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Democratic Policing Fall 2015 Syllabus

This seminar will consider how principles of democratic governance can be brought to bear on the various problems facing policing in the United States. The seminar—closely affiliated with the new Policing Project at NYU Law—will also focus on the basics of building a social change organization, from choosing coalition partners to selecting cases for litigation.

There is at present an emerging consensus that policing is troubled—as evidenced by the over-use of urban stop-and-frisk, officer shootings of civilians, abuse of civil forfeiture laws, bulk data collection by law enforcement agencies, and the secretive use of drones and other surveillance technology. The President's *Task Force on 21st Century Policing* concluded that police officials have lost the trust of many communities they serve. Theories vary as to both the causes—from implicit and explicit biases to a failure to understand that police work must serve communities, to a lack of training and capacity (such as maintaining useful databases)—and solutions. Rather than focus on after-the-fact remedies like litigation and Civilian Review Boards, the Democratic Policing seminar will explore methods for addressing potential problems before they arise through democratic oversight, cooperation between police and civil society, and public rulemaking.

Substantively, the seminar will be grounded in Constitutional Law, Administrative Law, and Criminal Procedure. Over the course of the semester, students will discuss how to evaluate different models of police governance, assess the efficacy of various police practices, develop litigation strategies to ensure law enforcement agencies are accountable to the public, and formulate model rules to govern policing. Students also will have an opportunity to develop a range of practical skills, from drafting rules, to basic cost-benefit analysis, to writing for a public audience. We occasionally will have some visitors in class from the police, social change and public interest communities to work with us on the problems we tackle.

Assignments:

This course will involve a mixture of oral and written work. We are hoping to embed you deeply into the substance, and teach a variety of useful lawyering skills.

Absent an emergency or prior approval, all assignments are due at 3pm sharp on the date indicated, by email to Alex Lu, Professor Friedman's assistant (lua@mercury.law.nyu.edu). It is extremely important to be on time, both because that is the obligation of lawyers and because—as you will see—at times these assignments will provide a focal point for class. For this reason, we will impose serious penalties for late assignments—do all of us a favor and be on time!

- Blog post (15%): First draft due TBA, final draft due by December 1 (last day of class)
- Group Presentation of Model Rule/Policy to Police Chiefs (20%): Presentations will be on November 13; we will moot the presentations in class on November 3.
- Final Model Rule/Policy + Analysis, 15-20 double-spaced pages (40%): Due December 17
- Class Participation (25%): includes short assignments, e.g. litigation pitch, prepared questions

There will be no exam for this class.

Class Readings

NOTE: All reading assignments are tentative and subject to change until one week before class. Unless indicated otherwise, readings can be found on the NYU Classes site.

If you are not taking Criminal Procedure this semester or would like to get up to speed quickly, you should read: Israel & LaFave, *Criminal Procedure in a Nutshell* (2014 ed.), on reserve at the library (skim Chapter 1, carefully read Chapter 2 + §§ 3.3, 6.3–6.4).

Class # (Date): Topics and Assigned Readings

1 (9/1/15):

The Problems Of, and With, Policing

This class will introduce the main themes of the seminar. Discussion will focus on diagnosing the challenges police face and the various problems that plague policing.

Note: There is a fair amount of reading for this first class, but all are quick and easy reads. Please read what you can, and try to make time to listen to the *This American Life* excerpts.

Readings:

- Comey, Hard Truths About Law Enforcement and Race
- Shipler, *Rights of the People* (Chapter 2, excerpts)
- Schultz & Pike, *Hollywood Style Surveillance Technology*
- *Milan* (7th Cir. 2015) + Balko, *Overkill* (excerpts)

(You can see a video of the raid here:

http://www.liveleak.com/view?i=6e7_1407930108)

- NYT, *Drug Agents Use Vast Phone Trove*
- Taibbi, *Apocalypse New Jersey*

Recommended:

- This American Life, “Cops See it Differently,” Prologue + Act One (~30 min.), <http://www.thisamericanlife.org/radio-archives/episode/547/cops-see-it-differently-part-one> (Link to the transcript available on NYU Classes)

2 (9/8/15):

The Shortcomings of Existing Governance Models

This class will focus on a variety of governance models currently in use, including judicial oversight, pattern of practice litigation, inspectors general, civilian review boards, and direct political control. Students should be prepared to discuss their benefits and shortcomings.

Class guest: Vanita Gupta, Acting Assistant Attorney General, Civil Rights Division, Dept. of Justice

Readings:

- Schulhofer et al., *American Policing at a Crossroads* – Intro, II & III pgs. 335-338, 344-364
- Walker, *The New World of Police Accountability* – pgs. 35-38 “The Legislative Strategy: External Oversight of the Police,” 100-103 except “Note on Terminology,” 129-145, 163-170
- Darius Charney, Testimony before the Task Force on Policing re: Civilian Oversight
- Harmon, *Promoting Civil Rights* – Excerpt re: 14141 program
- Brennan Center, *Proposal for NYPD Inspector General* (excerpt)
- Friedman & Ponomarenko, *Democratic Policing*, Part III

3 (9/15/15):

Community Engagement and Administrative Rulemaking

This class will examine how administrative law deals with problems of discretion, transparency, and accountability, and how these might be applied to policing, as well as considering the challenges inherent in applying an administrative model to police governance.

