

**Critical Theory in Legal Scholarship  
Seminar, Harvard Law School, Fall 2019  
Professor Janet Halley  
WCC 3036**

This seminar has seven parts: readings; written work assignments; class participation; grades; special rules for auditors; office hours; and an optional soirée at my house!

**Readings.**

**Canvas and Photocopied Materials.** Many of the readings in this course are available as photocopied course materials, and will be made available for downloading on our Canvas webpage and by hard copy from the Copy Center. Information about the course – including the syllabus, interim announcements, handouts, etc. – will also be available on Canvas.

**Required texts.** You should buy the following books, available for purchase at the Law Coop.

A note about Kierkegaard and Nietzsche: I will teach the class from these editions and will use their unique paginations. Neither book enumerates paragraphs. If you use different editions from those listed below, you will have difficulties following class discussion. You might want to borrow a classmate's copy of the assigned version in advance and do some collating so that you can follow the discussion.

Søren Kierkegaard, *Fear and Trembling*, trans. Alastair Hannay (Penguin Classics 1985).

Friedrich Nietzsche, *On the Genealogy of Morals: A Polemic*, trans. Douglas Smith (Oxford University Press 2009).

Michel Foucault, *History of Sexuality: An Introduction*, Volume 1, trans. Robert Hurley (Vintage Books, 1990; 1<sup>st</sup> printing 1978).

David Kennedy and William W. Fisher III, *The Canon of American Legal Thought* (Princeton 2006) (Kennedy & Fisher, *The Canon*).

Wendy Brown & Janet Halley, eds., *Left Legalism/Left Critique* (Duke U.P. 2002) (Brown & Halley, *LL/LC*)

## Written Work Assignments.

Students may write 6 short response papers or submit substantial writing within their own scholarly endeavors.

All deadlines fall at the end of the business day (5pm) on the date given.

Our Canvas page has a drop box for each assignment. Please post your submissions there. Do not submit any writing assignments in this Seminar to my email address or to that of my assistant Terry Cyr – it will be officially lost if you do! Penalties for lateness are at the discretion of the instructor, so please submit on time!

**Response papers.** These should be no longer than 3 pages, double space, 12-point type, with normal margins. Six of them are due in all. If you want feedback on them, these are your due dates: two of them are due by October 18, two by November 15, and two by Wednesday, December 18 (the last day of exam period. I will call this the “feedback schedule” because you need to meet these deadlines to get feedback. The ultimate deadlines for all papers are as follows: *For exchange students, cross-registrants, and February Degree Candidates: 5pm Wednesday, January 1; for all other students 5pm Sunday, January 5. These deadlines are referred to below as “the italicized deadlines.”* Papers submitted off the feedback schedule but on time will get feedback if I have time to provide it but basically you have waived your right to feedback. Papers submitted after the December 18 deadline the italicized deadlines will be deemed late.

Everyone who has adhered even in part to the feedback schedule has the Right to Revise ONE response paper. The paper selected must be one on which I have given feedback. Revised response papers are due on the italicized deadlines. **Important: Post to the Right to Revise folder on our Canvas page, not to the folder where you submitted the original version.** (If revised papers are posted to the original submissions folder I might be unaware of them and not count them into your grade.) Please mark clearly which paper (1, 2, 3, etc.) you are revising.

Whichever schedule you elect, I will grant extensions only for problems so major that the Dean of Students’ Office is involved. Lateness penalties are at my discretion.

There is only one distributional requirement on the Response Papers: each of them must be visibly anchored in a different week’s readings. This does not mean that you cannot rely, in a lesser way, on other weeks’ readings in any particular paper. Please note the week that you are concentrating on in the title and author area of your first page. You are free to write about all of a particular week’s readings or only one.

