they follow?

Purpose of the course:

In addressing all these questions we will to some degree simply want to find answers. But every philosophy course has two subject-matters: the content of the course—in this case, what was just described above—and *a particular way of approaching* that content. Philosophical inquiry is in the first instance a method of interacting with what you read, hear, and think. The fundamental questions are: a) “what does this mean?”; b) “if this is true, what are its implications?”; and c) “is this true?” In order to

answer the first question we engage in *conceptual analysis*, which is a fancy word for *definition*. But philosophical definitions are not dictionary definitions; we don't care how a word is generally used, but what the concept is. The premium is on significance and precision. In order to answer the second and third questions we engage in *argumentation*: identifying premises and relationships among them; disambiguating by drawing distinctions; drawing inferences; assessing theses and inferences; and setting up a claim against other salient theses and determining whether they are compatible or incompatible, and why.

Philosophy requires a slight shift in perspective to permit scrutiny of that which is unseen or taken for granted, but no less important for that. Think of radio waves. You could live your life without ever knowing they were there—as people did until the 19th century. But they are all around us, coming from all directions, bouncing off us, sometimes tickling our ear drums. They make possible a lot of modern life. They might be killing us slowly as we talk on cell phones or microwave our popcorn. And – as you know if you've ever operated a shortwave radio (or an FM radio in New York City) – even small distinctions between wavelengths can make the difference between two completely different broadcasts.

Doing philosophy is like attending to radio waves. If your radio waves or your interactions with them got out of whack, things could go quite wrong; your life might even be unbearable. Similarly, if the intellectual structure of your life got out of whack, your life might be unbearable. But if you didn't know about radio waves, or didn't do philosophy, you would never be able to diagnose, let alone fix, the problem.

Moreover, your own confidence that you've got the radio waves in check is not, in itself, evidence that they are in check. If you are not monitoring your connections and listening carefully, you don't have good grounds for your confidence. Certitude is the enemy of philosophy; groundless certitude is the enemy of knowledge. Memorization and absorption of facts are *useful* for philosophy, for the sake of informing our philosophical reflection, but do not themselves constitute philosophy. But at the same time, pure speculation and rumination, unmoored from any purpose, also do not constitute philosophy.

Academic Integrity: Cheating and plagiarism are immoral because a) they are *dishonest* (to me and others), in that the cheater/plagiarist presents as her/his own something that is not; b) they are *unfair* (to classmates), who work hard to meet shared requirements that the cheater/plagiarist circumvents; c) they violate *academic obligations* (to the university) that students voluntarily accept upon enrollment; and d) they may violate *self-regarding duties of self-development or self-perfection* (if such duties exist).

They can also get one in serious trouble. According to the University of Louisville's *Code of Student Conduct*, Section 5, "Academic dishonesty is prohibited at the University of Louisville. It is a serious offense because it diminishes the quality of scholarship, makes accurate evaluation of student progress impossible, and defrauds those in society who must ultimately depend upon the knowledge and integrity of the institution and its students and faculty." It is your responsibility to know this code and comply with its requirements. If I discover violations of this policy I will pursue the required disciplinary channels, which normally involve communicating with the dean for undergraduate affairs. If you have any questions about how to comply with this policy, ask me *in advance*.

Evaluation:

This course will use the +/- system. Grades will be allotted on a 100-point scale as follows:

A+	97.5-100	A	92.1-97.4	A-	89.5-92
B+	87.5-89.4	B	82.1-87.4	B-	79.5-82
C+	77.5-79.4	C	72.1-77.4	C-	69.5-72
D+	67.5-69.4	D	59.5-67.4	F	0-59.4

My courses normally have a final average grade in the range of 80%, which is in C+/B- range. If the average falls below a C+, or about 78%, I will probably boost the average by slightly lowering the letter-grade scale. If the average is above 80%, I will do nothing.

