

Legal Studies 100
Foundations of Legal Studies
Fall 2019
MWF 2-3:00 p.m.
VLSB 2060

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Foundations of Legal Studies

Course Description

Law operates everywhere in American society. Americans tell themselves a variety of stories about law, and law permeates the relationships Americans have with one another and with their government. Yet the United States is an outlier among wealthy democracies in the power and pervasiveness of its legal system. This course will ask why the U.S. has such an “overpowered” legal system and how that system affects those it touches. This course does not have prerequisites, but the readings (*about 75 pages per week*) are challenging. You will be expected to read carefully and think about the issues raised in each reading.

Course Learning Objectives

This course examines legal language, processes, and actors in their social context in the contemporary United States, and locates the U.S. experience in a cross-national context. By the end of this course you should be able to

1. show how scholars have explained the classic tension between “law on the books” and “law in action;”
2. critically evaluate criminal and civil legal processes and the biases in them; and
3. provide explanations of the role of law in shaping society’s practices and beliefs.

Requirements and Grading

Course grades will consist of grades on a scholarly blog post in two parts (an 800 word “law on the books” section and a 1200 word “law in action” section); a comprehensive final exam; responses to quiz questions (administered during 11 class sessions **without advance notice** and based on published study questions; the lowest score will be dropped); and section participation. There will be a handout on final exam format and expectations as we approach the exam.

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| Blog post project | 50% |
| Quizzes/homework | 20% |
| Final exam | 15% |
| Section | 15% |

Texts

Texts for the course have been ordered through the bookstore, but there will be a lot of course reading in electronic format on bCourses. If you cannot find a reading for a particular date, just ask. Readings may be updated throughout the semester, and I will indicate that on bCourses.

The following texts have been ordered through the bookstore and have been placed on reserve at Moffitt Library.

Sarat, Austin, ed. (2004) *The Social Organization of Law: Introductory Readings*. Los Angeles: Roxbury Publishing Company. ["Sarat"]

Kagan, Robert A. (2001) *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press. ["Kagan"]

The following book is optional background reading — there are no fixed assignments, and you will not be tested on it. It has been ordered through the bookstore and is on reserve at Moffitt, and you can dig up a used copy if you want.¹

Feinman, Jay. (2014) *Law 101*. New York: Oxford University Press.

Kagan's book frames key ideas in this course, while Sarat's reader has primary sources (like court decisions), debates, and suggestions for further reading. *Adversarial Legalism* is not as tightly structured as Sarat's text (which suffers from poor OCR and proofreading, alas), so take notes and look at the study questions first.

Note that the readings for each class session are from multiple texts, both paper and electronic, and that we may read partial chapters; check the page numbers in the assigned readings. Be sure to keep up with the readings and ask if anything is unclear.

Policies

The course requires you to read the reading assignments (for which there are study questions to help with key points), participate in discussion, take tests, and do some writing. Please feel free to come to office hours (or use the bCourses discussion or email tools) with ideas and questions.

Please be on time. You are expected to prepare for each class. Take notes as you read (and in class) and refer to the study questions posted on bCourses. Research shows that you learn more when you take notes on paper and leave your networked devices off, so if you want to make the most of class, take notes on paper. If you want to use social media, send text messages, or communicate with friends, do it outside of class. Drinking coffee, water, etc., in class is fine, but eating is a distraction to your fellow students, so do not eat in class. Basically, we are all adults here, so the expectation is that we will treat one another with respect.

Finally, please refer to Berkeley's Academic Integrity policy (<http://sa.berkeley.edu/conduct/integrity>). *I take academic integrity and honesty seriously. If you plagiarize, cheat, or are otherwise dishonest, you will at fail at least the assignment in question, and I will file an academic dishonesty report.* If you have any questions about this, please ask.

Students requiring [accommodation](#) for disability should also make sure that I get the official accommodation notice from DSP **by the third week of the semester**. Make sure to check bCourses daily, since that will be our medium of communication. Note—if problems with food or a place to live are getting in the way of academics, UC Berkeley has a resource, basicneeds.berkeley.edu

¹ There is also the "[Crash Course](#)" series of videos produced by PBS that provide a basic introduction to law that may be particularly helpful to students who have not encountered this material before.

