

HISTORY 500/LEGAL STUDIES 450:
THE RULE OF LAW IN HISTORICAL PERSPECTIVE

Richard Ross
University of Wisconsin (Madison) History Department
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This course explores the idea of the rule of law from the perspectives of history, jurisprudence, and political theory. After developing the variety of contrasting meanings of the rule of law, the course considers how this ideal has been used and refashioned by partisans in a number of conflicts—including the American Revolution, and debates over slavery, race relations, civil disobedience, crime control, and urban regulation. At the heart of these disputes were differing understandings of what the rule of law meant, and of which law should rule. The course then turns from history to theory and examines prominent critiques and defenses of the value and coherence of the rule of law ideal. The course concludes by discussing whether, as some theorists claim, the rule of law has decayed or been transformed in the last hundred years.

In line with this capacious understanding of the rule of law, the reading list contains a wide variety of sources. You will examine historical articles and monographs. But in line with the interdisciplinary ambitions of this course, you will encounter an unusually high percentage of selections drawn from political theory, philosophy, and jurisprudence.

Format: The course will meet for two seventy five minute sessions per week. As you will see in the syllabus, some of these sessions will feature lectures, while others will focus on collective discussion of the readings (in the nature of a large seminar). Careful preparation and thoughtful participation are essential, particularly in the meetings devoted to discussion.

Reading: A packet of required readings has been duplicated and is available at the Humanities Copy Center in the Humanities Building (room 1650). In addition, please purchase the following books from the University book store on State Street:

Cover, Robert M., Justice Accused: Antislavery and the Judicial Process.

Nonet, Philippe and Philip Selznick, Law and Society in Transition: Towards Responsive Law.

Reid, John Phillip, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution.

Sophocles, Antigone, trans. Richard Emil Braun.

Assignments and Grading: There will be a midterm examination and a final examination. The midterm examination counts for 30% of the final grade; the final examination counts for 60%; and class participation counts for 10%. Class participation will be evaluated based on the quality (insightfulness, pertinence) of discussion, not the number of comments.

Contact Information: I have offices in both the History Department and Law School. I am easier to reach in my law school office (rm. 7111; 263-7604). My email address is: Rjross@facstaff.wisc.edu. My office hours will be on Monday from 4:15 until 5:15 in my law school office. In addition, feel free to contact me by email to schedule a meeting at other times.

I look forward to working with you!

I. INTRODUCTION

Perspectives on the Rule of Law: Its Significance and Alluring Ambiguity; and an Agenda for Study (Class 1, Sept. 4: Lecture)

II. POSING THE PROBLEM: THE COLLISION OF CONFLICTING RULES OF LAW: THE DILEMMA OF ANTIGONE (Class 2, Sept. 9: Discussion of Reading)

Sophocles, Antigone, trans. Richard Emil Braun (Oxford, 1989)

III. WHAT AND WHY: THE SUBSTANCE, JUSTIFICATIONS, AND PURPOSES OF THE RULE OF LAW

A. Roots of the Rule of Law Ideal in Antiquity: Enduring Themes (Class 3, Sept 11: Discussion of Reading; Class 4, Sept. 18: Lecture)

Plato, Statesman, 291d-303b

Aristotle, Politics, Book I, ch. 1; Book III, chs. 4, 11, 15, 16; Book IV, ch. 4.

***Note:** Class does not meet on Yom Kippur religious holiday (September 16)

B. The Modern Rule of Law, I: Substantive and Formalist Accounts (Class 5, Sept. 23: Discussion of Reading; Class 6, Sept. 25: Lecture)

International Congress of Jurists, New Delhi, India, "Conclusions of the Congress" (1959), 4-14.

Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy (Carlton, 1988), 23-42

Robert S. Summers, "A Formal Theory of the Rule of Law," Ratio Juris 6 (1993): 127-142.

Robert S. Summers, "The Principles of the Rule of Law," Notre Dame Law Review 74 (1999): 1691-1712.

C. The Modern Rule of Law, II: The Uneasy Accommodation of Discretion (Class 7, Sept. 30: Discussion of Reading; Class 8, Oct. 2: Lecture)

(1) Friedrich Hayek and the Vices of Discretion

F. A. Hayek, The Constitution of Liberty (Chicago, 1960), 133-61, 205-219.

(2) Discretionary Powers in the Working Legal System: Juries, Police, and Prosecutors

Mortimer R. Kadish and Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (Stanford, 1973), 40-56, 72-85.

(3) Discretion in Legal Interpretation; Or, Can the Rule of Law Be a Law of Rules?

Margaret Jane Radin, "Reconsidering the Rule of Law," Boston University Law Review 69 (1989): 781-83, 792-819

IV. CONTENDING WITHIN THE STATE: WHICH LAW IS TO RULE?

A. Whig Law and Tory Law in the American Revolution (Class 9, Oct. 7: Discussion of Reading)

John Phillip Reid, In a Rebellious Spirit: The Argument of Facts, the Liberty Riot, and the Coming of the American Revolution (University Park, 1979), pp. 1-35

John Phillip Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution (University Park, 1977). Read Chs. 1-3, 7, 10-12, 16 [other chapters optional].