Course Requirements:

1. Reading questions: (5 @ 5)	25%
2. Star Witness Assignment:	25
3. Exams:	45 (=3@15)
4. Attendance	<u>5+</u>
Total:	100%

1. *Reading Questions*. For most reading assignments I will circulate questions in advance, often generated by students (see #2 below). You must write up and submit answers to these on **five** occasions; **at least two of these must be before the beginning of October, and at least two more must be before the beginning of November**. Answers will be due at the beginning of class on the day that we cover the relevant material. In general, answers need not be more than a few sentences or up to a paragraph each.
2. *Star Witness Assignment*. Once during the semester, you will be the Star Witness. This assignment has four parts. First, you choose a topic and meet with me to discuss it. Then, you prepare reading questions for your classmates, which, after you and I discuss them, form the core of the discussion for the day, and you play a major role in the discussion. Finally, you write up an analysis of your focus issue, in light of class discussion. More information will be available on a separate handout.
3. *Exams*. There are three exams. Exam #1 is an **in-class** exam consisting of multiple-choice, short-answer, and essay. Exam #2 is an **oral exam** taking about 20 minutes. I will circulate a schedule and more information separately. Exam #3 is a **take-home** essay to be distributed on the last day of class and turned in, on paper or electronically, by **5:00 p.m. on Wednesday, December 8**. I will provide details later in the semester.
4. *Attendance*. No matter how smart you are or how diligently you read, you will not be able to learn this material alone: philosophy is a discursive subject; lecture and discussion are essential. Attendance is therefore required. Each day I will circulate a sign-in sheet. Every two unexcused absences will cost one attendance point. **After your 10th unexcused absence you will fail the course.**

Handing in assignments. Unless otherwise specified, assignments are always due at the beginning of class on the due date. Late assignments will be penalized **one grade per school day late, beginning 15 minutes after class begins**. If you cannot hand in an assignment on time, you must communicate with me **beforehand** unless it is an unforeseen emergency. In general, physical impossibility and deaths in the family are the only valid excuses for late assignments. I am not flexible on this policy because, no matter how trustworthy you are, I am sad to say that I've learned that some people take advantage of flexibility. I can't fairly or accurately determine who is trustworthy and who is not. So I just need everybody to provide documentation of any claim that is used to excuse a late assignment.

You may hand in assignments on paper, typed with normal margins (like the ones on this document) and normal font (about this size), and bereft of any ornamentation beyond a single staple. Alternatively, you may hand in assignments as email attachments. Your best bet is to use Blackboard's "send email" function, but you can instead **use your UofL (groupwise) account and always cc yourself**. Just make sure you get my email address right. I have an aggressive spam filter and if you use a non-UofL address I cannot guarantee that the spam filter will not eat your message.

If you submit an electronic copy it must be in one of the following document formats **only**: (.doc, .docx, .odt, or .rtf). Other formats risk being unreadable by my computer; if I cannot open your assignment I cannot give you credit for handing it in on time. Electronically submitted assignments are due at the same time as hard-copy assignments.

Disabilities: The University of Louisville is committed to providing access to programs and services for qualified students with disabilities. If you are a student with a disability and require accommodation to participate in and complete requirements for this class, notify me immediately and contact the Disability Resource Center (Robbins Hall, 852-6938) for verification of eligibility and determination of specific accommodations.

Electronic Devices: You may use a laptop in this class but you must sit in the front row if you do so. All other electronic devices are forbidden, except if for some reason you need to be reachable (e.g., your partner is about to go into labor). In such cases you should let me know at the beginning of class that you need to keep your phone on. **Electronic interruptions other than these will count as unexcused absences for the day.**

Required Texts:

1. David A. Reidy, *On the Philosophy of Law* (Wadsworth, 2007)
2. Christopher Stone, *Should Trees Have Standing?* **3rd edition** (Oxford U.P., 2010)
3. Readings available online (see bottom of this document for instructions).
*You **MUST** use the 3rd edition of Stone.

Recommended Resource:

Lawrence Solum's *Legal Theory Blog* (<http://solum.typepad.com/legaltheory/>) includes a weekly "Legal Theory Lexicon" entry. I have listed a number of especially relevant entries at the bottom of the syllabus. I refer to them on the relevant dates by number, e.g. "LTB #__" These are optional but I encourage you to read them.

