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PSCI 370.01: Courts and Judicial Politics

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University of Montana
Department of Political Science

PSCI 370
Courts and Judicial Politics
Autumn 2015

Patrick Peel
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Office Hours: 1-2 pm M, W; by appointment

12:10-1:00 M, W, F
Classroom: LA 337

This course explores the role of law, courts, judges and lawyers in the American polity. Thus, we shall investigate the criminal and civil justice system, the role of the jury, judicial power and politics, tort reform, and constitutional interpretation, among other topics. While we focus on the United States, the course also compares the American justice system with those of other countries. To that end, the course raises theoretical questions about the proper role of a legal system within democratic forms of government, the nature of the rule of law, and social justice. Throughout we will investigate whether American courts, judges, and lawyers can and do live up to the aspirations of the American legal order.

Readings

The books listed below may be purchased at the University Bookstore.

Required Reading:

1. Murphy, Pritchett, Epstein, and Knight, *Courts, Judges, & Politics*, 6th ed. (McGraw Hill: 2006)
2. Robert A. Kagan, *Adversarial Legalism* (Harvard: 2003)
3. Jeffrey Abramson, *We, The Jury* (Harvard: 2000)
4. Jonathan Harr, *A Civil Action* (Vintage: 1995)
5. George P. Fletcher, *A Crime of Self Defense* (Chicago: 1988)

Procedures and Requirements

Grading and Assignments:

This course has seven requirements, which include the following:

1. Faithful attendance to class and active participation during the discussions (25% of the final grade; see “Participation” below)
2. Group Project (**Oct 1**: 15%; see “Group Project” below).
3. Midterm: 50 minute in class examination (**Oct 23**: 20%; see “In Class Writing Assignments” below)
4. Group Project (**Nov. 6**: 15%; see “Group Project” below).

5. Final Exam: (**Dec. 18:** 25%; see “in Class Writing Assignments” below)

In order to pass the class, you must complete all of the assignments.

Participation:

This course will be structured around lectures and class discussions. Thus, come to class with the reading assignments finished (completely read, and carefully thought about) and with questions to ask and ideas and thoughts to share. That is to say, in class it is your job to put your ideas forward for your classmates to endorse, challenge, and transform.

When you are reading the material, “actively” engage with it. That means interrogating the text by asking why the author might say such a thing - what the reasons are for the author asserting the claim he or she does – and what his or her presuppositions are. As you read, and as you ask questions of the text, try writing in the margins questions, thoughts or ideas. Once you are done actively reading the material, then jot down the questions, thoughts, and ideas you have written in the margin of the text. This will give you something to talk about, and also help prepare you for the course’s exams and writing assignments.

Your regular, thoughtful participation will be critical to determining the success of the course and the grade you receive in it.

In Class Writing Assignments:

The course requires two in class written examinations.

1. The mid-term examination will take place on October 23. It will last 50 minutes and cover the material from the course thus far. The test requires you to write an essay on some given topic or theme from the course, which will be presented to you at the time of the exam. The test will be open-book, and is designed to help you learn to master the bluebook format. The test is worth 20% of your grade.
2. The final examination also will be open-book, and will follow a similar format. It will take place on Dec. 18 at 8:00 am and will last 2 hours. It is worth 25% of your grade.

One of the aims of this course is to help you learn to write effective “argumentative essays.” The purpose of both these assignments is to help develop that skill.

Group Projects:

The course requires the completion of 2 group projects.

1. American Exceptions Project: On Oct. 1 the first of two group projects is due. Background: In 2008, the New York Times published a 10 part series on the commonplace aspects of the American justice system that are unique in the world, entitled “American Exceptions.” More information about the series can be found here:

http://topics.nytimes.com/topics/news/us/series/american_exception/

The second week of the course, participants will sign up to work on one of the 10 topics discussed in this series. Four people will be assigned per working group. Using the article touching on the topic your group is assigned, group members will investigate that topic and its distinctive features, as they contrast with other legal systems. The ultimate product of this group project will be to produce a dossier between 10 to 12 pages in length. Each member of the group,

however, is required to contribute two pages of text on some feature of the project. The remainder of the dossier may be produced collectively. As the term progresses, we will talk more about this project.

