

## Foundations of Legal Studies (LS 100)

**MWF 2-3pm**

**160 Krober**

**Fall 2013**

Christopher Kutz

[ckutz@law.berkeley.edu](mailto:ckutz@law.berkeley.edu)

Office Hours: Tuesdays, 2-4pm

341 North Addition (Law School)

Teaching Assistants:

Adam Hill, [adh@berkeley.edu](mailto:adh@berkeley.edu)

John Bliss, [jwb@berkeley.edu](mailto:jwb@berkeley.edu)

### **Description:**

This course provides an introduction to the major concepts and institutions of American law, both private and public (with some discussion of English and European law). The course emphasizes philosophy and history over legal doctrine. In private law, we will take up questions of we use private law to determine who pays for accidents, and how some but not all agreements are protected by the law of contracts. We will spend more time on criminal law, looking at the justifications for the state's exclusive right of punishment, and on the limits to what behavior the state can declare criminal (drawing on the example of the decriminalization of homosexuality). We will also examine the distinctive processes of the American criminal justice system, and some of the troubling aspects of its outcomes, especially in relation to race. The last third of the course will take up the quintessentially American institution of constitutional judicial review: the right of the judiciary to reject state and federal laws that it deems not to conform to the Constitution.

### **Learning objectives:**

This course has three principal goals. The first is to acquaint you with many of the concepts and institutions that make up the system of American law, as a basis for informed citizenship and for further work in the study of law as a social and political institution. The second (and more important) goal is to teach you how to think critically about the ways in which we in America govern our relations with each other and with the state through law. The third goal is to help you develop your skills in writing an analytical and argumentative essay.

### **Evaluation:**

Your grade will be based on two written papers, 5-7pp each (double-spaced), on assigned topics; a brief presentation in your discussion section; and a final exam. You will also have a shadow-graded midterm (i.e., the grade won't count, but is only for your

information.) The grade will be computed as follows: papers 25%, final 20%, editorial 15%, oral component (presentation, discussion section and class participation) 15%.

### **Attendance and classroom policies:**

You are required to attend lectures as well as discussion sections, and are expected to participate actively in both. You are permitted three unexcused absences from lecture, and one unexcused absence from section; any further absences will require justification from the Tang Center or another educational authority. Observance of religious holidays will also, of course, be honored. You are responsible, however, for any material covered in class, whether or not your absence is excused.

Those with conflicting extra-curricular commitments (e.g., performance, athletics) will need to make specific arrangements, per the campus guidelines. In particular, you need to notify me as early as possible, and ideally in the first few weeks of class, with a proposed solution to any conflict with deadlines. The solution may involve an earlier deadline or test time.

The lecture meeting will make use of an exciting strategy for peer-to-peer and peer-to-instructor active engagement and continuous self-assessment: listening and speaking. This will require your full attention to the words of each other and the instructor, as we discuss readings and topics. I may cold-call you on occasion as well. In order to facilitate this classroom strategy, I have a no-technology policy for you. Cell phones are to be put away, and texting during class is not allowed. (If you are responsible for a dependent during class hours, emergencies can be accommodated.) Unless you have a DSP accommodation (see below), laptops are also not allowed. Instead, you will take notes with pen and paper, old school.

In general, you should try to do all the readings for the week in advance of the Monday lecture, unless otherwise indicated in the syllabus. (I will adjust the syllabus over the semester as I gain an appreciation of the proper pace for work.)

### **DSP Accommodation:**

If you have specific needs due to documented disabilities, we will make every effort to accommodate these needs, in collaboration with the Disabled Student's Office. For information on University policies regarding students with disabilities, and federal and state laws affecting people with disabilities, contact: <http://access.berkeley.edu/>. Please convey your DSP accommodation letter to your GSI early in the semester so that the teaching staff can make all appropriate arrangements.

### **Important Dates:**

Paper 1: in section, week of September 30th

Mid-term: Nov. 4th

Paper 2: in section, week of Nov. 18<sup>th</sup>

Editorial: in section, week of Dec. 2.

Final exam: Thursday, Dec. 19<sup>th</sup>, 3-6pm

**Other course policies:**

Late papers will not be accepted without a prior arrangement directly with the instructor.

If you are unhappy with a grade, you may submit the work to the instructor for an appeal. You must accompany the work with a one-page (maximum) statement of the grounds for your appeal. You must accept the grade given by the instructor, even if it is lower than the grade given originally.

