

JUDICIAL PROCESS

GOV357L AT UNIVERSITY OF TEXAS

DR.ALAN SAGER

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SYLLABUS

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GOV357L M-W 2:30-3:45

Room: Mezes 1.306

Unique number: 38105

Welcome to Dr. Alan Sager's Spring 2022 course.

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About Dr.Sager

I look forward to teaching and working with you this semester. In case you do not know me, I have a J.D. from Michigan and a Ph.d. from Northwestern in Political Science.

I have done many things in my life including practicing law, teaching, running a business with 300 employees in 3 states, being in the political polling and consulting business, and working on the staff of Chief Justice Warren Burger among other things. I have taught part time at U.T. for more than 30 years and full-time back in the late 60's and early 70's before I went to the Supreme Court and the Federal Judicial Center. I continue teaching because I love doing it and I love the law, judicial process and politics. Also I started out as an engineer, B.S. Chem Eng. Tufts '62. As an engineer I like to model the various parts of what we are studying. Perhaps it is not surprising my dissertation was [A Computer Model of the 1962 Term of the U.S. Supreme Court.](#)

Lastly, I will note I have had very direct experience in courtrooms both as a lawyer and a business man. We just settled a case with a landlord(details are protected by a disclosure agreement) and we are about to go to

Course Info

Office Hours:

Monday/Wednesday Office

Hours: 1:30-2:30 Texas

Union Dining Area

Wednesday After Class

Office Hours: Cactus Cafe

4:00(after class) until

approximately 5:30 p.m. (if

Cactus closed for an event,

probably milkshake hours

at Shake Shack

Available by appointment

at other times before and

after class on Mon and

Wed

Email: amsag@utexas.edu

or class@alansager.com

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Current News & Opinion

Colleges come up short on what students need to know say Kathleen Parker in a new study of what colleges require. For one of the pull

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in another case where we are suing the owner of a storage business. My business once had a case that went on for 20 years, traveling to 4 different courts some a couple of times, 2 federal, 2 state, with perhaps 7 sets of one or more judges ruling on various aspects of the case. Going to court is not for the faint hearted.

Overview

This course focuses on understanding and explaining judicial behavior. In order to do this, this course examines not only what judges do, but also all aspects of the judicial process such as juries, attorneys, prosecutors, judicial selection, plea bargaining, court structures and the social and political settings in which courts operate. To put another way, along with studying judicial behavior we are studying many aspects of what is called procedural due process and how it is interpreted and applied. This also requires us to consider various aspects of fairness and justice.

Most of the assignments involve reading and analyzing judicial opinions in actual cases. When I first created this course in the Government Department many, many years ago, it was more quantitative. As the years have gone on I think using case illustrations makes many of the point than just numbers. A number of these cases are studied in a different context in law school. (I studied a number of them in my first year classes at Michigan.) These opinions not only reveal what the judge is thinking and how judges think and reason, but also explain how the judicial process works. Some assignments include viewing videos.

To look at this course another way. We are trying to predict judicial decisions, the dependent variable . We want to find the independent variables or predictors. I say predictors because in social life, no one variable explains all. As any seasoned lawyer will tell you, whatever you call the “law” is not necessarily the best predictor and as you will see in an interesting chapter in D’Amato in case packet, even lawyers regularly disagree what the “law” is.

The cases are drawn from a variety both “public’ and “private” law areas. Case topics include international law,

quotes. Students given so many choices aren't likely to select what's good for them. Given human nature, they'll choose what's fun, easy or cool -- and not early in the morning or on Fridays. It's up to universities to guide them away from the dessert tray to the vegetable courses they need to develop healthy minds. Neal says that colleges have abdicated

negligence and product liability law, criminal law and procedure, the interpretation of federal statutes, and constitutional law. Some cases used in this course come from the most recent terms of the U.S. Supreme Court. Several of the cases we will cover have been the subject of major movies or discussed in movies and popular T.V. series.

This course is designed for students who want a general understanding of the legal and judicial process as well as those who are thinking about attending law school. I also love to have future teachers in my courses.

Course Goals (promises)

A. Increase Students Understanding of:

1. The operation of the U.S. civil and criminal justice system
2. How judges go about making decisions and writing opinions as well as how we think judges should go about this task, e.g. both normative and empirical approaches to judicial behavior.
3. Some of the legal and constitutional doctrines that affect or frame the operation of the civil and criminal justice system.

B. Expand Students Ability:

1. To understand, comprehend and critique textual materials
2. To think logically, analytically and creatively(out side the box)
3. To draw useful information from empirical data about judicial behavior
4. To create cogent arguments on two or more sides of the issues we cover. (see discussion of tensions and crosscutting purposes below)
5. To use words more precisely (e.g. Holocaust, murder, law,)

C. Do A and B above in a challenging and interesting environment

We will find many tensions and cross cutting purposes in the institutional structures on which the judicial process is built. We will analyze the “who”, “how” and “why” of their

resolution. Here are some examples:

1. Judges
 - A. Making the law versus interpreting the law
 - B. Policy makers versus disinterested weighers, recall the statute of a blind justice holding a set of assayers scales
 - C. Justice vs. law
2. Adversary system
 - A. Fight theory vs. truth theory
 - B. Lawyers responsibility to client vs responsibility to society
3. Juries
 - A. Public participation by “competent” citizens versus alleged “lemmings and day time T.V. viewers”
 - B. “Fair” versus “efficient” juries
4. Prosecutors
 - A. Protecting the public welfare versus protecting their personal position
 - B. Justice v. law
5. Types of punishment and theories of punishment.

