Professor: John Lunstroth
Day/time: MW 9-10:15 am
Location: TBA

Books: Readings to be provided through print shop.
Recommended book: JM Kelly, A Short History of Western Legal Theory (1992)

This course provides an introduction to the main ideas of jurisprudence, legal theory, and the philosophy of law. One of the first things we will grapple with is the difference, if any, between those labels. By the end of the course you will have developed the basic linguistic skills for identifying and discussing jurisprudence and legal theory/philosophy, you will have a sense of the overall development of the western legal tradition (as philosophy), and you will be familiar to some degree with the major figures in the field.

The course will address one question, “what is [the] law?” It will explore the standard answer (provided by legal positivism), and then explore the many reasons positivism is a rather poor vision or image of an answer. Positivism will initially be contrasted with natural law theory; but then we will explore, through the history of philosophy of law, contexts, ideas and approaches that will result in a richer and more interesting vision of the law. We will approach the “historical” not as something from the past that is outdated and wan in light of the glorious present, but as living ideas that enliven the present.

We begin with an exploration of the larger jurisprudential context through various concepts and institutions by and through which we understand law. These ideas reach out into what we might otherwise think of as political theory but which we think of as philosophy of law (as opposed to the narrower jurisprudence). In this part of the class we will become familiar with some institutions of law, e.g.: the state, constitutionalism, international law, custom, global law, human rights, common law; and some philosophical concepts of law: e.g., the “moral order,” codes, justice, right, reasons, sources of law, authority/legitimacy; political theory, and other concepts and kinds of law. The distinction in some cases between institution and concept is thin, so we can understand the initial inquiry to be one into the language of the philosophy of law. We will get acquainted with the question of whether what we are doing or studying is sociology or philosophy.

Contemporary western jurisprudence is preoccupied with and dominated by “legal positivism”. Positivism is a theory about the scope of legal philosophy and the sources of law. Its primary tenets are that law is man-made and separate from moral concerns. It is a scientific theory of law, and is sometimes referred to as the science of law. Its main competition, albeit much smaller in
numbers of direct adherents, is “natural law.” All positivist philosophers of law refute natural law at some point in the expression of their theory or philosophy of law; and likewise the explanation of the role of positive law is *de rigueur* for natural law philosophers. Note that the existence of positive law has never been in doubt or contest; but the philosophy based on the idea that the only law that exists is positive law is deeply contested. After introductory matters, we will learn about these two theories through the fathers of contemporary positivism, Hans Kelsen and Herbert Hart, and through John Finnis a student of Hart and the most prominent face of natural law today, and through Ronald Dworkin, whose work, while analytic can be read as a natural law theory too.

There are numerous other schools or cabals of jurisprudence that in some jurisprudence courses would take up most of the semester. We will deal with them summarily as we have other and bigger fish to fry. These other schools include:

- Legal realism
- Law and economics
- Critical legal studies
- Feminist legal theories
- Critical race theory
- Gay legal rights and narratives
- Postmodern legal theory: pragmatism and poststructuralism

Of these one of the most significant is law and economics, and of the time we spend on these other approaches most will be spent on it. You will have an opportunity to explore one or more of these areas in depth if that interests you.

We will spend at least a third of the class becoming acquainted with the historical development of the philosophy of law. We will do this because the Enlightenment exercised such a profound effect on how law is understood, limiting it in important and interesting ways. In order to understand the law thoroughly we have to understand how law was understood before the Enlightenment, the forces that transformed law in the Enlightenment, and how those transformations developed through the 19th century into the thing we now understand as law. We could spend a few semesters in the historical flow, so will touch only on a few periods and a few philosophers. The goal will to form in your minds some sense of the development of law in the western tradition. The periodization is overly broad and linked to important dates in international law as well as philosophically important dates, but it is suitable to form a beginning outline of the historical development of the philosophy of law.

**Classical**: Aristotle, Cicero, Augustine, Justinian. We will focus on the ideas of natural law, war, Roman jurisprudential sensibilities, and codification. We will begin considering the idea of *order*. War is an important organizing concept in the philosophy of law, both as an historically consistent act that gets framed and reframed by successive philosophies of law, and as an act that defines one of the edges of law inasmuch as it represents the absence of political order.

**Late Middle Ages (~1100 - ~1650)**: Gratian, Thomas, constitutionalism, rights, property, the Church and the Reformation (and you will be exposed to some names from this period although
we may not deal with them, e.g., Ockham, Vitoria, Suarez, Grotius). It is the period when the philosophical basis all of the institutions of contemporary political/legal life were established. The natural law roots of international law.