2. The American Legal System: On Nov. 6, the second of two group projects is due.

Background: Week 9, three students per group will be assigned to work on one of the following topics: plea bargaining, alternative dispute resolution, the juvenile justice system, the judicial contempt power, judicial selection, the public defender, legal education, the office of the solicitor general, the law firm, the grand jury, justice of the peace, or tribal courts. The ultimate product of this group project will be a dossier, similar in format to that of the first project, between 8 to 10 pages.

Project Grading:

The level of excellence displayed in the 2 pages an individual has contributed to the dossier will largely determine each individual's grade on their projects. That said, some portion of one's grade will depend on the overall quality of the project. (We will talk more about the assignment as the term progresses).

Late Project Policy:

You will note from the syllabus that we do not have class scheduled on the week your project is due. For this reason, late dossiers will be marked down a grade every day they are late.

Writing Help:

The Writing Center is located in LA 144. To make an appointment with a writing advisor, call 243-2266, email growl@mso.umt.edu, or stop by LA 144.

Class Drop Policy:

The University allows students to drop courses until September 21 (i.e. the 15th instructional day). After that, students are required to obtain the signature of the faculty member teaching the course. **It is my policy to not sign students out of classes.** That is, you have three weeks (until Sept. 21) to decide if you wish to take this course. If you do not drop the course by September 21, I will assign students the grade they have received in the class. (Side note: It is not good for you or for the class to have students not committed to taking a course, and hence the policy...)

Academic Dishonesty:

Students in this course are expected to follow the University's standards of academic integrity and honesty. If you are caught cheating or plagiarizing, you may receive a failing grade for the assignment and/or class and may be reported to the University. Students are responsible for understanding what constitutes plagiarism. The Code is available for review online at <http://www.umt.edu/SA/VPSA/index.cfm/page/1321>

Course Topics and Readings:

Reading assignments are to be completed before the class meeting for which they are listed. Bring to class the assigned books, print-outs of online assignments, your reading notes, and this syllabus.

Week One: Law

1. Mon., Aug. 31: Introduction; What is "The Law"

*Murphy et al, *Courts, Judges, & Politics*, pp. 3-26:

- 1.1 William Blackstone, *The Federalist*, No. 78
- 1.3 Alexis de Tocqueville, *Judicial Power in the United States*
- *Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (1871) [M]
- *Book Review of Langdell's Casebook (1880) [Written anonymously by Oliver Wendell Holmes] [M]
- *Murphy et al, *Courts, Judges, & Politics*, pp. 27-33:
 - 1.4 Oliver Wendell Holmes, Jr. *The Path of Law*
 - 1.5 Benjamin N. Cardozo, *The Nature of the Judicial Process*

Prep: What is “the law?” What are the various conceptionalizations of law and how do these differ, one from the other? How would you characterize Landgell’s understanding of the law? Finally, what is Holmes’ objection to Langdell’s approach and how does Cardozo view the “judicial process?”

Recommended:

- *Duncan Kennedy, *Classical Legal Thought* [M]

2. Wed., Sept. 2: No Class (American Political Science Association): Contemporary Debate

- *Re-read: Murphy et al, “Realism’s Progeny and Critics,” in *Courts, Judges, & Politics*, pp. 16-18

Write paragraph, drawing on the reading from Monday and Wednesday, on the general question of what is “the law?”

3. Fri., Sept. 4: No Class (American Political Science Association):Contemporary Debate

- *Watch Ronald Dworkin, “Is There Truth in Interpretation? Law, Literature, and History,” Frederic R. and Molly S. Kellogg Lecture, Library of Congress (2009) (watch the intro, too, which includes Frederic Kellogg’s introduction of Dworkin)
<http://www.youtube.com/watch?v=742JyiqLhuk>

Prep: What is Dworkin’s argument? More generally, is there truth in the interpretation of law (Dworkin saves some of his important comments about the law for the end of the video)? Or is it just a matter of opinion? What factors are relevant to the interpretation of law? Does law have a moral component? If there can be unjust legal systems and unjust laws, doesn’t that mean that Dworkin is wrong?

Write paragraph on Dworkin responding to one of the prep questions.