We will also be constantly searching for the unspoken or assumed premises of judges, posecutors, juries, etc., and even ourselves as we study these materials.

Bringing such premises to light will sharpen and enhance your analytical skills and ability to create distinctions. Seeing and creating distinctions is the building block of learning and most efficient way to expand what you see in the world

What is required of students in the course:

- A. Keep up with reading and briefing for each class.
- B. Know the cases **before coming to class.**
- C. A willingness to be an active participant in the class.
- D. A willingness to go beyond any self imposed academic limits.

Course Requirements and Grading

Grades will be based on a plus and minus system.

1. 3 hours exams approximately 63%(40%

- objective,60% essay)
2. 2 short papers 3-4 pages approximately 22%
 3. Class attendance and participation approximately 15%

Office Hours and Location

This semester Dr. Sager's T.A. for this semester is Mr. James O'Connor

My Monday Office Hours: Texas Union 1:30-2:30

Wednesday Office Hours: Texas Union 1:30-2:30

Wednesday After Class Office Hours: Cactus Cafe
4:00(after class) until around 5:30 p.m.

If per chance Cactus is closed for a special event, we will meet near Shake Shack

Available by appointment at other times before and after class on Mon and Wed

Who Should Not Take This Course?

Anyone prone to putting everything off until the exam and not being willing to keep up with daily assignment—that is unrepentant and unchangeable **PROCRASTINATORS**.

How Can Students Make This Course Easier?

Spend all the time necessary in the first few weeks to do good to excellent briefs and put together a study group.

SUGGESTION As in law school, students have found that study groups with 4 to 8 classmates are extremely helpful in mastering this course.

Highlights:

(Current News & Opinion)

[This section](#) contains articles that directly or indirectly relate to this course. If any will be covered on the exam, it will be so noted in class.

1. Note: Students with disabilities may request appropriate academic accommodations from the Division of Diversity and Community Engagement, Services for Students with Disabilities, 471-6259, <http://www.utexas.edu/diversity/ddce/ssd/> Please let me know what accommodations are needed as early in the semester as possible

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Syllabus

Required Books:

1. *Courts, Judges and Politics: An Introduction to the Judicial Process*, Water Murphy, C. Herman Pritchett, Lee Epstein and Jack Knight, 6th Edition, 2006 (most editions after 4th and later are fine)
 2. *Judicial Process and Behavior Cases*, a compilation available at Co-op and now online. This contains cases and readings assigned during the semester.
- Supplementary Books:
3. Benjamin Cardozo, *The Nature of the Judicial Process*
 4. Clarence Thomas, *My Grandfather's Son*
 5. Charles Murray, *By The People, Rebuilding Liberty Without Permission*
 6. Milton Mayer, *They Thought They Were Free: The Germans 1933-1945*

In Addition:

The [Assignments Page](#) contains Supreme Court cases that can be read on the web as well as tables, graphs and figures you will be assigned to read and study

Briefing Cases:

For each case assigned in class you should prepare a brief, a summary of the case according to a form I have created. It is similar to but not exactly like what might be required in other classes where cases are to be read and briefed. For a full discussion of how to brief a case for this class ([click here](#))

Brief Example: Craig v. Boren ([click here](#))

Note: This brief is based on the entire case as it appears in the official reports. It is more extensive than what would be expected for most cases. All of the issues are noted in the issues and holding section. Normally, we are reading cases for one or two issues. Also there is more detail in the legal reasoning section than would usually be needed, especially especially for the concurrences and dissents.

Papers 2-4 pages.

1. Brief of a recent Supreme Court case most likely on constitutional criminal procedures.

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2. A 3-4 page voting analysis of your case which will be due late in the semester.

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Daily Course Assignments

Note: Stay up with the assignments even if the class discussion falls behind. The exams will cover everything up to the date of the exam whether we have covered it in class or not.

Movies:

There will be 3 movies assigned for this course:

1. **The Ox-bow Incident.** This is a 1940's western about the hanging of an innocent man. It was also created to cover much broader issues of the time. The book was also made into a comic book in a series called Classic Comic books.
2. **Judgement at Nuremberg** This is a 1950's movie about the trial of German Judges and member of the Reich Justice Ministry(their Department of Justice) for a number of crimes including crimes against humanity. This movie is based on the case entitle U.S. v. Aloestetter which we will read. Most people associate Nuremberg with the trial of major Nazi leaders like Goebels and others. Few know about the trials of lower level officials. This movie is about those in the American Sector of Berlin. Others groups like doctors and civil offices were tried in the British and Russian sectors.
3. **The Trial.** Most of you probably read this short book in high school. This movie is an interesting take on the book.
It is about due process and administrative bureaucracies, topics that are related to this course and to Murray's book.

[\(Edit\)](#)

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Assignments

Judicial Process *Spring 2022*

All cases assigned should be briefed unless otherwise noted. If a case is not linked to the web, it appears in the course packet available at the Coop. On this page “cp” means the case or reading is in the course packet. The Course Syllabus page contains a link to instructions on briefing a case. Briefs need to be written and brought to class unless you can commit your brief to memory in a way that you can answer questions about it. There are relatively few cases assigned in this class and many are very short because they are state cases, not Supreme Court cases or they are procedural cases. We will be covering them in more detail than the cases in my con law survey courses.

