

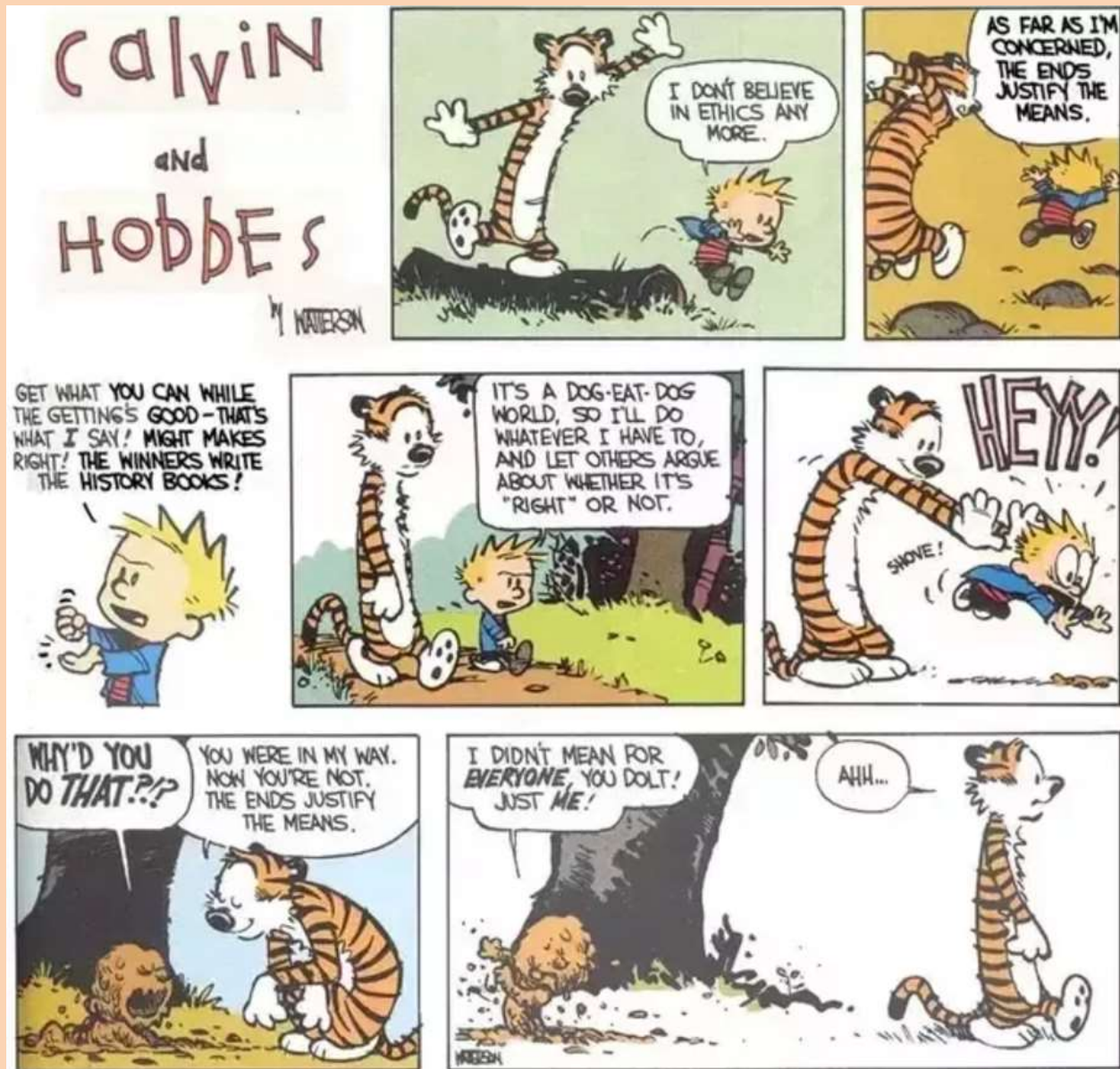
**JURISPRUDENCE AND PHILOSOPHY OF LAW:  
PRINCIPLES, METHODS, AND THEORIES**

**Class activities\***

**Class 1 Sep. 9: Introduction**

**Discussion questions**

- 1) What is Philosophy?
- 2) What questions does Philosophy deal with? Can you think of some examples?
- 3) What is the method of Philosophy?
- 4) What is the connection between Philosophy and Law?
- 5) What do you think Philosophy of Law is about?
- 6) What questions do you think Philosophy of Law deals with? Can you think of some
- 7) Discuss the following cartoon.



## Classes 2 Sep 16: Empiricism vs. Rationalism

### Discussion questions

- 1) Which things that you believe you know could be false?
- 2) Which things that you believe you know must absolutely be true?
- 3) Can something be just 'true for me' and or does truth mean 'true for everyone'? If so, what are some examples?

- 4) How do you know things?
- 5) Is all knowledge political? Does objectivity exist?
- 6) Do men and women think and construct knowledge in different ways?
- 7) Can you know through stories? Think of a story that gives you knowledge better than a concise argument would have.

**Choose one of the following authors and give examples to explain their main theory of knowledge.**

- Heraclitus
- Parmenides
- Plato
- Aristotle
- Descartes
- David Hume
- Kant
- Nietzsche
- Weber
- Postmodernism
- Neo-positivists
- Freud/Lacan

**Discussion on limits to state power**

- 1) Who owns our own bodies? Who decides what we can do with our bodies?
- 2) Are there any exceptions? What are these exceptions? Are they fair? Why or why not?
- 3) Should governments be allowed to mandate Covid tests? Why or why not? What about employers and educational institutions?
- 4) Should governments be allowed to require vaccination? Why or why not? What about employers and educational institutions? What about vaccine passports? If legal/ethical, who should enforce vaccine passports?
- 5) What is an mRNA vaccine? Are mRNA vaccines ethical? Why or why not?