Recommended:

- *Explore, as you see fit, NYU Law School’s The Hart-Fuller Debate at 50. There you can find contemporary articulations of the Hart-Fuller debate by leading scholars:
<http://www.law.nyu.edu/conferences/hartfuller>

Week Two: Courts

1. Mon., Sept. 7: No Class Labor Day

2. Wed., Sept. 9: Courts in Constitutional Democracies

- *Murphy et al, *Courts, Judges, & Politics*, pp. 38-46
- *Martin Shapiro, “Courts” [M]

Prep: What are the role of courts? What is the image of courts in American popular culture? How does Murphy et al define the role of courts? How does Shapiro define that role?

**PARAGRAPH ON THE GENERAL QUESTION OF WHAT IS THE LAW &
PARAGRAPH DUE ON DWORKIN’S LECTURE**

3. Fri., Sept 11: Judicial Organization

*Murphy et al, *Courts, Judges, & Politics*, pp. 77-121, 129-132:

3.1 Judiciary Act of 1789, Section 25

3.2 Inside Appellate Courts

3.3 Politics and Judgment on the Federal District Courts

3.4 The Importance of the Trial Judge

3.5 Litigation Flow in Three United States Courts of Appeals

3.6 Solutions to Federal Judicial Gridlock vs. 1,000 judges

3.8 William J. Brennan, Guardians of Our Liberties – State Courts No Less Than Federal

*Susan Silbey, “Making Sense of the Lower Courts” [M]

Prep: What is the structure of the American judicial system? What might some of the implications be of “judicial federalism?” What is “judicial bureaucratization?” What are the assumptions behind the concept of “judicial bureaucratization?” Does something need to be done to address this problem? If so, who is right, Victor Williams or Jon Newman? Finally, what is Justice Brennan’s argument? Does his position argue for a greater role of state courts in the American constitutional system? (Also, note the date of the article – what politically was going on in the United States during this period of time?)

Recommended:

*Broken Bench, NYT series [M]

Week Three: Judicial Power

1. Mon., Sept. 14: Access to Judicial Power

*Murphy et al, *Courts, Judges, & Politics*, pp. 253-80, 285-98:

6.1 The Washington Administration’s Request for an Advisory Opinion and the Justices’ Response

6.2 Roe v. Wade vs. Defunis v. Odegaard

6.4 Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Social Chance

6.5 Clement E. Vose, Litigation as a Form of Pressure Group Activity

6.6 Gregory Caldeira and John Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court

Prep: One of the features that distinguish the judicial branch from the other branches of American government are mechanisms that restrict access to judicial power. What are some of those mechanisms? Who typically uses the courts when it comes to accessing judicial power? What structural features exist in the system to determine who comes out ahead in their use of judicial power? (Here pay close attention to Galanter’s argument). What is the picture that Vose, Caldeira, and Wright paint? (We will come back to these issues when we turn the issue of Tort Reform and Judicial Elections)

2. Wed., Sept. 16: Instruments of Judicial Power

*Murphy et al, *Courts, Judges, & Politics*, pp. 299-328:

- 7.1 Texas v. Hopwood (1996)
- 7.2 Madsen v. Women's Health Center, Inc. (1994)
- 7.3 Wyatt v. Stickney (1971-72)
- 7.4 Illinois v. Allen (1970)

Prep: Unlike the other branches of government, courts have complex mechanism for limiting and structuring who has access to them. In addition, courts have specific instruments available to them to exercise judicial power. What are some of these instruments? Are there limits to these instruments when it comes to the range of capacities required for a health well functioning democracy? For instance, are courts well equipped institutionally to deal with the issue of affirmative action? (see Texas v. Hopwood) What does the debate in Wyatt v. Stickney tell us about these issues?