General reading assignments should be summarized in writing and also brought to class. Usually, for the assignments in Courts, Judges and Politics, called **CJP** on this Assignments page, three or four sentences summarizing the main points will be sufficient. Also do this for D’Amato chapters that appear in cp. They may take 1/2 page or more. Pay particular attention to the way D’Amato uses hypothetical fact situations to illustrate his points. He is a master at this kind of argument which is fundamental to the understanding of how judges and lawyers think and behave.

NOTE: As we move through the semester, assignments are subject to change. Check this page on a regular basis. Some links may not be updated until 2 weeks before the relevant class.

There is a [videopage](#) for this course which will be kept updated, mainly with relevant videos from Youtube. ([click here](#))

Class #1 -Wednesday January 19th

How do we predict the behavior of actors in the legal/judicial system, We make predictions consciously and unconsciously in our life all the time, For some students if we know how hard a course is we can predict whether they will enroll. No social prediction

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...on. If you can get predictions right maybe 75% of the time you are

doing well. Social life is multivariate. This will be illuminated in more detail in the famous Supreme Court death penalty case. **McCleskey v Kemp**. By actors I mean not only judges but also juries, lawyers, prosecutors and others who affect the system. As a citizen and/or a lawyer, you need to know this as you navigate life. For instance, at times when one is making a difficult business decision, as I know only too well, one must be cognizant of the law and how judges, juries and lawyers might react. In law school, one mainly studies the black letter law, written law and precedent. In many contexts these may not fully shape the outcome of the case or conflict. Many other factors may do so either individually or jointly. I have been in cases where I had to make these calculations. At times, I have been wrong.

This is not a normal Judicial Process course. We cover the material in a number of ways First, we use cases to illustrate various parts of the process. If we are going to talk about how juries operate and impact the process, we will be looking at some famous cases on juries. If we want to know how judges operate in interpreting common law we will be reading some of the most famous common law cases one might encounter in law school, **Palsgraph, Hawkins**, mentioned in the movie about Harvard Law School, **The Paper Chase**, and others. If we want to know what options a judge might see in deciding a case we will be looking at "**The Case of the Speluncen Explorers**", a famous hypothetical developed by Harvard Law Professor Lon Fuller, written in the 1940'sd complete with 5 judges using different philosophical approaches to making a decision in this case. As an add on, my late dear friend and Fuller student, Professor Anthony D'Damato(perhaps the smartest person I have ever met), added 3 more possible opinions in his book

A Introduction To Law and Legal Thinking most of which is in the course packet. (cp)

Second, as we learn about the legal/judicial process we also want to look at predictive models of outcomes, a major pastime for us quantitative social scientists. We will be looking at such models to help us understand patterns in judicial decision making. This was originally Dr. Sager's specialty. His dissertation was "A Computer Simulation of the 1962 Term of the Supreme Court." These models will help us see how various parts of the process impact the final part, the actual judicial decision.

Third, we will be reading commentaries on various part of the judicial process by academics and actors, mainly judges. In reading these, we want to keep in mind what the writer is saying about predicting decisions and outcomes.

Fourth, we will be analyzing the bivariate and multivariate relationships at various levels of generality. A bivariate relationship is between 2 variables.

If we know one variable, we try to predict the other. WIf we know the political view of a judge can we predict the outcome a particular case. In some instance it would be hard to take the notion of whether there is American style judicial review and predict the outcome of a particular case, But we could take that variable as a predictor of some broader concept such as a fair judicial system. Of course, we have to define "fair" fist. This will be clearly explained as we read the two articles assigned during the semester from when I was on the student board of "The Law and Society Review" at Northwestern University. Both are classics though we may have not realized they would be when we made the publishing decision. Especially the one on witchcraft, assigned for

the our first class, flummoxed us for a while. Then we printed it.
These above noted foci will be apparent as we go through the semester

Class 1 Assignments:

1. Read and Digest article on Witchcraft, Elliot Currie, **Crimes Without Victims**, in course packet CP. Original article can be found at jstor([click here](#))
The site will ask you to sign in through the UT Libraries. For me I just checked I was at UT Austin

2. Many students have probably read Franz Kafka's book **The Trial** in high school. **Either review it for class, read it(it is quite short) or watch the old Anthony Perkins film of the same name.** This is the 1962 film with an all star cast including Romy Schneider, Jeanne Moreau and the great Orson Wells who wrote the screenplay. Run time is 118 minutes. I find the movie quite scary so you might want to watch it with someone.

3. Read the short newspaper article about a conflict at the Round Rock ISD School Board meeting. ([click here](#)). What does this have to do with the judicial/legal process?

4. Consider the coverage and aftermath of the January 6th Events at the U.S. Capitol. What do you know about this and how do you know it?

5. Recall the events in Kenosha, Wisconsin in the summer of 2020. Kyle Rittenhouse was charged with killing 3 people and eventually acquitted by a jury recently. Did the prosecutors know he would not be convicted by a jury?

Here are some questions we will consider in Classes 1 and 2.

1. What is the judicial/legal process in this country? What are its main parts or essential elements? Is it followed everywhere, all the time, at all levels of government, by all actors in the process. What are your thoughts as we begin this course
2. Who are the main "players" in the judicial and legal process? How were they represented in the Curie article and Kafkas, **The Trial**.
3. Does Kafka's book have any relevance to what goes on with our judicial/legal process today? What if any is the relevance to this course of Round Rock School Board events, and the reference to the January 6th events and Rittenhouse case.
4. Some conservative writers now say the "**process is the punishment**" What does that mean. Does the **Currie article** or the **Kafka movie** shed light on this comment. How about the January 6th events and their aftermath and the RR School Board issues.

