

**New York University
School of Law**

CLASSICAL LIBERALISM

History, Theory and Contemporary Jurisprudence

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Description: Classical liberalism is the political philosophy that holds that society, within a legal framework of private property and liberty of contract, largely runs itself. This course is an interdisciplinary exploration of the fundamental principles of liberalism and its application to issues of broad relevance to the law. These principles are developed through classical and contemporary sources from Marcus Tullius Cicero to Richard Epstein and Randy Barnett. The applications include religious toleration, the legal status of homosexuality, the moral and economic status of profiting from the ignorance of others, paternalistic legislation, and slippery slopes.

Two books have been ordered and are available at the NYU bookstore:

David D. Boaz (ed.), *The Libertarian Reader: Classic and Contemporary Writings from Lao Tzu to Milton Friedman* (Free Press, 1998). When a reading is followed by a **(B)** it will be found in this collection.

Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford, 2000).

I. Introduction

David Boaz, “The Roots of Libertarianism,” From: *Libertarianism: A Primer*, Chapter 2. **(Blackboard)**

[F.A. Hayek, “Why I am Not a Conservative”](#). From: *The Constitution of Liberty*.

II. The General Principle of Spontaneous Order

Ronald Hamowy, "The Scottish Enlightenment and the Theory of Spontaneous Order," pp. 39-58. From: *The Political Sociology of Freedom*.
(Blackboard)

Todd J. Zywicki, "Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization." From: *Constitutional Political Economy*, vol. 9, 143-150 (1998). Available at JSTOR (through Bobst Library).

Friedrich A. Hayek, "The Creative Powers of a Free Civilization." From: *Essays on Individuality*, ed. Felix Morley. (Blackboard)

III. Fundamental Principles: "Classical" Views

• Utilitarianism

(a) Narrowly Conceived

Jeremy Bentham, Selections from *An Introduction to the Principles of Morals and Legislation, The Constitutional Code, and Deontology* in Kelly Rogers (ed.), *Self-Interest: An Anthology of Philosophical Perspectives*.
(Blackboard)

David Lieberman, "The Critique of the Common Law," From: *Bentham: Moral, Political and Legal Philosophy*, vol. II, ed. by Gerald Postema.
(Blackboard)

[Jeremy Bentham, "Value of a Lot of Pleasure or Pain, How to be Measured,"](#)
From: *An Introduction to the Principles of Morals and Legislation*, Chap. IV. (Optional)

["Pleasures and Pains, Their Kinds."](#) From: *An Introduction to the Principles of Morals and Legislation*, Chap. V.
Skim to see the wide variety of pleasures and pains recognized.
(Optional)

Immanuel Kant, "Happiness...an Indefinite Concept," "Reason Ill-Equipped to Secure Happiness," Excerpts from *Foundations of the Metaphysics of Morals* in Kelly Rogers (ed.), *Self-Interest: An Anthology of Philosophical Perspectives*. (Blackboard)

(b) Broadly Conceived

[Ludwig von Mises, "Ownership."](#) Chapter 1, *Socialism: An Economic and Sociological Analysis* (Orig. 1922), pp. 27-36.

• *Indirect Utilitarianism*

[Henry Hazlitt, "Need for General Rules."](#) From: *The Foundations of Morality*, Chap. 8.

David Hume, "Justice and Property." From: *Treatise of Human Nature*, Book 3. (B)

[Adam Smith, The Theory of Moral Sentiments](#), Part II, Sec. II, Chap. III, Paragraphs II.II.15-II.II.18; II.II.20. Begins "It is thus that man..."

• *Natural Law*

[Marcus Tullius Cicero, "True Law."](#) From: *The Commonwealth* (p. 270) (*De Re Publica*) (54BC).

[Samuel Pufendorf, "On Natural Law."](#) From: *On the Duty of Man and Citizen* (1682), Book 1, Chap. III.

Wilhelm von Humboldt, "The Purpose of Man" and "The Purpose of the State." From: [The Sphere of Duties of Government](#) (1792) [also known as *The Limits of State Action*]. (Blackboard)

IV. **Fundamental Principles: Division of Knowledge in Society**

F. A. Hayek, "The Use of Knowledge in Society." From: *American Economic Review*, Sept. 1945, pp. 519-30. (B, abridged) / Unabridged: ["The Use of Knowledge in Society."](#)

Russell Hardin, "Liberalism." From: *How Do You Know? The Economics Of Ordinary Knowledge*, Chap. 4. (Blackboard)

V. Fundamental Principles: Contemporary Views

Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*, Part 1: “The Problems of Knowledge,” Chap. 2, 3, 4, 5, and 6.

Richard A. Epstein, *Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State* (forthcoming). **(Handout)**
Chap. 1, “Where Natural Law and Utilitarianism Converge”
Chap. 2, “Where Natural Law and Utilitarianism Diverge”
Chap. 3, “The Traditional Conception of the Rule of Law”
Chap. 4, “Property Rights in the Grand Scheme”
Chap. 10, “The Rule of Law Diminished”

VI. Social Cooperation

[Henry Hazlitt, “Social Cooperation.”](#) *The Foundations of Morality*, Chap. 6.

