

Law & American Society
Social Studies 98cl., Spring 2013

[Tuesdays 3:00-5:00 p.m. CGIS Knafel Room K-108]

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The law is arguably the central organizing principle of American life and has been the battleground for every major transformation in American politics. For over two centuries the law and the courts have provided the framework in which the issues facing the nation have been aired and our sense of justice defined. It has shaped the political landscape in matters of equity (property, race and gender), and in matters of liberty (rights to due process, freedom of speech). Yet nothing is more hotly contested than the way the law defines what a person is—his or her rights or privacy, his or her sovereignty and accountability—as it adjudicates among, coerces or punishes its citizens. How then does our system of law resolve these matters under the Constitution? What is the nature of its authority, efficacy and legitimacy in addressing them? Is it based securely in reason, “God given” or “natural rights” as our enlightenment founders supposed, or in the “original intent” of those constitutional framers as the “textualists” or “originalists” of the Roberts Court insist? Is it a “construct” arising from political contingencies, or a “living constitution,” as the neo-pragmatists and other critics suggest? Is the law a reflection of liberal, capitalist imperatives as it was for Marx, or is it a convenient source of meaning and ‘visible symbol’ of social solidarity as for Durkheim? Is the law a changing ‘mechanism of normalizing judgment,’ as it was for Foucault?

These theoretical questions may be distilled into four general questions that will guide the tutorial: 1.) How does the law define individual rights and set limits of toleration and freedom for Americans? 2.) How does the law negotiate between competing interests, communities and constituencies? 3.) How has the law established the terms of punishment, coercive power and social control? 4.) How does the law function as ideology, providing a source of meaning and norms of discourse? Each of these questions will frame a unit of several weeks. Each unit will take up issues at the level of jurisprudence or political theory, and also at the level of the cases and public debates in which those questions arise—cases in which religious or sexual freedom are at stake, cases in which the claims of communities of belief seem irreconcilable, cases in which the nature and extent of punishment have been debated and notorious public trials of terrorists and others in which the national self-understanding has been shaped. Our aim is to bring theory to bear (and down to earth!) in each consideration.

Note: In the unit on punishment in April, pending final approval from the Superintendent (and after rereading portions of Foucault’s *Discipline and Punish* and Aladjem’s *the Culture of Vengeance*), we will make a field trip to Norfolk State Prison.

Reading supplements: will be circulated on changes in the law since 9/11/01 such as the Patriot Act, and on other key issues such as gun violence as they arise.

Writing assignments: In addition to a midterm essay responding to the first two units on rights, students will produce a final research or theoretical paper that builds upon any one of them, pursuing cases and other readings that may also provide the foundation for a sustained future project. There will be an opportunity to present a proposal for each essay and receive feedback on method and content from others in special workshops in two extra sessions (perhaps over dinner). The highest standards of academic integrity will be maintained in the tutorial, and proper scholarly citation expected. The Social Studies norm of grade reductions for late work will be applied except where special permission has been extended.

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Unit 1.) Law, Individual rights and the limits of toleration and freedom:

Week 1: February 4—Tutorial Orientation & Introduction: *What is law? What is a “society of laws”?*

Note: *There are two suggested course readings for the first week and an invitation to review some of the commentary on law offered by theorists (or in texts) addressed in Social Studies 10. It is suggested that you read selections from of Mill’s *On Liberty* and Marx, *On the Jewish Question* (assigned in 10, Fall, 2007):*

Readings (week 1) links to be sent:

J. S. Mill, *On Liberty* (especially chapters 2 & 4):

<http://books.google.com/books?id=f14SAAAIAAJ&printsec=frontcover&dq=On+Liberty,+Mill>

Karl Marx, *On the Jewish Question*:

<http://www.marxists.org/archive/marx/works/1844/jewish-question/>

You may wish to look at other readings from Social Studies 10 (past and present) or just refresh your memory on the following:

Emile Durkheim, *The Division of Labor in Society*, Book I, Chapters II and III

Adam Smith, *...The Wealth of Nations*, Vol. II, Book V, Chapter I, Part II: “Of the Expense of Justice” (708-723, may vary depending on edition)

Alexis de Tocqueville, *Democracy in America*, Part 1, Chapters 6, 7, 8 “On Judiciary Constitution” (99-163, may vary depending on edition)

Max Weber, *Economy and Society*, Vol. II, Chapter VIII: Economy and Law (Sociology of Law) Parts i, ii, iii, iv. (641-802, may vary depending on edition).