The Enlightenment (~1650-~1815): Hobbes and the contract theory of political organization; and science. We will focus primarily on understanding how science (as we know it) and the moral emerged as a dialectic after the Protestant revolution, and how the idea of right, once synonymous with the moral, lost its moorings in human nature. We will become familiar with the main philosophical tenets of positivism, and see how it emerges (c. 1840) from early attempts to resolve the dialectic. We will see in this period a kind of eclipse or occultation of natural law, and understand how that is associated more broadly with the rejection of the church in earthly affairs (kinda) and the banishment at the same time of Aristotle. Since right, in this history of ideas, no longer had philosophical legitimacy, the central understanding of the law as entirely man-made and in this sense strangely arbitrary (legal positivism) emerged.

The 19th century (~1815-~1919/45): Hegel, Marx. By the end of the 19th century science proper had assumed the form we see in the academy now: the natural sciences, the life sciences and the social sciences. We will become acquainted with the intimate relationship fixed in this period between science and law, the roots of legal positivism; with the split between European philosophy and Anglo-American philosophy and its impact on legal/political philosophy; with the development of codes as the base of civil law systems; with the effect of Marx’s theories on international law and constitutionalism; and other things. Hegel is, arguably, the last of the great comprehensive philosophers, and you will learn, if nothing else that he has a comprehensive theory of law that stands looming over the positivism/natural law arguments. The 19th century ended sometime between the beginning of WW1 and the end of WW2. We will touch on the theoretical and philosophical significance of the UN Charter as marking the end of an epoch in legal theory.

The 21st century: While the dialogue (or argument) between positivism and natural law continues apace in much of the Anglo-American academy, there is an argument the theoretical and philosophical bases of positivism are beginning to fail. We will explore this argument through the idea that Enlightenment constitutionalism is breaking down. We see this in the ongoing erosion of the idea of sovereignty; the emergence (or return) of the city-state; the size and influence of the informal or “perverse” economy; and the failure of the Enlightenment scientific understanding of the life-world (e.g., as reflected in the philosophical dead-end of neuroscience and the musings of the legal philosopher Thomas Nagel in Mind & Cosmos). As these bases of legal philosophy mutate in the ordinary course of history, we are asked to be nimble and proactive in thinking about the identity of law, the thing about law that does not change as political and social forms develop.

Papers: You will be responsible for four 5-page papers. Papers should be double-spaced, 12 point Times New Roman font, with 1 inch margins on all sides. I provide alternate topics for you to choose from below. Papers should be based on the readings for the class and class discussion and on limited outside research. Apart from cites to materials provided in the readings, no more than 5 sources. I will help you with outside sources. I expect to have substantial interaction with you on your first paper, and as needed on the others, with the exception of the last paper.
I expect the papers to report on a topic, and then evaluate it with regard to either another period or topic we cover. If you find a topic not listed, and want to write about it, please discuss with me first.

Suggested topics follow. You pick 3. Obviously, the further into the semester we go the more topics will make sense, and the list is oriented to the readings. I am trying to make the writing schedule flexible for you, but in general I require one paper a month for the months of February, March, April and May. For the final paper I want you to reflect on your philosophical understanding of the law in light of the class. Final paper is due last day of finals (the May paper).

The relationship between the state and [the] law in MacCormick and Dworkin.
The relationship between positivism and natural law theory; or
Hart and Finnis.
An “other” school of jurisprudence of your choice. You will present the class with a short introduction to your topic.
Natural law theory (Aristotle to Corpus Civilis);
Aristotle on the relation between justice, law, decency and the constitution;
Changes wrought by Christian theology of evil (in Classical period).
The role of quod omnes tangit;
Dominicans v. Franciscans re: property theory;
Relationship between canon and civil law;
Objective and subjective right;
Scholastic analytic methods and the law;
The jurisprudence of colonization: Spain in “America”/”Indians”;
How the idea of nature influenced the idea of law.
Science and law;
Development and theory of codification;
Split of morals and law;
Theory of slavery (or, if desired, the discourse on “master and slave”);
Hegel on freedom and law;
Marx/Engels on the ideology of law and the end of the state;
Law and history;
Vattel’s influence on international law in American jurisprudence;
Development of the idea of the secular state;
The French and American declarations of natural rights;
The relation between natural law and natural right;
The emergence of international law from natural law;
The UN Charter as legal theory;
The law of war (for this I require you to pick a period in discussion with me);
The relation between justice and law;
The breakdown of sovereignty;
Etc.

The following is a provisional schedule. (as of 11/5/13)
NB: The readings are gathered for the general period in which we will be dealing with the topic, not on a per class basis. Reading assignments will not necessarily include all the readings listed.

