

FALL 2007

LS 19AC

Legal Studies 19AC

## Moral Politics and Legal Culture

How Americans Use Law to Conduct Difficult Dialogs across our Moral Chasms

### Instructors:

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### Course Description:

Law has long been inextricably bound up with the deepest conflicts over identity, inclusion/exclusion and tolerance in American society. The tendency of Americans to bring their pursuit of social change into legal frameworks and institutions often seems to make efforts at political compromise more difficult, for example, abortion access after Roe v. Wade (1973). At the same time, conducting some of our deepest culture and policy wars in and through our legal system introduces elements of a common vision and values into the conflicts themselves. For example, the religious right has adopted the language and metaphors of the civil rights movement in pursuing legal protection for religious practices in Congress, the state legislatures, and the courts.

Lawyers themselves embody this promising paradox. Few actors are more adept in deploying the full panoply of knowledge available in the society (cultural as well as scientific) to maximize the singular advantage of their clients, sometimes at a cost to the broader public discourse and civil peace. Yet law study imparts a discipline through which advocates for all sides of the most heated controversies (sometimes called "cause lawyers") can reason and debate together in a public forum without fear of slipping through the bounds of civil discourse.

The goal of this course is to plumb in real time the process of how several of America's most impassioned social conflicts move into and through law, and the consequences for the people, movements, and advocates involved. The freshman and sophomore students who take the class will leave with a greatly enriched sense of how law and legal institutions provide a common context for addressing seemingly distinct disputes. Beyond that, through exposure to the skills of interdisciplinary analysis and reasoned advocacy that contemporary lawyers master, these undergraduates will feel more equipped to participate in difficult dialogs about values-based conflicts that they confront in their subsequent courses and in life.

The course also aims at giving undergraduates an early and sustained exposure to the research process. Working in their sections, students will collaborate to research policy questions behind major moral conflicts. Sections will be assigned a real or hypothetical organization with a moral perspective on public policy and work together to craft the best political and legal strategies. Students will learn how to use the library's research engines to identify and obtain policy relevant scholarship and government reports and to engage in critical reading of such materials.

## **American Cultures Requirement**

Berkeley's American Cultures requirement is designed to assure that all graduates develop a sophisticated sense of the diversity of cultures within the American experience and history. It is highly appropriate that the Legal Studies major offer a course in fulfillment of this requirement because the legal system and litigation have shaped the meaning of race, ethnicity, and culture in America from the very beginning of European settlement. By focusing on moral conflicts, the course will show how race and ethnicity interact with broader notions of

## **Course Objectives**

Law is far too important an institution in American society to be left only to the professional study of future lawyers. In offering this course to UC undergraduates, the instructors have three major objectives.

The first is to provide a general introduction to the study of law as a crucial social institution in the shaping of individual and group identity within American society. How we identify as Americans, and the ways in which we conceive of the differences between ourselves and "other" Americans, is deeply influenced by American legal institutions and practices. Students will learn how to read and analyze statutes and case law and to understand the process by which political and moral conflicts become litigation. By the end of the course you will know how to find and read law produced by legislatures, courts, and administrative agencies, and to analyze the legal strategies being utilized by different factions within our society as they battle each other.

The second is to study the role law plays in shaping moral values conflict in American society. American society is thought by many (but not all), to be highly polarized around conflicts over moral values (e.g., between equality for gay and lesbian partners, and traditional Biblical values of marriage). By moral value conflicts we do not mean to focus only on those conflicts focused primarily on religious identity or the small group of family and sexual issues that have been framed in the media (or by participants) as moral. Indeed, a moral value issue can be any issue in which values perceived by some as defining for their individual and group identity arise. From that perspective there is hardly an issue in American politics or public policy that is not a moral values issue. American society is also believed to be highly legalistic and to have a particularly adversarial legal culture at the heart of its political system. We want to explore in an empirical way the relationship between these observations. Law, of course, implies many different practices from drafting statutes to police interrogating prisoners. In this course we will be focusing primarily on litigation as a vehicle for contesting and shaping the way moral values are defined and used to unify or divide Americans.

The third is to equip students to participate in public discussion and debate on moral value issues with a sophisticated sense of both the sources of moral conflict and the results of the litigation process. Too often we assume that moral values must inevitably lead to conflicts that escalate beyond rational argument, and move towards emotions and the risk of offense (to one or all parties). By placing moral conflict in a socio-legal

frame, we do not wish to ignore emotions but to recognize that there is a lot of ground to cover that can benefit from empirical research and disciplined conceptual analysis. Proponents of a law to limit access to abortions, for example, presumably harbor strong emotions about the wrongness of abortion, but they also hold expectations about how the law will be implemented and the effects it will have on women seeking an abortion. Those expectations deserve to be taken seriously in their own right, and explored using empirical knowledge and conceptual analysis.

### **Modes of Evaluation**

Students will be evaluated in three ways.

- They will take an in-class midterm and final examination on the materials covered in the main lectures that is worth 20 and 30 % of their total grade respectively.
- They will write a research memorandum as part of the collaborative section research/advocacy project that is worth 30% of their total grade.
- They will also be evaluated for their class participation in section, worth 20% of their grade.

### **Section participation and the collaborative research project**

Attendance and participation at section is vital to this course. The instructors will use lecture time to explore the broad themes of the class and to investigate particular litigation battles over moral conflicts. Section will concentrate on developing both legal skills (finding and understanding judicial opinions, statutes, and administrative regulations) and socio-legal skills (finding evidence about the implementation of law and its influence on the behaviors, strategies and identities of individuals and organizations).

