

UNIVERSITY OF WISCONSIN  
SCHOOL OF LAW  
Spring 2007

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**LAW 944-001**  
**SPECIAL PROBLEMS IN MODERN AMERICAN LEGAL HISTORY**  
**READING SEMINAR**  
**SYLLABUS**

This is a three-unit class that will meet once each week for two hours. Enrollment will be limited to 20 people, first-come first-served, and will be open to graduate students in other areas as well as law students. The course will have a reading-discussion component and a writing component. Reading will consist three (more or less) article-length academic writings each week, sometimes with an additional legal writing that implicates one or more of the issues raised in the other readings.

Each assignment will consider several possible interpretations of a different issue in legal history. Examples might include the significance of the New Deal court-packing incident, the suppression of political dissent in the World War I era, competing strategies of the late nineteenth-century women's movement, or the real-world impact of Brown v. Board of Education. The course will demonstrate that different interpretations are available for any particular historical problem. The aim is to think about how one makes choices between different interpretations of historical events, and what those choices imply for our lives in the present.

*Grades:* Grades will rest primarily on one paper, ca. 25 pages, based on outside reading on a topic of the student's choice. Each student will also be responsible for leading one of the class discussions; class members will review each discussion anonymously over the following week and the instructor will summarize the reviews for the discussion leader. Attendance, preparation, and participation in class will also affect final grades.

*Books:* There are no books to buy. The syllabus and all of the readings are available at Lexis/Nexis Web Course 126646, for which everyone registered for the class has been signed up. Students should print their own copies of the readings from the Web Course site. Registered students will get the first week's readings by email.

*Email list:* The class has an email list (law944-1-s07@lists.wisc.edu), which students should use to communicate with me and among themselves.

*No Laptops:* Laptops are a useful tool for research. They may also be a convenient and efficient way of making readings available to students (this class will test that hypothesis). Laptops are, however, toxic to the ecology of the classroom. Laptops will, therefore, not be permitted in class without a written advisory, addressed to me, from Disabled Student Services.

*Weekly assignments and discussion topics* are as follows:

### **1. (26 January) Introduction**

Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119

Brown v. Board of Education, 347 U.S. 483 (1954)

Hayden White, "The Burden of History," 5 History and Theory 111-134 (1966)

"The Art of Conversation," 381 The Economist 381:8509 (23 December 2006), 79-82

### **2. (02 February) Historiographical Issues in Legal Studies**

Lawrence M. Friedman, "Legal Culture and Social Development," 4 Law & Soc'y Rev. 29 (1969-70)

Laura Kalman, "Border Patrol: Reflections on the Turn to History in Legal Scholarship," 66 Fordham L. Rev. 87 (1997)

William E. Forbath, "Constitutional Change and the Politics of History," 108 Yale L.J. 1917 (1999)

Lawrence M. Friedman, "Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History," 24 Law & Social Inquiry 253 (1999)

### **3. (09 February) Judicial Biography**

Richard A. Posner, "Symposium: The Path of the Law 100 Years Later: Holmes's Influence on Modern Jurisprudence: Foreword: Holmes," 63 Brooklyn L. Rev. 7 (1997)

Louis Menand, "The Principles of Oliver Wendell Holmes," in American Studies (New York, 2002), 31-53, 290-292

Linda Przybyszewski, "The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand," 21 Law and Social Inquiry 135 (1996)

### **4. (16 February) Work Accidents**

Lawrence Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," 67 Col. L. Rev. 50 (1967)

Christopher L. Tomlins, "A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850," 6 Law & Hist.

Rev. 375 (1988)

John Fabian Witt, Note, "The Transformation of Work and the Law of Workplace Accidents, 1842-1910," 197 Yale L.J. 1467 (1998)

People v. Harris and Blanck, 74 N.Y.Misc. 353 (1911)

## **5. (23 February) Family Law**

Martha Minow, "We, the Family: Constitutional Rights and American Families," 74 J. Am. Hist. 959 (1987)

Brook Thomas, "Michael Grossberg's Telling Tale: The Social Drama of an Antebellum Custody Case," 23 Law & Social Inquiry 431 (1998)

Michael Grossberg, "How to Tell Law Stories," 23 Law & Social Inquiry 459 (1998)

Michael H. v. Gerald D., 491 U.S. 110 (1989)

