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MORAL REASONING 68

Legalism: Ruly and Unruly Thought and Practices

Spring 2004

Prof. Nancy L. Rosenblum

Course Description: “Legalism” refers to rule-making, rule-following, and legal reasoning. This course considers the omnipresence of legalism in every aspect of our lives – from criminal due process to Harvard course requirements to the rules made and enforced by voluntary associations like the Boy Scouts. Public law is only one of many systems of rules under which we live. Our social universe is *jurisgenerative*.

The course invites students to explore the distinctive characteristics of legalistic modes of thought and the moral justifications offered for legalism. We will also consider a variety of moral objections to legalism and the power of romantic resistance to rule-making and rule-following. Legalistic practices and institutions – juries, university disciplinary committees, contracts, “truth commissions”, and others -- provide materials for reflecting on the use and misuse of rule-making and rule-following.

Course Requirements: There will be two take-home essay exams of approximately 6 pages. The **first take-home exam** will be passed out on **February 24** and will be due on **March 2** in class. The **second take-home exam** will be passed out on **March 18** and will be due on **March 25** in class. There will be a final exam covering material from Parts III and IV of the course.

Discussion sections: These are designed to give students an opportunity to raise questions about the meaning and relevance of the readings and lecture themes and to relate them to their own experiences as rule-makers and rule-followers.

Grading: Performance in discussion section will account for 20% of the grade; the two take-home exams will count for 20% of the grade each; the final exam will count for 40% of the grade.

Readings:

- All Source Book selections are noted with **(SB)**. The **MR 68 Source Book** may be ordered on-line from HPPS at www.hpps.harvard.edu/coursepacks.

- Links to the court cases and a list of those from which you must read only excerpts may be found in on the course website in the “Court Cases” folder. Links to several other pieces are available in the “WWW Links” folder. Go to [**www.courses.fas.harvard.edu/~mr68/**](http://www.courses.fas.harvard.edu/~mr68/)
- A copy of the source book on reserve at Lamont and Hilles Libraries
- **On order at the Coop:** Shakespeare, *The Merchant of Venice* and Coetzee, *Disgrace*

Part I. Legalism

Lecture 1. (Feb. 5) The Omnipresence of Legalism: Harvard University as a Legal Entity, Legal Subject, and Private Law-Maker

- Kors and Silverglate, “Sue the Bastards”, from *The Shadow University* **(SB)**

Lecture 2. (Feb. 10) Legalism as a Continuum

- Shakespeare, *The Merchant of Venice*

Lecture 3. (Feb. 12) Varieties of Antilegalism #1: Legalistic Anti-Legalism

- Machiavelli, *The Prince* (Ch. 15, 17, 19); *Discourses on Livy* (Book I Ch. 34, 35, 49; Book III Ch. 13) **(SB)**
- Locke, “Of Prerogative” from *Second Treatise of Government* **(SB)**
- William Jefferson Clinton, “My Reasons for the Pardons” (“WWW Links” on course web-site)

Lecture 4. (Feb. 17) Varieties of Anti-Legalism #2: Moral Skepticism and Moral Aversion

- Carol Gilligan, *In a Different Voice* **(SB)**
- Mary Ann Glendon, *Rights Talk* **(SB)**
- *Bush v. Gore* (excerpted)

Lecture 5. (Feb. 19) Varieties of Anti-Legalism #3: Romanticism and the Law of the Heart

- Rosenblum, “The Law of the Heart” from *Another Liberalism* **(SB)**
- Coetzee, *Disgrace* (Ch. 1-7)

Lecture 6. (Feb.24) Is There Such a Thing as Legal Reasoning?

- *Arkansas Educational T.V. v. Forbes* (excerpted)
- Dershowitz, “The Inconsistency of the Majority Justices” **(SB)**
- **Take home exam #1 handed out Feb 24. Due in class March 2.**

Lecture 7. (Feb.26) Legal Reasoning #2:

- *PGA Tour v. Martin* (excerpted)
- Professors’ amicus brief in the advisory opinion on *Goodridge v. Dept. of Public Health*, pps.9-17, 31-49 (Argument and Sections I.A, II, & III) (“WWW Links” on course web-site)

Part II: Legalism's Domain: Crime and Punishment

Lecture 8. (Mar. 2) The Priority of Due Process

- *Gideon v. Wainwright* (excerpted)
- *Miranda v. Arizona*
- Peter Brooks, "Storytelling Without Fear? Confession in Law and Literature" **(SB)**
- **Take home exam #1 due in class March 2.**

Lecture 9. (Mar. 4) Punishment

- Van den Haag, "The Collapse of the Case Against Capital Punishment" **(SB)**
- Kant, "On the Right to Punish" **(SB)**
- *McCleskey v. Kemp* (excerpted)
- *Penry v. Johnson* (excerpted)

Lecture 10. (Mar. 9) Juries and the Communitarian Element of Justice

- *Taylor v. Louisiana* (excerpted)
- Abramson, "Jury Selection and the Cross Sectional Ideal" **(SB)**
- Butler, "Racially Based Jury Nullification" **(SB)**

Lecture 11. (Mar. 11) "Naming, Blaming, and Claiming": What is an Injury?