The topic is open, but here are some questions that you can ask again and again: How do the assignments for a particular week agree and disagree? What is “critical” about the more critical readings? How did the ideas (worldviews, analytic methods, etc.) from the “classic” reading manifest in one or more of the examples of work by senior and/or junior

laborers in the legal-scholarly vineyard? You may also answer this question if you have a project amenable to it: If I modeled some of my own work on work in this week's assignment, or used ideas from it, how would I proceed and would this approach yield interesting results? These questions are examples only; you may frame your paper around others if you like. Accurate and detailed close readings are highly valued; as are capacious mappings.

Make an integrated analysis or argument with an identifiable thesis; I am not seeking series of disconnected comments and will give any I receive very low marks! Feel free to consult with me about your papers.

**Substantial scholarly writing.** As an alternative to the response papers, you may submit part or all of your own current scholarly work. Please note that you may submit, for credit in this class, *only* work that is not getting you credit in any other setting (rule against double dipping). It is OK to submit your pages for credit in this seminar *along with* pages that you have submitted or will be submitting for credit for another course or supervision: I will read the entire thing, and will give credit for the pages that you indicate are submitted for credit in this seminar.

The minimum length for credit for this class is 25 pages, double space, 12-point type, with normal margins.

Paper proposals are on October 18. You need my *written* consent, *copied to my assistant Terry Cyr*, [tcyr@law.harvard.edu](mailto:tcyr@law.harvard.edu), by November 15, to take the paper option. Please anticipate that I will not give permission if I feel the project is not well enough articulated to assure me it will result in a strong paper. You may wish to show me draft proposals in advance of the deadline; I will review them and advise on your project but I need a full week of turn-around time to do this. So please start thinking about your proposal early in the semester! If in the end I'm not persuaded that your project is right for this class, you will have a separate set of deadlines triggering the right to revise. Your first set of two is due Nov. 29; your second set Dec. 6, and your third set Dec. 18. If you take the full time for your third set you won't be able to revise either of those papers as Dec. 18 is also the deadline for Right to Revise papers.

Substantial scholarly writing is due by January 6, the first day of January Term. I will grant extensions past this date only for situations so dire that the Dean of Students Office is involved. If you do not think you can make this deadline, you should write the Response Papers. I am on sabbatical after Fall term ends, so I will be unavailable to supervise coursework writing after these deadlines.

***Important note on collaboration, credit, and plagiarism.*** I encourage students to discuss their written assignments in this course with me, with fellow classmates, and with others. The limit to this is simple: *all written work submitted for credit in this course must be solely that of the student submitting it.* If you have learned something from someone else, or borrowed an idea from a book or class conversation or any other source other than

your own thinking and working on your assignments, all you have to do is *give credit*. In substantial scholarly writing, this can be via any recognized system of citation. In response papers it can be by short parenthetical: (Conversation with Named Classmate, Oct. 10); (Holmes 31).

### **Class Participation.**

Regular class attendance and participation are expected. You should make it manifest that you have done the readings. I will consult with the Dean of Students in cases of chronic absence. For Law School rules on chronic absence, including the process for involuntary withdrawal from courses, please see

<https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xi-leaves-and-withdrawals/>

In addition, students will be on Panels, and Panels will have responsibility for in-depth knowledge of the materials to facilitate class discussion. To prepare for your Panel Days, ask yourself the questions suggested for Response Papers just above! Also, Tips for Panels will be posted on Canvas for each week's readings. Everyone is welcome to use those as a guide to "why I assembled the readings the way I did."

### **Grades.**

Final grades will be based on the following: Response Paper or Substantial Scholarly Writing 75%; Class Participation including Panel Days 25%.

### **Accommodations for students with disabilities.**

To request an accommodation for a disability during the course, students should contact Accessibility Services in the Dean of Students Office at [accessibility@law.harvard.edu](mailto:accessibility@law.harvard.edu) or at 617-495-1880, or visit the office in WCC 3019. Additional information, including advice about how to register for accommodations, can be found at <https://hls.harvard.edu/dept/dos/student-support/accessibility-services-resources/>

### **Use of computers.**

The use of computers and other electronic devices is not allowed during class meeting times unless the professor specifically requests some or all students to go on line for a task. Notice will be provided in advance if students should bring an electronic device to class.