University policies on plagiarism will be strictly enforced. Plagiarism consists in offering work as your own for a grade without acknowledging its source. Self-plagiarism, or offering your own work submitted for grading in another course, is also prohibited. This is the University policy:

*All written work submitted for a course, except for acknowledged quotations, must be expressed in the student's own words. It must also be constructed upon a plan of the student's own devising. Work copied without acknowledgement from a book, from another student's paper, from the internet, or from any other source is plagiarized. Plagiarism can range from wholesale copying of passages from another's work to using the views, opinions, and insights of another without acknowledgement, to paraphrasing another person's original phrases without acknowledgement. The submission of such work will, under University rules, render the offending student subject to an F grade for the work in question or for the entire course, at the discretion of the instructor, and will also make the student liable for referral to the SJA.*

**Books to purchase:**

Oliver Wendell Holmes, Jr., *The Common Law* (2009/1881)

Lawrence Friedman, *A History of American Law* (2005)

Herman Melville, *Billy Budd* [1924]

All other materials will be on the Bspace site. A reader will be made available if there is sufficient demand.

**Week 0: Introduction****Fri., Aug. 30: Introductory meeting:**

Discussion of course objectives, materials, and requirements

**Week 1 (Sept. 2-6): What is law?**

*Objective: You should come out of this week with a basic understanding of the basic terms of American and English law, and of the centrality of the "case" to the common law system. You should also understand law as a distinctive set of social norms.*

**Mon.: Labor Day – no class**

**Wed. & Fri.:**

**Reading:**

Lawrence Friedman, *History of Law in America*, Prologue and Pt.II ch. 1, pp. 3-22, 31-41; *Law in America*, ch. 1. (B)  
*Riggs v. Palmer* (New York, 1889) (B)

**Week 2 (Sept. 9-13): Common Law: Accidents & Contracts**

*Objective: You should understand the basic ideas, and critical questions about, the treatment of accidents (“torts”) in England and America in the 19<sup>th</sup> century.*

Reading:

Oliver Wendell Holmes, Jr., *The Common Law*, Lecture III  
Friedman, *Law in America*, ch. 3 (B); *History*, Ch. 3, pp. 222-225, 350-366.

For Weds.: Blackstone, *Commentaries on the Laws of England* (excerpts) (B)

Cases (for Monday): *Hawkins v. McGee*, *Hadley v Baxendale*, *Sherwood v. Walker*, *Brown v. Kendall*, *Ives. v South Buffalo Railway* (B)

**Week 3 (Sept. 16-20): Criminal Law I: Morality and Law**

*Objective: You should understand the bases of punishment and mercy, and the role of the decisionmaker.*

**First paper topics distributed**

Monday:

*Billy Budd*, Chs. 1-15  
Friedman, *History*, Pt. II, Ch. 7 (pp. 207-222)

Weds. & Fri.:

*Billy Budd*, Chs. 16-31  
Case: *R v. Dudley & Stephens* (B)

**Week 4 (Sept. 23-27): Criminal Law: Morality and Law II**

*Objective: You should understand the ambivalence within the Anglo-American liberal tradition of criminalizing sexual morality.*

**Monday:**

Holmes, *Common Law*, Lecture II  
Friedman, *History*, Pt. III, Ch. 10, pp. 434-462.

**Weds. & Fri.:**

Wolfenden Report, Chs. 2 & 5 (B)

The debate between H.L.A. Hart and Lord Devlin concerning the report (B)

**Cases:** *Bowers v. Hardwick* (1986), *Lawrence v Texas* (2003), esp. pp. 4-6, 14-16 (B)

**Week 5 (Sept. 30 - Oct. 4): Criminal Procedure: The jury system (and the death penalty)**

*Objective: You should understand the nature and arguments for the lay jury system.*

**First paper due in discussion section.**

**Mon.**

Alexis de Toqueville, *Democracy in America*, vol. 1, ch. 16. (B)  
William Finnegan, "Doubt," *The New Yorker*, (Jan 31, 1994) (B)

**Weds:** film excerpt of *Twelve Angry Men*

**Friday:** *Gregg v. Georgia* (1976), *McCleskey v Kemp* (1986)

**Week 6 (Oct. 7-11): Trayvon Martin and America**

*Objective: You should understand the specific legal issues within the Martin/Zimmerman case, and the broader socio-legal issues around the case.*

**Mon.:**

Friedman, *History*, Pt. II, ch. 7, pp. 381-389.  
Legal materials on Trayvon Martin case (B)

**Wed.:**

George Fletcher, *A Crime of Self-defense* (excerpts) (B)  
Editorials on the Zimmerman verdict (collected)(B)

**Fri:**

Bruce Western and Becky Pettit, "Incarceration and Social Exclusion" (B)