Class #2 – Monday January 24

We will finish up the material and discussions from Class #1.

Why are judges important and How should judges behave?

1. Importance of judges

Reacquaint yourself with **Marbury v. Madison**. If you have never read it you can find the case on Findlaw or Scotusblog. Dr. Sager will discuss it. Get a sense of how it is put together with regard to arguments and focus.

2. How Should judges behave? How should they make decisions.

To begin thinking about judges and judging we will start with a well know Supreme Court case, **Republican Party of Minnesota v. White.**

Brief [Republican Party of Minnesota v. White.](#) (find law)

Go to the full Supreme Court opinion:

Republican Party of Minnesota v. White(Online findlaw)([click here](#) for Dr. Sager's very brief brief of this case)(you can find more about the case and judges who decided it by going to the Oyez Oyez website on our resources page and search for the case by name. Also, you can find on Oyez the oral argument in downloadable mp3 format and a transcript of the oral argument. Most oral arguments are exactly an hour long and they provide great insights you may not get from reading an opinion)

On the surface this is a case about free speech during a judicial election. But this is not a course in civil liberties. So you need to look below the surface to see how this case applies to this course. *Study this case very carefully.*

- What theories about how judges do and should behave are propounded or hidden in the various opinions?
- Do these theories apply only to judges or to all political actors or all people?
- How would you have decided this case and why?
- What is the political significance of this case?
- What current political issues does this case speak to?
- What parts of this course does this case speak to? (look at the various topics in the syllabus to get a handle on this question)

▪ We will be reading a book that is now out of print entitled "*An Introduction To Law and Legal Thinking.*" All but 2 of the chapters are reprinted in the course packet (CP) Professor D'Amato in a law review article and a presentation accused a famous judge of lying about the fact of a case that came to his court on appeal. D'Amato was representing a black doctor from Chicago who was accused of killing his wife. For a brief news article in the New York Times from 1989 about D'Amato's accusations [click here](#). What, if anything, does this have to do with the above questions and this case?

For this second class:

Begin reading Clarence Thomas, ***My Grandfather's Son.*** We will begin using it for discussion in our fourth class.

For this second class:

1. **Read and briefly summarize** Scott Turow **One L:An Inside Account of Life in the First Year of Harvard Law School** CJP Reading 5.1 pp 221-228(CJP refers to the assigned book, **Court Judges and Politics**, by Murphy, Pritchett, Epstein and Knight. Note: if you have a different edition, the page numbers may vary from what is assigned. Go by the title of the article in that case)
2. **Take detailed notes** on Oliver Wendell Holmes, Jr. **The Path of the Law**, CJP Reading 1.4, pp 27-30. This is an essay from the an 1897 Harvard Review. You can find this on many different websites. Here a link to a Holmes piece from Murphy book ([click here](#))

Class #3 – Wednesday, January 26

First, for a little fun read this article about 25 of the weirdest, silliest and frivolous

lawsuits in a USA Today article covering each one rather briefly

[\(click here\)](#)

Now to more serious reading.

Brief Caperton v. Massey [\(Edited version Click here\)](#)

On the surface this is a case about due process of law and whether a judge should recuse himself or herself as a result of campaign contribution by parties in case on which he or she is sitting.

But under the surface, as in the Republican Party v. White case, there are theories about judicial behavior and the role of Courts in defining and regulating it.

This is another case like Republican Party v. White, where a civil rights claim is made and decided on top of a number of assumptions about how judges do or should behave and appear. It deals with some of the same underlying issues as in Republican Party v. White from the perspective of a litigant where as White deals with them from the perspective of the bar associations. Both cases involved judicial elections which is one of the major ways many states staff their judiciaries. There is a reading about the various ways judges are selected in the states coming up in CJP. These case also provides some context the federal process in which judges and justices are appointed for life.

The majority opinion in Caperton mimics a model of how judges should decide cases. Can you see that model?

Brief Band Refuse Removal v. Village Fair Lawn (cp)(If you have not gotten course packet yet, you can find this case by [clicking here](#))

At a general level, what are some of the similarities and differences between Band and the previous two cases. Of course the previous two were decided by the U.S. Supreme Court not a New Jersey court. The mafia was not involved in the previous 2 cases as best we know, though in some political circles Massey Coal and Blankenship are spoken of as if they fit the common view of the mafia.

Class #4 – Monday January 31st.

What is Justice?

Read: D'Amato Chapter 7 on Justice (cp)

What role should Justice play in judicial decision making?

What would a "just result" be in a constitutional case or a common law case or a murder case? We have read 3 cases so far. Were the results just? Was justice done? As noted above, D'Amato wrote an interesting article about the injustice done to a Black doctor he represented in a murder case in 1968. D'Amato eventually wrote an article that appeared in the New York Times about appellate judges lying about case facts. He wrote a more erudite articles in 1990 [\(click here\)](#). Read at least first two pages of this article. To be up front, D'Amato was a friend from 1968 till he passed away in 2017. We were also in business together for much of that time Among other things he had a law degree from Harvard and a Ph.D. in Political Science from Columbia in International Relations. Most of his teaching life was spent at Northwestern Law School. He wrote about 3 articles a year and a book every 3 years or so. He also took interesting cases usually involving international law around the world. We will be reading more parts of his book, An Introduction to Law and Legal Thinking which is out of print. He gave me permission to reproduce parts when the book went out of print many, many years ago. He also produced a hit Broadway show and wrote his own musical. More about this in class as we read his book.