- Coetzee, *Disgrace* (Ch. 16-24)
- Felstiner, Abel, and Sarat. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." *Law and Society Review*, Vol. 15, No. 3-4 (1980-81), pp. 631-54 **(SB)**
- Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" **(SB)**

Lecture 12. (March 16) Communal Norms and Civil Injury: Whatever Happened to Blasphemy, Defamation, Group Libel?

- *Texas v. Johnson* (excerpted)
- Mari Matsuda, "Public Responses to Racist Speech" **(SB)**

Lecture 13. (March 18) Norms, Injury, and Due Process: Where?

- Reading TBA
- **Take home exam #2 handed out March 18. Due in class March 25.**

Part III: Legalism in Everyday Life: A Jurisgenerative Universe

Lecture 14. (March 23) “The Triumph of Contract”

- *Shelley v. Kraemer* (excerpted)
- Walzer, “Money and Commodities” **(SB)**
- *Surrogate Parenting v. Kentucky* (excerpted)

Lecture 15. (March 25) Status vs. Citizenship

- Mill, *The Subjection of Women* (Chapters 1 and 2) **(SB)**
- *Reed v. Reed*
- *Goodridge v. Dept. of Public Health* (excerpted)
- **Take home exam #2 due in class March 25.**

Lecture 16. (April 6) Private Law-Making #1

- Rosenblum, “Corporate Culture and Community at Home” **(SB)**
- *Shearwater Assoc., Inc. v. Donald Kline*

Lecture 17. (April 8) Private Law-Making #2

- *Corporation of Presiding Bishops v. Amos*
- Rosenblum, “Amos: Religious Autonomy and the Moral Uses of Pluralism,” *Obligations of Citizenship and Demands of Faith* **(SB)**
- Barry, *Culture and Equality* **(SB)**

Lecture 18. (April 13) Private Law-Making #3

- *Roberts v. Jaycees* (excerpted)
- *Boy Scouts of America v. Dale* (excerpted)
- George Kateb, “The Value of Association” **(SB)**

Lecture 19. (April 15) Communal Law-Making: Multiculturalism and the Rights of Groups #1

- Okin, “Is Multiculturalism Bad for Women?” **(SB)**
- Joseph Raz, “Multiculturalism: A Liberal Perspective” **(SB)**

Lecture 20. (April 20) Communal Law-Making: Multiculturalism and the Rights of Groups #2

- Parekh *Rethinking Multiculturalism* (Chapters 5 and 6) **(SB)**
- Kymlicka, *Multicultural Citizenship* (Chapter 6 pp. 107-116) **(SB)**

Part IV: Laws, Higher Laws, and Even Higher Laws

Lecture 21. (April 22) Constitutionalism as Higher Law

- *Bowers v. Hardwick*
- *Lawrence v. Texas* (excerpted)

Lecture 22. (April 27) Natural Law

- Locke, Second Treatise of Government, Ch. 2-4; 18 **(SB)**
- *Dred Scott* (excerpted)
- Thoreau, "On Civil Disobedience" **(SB)**

Lecture 23. (April 29) International Law as Higher Law

- The United Nations Declaration of Human Rights ("WWW links" on web-page)
- The Princeton Principles on Universal Jurisdiction ("WWW links" on web-page)
- David Miller, "Bounded Citizenship" **(SB)**
- Michael Ignatieff, "Human Rights as Politics" **(SB)**

Lecture 24. (May 4) Cycles of Violence and the Limits of Legalism

- Minow, "Memory and Hate: Are there Lessons from Around the World?" from *Breaking the Cycles of Hatred: Memory, Law, and Repair* **(SB)**
- Mark Galanter, "Righting Old Wrongs," from *Breaking the Cycles of Hatred: Memory, Law, and Repair* **(SB)**
- Ball, "Machette Genocide in Rwanda" **(SB)**

Lecture 25. (May 6) The Limits of Legalism: Truth and Reconciliation Commission

- Film, "Long Night's Journey into Day"