- 6) Discuss the following argument “If the government can control what you put in it, what you do with it, and what you allow others to do to it, then the government is the de facto owner of your body and every organ in it.” Do you agree with it? Why or why not?
- 7) Should we be able to make money by selling organs and other parts of our body? Why or why not?
- 8) Discuss the images below.



## Who owns your body?

By **Andrew Chung** Staff reporter

Sun., Feb. 10, 2008

Some libertarians would say that as individuals, we should be able to choose, if we so desire, to sell one of our two kidneys. It's my kidney, after all, and I can do what I like with it.

The most extreme might go so far as to argue we should be able to sell *both* of our kidneys, even if it means we should die in the process. It's my life, after all.

But when it comes to the brave new world of the buying and selling, not only of our organs but anything our bodies produce, and the prohibitions that come with it, you don't have to be a libertarian to ask the legitimate question, "Just who owns our bodies anyway?"

The government says that, apart from not permitting the sale of organs, we are also not able to sell our semen to a sperm bank or our eggs to a fertility clinic. We can donate, to be sure; we just can't be paid for it.

The national blood bank, Canadian Blood Services, similarly, does not pay anyone for donating blood.

Why shouldn't we make money for providing such valuable human resources? We pay for the oil filter that goes in our car. (We pay an increasingly hefty price for the oil, too.)

Ethicists say that turning donations into transactions diminishes the human element. It turns our bodies, which most of us view as inseparable from our sense of selves, into nothing more than property we own, such as that car, or a bicycle, or that Eli Manning-signed Giants' jersey for sale on eBay.

"It's not just another piece of property that we own, like a watch," says Michael McDonald, the Maurice Young Chair of applied ethics at the University of British Columbia.

We do have a high degree of autonomy as individuals, McDonald argues, "But our bodies are not something we can alienate from ourselves. We don't have the right to sell parts of our own body."

Indeed, we may have scars or tattoos, but we don't have UPC codes that can be scanned to show a price.

"Who owns the body?" he asks. "There are just some things that are not to be bought or sold, not marketable quantities.

"Some, in their religious or cultural views, regard as sacred or holy things that we say 'aren't for sale.' For example, our own moral integrity, it's not for sale."

Questions about the underground world of organ trafficking were thrust into the open last week after the *Star* discovered that a man accused of being the mastermind behind an alleged, massive black-market trade in kidneys was living in Brampton.

Amit Kumar, who is accused of harvesting kidneys from hundreds of poor, sometimes unwilling, Indians, stands as the proxy for all the ethical quandaries in the debate.

In ethics literature some have argued that the creation of a market in which people are free to sell their organs – as long as they're not coerced to do so – could go far in reducing the tortuous reality of years-long waiting lists for transplants. But Kumar's story underscores how such a market would be fraught with exploitation.

"If a decision is uncoerced, if no one's forcing you, you should be in a position where you can make the choice and live with the consequences," posits Leigh Turner, a professor with the McGill University Biomedical Ethics Unit, who studies the global trade in organs. "But once you add poverty and real inequality to the mix, suddenly choice and autonomy starts to look a lot murkier."

In the West, a wealthy person needing a kidney can order a trip from a "medical tourism" company to a place where rules are lax, such as the Philippines, to get a transplant for about \$80,000.

One website Turner visited even allowed customers to add the transplant to the online "shopping cart," as you would add a book on Amazon.com before paying with your credit card.

But the people giving up their kidneys are invariably dirt poor, or indebted, desperately needing the money, Turner adds.

"Some of the poorest people on the planet, can they really be making an autonomous choice that by not selling the kidney they can't buy food to eat? It's really not a free choice of any kind."

Even in Canada, where the income gap isn't as wide and hospital care is top-notch, a regulated market would still attract the lower socioeconomic rungs to donate since they'd need the cash.

What's the harm? Poorer people have it harder in all sorts of ways that we don't regulate out of existence.

"Sure, we allow all kinds of things where poor people have added risks – for example more dangerous jobs," Turner points out. "But another way of looking at it is, do we want to make those inequalities even sharper?"

Moira McQueen, director of the Canadian Catholic Bioethics Institute in Toronto, says the Catholic faith, along with many other religions, views organ donations as a noble venture.

But when money changes hands, it becomes an affront to the basic doctrine of treating others with dignity, she says, because it "turns people into products we can use for our own ends."

"The introduction of monetary payments takes away the 'love of neighbour' aspect and turns it into a commercial transaction," explains McQueen, also a professor of moral theology at the University of Toronto.

Canada doesn't allow payment for human tissue or by-products to avoid just this kind of commodification. The blood policy is, by contrast, related to studies that show blood from paid donors is statistically riskier than from the unpaid.

In the U.S., however, you can sell both your blood and your sperm.

McQueen says the experience there offers reasons for not going in that direction here.

For example, infertile couples or individuals both search for, and are bombarded by, marketing that does not respect the diversity of human beings, she notes.

"Advertisements (touting sperm donors) are along the lines of the young, intelligent, articulate, attractive, physically healthy. They don't advertise for middle-of-the-road people who don't look good or have a weight problem."

If we can't sell our parts, or buy them, does this mean that the state, which prohibits it, is the ultimate owner of our bodies?

McQueen laughs. "I certainly hope not."

She relates it to her faith. "I don't actually own my body, but the state doesn't own it either.

"I feel we're all here by God's grace and our parents as being co-creators of bringing us into existence."

Perhaps it has less to do with ownership of our bodies than control over them.

In many European countries, people are automatically considered organ donors unless they opt out, which is the opposite of our system, in which we must opt-in.