Course Readings and Schedule²

1) Political organization, law, and social control (8/28 – 9/18)

a) “legitimate violence” and political order

| Date | Theme | Assignments to have ready for class |
|------|---|---|
| 8/28 | course introduction, syllabus does law constrain power? | Dept. of Commerce et al. v. New York et al. syllabus, Roberts opinion Parts I, II, IV-A, V (PDF pp. 1-5, 6-16, 18-21, 28-34) [bCourses] <i>optional: briefs, oral argument audio, etc. at Scotusblog</i> |
| 8/30 | what is the relationship between rule of law and democracy? | Levitsky & Ziblatt, <i>How Democracies Die</i> , Chs. 4 & 5 (pp. 72-117) |
| 9/4 | state monopoly on legitimate coercion | Max Weber, “Politics as a Vocation” excerpted in O’Neil & Rogowski (2006, pp. 31-32) [bCourses] Sarat, ch. 7 (“Leviathan”) pp. 39-42 [excerpts Thomas Hobbes’ <i>Leviathan</i> chs. 13 & 17, reproduced here] |
| 9/6 | law as political instrument LIBRARY RESOURCES ORIENTATION | Sarat, ch. 8 (“Law as a Weapon”) pp. 43-46 ONLINE SYLLABUS QUIZ DUE |

b) law and normative orderings

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| 9/9 | law as freedom from the state | Sarat, chs. 9 (“On Liberty”) & 10 (“Lawrence v. Texas”) (pp. 49-61) <i>optional: Radiolab backgrounder on plaintiffs</i> |
| 9/11 | is law mutually constitutive or an order? | Miller, <i>Primer on American Courts</i> ch. 4 (pp. 85- 114) [bCourses] Sarat, chs. 11 (“Law as Rhetoric”) & 14 (“Violence and the Word”) (pp. 62-67, 84-93) |
| 9/13 | changing the normative ordering of society PRECLEARANCE OF LEGAL PROVISION DUE | Upham, “Litigation and Moral Consciousness in Japan” (excerpted in Milhaupt et al., eds., 2001, pp. 275-281) [bCourses] Hull, “The Cultural Power of Law” (<i>Law and Social Inquiry</i> Summer 2003, 629-643) [bCourses] Obergefell v. Hodges (syllabus, Kennedy opinion pp. 3-10, Roberts dissent pp. 1-9) [bCourses] |

² Readings subject to change at instructor’s discretion. See bCourses for updates. Note that the links to readings in the UC Library will only work from a UC Berkeley IP address.

c) roots and irrationalities of the American legal system

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| 9/16 | disputing versus adversarial legalism; common/civil law systems | Shapiro, <i>Courts</i> (pp. 1-8) [bCourses] Kagan, ch. 1 “The Concept of Adversarial Legalism” (pp. 1-17) |
| 9/18 | politics and legal systems | Kagan, ch. 3 “The Political Construction of Adversarial Legalism” (pp. 34-58) |

2) **Turning disputes into lawsuits: civil justice (9/20–10/11)**

a) are Americans litigious? why?

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| 9/20 | disputing and selection bias | Sarat, ch. 15 (“Emergence and Transformation of Disputes”) (pp. 99-104) |
| 9/23 | dual structure of U.S. courts building a bridge to the 18 th century—private law | Miller, <i>Primer on American Courts</i> ch. 3 (pp. 55-68) [bCourses] Kagan, ch. 6 “Adversarial Legalism and Civil Justice” (pp. 99-125) |
| 9/25 | structural advantages and disadvantages of disputants | Galanter, “Why the Haves Come Out Ahead,” excerpted in Diascro & Evers, eds. (2006, pp. 316-321) [bCourses] Desmond, <i>Evicted</i> ch. 8 (pp. 94-107) [bCourses] Seron et al. “Impact of Legal Counsel on Outcomes for Poor Tenants” in Larson & Schmidt, eds. (2014, pp. 159-165) [bCourses] |
| 9/27 | amplifying systemic bias “LAW ON THE BOOKS” DRAFT DUE | Milhaupt et al. <i>The Japanese Legal System</i> , “Property” (2006, pp. 394-400) [bCourses] Desmond, <i>Evicted</i> ch. 15 (pp. 94-107) [bCourses] |