B. The Rule of Law and "Popular Justice": Mobs and Vigilantes (Class 10, Oct. 9: Lecture)

V. LEGAL, EXTRALEGAL, AND ILLEGAL: CIVIL DISOBEDIENCE, CONFORMITY, AND THE CHALLENGE OF UNJUST LAW

A. Defying Unjust Law—Why and to What End? (Class 11, Oct. 14: Discussion of Reading; Class 12, Oct. 16: Lecture)

Henry D. Thoreau, "Civil Disobedience" (1849)

Rev. Martin Luther King, Jr., "Letter from Birmingham City Jail" (1968)

John Rawls, "Civil Disobedience," in A Theory of Justice (1971)

B. Obeying Unjust Law—Why and to What End? (Class 13, Oct. 21: Discussion of Reading)

Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1984). Read: Prelude; Chs. 7 and 8; Postscript to Part II; Introduction to Part III; Chs. 12 and 13 [skip biographies]; Postscript to Part III. [Chapters 10 and 11 are optional]

***Review Session for Midterm** (Class 14, Oct. 23)

***Midterm** (Class 15: Monday, Oct. 28)

VI. GOING BEYOND THE IDENTIFICATION OF LAW WITH THE STATE

A. Legal Pluralism: Coexistence, Tension, and Negotiation among Governmental and Alternative Rules of Law (Class 16, Oct. 30: Discussion of Reading; Class 17, Nov. 4: Lecture)

John Griffiths, "What is Legal Pluralism?," Journal of Legal Pluralism and Unofficial Law 24 (1986): 1-5.

Hendrik Hartog, "Pigs and Positivism," Wisconsin Law Review (1985): 899-935.

Robert Cover, "Foreword: Nomos and Narrative," Harvard Law Review 97 (1983): 4-68 [pp. 60-68 optional]

B. The Uncertain Status of the Rule of Law in "Private Governments" (Class 18, Nov. 6: Discussion of Reading; Class 19, Nov. 11: Lecture)

Stewart Macaulay, "Private Government," in Law and the Social Sciences, eds. Leon Lipson and Stanton Wheeler (New York, 1986), 445-54.

Note, "The Rule of Law in Residential Associations," Harvard Law Review 99 (1985): 472-490.

Susan F. French, "The Constitution of a Private Residential Government Should Include a Bill of Rights," Wake Forest Law Review 27 (1992): 345-352.

David J. Kennedy, "Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers," Yale Law Journal 105 (1995): 761-93. [optional reading]

VII. CRITIQUES OF THE RULE OF LAW

A. The Rule of Law Promotes Subordination to Authority and Impedes Progressive Reforms (Class 20, Nov. 13: Discussion of Reading; Class 21, Nov. 18: Lecture)

Douglas Hay, "Property, Authority and the Criminal Law," in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England (London, 1975), 17-63.

Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?," Yale Law Journal 86 (1977): 566.

Howard Zinn, "The Conspiracy of Law," in The Rule of Law, ed. Robert Paul Wolff (New York, 1971), 15-36.

B. The Rule of Law Saps the Vigor of Democracy (Class 22, Nov. 20: Some Discussion of Reading and Some Lecture)

Allan C. Hutchinson and Patrick Monahan, "Democracy and the Rule of Law," in The Rule of Law: Ideal or Ideology, eds. Allan C. Hutchinson and Patrick Monahan (Toronto, 1987), 97-123.

C. The Rule of Law Obscures Women's Differing Values and Interests (Class 23, Nov. 25: Some Discussion of Reading and Some Lecture)

Robin West, "Jurisprudence and Gender," University of Chicago Law Review 55 (1988): 1-3, 58-68.

Katherine O'Donovan, "Engendering Justice: Women's Perspectives and the Rule of Law," University of Toronto Law Journal 39 (1989): 127-48.

VIII. THE TRANSFORMATION OF THE RULE OF LAW IN THE TWENTIETH CENTURY? TWO MODELS

A. Administrative Justice, the Social Welfare State, and the Decline of Governance through Rules (Class 24, Nov. 27: Discussion of Reading; Class 25, Dec. 2: Lecture)

Theodore J. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority (New York, 1969), 125-56.

Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory (New York, 1976), 192-223, 238-42.

B. From Autonomous to Responsive Law (Class 26, Dec. 4: Discussion of Reading)

Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law (2001). [Chapter 2 on "repressive law" is optional]

C. Trends and Prospects (Class 27, Dec. 9: Lecture)

***Review Session for Final** (Class 28, Dec. 11)

***Final:** Tuesday, Dec. 17 at 7:45 a.m. [room to be announced]