

Final. 8/30/11

LEGAL STUDIES 182: LAW, POLITICS AND SOCIETY

Professors Malcolm M. Feeley

GSI: Adam Hill and Jerett Yan

Lecture T Th 8:10 – 9:30 am

Fall 2011

Website at: <http://blackboard.berkeley.edu>

Introduction:

This course examines the theory and practice of legal institutions in performing several major functions: allocating authority, defining relationships, resolving conflict, adapting to social change, and fostering social solidarity. In examining these functions, the course will also assess the nature and limits of law, consider alternative perspectives on law, and discuss various ways to structure legal processes.

Required Books:

Gerald Stern, THE BUFFALO CREEK DISASTER

Gerald Rosenberg, THE HOLLOW HOPE

Gordon Silverstein, LAW'S ALLURE

Feeley, MATERIALS FOR LAW, POLITICS AND SOCIETY (available at Copy Central, Durant Mall)

NOTE: please bring the assigned readings materials for each session to class with you.

Course Website (BSpace):

Note that the class has a website. The website contains the following materials: the course syllabus and supplementary materials. I will also use it to distribute assignments, post additional supplementary readings, post announcements, post section assignments (readings, short written assignments, and the like), post study questions, and post responses to queries and issues that might arise in class. You can access the website at: <http://bpace.berkeley.edu>, and you should enroll yourself in the section assigned to you via Telebears. Instructions can be found by clicking Help on the My Workstation tab.:

Midterm and Final Exams:

These will be in a short-answer essay format

Paper:

One research paper with a maximum length of five pages (1250 words) will be assigned shortly after term begins. This paper will be turned in twice. Paper #1 is expected to be an example of the very best writing you are capable of. It will be carefully read and evaluated for style, grammar, and spelling, as well as for substance and organization. It will be graded and returned to you. You will then rewrite as necessary and resubmit it. This paper, #2, will again be graded. Both grades will be recorded and count equally in computing your final course grade.

The paper will be based upon assigned and supplemental reading assigned and made available early in the term. Dates and details will be forthcoming.

Discussion Section Assignments:

Discussion sections are an integral part of this course. You must sign up and attend all your section meetings. Sections provide an opportunity to review materials covered in lecture and to explore variations and alternative views to those covered in lecture. From time to time there will be additional section-based reading assignments, as well as oral and written reports and one or two pop quizzes. Details of these assignments will be announced in section meetings.

Assignments and Grading:

Below is a list of assignments and their value in terms of your final grade. Each assignment must be completed.

Midterm (date to be determined)	25%
Paper, Version #1 (dates to be determined)	15%
Paper, Version #2 “	15%
Final Exam (as scheduled)	30%
Discussion and extra class assignments, oral presentations, participation, pop quizzes, etc., at discretion of GSI and instructor)	<u>15%</u>
TOTAL	100%
Extra Credit	<u>01%</u>
GRAND TOTAL	101%

READING ASSIGNMENTS

I. Introduction to Law (and Politics)

Assigned Readings:

A. General:

L. Fuller, "The Case of the Speluncean Explorers," (HANDOUT and on Website)

T. Hobbes, Leviathan (excerpts), MATERIALS

B. Sources of Law

J.B.White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life,"
MATERIALS

R. Cover, "Violence and the Word," MATERIALS

C. Fidelity to Law:

T. Tyler, Why People Obey the Law, MATERIALS

D. Basic Concepts

Supplementary materials about basic concepts are posted on bspace for the course. Read them.

Suggested Readings:

Note: The books listed in this section contain material relevant to the entire course, and it would be valuable for you to acquaint yourself with some of them. Many are on reserve in Moffitt Library.