**Concepts and Institutions**

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<th>Week</th>
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<th>Assignments</th>
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<tr>
<td>Week 1</td>
<td>Jan 13 &amp; 15</td>
<td>Montesquieu, The Spirit of Laws, pp 1-7</td>
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<td>MacCormick, Institutions of Law, pp 1-37</td>
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<td>Susan Marks, defining “ideology”, The Riddle of All Constitutions, pp 8-29</td>
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<td>The central or focal case – Hart CL 13-17, Finnis, NLNR 9-18</td>
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<td>Dworkin, Justice for Hedgehogs, pp 1-19; 400-423</td>
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**Legal Positivism and Natural Law Theory**

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<tr>
<td>Week 3</td>
<td>Jan 27 &amp; 29</td>
<td>Brian Bix, Jurisprudence: Theory and Context, pp 33-81; 91-104</td>
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<td>Herbert (HLA) Hart, Concept of Law (Postscript), pp 238-276</td>
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<td>Hans Kelsen, The Pure Theory of Law (excerpts)</td>
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<td>John Finnis: Natural Law and Natural Right (excerpts)</td>
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<td>Waldron, “Partly Laws Common to All Mankind”, Chap 2</td>
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<td>Robin West, Three Positivisms (excerpts)</td>
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<td>Waldron, The Dignity of Legislation, pp. 7-35 (positivist attitude to legislation)</td>
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**Law & economics; sociology of law; etc.**

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<tr>
<td>Week 6</td>
<td>Feb 17 &amp; 19</td>
<td>Hayman et al: 299-308; 316-319; 325-346; 371-374; 385-394</td>
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<td>Exercise: class reporting on other schools of jurisprudence</td>
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**Classical (~800 BC - ~530 AD)**

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<tr>
<td>Week 7</td>
<td>Feb 24 &amp; 26</td>
<td>Alistair MacIntyre, A Short History of Philosophy, pp 1-13 (development of civilization)</td>
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<td>Allan Chester Johnson et al, Ancient Roman statutes, pp 9-12 (The 12 Tables)</td>
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<td>Aristotle, Ethics (Irwin), Bk v, chap 1, 2, 6, 7, 10 (on justice, law, decency)</td>
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<td>Bk viii, chap 9-11 (on constitutions and friendship)</td>
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<td>Aristotle, Politics (Barker) Bk i, chap 1-7 (constitution theory, slavery)</td>
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<td>JM Kelley, Short History Legal Theory, pp 57-67 (Cicero)</td>
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Huntington Cairns, Legal Philosophy from Plato to Hegel, pp 127-162 (Cicero)
Lloyd Weinreb, Natural Law and Justice, pp 39-49 (Cicero, Augustine, *Corpus Civilis*)
Justinian’s Digest (Monro), Ulpianus et al, pp 1-6 (on justice and law, origins of law)
James Whitman, Origins of Reasonable Doubt, pp 28-40 (Augustine, evil, fear of hell)

**Late Middle Ages (~1100–1650)**
Week 8  Mar 2 & 5
Week 9  Mar 10 & 12

B Tierney, The Idea of Natural Rights, pp 131-169 (Property, Natural Right, Nature)
pp 255-287 (Aristotle and the American Indians)
James Whitman, Reasonable Doubt (Ordeal); pp 52-66
B Tierney; Religion, law, growth of constitutional thought 1150-1650, pp 1-44; 54-65;
80-97; 103-108
Jean Buridan (master and slave), 488-515
Vitoria, On Law, §§121,122,123
On the American Indians, pp 233-251
Harold Berman, Law and Revolution, pp.
Frances Oakley, Natural Law, Laws of Nature, Natural Rights, pp 13-86 (small pages!)

**Enlightenment (~1650 - ~1800)**
Week 10  Mar 24 & 26
Week 11  Mar 31 & Apr 2

Harold Berman, Law and Revolution II, pp 62-99 (Legal philosophy of Lutheranism)
pp 231-269 (changes to English legal phil.)
Hobbes, Leviathan, pp 183-216 (state of nature, contract, natural law)
Martha Nussbaum, Frontiers of Justice, pp 9-54 (contract theory, Grotius – Kant)
Alastair McIntyre, After Virtue, pp 31-61 (on how the moral emerged)
Vattel, The Law of Nations, pp 67-79

**19th Century (~1800 - ~1945)**
Week 12  Apr 7 & 9
Week 13  Apr 14 & 16

John Austin, excerpts from The Province of Jurisprudence Determined
Von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence, pp 17-69
Nils Jansen, The Making of Legal Authority, pp 13-49
Andrew Vincent, Marx and Law, pp 45-63
Max Weber, ed. Gerth & Mills, 77-83; 180-195; 216-221
Harold Berman, Law and Revolution, pp 538-558 (on Marx and Weber)
Hegel, Elements of the Philosophy of Right, pp 25-64 (Hegel’s Introduction)
Conklin, Hegel’s Laws, pp 27-56

**21st century (~1990 - )**
Week 14  Apr 21 & 23

The break-down of Enlightenment forms of legitimacy
National Intelligence Council Global Trends 2030: Alternative Worlds
The shadow banking system
Thomas Nagel, Mind & Cosmos, pp 3-33, 97-128
Waldron, Partly Laws Common to All Mankind, pp 210-223

Wrap-up
Week 15  Apr 28 (last day of class)