

UNIVERSITY OF ST. THOMAS SCHOOL OF LAW

Professor Rob Vischer
Office: Room 439
Email: rkvischer@stthomas.edu
Office telephone: (651) 962-4838

Associate Dean Jerry Organ
Office: Room 412
Email: jmorgan@stthomas.edu
Office telephone: (651) 962-4919

Foundations of Justice – Spring 2010 Syllabus

Overview: This course continues last semester's one-week introduction to the foundational moral commitments shaping both the structure of our system of justice and the multiple roles of the lawyer in administering that system. The course is organized around areas of inquiry in which the law implicates questions of morality and social justice. Each line of inquiry is explored through both Catholic texts and texts from other religious or philosophical traditions, and by examining the multiple roles of the lawyer – as advocate for powerless or powerful clients, as policy-maker, as judge, as voter, as community member, and as family member. The course is designed to give students tools for discerning and articulating the moral dimension of legal practice, and to provide a common vocabulary for continued consideration of this dimension in the remainder of their law school courses.

Objectives: Based on the description set forth in the preceding paragraph, the objectives for this course include the following:

Essential Objectives:

Learning fundamental principles, generalizations, or theories
Learning to *apply* course material (to improve thinking, problem solving, and decisions)
Learning to *analyze* and *critically evaluate* ideas, arguments, and points of view

Important Objectives:

Developing skill in expressing oneself orally or in writing
Developing a clearer understanding of, and commitment to, personal values

Text: The course text is a photocopied compilation of materials available in the bookstore.

Grade: Your grade will be based on one or two short reflection essays, an oral presentation and accompanying report (more information to follow in January), and a final exam.

Reading Assignments: The following list of reading assignments reflects the readings we will do for each of the first eleven weeks of class. The readings are arranged by class – so one set of readings per week for the first eleven weeks of the semester. The last two classes of the semester will be devoted to group presentations. Prior to each week's class we will email a set of discussion questions about which you should be thinking as you read the material for the coming week.

WEEK ONE

Human Dignity (review of last semester)

Do our conceptions of human dignity speak to the law's struggle with race?

Class 1:	<i>Somerset v. Stewart</i> , 12 Geo. 3, 1772, K.B.	1-1
	<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	1-3
	<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	1-8
	<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003)	1-11

As you read these materials, consider the following questions. How would you articulate what is wrong with slavery from the perspective of human dignity? How would you take issue with the majority's assertion that separate cabins are not an indication of inferiority? Would the law have been "less reasonable" if it had required separate cabins for people with brown eyes or for people who were left-handed? How would you describe whether the Louisiana statute impairs human dignity? What is the problem with evaluating the legality of statutes in the context of social norms? Why does the Court in *Brown v. Board of Education* conclude that "separate, but equal" is no longer legal in the education context? What deprivation do students of color (and white students?) experience in a segregated grade school and high school educational system? *Brown* tells us that states can't compel segregation – but can states allow segregation for those who want to choose that option for their children? Is public higher education a "right"? If so, on what basis should it be allocated if demand exceeds supply? Is diversity a compelling state interest in the context of higher education? What criteria are appropriate (or inappropriate) when a state university is making admissions decisions?

WEEK TWO

THEME FOR WEEKS TWO - SIX

The Social Order and the Role of the State

Is there a natural order to society, and if so, should the law reflect that order?

What are the limits of the state's use of the law in establishing that order, in reflecting that order, or more generally, in trying to promote a just society?