What does this imply?

"There's more control being asserted in that position," UBC's McDonald says. Ethically, "that's one where people start to divide a bit. Some have argued strongly in favour of the European kind of system. Some are more resistant to it."

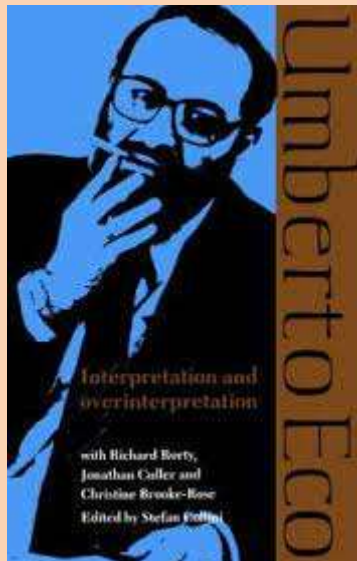
To be sure, the state tells us what we can or cannot do in all sorts of ways. We can't shoot another person. We can't disturb the peace after 11 p.m.

By definition, the government has power because it can make laws and use coercive force to enforce them.

While libertarians would get rid of most of the power beyond the individual, most of society accepts authority as a given.

So when it comes to transacting organs, integral elements of our very being, should it be any different?

### Class 3 Sep 23 Interpretation and Overinterpretation



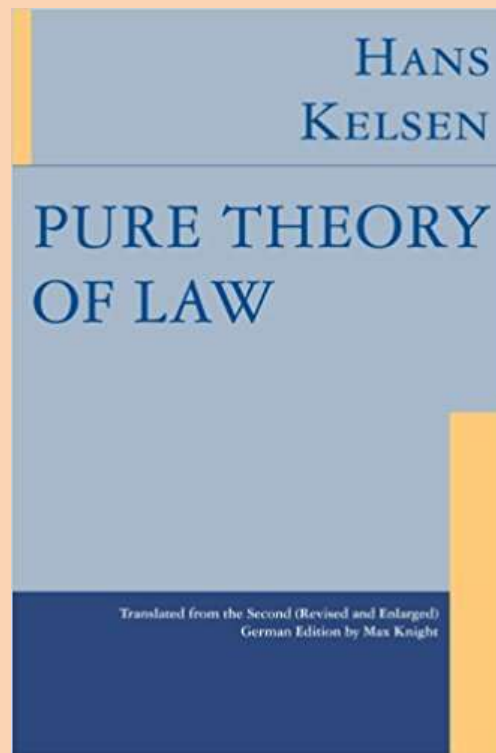
1. What are the main principles for statutory interpretation? Discuss their flaws and advantages.
2. What is Eco's argument about interpretation and overinterpretation? Do you agree? Why or why not?
3. What is Rorty's argument about interpretation and overinterpretation? Do you agree? Why or why not?
4. Discuss the following quote from Eco's book *Interpretation and Overinterpretation*.  
"Evidence [in a text] is considered a sign of something else only on three conditions: that it cannot be explained more economically; that it points to a single cause (or a limited



class of single causes) and not to an indeterminate number of dissimilar causes; and that it fits in with the other evidence.” (p. 49).

5. Briefly read “Bork, Robert H. (1971) "Neutral Principles and Some First Amendment Problems," Indiana Law Journal: Vol. 47: Iss. 1, Article 1.” What is Bork’s main idea? Do you agree? Why or why not?
6. Discuss the following statement accepted as law in Canada “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” What does it mean? Do you agree? Why or why not? What are the flaws of this argument? What are its virtues?
7. Discuss Oliver Wendell Holmes’ quote "We do not inquire what the legislature meant; we ask only what the statute means."

## Legal Positivism Hans Kelsen and Pure Theory of the Law



### Group discussion

- 1) What is Legal Positivism?
- 2) What is Hans Kelsen's Pure Theory of Law?
- 3) What is the basic norm?
- 4) What are the pros and cons of this theory? What are its main implications? What are the criticisms of Legal Positivism?
- 5) Find a judicial case from the Canadian Supreme Court and analyze whether it follows Legal Positivism or not.
- 6) Find a newspaper article dealing with a legal issue that illustrates Legal Positivism.

## **Class 4 Oct. 7 Sociology of the Case and Legal Realism**

### **Martin Shkreli's trial**

#### **Discussion questions**

- 1) Who is Martin Shkreli?
- 2) What is he notorious for?
- 3) Was raising the price of medication to make profit illegal? Is it ethical? What is the difference between legal and ethical?
- 4) Why was he tried for? What has the verdict and sentence?
- 5) When was he incarcerated? Why?
- 6) Analyze Martin Shkreli's case applying the Sociology of the case.

Analyze the following cases from both a Positivist and Sociology of the case perspectives:

1) *Medellin v. Dretke* (2005): A Texas trial court sentenced Medellin, a Mexican citizen, to death for participating in the gang rape and murder of two girls in 1993. A state appeals court affirmed the conviction. Medellin then filed a state habeas corpus action, claiming that Texas failed to notify him of his right to counsel under the Vienna Convention. The Vienna Convention clearly states that if the person detained or arrested is a foreign national, they must, in addition, be promptly informed of their right to communicate with their embassy or consular post. The Vienna Convention on Consular Relations requires that an arrested, detained or imprisoned person be informed of this right without delay. Failure to comply with these rights should result that any conviction rendered should be declared invalid. The case was appealed to the US Supreme Court.

2) *Scales v. United States*. Junius Scales was criminally charged with membership in the Communist Party of the United States under the Smith Act. Challenging his felony charge, Scales claimed that the Free Speech clause of the US Constitution has been interpreted as to protect membership in any organization. In other words, membership in any organization may not constitute a per se violation of any criminal statute. The case reached the US Supreme Court, which had to decide the constitutionality of the Smith Act.

