

LAW, LAWYERS, AND SOCIAL CHANGE			
POSC 4931-104			
MARQUETTE UNIVERSITY, SPRING 2012			
<u>Instructor Information:</u>	Professor Paul Nolette, J.D., Ph.D. paul.nolette@marquette.edu (414) 288-5821	<u>Class Time:</u>	Mondays, Wednesdays & Fridays 10:00am – 10:50am
<u>Office:</u>	William Wehr Physics Room 402	<u>Class Location:</u>	William Wehr Physics Room 122
<u>Office Hours:</u>	Mondays & Wednesdays 1:00pm – 4:00pm and by appointment		

COURSE DESCRIPTION:

Law is everywhere around us. It provides the foundation for our political system, a fact captured by the oft-cited adage that American government is “one of laws and not of men.” It also serves as the glue for countless everyday transactions. Law serves both as a restriction *on* freedom as well as a protection *of* freedom. Law provides social stability but it is frequently a tool used in order to change society. The purpose of this course is to explore “the law” in a broad sense. What is law? Why is there law? What are the roles of various actors in the American legal system, such as lawyers, judges, juries, and law enforcement personnel? Can law be used to achieve social change? To help us explore these and similar questions, we will consider insights from a wide variety of fields including legal studies, political science, sociology, psychology, criminal justice, journalism, and film.

The course has three main sections, each with its own theme. In the first section, we will examine what we mean by “the law.” What is it? Where does it come from and what purposes does it serve? Why do people comply with the law – and when (if ever) should they ignore it? We will also explore some of the distinctive aspects of law in America. In the second section, we will examine key actors in the law – including judges, juries, police, prosecutors, and the legal profession generally. How do these various actors view their role in the American legal system? What impact do they have on the development of law in America? The third section of the course will consider the use of law and litigation as a tool for social change. Who brings lawsuits to try and achieve social change, and why? Is such legal mobilization effective?

REQUIRED READINGS: There are no required textbooks for this course. Instead, you will read a variety of shorter pieces (scholarly articles, book chapters, newspaper articles), all of which will be made available on D2L prior to class.

COURSE EXPECTATIONS AND REQUIREMENTS:

- (1) Class Participation (15%).** Active participation will be an important component of your grade in this class. I expect everyone to come on time and prepared for class and ready to actively discuss the readings and topics for the day. Quality participation includes engaging with the readings,

expressing one's own opinions of relevant issues on the topic (while respecting other students' opinions and experiences), and asking questions when you need additional clarification.

To help generate discussion and ensure that everyone is heard from during the semester, two students will be assigned "on call" duties for each class. Every student will be "on-call" for three class periods during the course of the semester. You will have two responsibilities during your on-call day. The first will be to post a short set of questions and/or reactions you had from the readings for that day (about 200-300 words) on D2L. Did anything in the readings strike you as particularly interesting, odd, surprising, or controversial? What sort of broader questions about the law do the readings invite? You should post this reaction no later than 5PM on the day before your on-call class. Your second responsibility includes being available to answer questions about the readings and to spark discussion during the class period itself. You will have the opportunity to sign up for your three on call days early in the semester. Note that your participation outside of your on-call days will factor into your grade as well, so make sure to be prepared to discuss the readings for every class during the semester.

While in-class participation is important, you may also bolster your participation grade by responding to comments and questions made by other students on D2L.