Class 2:	Aristotle, <i>Politics, Book Two, Part III</i>	2-1
	Abraham Kuyper, <i>The Stone Lectures: Calvinism and Politics</i>	2-2
	John Paul II, <i>Letter to Families</i>	2-8
	Alexis de Tocqueville, <i>Democracy in America, Book II, chap. 5</i>	2-10

John Paul II, <i>Quadragesimo anno</i>	2-12
John Paul II, <i>Sollicitudo rei socialis</i>	2-13
Thomas Hobbes, <i>The Leviathan chap. XIII</i>	2-14

As you read through these materials, please ponder the following questions. In these readings about the Social Order and the Role of the State, what is Aristotle highlighting about the common order? How does Aristotle’s statement compare with Pope John Paul II’s comment on “solidarity” from *Sollicitudo rei socialis* (page 2-13)? How does the excerpt from Andrew Kuyper’s analysis of *Calvinism and Politics* inform our understanding of the impact of our fallen state as sinful people on the sovereignty of the state as compared with the sovereignty of the private associations? What are the four “spheres” of private association of which Calvin spoke? If the state exists to promote justice and the common good, what should the state be doing according to Calvin? How do Calvin, Pope Pius XI and Pope John Paul II describe similarly the relationship between the state and communal associations, including the family? What does Tocqueville describe as one of the distinctive strengths he saw in the American experiment? How does Tocqueville’s reflection on “associations” in America manifest itself in Pope Pius XI’s excerpt from *Quadragesimo Anno* dealing with the principle of subsidiarity? Does Hobbes accurately describe the world we would experience in the absence of the social order – of a common power protecting all within its authority? How do these questions of the role of the state and of individual liberty and communal association continue to manifest themselves in this day and age?

WEEK THREE

THEME FOR WEEKS TWO - SIX

The Social Order and the Role of the State

**Is there a natural order to society, and if so, should the law reflect that order?
What are the limits of the state’s use of the law in establishing that order, in reflecting that order, or more generally, in trying to promote a just society?**

Class 3:	<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	3-1
	<i>Pierce v. Society of the Sisters</i> , 268 U.S. 510 (1925)	3-5
	<i>Fields v. Palmdale School District</i> , 427 F.3d 1197 (9 th Cir. 2005)	3-8
	<i>United States v. Reynolds</i> , 98 U.S. 145 (1878)	3-12
	<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	3-17

As you read through these cases, please reflect upon the following questions in anticipation of our class discussion.

Meyer/Pierce/Fields

What were the key relevant facts of *Meyer*? What was the social/historical context for the decision in *Meyer*? In what ways does that context resonate with the current social/historical context? What are some of the liberties that the Court mentions as being within the scope of the Fourteenth Amendment? What standard does the *Meyer* Court use for evaluating the statute in question? In finding that the state cannot criminalize instruction in German, what did the Court say about what the state can do? How does *Pierce*, decided two years later, advance the conversation? What was different about the statute at issue in *Pierce*? With what rights did the statute in *Pierce* interfere? How does *Fields* present yet a different perspective on the relationship between the state, public schools and families? What is the Court's response to the parents' concerns in *Fields*? In light of the *Fields* decision, what avenue is open to parents concerned about the curricular emphasis of their local public schools?

Reynolds and Loving

What does *Reynolds* tell us about the role of the state in regulating formation of the family unit and the relevance of freedom of religion in this inquiry? What does the *Reynolds* Court tell us about societal views on polygamy and about the role of the family in society? How does *Loving* present a different understanding of the extent to which we will allow the state to regulate marriage? Why did the Court conclude that the Virginia statute violated the Equal Protection clause even though it applied equally to both parties to the marriage? What other interest does the Court recognize and protect?

WEEK FOUR

THEME FOR WEEKS TWO - SIX

The Social Order and the Role of the State

Is there a natural order to society, and if so, should the law reflect that order?

What are the limits of the state's use of the law in establishing that order, in reflecting that order, or more generally, in trying to promote a just society?