b) tort law plus juries equals big money and big risk

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| 9/30 | tort law: route to “total justice”? | Kagan, ch. 7 “Tort Law System” (pp. 126-155) |
| 10/2 | too much claiming, or not enough? | Sarat, chs. 16 (“Liability”) & 17 (“Crisis is Injuries”) (pp. 105-117) |
| 10/4 | tort stories and tort reality | Sarat, chs. 18 (“How the Jury Decided”) & 19 (“Jurors’ Judgments”) (pp. 118-129) Nottage, <i>Katsurakawa v. McDonalds</i> (in Milhaupt et al. eds. 2006, pp. 386-393) [bCourses] |

c) legal contestation and the modern American state: regulation & social welfare

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| 10/7 | American regulatory state exceptionalism | Kagan, ch. 9 “Adversarial Legalism and Regulatory Style” (pp. 181-206) |
| 10/9 | law and the work of lawyers | Sarat, chs. 20 (“Lawyers & Consumer Protection”) & 21 (“Justice Broker”) (pp. 131-149) |
| 10/11 | legal process and the modern welfare state | Kagan, ch. 8 “Adversarial Legalism and the Welfare State” (pp. 159-175) Sarat, chs. 28 (“Subordination, Rhetorical Survival Skills”) & 29 (“Dependency by Law”) (pp. 222-255) |

3) Turning conflict into crime: criminal law (10/14–11/8)

a) the criminal law: protecting the powerful?

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| 10/14 | American criminal law and Albion’s fatal tree | Sarat, ch. 13 (“Property, Authority”) (pp. 75-83) Simon (2014), “ Uncommon Law ” <i>Daedalus</i> 143:3, 62-72 [bCourses] Miller, <i>Primer on American Courts</i> ch. 3 (pp. 68-84) [bCourses] <i>optional: Old Bailey Online, esp. Crime, Justice, and Punishment backgrounder</i> |
| 10/16 | neither fair nor speedy? | Kagan, ch. 4 “Adversarial Legalism & American Criminal Justice” (pp. 61-81) |
| 10/18 | rape and “real rape” and the pace of social change | Sarat, chs. 23 (“Rusk v. Maryland”) & 24 (“Rape”) (pp. 157-180) Bay Area News Group materials on Scribd from Brock Turner case (police report , survivor’s statement (ex. 16) , character letters , complaint , sentencing memo , probation report) Brock Turner appellant’s brief (pp. 90-114), Astor, “California Voters Remove Judge Aaron Persky”, Kaplan “Brock Turner Wanted Nothing More”, Gersen “Unintended Consequences” [bCourses] |

b) criminal legal procedure and its consequences

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| 10/21 | burdens of proceduralism | Kagan, ch. 5 “Deciding Criminal Cases” (pp. 82-96) |
| 10/23 | the American workaround | Sarat, chs. 30 (“American Courts”) & 32 (“Torture & Plea Bargaining”) (pp. 261-266, 275-282) PBS Frontline The Plea (and its supplementary material) |

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| 10/25 | procedure and case selection, adversarialism as norm | Sarat, chs. 33 (“Convictability”), 34 (“Lawyers’ Ethics”) (pp. 284-299) |
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c) protector of rights & banisher of bias? the jury in criminal cases

