

Judgment and Dissent:
Interpreting Rights in American Constitutional Discourse

Prof. Daniel Karpowitz

DeWitt, Robert. 1850. *The Life, Trial and Execution of Cpt. John Brown*. (complete trial transcripts). New York: DeWitt

Cover, Robert. 1975. *Justice Accused*. New Haven: Yale

Melville, Herman. 1997. "Billy Budd, Sailor". *Selected Tales*. New York: Oxford University

Arendt, Hannah. 1992. *Eichmann in Jerusalem*. New York: Penguin

This course has two main objectives. The first is to introduce the American constitutional structure by way of themes such as federalism, the separation of powers and rights of due process. The more challenging goal is to introduce some basic questions about American jurisprudence, such as the connection between law and morality and the problem of textual interpretation. Judicial debates about rights, and the differing conceptions about the human beings who are thought to possess them, are central as judges undertake the work of applying fundamental texts to concrete social situations. Since our readings will include a number of judicial opinions, students will explore the nature of American constitutional discourse – that is, the way we conceptualize the work of judgment and dissent within a constitutional system. Through additional readings in philosophy, literature, and political science, students will juxtapose radically different sorts of texts in order to explore the underlying political interests that may unite them.

Four different moments provide case-studies: (i) the antebellum crisis over abolition and the Fugitive Slave Law; (ii) the philosophical challenge presented to the legal profession in the 1950s by the state-sponsored crime of administrative genocide; (iii) the mid-1980s U.S. Supreme Court controversy over the victims' rights movement and capital trials; and (iv) the peculiar American constitutional practice of institutionalized dissent.

Requirements and Grading:

1. Attendance: More than three absences will seriously affect your grade. Six absences or more is an automatic failure. Lateness to class counts as 1/3 of an absence.

2. Class atmosphere: Respectful decorum and sensitivity in the classroom are especially important in a course like this one, where issues of race, politics, moralism and ideology will be central to many of our discussions. If respected, our own differences will make the class that much richer. If any student should feel uneasy about any subject that comes up in the course or how it is being handled, please feel free to speak up in class or to speak with me privately outside of class.

3. Participation: (1/2 of final grade)

Good participation consists of thoughtful preparation of the readings, building on other students' comments, and sensitivity to your classmates. Students are expected to contribute to class discussions based on their serious engagement with the assigned materials of the class.

Short assignments may be a regular feature of the course, and will be important for this part of the grade. These may include reading questions that will be prepared for discussion and will then be handed in at the end of class.

Students will present on the topics of their final papers during the last two weeks of class. About three students will present on any given day, and each presentation will be between five and ten minutes. These may focus our attention on a particular area of the course, or on the presenter's outside research, depending on the nature of their final paper.

4. Mid-term and Final papers: (1/2 of final grade)

A) A mid-term paper of 5-10 pages will be on a topic of your choice, drawn directly from the class materials. Outside research should not be a significant part of this project. It should be based on the materials from the first three units - on John Brown, Robert Cover, Melville, Twain and Arendt.

A proposal for this mid-term paper is due on Friday, March 14th.

The mid-term paper is due on the last day of class *before* Spring Break, March 28th.

B) The final paper will be of 10-20 pages on a topic of your choice. It may be drawn directly from the class materials from any point throughout the course. It may also be based on additional research that you pursue based on a segment of the course - such as: Melville's political aesthetics (the metaphor of the machine, for example); the practice of dissent in European or international tribunals; the nature of resistance to American slave law - legal and illegal; the problem of legalized state-crimes like genocide or the defense in military law of 'superior orders' etc., etc. However - whatever the subject, the paper must address some of the major themes that become clear by the second half of the course.

A proposal for the final term paper is due on Wednesday, April 23.

The final paper itself is due on the last day of class, Wednesday, May 21.

Introduction

1. Wednesday, January 29
Introductory lecture

I. American Slavery

A. John Brown

2. Friday, January 31
Introduction to John Brown
Trial transcript: *The Life, Trial, and Execution of Cpt. John Brown*
p.49 through 74 (up till 'The Defense')
3. Wednesday, February 5
Trial transcript: *The Life, Trial, and Execution of Cpt. John Brown*
4. Friday, February 7
Readings on John Brown: Frederick Douglas, Thoreau, WEB DuBois et al.

B. The Fugitive Slave Laws (1791 and 1850)

5. Wednesday, February 12
Justice Accused, day 1
6. Friday, February 14
Justice Accused, day 2
7. Wednesday, February 19
Justice Accused and Federalism
8. Friday, February 21
Prigg and Introduction of Dissent

C. Billy Budd

9. Wednesday, February 26
Billy Budd
10. Friday, February 28
Billy Budd

II. Legality and Genocide

11. Wednesday, March 5
Introduction to law of genocide, war crimes, defense of superior orders and the question of legality of crime. *Mens rea* and criminal culpability.
12. Friday, March 7
Eichmann in Jerusalem
13. Wednesday, March 12
Eichmann in Jerusalem
14. Friday, March 14
Eichmann in Jerusalem
15. Wednesday, March 19
Arendt on 'thinking'
16. Friday, March 21
"Arendt, Eichmann and Freud In Jerusalem: On the Evils of Narcissism and the Pleasures of Thoughtlessness," Jose Brunner

III. Thinking, evil and politics

17. Wednesday, March 26
on thinking. Selections from Mark Twain's *Huckleberry Finn*
18. Friday, March 28
on evil. Melville's Billy and Arendt's Eichmann

Spring Break

IV. The Separation of Law and Morality: The Post-War Crisis for Positivism

19. Wednesday, April 9
"The Separation of Law and Morality," H.L.A. Hart
20. Friday, April 11
"Positivism and Fidelity to Law - A Reply," Lon Fuller

V. Voices on trial: Culpability, Individuality and the Judicial Process

21. Wednesday, April 16
Eddings v Oklahoma, 455 US 104 (1982)
Booth v Maryland, 482 US 496 (1987)

22. Friday, April 18
South Carolina v Gathers, 490 US 804 (1989)
23. Wednesday, April 23
Payne v Tennessee, 501 US 810 (1991)
24. Friday, April 25
“The Jurisprudence of Victimhood,” Angela Harris
“Victims and Voyeurs: Narrative Problems at the Criminal Trial,”
Paul Gewirtz

VI. The voice of a single court: unity and fragmentation in judicial bodies.

25. Wednesday, April 30
The significance of the separate opinion and Osiatynski’s definition of constitutionalism.
26. Friday, May 2
Judges on Dissent
“The Dissent,” Justice William O. Douglas
“The Dissenting Opinion,” Justice Antonin Scalia
“A Note on Dissent,” Justice Ruth Bader Ginsberg

VII. Among judges and states: dissent in international law

27. Wednesday, May 7
European Conflict over American capital punishment
student presentations
28. Friday, May 9
The Dissenting Opinion in the New International Tribunals: ICJ, ECHR, etc.
student presentations
29. Friday, May 16
student presentations
30. Wednesday, May 21 / last day of classes
student presentations