Week 2: February 12—*What are rights? How are they traditionally grounded or justified? How do such concepts embodied in law define the individual and shape society?*

“Declaration of Independence” (packet 2)

“Bill of Rights of the Constitution” (packet 8-11)

John Locke, from *The Second Treatise of Government* (packet 12-16)
T. Paine (2 selections) *Common Sense; The Rights of Man* (packet 17-27)
John Rawls, from, *A Theory of Justice* (link to be sent: 27-33)
M. Minow, (Chapter TBA)
Kors and Silverglate, *The Shadow University*, Ch. 8, “Individual Identity: The Heart of Liberty” (187-192 only); Ch. 11, “The Rules of Civilization” (265-275 only)
Patricia Williams, *The Alchemy of Race and Rights*, Ch. 1, “The Brass Ring...” (3-14)

Week 3: February 19—*What is the status of rights?*

Shute and Hurley eds. *On Human Rights*:

John Rawls, “The Law of Peoples” (41-82—Omit 60-77, but read page 68)
Richard Rorty, “Human Rights, Rationality, and Sentimentality” (111-134 text pages)
R. Rorty, “What’s Wrong with Rights”, *Harpers* 3/96 (packet 60-63)
S. Fish, *There’s No Such Thing as Free Speech*, “The Law Wishes to Have a Formal Existence,” Ch. 11, (141-179): (Omit 156-168—read 168-172—omit 172-177—read 177-179)
J. Scalia, “Common Law Courts and the Civil System” (3-48)
P. Williams, *The Alchemy of Race and Rights*, Ch. 2, “Guilded Lilies and White Guilt.” (15-43)
UN Declaration of human rights & “Are Human Rights Universal?”
News articles on detentions since 9/11, tribunals, etc. (to be sent)

Recommended:

S. Fish Ch. 13, on the jurisprudence of Posner, Rorty and Dworkin
C. Sunstein, What is Standing after *Lujan*? Of Citizens, Suits, “Injuries,” and Article III 91 Mich. L. Rev. 163 (1992-1993)
Richard Posner. “The Decline of Law as an Autonomous Discipline: 1961-1987,” *Harvard Law Review* 100, no. 4 (1987): 761-780.
Schelly, Judith M. “Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama.” *California Law Review* 73, no. 1 (January 1985): 158-180.

Week 4: February 26—*...how does the law thereby define the individual?...privacy, protection, bodies, persons, families, children... ?*

M. Foucault, *Discipline and Punish*, Part III, Chapter 2, “The Means of Correct Training” (170-194)
M. Minow, “Words and the Door to the Land of Change: Law Language and Family Violence” (111-145 packet)
C. Smart, “Law, Power and Women’s Bodies” in *Feminism and the Power of the Law*, Ch. 5. (60-71 packet)
Stephen Schulhofer “Unwanted Sex” (188-199 packet)
Bowers v. Hardwick (1986) (Link to be sent, or 146-165 packet)

Recommended: M. Minow, *Making All the Difference*, Ch. 9, “Rights and Relations: Families and Children” (267-311)

[First Essay assignment to be posted: to locate cases you may wish to check out www.findlaw.com]

Week 5: March 5—...how does the primacy of free speech effect a politics (the case of the academy)?