3) *MGM Studios v. Grokster*. Grokster and other companies distributed free software that allowed computer users to share electronic files through peer-to-peer networks. In such networks, users can share digital files directly between their computers, without the use of a central server. Users employed the software primarily to download copyrighted files, file-sharing which the software companies knew about and encouraged. The companies profited from advertising revenue, since they streamed ads to the software users. A group of movie studios and other copyright holders sued and alleged that Grokster and the other companies violated the Copyright Act by intentionally distributing software to enable users to infringe copyrighted works.

4) *US v. Alvarez-Machain* (US S.Ct. 1992). Dr. Alvarez-Machain, a citizen and resident of Mexico, was indicted in the US as an accessory to the kidnapping and murder of a US Drug Enforcement Administration special agent (Dr. A-M allegedly medicated the agent to allow the kidnappers to torture and interrogate the agent further). Unable to gain Dr. Alvarez's presence in the US through negotiations with Mexico, DEA officials arranged for the kidnapping of Dr. Alvarez from Mexico to stand trial in the US. Dr. Alvarez claimed that the US courts lacked jurisdiction to try him because his abduction violated the US-Mexico extradition treaty. US-Mexico extradition treaty:

EXTRADITION Article I OBLIGATION TO EXTRADITE The High Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in the following articles, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order. Article 2 EXTRADITABLE OFFENCES 1. Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least six months or by a more severe sentence or order. Article 11 THE REQUEST AND SUPPORTING DOCUMENTS The request for extradition shall be addressed in writing by the Minister of justice of the requesting Party to the Minister of justice of the requested Party. The request shall be supported by: The original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party; A statement of the offences for which extradition is requested. The time and place of their

commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; A copy of the relevant enactments and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

6) Lopez-Mendoza. Adan Lopez-Mendoza and Elias Sandoval-Sanchez, both Mexican citizens, were ordered deported by an immigration judge in separate proceedings. The orders were issued based upon the INS' arrest without any cause after which each respondent admitted to Immigration and Naturalization Service (INS) officials that they had entered the country unlawfully. Lopez-Mendoza and Sandoval-Sanchez challenged the orders on grounds that their respective arrests by INS officials were illegal and in violation of the Fourth Amendment. The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. According to the Fourth Amendment, if there is an illegal arrest, the fruit of that illegal arrest should be excluded.

**Class 5 Oct. 21**

### **The Speluncean Explorers**

Read the case of the Speluncean Explorers: <https://turtletalk.files.wordpress.com/2012/08/the-speluncean-explorers.pdf>



**Answer the following questions/tasks by using theories, concepts, and readings actually discussed in class. No outside ideas, concepts, or sources may be used.**

- 1) What is the legal rule at issue?
- 2) Suppose you are Umberto Eco. How could you interpret the legal rule? Why? What interpretations of the law would you not accept? Why?
- 3) Suppose you are Richard Rorty. How could you interpret the legal rule? Why? What interpretations of the law would you not accept? Why?
- 4) Choose one of the following philosophers: Plato, Aristotle, or Kant. Write your judicial opinion based on the facts and law in the case (not on current Canadian Law) as if you were your selected philosopher. Address whether the defendants should be convicted of murder and, if so, if they should be executed.
- 5) Suppose you are Donald Black. Write your prediction of the outcome of the case as if you were Donald Black. Address whether the defendants will be convicted of murder and, if so, if they will be executed.

### **Class 6 Oct. 28 Critical Legal Studies/Postmodernism and the Law**

**Read the article and discuss the following questions**

<p style="text-align: center;"><b>ADVANCING RACIAL EQUALITY &amp; SOCIAL JUSTICE</b></p> <p style="text-align: center;"><b>Are government bans on the teaching of critical race theory unconstitutional?</b></p> <p style="text-align: center;">BY ENGY ABDELKADER</p> <p>OCTOBER 7, 2021, 10:22 AM CDT</p> <p>According to recent reports, local legislators have enacted bills in eight states banning the teaching of critical race theory in public schools, colleges and universities. Similar measures have been or soon will be introduced in 20 more.</p> <p>CRT is an analytic framework that illuminates the manner in which racism and inequality are embedded within society and its structures. The anti-CRT legislative movement targets discussion of racism and bias in the public school system while chilling free speech in violation of the First Amendment.</p> <p><b>What's going on? The social, political and legal context</b></p> <p>Significantly, the attack against CRT does not occur in a vacuum; rather, it is part of a pattern of legislative reprisals following 2020's historic racial justice movement and in the aftermath of</p>
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its presidential election cycle. Indeed, the backlash against CRT is part of a broader GOP response to the political mobilization of communities of color.

In response to the Black Lives Matters demonstrations after George Floyd's murder by a Minneapolis police officer, Republican lawmakers introduced more than 80 anti-protest bills across the country. Targeting freedom of expression, some of these measures define a riot as constituting as few as three people and/or expand penalties from monetary fines to multiple-year prison sentences.

Additionally, after historically marginalized communities delivered Democratic victories in November, lawmakers introduced more than 360 voter suppression bills in the first three months of this year, the vast majority by Republicans. Subsequently, in *Brnovich v. Democratic National Committee*, the U.S. Supreme Court's conservative majority upheld a voter suppression measure in Arizona signaling likely hostility to similar challenges from other jurisdictions.

In essence, anti-CRT bills are part of a broader pattern of retaliation steeped in race, politics and the law. But are they lawful?

### **Do Anti-CRT bills pass constitutional muster?**

While the courts have not yet considered the constitutionality of anti-CRT measures, a string of cases from the McCarthy era in the 1950s may prove instructive.