## **Auditors.**

I welcome auditors! I welcome your contributions but please offer them with awareness of my need to prepare enrolled students for their graded performances. And please commit to attending regularly, with a copy of the readings in hand.

In addition, auditors must register with the Registrar. This will gain you access to the course's Canvas page. Get my signature on the required form. You can find a link to the form here: <http://www.law.harvard.edu/academics/registrar/policies-forms/index.html>

## **Office Hours.**

I will have regular office hours on Wednesdays from 11am-12:30pm and 3-5pm. My assistant Terry Cyr, [tcyr@law.harvard.edu](mailto:tcyr@law.harvard.edu), makes my appointments. Please let her AND me know if you cannot make it to my scheduled office hours so that she and I can find a Plan B.

## **Bird's Eye View of the Syllabus**

- I. What is Critique and Why Do It?
- II. Sexuality and the Law as a Site of Critique
  - A. Critique and Structure
  - B. Unpacking Structure: Background Rules and Bargaining in the Shadow of the Law
  - C. Rights, the Critique of Rights, and the Defense of Rights for Identities
- III. Elements of Critique
  - A. Separating Is from Ought
  - B. Seeing Law as Language
  - C. Doing a Distributional Analysis
  - D. Queer Critical Legal Studies
  - E. A Single Article that is a Compendium of Many Critical/Legal Realist Methods
  - F. Groking the Local through Field Work
  - G. Getting Some Distance by Doing a Mapping Exercise
  - H. Dire Decisionism and the Ethic of Responsibility
  - I. Optional: Genealogy v. History

# Syllabus

## I. What is Critique, and Why Do It? (#1; Sept 9)

Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222 (1984).

Wendy Brown & Janet Halley, Introduction to Brown & Halley, *LL/LC*, pp. 1-37.

## II. Sexuality and the Law as a Site of Critique

### A. Critique and Structure (#2; Sept.16) (Panel 1)

Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence," 8 *signs: Journal of Women, Culture and Society* 635 (1983), as reprinted in Kennedy & Fisher, *The Canon*, pp. 869-886.

MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard U.P., 1987), ix-xvii, 170-83, 237-49.

### B. Unpacking Structure: Background Rules and Bargaining in the Shadow of the Law (#3; Sept. 23). (Panel 2 - Thomas and Kotiswaran); (Panel 3 - Hale and Kornhauser).

#### Structure

Chantal Thomas, from Janet Halley, Kotiswaran, Thomas, and Hila Shamir, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism," 29 *Harvard Journal of Law and Gender* 335 (2006) (selections).

#### Unpacking Structure

Robert Hale, "Coercion and Distribution in a Supposedly Noncoercive State," 38 *Political Science Quarterly* 470 (1923), in *The Canon*, pp. 83—99 ("... raise their market value").

Lewis Kornhauser and Robert Mnookin, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale L. J.* 954 (1979) (selections).

Prabha Kotiswaran, from Janet Halley, Kotiswaran, Thomas, and Hila Shamir, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism," 29 *Harvard Journal of Law and Gender* 335 (2006) (selections).

**Also, for "Unpacking Structure," read one of the following (I will ask you to sign up for your selection in class on September 16):**

**If you want to see a young scholar unpacking structure in constitutional-rights argumentation:**

Pascale Fournier, "Flirting with God in Western Secular Courts: Mahr in the West," 24 *International Journal of Law, Policy and the Family* 67 (2010).

**If you want to see a young scholar unpacking structure in a law-in-action, ethnographic study:**

Amada Wei-Zhen Chong, "Migrant Brides in Singapore: Women Strategizing within Family, Market and State," 37 *Harvard J. of L. & Gender* 331 (2014)

### **C. Rights, the Critique of Rights, and the Defense of Rights for Identities (#4; Sept. 30) (Panel 4)**

Ronald Dworkin, "Hard Cases," in *The Canon*, pp. 581-601. **Note** that this is an excerpt of the entire article.