Readings:

- Friedman & Ponomarenko, *Democratic Policing*, Intro, I, II.A, IV
- Freeman, *Collaborative Governance in the Administrative State*, Part I.A.I
- COPS, Implementing Community Policing: Portland Case Study
- Policing Project & IACP, COPS Community Engagement Proposal

(9/22/15):

NO CLASS (Yom Kippur)

4 (9/29/15):

Drafting Legislative Rules

This class is about drafting rules to govern policing. Inter alia, we will consider the difference between rules and standards, as well as the potential difficulties of drafting rules to address the problem of police discretion.

Class guest: Sheldon Krantz, Senior Fellow, Georgetown Law

Readings:

- Kaplow, *Rules vs. Standards—An Economic Analysis*—Intro
- Krantz, *Police Policymaking, the Boston Experience* (Chs. 1, 3, 4, 5)
- ALI, Field Interviews Policy + Comments

- IACP, Field Interviews Policy
- IACP, Body Cameras Policy
- Boston Police, Consent Search Policy
- Boston Police, Investigative Stop Policy

5 (10/6/15): Conducting Cost-Benefit Analysis

This class will introduce students to the basic principles of cost-benefit analysis and consider how cost-benefit analysis might be applied to the policing context.

Readings:

- Vera Institute, *Advancing the Quality of Cost-Benefit Analysis*—Intro + Sections I & III
- Heaton, *Hidden in Plain Sight*
- Miller et al., *Costs and Benefits of a Community Sobriety Checkpoint Program*

6 (10/13/15): Assuring Compliance (The Problem of Remedies)

This class will consider proposed alternatives to existing judicial remedies of exclusion and money damages, and consider which if any of these proposals can serve as a model for assuring police compliance with administrative rules.

Readings:

- Estreicher & Weick, *Opting for a Legislative Alternative to the Exclusionary Rule*—Intro + Parts I, III, IV pgs. 949-953, 960-966
- Caldwell & Chase, *Unruly Exclusionary Rule*—Part III (International Perspective) pgs. 56-66
- *Herring v. United States* (2009)
- *Sugar Cane Growers* (D.C. Cir. 2002)—Skim Part I, Read III
- *American Airlines Inc.* (5th Cir. 2000)—Skim Part I, Read III.A.1

**7 (10/16/15): MAKE-UP CLASS: Building a Social Change Organization
2PM-4PM**

This session will examine the various strategic choices involved in building a successful social change organization.

Class Guest: Connie Rice, Co-Founder, LA Advancement Project

Readings:

- Rice & Lee, Relationship-based Policing Achieving Safety in Watts
- Advancing Safety, Watts in Action,
<https://www.youtube.com/watch?v=ZmG62eeGVs8>

8 (10/20/15): Roundtable #1: Blogging and Social Media

This class will consider what it takes to craft a successful communications and social media campaign. These skills are valuable in a variety of practice settings. We will discuss blog posts you have written (perhaps for the Policing Project website).

Class Guest: Rebekah Carmichael, Assistant Dean for Communications at NYU School of Law

Assignments:

- Browse Spitfire Pinterest page of successful media campaigns (<https://www.pinterest.com/sfstrategies/advocacy-campaign-examples/>), pick two you think stand out and come to class prepared to discuss why.
- Rough draft of blog posts due one week before this class.

Readings:

- Spitfire, *Discovering the Activation Point* -- Excerpts
- Spitfire, *Digital S.M.A.R.T.S.*—Excerpts

9 (10/27/15): Effecting Legislative Change

This class will focus on the difficulties of effecting legislative change, and the potential strategies for pursuing criminal justice reform.

Class Guest: Katharine Huffman, Raben Group

Readings:

- Donald Dripps, *Criminal Procedure, Footnote Four*
- William Stuntz, *The Political Constitution of Criminal Justice*—Intro + Parts I + II.A pgs. 781-823
- Rachel Barkow, *The Political Market for Criminal Justice*

10 (11/3/15): Model Rule Presentations: Moots

Students will present draft versions of their model rules presentation and receive feedback; class visitors will include law professors, local attorneys, and other members of the NYU law community.

**11 (11/13/15): FRIDAY CLASS: Presentations to Police Chiefs on Model Rules
2PM-4PM**

Students will present model rules to panels of visiting police chiefs.

12 (11/17/15): The Challenges of Social Change Litigation

This class will consider the advantages and potential limitations of pursuing social change through impact litigation in the courts in order to ensure the democratic accountability of policing.

Readings:

- Review Friedman & Ponomarenko, *Democratic Policing*, Part III
- Tushnet, *NAACP's Legal Strategy—Conclusion*
- Winkler, *Gunfight* (Excerpts)
- Friedman & Ponomarenko, *Democratic Policing*, Part V
- Friedman & Benin, *Redefining What's Reasonable*, Part II + III.A

13 (11/24/15):

Round Table #3: Litigating Policing Governance

Students will pitch potential litigation ideas to a panel of local attorneys and judges.

14 (12/1/15):

The Hardest Problems: Revisited

In this final class we will return once more to the “hardest” problems identified throughout the course, and discuss strategies for overcoming these obstacles as well as specific initiatives that the Policing Project might pursue in the future.