During that time, lawmakers enacted Red Scare laws, including those designed to stifle the teaching of Marxism and Communism. Legal challenges to these measures led to the Supreme Court addressing whether they violated the First Amendment. A representative case is *Yates v. United States* (1957).

In *Yates*, the high court drew a distinction between advocating for unlawful action and the academic discussion of such a doctrine in the abstract. Indeed, laws that bar academic discussion—even of concepts that a subset of the public deems provocative or controversial—will not survive constitutional scrutiny unless such instruction crosses over into advocacy of unlawful conduct.

It is significant to note that this legal principle is implicit in other Supreme Court rulings. Consider, for instance, the religion clause cases.

In the post-9/11 context, parents have posed legal challenges to classroom instruction about Islam and Muslims in public education. While an entirely distinct legal standard applies in those cases, particularly where allegations of establishment clause violations are involved, the same implicit rule has emerged. The courts consistently defend the academic discussion of such subjects even when viewed as unpopular by a subset of the general population. These courts have reasoned that the classroom is a “marketplace of ideas” where a robust exchange should yield truth. As such, anti-CRT bills that bar the discussion of racism and bias in the classroom are likely unconstitutional.

### **What's the point of public education, anyway?**

In *Brown v. Board of Education*, the Supreme Court struck down its prior ruling in *Plessy v. Ferguson* by ending racial segregation in public schools, which began the demise of Jim Crow laws. Significantly, the *Brown* court reminds us of public education's primary purpose: "Today, education is the most important function of state and local governments. ... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed. In life if he is denied the opportunity of an education."

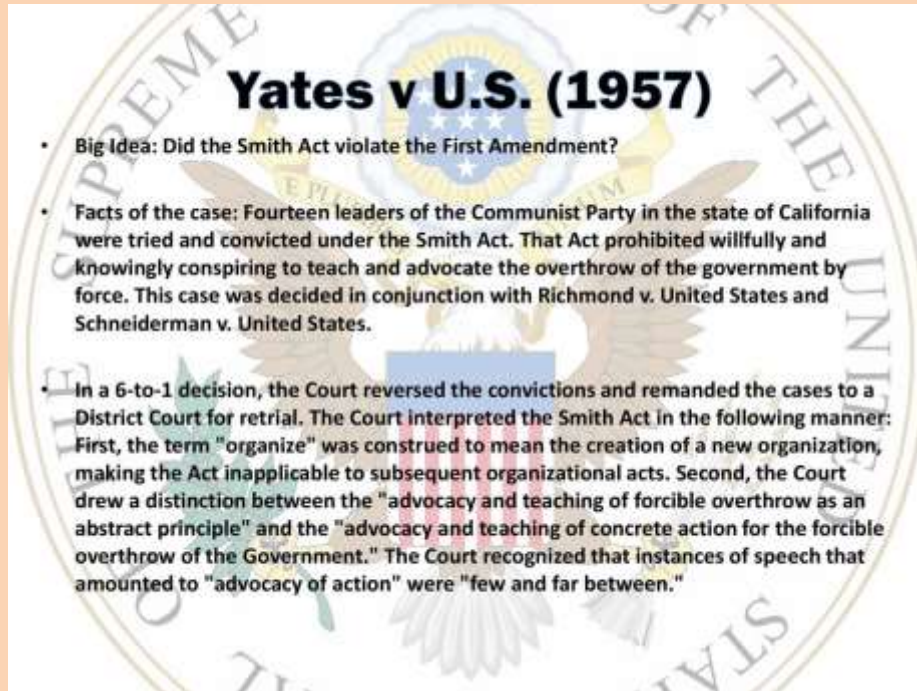
Essentially, *Brown* teaches that public education is the foundation of good citizenship in democratic society. As such, if we are to address the scourge of racism and bias in our society and its structures, social change begins with a relevant education.

Indeed, consider the lived experiences of historically marginalized groups in contemporary America. According to the 2019 FBI Hate Crimes Statistics report, historically marginalized groups, including African Americans, Asian Americans, Jewish Americans, Latinos and Muslim Americans, continue to experience disproportionate rates of interpersonal violence. Further, regarding institutional discrimination, African Americans are disproportionately affected by police brutality, racial profiling while driving and stop-and-frisks. And Latinos and Muslim Americans are affected by discriminatory immigration laws also known as structural racism.

As such, good citizens in our democracy require an appropriate critical lens to understand the ways that racism and inequality manifests in interpersonal, institutional and structural contexts. CRT provides that necessary analytic framework.

- 1) What is Critical Race Theory? What is its goal?
- 2) What are the benefits of Critical Race Theory?
- 3) Why have there been many state laws banning or restricting the teaching of CRT in public schools in the US? Do you agree with these laws? Why or why not?
- 4) What are the facts in *Yates v. United States* (1957)? What did the Smith Act regulate?
- 5) What is the main tenet of *Yates*?
- 6) Do you agree that universities are a "marketplace of ideas"? Why or why not? Should there be any limits to the academic discussion of ideas at universities? What about the academic discussion of ideas that the "public deems provocative or controversial"?
- 7) Find some other quotes from *Yates v. United States* and discuss them.
- 8) Is there a similar situation in Canada?





## Yates v U.S. (1957)

- **Big Idea:** Did the Smith Act violate the First Amendment?
- **Facts of the case:** Fourteen leaders of the Communist Party in the state of California were tried and convicted under the Smith Act. That Act prohibited willfully and knowingly conspiring to teach and advocate the overthrow of the government by force. This case was decided in conjunction with *Richmond v. United States* and *Schneiderman v. United States*.
- In a 6-to-1 decision, the Court reversed the convictions and remanded the cases to a District Court for retrial. The Court interpreted the Smith Act in the following manner: First, the term "organize" was construed to mean the creation of a new organization, making the Act inapplicable to subsequent organizational acts. Second, the Court drew a distinction between the "advocacy and teaching of forcible overthrow as an abstract principle" and the "advocacy and teaching of concrete action for the forcible overthrow of the Government." The Court recognized that instances of speech that amounted to "advocacy of action" were "few and far between."