Kors and Silverglate, *The Shadow University*, from: Chapter 1 “The Water Buffalo Affair,” (9-16 only), Ch. 2 “Free Speech in a Free Society,” (34-49) and Ch. 4, “Marcuse’s Revenge” (67-79)

Stanley Fish, *There’s No Such Thing as Free Speech*, Ch. 3 “The Empire Strikes Back” (53-59); Ch. 5, “You Can Only Fight Discrimination...” (70-79), Ch. 7, “Speaking in Code...” (89-101)

Articles on Campus free speech, patriotism, and critics of U.S. policy since 9/11. (extra packet)

Recommended:

Jürgen Habermas, from *Communication and the Evolution of Society* (174-187 packet)

Hate Crimes article, under *Boston Globe* articles (166...packet)

Week 6: March 12—the question of free speech contd...

Kors and Silverglate, *The Shadow University*, Ch. 3 (pages 50-56 only); Ch. 6 (113-121; 130-136 only), Ch.15 (369-373 only).

S. Fish, *There’s No Such Thing as Free Speech*, Ch. 8 “There’s No Such Thing...”(102-119);

Patricia Williams, *The Alchemy of Race and Rights*: Ch. 5, “Crimes without Passion” (80-97)

R. Dworkin, *Taking Rights Seriously*, Ch. 8, “Civil Disobedience” (handout)

Article on dissent and the “war on terrorism” (to be circulated)

FIRST ESSAY DUE: Thursday, March 14—(before recess)

SPRING RECESS! March 16 (Sat)—March 24 (Sun)

Unit 2.) Competing interests, communities and constituencies:

Week 7: March 26— “*Dilemmas of difference*” ...or how does the law negotiate between competing interests, communities and constituencies in such matters as affirmative action?

M. Minow, *Making all the Difference* Minow, Ch. 2 "Sources of Difference" (pp 49-70 only)

R. Kennedy, *Race Crime and the Law* Ch. 2 “Unequal Protection” (29-76)

S. Fish, *There’s No Such Thing* Ch. 4 "Reverse Racism, or How the Pot Got to Call the Kettle Black" (60-69)

UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE, 438 U.S. 265 (1978). Listen to the opinions of the Justices and the argument of Harvard’s Archibald Cox at:
http://www.oyez.org/cases/1970-1979/1977/1977_76_811

P. Williams, *The Alchemy of Race and Rights* Ch. 6, "The Obliging Shell (an informal essay on formal equal opportunity)" (98-121 Only)

Week 8: April 2— “*Dilemmas of difference*” ... matters of faith and freedom contd.

J. Locke, *A Letter on Toleration* (at a library near you) or:

<http://www.constitution.org/jl/tolerati.htm>

C. Weisbrod, *Boundaries of Utopia* (packet pages 201-216 only)

Richard Rorty, from *Contingency, Irony, Solidarity, Chapter 4* (49-53 packet, stop at his page 82)

C. Dalton, “Deconstructing Contract Doctrine” (handout)

Case : *Mass. v. Twitchell* (1984) (handout)

Wallace v. Jaffree (1985) (237-268 packet) or at:

<http://members.aol.com/TestOath/JaffreeR.htm>

Unit 3.) Punishment, coercive power and social control:

Week 9: April 9 *Theories: or how does the law establish and justify punishment?*

J. Murphy, Punishment and Rehabilitation, essays on the theory and practice of punishment:

Immanuel Kant (selection) “The Right to Punish” (14-20)

Herbert Morris, “Persons and Punishment” (74-93)

Jeremy Bentham, “Punishment and Utility” (21-35)

Richard Delgado (249-273)

Recommended: T. Aladjem, *The Culture of Vengeance* (14-22)

Review: Mill’s *Utilitarianism*

Week 10: April 16—*Disciplinary society, or what are the practices of punishment and social control?*