- (2) **Two Film Response Papers (10% each).** During the course of the semester, you will write two short response papers to two separate films with themes related to the law (each paper should be about 3-4 double-spaced pages long). In each paper, you will be expected to relate the film to aspects we've discussed in the class (and not simply to repeat what happened in the film). How does the film portray the law or legal actors? Do you think this is an accurate portrayal of the law? You will have the choice of a variety of films, each of which will be due on a specific date. This gives you some flexibility in managing your workload for the semester. The list of films from which you may choose will be distributed during the second week of class. Some of the films may be available either in the Raynor Library or the law school library, but I will also have all the films available to loan on a short-term basis.
- (3) **Midterm Exam (15%).** There will be one midterm exam for this course, which will be held on **Friday, March 9th** during the regular class period. The exam will be closed-book and may contain a variety of questions (including multiple choice, fill in the blank, and longer essay questions). The exam will take approximately 50 minutes to complete.
- (4) **Final Exam (20%).** The final exam will be a closed-book, in-class exam similar in format to the midterm exam. The final exam will be cumulative and will take about two hours to complete. It is scheduled for **Tuesday, May 8th** at 8am.
- (5) **Final Paper/Project (30%).** You have two options for your final paper for this course: an interview project option or a research paper option. For either option, the final paper will be about 10-12 double-spaced pages in length and will be due on the last day of class (**Friday, May 4th**).

Interview Project Option: If you choose this option, you will interview at least two people and write a field report in which you report on your observations in this interview. One of these people should be someone with direct professional experience with the legal system (such as a lawyer, a law student, a prosecutor, a police officer, a corrections officer, or a judge). The second interviewee should be someone who does not have a law-related job. These interviewees can be family members, but should not be your peers here at Marquette. (They can, however, be Marquette staff members. They can even be professors, though I'd prefer non-law or political science professors). If you choose this option, you will first turn in an interview proposal in which you briefly (in about 1-2 pages) identify your interviewees and why you have chosen them for this project. This proposal will be due on Wednesday, February 15. Second, by Monday, March 19 you will turn in a set of draft interview questions before you conduct the actual interviews. Finally, the field report itself will be due on **Friday, May 4th** and should be about 10-12 pages long. I will provide more detail about this option early in the semester.

Research Paper Option: If you choose this option, you will write an in-depth and theoretically-informed research paper on a subject of your choosing relating to the subject matter of the class. For example, you might write about the impact of women in the legal profession or the role of discretion in the work of police or prosecutors. If you choose this option, you will first turn in a short paper proposal (about 1-2 pages) in which you briefly describe your topic and general approach to finding sources for your research. This proposal will be due on Wednesday, February 15. Second, by Wednesday, April 4 you will turn in a substantial outline of your research paper containing both the structure of your paper and key sources you plan to rely upon in the paper. The final research paper will be due on **Friday, May 4th** and should be about 10-12 pages long. I will provide more detail about this option early in the semester.

Late assignments:

I expect all students to complete required assignments when they are due. If you are unable to complete an assignment or take an exam for a compelling reason you must contact me **before** the assignment is due. Otherwise, the assignment will be marked down a full letter grade for each day past the deadline.

SUMMARY OF GRADING COMPONENTS:

<u>Class Participation:</u>	15%
<u>Film Response Paper #1:</u>	10%
<u>Film Response Paper #2:</u>	10%
<u>Mid-Term Examination:</u>	15%
<u>Final Examination:</u>	20%
<u>Final Paper/Project:</u>	30%

GRADING SCALE:

<u>Grade</u>	<u>Achievement</u>	<u>Grade Points</u>	<u>Cut-off</u>
A	Superior	4.0	93+
AB		3.5	87-92.9
B	Good	3.0	82-86.9
BC		2.5	77-81.9
C	Satisfactory	2.0	72-76.9
CD		1.5	67-71.9
D	Minimum Passing	1.0	60-66.9
F	Failing	0.0	Below 60

ELECTRONIC DEVICES: All cell phones and similar devices must be turned off before class.

STUDENTS WITH DISABILITIES: If you have a disability for which you are requesting an accommodation, you are encouraged to contact the University's Office of Disability Services within the first week of classes. For more information, contact the Office of Disability Services in Marquette Hall, Suite 005 or at (414) 288-1645. If you require any accommodations for exams or other assignments, you must notify me (along with all required documentation) at least one week in advance of the assignment due date.