**Week 7 (Oct. 14-18): Constitutionalism and Judicial Review**

*Objective: You should understand the history and basic justification of the system of constitutionalism and judicial review (and their differences).*

**Mon:**

John Louis De Lolme, *The Constitution of England*, Chs. 1, 4-6  
*Magna Carta*,  
Publius, *The Federalist Papers*, #78 (B)

**Wed. & Fri.:**

Stephen Breyer, "Making Democracy Work," *Yale Law Journal* 120 (2011): 1999-2026, <http://www.yalelawjournal.org/images/pdfs/986.pdf>  
Antonin Scalia, *A Matter of Principle* (1997), 3-47, 115-127

**Cases:** *Marbury vs. Madison* (excerpts), *Shelby County v. Holder* (B)

**Week 8 (Oct. 21-25): Constitutional Law: Separation of Powers**

*Objective: You should understand some of the problems in the institutional design of a governance system.*

**Second paper topics distributed**

**Reading:**

Friedman, *Law in America*, Ch. 6 (B)  
Jack Rakove, "Framing the Constitution," (B).  
*The Federalist Papers* #51.

**Cases:**

*Schechter Poultry v. U.S.* (1935), *Wickard v. Filburn* (1942), *Youngstown Sheet and Tube v. Sawyer* (1952), *Hamdan v. Rumsfeld* (2006)

**Week 9 (Oct. 28-Nov. 1): Race, Reconstruction and racial equality**

*Objective: You should understand the limits of the attempts to overturn a system of racial supremacy through constitutional law.*

**Mon.:**

Friedman, *History*, Pt. II, Ch. 4, pp. 154-166.

**Wed.:**

Don Fehrenbacher, *Dred Scott* (excerpts, posted).  
Gerald Rosenberg, *A Hollow Hope* (excerpts) (B)

**Cases:** *Dred Scott*, *Plessy v. Ferguson*, *Brown v. Board of Education*, *Grutter v. Bollinger*

**Week 10 (Nov. 4-6):**

*Objective: This week is meant to check your understanding of what we have already covered, and to begin a discussion of the legal notion of equality.*

**Monday: Shadow mid-term**

**Weds.: Grading exercise**

**Fri.: Constitutional Law: Equal Protection and Fundamental Rights**

Friedman, *History*, Pt. II, Ch. 4, pp. 140-154.

**Cases:** *Lochner v. New York*

**Week 11 (Nov. 11-15): Sex and the constitution**

*Objective: You should understand the legal and moral questions surrounding reproductive rights.*

**Monday: Veterans Day (no class)**

**Wed. & Fri.:**

Reva Siegal & Linda Greenhouse, "Before (and After) *Roe v. Wade*," *Yale Law Journal* (2011), <http://yalelawjournal.org/images/pdfs/987.pdf>

Kristin Luker, *Abortion and the Politics of Motherhood* (1984) (excerpts)

**Cases:** *Griswold v. Connecticut*, *Roe v. Wade*, *Lawrence v. Texas*, *R. (on the application of Axon) v. Secretary of State for Health & Another*

**Week 12 (Nov. 18-22): Constitutional Law: Free (political) speech**

*Objective: You should understand the distinctiveness of the American free speech tradition, and its justification.*

**Second paper due in discussion section**

**Mon. & Wed:**

Dan Farber, *The First Amendment*, ch.1 (B)

Thomas Scanlon, "A Theory of Freedom of Expression" (B)

**Cases:** *Texas v. Johnson* (1989), *Citizens United v. F.E.C.* (2010), *Snyder v Phelps* (2010)

**Fri.:** Guest lecture

**Week 13 (Nov. 25-29): Administrative Law and Adversarial Justice**

*Objective: You should understand the changing nature of the administrative state, and the important role of adversarial legalism in constraining that state (for better and for worse).*

**Mon.:**

Friedman, *History*, Pt. III, ch. 5, pp. 329-349.

Robert Kagan, *Adversarial Legalism* (excerpts) (B)

**Cases:** *Massachusetts v. Environmental Protection Agency* (2007)

**No class Weds. or Fri. for Thanksgiving**

**Week 14 (Dec. 2-6): Conclusion and Review: Strengths and weaknesses of the Anglo-American system**

*Objective: This is a stock-taking week, for thinking about the Anglo-American system in contrast with civil law alternatives.*

**Editorial due in section**

**Mon.:**

Mirjan Damaska, *Faces of Justice* (excerpts) (B)

**Wed. & Fri.:**

Jeremy Waldron, "The core of the case against judicial review" (B)

**Week 15 (Dec. 9-11): RRR week**

Your instructors will be available to discuss and review material for you this week.