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| 10/28 | great, free law schools | Sarat, chs. 38 (“Trial by Jury”), 39 (“Twelve Heads”), and 40 (“Jury Duty”) (pp. 319-334) |
| 10/30 | deliberation is a political process | Sarat, chs. 41 (“Race Trumps”) and 42 (“ <i>U.S. v Thomas</i> ”) (pp. 335-348) |

d) punishment and discretion

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| 11/1 | constraining discretion and penal populism | Sarat, chs. 43 (“Sentencing Guidelines”), 44 (“ <i>Ewing v. California</i> ”) (pp. 350-364) optional: how judges get selected in Chicago (podcast) |
| 11/4 | sentencing and the “actuarial turn” | Sarat, ch. 45 (“Thirty Years of Sentencing Reform”) (pp. 365-381) Barry-Jester, “ Should Prison Sentences Be Based On Crimes That Haven’t Been Committed Yet? ”; State of Wisconsin v. Loomis (pp. 1-31, <i>optional 31-48</i>) [bCourses] |

4) The legitimate use of violence: enforcement & punishment (11/6—12/6)

a) police discretion and risk

EXTRA CREDIT: FRUITVALE STATION RESPONSE (DUE MON. 25 NOV.) (film available on reserve or commercially)—worth one quiz in terms of points

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| 11/6 | police and lethal force | Sarat, chs. 47 (“Justice Without Trial”), 52 (“ <i>Tennessee v. Garner</i> ”), 53-54 (<i>Amadou Diallo</i>) (pp. 394-403, 456-467) |
| 11/8 | politics of police violence “LAW IN ACTION” DRAFT DUE | http://www.pbs.org/wgbh/frontline/film/policing-the-police/ Cobb, “ Three Terrible Days of Violence, ” “ Baton Rouge and a Reservoir of Wrongs ” Washington Post, “ Sessions Orders Justice Department ” (3 Apr 2017); Atlantic, “ Can Trump’s Justice Department ” (4 Apr 2017) Guardian database of police killings |
| 11/13 | order maintenance and bias | Sarat, chs. 48 (“Broken Windows”) & 49 (“Policing Disorder”) (pp. 404-423) |
| 11/15 | profiling and the problems of predictive policing | Sarat, chs. 50 (“Profiles in Justice”) & 51 (“Myth of Racial Profiling”) (pp. 424-455) <i>optional: Bergstrom & West (2017) “Criminal Machine Learning” [bCourses]</i> |

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| 11/18 | stop and frisk and bias in police encounters | <p>Floyd v. City of New York (“stop and frisk” decision), pp. 1-15 (and whatever else interests you); Ferguson MO articles [bCourses]</p> <p>optional: Adrian Schoolcraft’s story (podcast)</p> <p>Fryer (2016) “An Empirical Analysis of Racial Differences in Police Use of Force” (pp. 1-7) and its discussion and follow-up on Andrew Gelman’s blog [bCourses]</p> |
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b) exacting punishment

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| 11/20 | the carceral state | <p>Sarat chs. 57 (“Punishment, Power, & Justice”) pp. 480-489; optional: 58 (“U.S. v. Bailey”) pp. 490-500</p> <p>Simon (2014), <i>Mass Incarceration on Trial</i>, ch. 1 “Total Incapacitation” (pp.17-46) [bCourses]</p> <p>resource: Life of the Law (podcast)</p> |
| 11/22 | inside and outside orders of race and class | <p>Sarat ch. 59 (“Deadly Symbiosis”) (pp. 501-510)</p> <p>Conover, <i>Newjack: Guarding Sing Sing</i> (pp. 12-56) [bCourses]</p> |
| 11/25 | high cost of punishment EXTRA CREDIT FILM RESPONSE WRITE DUE | <p>Simon (2016), <i>AAPSS Annals</i>, “The New Gaol” (pp. 280-301) [bCourses]</p> |

c) the on-again-off-again story of the death penalty

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| 12/2 | American divergence | <p>Zimring, <i>The Contradictions of American Capital Punishment</i> (pp. 3-13) [bCourses]</p> <p>Sarat, chs. 60 (“Furman v. Georgia”), 61 (“Gregg v. Georgia”) (pp. 512-536)</p> |
| 12/4 | normalizing capital punishment | <p>Zimring, <i>The Contradictions of American Capital Punishment</i>, (pp. 42-64) [bCourses]</p> <p>Sarat, chs. 62 (McCleskey v. Kemp) & 63 (“Folk Knowledge”) (pp. 537-562)</p> <p>Benner, “U.S. To Resume Executions,” <i>New York Times</i> (25 July 2019) [bCourses]</p> |
| 12/6 | discussion and wrap up | INTERNET READY BLOG POST DUE |

POST ON PUBLIC-FACING BLOG BY FRIDAY 13 DECEMBER

FINAL EXAMINATION THURSDAY 19 DECEMBER 2018, 3–6 PM

Blog Post Project

The intent of this two-part assignment is to allow you to investigate a legal rule that interests you and to find out how that rule works in practice. The distinction between written laws and how those laws work is one of the touchstones for the study of law and society.