Duncan Kennedy, "The Critique of Rights in Critical Legal Studies," in Brown & Halley, *LL/LC*, pp. 178-228.

Patricia Williams, *Alchemy of Race and Rights* (Cambridge: Harvard U.P. 1991), selections.

Kenneth A. Stahl, "Local Government, 'One Person, One Vote,' and the Jewish Question," 49 *Harv. C.R.-C.L. L. Rev.* 1 (2014).

## **III. Elements of Critique**

### **A. Separating Is from Ought (#5; Oct. 7) (Panel 5)**

Robin West, *Caring for Justice* (NY: New York University Press, 1997) (selections).

Friedrich Nietzsche, *On the Genealogy of Morals: A Polemic*, trans. Douglas Smith (Oxford University Press 1998), First and Second Essays, pp. 3-76.

Oliver Wendell Holmes, Jr., “The Path of the Law,” 10 *Harvard Law Review*. 457 (1897), in Kennedy & Fisher, *The Canon*, pp. 21-43. **Read pp. 29 through 34 (end of jump paragraph, i.e., to “clearness of our thought.”).**

Karl Llewellyn, “Some Realism about Realism – Responding to Dean Pound, 44 *Harvard Law Review*. 1222 (1931), in Kennedy & Fisher, *The Canon*, pp. 131-162. **Read pp. 141 through 143 and 148 (Real Realists) through 162).**

Philomila Tsoukala, “Gary Becker, Legal Feminism, and the Costs of Moralizing Care,” 16 *Columbia Journal of Gender & Law* 357 (2007).

## **No class meeting on October 14**

### **B. Seeing Law as Language (#6; Oct. 21) (Panel 6)**

Ferdinand de Saussure, *A Course in General Linguistics*, trans. Roy Harris (Chicago: Open Court, 1972), selections.

Duncan Kennedy, “Semiotics of Legal Argument,” 42 *Syracuse Law Review* 75 (1991).

Gary Peller, “Race Consciousness,” 1990 *Duke Law Journal* 758 (selections)

Janet Halley, “Like-Race Arguments,” in Judith Butler, John Guillory and Kendall Thomas, eds., *What’s Left of Theory?* (Routledge, 2001) (Proceedings of the English Institute), pp. 40-74.

### **C. Doing a Distributional Analysis (#7; Oct. 28) (Panel 7 for Kennedy (Ricardo/Marx), Halley and Adler; students will also be responsible for reporting to the class on the articles they selected to focus on as between Kennedy (Housing), Shamir and Apple.)**

Duncan Kennedy, “Ricardo/Marx,” MS.

Janet Halley, “Doing a Distributional Analysis,” in Halley, Prabha Kotiswaran, Hila Shamir and Rachel Rebouché, *Governance Feminism: An Introduction* (Minnesota U.P. 2018), pp. 253-67.

Libby Adler, "Making the Distributive Turn," in Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke U.P., 2018), pp. 175-211; "Conclusion," *id.* at 212-15; and notes, *id.* at 240-45.

**Select One of the following examples of DADA to read (I will ask you to sign up for your selection in class on October 21):**

**Doing a Distributional Analysis through Modeling:**

Duncan Kennedy, "Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis," 4 *Journal of Law in Society* 71 (2002)

**Doing a Distributional Analysis through Topic-Specific Research #1:**

Hila Shamir, "Anti-Trafficking in Israel: Nationalism, Borders, and Markets," forthcoming in Janet Halley, Prabha Kotiswaran, Hila Shamir and Rachel Rebouché, *Governance Feminism: An Introduction* (Minnesota U.P., forthcoming 2016).

**Doing a Distributional Analysis through Topic-Specific Research #2**

Benjamin E. Apple, "Mapping Fracking: An Analysis of Law, Power, and Regional Distribution in the United States," 38 *Harvard Environmental Law Review* 217 (2014).