Specific Issue: Should People Be Able to Profit from the Ignorance of Others?

[Marcus Tullius Cicero, On Duties](#), (*De Officiis*) Book 3, sec. 12-13 (44 B.C.)

[Thomas Aquinas, Summa Theologia \(1270\), “Of Fraudulent Dealing in Buying and Selling.”](#) From: *Aquinas Ethicus: or, the Moral Teaching of St. Thomas. A Translation of the Principal Portions of the Second part of the Summa Theologica*, ed. Joseph Rickaby, S.J.

[U.S. Supreme Court, Laidlaw v. Organ \(1819\)](#) Summarized and discussed in [David Friedman, Law’s Order](#), Chap. 12, pp. 168-70.

Israel Kirzner, “Entrepreneurship, Entitlement and Economic Justice.”
From: *Perception, Opportunity and Profit* (1979). **(Blackboard)**.

VII. Social and Religious Toleration

George Smith, “Philosophies of Toleration.” From: *Atheism, Ayn Rand and Other Heresies* (1991). **(Blackboard)**

John Stuart Mill, “On Individuality, as One of the Elements of Well-Being.”
From: *On Liberty* (1859). **(B)**

Specific Issue: Homosexuality, Same-Sex Marriage and the Law

Lea Campos Boralevi, "Sexual Non-Conformists," From: *Bentham and the Oppressed*, Chap. 3 (1984) (**Blackboard**)

Jeremy Bentham, "[Offences Against One's Self: Pederasty, Part I](#)"
From: *Journal of Homosexuality* (1972 – originally written c. 1785). (*Optional*)

[Perry v. Schwarzenegger \(2010\)](#), pp. 1-24; 109-136. (Also please skim the "Findings of Fact" section [pp. 54-108] and compare with Bentham's empirical analysis of sexual non-conformity above.)

Specific Issue: Knowledge Problems in Morals Legislation

[Mario J. Rizzo, "The Problem of Moral Dirigisme: A New Argument Against Moralistic Legislation."](#) From: 1 *NYU Journal of Law and Liberty* 798-813 (up to not incl. Kantianism); 816-818 (up to not incl. IX); 820-826. (2005)

VIII. Liberty and Democracy

Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns." (1819). From: *Political Writings*. (**B, abridged**).

Herbert Spencer, "Right to Ignore the State," From *Social Statics* (1851). (**B**)

[Herbert Spencer, "Political Rights - So-Called."](#) From: *Principles of Ethics* (1887), vol. 2, ch. 22.

[Ilya Somin, "When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy."](#) *Cato Policy Analysis* no. 525 (2004), pp. 1-5; 9-21.
Emphasis on Parts IV and V.

R.H. Coase, "The Market for Goods and the Market for Ideas," American Economic Association, *Papers and Proceedings*, May, 1974, pp.384-391.
Available at: JSTOR (through Bobst Library).

IX. General Slippery Slope Analysis

[A. V. Dicey, "The Debt of Collectivism to Benthamism."](#) From: *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, Lecture IX.

[Eugene Volokh and David Newman, "In Defense of the Slippery Slope,"](#) From: *Legal Affairs*, March-April, 2003. (The full story is in Volokh, "The Mechanisms of the Slippery Slope," From: 116 *Harvard Law Review* 1026 (2003).)

Mario J. Rizzo and D. Glen Whitman, "The Camel's Nose is in the Tent: Rules, Theories and Slippery Slopes." From: 51 *UCLA Law Review* 539 (2003), pp. 540-46; 570-73. (Optional)
Available at: HeinOnline (through Julius Law Library)

X. Paternalism

John Stuart Mill, "Objections to Government Interference." From: *On Liberty*. (B)

Richard Thaler and Cass Sunstein, "Libertarian Paternalism." From: *AEA Papers and Proceedings* (May 2003), pp. 175-179.
Available at: JSTOR (through Bobst Library).

[Mario J. Rizzo and D. Glen Whitman, "The Knowledge Problem in the New Paternalism,"](#) *Brigham Young University Law Review* 905 (2009), pp. 905-940.

[D. Glen Whitman, "Against the New Paternalism: Internalities and the Economics of Self-Control,"](#) *Cato Policy Analysis*, no. 563 (2006). (Optional)

[D. Glen Whitman and Mario J. Rizzo, "Paternalist Slopes,"](#) From: 2 *NYU Journal of Law and Liberty*, 411-443 (2007). (Optional)

[Mario J. Rizzo and D. Glen Whitman, "Little Brother is Watching You: New Paternalism on the Slippery Slopes,"](#) 51 *Arizona Law Review* 685-736 (2009). (Optional)