3. Fri., Sept. 18: Limitations on Judicial Power

*Murphy et al, *Courts, Judges, & Politics*, pp. 329-44, 349-63, 366-78

- 8.2 Lee Epstein and Jack Knight, The Choices Justices Make
- 8.3 Jeffrey A. Segal et al., Decision Making on the U.S. Courts of Appeals
- 8.4 Andrew Jackson's Veto of the Bank Bill
- 8.5 Abraham Lincoln's First Inaugural Address
- 8.6 Franklin D. Roosevelt, Reorganizing the Federal Judiciary
- 8.9 James Kuklinski et al., Political Participation and Government
- 8.10 James Gibson, et al., On the Legitimacy of National High Courts and the Supreme Court and the U.S. Presidential Election of 2000

Prep: Despite the extensive range of public policy issues courts might be involved in, and the range of instruments they can use to implement their power, there are institutional and cultural features of American government which limit judicial power. What are these "limitations" and how do the texts for today's class highlight those limitations? Ultimately, how able are courts to act outside the confines of public and political support? Recall that one of the key features of courts is often thought to be an "independent judiciary." To what extent is the judiciary truly independent?

Week Four: American Legal Culture

1. Mon., Sept. 21: Adversarial Legalism

*Robert Kagan, *Adversarial Legalism*, pp. 3-33:

- The Concept of Adversarial Legalism
- The Two Faces of Adversarial Legalism

Prep: Since at least the time of Alexis Tocqueville, commentators have sensed there was something distinctive about American legal culture. Kagan's book is entitled, "Adversarial legalism: The American Way of Law." Why is "adversarial legalism" the "American way of law?" What does the concept of "adversarial legalism" entail, and what are its contours, consequences, and causes?

2. Wed., Sept 23: Adversarial Legalism

*Robert Kagan, *Adversarial Legalism*, pp. 34-58:

- The Political Construction of Adversarial Legalism

Prep: What is the “political construction of adversarial legalism?” What is “total justice” and why when paired with “fragmented government” does one get “adversarial legalism?”

Recommended:

*Erhard Blankenburg, “Indicators of Growth of the Systems of Justice in Western Europe in the 1990’s: The Legal Professional, Courts, Litigation, and Budgets” [M]

3. Fri., Sept 25: Adversarial Legalism

*Robert Kagan, *Adversarial Legalism*, pp. 159-228:
Adversarial Legalism and the Welfare State
Adversarial Legalism and Regulatory Style
Economic Development, Environmental Protection, and Adversarial Legalism

Prep: One of the distinctive features of modern democratic government is the development of a regulatory, administrative, welfare state. How does the concept of adversarial legalism impact and interact with the concept of the regulatory, administrative, welfare state? Are there positive effects of adversarial legalism in these domains? Are there negative aspects? What are they?

Recommended:

*Susan Silbey, “Legal Culture and Legal Consciousness” [M]

Week Five: American Exceptions Project

1. Mon., Sept. 28: Work on Projects

*American Exceptions, NYT Series [M]

2. Wed., Sept. 30: Work on Projects

3. Fri., Oct. 1: Project Due

Week Six: The Legal Profession, Judges, & Tort Reform/Judicial Elections

1. Mon., Oct. 5: The Bar

*Video: ThinkBig, Larry Kramer, Dean Stanford University Law School (now President of the Hewlett Foundation) (27 mins.): <http://bigthink.com/users/larrykramer>

*Murphy et al, *Courts, Judges, & Politics*, pp. 212-50:

5.1 Scott Turow, *One L: An Inside Account of Life in the First Year at Harvard Law School*

5.2 Austin Sarat and William Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*

5.3 Abraham S. Blumberg, *The Practice of Law a Confidence Game*

5.5 F. Lee Bailey, *The Defense Never Rests*

5.5 Sandra Day O’Connor, *Professionalism*

Prep: What, according to Kramer, are some of the contemporary forces and factors that are changing the nature of the law school experience? How does this track with Scott Turow’s description of life in the first year of law school? What sort of work do lawyers typically do and where do they typically work? How would you characterize the lawyer-client relationship? Finally, why do you think lawyers play such a big role in American life? How, for instance, does one explain the paradox that Americans love litigating but hate lawyers? Does Kagan’s work on adversarial legalism help explain the role of lawyers in American life?