In class video: Justice For Sale from 60 Minutes 1988.

The Selection of Judges I: State and Federal Processes

Read:CJP Chapter 4 pp 141-159 (137-157 in earlier edition) on judicial selection.

Read Russell Wheeler 's piece on background of federal lower court judges([click here](#)) He updates some of the data in the Goldman and Slotnick following this section of Chapter 4. Russell was a Judicial Fellow a year ahead of Dr. Sager

Read: Commentary Article on Bork nomination to Supreme Court for a word version ([click here](#)) **For a pdf version of the article**([click here](#))

Can politicians and the public predict judicial behavior?

Should a judge's future behavior matter? Was Bork treated "justly"? Why or why not.

[Class #5- Wednesday February 2nd](#)

The Selection of Judges: State and Federal II

TMA Video will be shown in class. It is a companion to the Justice for Sale Video shown last Wednesday. Watch some of the Bork and Thomas videos on the **videopage for this class and the next.** Read Commentary articles on Thomas nomination and the letters about those articles.([click here](#))

For PDF version of Thomas nomination article ([click here](#))

Finish Thomas autobiography by this class.

[Click here](#) for study questions on Garment articles on Thomas and Bork and Thomas Book

Click on Table Number to get that table. Tables [7](#), [8](#) and [15](#)

View the following Tables in CJP and see if they add much to what we know from the above tables:

Siegal et. al. Table 1 p. 194 Presidential Policy Liberalism by Walker and Barrow Tables 1 and 2, pp 202-203 Gender and Policymaking and Race and Policymaking Note again: various editions of CJP may have different page numbers.

After studying the table ask your self what information does it give you about judicial behavior, the appointment process, the comparative views of Republican and Democratic appointees, and about some of the conflicts in the Senate about the process.

Work on getting as much information as you can from each Table and compare what each Table says in light of the others.

opinion and summary of facts and procedure ([click here](#)) (notes and questions on case, [click here](#)) CP

[Class #6 Monday February 7th](#)

What do Courts Do: II

Brief McNaughten's Case ([click here](#))

Note I have just included a couple of pages from the old English case which is the basis for the insanity defense. Should Dudley and have Stephens pleaded insanity?

Who should decide if the defendant is insane, the judge or the jury?

\Brief Sherrod v. Berry cp

CJP reading 8.2, Epstein and Walker, The Choices Justices Make
(essential reading to go with Craig v. Boren)

Brief Craig v. Boren(Online Findlaw)

Read D'Amato, Chapter 1 What Law Does cp

Figure 1. Traditional Model of Legal Reasoning ([click here](#))

Paper #1, Brief a recent Supreme Court case, will be assigned in this class or perhaps an earlier one

Class #7 – Wednesday February 9th

Begin reading Murray book. Part I through Chapter 2 on what he calls the law less state This book is about a many political issues related to law, the legal and judicial processes.

Dr. Murray has a unique solution to the problems he presents. Unfortunately the way he develops his thesis does not fit with the organization of this course. For instance Chapter 3 fits with Class 24 and Part III fits in any number of places and so on. His conceptions of justice, correct constitutional interpretation and judicial roles underlies much of this provocative book.

Models of the Judicial Process

The entire Anglo-American judicial and legal process is quite complex. For a beginning look at this process in a flow chart. ([click here](#))

The Traditional Model of the Judicial Process I: Examples from the law of Tort

Brief Winterbottom v. Wright ([click here](#)) for text of 1842 English case

Brief Thomas v. Winchester cp

Brief Loop v. Litchfield cp

When reading these tort cases on the development of product liability law, pay attention to the exactly what part of the process is being challenged, e.g., a jury verdict or a judicial ruling or a pleading and so on.

Read D'Amato What Is Court Made Law Chapter 4 cp

CPJ Chapter 10 Precedents and Legal Reasoning pp. 438-449

Products Liability Glossary ([click here](#))(Begin reviewing these terms and make sure you understand them all by the end of class 8. Ask questions about those you do not understand).

Figure 1. Traditional Model of Legal Reasoning ([click here](#))

Watch The Ox-Bow incident, a 1940's western with some larger messages. It was recently mentioned by a least one journalist

Class #8 – Monday February 14th

The Traditional Model of the Judicial Process II: Examples from the law of Torts

Brief Losee v. Clute cp

Brief Devlin v. Smith cp

Brief Torgeson v. Schultz cp

Brief MacPherson v. Buick cp

In case there is a problem with cp copy of case, this case is linked here ([click here](#))

Class #9 – Wednesday February 16th.

Read Appellate Judge Ruggio Aldisert

on categorical syllogisms and deductive reasoning. Instead I have scanned it. ([click here](#))

All you need to understand for class and for the exam later this week is what is a categorical syllogism and how it is constructed from judicial reasoning. We will discuss this in class today. I will start this discussion with the 2 assumptions 1. That you have read Aldisert and understand the basic syllogism: All men are mortal. Socrates is a man. Therefore Socrates is mortal. 2. That you know the the 3 parts of the syllogism. If you already know syllogisms, this will be a review. If you don't, you have this reading. Read as much of Aldisert as you need to understand the basic syllogism.