Class 4:	<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	4-1
	<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	4-4
	<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	4-6
	<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	4-13
	<i>Boy Scouts v. Dale</i> , 530 U.S. 640 (2000)	4-24

As you review these cases, please consider the following questions in anticipation of our class discussion. Where is the right of privacy rooted in the Constitution? What argument could the state make to support the statute in *Griswold*? What argument could the state make in *Eisenstadt* regarding why married persons should be treated differently than unmarried persons with respect to contraception? Does the right to privacy in *Griswold* and *Eisenstadt* support the same "social order" values as the right to privacy in *Meyer* and *Pierce*? What argument could the state make regarding why *Lawrence* is different than *Griswold* and *Eisenstadt*? With an appreciation for the right of privacy and the liberty interests the Court protects in *Griswold*, *Eisenstadt* and *Lawrence*, what can the State do in terms of "morals" regulation? How do the *Lawrence* majority and dissent view the state's role in society differently?

What limits, if any, exist with respect to liberty/privacy interests when we switch from individual choices to communal choices? To what extent can private organizations limit membership? What is a "place of public accommodation"? How is the community of the Jaycees different than the community of a family? What association would be private and not be a "place of public accommodation"? How are the Boy Scouts in *Dale* different than the Jaycees in *Roberts*? What are the two senses of "freedom of association," as explained by the *Roberts* majority? What social values are protected by the freedom of association? Do you agree that Minnesota's interest in requiring the Jaycees to admit women as full voting members outweighs the Jaycees' interest in determining their own membership? From the perspective of the social order, what relevance is it that the local chapters wanted to admit women? How does New Jersey's requirement that the Boy Scouts readmit Dale pose a potential First Amendment violation? How do we know that homosexual conduct conflicts with the Boy Scouts' values? Should the evidence of that conflict be deemed sufficient by the Court? Which perspectives on the social order support the result in *Dale*? Which perspectives are in tension with that result?

WEEK FIVE

THEME FOR WEEKS TWO - SIX

The Social Order and the Role of the State

Is there a natural order to society, and if so, should the law reflect that order?

What are the limits of the state's use of the law in establishing that order, in reflecting that order, or more generally, in trying to promote a just society?

Class 5:	Martin Luther, <i>Temporal Authority: To What Extent It Should Be Obeyed</i>	5-1
	Martin Luther King, Jr., <i>Letter from Birmingham Jail</i>	5-7
	Thomas Paine, COMMON SENSE	5-19

As you review these materials, please consider the following questions for class discussion. What does Martin Luther tell us about Scripture and the role of the state in the divine order? How do we reconcile the Kingdom of God and the Kingdom of the World? How does morality figure into our relationship with the Kingdom of God? With the Kingdom of the World? What obligation does Martin Luther suggest Christians have to the Kingdom of the World? How does Martin Luther King describe these relationships differently? When does justice demand that we disobey the civil laws according to Martin Luther King?

WEEK SIX

THEME FOR WEEKS TWO - SIX

The Social Order and the Role of the State

**Is there a natural order to society, and if so, should the law reflect that order?
What are the limits of the state's use of the law in establishing that order, in reflecting that order, or more generally, in trying to promote a just society?**

Class 6:	<i>Nathanson v. Commonwealth of Mass.</i> , 2003 WL 22480688 (Mass. Super. 2003)	6-1
	<i>In re Matthew Hale</i> , 723 N.E.2d 206 (Ill. 1999)	6-4
	<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005)	6-6
	<i>DeShaney v. Winnebago Cty. Dep't of Social Servs.</i> , 489 U.S. 189 (1989)	6-13

As you read through these materials, be thinking about your role as a lawyer and your associational rights as well as the state bar's associational rights. What role does the state have in regulating an attorney's choice of clients? To what extent can an attorney refuse to take a client? Does the *Nathanson* case suggest that attorneys must accept everyone who comes in the door or can/should attorneys be somewhat discriminating in selecting clients? If *Nathanson's* discrimination is inappropriate, what circumstance might reflect appropriate discrimination? How does/should an attorney's conscience or right to expression impact *Nathanson's* choice to represent someone (or not)? What about the *Hale* dissent? Does the Bar have a right, or the responsibility, to assure that all members promote justice and reflect certain views? Should someone's expressed "beliefs" be a basis for refusing membership in the bar?