In the second half of the course, you will work with your section on a collaborative research project. Each section will be assigned a number of related conflicts that have or are likely to produce litigation. Using the “wiki” tool on B-Space, students will write articles analyzing the legal and socio-legal dimensions of each of these conflicts with the goal of producing an on-line “wikipedia” like resource on moral conflicts and the legal system. As with the articles on the actual on-line encyclopedia, Wikipedia, students will be expected to participate in checking and editing each other’s articles.

## Syllabus

### Week 1-3: Culture Wars: Just How Divided is America?

#### WK 1, August 29: Supreme Conflicts

##### Readings:

E. J. Dionne, Jr. "Why the Culture War is the Wrong War," *The Atlantic Monthly*, January/February, 2006 (course reader vol. 1)

John Dombink, "Red, Blue and Purple," *Dissent*, Spring 2005 (course reader vol. 1)

Morris P. Fiorina, Culture War? The Myth of a Polarized America (New York: Pearson Longman 2<sup>nd</sup> ed. 2006) (Introduction, Chapter 1 & 2)

##### Topics:

Course overview

*Gonzales v. Carhart et. al.* (2007) (the "partial birth abortion" decision)  
*Parents Involved in Community Schools v. Seattle School District No. 1, et. al.* (2007) (Race conscious school selection decision)

#### Wk 2, September 5: The Moral Quality of Political Conflict in America

Noah Feldman, Divided by God: America's Church-State Problem--- and What we Should Do About It (New York: Farrar, Straus and Giroux) pp. 1-17

George Lakoff, Moral Politics: How Liberals and Conservatives Think (University of Chicago Press, 2<sup>nd</sup> edition, 2002) pp. 24-37 (course reader vol. 1)

##### Topics:

How divided is America?

What role do moral beliefs play in political conflict?

##### *Week 2 Section Assignment: How divided is America?*

Morris P. Fiorina, Culture War? The Myth of a Polarized America (New York: Pearson Longman 2<sup>nd</sup> ed. 2006) (chapter 3)

### **Week 3: Adversarial Legalism: Does Law Exacerbate Moral Conflict?**

#### **Wk 3, September 12: Adversarial Legalism**

##### ***Special Guest: Robert Kagan***

Robert Kagan, Adversarial Legalism: The American Way of Law (Harvard, 2003)  
pp. 3-17 (course reader vol. 1)

##### Topics:

What makes American legality especially adversarial?  
Is an adversarial culture necessarily a divided or a polarized one?

*Week 3 Section Assignment: What are the consequences of litigation being such an important form of political process in America?*

Lawrence Friedman, "Litigation and Society," Annual Review of Sociology, pp.  
17-29 (1989) (course reader vol. 2)

### **Week 4-5: How does Moral Conflict Become Litigation: The History of Planned Parenthood v. Casey (1992)**

#### **Wk 4, September 19: Roe and Moral Conflict**

*Roe v. Wade* (1973)

Pennsylvania Abortion Control Act of 1982

Morris P. Fiorina, Culture War? The Myth of a Polarized America (New York: Pearson Longman 2<sup>nd</sup> ed. 2006) (chapter 5)

##### Topics:

Did Roe v. Wade polarize Americans on abortion?

*Week 4 Section Assignment: How does the constitutionality of a law get challenged? How do you find and read Supreme Court cases and statutes?*

TBA

## **Wk 5, September 26: Casey and Convergence?**

*Planned Parenthood v. Casey* (1992)

David Strauss, "Abortion, Toleration and Moral Uncertainty, 1993 *Supreme Court Review* 1 (1993)

Topics:

Does Casey point to sources of unity among Americans regarding abortion rights?

*Week 5 Section Assignment: The concept of "legal consciousness"*

Catherine Connolly, "The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings," *Law & Society Review*, Vol. 36, (2002), pp. 325-346

---- THE REST OF THE SYLLABUS IS TENTATIVE ----

## **Week 6-8. Sex Education**

### **October 3. Schools and Religious Identity**

Noah Feldman, Divided by God: America's Church-State Problem--- and What we Should Do About It (New York: Farrar, Straus and Giroux)

### **October 10. Sex, Schools, and Marriage**

Kristin Luker, When Sex Goes to School: Warring Views on Sex --- and Sex Education --- Since the Sixties (New York: Norton, 2006) excerpts

### **October 17: Abstinence and Values**

*Special Guest: Kristin Luker*

Kristin Luker, When Sex Goes to School: Warring Views on Sex --- and Sex Education --- Since the Sixties (New York: Norton, 2006) excerpts

### **Week 9-10. Affirmative Action in Education**

Christopher Edley, Not All Black and White, Affirmative Action and American Values (1998) excerpts

Cass R. Sunstein, “*Did Brown Matter,*” *The New Yorker*, May 3, 2004

Derrick Bell, “Diversity’s Distractions”, *Columbia Law Review*, Vol. 103: \_\_\_ (October 2003).

### **Week 11-12. Capital Punishment**

Stuart Banner, The Death Penalty: An American History (Cambridge University Press, 2002) excerpts

Austin Sarat, When the State Kills: Capital Punishment and the American Condition (Princeton University Press, 2002) excerpts

Franklin Zimring, The Contradictions of American Capital Punishment (New York: Oxford University Press, 2003) excerpts

### **Week 13-14. Immigration**

Bill Ong Hing, Defining America Through Immigration Policy, (2004)

Andrew Sum, Paul Harrington, and Ishwar Khatiwada, Impact of New Immigrants on Young Native-Born Workers 2000-2005 (Center for Immigration Studies, September 2006)

Elizabeth Greico, What Kind of Work Do Immigrants Do? Occupation and Industry of Foreign-born Workers in the US (Migration Policy Institute Fact Sheet, January 2004).