Three Models of Judicial Decision making ([click here](#))

CPJ readings

10.2 Lief Carter Reason in Law

The Traditional Model of the Judicial Process III : Examples from the law of Torts

Brief Escola v. Coca Cola cp

Brief Greenman v. Yuba Power cp

Breif Sindell v. Abbott Labs cp

Paper #1 Brief due in class

Class #10 Monday February 21st

Exam #1

(CLICK HERE FOR A FEW EXAMPLES OF SOME POSSIBLE TYPES OF QUESTIONS)

Class #11-Wednesday, February 23rd

The Traditional Model of the Judicial Process IV: Examples from the law of Contracts

I

Brief Oscar Schlegel v. Peter Cooper's Glue(2 cases) cp

Brief Williams v. Walker Furniture Company(2 cases) cp

Brief Hawkins v. McGee cp

Tables 10 and 11.([click here](#))

Additional reading for Class 10

Conversation with Clarence Thomas at Library of Congress Auditorium on Thursday February 15th. One of his former clerks who was law professor and just was appointed to a Judge position on a federal administrative court interviewed him. Here are 3 different stories from various news sources. The Daily Caller story appeared on The Drudge Report for less than 24 hours. What difference if any do you see in them. I will denominate them as Story 1, 2 and 3 Click on name for article. [Story 1](#) [Story 2](#) [Story 3](#)

Recently Justice Ginsburg sat down with Jefferey Rosen who is a law professor and liberal columnist. The link here is for

an article about the interview. The full interview is shown in the article. For the article, [click here](#)

In light of Republican Party of Minnesota and other materials we have read, what do you think about her doing such interview.

Based solely on the news stories. what ways is her interview similar to the Thomas Conversation and in what ways is it different.

Lastly, check out this article about a Federal judge who was basically appointed by Senator McCaskill of Missouri fining the Senators Republican opponent ([click here](#))

Class #12 – Monday February 28th

The Traditional Model of the Judicial Process V: Examples from the law of Contracts II

Brief Peevyhouse v. Garland Coal Company cp

Brief Haslip v. Pacific Mutual Insurance Company Findlaw or other websites with full S/C Opinions

What does this data tell you about current public discussions?([click here](#)). What further questions might you ask about this data?

Whose data is reliable? ([click here](#))

Class #13 – Wednesday March 2nd

How the Judicial Process Works I: Choice of Forum and Pleadings

Swift v. Tyson(Dr. Sager will discuss)

Brief Erie Railroad v. Tompkins

Read and digest Justice Brandeis in Ashwander v. T.V.A. ([click here](#))

Swift v. Tyson ([Click here](#)) While not assigned to brief, you are

welcome to try your hand at reading it. We are interested in the issue related to what law applies to this contract, New York or Federal. If it is Federal, where can the come from, what is its source?

Erie Railroad v. Tompkins(Findlaw)

Erie cites a case entitled Black and White Taxi v. Brown and Yellow Taxi.

It is important to understand this case. [Click here](#) for a brief description of the case.

You should fully understand the issue and voting lineups in the Supreme Court when case was decided and when Erie comes around

Figure 2. (Go to Link on Feb 1 for Figure 1 Traditional Model of Legal Reasoning.

Click on it and you will get a list of nearly all the graphs, figures and charts for this course.

The 2nd item contains Figure 2)

Read CJP Chapter 8, Limitations on Judicial Power 329-344

Read a brief discussion on judicial law making by an Associate Dean of a law school ([click here](#))

Class #14 – Monday March 7th

How The Judicial Process Works II: Trials, Pre-Trials, Juries

[Brief J.E.B. v. T.B. \(click here\)](#)

[Brief Ballew v. Georgia findlaw](#)

[Brief State v. Susan Nelson cp](#)

From **J.E.B.** be sure you know the facts with regard to gender of the various parties. Also understand the difference between peremptory challenges of jurors and challenges for cause and how they work in jury selection. Lastly be sure to understand the various positions of the justices for and against the allowing the challenge in question.

For **Ballew**, pay particular attention to the research on juries discussed by Justice Blackmun. Some other jury research appears in the CJS readings. Also wrestle with what is called Type I and Type II error and try to apply that to your everyday decisions metaphorically. Again be sure to know the various positions laid out in all the various opinions.

For **State v. Nelson** read the following article on prosecutorial misconduct from the D.C. Bar magazine and be prepared to discuss in class. ([click here](#))

Additional Assignments

I mentioned this early in the semester. View the movie **The Ox Bow Incident** as soon as you can, but no later than the first class after Spring Break. It's available on Netflix and elsewhere. It is a classic Western that may seem somewhat remote to you since cowboys, even in Texas, are out of favor. Still its main points and metaphors should ring true today.

Lastly, by April 11th when we cover the topic about judging the judges and watch an edited version of the award winning film **Judgment At Nuremberg** read Milton Mayer, **They Thought They Were Free: The Germans 1933-45**. University of Chicago Press. You can get it on kindle or used from Amazon. Originally written in 1955 and now back in print, I am sure you will find it interesting and perhaps, even frightening, in so many ways.

