

Legal Studies 100A Foundations of Legal Studies Fall 2011

Lecture: Fridays 2:00-5:00 in 3 LeConte Hall

Course Description (4 units): A lecture class with required discussion sections designed as a gateway course to introduce new and prospective Legal Studies majors to the foundational frameworks and cross-disciplinary perspectives from humanities and social sciences that distinguish legal studies as a scholarly liberal arts field. It provides a comparative and historical introduction to the diverse forms, ideas, institutions, and systems of law and socio-legal ordering. It highlights theoretical issues and trans-disciplinary scholarly methods of understanding questions of law and justice.

Instructor:

Professor Richard Perry

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Office Hours: 9:30-10:30 T/Th; Fridays 12:00-1:00

GSI: Andrew Brighten: <andrew.brighten@berkeley.edu> ; Office hours: Monday 1:30-3:30 PM in 257 Boalt Hall.

GSI: Ayako Hirata: <ayako.h7@gmail.com>; Office hours: Monday 10:00-12:00 in 257 Boalt Hall.

Learning Objectives:

Legal Studies 100 students should attain:

1. An understanding of “law” in the broadest, socially constitutive sense, one that interweaves humanities and social science scholarship in the liberal arts tradition; a grasp of what Lawrence Friedman calls “external” and “internal legal cultures” in their diverse forms. Course materials will include empirical, ethnographic, historical, literary, cinematic and other sources.
2. An understanding of both normative and positive approaches to law, legality, and justice in theory and in concrete institutional forms.
3. A working familiarity, linked to the Legal Studies Department’s curricular “neighborhoods,” with the disciplinary intersections, conflicts, and convergences that constitute legal studies or “law & society” as a vibrant field of scholarship and debate.
4. A basic understanding, connected to these neighborhoods, of the diverse ways of knowing and of inquiring, i.e., of the methods of socio-legal scholarship including empirical-quantitative, deductive-experimental, ethnographic-qualitative, logical-analytic, and narrative.
5. A grasp of the emergence of core legal institutions, such as courts, other governmental agencies, law firms, and law schools, and an integrated discussion of sovereignty, jurisdiction, and legal legitimacy, from the local level all

the way to the aspirational “universal jurisdiction” of modern human rights law.

6. An awareness of the continuing development of the legal profession in its diverse forms of knowledge and practice, and of the related evolution of legal education.
7. An understanding of the conceptual structure of law and legality: the ways that legal categories segment and articulate the social world; e.g., substantive versus procedural law, public versus private law; the legal understandings of objects, events, actions, consequences that are embodied in *property*, *contract*, *tort*, and *crime*.
8. An experience of field observation in one or more legal-institutional sites, e.g., a courtroom, with an assigned short write-up of field observation data.
9. A strong sense of the concrete policy implications of socio-legal scholarship, both of its potential policy contributions and of the scholarly “pull” of such policy connections.

Readings:

NOTICE: It was originally announced on the UCB Schedule of Classes that there would be one required book for LS 100A, i.e., Lawrence Friedman’s, *A History of American Law*, 3rd ed. 2005. This month the publisher notified the LS Department that this classic work is being discontinued. Therefore, at this late date there will be no required book for LS 100A students to purchase at the bookstore. In place of Friedman 2005, we will have on bSpace links to another, shorter, somewhat similar book by Friedman, *Law in America* (2002). This book can be read from our library directly on-line via the UCB ebook reader. Your GSI can show you how to use this ebook source in section.

Apart from Friedman 2002, all other required readings are on the LS 100A bSpace site. A course reader of required readings will be made available at Copy Central if there is sufficient student demand.

Student Responsibilities:

Attendance: Students are expected to attend all lectures and section meetings having already prepared any readings or assignments. If you are unable to attend due to illness of yourself or a dependent you need not contact the Professor or GSI unless you will be absent for more than a week in which case you should be prepared to offer medical verification of the problem. During the first two weeks of classes, however, when we will be taking attendance in order to permit students on the waiting list to add the class, you must contact us on the same day of any absence.

CAVEAT: If you should find that you must miss a test due to serious illness or other comparable circumstance, you must email your GSI before the testing period to notify her of your situation. The GSI will discuss your circumstances with the professor and an effort will be made to assist you. However, a student who misses a test and only contacts the GSI days after the testing date is not likely to be allowed to sit for a make-up test – except in very rare cases, such an accommodation would clearly be unfair to the rest of the class.

University Regulations on Specific Scheduling Accommodations:

DSP ACCOMMODATIONS:

If you have specific needs due to documented disabilities we will make every effort to accommodate them, with the assistance and advice of the Disabled Students 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 letter to your GSI early in the semester (i.e. during the first two weeks) to make arrangements.