2. Wed., Oct. 7: Judges

*Murphy et al, *Courts, Judges, & Politics*, pp. 141-211:

- 4.1 Sheldon Goldman et. al., The Composition of the Federal Judiciary
- 4.2 Sheldon Goldman, Picking Federal Judges
- 4.3 Neil Lewis, Partisanship and the Appointment of Federal Judges
- 4.4 Jason Roberts, Parties, Presidents, and Procedures: The Battle over Judicial Nominations in the U.S. Senate

Prep: Who are judges? What are their social background and career experience? What features contribute to the quality of a judge's performance, and how might one improve judicial quality? Note the issues raised by the articles in 4.3 and 4.4. These issues are at the center of the most recent battle regarding the Senate filibuster. Has our judiciary become too "politicized?" Or is politics a necessary and inescapable feature of judicial selection and behavior? Is this especially true, and importantly so, in a democratic legal system?

Recommended:

*Judith Resnik, "Managerial Judges" [M]

3. Fri., Oct. 9: Politics by Other Means: Tort Reform & Judicial Elections

*Robert Kagan, *Adversarial Legalism*, pp. 99-155:

Adversarial Legalism and Civil Justice

*Audio: The Conservative Legal Movement and the Future Liberal Jurisprudence, Brookings Institution (2011) <http://www.brookings.edu/events/2011/12/01-liberal-jurisprudence> (Second Audio Clip with Steve Teles, Lee Liberman, and Pamela Karlan; stop at 12 minutes)

*Video: Watched in class *Hot Coffee* (2012) (Clips)

Prep: What is the characterization of the legal system prior to the "conservative legal movement" that Teles highlights? How is the issue of tort reform bound up with politics, and a struggle for who gets what when and how? How and when should people have access to the civil legal system? What sort of problems does Kagan see with adversarial legalism and the civil justice system? Finally, note the role of judicial elections in the process of tort reform. Is this an instance of the "politicization" of the judiciary or simply a feature of a democratic political order, where powerful interests seek to support judges they think will be supportive to their cause on the bench? If so, though, might the agenda of these groups conflict with the public interest? Does the process threaten judicial independence?

Week Seven: Trial Courts and Civil Justice

1. Mon., Oct. 12: Civil Justice in Action

*Jonathan Harr, *A Civil Action*, pp. 3-119; pp. 123-232

Prep: (1) Who are the major players in the case? How would you describe their characters? Do their character traits determine the way the case unfolds in any way? (2) What are the "political" dynamics of the case – that is, how easy is it to separate the "legal" qua "legal" aspects of the case from the strategic and political aspects of the case? (3) Why do personal injury lawyers have a bad reputation? (4) How important is the role of money in the case? (5) What are orphans and dogs?

Recommended:

*Robert H Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law" [M]

2. Wed., Oct. 14: Civil Law in Action

*Jonathan Harr, *A Civil Action*, pp. 235-375

*Civil Action Timeline [M]

Prep: (1) Ch. "Billion Dollar Charlie" (A-E): in the Harvard Law Review article that Nelson authored the claim is made that "judgments of the courts are meant to reinforce social rules and values and, at the same time, to deter behavior contrary to those rules and values" (pg. 236). Do you think this is right? Does this seem to be what is going on with the case in *A Civil Action*? Furthermore, what is the supposed problem with statistical evidence in a court of law? Is Judge Skinner right to be worried? Should Schlichtman be worried given the nature of the scientific evidence he has put together? (2) Ch. "Facher's Plea" (J-M): this chapter largely deals with the jury selection process. When you read it ask yourself the following questions: Does the jury selection process, and the role of the various lawyers within it, seem to be a good system that ensures an impartial jury? Also, are there biases that you notice operating among any of the participants in the process? (3) Ch. "The Trial" (P-Z): For those of you focusing on "Trial" ask yourself the following: the questions that Judge Skinner sets for the jurors ask "for answers that were essentially unknowable... The judge was, in effect, asking the jurors to create a fiction that would in the end stand for the truth" (pg. 369). Do these questions demand too much from a jury of non-experts? Harr (the author of *Civil Action*) suggests that perhaps the case was one "that the judicial system was not equipped to handle" (pg. 369). Is this true? How else might it be handled and settled?