ACADEMIC HONESTY: As noted in the Undergraduate Bulletin, Marquette University demands the strictest honesty and integrity of students in their various academic tasks. **Academic dishonesty of any type, including plagiarism, is completely unacceptable and will result in a failing grade for both the assignment and the course.**

- **What is Plagiarism?** The Undergraduate Bulletin defines plagiarism in the following manner: "Plagiarism is intellectual theft. It means use of the intellectual creations of another without proper attribution. Plagiarism may take two main forms, which are clearly related: 1. To steal or pass off as one's own the ideas or words, images, or other creative works of another and 2. To use a creative production without crediting the source, even if only minimal information is available to identify it for citation."
- If you use another person's writings or ideas in your own writing, you must provide a citation to the original material. If you have any doubt about the need to provide a citation to a source, it is better to be on the safe side and provide a citation. If you have any questions about this policy, please discuss it with me.

CLASS AND READING ASSIGNMENT SCHEDULE:

Disclaimer:

I reserve the right to change this syllabus as necessary throughout the semester. I expect that any such changes will be rare, but in this event I will notify the class of any and all changes well in advance.

NOTE:

All of the following materials on this syllabus will be available on D2L prior to class.

PART I. INTRODUCTION – WHAT IS “LAW”?

1/18 (W): Course Introduction

No Reading Assignment

1/20 (F): What is the Purpose and Function of Law?

- (1) Steven E. Barkan, “The Social Nature and Significance of Law,” in Law and Society: An Introduction (pp. 1-12) (2009)
- (2) Lon Fuller, “The Case of the Speluncean Explorers,” *Harvard Law Review* 62 (1949)

1/23 (M): Where Does Law Come From?

- (1) Ted Cohen, “There are No Ties at First Base,” *Yale Review* 79 (1990)
- (2) Adam Smith, from An Inquiry into the Nature and Causes of the Wealth of Nations (1776)
- (3) Clarence Darrow, “Address to the Prisoners in Cook County Jail” (1902)

PART II. COMPLIANCE WITH THE LAW

1/25 (W): Why Do People Obey the Law?

- (1) Tom Tyler, “Legitimacy as a Theoretical Issue,” from Why People Obey the Law (1990)
- (2) Mark F. Schultz, “Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law,” *Berkeley Technological Law Journal* 21 (2006)

1/27 (F): The Role of Punishment and Surveillance

- (1) Jeffrey Rosen, “A Watchful State,” *New York Times Magazine* (October 7, 2001)
- (2) Melissa Bateson, Daniel Nettle, and Gilbert Roberts, “Cues of Being Watched Enhance Cooperation in a Real-World Setting,” *Biology Letters* (2006)

1/30 (M): Civil Disobedience

- (1) Thoreau, “On the Duty of Civil Disobedience” (1849)
- (2) Martin Luther King, Jr., “Letter From Birmingham Jail” (1963)
- (3) Harrison Tweed, Bernard G. Segal and Herbert L. Packer, “Civil Rights and Disobedience To Law: A Lawyers' View,” *New York State Bar Journal* 36 (1964)

PART III. LAW IN AMERICA

2/1 (W): How Do Americans View the Law?

- (1) Robert A. Kagan, Bryant Garth, and Austin Sarat, "Facilitating and Domesticating Change: Democracy, Capitalism, and Law's Double Role in the Twentieth Century," in Sarat, Garth, and Kagan, Looking Back at Law's Century (2002)

2/3 (F): How Do Americans View the Law? (continued)

- (1) Robert A. Kagan, "Adversarial Legalism and American Government," in Marc Landy and Martin Levin, The New Politics of Public Policy (1995)

2/6 (M): Who Benefits From the American Legal System?

- (1) Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9 (1974)

2/8 (W): How do "Regular People" View the Law?

- (1) William M. O'Barr and John M. Conley, "Lay Expectations of the Civil Justice System," *Law & Society Review* 22 (1988)

2/10 (F): Popular Culture and the Law

- (1) Richard K. Sherwin, "Screening Reality: The Vanishing Line between Law and Popular Culture," in When Law Goes Pop (2000)

2/13 (M): What is a "Dispute"?

- (1) William L. F. Felstiner, Richard L. Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...," *Law & Society Review* 15 (1981)

2/15 (W): PAPER/PROJECT PROPOSALS DUE

Does America Suffer From a "Litigation Crisis"?

