

Critical Perspectives on Law 2009 (Fall)

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“This course examines several contemporary critical theories of law in their interdisciplinary settings. Starting with critical legal studies, we trace the emergence in legal scholarship of some or all of the following: deconstruction, communitarianism, feminist relationalism, critical race theory, gender studies / queer theory, critical disability studies, and the return to political economy. We focus upon the challenges raised to dominant legal-theoretical conceptions of autonomy and objectivity, and the contested significance of narrative as a conceptual and methodological tool of legal critique.”

Much of what has been called “critical theory” has sought to address the uneasy heritage and unfulfilled, on some accounts untenable, promises of the Enlightenment: a story of the rise of the individual as the central unit of the moral and political order, and accompanying loss of the sacred or of a shared system of transcendent values by which to orient personal and social life. At the same time, critical theorists have sought to radicalize the study of law and its relationship to politics, diversely conceived under such models as that of deliberative democracy (Habermas) or a pervasive field of power and subjectification (Foucault). Critical theory so understood both responds to and invites deep interpretive contests around questions of justice or justification in law.

This course explores the conceptual background to and recent developments in selected critical perspectives on law. “Critical perspectives” here refers to ways of exposing and challenging the conceptual assumptions and/or oppressive social effects of law and the dominant theory of law’s legitimacy known as liberal legalism. We begin with attention to the anti-foundational critiques of the American Legal Realists writing in the early part of the 20th century, with an eye to the ways these critiques were taken up and transformed within the post-Vietnam Critical Legal Studies movement. Here and throughout the course we find two emphases: 1) a rejection of ultimate justificatory foundations for legal decisions (or the legal order more broadly), and 2) an insistence on the fundamental importance of attention to law’s social (particularly its distributive) effects. We will trace the ways these approaches play out in the work of selected critical and post-structuralist thinkers in and beyond the analysis of law. Our aim is to assess the utility of these interventions as tools for clarifying, problematizing, or creatively re-imagining the role of law in defining, advancing and/or impeding the projects of social justice and equality under contemporary social conditions.

A major focus of the course is whether or how the theoretical approaches examined lend insight not only into the distributive but the constitutive functions of law: law’s role in (partially) constituting the self – one’s identity, one’s goals -- as well as the possibilities for relationship with others. In this we will pay attention to contemporary theoretical and political contests around (and within) the categories of gender, race, sexual orientation, and disability. Our explorations of the interaction of legal norms and imagined and lived identities will proceed with attention to theory, selected case law, and in addition, literary and autobiographical works which render the questions we are pursuing in concrete form. This will require that we engage with the

relationship between theory and storytelling, and the value and limitations of assessing questions of justice with reference to personal or literary narratives.

Ultimately, we seek to arrive at a better sense both of the regulatory function of law (its role in maintaining the status quo) and its potentially transformative function (in light of the lack of immutable or unchallengeable foundations). We will end by contemplating the challenges presented to those committed to carrying forward the insights of theory through the practice of “critical lawyering”.

Required coursework / evaluation

- presentation (opening discussion of class readings) 15%
- participation and response papers 15%
- major paper 70%

Major Paper

I will give you a separate handout on my expectations for the major paper. **I would like you to submit an outline of your paper, including a list of research materials consulted to date, by November 3 at the latest (earlier submissions are most welcome).** I am happy to review drafts of your paper after seeing your outline. The paper is due **Friday, December 18, by 12:00 noon**. The paper is to be handed into reception and date-stamped, and an electronic copy sent to me at sheila.wildeman@dal.ca

Presentations

Students will be asked to sign up for one class in which they will introduce and guide discussion of selected class readings. Each student’s presentation should last about 40 minutes, including time for class interaction and discussion. **The main points you anticipate you will cover in the presentation should be written up and submitted to me by noon on the day of the presentation (format no longer than 2 pages).** This outline will constitute part of your presentation mark so please don’t forget to give it to me.

The presentations are an opportunity for you to offer a critical analysis of the readings - the arguments you found weak or convincing, the proposals that resonated, and/or other thoughts – rather than description. Your critical response should include a set of discussion questions to propose to the class and some interactive exercise. You may assume that everyone has completed the readings.

In general, the presentations will be marked based on the following criteria:

- Review of the arguments in the assigned material – 25%
- Evaluation and analysis – 50-55%
- Ability to stimulate and sustain discussion – 5-10%
- Presentation style / visual aids / creative formats – 0-5%
- Written summary of presentation – 10%

Participation

The class participation grade is divided into two components: in-class participation (5%) and written commentaries (10%).

In-class participation: In-class participation will be evaluated through contributions to class discussion in a constructive and informed fashion (ie informed by the readings). Students are expected to come to class having isolated issues which they would like to explore in a group context.