Recommended:

*Hazardous Material Found on MBTA Site, *The Daily Times*, Woburn, Mass. May 7, 1979 [M]

*William Felstiner, *et al.*, "The Emergence and Transformation of Disputes" [M]

3. Fri., Mar. 16: Civil Law in Action (Pacific Northwest Political Science Association)

*Jonathan Harr, *A Civil Action*, pp. 379-492

Prep: (1) How important is money in winning a suit? As a general rule, will the party with the deepest pockets win? Do the results of the Woburn case support that theory? Is it possible to present a case well and fairly, even from a position of financial disadvantage? What say you? (2) Do you think Schlichtmann's dealings with the eight Woburn families was sufficiently fair and honest? Was the case taken out of the plaintiffs' hands, and, if so, was such a method essential for an efficient prosecution? Anne Anderson believes that Schlichtmann was patronizing toward the Woburn families, kept them from having any control over their own case, and used them "simply as a vehicle for his own ambition, for his own fame and fortune" (pg. 453). What do you think? Do you agree with her complaints? (3) After the decision, the jurors each "had some misgivings, but on balance they felt they had done the best they could" (pg. 392). But is that good enough? If not, what might be done to improve the situation? What sort of alternatives do you see? (4) Rhetoric, obviously, played an enormous role in *A Civil Action*, and plays a large part in a lawyer's ultimate success or failure. Is this fair? What about rhetorical tactics that hinder the other side's presentation of evidence, like Facher's repeated objections? Do these courtroom tactics serve to reveal or to obscure the truth? And ultimately do you think the "truth" is what the adversarial system aims at? Or are there other values and things going on in this sort of system? (5) Donna Robbins believes that she and her fellow plaintiffs have succeeded in teaching corporate America a lesson; Reverend Young, on the other hand, thinks that the Grace executives

and attorneys have reason to celebrate. With which of these opinions do you agree? Does the final settlement represent a victory, a loss, or a compromise? (6) Finally, ask yourself if reading a Civil Action has changed your ideas about the American judiciary system, and, if so, in what way?

Recommended:

*Daniel D. Kennedy, Toxic Trial: Many Questions, Few Answers [M]

*Owen Fiss, "Against Settlement" [M]

Week Eight: Midterm

1. Mon., Oct. 19: Optional Review

2. Wed., Oct. 21: No Class

3. Fri., Oct. 23: 50 Minute In Class Midterm (Association for Political Theory)

Week Nine: Crime After Crime

1. Mon., Oct. 26: Crime After Crime

*Robert Kagan, *Adversarial Legalism*, pp. 61-81:

Adversarial Legalism and American Criminal Justice

Prep: What is the impact of adversarial legalism on the American criminal justice system?

2. Wed., Oct. 28: Crime After Crime

*Robert Kagan, *Adversarial Legalism*, pp. 82-96:

Deciding Criminal Cases

*Movie: *Crime After Crime* (2011): http://www.youtube.com/watch?v=zfl6r_4RjGQ

Prep: Do you see the impact of adversarial legalism at work in *Crime After Crime*? Are there limits to the system of adversarial legalism when it comes to the criminal justice system? Would you ever plead guilty to a crime you did not commit? What might be the role of politics in this case?

3. Fri., Oct. 30: Crime After Crime

*Movie: *Crime After Crime* (2011): http://www.youtube.com/watch?v=zfl6r_4RjGQ

Prep: What are the tendencies in the adversarial system in the handling of criminal cases? Kagan sketches out different systems for dealing with criminal cases. Would these other systems work better? What are the main structural problems you see in the criminal justice system if any? How best might individuals or organizations address these?

Week Ten: The American Legal System

1. Mon., Nov. 2: Work on Project

2. Wed., Nov. 4: Work on Project

3. Fri., Nov. 6: Project Due

Week Eleven: Juries

1. Mon., Nov. 9: Fact Finding in the Courts

- *Video: *12 Angry Men* (First 45 minutes)
<http://www.youtube.com/watch?v=RelOJfIyp8>
- *Jeffrey Abramson, *We, The Jury*, pp. 1-13

Prep: What sort of difficulties do you perceive with the jury system? What sort of difficulties do you see as evidenced by *12 Angry Men*? Why does Abramson say the jury trial is “about the best of democracy and about the worst of democracy?” Are juries really capable of deciding the difficult issues, technological and otherwise, that come before them? (We will come back to this issue when we read *A Civil Action*) Finally, how important is the jury really to the American democratic system?