## The Rule of Law

### Discussion questions

- What is the rule of law? What does it mean that Canada is a country of laws and not of men?
- Give examples of ways that the rule of law has an impact on your life.
- According to the rule of law theory, what is the responsibility of judges when their personal opinions are in conflict with the rule of law in the case before them?
- What is the myth of the rule of law? What is John Hasnas' main claim about the rule of law? Why is law predictable? Why is the outcome of cases uniform and predictable?
- When does the law become less predictable? What do judges have in common?
- Think of recent examples that contradict the rule of law theory.
- Think of examples that support the rule of law theory.
- Discuss the following quotes about the rule of law. Identify what components of the quotes and comments you think are essential to a definition of the rule of law. Consider any important aspects of the rule of law that you do not see reflected in the quotes and comments. What are they?

To make laws that man cannot and will not obey serves to bring all law into contempt. It is very important in a republic that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?  
—Elizabeth Cady Stanton (1860)

There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.  
—U.S. Supreme Court Justice Felix Frankfurter,  
United States v. United Mine Workers (1947)

I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.  
—Martin Luther King, Jr.,  
“Letter from Birmingham Jail” (1963)

Neither laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary.  
—U.S. Court of Appeals Judge Diane Wood,  
“The Rule of Law in Times of Stress” (2003)

- Do an online search of quotes that reflect your understanding of the rule of law.

### **That’s My Spot**

Prepare and argue the appeal for Sheldon Cooper’s contempt of court.

**Identify the predominant theory of law in the following statements and explain them**

1. Law and society are always in flux, and courts adjudicate with an eye to law's practical effects. Morality has nothing to do with law; it amounts to little more than a state of mind. There are no objective standards for determining right and wrong and therefore no simply just answers to legal questions. Legal adjudication has no natural or even constitutional basis; instead it comes down to weighing questions of social advantage according to the exigencies of the age.
2. Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted.
3. The Bluebook is an absurdity, but it endures, in fact thrives, impervious to criticism and ridicule. The judiciary navigates the sea of modernity, slowed, thrown off course, by the barnacles of legal formalism (semantic escapes from reality, impoverished sense of context, fear of math and science, insensitivity to language and culture, mangling of history, superfluous footnotes, verbosity, excessive quotation, reader-unfriendly prose, exaggeration, bluster, obsession with citation form) – an accumulation of many centuries, yet constantly augmented. There is little desire to give the hull a good scraping. There is fear that the naked hull would be unsightly, even unseaworthy. The fear is overblown. A week after all the copies of the Bluebook were burned, their absence would not be noticed.
4. Austin's model of law is referred to as "command theory:" Law, Austin reasons, has the status of command. Austin then defines 'command' as any signification of a desire by the sovereign. He then defines the sovereign as "the determinate rational being or body that the other rational beings are in the habit of obeying." Each of these further definitions is an attempt to substitute a descriptive analysis of some prescriptive concept. The notion of a 'command', for example, includes a normative element of authority and imperative (as distinct from a presumptive request). Similarly, 'sovereign' has a normative element of legitimacy. He tries to define these both away through the notion of shared habits. The rest of the definition of 'command' is important. Austin's analysis of a law is different from a normal command in the sense that a law must be logically general. The court makes particular judgments, but the legislation is always general in form. A direct, one-time command to an official is not law. Law is a command to "forbear a whole class of acts."

There is a further element that Austin thinks is inherent in the notion of law-namely that of punishment. However, 'punishment' also has a normative connotation, namely, of a harm that is "deserved" or results from violation of a valid law. This Austin tries to define away with the words "accompanied by the threat of evil in case he does not."

5. Former Supreme Court Justice Sandra Day O'Connor that a "wise man" and a "wise woman" should necessarily reach the same verdict.
6. Out of my own experience as a trial lawyer, I can testify that a trial judge, because of overeating at lunch, may be somnolent in the afternoon court-session that he fails to hear an important item of testimony and so disregards it when deciding the case. "The hungry judges soon the sentence sign, And wretches hang that juryman may dine," wrote Pope. Dickens' lovers well remember Perker's advice to Pickwick: "A good, contented, well-breakfasted juryman, is a capital thing to get hold of. Discontented or hungry jurymen, my dear sir, always find for the plaintiff."
7. Law is defined as an aggregate or system of norms, as a normative order. Now, what is a norm? A norm is a specific meaning, the meaning that something ought to be, or ought to be done, although actually it may not be done. There are different kinds of norms, norms of thinking, that is, logical norms, and norms of acting, that is, moral and legal norms. According to a legal norm, men ought to behave under certain conditions in a certain way. That a man ought to behave in a certain way means that this behavior is prescribed or permitted or authorization. Such a norm may be the meaning of an act of will of one individual intentionally directed at the behavior of another individual.
8. Our Lord is delivering his Sermon on the Mount –Jesus addresses the question of His relationship to the Law of Moses. "Jesus does not want to erase the commandments that the Lord gave through Moses," explained Pope Francis. "Rather," he continued, "He desires to bring them to their fulfilment – and He immediately adds that this 'fulfillment' of the Law requires a higher justice, a more authentic observance. The Holy Father went on to note the words of Jesus to His disciples: "Unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven." The Pope explained that Jesus does not give importance to rote observance and outward conduct. "He goes to the root of the law, focusing above all on the intention and therefore on the human heart," which is the source of our actions for good and for evil. Pope Francis said that profound

motivations, the expression of a hidden wisdom, of God's wisdom, are needed in order for us to act well – not merely good rules and legal norms. “The Wisdom of God,” he said, “can be received through the Holy Spirit: and we, through faith in Christ, open ourselves to the action of the Spirit, which enables us to live God's love.” The Holy Father concluded, saying, “In light of this teaching of Christ, every precept reveals its full meaning as a requirement of love, and all [precepts] come together in the greatest commandment: love God with all your heart and love your neighbor as yourself.”