- (1) David M. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," *Law & Society Review* 18 (1987)
- (2) Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Out Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1983)

2/17 (F): Does America Suffer From a "Litigation Crisis"?, continued

- (1) William Haltom and Michael McCann, "Java Jive: Genealogy of a Juridical Icon," in Distorting the Law (2004)

PART IV. LAWYERS AND THE LEGAL PROFESSION

2/20 (M): Lawyers and the Legal Profession in America

- (1) Alexis de Tocqueville, "On the Spirit of the Lawyer in the United States and How It Serves As a Counterweight to Democracy," in Democracy in America, Vol. 1 (1835)
- (2) Steven E. Barkan, "History of the Legal Profession" in Law and Society: An Introduction (2009)
- (3) Marc Galanter, "The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse," *University of Cincinnati Law Review* 66 (1998)

2/22 (W): Legal Education in America

- (1) David S. Clark, "American Legal Education: Yesterday and Today," *International Journal of the Legal Profession* 10 (2003)
- (2) Geoffrey R. Stone, "Learning to Think Like a Lawyer," *New York Times* (July 25, 2011)
- (3) George Leef, "Allow Anyone to Take the Bar," *New York Times* (July 25, 2011)
- (4) Stephen R. Elias and Ralph Warner, "Lawyers Try to Reestablish Their Monopoly," *Nolo.com* (2003)

2/24 (F): Criticisms of Legal Education

- (1) Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy," *Journal of Legal Education* 32 (1982)

2/27 (M): Lawyers and American Legal Culture

- (1) Charles R. Epp, "The Two Motifs of 'Why the Haves Come Out Ahead' and Its Heirs," *Law & Society Review* 33 (1999)
- (2) Richard L. Abel, "The Transformation of the American Legal Profession," *Law & Society Review* 20 (1986)
- (3) Lisa Faye Petak, "Young Lawyers Turn to Public Service," *New York Times* (August 19, 2010)

PART V. PROSECUTORS, JUDGES, AND COURTS

2/29 (W): The U.S. Solicitor General

- (1) Jeffrey Toobin, "Clinton's Left-Hand Man," *The New Yorker* (July 21, 1997)
- (2) Kevin T. McGuire, "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success," *Journal of Politics* 57 (1995)

3/2 (F): The Politics of Prosecution

- (1) Allisa Pollitz Worden, "Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining," *Judicature* 73 (1990)
- (2) Mark Follman, "Inside Bush's Prosecutor Purge," *Salon* (February 28, 2007)
- (3) Paul Nolette, "Status and Trends in Multistate Litigation by State Attorneys General" (draft manuscript)

3/5 (M): Judges in America

- (1) P.S. Atiyah and R.S. Summers, "The Judges" in Form and Substance in Anglo-American Law (1987)
- (2) Michael J. Goodman and William C. Rempel, "In Las Vegas, They're Playing With a Stacked Judicial Deck," *Los Angeles Times* (June 8, 2006)

3/7 (W): Alternatives to Adversarial Litigation

- (1) Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28 (1963)
- (2) Deborah Hensler, "Suppose It's Not True: Challenging Mediation Ideology," *Journal of Dispute Resolution* 81 (2002)
- (3) Robert Frost, "Mending Wall" from North of Boston (1914)
- (4) Jonathan Rauch, "The Rise of Antisocial Law" *AEI Newsletter* (2001)

3/9 (F): MIDTERM EXAM

3/10 through 3/18: Spring Break (No Class)

PART VI. POLICE AND JURIES

3/19 (M): INTERVIEW QUESTIONS DUE

What is the Role of Police?