CJP Readings Again summarize in a couple of sentences

9.1, Frankel The Adversary Judge: The Experience of the Trial Judge

9.2 Zeisel and Kalven, The American Experiment

9.5 Etzioni, Science; Threatening the Jury Trial

9.6 Michael Saks, The Limits of Scientific Jury Selection

13.1 Charles Nesson, Critical Issues in the Courtroom: Exploring a Hypothetical case

Class #15-Wednesday March 9th

How the Judicial Process works: Evidence and Ethics

[Brief U.S. v. Kasto cp](#)

[Brief Nix v Whiteside \(findlaw\)](#)

[Brief In Re Winship \(Findlaw\)](#)

Read Blumberg, The Practice of Law as a Confidence Game CJP 5.3. Another famous article from the last 60's The Law and Society Review.

With regard to our previous discussions of prosecutors, read a review by a large law firm lawyer of the Daniel Fischel's late 90's book Payback. One of the main main prosecutors referenced in the book and not mentioned by name was Rudy Guiliani. Fischel, who had created a law and econometrics business, later became dean of University of Chicago Law School. He hired as an adjunct Professor named Barak Obama to teach at the U of C Law School.

Spring

Break March 14-18

Class #16 – Monday March 21

How the Judicial Process Works IV: "Scientific Evidence"

Brief McCleskey v. Kemp CJP 9.9 (or Findlaw)

Brief Daubert v. Merrill Dow Findlaw

Junk science of John Edwards

Read again on Witchcraft in Europe and England from Law and Society Review cp

Two views of the relationship between breast implants and various diseases([Click Here 1](#))

([Click Here 2](#))

Table 4.

CJP Readings

9.10 David Baldus The Death Penalty Dialogue Between Law and Social Science

9.11 John C. Jeffries Jr. Lewis Powell Jr.

Dr. Sager's Department of Government Commencement Address May 2009([click here](#))

S

Class #17 Wednesday March 23rd

How the Judicial Process Works V: Judicial Discretion and Control

Brief Wyatt v. Stickney_cp

Brief Heilmann v. Joseph Oat_cp

The Heilmann case has 5 dissents by Federal Appellate Judges. Dissenters Richard Posner and Frank Easterbrook are well known scholars as well as judges. Judge Daniel Manion's father was dean Notre Dame Law School. He attended Indiana Univ Law School at night after serving in Viet Nam. **Read all of the dissents carefully and be sure to identify the differing views on the main issue including those by Judges Ripple and Coffey.** This is a very important case in that it relates to many issues in this course.

Chart of Judicial Policymaking([click here](#))

CJP Chapter 7 Instruments of Judicial Power 299-311

I am linking an article that talks about some of the issues raised in Monday's class in a different context. See if you can breeze through it and get the essence in a few minutes. It

can be reduced to a couple of sentences relating it to several of the ideas mentioned Monday. ([Click here](#))

Class #18- Monday March 28th

How the Judicial Process Works VI: Doing Justice and Judging the Judges

Judicial Behavior and the Common Law: Does Judicial Biography influence case outcomes?

Brief Palsgraph v. Long Island R.R. cp

Brief Hynes v. New York Central Railroad cp

Brief Sodero v. Sodero cp

Brief Riggs v. Palmer

Here are some questions to consider when reading Palsgraph and Hynes. Can you draw a picture of what happened in each case? How does Cardozo describe the injured party in each case? What is basis of each decision. Was justice done each case? Should each case have come out the same in terms of the injured party or the railroad winning? What other considerations not mentioned in the case may have played a role in the outcome, e.g. any other independent variables you can think of?

Have Cardozo book, The Nature of the Judicial Process finished by this class.

CJP Reading

1.4 Review Homes Path of the Law

1.1 Blackstone Commentaries on the Law of England

3.7 Kagan, Bliss and Cartwright et. al. The Evolution of State Supreme Courts

Class #19 Wednesday March 30th

Multivariate Model of Judicial Behavior([click here](#))

Read CJP Chapter 1, Political Jurisprudence pp 3-20

Read D'Amato Elmer's Rule([click here](#))

Judicial Behavior and Administrative Law

Brief NBC v. United States (click here)

This case is discussed in the Murray book with regard to out of control government.

Brief Chevron v. Natural Resources Defense

Council(click here)

This case is a modern expansion of NBC revolving around the meaning of the word "sources."

13.3 Frank Cross and Emerson Tiller, Judicial Partisanship and Obedience to Legal Doctrine:Whistleblowing on the Federal Courts of Appeals CJP

Paper Assignment.

Class #20 Monday April 4th

Exam #2

Class 21 Wednesday April 6th

Doing Justice, Judging the Judges and International Law

Brief *People v. Alstoetter* CP

View full movie, *Judgement at Nuremberg*, for discussion in class. If you have not been able to see it, Dr. Sager will show it on Sunday evening April 5th. Times to be determined. This will be an abridged version containing the story about the Alstoetter trial.

Judgement at Nuremberg is a fictionalized version of the Alstoetter case.

The movie is available in a pretty much its original form on Youtube according to Mr. O'Connor.

Read over Linder materials on Nuremberg Trials([click here](#)) This contains a copy of Alstoetter case as well as excellent commentary on the issues. He also has some pictures from the trial. This supplements the Alstoetter case that is in the course materials.

D'Amato Chapter 7. Review materials on Justice.

We are interested in the major part of the film which is the reenactment of the Alstoetter case. Read this commentary on the Alstoetter class ([click here](#)) Think about how these comments bring some of the themes of the movie back to some of our course themes.