B. Ackerman, RECONSTRUCTING AMERICAN LAW

A.M. Bickel, THE LEAST DANGEROUS BRANCH
H. Berman, LAW AND REVOLUTION
R. Cotterrell, THE SOCIOLOGY OF LAW: AN INTRODUCTION
R. Cotterrell, LAW'S COMMUNITY
M.P. Golding, ed., THE NATURE OF LAW
J. Haley, AUTHORITY WITHOUT POWER: THE JAPANESE PARADOX
H.L.A. Hart, THE CONCEPT OF LAW
F. Hyack, THE ROAD TO SERFDOM
 K.N. Llewellyn & E.A. Hoebel, THE CHEYENNE WAY
L. McIntyre, LAW IN THE SOCIOLOGICAL ENTERPRISE
A. Renteln & A. Dundes, FOLK LAW, VOLS. 1 & 2
M. Sandel, LIBERALISM AND THE LIMITS OF JUSTICE
S. Vago, LAW AND SOCIETY

II. The Adversarial System

Assigned Readings:

A. The Adversary System: Theory

M. Feeley, "The Adversary System," MATERIALS

B. The Adversary System and Social Change

J. Lieberman, THE LITIGIOUS SOCIETY, (excerpts), MATERIALS

Marc Galanter, "Why the Have's Come Out Ahead," MATERIALS

C. The Effectiveness and Efficiency of the Adversary System

J. Dwyer, Richard W. Brooks, and A. Marco, "The Air Pollution Permit Process for U.S. and German Automobile Assembly Plants," MATERIALS

D. The Adversary System: Controversies and Alternatives

J. Langbein. Torture and Plea Bargaining

J.Q. Wilson, "Courts," (excerpt from BUREAUCRACY), MATERIALS.

E. Alternatives to the Adversary System and Traditional Conceptions of Justice

J. Langbein, Land without Plea Bargaining: How the German's Do it," MATERIALS

F. Alternatives to Traditional Systems of Justice

F. Sander, Varieties of Dispute Processing, MATERIALS

J. Braithwaite, Restorative Justice, MATERIALS

W. Clifford, Alternatives to the Criminal Justice System, MATERIALS

Center for Court Innovation, "Principles of Problem Solving Courts," MATERIALS

G. Private Courts

S. Talish, "The Privatization of Public Legal Rights" MATERIALS

Suggested Readings:

J. Braithwaite, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION

R. Kagan, ADVERSARIAL LEGALISM

D. Johnson, THE JAPANESE WAY OF JUSTICE

M. Damaska, The Faces of Justice and State Authority

III. Case Study of the Adversary System in Action

G. Stern, THE BUFFALO CREEK DISASTER

IV. Social and Political Influences on Courts: Symbols, Discretion, Values

Assigned Readings:

A. Symbols

J. Noonan, "Persons and Masks of the Law," MATERIALS.

K. Bumiller, "Victims in the Shadow of the Law, MATERIALS.

B. Discretion

M. Feeley, The Process is the Punishment, MATERIALS

Vera Institute of Justice, Felony Arrests, MATERIALS

C. Values

H. Packer, "Two Models of the Criminal Process," MATERIALS

V. Courts, Politics, and Public Policy: An Assessment of the Function of Courts

Assigned Readings:

A. The Functions of Courts: A Historical Debate

Publius [Alexander Hamilton], Federalist Paper #78, MATERIALS.

Essays of the Anti-Federalist Brutus on the Judiciary, MATERIALS.

B. The Continuing Debate:

G. Rosenberg, THE HOLLOW HOPE, pp. 1-36.

R. Dahl, "The Supreme Court as a National Policy-Maker," MATERIALS.

J. Casper, "The Supreme Court and National Policy Making," 70 Am. Pol. Sci. Rev. 50 (1976), MATERIALS

C. Interest Groups, Public Interest Lawyers, and Class Action

D. Truman, "The Governmental Process (excerpts, MATERIALS

D. Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," MATERIALS.