Written reaction papers: Each student will write a reaction paper in response to the materials assigned for 5 of the 12 classes (not including the class for which you are doing a presentation). These commentaries are to be approximately 2 pages in length, double-spaced, and must be **emailed to the instructor by noon the day of the relevant class**. *Late commentaries will not be accepted for evaluation purposes.*

Students are to compose a reflective commentary on and evaluation of the assigned materials, and as such are expected to go beyond a descriptive summary of their content. You are free to focus on one or two of the assigned readings, although it is helpful if you can very briefly locate the readings on which you are focusing within the wider set of readings assigned for that day. In your commentary, I expect you to identify elements of the readings which you find persuasive, or alternatively weak, or confusing, and indicate why. These commentaries will be drawn upon in class discussion, but will not come back to you in graded form (I grade them as a unit at the course's end).

Students may wish to interweave personal reflections, or even narrative or other creative formats, into their reaction papers. It is possible to construct a set of reaction papers that connect up in a more-or-less cohesive fashion, in the style of a progressive though episodic narrative (akin to a journal), or a fictional genre (a play, a linked set of stories, a long poem). This is by no means expected; it is simply to put a challenge to those of you who may wish to experiment with alternative formats. (As one example of an interweaving analysis and (in this case non-fiction) narrative, see Michelle Oberman's essay, "Judging Vanessa," included in the first week's readings.)

Class schedule

By way of acknowledging that some weeks feature materials that are particularly heavy or dense, I have occasionally indicated the readings that I would like you to focus your attention upon (these are starred and underlined). On such weeks, I would like you to read the other assigned materials, but please approach these as a means of deepening your analysis of the issues raised in the central material(s).

I. Introduction (Sept. 15)

1. Slavoj Zizek, *Welcome to the desert of the real!* (excerpts)

NOTE for 2009: You need read only

- pp. **3-4** (to end of last full para on p.4);
- p.**12** (top line "If we simply. . ." to end of that para);
- p.**15** (last para on page – on the theme of "think for yourself"); &
- p.**20** (from first full sentence to end of essay).

2. Immanuel Kant, "What is enlightenment?" in *Perpetual Peace and Other Essays* (T. Humphrey, trans.)
3. Michel Foucault, "What is enlightenment?" in *The Essential Foucault* (Rabinow & Rose, eds.)
4. Michelle Oberman, "Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood" Working Paper No. 09-06, March 2009 (SSRN Legal Studies Research Papers Series) **NOTE for 2009: Electronic distribution (not in course materials)**

II. Legal Realism & CLS: functionalism (and beyond?) (Sept. 22)

1. **Felix Cohen, "Transcendental nonsense and the functional approach" (excerpts) (1935) XXXV Columbia LR 809
2. **Joseph Singer, "Legal Realism Now" (excerpts) (1988) 76 Cal LR 465
3. David Kairys "Introduction" to *The Politics of Law*
4. Mark Tushnet "The Critique of Rights" (1993) 47 SMU Law Review

III. Law and interpretation: integrity or deconstruction? (Sept. 29)

1. Franz Kafka, "Before the Law" (extract from *The Trial*)
2. **Ronald Dworkin, *Law's Empire* (Preface, extracts from chs. 2 & 7)
3. Jacques Derrida, "Signature, event, context" in *Margins of Philosophy*
4. **Derrida, "Force of Law: The 'Mystical Foundation of Authority'" (extract) in *Deconstruction and the Possibility of Justice* (Cornell, Rosenfeld, Carlson, eds.)

IV. Power, discipline, subjection (Oct. 6)

1. Kafka, "In the Penal Colony" (extract) in *In the Penal Colony* (stories)
2. Foucault, from *Discipline and Punish* (ch 1)
3. **Foucault, "Two Lectures" in *Power/Knowledge*

V. Locating oppression(s): gender, race, culture, class (Oct. 13)

1. Iris M. Young, from *Justice and the Politics of Difference* (chap. 2, excerpt)
2. Lise Gotell, "Towards a Democratic Practice of Feminist Litigation? LEAF's Changing Approach to Charter Equality" in *Women's Legal Strategies in Canada* (Radha Jhappan, ed.)
3. Patricia Williams, "The Pain of Word Bondage" (excerpt) in *The Alchemy of Race and Rights*
4. Sherene Razack, *Looking White People in the Eye* (chap. 6)

Supplementary reading (in text but not assigned this year)

- * Nancy Fraser, "Rethinking Recognition" (2000) 3 *New Left Review* 107

VI. Legitimacy reconstituted? Deliberation, difference and law (Oct. 20)

1. George Elliott Clarke, *Execution Poems* (excerpts)
2. **Jurgen Habermas, "On the internal relationship between the rule of law and democracy" in *The Inclusion of the Other*
3. **Melissa S. Williams, "The Uneasy Alliance of Group Representation and Deliberative Democracy" in *Citizenship in Diverse Societies* (Kymlicka and Norman, eds.)
4. Gerald Postema, "Objectivity Fit for Law" (excerpts) in *Objectivity in Law and Morals* (Leiter ed)

VII. Sex, dependency, poverty (Oct. 27)

1. Martha Fineman, "Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency," (2000) 8 *American University Journal of Gender, Social Policy and the Law* 13
2. Janet Mosher, "Managing the Disentitlement of Women: Glorified markets, the Idealized Family, and the Undeserving Other" in *Restructuring Caring Labour: Discourse, State Practice, and Everyday Life* (Neysmith, ed.)
3. *Gosselin v. Quebec* (headnote)
4. Reread / reconsider: Michelle Oberman, "Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood" from class 1.