Class #2 – Monday April 11t

Paper Two Discussed

Mayer Book **They Thought They Were Free** also will be discuss in this class.

You will be doing what is called Guttman or Cumulative scaling with regard to your case.

The paper will be a piece of original research on the judicial behavior of the justices in your case. Here is a short article on this method.([click here](#)) The next link contains some examples as they relate to judicial behavior. Over this coming weekend familiarize yourself with Guttman scaling.([click here](#)) Find 4 Supreme Court cases cited by your case, preferably decided as recently as possible. Get together the votes in each of those cases. Be prepared to ask questions about these cases and your case next Wednesday. The paper will take the case you briefed and attempt to use Guttman scale

Judicial Behavior and Statutory Interpretation: I

For the cases from *TVA v. Hill* to *King v. Burwell*, excluding *Alstoetter*, make sure you put the statute in question in your brief. Know clearly what words are being interpreted so you can easily recite them when called up in class. Also try to figure out what was the method used for doing that interpretation if there is some way to denominate it from the Canons below. Use the Canons below to learn about the methods. The first and most obvious is called "the plain meaning rule". Of course, my plain meaning may not be your plain meaning of a set of words. (I am struggling through this trying to figure the guidance from Treasury and SBA on the Payroll Protection Act.) This is probably not the complete list of statutory interpretive methods. Hopefully, you will find the cases fun to read , discuss and think about. **Click on case for a somewhat edited version except**

for Weber. What you are looking for in the case again is statute involved and getting a sense of why the Court interpreted as they did. It could be pure statutory construction or perhaps some other reasons lead to a particular statutory construction.

[Brief TVA v. Hill](#)

[Brief PGA v Martin](#)

[Brief U.S. v. Locke](#)

[Brief U.S. Steel Workers v. Weber](#)

Canons of Statutory Interpretation([click here](#))

D'Amato Chapter 3 cp

Graph 1

CJP Chapter 11, 491-501 on statutory interpretation

CJP Reading 13.6

D'Amato on Karl Lewellyn, famous legal scholar and positivist who took apart canons of statutory interpretation ([click here](#))

[Class 23 Wednesday April 13th](#)

Judicial Behavior and Statutory Interpretation II

[Brief Swann v. Charlotte Mecklenburg Board of Education](#)

[Brief City of Los Angeles Dept of Power and Water v. Manhart](#)

[Brief Federenko v. U.S.](#) ([click here](#))

This case had a couple of issues. We are only looking at the statutory interpretation issue.

The two parts of the statute in question are highlighted in on page 8 and again on page 10.

Most of the case as edited for this class is about the facts which are echo some of the issues

in the **Judgment At Nuremberg** case.

[Class # 24 Monday April 18th](#)

Judicial Behavior and Statutory Interpretation I

[Brief King v. Burwell](#)([click here](#))

[Brief NFIB v. Department of Labor-OSHA](#)([findlaw](#))

Carefully read and critique the following article about what Christopher Caldwell call the two constitutions. Then see if you can find Hubert Humphrey in the opinion of Manhart.

[Click here](#)

from Wikipedia article on Statutory Interpretation, another list of canons([click here](#))

CJP Readings

11.1 Felix Frankfurter Some Reflections on the Reading of Statutes

11.7 Frank Easterbrook Statute's Domain

11.8 William Eskridge Jr. Dynamic Statutory Interpretation

Class #25 Wednesday April 20th

Judicial Behavior and the Constitution: Procedural and Substantive Due Process

Brief Goldberg v. Kelly, Wheeler v. Montgomery.

Brief DeShaney v. Winnebago County.

Brief Hudson v. MacMillan (**Thomas dissenting.**

opinion only)

Brief Brumfield v Cain (**Thomas dissenting opinion**

only, Part I and IV)(**critique of Thomas opinion)**

Table 9

CJP Chapter 12, pp 539-558

Class #26 – Monday April 25th

Judicial Behavior and the Constitution: Criminal Justice

Coker v. Ga.

U.S. v. Leon and Shepard v. Mass.

Tables 4,5 , 11, 12, 13 ([click here](#))

Class #27 – Wednesday April 27th

Judicial Behavior and the Constitution: The Role of Precedent

We come back to the issue of precedent in the context of constitutional adjudication.

These cases have been edited down. Read [Payne](#) to see how the Court handles overruling a precedent case that is less than 10 years old. Also pick up a little more 8th amendment jurisprudence. This case is about victim impact statements as evidence in the sentencing phase

of a criminal trial. Then read [Planned Parenthood](#) for another view of overruling precedents. O'Connor's opinion makes what she thinks is a clear case of when to and not to overrule precedent. Many of the other justices

disagree. I have highlighted where [Payne](#) is cited by her. Also notice the myriad points of view among the justices on various aspects of both the general constitutional issues relating to abortion and then which parts of

the Pennsylvania statutes should be upheld or struck down. I have linked a chart outlining all the positions below. Maybe someone should do a Guttman scale for each part of the statute as well as the major issues about abortion.

Brief Payne v. Tennessee

Also know a bit about **South Carolina v. Gathers** and **Boothe v. Maryland** cited in **Payne**

Brief Planned Parenthood v. Casey (For a brief diagram of Casey opinions [click here](#))

Brief Bosse v. Oklahoma discussed in class

by 7 p.m. on Thursday. For that 2nd essay worth 30 points, you will have roughly 750 words for the answer. Please put word count on top left of first page of your answer.

[\(Edit\)](#)