VI. Resources Available to Courts: Judge & Co.

M. Feeley, "Implementing Court Orders in the United States," MATERIALS

M. Feeley, "Prison Conditions Cases and the Bureaucratization of American Corrections," MATERIALS

Suggested Readings:

L. Fuller, "The Forms and Limits of Adjudication," MATERIALS.

A. Chayes, "The Role of the Judge in Public Law Litigation," MATERIALS.

R. Dahl, HOW DEMOCRATIC IS THE CONSTITUTION?

FEDERALIST PAPERS

H. Storing, ed., THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION

M. Shapiro, COURTS

M. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY

D. Kairys, ed., THE POLITICS OF LAW

S. Scheingold, THE POLITICS OF RIGHTS

S. Melnick, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS

S. Melnick, THE CLEAN AIR ACT

M. Olson, THE LOGIC OF COLLECTIVE ACTION

D. Truman, THE GOVERNMENTAL PROCESS

J. Segal & H. Spaeth, THE ATTITUDINAL MODEL

L. Epstein & J. Knight, THE CHOICES JUSTICES MAKE

A. Sarat & W. Felstiner, DIVORCE LAWYERS AND THEIR CLIENTS

D. Black and M. Mileski, eds., THE SOCIAL ORGANIZATION OF LAW

M. Feeley, THE PROCESS IS THE PUNISHMENT

T. Baker, THE MEDICAL MALPRACTICE MYTH

VII. How Law Undermines Politics

Assigned Readings:

A. The General Argument: The False Promise of Rights

J. Novkov, How to Read a Case, MATERIALS

In this and the following section, the authors consider a handful of Supreme Court cases. You cannot understand their arguments without having knowing something about the cases. So, you are expected to read the key cases in their discussions carefully and understand them. Law cases are something like a foreign language, do you must learn to read them. Julie Novkov's guide is a useful guide. Read this guide, then reread it. Then turn to the cases. Below is a list of a handful of cases you will be expected to understand in this and the next section. Start reading now. To aid in this, you are required to write (no more than one typed page per case) a one-page statement that includes the following: 1) identifies the key facts of the case; 2) states the constitutional question (only one!) before the Court; 3) outlines the Court's reasoning; and 4) states the answer to the question that the Court has considered. In some cases, you should include a short additional section, outlining the dissenter's position. These notes may be picked up by the instructor or GSIs after notice of a specific date due. (Note: times the dissent helps you understand what the majority opinion is about.) In most cases the cases can be found on the course b-space site. If not, you can Google them and locate them.

Baker v. Carr (1962)

Griswald v. Connecticut (1965)

Roe v. Wade 1973)

Youngstown Sheet & Tube v. Sawyer (1952)

Brown v. Board of Education (1954) (Brown I)

Brown v. Board of Ed. (1955) (Brown II)

Lawrence v. Texas (2003)

G. Silverstein, *Law's Allure*, pp. 1-94

Baker v. Carr (b-space)

Brown v. Board of Education (I & II) (b-space)

B. Patterns, Process, and Cautionary Tales

Silverstein, *Law's Allure*, pp. 95-174;

Griswald v. Connecticut (b-space)

Roe v. Wade (b-space)

C. War Powers and the Constitution

Silverstein, *Law's Assure*, 175-242

Youngstown Sheet & Tube v. Sawyer (b-space)

C. Costs and Consequences

Silverstein, pp. 245-286

VII. The Impact (and Limits) of Courts

Assigned Readings:

Julie Novkov, *How to Read a Case* (reread)

A. General: Two Models of Courts – the Dynamic and the Constrained Court

G. Rosenberg, *THE HOLLOW HOPE*, pp. 1-38 (reread)

B. The Hollow Hope: Civil Rights: School Desegregation and Voting Rights

Brown v. Board of Education (I and II) (reread)
Rosenberg, pp. 39-172

C. Massey & N. Denton, AMERICAN APARTHEID (excerpts), MATERIALS.

C. The Hollow Hope: Women's Rights and Abortion:

Roe v. Wade (1973) (reread)
Rosenberg, pp. 173-268

D. The Hollow Hope: Same Sex Marriage

Lawrence v. Texas (2003) (b-space)
Rosenberg, pp. 339-419

E. Summing up and Assessing The Hollow Hope

Rosenberg, pp. The Fly-Paper Court pp. 420-429.