- (1) Herman Goldstein, "Confronting the Complexity of the Policing Function," in Lloyd E. Ohlin and Frank J. Remington, Discretion in Criminal Justice (1993)
- (2) Egon Bittner, "Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police," in Hebert Jacob, The Potential for Reform of Criminal Justice (1974)

3/21 (W): Discretion in Policing

- (1) James Q. Wilson and George L. Kelling, "Broken Windows," *The Atlantic Monthly* (March 1982)
- (2) Donald J. Black, "The Social Organization of Arrest," *Stanford Law Review* 23 (1971)

3/23 (F): Discretion and Imprisonment

- (1) David Simon, from Homicide: A Year on the Killing Streets (pp. 103-115 and 201-216) (1991)
- (2) Jerome S. Bruner, "Do Not Pass Go," *New York Review of Books* (September 25, 2003)

3/26 (M): The Jury System in America

- (1) Alexis de Tocqueville, "On the Jury in the United States Considered as a Political Institution," from Democracy in America, Vol. 1 (1835)
- (2) P.S. Atiyah and R.S. Summers, "The Jury" in Form and Substance in Anglo-American Law (1987)

3/28 (W): Jury Nullification

- (1) Alan W. Schefflin and Jon. M. Van Dyke, "Merciful Juries: The Resilience of Jury Nullification," *Washington and Lee Law Review* 48 (1991)
- (2) Tony Newman, "Just Say No to Marijuana Convictions," *Baltimore Sun* (December 27, 2011)

PART VII. LEGAL MOBILIZATION

3/30 (F): Legal Mobilization and the “Rights Revolution”

- (1) Charles R. Epp, “The Support Structure and the U.S. Rights Revolution,” *from The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998)

4/2 (M): Why Choose Litigation as a Political Strategy?

- (1) Paul Frymer, “Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85,” *American Political Science Review* 97 (2003)
- (2) Emily Zackin, “Popular Constitutionalism’s Hard to Do When You’re Not Very Popular: Why the ACLU Turned to Courts,” *Law & Society Review* 42 (2008)
- (3) *U.S. v. Carolene Products*, Footnote Four

4/4 (W): RESEARCH PAPER OUTLINE DUE

Who Uses Litigation as a Political Strategy?

- (1) Susan M. Olsen, “Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory,” *Journal of Politics* 52 (1990)

4/6 through 4/9: EASTER BREAK (No class)

4/11 (W): Litigating Desegregation

- (1) Mark Tushnet, “Conclusion: Some Lessons from the Campaign,” *from The NAACP’s Legal Strategy Against Segregated Education, 1925-1950* (1987)

4/13: Litigating Gay Rights

- (1) Patricia A. Cain, “Lawyers, Legal Theories, and Litigation Strategy” and “Conclusion” *from Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* (2000)

4/16 (M): Conservative Legal Mobilization

- (1) Steven M. Teles, Introduction and Chapter 5 *from The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2008)

4/18 (W): Conservative Legal Mobilization, continued

- (1) Jeffrey Rosen, “The Unregulated Offensive,” *New York Times* (April 17, 2005)
- (2) Marc Lacey, “A Watchdog for Conservative Ideals,” *New York Times* (December 25, 2011)

4/20 (F): Does Legal Mobilization Matter?

- (1) Gerald N. Rosenberg, Introduction and Chapter 1 *from The Hollow Hope: Can Courts Bring About Social Change?* (1991)

4/23 (M): Does Legal Mobilization Matter?, continued

- (1) Gerald N. Rosenberg, "Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation," *Law & Inequality* 24 (2006)
- (2) Erik Eckholm, "Battling Anew Over the Place of Religion in Public Schools," *New York Times* (December 27, 2011)

4/25 (W): The Effects of Legal Mobilization

- (1) Michael W. McCann, "Reform Litigation on Trial" (Review of The Hollow Hope), *Law & Social Inquiry* 17 (1992)

4/27 (F): The Effects of Legal Mobilization, continued

- (1) Lynn Mather, "Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation," *Law & Social Inquiry* 23 (1998)

4/30 (M): The Effects of Legal Mobilization, continued

- (1) Charles Epp, "Introduction" and "Theory: The Fertile Fear of Liability," from Making Rights Real (pp. 1-30) (2009)

5/2 (W) and 5/4 (F): Discussion of Student Papers/Projects and Conclusion

5/8 (TUES): FINAL EXAM (8:00-10:00 AM)