Shifting gears, what do *Kelo* and *DeShaney* tell us about the role of the state in relation to property owners and individuals in need of protection? What constrains the state's right to take someone's property? Who decides whether the state is taking property for a public use? As we try to define the balance between protecting property and affording the state

the right to take property for public use, what problems might be presented by the decision in *Kelo*? What about *DeShaney*? When would the state be responsible for injuries to someone like Joshua? Why is the Court reluctant to impose liability on the state? What interests is the Court protecting by not holding the state liable?

WEEK SEVEN

THEMES FOR WEEKS SEVEN AND EIGHT – ECONOMIC JUSTICE What is economic justice and is its attainment a proper objective of the law and of government?

Class 7:	Meir Tamari, <i>With All Your Possessions – Jewish Ethics and Economic Life</i>	7-1
	Timur Kuran, <i>On the Notion of Economic Justice in Contemporary Islamic Thought</i>	7-5
	John Paul II, <i>Centesimus annus</i> ¶¶ 4-11, 30 to 43	7-10
	Michael Novak, <i>Defining Social Justice</i>	7-27
	<i>Manifesto of the Communist Party</i>	7-31
	John Rawls, A THEORY OF JUSTICE	7-35
	Milton Friedman, CAPITALISM AND FREEDOM	7-40

As you prepare for class, be thinking about how you would compare and contrast the different perspectives on economic justice that you have read. What lessons does Jewish law draw from the story of Sodom? What is "charity" in Jewish law? What is the relationship between the wealthy and the poor in Jewish law? What are the two fundamental principles of economic justice under Islamic law? What is "zakat?" Why does Islamic law require interest-free loans? What does Centesimus Annus tell us about the universal destination of material goods? How is the notion of ownership changing, and why does that pose problems for economic justice? What is the Catholic understanding of the nature of the corporation, and why is that understanding in tension with the dominant view of the corporation? What does Novak identify as the problem with "social justice?" Why is it a dangerous concept, in Novak's view? What should "social justice" emphasize? How does the communist view of economic justice view things differently? On what grounds would Novak object to the communist view? On what grounds would John Paul II object to the communist view? How are Friedman's views on the role of the state related to the harm principle? How do his views on the state

translate into a vision of economic justice? What are the dangers of Friedman's views? Why does Rawls suggest justice is not a function of moral virtue? What should justice be based on?

WEEK EIGHT

THEMES FOR WEEKS SEVEN AND EIGHT – ECONOMIC JUSTICE What is economic justice and is its attainment a proper objective of the law and of government?

Class 8:	<i>Lochner v. New York</i> , 198 U.S. 45 (1905)	8-1
	<i>West Coast Hotel v. Parrish</i> , 300 U.S. 379 (1937)	8-9
	<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968)	8-22
	<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973)	8-36

As you review the cases for class this week, think about what they tell us about the Supreme Court's views on economic justice and the role of the state in promoting economic justice. What was at issue in *Lochner* from the standpoint of economic justice? What were the competing interests or policies reflected in the majority and dissenting opinions? How do these opinions reflect (or not) the principle of subsidiarity? Looking back 100 years, what are your thoughts about the regulations challenged in *Lochner*? What was at issue in *West Coast Hotel*? What does the *West Coast Hotel* Court tell us about liberty and freedom of contract? Why is state regulation relevant and appropriate in this context according to the *West Coast Hotel* Court? What was the context in which *West Coast Hotel* was decided? What concerns do the dissenting judges express? What about the *Jones* case? What was the issue in the *Jones* case? Why did it take 100 years for this issue to make it to the Supreme Court? How does the *Jones* case reflect a concern for economic justice? Is this something that should be decided by the states or by Congress? What about the *San Antonio School District* case? What are the inequities in the Texas school funding formula? Why does the majority conclude that the Texas formula does not violate equal protection? What concerns do the dissenting justices highlight? If part of economic justice is equality of opportunity, how should we evaluate the Texas school funding formula?