Schedule*

Date	Topic	Reading	Assignment/Notes
M 8/23	Introduction		
W 8/25	Doing the Philosophy of Law	Reidy, Chap. 1	
Part One: Analytical Jurisprudence			
M 8/30	Positivism	Reidy, pp. 7-23	
W 9/1		Reidy, pp. 23-43 LTB #1	

M 9/6	Labor Day	No Class	
W 9/8		Continued	
M 9/13	Natural Law	Reidy, pp. 44-60	
W 9/15	Dworkin	Reidy, pp. 60-81 LTB #2	Last day to apply for a December degree
M 9/20		Continued	
W 9/22	Realism	Reidy, pp. 82-98	
M 9/27	Law & Economics	Reidy, pp. 98-107 LTB #3, 4, 5	
W 9/29	Continued; Feminist Legal Theory	Reidy, pp. 107-11 and Davies, "Unity and Diversity in Feminist Legal Theory" (online)	
M 10/4	Continued	Continued	
W 10/6	Exam		Exam #1
M 10/11	Fall Break	No Class	
Part Two: Normative and Conceptual Problems of Law			
W 10/13	Criminal Law	Reidy, pp. 151-70	TOMORROW (10/14) is last day to withdraw
M 10/18		Reidy, pp. 170-84	Humphrey Colloquium submission deadline
W 10/20	Constitutionalism	Reidy, pp. 112-27 LTB #6, 7, 8, 9	
M 10/25		Reidy, pp. 127-50	
W 10/27	International Law	Reidy, chapter 7	
M 11/1		Continued; and Shue, "Global Environment and International Inequality" (online)	Exam #2 sometime this week
W 11/3		Continued	
Part Three: A Philosophy of Environmental Law			
M 11/8	Trees	Stone, Introduction and Chap. 1	
W 11/10		Continued LTB #10	Humphrey Colloquium is Friday
M 11/15	Climate	Stone, Chap. 2 parts I, V, and VI (other parts optional)	

W 11/17		Continued	
M 11/22	Agriculture and Oceans	Stone, chaps. 3-4	
W 11/24	Thanksgiving Break	No class	
M 11/29	Future Generations and Sustainable Development	Stone, chaps. 5-6	
W 12/1	How to Heal the Planet	Stone, chap. 7 and Epilogue	
M 12/6	Conclusions	No new reading	Exam #3 distributed in class
W 12/8			Exam #3 due by 5:00

*Schedule is subject to change in the event of missed classes, changes in material to be covered, or other reasons to be determined by the instructor. At no point will you be held responsible for anything that is not in this syllabus or a published successor made available with reasonable advance notice.

Online articles list

1. Margaret Davies, "Unity and Diversity in Feminist Legal Theory," *Philosophy Compass* 2/4 (2007), 650-664. <http://www3.interscience.wiley.com/cgi-bin/fulltext/117982814/PDFSTART>
2. Lawrence Solum's *Legal Theory Lexicon* entries:
 1. "Primary and Secondary Rules": <http://lsolum.typepad.com/legaltheory/2009/12/legal-theory-lexicon-primary-and-secondary-rules.html>
 2. "Rules, Standards, and Principles": <http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html>
 3. "Efficiency: Pareto- and Kaldor-Hicks": http://lsolum.typepad.com/legal_theory_lexicon/2006/10/legal_theory_le_1.html
 4. "Social Welfare Functions": <http://lsolum.typepad.com/legaltheory/2009/08/legal-theory-lexicon-social-welfare-functions.html>
 5. "Prisoner's Dilemma": http://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le.html
 6. "The Countermajoritarian Difficulty": <http://lsolum.typepad.com/legaltheory/2010/01/legal-theory-lexicon-the-countermajoritarian-difficulty.html>
 7. "Interpretation and Construction": http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html
 8. "Strict Constructionism and Judicial Activism": <http://lsolum.typepad.com/legaltheory/2009/11/legal-theory-lexicon-strict-construction-and-judicial-activism.html>
 9. "Originalism": http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html
 10. "Persons and Personhood": <http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-persons-and-personhood.html>
3. Henry Shue, "Global Environment and International Inequality." *International Affairs* 75 (1999), 531-45. <http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.00092/pdf>