You will write (across multiple drafts) a two-part scholarly blog post for the whole world to see. The assignment will have seven graded components. Note: you may use a pseudonym (approved by your GSI) to post on the public-facing blog. You will not be allowed to duplicate (or even worse, plagiarize from) existing blog posts, which you can see [here](#). That means you will have to work harder for part (a) of the project to find a legal provision that has not yet been explored by LS 100 students.

| sub-assignment | points | value | due date |
|---|--------|-------|----------|
| a) “preclearance” of legal provision + 4 references | 25 | 5% | 9/13 |
| b) law on the books draft (maximum 800 words) | 125 | 25% | 9/27 |
| c) law in action draft (max. 1200 words) | 175 | 35% | 11/8 |
| d) Internet-ready post consisting of revised l.o.b. and l.i.a. sections (max. 2000 words) | 150 | 30% | 12/6 |
| e) post on public-facing blog | 25 | 5% | 12/13 |

Note: lateness penalty of 5% of total points per subassignment per day

a) “preclearance” of legal provision + 4 references

This is simply a document of no more than 300 words that

- a) identifies the specific provision of law you plan to investigate and confirms it is of the proper scope (not too broad or narrow) for the blog post;
- b) explains how you expect to find evidence for how the law works in action;
- c) describes very briefly the evidence for how the law works (or fails to, or has been prevented from taking effect, etc.);
- d) lists at least 4 quality references (e.g. refereed scholarly articles, law review pieces, reliable journalism)

There must be evidence of how the law or rule has actually worked in practice to enable you to write both papers. (A good rule of thumb is that the law has already been in effect for at least two years.) At the end you will list at least four references that will allow you to satisfy the requirements of the law on the books section and to write the law in action section. Be sure that you have narrowed the provision down enough! The tendency is to start too broad.

| too broad | proper scope |
|-------------------------------|---|
| the 4 th Amendment | effect of <i>United States v. Jones</i> 132 S.Ct. 945 (2012) on search via GPS device |

| | |
|-------------------------------------|--|
| abortion rights | Wisconsin Statutes §253.10(3g) informed consent procedures (2013 Wisconsin Act 37 Section 8) |
| the Clean Air Act | applying Clean Air Act §202 (42 U.S.C. § 7521) to emission control defeat devices |
| recreational marijuana legalization | regulations on retail sale of pot under Colorado Amendment 64 |

Please discuss your law on the books with your GSI first.

b) law on the books draft

In this part you will describe a law (or a particular provision of a larger law) that has been passed by elected officials at any level of government (local, state, or federal) in the United States, or a legal rule that judges have made.

You should tell your audience at least about

1. the intent of the law or rule;
2. the content (what the law or rule does);
3. its history (who created it when? did it modify an earlier law or rule?);
4. the proponents and opponents of the law or rule (key political information!); and
5. who implements the law or rule and how (including the implementer’s scope of discretion).

Examples could include the Clean Air Act provisions on point sources of nitrogen oxides (the Clean Air Act itself is too huge, and even this section might be a bit much); the section of the state motor vehicle code that deals with expired tags on an operating vehicle; state law on eviction; or the municipal zoning ordinance provisions on garages. Any state or local law is fair game. Choose your law on the books with an eye to talking about how it works in action, whether you observe it working directly (e.g., in a courtroom or enforcement agency) or indirectly (through written accounts of how it works). The key is to make sure to pick a specific enough law or provision so that you can talk about it in 800 words

For this part of the assignment, your job is to describe the law accurately and to provide a basis for asking, in the “law in action” paper, how closely the enforcement of the law matches what you found in the law itself. Use the highest quality references you can. Use a consistent style for your in-line citations and your references; I suggest the [APSA Style Manual](#) as a guide. The maximum length of the “law on the books” draft is 800 words.

