

Judicial Studies Program
History and Theory, Week 3 , July 20-23

Lawrence Rosen Anthropology Dep't. Princeton University Princeton, NJ 08544

Law as Culture

Forms of legal thought are inextricably linked to the society and culture whose central concerns they seek to articulate and guide. Students of law are quickly taught to look for the connections among diverse facts and cases. However, the range of factors that shape the subject of their study and the practical implications that flow from attention to such connections are often too narrowly drawn. The purpose of this section of the Judicial Studies summer program is, therefore, to draw on the common quest for connections that inform both law and social thought and thus to develop a sense of how deeply these two approaches may contribute to one another.

Toward this end the sessions are organized around a series of issues that could, in a sense, arise for almost any legal system. By picking subjects that have some touchstone in American experience – subjects like the relation of cultural background to criminal culpability, the implementation of moral precepts into legal decisions, the social support needed to make a system of mediation work – we will quickly be drawn into examples whose resolution forces consideration of a host of possible connections. By adding comparative examples, often from societies quite unlike our own, we can also explore some of those systemic ties and repercussions that failure to think in terms of connections may otherwise obscure.

The four sessions will build on the issues and chapters set out in my recent book, *Law as Culture: An Invitation* (Princeton University Press, 2008). The four chapters in that

book will also be supplemented by readings from original sources, including legal cases. These latter readings are intended as optional: They relate to many of the points raised in the book but allow readers to see the original materials and to explore – whether during the week-long course or later – issues that may be of particular interest. In addition, bibliographic references will be offered, both for those who wish to do additional reading for each session and for those who may wish to follow up some of these issues at a later time. During our sessions the main focus will be on our common discussion, with participants encouraged to bring their own experiences and knowledge to bear on the materials we will share. To the extent that it is relevant, the topics of individual master's theses may also form an important point of reference for part of our discussions as we seek to consider how the anthropological perspectives of each topic may contribute to the projects of individual participants.

Session 1: Law and Social Control

We will begin by looking at the role of the cultural defense in several cases as a basis for considering how culture is being brought into the law and how culture is conceptualized by American and foreign legal professionals. Indeed, we will use these cases, along with considerations of the implementation of moral precepts, the structure of law in stateless societies, mechanisms of informal social control among American businessmen, cases involving the determination of “good moral conduct,” the legal system of a Philippine tribe that assesses the subjective moral injury of an offended litigant, and Judge Wright’s decision about a Jehovah's Witness in need of a blood transfusion to

consider how formal legal systems embrace cultural propositions and ‘informal’ mechanisms of social control.

Readings: *Law as Culture*, Chapter 1

Supplementary Readings:

L. Bohannon, “Shakespeare in the Bush”

R. v. Muddarubba; *State v. Rodriguez*; *People v. Poddar*

“Eskimo Erotica?”; “Culture Clash...”; “ ‘Cultural’ Defense
Draws Fire”; *State v. Kargar*

“What’s Culture Got to Do with It?”; *Repouille v. U.S.*

Dalkon Shield; *Application of Georgetown College*

Session 2: Creating Facts

The focus of our second session is on the way legal facts are shaped and how that process connects to the forms of relationship and assumptions prevalent in the larger society. The development of the jury system is taken as a prime example, followed by consideration of how continental systems that emphasize the central role of the judge as fact-finder shape facts in a way that clearly attaches to the political and social structure of those communities. Then by looking at Japanese conciliation and attempts to import Scandinavian and African models of mediation into the United States we can test the relation between practical proposals for judicial reform and the social support that may be required for them. Similarly, the case of community standards for determining pornography and the social assumptions that underlie the legal implementation of customary practices challenge us to consider

alternative forms of dispute resolution in the light of a broader range of features than legal or sociological considerations alone may embrace. Finally, we will look at the role that current social science research has played in decisions concerning the selection of jurors, the nature of psychological testing, and the relation of women's speech styles to their believability as witnesses in courts of law

Readings: *Law as Culture*, Chapter 2

Supplementary Readings:

Victor v. Nebraska

C. Stack, *All Our Kin*, ch. 6; *Back v. Back*; Levi-Strauss and

Margaret Mead on the family

State Ex Rel Black; "Arizona Raided Short Creek"; "My Husband's

Nine Wives"

E. Abelson, "The Invention of Kleptomania"

Session 3: Reason, Power, Law

Our third session is concerned with the ways in which legal thought changes as cultural conceptualizations change. It begins by considering how the idea of intentionality first entered western law and the ways in which our assumptions about others' states of mind reflect changes in our socio-economic and religious life. By using themes from family law in particular we can explore changes in intestacy and kinship, the structure of Black family life and American legal thought, and the culturally provocative problems of incest and polygamous marriage. Then, by using the Supreme Court's use of anthropological

testimony in the Amish education case and a key Indian land rights case we will consider the role of expert social science testimony in American and foreign proceedings.

Readings: *Law as Culture*, Chapter 3

Supplementary Readings:

“Jurors Hear Evidence and Turn it into Stories”; “Public Disclosures
of Jury Deliberations”

“When a Juror Watches a Lawyer”; “In a Different Register...”

“Japan Learns Dreaded Task of Jury Duty”

Session 4: Law as Cosmology

In our final meeting we will move away from law as a vehicle for addressing disputes and ask in what ways law serves to maintain a sense of the orderliness of the world of everyday experience. As we look at the logic of Jewish dietary laws and the logic of Jewish legal thought, as we consider the relation of Islamic cultural assumptions and Islamic legal process, and as we review some key developments in the new area of behavioral economics we will see how perspectives on human nature and society are deeply writ into the orientations and perspectives involved, and how, as a consequence, the aim – rendered concrete by ritual and sustained by the concepts and representations of justice – is as often to perpetuate the cosmos as to render comprehensible the differences among litigants.

Readings: *Law as Culture*, Chapter 4

Supplementary Readings:

J. Neusner, "The Case of the Mishnah"

Wisconsin v. Yoder

J. Gibbs, "The Kpelle Moot"

Cass Sunstein, "Behavioral Analysis and Law