**Class cancelled on November 4 because of Prof. Halley's illness.**

**D. Queer Critical Legal Studies (with a brief introduction to Derridian chiasmatic critique) (#8; Nov. 11) (Panel 8)**

Michel Foucault, *History of Sexuality: An Introduction*, Volume 1, trans. Robert Hurley (Vintage Books, 1990; 1<sup>st</sup> printing 1978), pp. 3-131.

Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley and Los Angeles: U. of California P., 1990), selections.

*Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, Princeton U.P., (2006), "Taking a Break to Decide II: *Twyman v. Twyman*," pp. 348-63.

Catherine A. MacKinnon, "Points against Postmodernism," 75 *Chi.-Kent Law Rev.* 687 (2000).

**E. A Single Article that is a Compendium of Many Critical/Legal Realist Methods (#9; November 18) (Panel 9)**

Duncan Kennedy, "Sexual Abuse, Sexy Dressing and the Eroticization of Domination", 26 *New England Law Review*. 1309 (1992), as reprinted in Duncan Kennedy, *Sexy Dressing, etc.* (Cambridge: Harvard University Press, 1993).

**F. Getting Some Distance by Doing a Mapping Exercise (#11; Nov. 25) (Panel 11)**

Mark Kelman and Gillian Lester, "Ideology and Entitlement," in *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Disabilities* (Cambridge, MA: Harvard U.P., 1997), Chapter 8, pp. 195-226, as published in Brown & Halley, *LL/LC*, pp. 178-228.

David Kennedy, "When Renewal Repeats: Thinking against the Box," as published in Brown & Halley, eds., *LL/LC*, pp. 373-419.

Amy J. Cohen, "Negotiation, Meet New Governance: Interests, Skills, and Selves," 33 *Law & Social Inquiry* 503 (2008).

**G. Dire Decisionism and the Ethic of Responsibility (#12; Dec. 2) (Panel 12)**

Søren Kierkegaard, *Fear and Trembling*, trans. Alastair Hannay (Penguin Classics 1985), p. 44; Speech in Praise of Abraham, pp. 49-56; part of Preamble from the Heart, pp. 60 (from the top) to 70 ("only marvel."); Problema I, pp. 83-95; Problema II, pp. 96-108.

Max Weber, "Politics as a Vocation," in *The Vocation Lectures*, ed. David Owen and Tracy B. Strong, trans. Rodney Livingstone (Indianapolis: Hackett, 2004), selections.

Hani Sayed, "Fear of Torture," in *The Dawn of the Arab Uprisings: End of an Old Order?*, ed. Bassam Hadad, Rosie Bsheer and Ziad Abu Rish (Pluto Press, 2012).

Handout: Cheat sheet on *Portrait of a Lady* (Spoiler Alert! If you don't want to have the plot of this wonderful novel spoiled for you, you may opt out of this assignment and leave class before we discuss it.)

Henry James, *Portrait of a Lady*, chapter 42.

**H. Optional Makeup Meeting, dinner *chez Janet*, December 4. This meeting will take place at my home in Central Square, ½ hour from campus. We will meet at 7pm. I will not assume that anyone has done any of the readings, in honor of Reading Period. If you have time to read only one, and unless your own interests direct you the article by Halley or the one by Shalakany, focus on Kennedy, “The Three Globalizations.”**

### **Genealogy v. History**

Duncan Kennedy, “The Three Globalizations of Law and Legal Thought,” in *The New Economic Development: A Critical Appraisal*, ed. David Trubek & Alvaro Santos (Cambridge, 2003), pp. 19-73.

Halley, “What is Family Law?: A Genealogy, Part I,” forthcoming in the *Yale Journal of Law and the Humanities*.

Amr A. Shalakany, “Islamic Legal Histories,” 1 *Berkeley Journal of Middle Eastern & Islamic Law* 1 (2008).