Peer comments

Your GSI will organize you into groups for the semester to do the peer review part of the assignment, which will be done in your discussion section and will count toward your section participation grade. You will be responsible for making substantive comments on three other students’ draft posts for each part (law on the books and law in action). Your comments should help the author improve her, his, or their content and writing.

c) law in action draft

In this part you will investigate and observe what the law or rule you described in the first paper actually does. You should tell your audience

1. the procedures used to enforce the law or rule;
2. court decisions, legislative actions, regulatory decisions, etc., that affect the implementation of the law or rule;
3. the pattern of enforcement (is it selective? is it biased?);
4. a reasoned evaluation of the effectiveness of the law or rule; and
5. ideas for reforming the law and its enforcement.

Again, you will have to do some research on your own and you should include interviews with officials, observation of procedures, enforcement activities, etc., in your list of references. The maximum length is 1200 words.

d) Internet-ready blog post

Using the comments you have received from peers, your GSI, and the instructor, you will revise the draft posts into a publishable, concise essay that the whole world will see on a standard blogging platform (WordPress; [well done sample posts](#) from the last couple of years). Your post will be published in the true sense of the word, so you will want it to be accurate, to read well, and to be free of mechanical errors. The maximum length is 2000 words.

e) publishing your blog post

The instructors will make you an author on the WordPress site and you will publish your scholarly blog post there. Then, **you must post a link** on the bCourses assignment so that we know that the post is published on the WordPress site—be sure that you publish the post on the WordPress site rather than just leave it there as a draft.

There is a lot of law going on, all around us. On bCourses there is a [table](#) of examples of venues where you can see the law in action, but there is much more in the universe of law that you could choose, so think about what interests you.

Quizzes

“Pop” quizzes based on the study questions prepare you for class and make class that much more engaging for everyone. They also prepare you for the final exam. If you require DSP accommodation, email both your GSI and Prof. Marshall and have DSP send the accommodation notice ASAP. There will be 11 quizzes total, and each student’s lowest score will be dropped. Here are some salient rules on quizzes.

1. quizzes are in-class and will not be announced in advance
2. pen and ink on paper
3. 5 minutes and 10 points each (lowest quiz score will be dropped)
4. based on the published study questions you have been assigned for that day (i.e. make sure you prepare the study questions for that day, even if you have previous ones yet to do)
5. **no computers or phones**, but open book and open (paper) note; this means you will want to prepare study question responses in your notebook or print them out and bring them to class
6. there will be a sample question and rubric on bCourses
7. style and mechanics count, so write mindfully in complete, concise sentences (you will lose points for excessive wordiness if you attempt to write down everything you know even if it is not responsive to the question)
8. please make sure your DSP accommodation letters are sent to your GSI and Prof. Marshall as soon as possible
9. there are no make-ups for quizzes you have already missed
10. If you know you will miss class, give Prof. Marshall at least 24 hours’ notice by email and you may take an alternate quiz. Proviso: you may make such a request no more than twice during the semester unless there are extenuating circumstances that are documented.

Blog Post Assignment Agreement

This course has an assignment, the Blog Post Project, that reserves 5% of the points on the project for publicly posting the finished document on a WordPress site, <https://foundationsoflawandsociety.wordpress.com/>, that is not managed by the University of California, Berkeley. The provisions below are intended to allow you to protect your privacy under FERPA and control the subsequent status of your work.

- You will be able to post anonymously under a pseudonym (which must be approved by your GSI).
- You will be registered on the WordPress site as an author, which allows you to delete your post and delete comments on your post. The instructor will have ownership privileges over the site and will serve as moderator along with the current GSIs.
- You may retain intellectual property rights to your own work (see, for example, <https://creativecommons.org/licenses/>).

By signing below, you acknowledge that you have read and understand the conditions for the publication part of the Blog Post assignment.

signature

printed name