VIII In-laws or outlaws? Gay, lesbian and transsexual challenges to heteronormativity (Nov. 3)

1. Brenda Cossman, "Lesbians, Gay Men, and the Charter" (2002) 40 Osgoode Hall LJ
2. **Judith Butler, *Gender Trouble* (excerpts)
3. Kate Bornstein, *Gender Outlaw* (excerpts)
4. ** *Nixon v. Vancouver Rape Relief and Women's Shelter* (BCJ No. 2899)

****Please note** that the *Nixon* case included in the materials was superseded by a B.C. Court of Appeal decision which I will describe in class.

IX. Critical disability theory I: social construction and the lived body (Nov. 10)

1. Susan Wendell, *The Rejected Body* (chap. 1)
2. Shelley Tremain, "On the Government of Disability" (2001) 4 Social Theory and Practice 617
3. Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Canadian Journal of Women and the Law

X. Critical disability theory II: Difference, value pluralism & the challenge of the psychiatric subject (Nov. 17)

1. **Susan Wendell, *The Rejected Body*, (chap. 3, excerpts)
2. Foucault, *Madness and Civilization* (preface)
3. ***Starson v. Swayze* [2003] 1 S.C.R. 722
4. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* [2004] S.C.J. No. 71 (headnote)
5. Factum of Intervenor Michelle Dawson in *Auton* at the Supreme Court of Canada

XI. Liberalism in crisis: identity, pluralism and the stakes of legitimacy (Nov. 24)

1. Carl Schmitt, *The Concept of the Political* (excerpts)

2. David Dyzenhaus, "Introduction: Why Carl Schmitt?" in *Law as Politics: Carl Schmitt's Critique of Liberalism*, Dyzenhaus ed. (Durham and London: Duke UP, 1998)
3. Chantal Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy"

XII. Critical lawyering (Dec. 1)

1. Scott Cummings & Deborah Rhode, "Public Interest Litigation: Insights From Theory and Practice," *Fordham Urban Law Journal*, Vol. XXXVI (2009) [**Handout**]
2. Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" (excerpts) in *Women's Legal Strategies in Canada* (Radha Jhappan, ed.)

Supplementary readings (in text but not assigned this year)

- * Austin Sarat, "Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment" (excerpt) in *Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat & Stuart Scheingold, eds.)
- * Michael McCann & Helena Silverstein, "Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States" in *Cause Lawyering*

OTHER IMPORTANT INFORMATION

PLAGIARISM POLICIES

All students in this course must read

- the University policies on plagiarism and academic honesty referenced in the Policies and Student Resources sections of the plagiarism.dal.ca website, and
- the Law School policy on plagiarism, as set out in the law school regulations (available in hard copy from the Associate Dean's office and online at http://law.dal.ca/Current_Students/Course_Selection_Materials/Regulations_Handbook/index.php)

Any paper or assignment submitted by a student at Dalhousie Law School may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred to above.

Ignorance of the policies on plagiarism will not excuse any violation of those policies.

ACCOMMODATION

Students with Special Needs/Requests for Accommodation

Professor Pothier is the faculty advisor to students with disabilities. Students wishing to discuss in-class accommodation or in-class study assistance needs should see Professor Pothier.

Students seeking special accommodation with regard to any aspect of course evaluation (including exam deferrals and extensions to deadlines) must make an application to the Studies Committee. Academic regulations require such requests to be made as soon possible and, in any event, no later than the date on which the exam is to be written or the paper or other assignment is to be submitted. Students should contact Associate Dean Michael Deturbide or Assistant Dean Elizabeth Hughes for more information about requests for accommodation and about the Studies Committee process.

Pandemic H1N1 Influenza Advisory in relation to Academic Continuity

In the event of an escalation of the pandemic H1N1 influenza virus, the University may need to authorize Academic Units to change elements of class schedules and/or evaluation plans as outlined in course syllabi. Any change is intended to support the primary goal of reducing the risk of spreading a pandemic influenza among students, faculty and staff.

Although it is difficult to predict the severity of the pandemic, the University is committed to minimizing the impact on student's academic progress. Therefore, every effort will be made to provide students with options for continued learning and for continued fair evaluations.

Changes may include but are not limited to:

- Adjustments to course assignments;
- Changes to the dates of exams;
- Arrangements for alternative evaluations for students affected by H1N1 influenza virus;
- Adjustments to work terms;
- Modification of marks awarded for participation;
- Adjustments to attendance policies.

Any alternative plan made in individual courses may be superseded by University-wide or Government measures to reduce the spread of the pandemic H1N1 influenza virus.