Suggested Readings:

M. Feeley and E. Rubin, JUDICIAL POLICY MAKING AND THE MODERN STATE : HOW THE COURTS REFORMED AMERICA'S PRISONS

W. Haltom and M. McCann, DISTORTING THE LAW

K. Luker, ABORTION AND THE POLITICS OF MOTHERHOOD

M. Klarman, FROM JIM CROW TO RIGHTS

M. McCann, RIGHTS AT WORK

m. Miller and Jeb Barnes, MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE

D. Schoenbred and Ross Sandler, DEMOCRACY BY DECREE

A. Thernston, WHOSE VOTES COUNT?

VIII. CONCLUSION

Assigned Readings:

E.P. Thompson, Whigs and Hunters (Excerpts), MATERIALS.

QUERIES, ASSIGNMENTS, QUESTIONS, FOR ASSIGNED READINGS AND SHORT PAPERS. REWORK THESE INTO THE TEXT, AFTER EACH READING ASSIGNMENT. mmf. 05.25.11

Legal Studies 182

Feeley, Mayo

Reading Assignments for May 31, June 1, and June 2 and Writing Assgt. May 31

Tues. May 31

1) Feeley, The Adversary System, MATERIALS

Queries for Feeley's piece: (come prepared to answer the following questions):

What is the big alternative to the adversary process?

What is the major difference between it and the adversary process?

How is truth found in the adversary process?

2) J. Lieberman, The Litigious Society, MATERIALS (both chapters; skim pp. 1-11, and read carefully the last three paragraphs on p.12 and on to rest of chapter 1)

Queries for Chapter One in Lieberman's book (come prepared to answer the following questions):

Read pp. 18-25 very carefully and ask:

What did Sir Henry Maine mean when he said, "the movement from progressive societies has hitherto been a movement from status to contract."?

How does Lieberman expand this observation? What does he mean by it?

What is the difference between "rules" and "standards"? (what are his examples? Come up with two rules and two standards of your own.)

Why is this difference important, according to Lieberman?

pp. 25-32

What does Lieberman mean by "total redress"?

What are the problems in trying to provide total redress by the courts? (what does Lon Fuller (yes, the same!) mean by "polycentric tasks"? What is their significance?

Examine the chart on p. 31. What are the differences between the "traditional" and the "emerging new" lawsuit models? Can you give an example of each kind?

Wed. June 1 (NOTE: THIS READING IS A BIT OUT OF SEQUENCE)

J. Lieberman, MATERIALS (Con't.)

***J. Langbein, Torture and Plea Bargaining, MATERIALS (Yes, it is there!)**

(SEE WRITING ASSIGNMENT INSTRUCTIONS BELOW)

Thurs. June 2

1) J.Q. Wilson, "Courts," MATERIALS (come prepared to answer the following questions)

Wilson's short article makes a series of paired comparisons. Focus on one such pair and be prepared to describe the two events being compared and identify the different responses by the courts to each event.

What does Wilson think these paired comparisons reveal about the law and courts and congress, and perhaps the modern administrative state?

What costs and benefits does Wilson identify with this change?

Is the change “inevitable? What might an alternative be?

2) J.Dwyer et al, “The Air Pollution Permit Process for US and German Automobile Assembly Plants,” MATERIALS (come prepared to answer the following questions)

What is the central comparison that Dywer and his colleagues make?

On what dimensions if the comparison made?

What are the central findings of the study?

What is the “lesson” of this study?

***Writing Assignment on Langbein article (due 8:10 am Wednesday June 1)**

What is John Langbein’s point in comparing torture with plea bargaining? On what basis does he make the comparison?.

- 1) Explain the purpose and nature of the comparison in about half a page (i.e. what is the basis of the comparison, towards what end does he make the comparison, how far does he want to generalize when developing his arguments, what evidence does he present to make the comparison, etc.)?
- 2) What are the strengths of the article? What does it do successfully? Why? How?
- 3) What are the weaknesses or limits of the article? Explain (Note: Address its central claims—I don’t want you to tell me you found a typo or that it is poorly written,etc.)?

Note: The object of this assignment is to get you to dig deeply into the Langbein article, turn it over and over in your mind, and reflect on it and its implications. However in doing this, you can if you want relate his piece to other materials on the adversary process we have read or will read in the course. But keep in mind, you have only about 500 words (two double spaced pages) in font about this size.