9. Justice is what the judge ate for breakfast.
10. The principles of society are the laws, which Almighty God has established in the moral world, and made necessary to be observed by mankind; in order to promote their true happiness, in their transactions and intercourse. These laws may be considered as principles, in respect of their fixedness and operation; and as maxims, since by the knowledge of them, we discover those rules of conduct, which direct mankind to the highest perfection, and supreme happiness of their nature. They are as fixed and unchangeable as the laws which operate in the natural world.
11. The science of law always generates predictable results.
12. The prediction of judicial decision-making often involves making reference to patterns of judicial behavior identified in close analysis of empirical data.

#### **Class 7 Nov. 4**

#### **Natural Law**

#### **Presentations**

Choose one of the following questions and prepare a short presentation.

1. Should attempted murder be a lesser crime than murder?
2. Is unauthorized downloading of music stealing?
3. Can governments legislate morality?
4. Can a consensual activity be illegal?

5. If a lawyer that is representing a defendant finds that their client is guilty, how are they supposed to act?
6. Should constitutional rights be suspended during a pandemic?
7. Is it ethical for governments to compel their citizens to lead healthy lives?
8. When, if ever, is it right to break the rules?

### **Before the Law**

- Who is Franz Kafka?
- What is the story about?
- What does the author want to show with this story? What purpose does he seek?
- What is your interpretation of the story?
- What legal theory predominates in the story?
- What are the main symbols in the story? What do the gate, the gatekeeper, and the man symbolize?
- What would you have done if you were the man before the law?
- Suppose you are the lawyer representing the man's heirs. You file a lawsuit against the gatekeeper for having denied you the right to access to the law. Outline your legal arguments. Be as specific as possible.





**Class 9 Nov. 18 Feminist Jurisprudence/ Some of Us Had Been Threatening Our Friend Colby by Donald Barthelme**

**Some of Us Had Been Threatening Our Friend Colby**  
Donald Barthelme

Some of us had been threatening our friend Colby for a long time, because of the way that he had been behaving. And now he'd gone too far, so we decided to hang him. Colby argued that just because he had gone too far (he did not deny that he had gone too far) did not mean that he should be subjected to hanging. Going too far, he said, was something everybody did sometimes. We didn't pay much attention to this argument. We asked him what sort of music he would like played at the hanging. He said he'd think about it but it would take him a while to decide. I pointed out that we'd have to know soon, because Howard, who is a conductor, would have to hire and rehearse the musicians and he couldn't begin until he knew what the music was going to be. Colby said he'd always been fond of Ives' Fourth Symphony. Howard said that this was a "delaying tactic" and that everybody knew that the Ives was almost impossible to perform and would involve weeks of rehearsal, and that the size of the orchestra and chorus would put us way over the music budget. "Be reasonable," he said to Colby. Colby said he'd try to think of something a little less exacting.

Hugh was worried about the wording of the invitations. What if one of them fell into the hands of the authorities? Hanging Colby was doubtless against the law, and if the authorities learned in advance what the plan was they would very likely come in and try to mess everything up. I said that although hanging Colby was almost certainly against the law, we had a perfect \*moral\* right to do so because he was \*our\* friend, \*belonged\* to us in various important senses, and he had after all gone too far. We agreed that the invitations would be worded in such a way that the

person invited could not know for sure what he was being invited to. We decided to refer to the event as "An Event Involving Mr. Colby Williams." A handsome script was selected from a catalogue and we picked a cream-colored paper. Magnus said he'd see to having the invitations printed, and wondered whether we should serve drinks. Colby said he thought drinks would be nice but was worried about the expense. We told him kindly that the expense didn't matter, that we were after all his dear friends and if a group of his dear friends couldn't get together and do the thing with a little bit of \*eclat\*, why, what was the world coming to? Colby asked if he would be able to have drinks, too, before the event. We said, "Certainly."

The next item of business was the gibbet. None of us knew too much about gibbet design, but Tomas, who is an architect, said he'd look it up in old books and draw the plans. The important thing, as far as he recollected, was that the trapdoor function perfectly. He said that just roughly, counting labor and materials, it shouldn't run us more than four hundred dollars. "Good God!" Howard said. He said what was Tomas figuring on, rosewood? No, just a good grade of pine, Tomas said. Victor asked if unpainted pine wouldn't look kind of "raw", and Tomas replied that he thought it could be stained a dark walnut without too much trouble.

I said that although I thought the whole thing ought to be done really well, and all, I also thought four hundred dollars for a gibbet, on top of the expense for the drinks, invitations, musicians and everything, was a bit steep, and why didn't we just use a tree -- a nice-looking oak, or something? I pointed out that since it was going to be a June hanging the trees would be in glorious leaf and that not only would a tree add a kind of "natural" feeling but it was also strictly traditional, especially in the West. Tomas, who had been sketching gibbets on the backs of envelopes, reminded us that an outdoor hanging always had to contend with the threat of rain. Victor said he liked the idea of doing it outdoors, possibly on the bank of a river, but noted that we would have to hold it some distance from the city, which presented the problem of getting the guests, musicians, etc., to the site and then back to town.