ACCOMMODATION OF RELIGIOUS CREED

In compliance with Education code, Section 92640(a), it is the official policy of the University of California at Berkeley to permit any student to undergo a test or examination, without penalty, at a time when that activity would not violate the student's religious creed, unless administering the examination at an alternative time would impose an undue hardship that could not reasonably have been avoided. Requests to accommodate a student's religious creed by scheduling tests or examinations at alternative times should be submitted directly to the faculty member responsible for administering the examination by the second week of the semester.

Reasonable common sense, judgment and the pursuit of mutual goodwill should result in the positive resolution of scheduling conflicts. The regular campus appeals process applies if a mutually satisfactory arrangement cannot be achieved.

CONFLICTS BETWEEN EXTRACURRICULAR ACTIVITIES AND ACADEMIC REQUIREMENTS

The Academic Senate has established Guidelines Concerning Scheduling Conflicts with Academic Requirements to address the issue of conflicts that arise between extracurricular activities and academic requirements. They specifically concern the schedules of student athletes, student musicians, those with out-of-town interviews, and other students with activities (e.g., classes missed as the result of religious holy days) that compete with academic obligations. The guidelines assign responsibilities as follows:

-It is the student's responsibility to notify the instructor(s) in writing by the second week of the semester of any potential conflict(s) and to recommend a solution, with the understanding that an earlier deadline or date of examination may be the most practicable solution.

-It is the student's responsibility to inform him/herself about material missed because of an absence, whether or not he/she has been formally excused.

Classroom expectations: While in class please turn your cell phone off. If your laptop has wireless access you may use it to access information relevant to the discussion but please do not read emails, newspapers, or other non-class related materials during class. The topics of this course include many subjects on which strong feelings and emotions may be generated. Students are encouraged to speak up with questions and comments, and to respond to points raised by other students. The maintenance of an effective discussion space in class, however, obliges all of

us to act with respect for and sensitivity toward everyone else in the room.

Plagiarism: According to the College of Letters and Sciences:

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.

Written Assignments and Evaluation: (these assignments are designed to encourage and assess competence in foundational skills for legal studies scholarship, including writing skills, analytic and empirical observation skills; basics of socio-legal research):

Two in-class short-answer written midterms (bring Blue Books), and one 4-5 page field observation report of a required courtroom visit of at least 4 hours duration: 15% each = 45% of total grade.

A take-home short final exam that tests key the understanding terms and concepts of legal studies. 25%

In-class active participation: Section meetings will include required small-group debate on legal policy controversy; occasional quizzes on terms and concepts; also, basic introduction to sociolegal research tools including law & social science data bases, case law reporters; law reviews; Lexis, Westlaw; state and federal legislative resources; administrative law sources; the resources of Moffitt Lib. 30%

Order of Topics, Readings, Course Activities

Week 1 (Aug. 26): Introduction to Constitutive Understandings of Law: Law as a Distinctive Mode of Knowing and Making the Social World -- Is the Law Everywhere?

Introduction to the course plan, the instructors, and to one another; a short demographic survey of the students will be administered so that the instructors can better know and serve their students' backgrounds and interests (other short surveys will be conducted during the semester). Since, at this first class meeting, we will not have been able to do any prior course reading, we will view a filmed excerpt from *Billy Budd* (1962: 119 mins.), using this to spark a discussion of broad concepts of the "rule of law" and its legitimacy in the modern state, including questions of law in wartime. We will introduce and discuss classic law/morality and positive/natural law

distinctions, among others, and discuss the reading assignments for next week. [Law and Culture; Crime, Law, Governance]

Week 2 (Sept. 2): Historical Foundations I: Is Law the Original Social Science? The socio-historical conditions for the emergence of law/legal systems; law and/as religion; complex societies and literacy; law as justice, norm, rule, custom, morality. Herodotus and other classical traditions in Europe, Asia, the Middle East: *nomos*, *dike*, *halakha*, *jus*, *lex*, *Recht*, *Gesetz*, *haq*, *fiqh*. View-discuss a short *Antigone* video-excerpt and compare a short video excerpt from Wells' *The Island of Lost Souls* (1933).

Read for Week 2: *Emile Durkheim on Law and Society* (1897), excerpt. Clifford Geertz (1983) "Local Knowledge: Fact and Law in Comparative Perspective," excerpt; also "Legal Pluralism" short excerpts.

Recommended: Jack Goody (1986) *The Logic of Writing and the Organization of Society*. Laura Nader (1965) "Introduction to the Ethnography of Law."

1st Discussion section meetings: review discussion of key terms and concepts of law, religion, and moral traditions.