WEEK NINE

THEMES FOR WEEKS NINE AND TEN – TRUTH AND PLURALISM **Can (and should) the law reflect our society's commitment to pluralism without abandoning the possibility of moral truth?**

Class 9:	John Paul II, <i>Veritatis Splendor</i> ¶¶ 31 to 35	9-1
	Declaration of Independence	9-4
	Isaiah Berlin, <i>THE CROOKED TIMBER OF HUMANITY</i>	9-7
	Arthur Leff, <i>Unspeakable Ethics, Unnatural Law</i> , 1979 <i>Duke L.J.</i> 1229	9-13
	Robert George, <i>What is Law?</i> , <i>FIRST THINGS</i> (April 2001)	9-26

With respect to these readings, what is Pope John Paul II's problem with the modern view of freedom? How does he believe conscience should function, and how does his view differ from the modern conception of conscience? What is the relationship between freedom and truth? How does the Declaration of Independence talk about human nature and the relation of individuals to the state? According to Berlin, what is the problem society faces when we talk about, and act on, values? What does Berlin think about the possibility of the perfect whole in which all things coexist in harmony? Is Berlin a moral relativist? What does Leff identify as the basic tension in ethics? What do we need if we are going to "find" a transcendent set of rules? What does Leff mean by a "performative utterance?" What are the alternatives to belief in God as a basis for ethics? What does George tell us about Holmes' view of where the law is derived from? Moral obligation? Why or why not? History? Economics? Human psychology? Something else?

WEEK TEN

THEMES FOR WEEKS NINE AND TEN – TRUTH AND PLURALISM **Can (and should) the law reflect our society's commitment to pluralism without abandoning the possibility of moral truth?**

Class 10:	<i>Freiler v. Tangipahoa Parish Board of Education</i> , 185 F.3d 337 (5 th Cir. 1999)	10-1
	John Paul II, <i>The Defense of Every Life</i> , from	

As you read the materials for this week, consider the following questions in anticipation of the class discussion. With respect to *Freiler* -- why would the school board feel the need to adopt this disclaimer? What were the three secular purposes offered to defend the disclaimer? Do you find any of them convincing? Do you think that the disclaimer encourages students to "read and meditate upon religion in general and the Biblical version of creation in particular?" Is the 5th Circuit imposing Truth on parents' freedom? With respect to Pope John Paul II -- why isn't the right to choose relevant to his moral analysis of abortion? What about abortion to protect the life or health of the mother? What about the hardship on women caused by a prohibition of abortion? Is the Truth of Pope John Paul II's view of abortion accessible to those who do not share his religious beliefs? Is the opposing argument based on a contrary claim of Truth or on lots of individual truths? In other words, is the right to abortion a "great good" (Berlin) or a consequence of each individual functioning as the ultimate arbiter/god on moral questions (Leff), or something else? In thinking about *Roe* -- what's the trimester framework adopted by *Roe*? Why do critics insist that *Roe*'s framework fails to impose any meaningful limitation on abortion? We will have a small group conversation on *Roe* -- please reflect on, and be prepared both to defend and oppose the decision in *Roe* in terms of human dignity, the social order, the role of the state, and economic justice.

WEEK ELEVEN

Class 11: Review/Recap Vocation of Lawyer

Thomas Shaffer, *Lawyers as Prophets*, 15 ST. THOM. L. REV. 469 (2003) 11-1

As you read this excerpt from Thomas Shaffer, reflect again on the concept of vocation and why you feel called to be a lawyer. How does it help to look through the lens of lawyers as prophet as discussed in Shaffer's article? Why is Shaffer concerned about complacency in the midst of injustice? What do prophets do that Shaffer would like lawyers to do? What is the likely consequence of being a lawyer/prophet? Why is Shaffer not copacetic about the extent to which faith communities will nurture lawyer/prophets? What are some lessons we can draw from Shaffer regarding relationships we should nourish if we wish to be lawyer/prophets?

\