2. Wed., Nov. 11: No Class: Veterans Day

3. Fri., Nov. 12: No Class: (New England Political Science Association)

The Jury: Democratic Knowledge

- *Jeffrey Abramson, *We, The Jury*, pp. 17-95
- *Video: *12 Angry Men* (Last 45 minutes)
<http://www.youtube.com/watch?v=RelOJfIyp8>

Prep: What are the tensions bound up in the concept of the jury with it comes to the issue of knowledge, according to Abramson? Do the jurors in *12 Angry Men* manage to navigate the conflicting ideals of democratic knowledge embodied in the ideal of the jury? If so, how? *12 Angry Men* ends on a hopeful note. But given what Abramson says, should we take any comfort in that? Finally, should juries be able to decide matters of law as well as fact? Should they be able to nullify laws?

Write up paragraph responding to one of the prep questions.

Week Twelve: The Criminal Justice System

1. Mon., Nov. 16: Mock Trial

- *George P. Fletcher, *A Crime of Self-Defense*, pp. 1-83

PARGRAPHS DUE

2. Wed., Nov. 18: Mock Trial

- *George P. Fletcher, *A Crime of Self-Defense*, pp. 84-136

3. Fri., Nov. 20: Mock Trial

- *George P. Fletcher, *A Crime of Self-Defense*, pp. 137-217

Week Thirteen:

1. Mon., Nov. 23: No Class

THANKSGIVING BREAK: 25TH THROUGH 27TH

Week Fourteen: Appellate Courts and Judicial Policy-Making

1. Mon., Nov. 30: Judicial Review and Policy-Making

*Murphy et al, *Courts, Judges, & Politics*, pp. 46-55, 61-73:

2.2 Marbury v. Madison

2.3 Eakin v. Raub

2.4 Robert Dahl, Decision Making in a Democracy: The Supreme Court as a National Policy Maker

2.5 Jonathan D. Casper, The Supreme Court and National Policy Making

*Video Watched in class: "This Honorable Court" (Part I)

Prep: What is the power of judicial review? What is the argument of Marbury v. Madison for that power? Conversely, what is the critique of that reasoning found in Eakin v. Raub? More generally, what should the role of appellate courts be in a democratic political system? The power of judicial review is now generally accepted as a necessary feature of democratic constitutional political systems. Is that a good thing? Why might it be problematic? Finally, what is the empirical claim that Dahl makes about the practice of judicial review? Does that power actually operate as people commonly think, according to Dahl? And why does Casper disagree with Dahl's claim?

2. Wed., 3. Dec. 2: Constitutional Interpretation

Video: Justices Stephen Breyer and Antonin Scalia talk about the Constitution, hosted by the Federalists Society and the American Constitution Society (2011) (about 1 hour):

<http://www.youtube.com/watch?v=qjAYuMLDGyI>

*Murphy et al, *Courts, Judges, & Politics*, pp. 539-58, 566-85, 519-616:

12.2 Antonin Scalia, Originalism: The Lesser Evil

12.3 Robert H. Bork, The Tempting of America

12.4 Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution

12.5 Constitutional Court of the Republic of South Africa, The State v.

Makwanyane

12.7 Economic Reasoning and Constitutional Interpretation

12.8 William H. Rehnquist, The Notion of a Living Constitution

12.9 Ronald Dworkin, Taking Rights Seriously

Prep: If constitutional law is higher fundamental law, sitting above ordinary law and controlling it, then how one should interpret that law (and who gets to interpret that law) will have profound consequences. Indeed, depending upon one's theory of constitutional interpretation, one may be able to control policy outcomes, and establish the rules, so to speak, in which ordinary democratic politics is conducted. How would you characterize the various approaches to constitutional interpretation? What might be some of their implications for public policy?