Week 3 (Sept. 9): Historical Foundations II: From the Classical Tradition to the Early Modern Nation-state: If "the Law is everywhere," then how/why has it taken particular shapes in particular places and historical moments? Founding concepts of the Western "government of laws" ideal: Hobbes' *Leviathan*; foundational legal institutions (sovereigns, legislatures, courts); nation-states and citizens; continental and common law traditions; law's relation to religion and the state; religious conflicts and colonial legal forms; constitutions. [Law and Sovereignty]

Read for Week 3: L. Friedman, Prologue and Ch. 1; Montesquieu *The Spirit of Laws* (1741) short excerpt; Perry Miller "Puritan State and Puritan Society" (1951); Foucault *Security, Territory, Population* 1977, short excerpt.

Recommended: E. Kantorowicz *The King's Two Bodies* (1957) excerpt; K. Erickson "Wayward Puritans" (1968); J. Lepore, "Where is O Thy God?," *In the Name of War: King Phillip's War and American Identity* (1998).

2nd Discussion section meetings: discuss excerpt from Franz Kafka, "The Castle."

Week 4 (Sept. 16): "In America the Law is King"—The Enlightenment, American Exceptionalism and a New Legal Consciousness: The American "reception" of the Common Law and the paths not taken in the Federal Era and early republic: codification and case law; ecclesiastical and equity courts; the "architecture" of the Anglo-American law: crime, tort, contract, property. What was modern reason? Blackstone, Beccaria, and Bentham: the making

and disciplining of the Rational Man. Law, legitimacy and the ideals of democratic self-government. [Crime, Law, Governance; Law and Sovereignty; Law, Rights, and Social Change]

Read for Week 4: Blackstone's *Commentaries on the Laws of England* (1758), excerpt; Bentham *Introduction to the Principles of Morals and Legislation*, (1780), excerpt; Beccaria *On Crimes and Punishments* (1767), excerpt; Foucault *Discipline and Punish* (1977), chs 1-2; The U.S. Declaration of Independence (1776).

Recommended: Bentham, *The Panopticon* (1787); Jefferson *Notes on the State of Virginia* (1783).

4th Discussion section meetings: Review key terms and concepts.

Week 5 (Sept. 23): Tocqueville's "American Aristocracy of Bench and Bar": The Very Notion of a "Case" On Codes, Constitutions, and the new social role of lawyers in a Republican Age: Bentham, Lieber, Tocqueville, Marshall, Story, Kent; *Marbury* and judicial review; *Johnson v. M'Intosh* and *Dred Scott*; natural vs. positive law discourses of rights and duties in court reasoning. In-class cinema excerpts (from Spielberg's *Amistad* 1997) of district and appellate court process. In-class discussion of video excerpt of early frontier trial scene from *Young Mr. Lincoln* (1939). Summary of U.S. court structure: federal-state system of dual jurisdiction; trial and appellate functions and jurisdictions. [Law and Markets; Law and Sovereignty]

Read for Week 5: L. Friedman 59-72; Tocqueville's *Democracy in America*, Chs. 14-16 on lawyers and courts as a check on the "tyranny of the majority". L. Friedman Ch. 4 "The Law of Personal Status: Wives, Paupers, and Slaves"; Hendrik Hartog, "Abigail Bailey's Coverture: Law in a Married Woman's Consciousness"; Reed, "Celia's Case."

Recommended: Thoreau "On Civil Disobedience"; Thoreau "Letter"; R. Ferguson *Law and Letters in American Culture*, excerpts; H. Melville *Billy Budd*.

5th Discussion section meetings: On legal consciousness, Silbey and Ewick, short excerpt.

Week 6 (Sept. 30): From Dred Scott to Homer Plessy -- Reconstruction of American Law, American Lawyers, and of Law's Persons (Natural and Other), Part I: the distinction between public and private spheres of social life; The 14th Amendment, due process and equal protection; on new citizens, slaves, peons, and others. View-discuss excerpt from *Birth of a Nation* (1915) on Reconstruction and Reaction, (and the double-edged structure of reform). [Law, Rights, and Social Change; Law and Markets]

Read for Week 6: The 14th Amendment to the US Constitution; *Minor v. Happersett*, *Bradwell v. Illinois* (1873), *Yick Wo v. Hopkins* (1886), *Plessy v. Ferguson* (1896) L. Friedman pp. 37-42, 49-55.

Recommended: Brook Thomas (1999), chapter 7 of *The Failed Promise of Contract; The Slaughterhouse Cases, Dartmouth College v. Woodward* (1819)

5th Discussion section meetings: on race, gender, rights and personhood.