## **6. (02 March) The Legacy of J. Willard Hurst**

Stewart Macaulay, "Willard's Law School?" 1997 Wis. L. Rev. 1163-1179

J. Willard Hurst, "Release of Energy," in Law and the Conditions of Freedom in the Nineteenth-Century United States (Wisconsin 1957)

Hurst, letter on Brown v. Board of Education (1954)

Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of Willard Hurst," 18 Law and History Review 97 (2000)

Robert Gordon, "Hurst Recaptured," 18 Law and History Review 167 (2000)

## **7. (01 March) Social Change and Tort Law**

Lawrence M. Friedman, "Civil Wrongs: Personal Injury Law in the Late 19<sup>th</sup> Century," 1987 Am. B. Found. Res. J. 351

Barbara Y. Welke, "Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920," 19 Law & Social Inquiry 369 (1994)

John Fabian Witt, "From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century

Family,” 25 Law & Social Inquiry 717 (2000)

Fifty Associates v. Tudor, 6 Gray 255 (Mass. 1856)

Escola v. Coca-Cola Bottling Company of Fresno, 24 Cal. 2d 453 (1944)

## 8. (09 March) **The Origins of Civil Rights**

Eric Foner, “Rights and the Constitution in Black Life during the Civil War and Reconstruction,” 74 J. Am. Hist. 863 (1987)

Risa Goluboff, “The Thirteenth Amendment and the Lost Origins of Civil Rights,” 50 Duke L.J. 1609 (2001)

Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993)

Newspaper Articles re: Operation Rescue

## 9. (16 March) **Brown v. Board of Education**

Jeffrey Rosen, “The Color-Blind Court,” 45 Am. U.L. Rev. 791 (1996)

Michael J. Klarman, “*Brown*, Racial Change, and the Civil Rights Movement,” 80 Va. L. Rev. 7, 7-13, 75-84 (1994)

David J. Garrow, “Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*,” 80 Va. L. Rev. 151 (1994)

Michael J. Klarman, “*Brown v. Board of Education*: Facts and Political Correctness,” 80 Va. L. Rev. 185 (1994)

Lawrence M. Friedman, “Brown in Context,” in Sarat, ed., Race, Law, and Culture: Reflections on *Brown v. Board of Education* (New York, 1997), 49-73

Angela P. Harris, “Equality Trouble: Sameness and Difference in Twentieth-Century Race Law,” 88 Cal. L. Rev. 1923 (2000)

Missouri v. Jenkins, 515 U.S. 70 (1995) (Thomas, J., concurring)

## 10. (23 March) **The New Deal**

Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201 (1994)

Larry Kramer, "What's A Constitution For Anyway?" 46 Case W. Res. 885 (1996)

Cass Sunstein, The Second Bill of Rights 1 - 59 (2004)

United States v. Lopez, 514 U.S. 549 (1995)

### **11. (30 March) Lochner v. New York**

Cass Sunstein, "Lochner's Legacy," 87 Col. L.Rev. 873 (1987)

Gary Rowe, "*Lochner* Revisionism Revisited," 24 Law & Social Inquiry 221 (1999)

David Bernstein, "Lochner's Legacy's Legacy," 82 Tex. L.Rev. 1 (2003)

Cass Sunstein, "Reply – Lochnering," 82 Tex. L.Rev. 65 (2003)

### **12. (06 April) SPRING BREAK**

### **13. (13 April) Reproductive Rights**

Matthew J. Lindsay, "Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920," 23 Law & Social Inquiry 541 (1998)

Leslie J. Reagan, "About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940, 77 J. Am. Hist. 1240 (1991)

David J. Langum, "A Personal Voyage of Exploration through the Literature of Abortion History," 25 Law & Social Inquiry 693 (2000)

Planned Parenthood v. Casey 505 U.S. 833 (1992)

### **14. (20 April) Marriage and Divorce**

Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," 105 Yale L.J. 2117 (1996)

Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Emancipation 175-217 (Cambridge 1998)

Lawrence M. Friedman, "A Dead Language: Divorce Law and Practice Before No-

Fault,” 86 Va. L. Rev. 1497 (2000)

**15. (27 April) Law Schools**

R. Kent Newmyer, “Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence,” 74 J. Am. Hist. 814 (1987)

Paul D. Carrington, “Hail! Langdell!” 20 Law & Social Inquiry 691 (1995)

Laura Kalman, “To Hell with Langdell!” 20 Law & Social Inquiry 771 (1995)