Recommended:

*Watch video: Interview of Justice Scalia on his book, *Reading Law: The Interpretation of Legal Texts* (2012) <http://www.youtube.com/watch?v=DaoLMW5AF4Y>

*Richard Posner, "The Incoherence of Antonin Scalia," *The New Republic* (2012) [M]

3. Fri. Dec. 4: The Processes of Appellate Judicial Decision Making

*Murphy et al, *Courts, Judges, & Politics*, pp. 617-44, 660-90:

13.3 Frank Cross and Emerson Tiller, Judicial Partisanship and Obedience to Legal Doctrine

13.4 Melinda Hall, Constituent Influence in State Supreme Courts

13.5 H.W. Perry, Deciding to Decide

13.6 David Danelski, The Influence of the Chief Justice on the Decisional Process

13.7 Wahlbeck et al., Marshalling the Court

Prep: Constitutional interpretation may drive public policy outcomes; but so may internal and external institutional factors. What other factors may be important in the process of judicial decision-making? Indeed, might not these factors actually trump the ideological factors embodied in judicial philosophies of constitutional interpretation?

Week Fifteen: Courts, Justice and Democracy

1. Mon., Dec. 7: The Vanishing Trial?

*Jeffrey Abramson, *We, The Jury*, pp. 179-250

Prep: Are trials “vanishing” and is that something to be worried about? Would Abramson be worried about that?

Recommended:

*Laurence Friedman, “The Day Before Trials Vanished” [M]

*Marc Galanter, “The Vanishing Trial” [M]

2. Wed., Dec. 9: The Impact of Judicial Decisions

*Murphy et al, *Courts, Judges, & Politics*, pp. 691-722, 725-57:

14.1 Canon et al., Judicial Policies: Implementation and Impact

14.2 Slotnick and Segal, Television News and the Supreme Court

14.4 Fisher, Legislative Vetoes, Phoenix Style

14.5 Rosenberg, The Hollow Hope: Can Courts Generate Social Change?

14.6 Mann, Reform Litigation on Trial: Review of the Hollow Hope

Prep: What is the impact of judicial decisions? The issuing of a decision does not simply imply that a decision is implemented (see 14.4), and even if it is, might there be unintended consequences to its implementation, such that its impact is far afield for that which was intended? (Note: Should consequences even be taken into account when thinking about the law?) How do Canon and Johnson see the complex system of judicial implementation? Finally, do you think Courts can advance the cause of social justice? Rosenberg is skeptical – why so? Who do you think has the better argument here, Mann or Rosenberg?

3. Fri., Dec. 11: The Rule of Law and Democracy at Home and Abroad

*Video: Duncan Kennedy (Harvard Law School), Global Dialogue on the Future of Legal Education (2012) (27 mins): <http://www.youtube.com/watch?v=eldHmK4wYcc>

*Robert Kagan, *Adversarial Legalism*, pp. 229-52

*Doris Provine, “Judicial Activism and American Democracy” [M]

*Thomas Carothers, “The Rule-of-Law Revival” [M]

*George Soros and Fazle Hasan Abed, “The Rule of Law can Rid the World of Poverty,” *The Financial Times*, September 26, 2012 [M]

*Walter Dellinger and Samuel P. Fried, “Promoting the Rule of Law Abroad” [M]

Prep: Is the global rule of law public policy movement within the United States the rightful inheritance of hard fought for progress toward a more humane, just, and fair structure of government and social life, the product of the development of human rights, constitutionalism, professional lawyers and judges to uphold those rights and protect us from excessive executive power and oppressive democratic majorities? Or does this global rule of law movement simply reflect the deep obsession of Americans with legal institutions, one stretching back to the very beginning of American politics? Further, given what you now know about the "rule of law" in America and the operation of the American legal system do the pluses outweigh the negatives? And given that, what should our stance be to the rule of law movement? Is some form of, as Kagan puts it, “the American way with law” right for other countries? Or is America’s desire to, as a recent and influential foreign policy paper puts it, “forge a world of liberty under law” misguided?

Recommended:

*The World Justice Project: <http://worldjusticeproject.org/>

*The Mansfield Legal Reform Initiative (University of Montana):

<http://www.umt.edu/mansfield/internationalprograms/archive/legalreforminitiative/default.aspx>

*Legal Atlas (University of Montana): <http://www.umt.edu/mansfield/Legal-Atlas/default.aspx>

Final Exam: Friday, Dec. 18, 8:00 – 10:00 am