Week 7 (Oct. 7): Reconstruction, Risk, and the Rise of Regulation: On the changing nature and evolving social role of the legal profession in the late 19th and early 20th centuries. *Santa Clara County v. Southern Pacific Railroad* (1886); on railroads, torts, and the beginnings of the regulatory state, transforming contracts and labor law. [Law and Markets; Law, Rights, and Social Change]

Read for Week 7: L. Friedman pp. 42-49; R. Abel “Torts” (1983); J. Simon “Embracing Risk” (2003).

Recommended: Frank Norris, *The Octopus: A Story of California* (1898); Guido Calabresi, *The Cost of Accidents* (1970); J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956).

6th Discussion section meetings: On risk and rights and persons – key concepts.

Week 8 (Oct. 14): New Modes of Legal Knowledge for a New Century: The “Path of Law” from Legal Formalism to Sociological Jurisprudence and Legal Realism: Holmes on Langdell, on legal history *The Common Law* (1881), on “The Path of Law” – law as “logic, not experience”; Brandeis’ “The Right of Privacy” and the Brandeis brief; Holmes, Pound, Llewellyn, Frank. **Courtroom observation assignment guidelines handed out.**

Read for Week 8: L. Friedman pp. 163-170; *Lochner v. New York* (1905); *Muller v. Oregon* (1908); *Buck v. Bell* (1927); short excerpts from Holmes (1881, 1897), Pound (1908), Llewellyn (1929), Frank (1931).

Recommended: John Noonan *Persons and Masks of the Law* (1973), excerpts; Morton Horowitz *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992), Chs. 3, 5, 6.

7th Discussion section meetings: Classroom small-group debates on topics handed out on Oct. 7th, exploring classical versus realist law and policy argumentative structures.

Week 9 (Oct. 21): First midterm in first half of class.

Courts: Competence, Legitimacy, Jurisdiction (including dual structure), trial and appellate functions, legal error correction and policy formulation

Read for Week 9: Sally Engle Merry, “Courts As Performances” (1994); Murphy et al on structure and jurisdiction.

Recommended: Shapiro on court hierarchies.

8th Discussion section meetings:

Week 10 (Oct. 28): Lawyering Profession: Ideals and Sociological Facts

Read for Week 10: L. Friedman, *American Law: An Introduction*, Ch. 13; C. Wright Mills.

Recommended: R. Gordon, “Unfreezing Legal Reality” (1987), excerpt.

9th Discussion section meetings: class discussion of Marc Galanter’s web site on the history and sociolegal significance of lawyer jokes. Review of U.S. court system: dual jurisdiction, trial and appellate functions.

Week 11 (Nov. 4): Legal Reasoning & Legal Education: Cases, Statutes, Constitutions and Codes

Read for Week 11: Fuller/Hart debate; On Dynamic Interpretation

Recommended:

10th Discussion section meetings:

Week 12 (Nov. 18): Second In-class midterm administered during first part of class.

Legal Reasoning & Seeing Like a State after WWII: From Legal Realism to The Process School; Wechsler’s Neutral Principles; the Warren court, *Brown v. Board* and the due process revolution. View-discuss video excerpts: *Nuremberg 1949* and *Eyes on the Prize: the Emmett Till Murder Trial* (1988). [Law, Rights, and Social Change; Crime, Law, Governance]

Read: H. Wechsler “Toward Neutral Principles of Constitutional Law” (1959), excerpt; M. Galanter “Why the Haves Come Out Ahead: Speculations on Limits of Legal Change” (1974); *Korematsu v. US* (1942), excerpt; *Brown v. Board of Education* (1954), excerpt; M.L. King “Letter from the Birmingham City Jail” (1963); L. Friedman, 140-146.

Recommended: G. Peller “Toward Neutral Principles in the 1950s” (1988); B. Harcourt, “Making Willing Bodies: Manufacturing Consent Among Prisoners and Soldiers” (2011); Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

11th Discussion section meetings: on techniques of courtroom observation.

Week 13 (Dec. 2): Court Observation Papers due at start of class period. Take-home final exam handed out.

New Legal Subjects: Identities, Intersectionalities and Global Transformations: Immutable characteristics vs. anti-essentialism; empirical studies of intersectionality and performativity; ethnographies of emerging forms of rights consciousness. View-discuss Jenness slides, also excerpts from *Paris is Burning*.

Read: K. Crenshaw *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color* (1991); B. Garth and Y. Dezaley; P. Williams, “Metro Broadcasting”; L. Friedman, 147-157.

Recommended: K. Bumiller; Kath. Weston, *Families We Choose* (1997), excerpt; J. Collier and B Maurer *Sanctioned Identities* (1995).

Discussion section: Review key terms and concepts of rights consciousness and social mobilization.

RRR Week: Review sessions to be scheduled.

December 15th: The UCB Campus-Assigned Final Exam Period: 3:00-6:00 PM – Submit Take-home Final (mode of submission either in person or via bSpace TBA)