T. Dumm, *Democracy and Punishment: the Disciplinary Origins of the United States*: Chapters 3, 4 and 5 of part II, (65-140). Photocopy
David Garland, *The Culture of Control*, Ch 6 “the Crime Complex.” Photocopy
Review: M. Foucault, *Discipline and Punish*, Part III, Ch 3 “Panopticism”, Part IV, Ch. 1, “Complete and Austere Institutions”
Eric Schlosser “The Prison Industrial Complex” (269-287 packet)
PBS Videotape: “Crime and Punishment in America”
PBS Videotape (Frontline) “*Snitch*” (on mandatory sentencing and the effects on prosecution)
60 Minutes: Chicago: the False Confession Capital
<http://www.cbsnews.com/video/watch/?id=50136707n>

Article on arrests and detentions since 9/11

T. Aladjem, *The Culture of Vengeance* Ch. 2. (to be read over two weeks)

Week 11: April 23— *Death Penalty discussion and debate*

Gregg v. Georgia (1976): <http://www.lectlaw.com/files/case26.htm>
(Note: the dissenting opinions are way at the bottom after footnotes)
R. Kennedy, Ch.9, “Race, Law and Punishment: The Death Penalty”
F. Kafka, *The Penal Colony* (288-302 packet)
T. Aladjem, *The Culture of Vengeance* Ch. 4.
News Paper article: “Child killer hanged in Washington state”(1 page to be distributed)
PBS Videotape (Frontline): “The Execution”

PRISON VISIT (after hours) Date to be announced.

Unit 4.) Law as ideology and source of norms and informing images:

Week 12: April 30 —*Race, law and media effects...*Or how the law, and notorious cases become a vehicle for ideological debates [What the media do with a Capital case...thinking of O.J. Simpson and others]

Williams Ch. 4, “Teleology on the Rocks (Howard Beach, Bernard Goetz etc.)
R. Kennedy Ch. 8, “Playing the Race Card in a Criminal Trial” (O.J.)
J. Fiske *Power Plays; Power Works* (304-317 packet)
T. Aladjem, *The Culture of Vengeance* Ch. 2. (contd...)
A sustained look at a notorious case: the trial of O.J. Simpson and its effects

[Reading Period: May 2—May 9, Final Essays Due, Date TBA]

An extra session to reflect on the semester's work and get feedback on final projects will be offered

Readings will include selections from these and other sources:

Available for purchase at The Coop:

T. Aladjem, The Culture of Vengeance and the Fate of American Justice (readings to be supplied/discounted on Amazon)

S. Fish, There's No Such Thing as Free Speech...and its a Good Thing, Too

M. Foucault, Discipline and Punish: The Birth of the Prison (or saved from SS10)

R. Kennedy, Race, Crime and the Law

A. Kors and H. Silverglate, The Shadow University

M. Minow, Making all the Difference: Inclusion, Exclusion and American Law (readings to be supplied)

J. Murphy, Punishment and Rehabilitation

A. Scalia, A Matter of Interpretation: Federal Courts and the Law

Other readings available to borrow or that will be sent:

T. Dumm, Democracy and Punishment : the Disciplinary Origins of the United States

J. Fiske, Power Plays; Power Works (selection)

J. Habermas, Communication and the Evolution of Society (selection, recommended)

M. Minow, "Words and the Door to the Land of Change: Law Language and Family Violence"

R. Rorty, from Contingency, irony, and solidarity

C. Smart, Feminism and the Power of the Law (selection)

J. Locke, A Letter Concerning Toleration (selection)

C. Weisbrod, Boundaries of Utopia (selection)

S. Shute and S. Hurley eds., On Human Rights: The Oxford Amnesty Lectures 1993

P. Williams, The Alchemy of Race and Rights

Articles on changes in the law since September 11, 2001

Cases to be discussed and made available in some form: *Bowers v. Hardwick* (1986); *Gregg v. Georgia* (1976); *University of California Regents v. Bakke* (1978); *Commonwealth of Mass. v. Twitchell* (1989); *Wallace v. Jaffree* (1985), also available on line.