At this point everybody looked at Harry, who runs a car-and-truck-rental business. Harry said he thought he could round up enough limousines to take care of that end but that the drivers would have to be paid. The drivers, he pointed out, wouldn't be friends of Colby's and couldn't be expected to donate their services, any more than the bartender or the musicians. He said that he had about ten limousines, which he used mostly for funerals, and that he could probably obtain another dozen by calling around to friends of his in the trade. He said also that if we did it outside, in the open air, we'd better figure on a tent or awning of some kind to cover at least the principals and the



orchestra, because if the hanging was being rained on he thought it would look kind of dismal. As between gibbet and tree, he said, he had no particular preferences, and he really thought that the choice ought to be left up to Colby, since it was his hanging. Colby said that everybody went too far, sometimes, and weren't we being a little Draconian. Howard said rather sharply that all that had already been discussed, and which did he want, gibbet or tree? Colby asked if he could have a firing squad. No, Howard said, he could not. Howard said a firing squad would just be an ego trip for Colby, the blindfold and last-cigarette bit, and that Colby was in enough hot water already without trying to "upstage" everyone with unnecessary theatrics. Colby said he was sorry, he hadn't meant it that way, he'd take the tree. Tomas crumpled up the gibbet sketches he'd been making, in disgust.

Then the question of the hangman came up. Paul said did we really need a hangman? Because if we used a tree, the noose could be adjusted to the appropriate level and Colby could just jump off something -- a chair or stool or something. Besides, Paul said, he very much doubted if there were any free-lance hangmen wandering around the country, now that capital punishment has been done away with absolutely, temporarily, and that we'd probably have to fly one in from England or Spain or one of the South American countries, and even if we did that how could we know in advance that the man was a professional, a real hangman, and not just some money-hungry amateur who might bungle the job and shame us all, in front of everybody? We all agreed then that Colby should just jump off something and that a chair was not what he should jump off of, because that would look, we felt, extremely tacky -- some old kitchen chair sitting out there under our beautiful tree. Tomas, who is quite modern in outlook and not afraid of innovation, proposed that Colby be standing on a large round rubber ball ten feet in diameter. This, he said, would afford a sufficient "drop" and would also roll out of the way if Colby suddenly changed his mind after jumping off. He reminded us that by not using a regular hangman we were placing an awful lot of the responsibility for the success of the affair on Colby himself, and that although he was sure Colby would perform creditably and not disgrace his friends at the last minute, still, men have been known to get a little irresolute at times like that, and the ten-foot-round rubber ball, which could probably be fabricated rather cheaply, would insure a "bang-up" production right down to the wire.

At the mention of "wire," Hank, who had been silent all this time, suddenly spoke up and said he wondered if it wouldn't be better if we used wire instead of rope -- more efficient and in the end kinder to Colby, he suggested. Colby began looking a little green, and I didn't blame him, because there is something extremely distasteful in thinking about being hanged with wire instead of rope -- it gives you sort of a revulsion, when you think about it. I thought it was really quite unpleasant of Hank

to be sitting there talking about wire, just when we had solved the problem of what Colby was going to jump off of so neatly, with Tomas's idea about the rubber ball, so I hastily said that wire was out of the question, because it would injure the tree -- cut into the branch it was tied to when Colby's full weight hit it -- and that in these days of increased respect for the environment, we didn't want that, did we? Colby gave me a grateful look, and the meeting broke up.

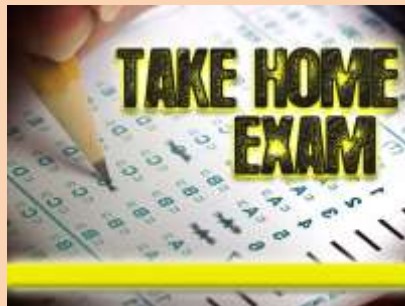
Everything went off very smoothly on the day of the event (the music Colby finally picked was standard stuff, Elgar, and it was played very well by Howard and his boys). It didn't rain, the event was well-attended, and we didn't run out of Scotch, or anything. The ten-foot rubber ball had been painted a deep green and blended in well with the bucolic setting. The two things I remember best about the whole episode are the grateful look Colby gave me when I said what I said about the wire, and the fact that nobody has ever gone too far again.

### **Discussion questions**

- 1) What is the story about?
- 2) What does the author want to show with this story? What purpose does he seek?
- 3) What is your interpretation of the story?
- 4) What legal theory predominates in the story?
- 5) What are the main symbols in the story?
- 6) What does “going too far” mean? What do you think that Colby did?
- 7) What would you do if you were Colby?
- 8) Suppose you are a lawyer representing Colby before he is executed. Outline your legal arguments for his defence. Be as specific as possible.

### **Class 11 Dec. 2 Review and feedback**

### **Distribution of final take-home**





**Class 12 Submission of final take-home**



**\* TRIGGER WARNINGS**



Some materials in this course may be sensitive. Course materials, including lectures, class activities, hypotheticals, scenarios, examples, court cases, and films shown in class, may have mature content, including violent, sexual, and strong language content.

**Disclaimers**

Except for newspaper articles and court cases, all class activities are hypothetical and fictitious. Any resemblance to actual persons, institutions, or events is purely coincidental. The views and opinions expressed in the articles assigned for reading in this course, as well as those expressed in videos shown in class, are those of the authors or the individuals who made those opinions and do not necessarily reflect the position of the course professor. Questions, follow-up questions, examples, and comments made within the context of class activities do not purport to reflect the opinions or views of the course professor. All such articles, comments, questions, examples, and activities are meant solely to facilitate the discussion and study of Law. They are not meant to advocate or promote any crime or unlawful action. Neither are they meant to advance any ideological perspective. Discretion advised before signing up for this course.