Legislation Distribution I

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On your paper, we will award 10 marks (out of 100) for observing the following stylistic rules:

1. As discussed in greater detail in the handout on the Memorandum of Law, every paper should have two themes. The main theme of course consists of your subject-matter. The minor theme consists of a series of introductions, connectives, conclusions, and references to theory designed to tell the reader where she stands in the argument. Please refer to the Memorandum of Law handout for details.

   On paragraph construction: You need a lead ("topic") sentence for each paragraph. Each paragraph should discuss only one major idea.

   If you have followed these rules, if you isolate the introduction, the mini-introductions and conclusions, the connectives, the topic sentences of every paragraph, and the conclusion, they will read in a connected fashion.

2. On sentence structure:
   a. Do not use the verb "to be" in any of its forms. In the Atlantic Monthly Cullen Murphy recently explained why:

      "...[S]urely we can all hope that [the rule against using "to be" might become a pedagogic tool. Almost all of us tend to overuse to be. ... [The rule against not using it] force one relentlessly to confront sloppiness, laziness, fuzziness, blandness, imprecision, simplistic generalization, and a half dozen other al to frequent characteristics of casual prose. As a self-administered exercise, this single restraint on stylke, with all the discomfort that may ensue, offers more real insight in an afternoon than can be gained from a years' worth of spoken precepts."

   b. Do not use the passive voice. (Not "the ball was hit by John" but "John hit the ball.")
   c. Use short sentences, not long sentences. Never use "and" to connect two separate sentences, nor ";" to the same effect. Any sentence longer than 17 words becomes suspect.
   d. Dependent clauses, conditions, etc., belong at the beginning of the sentence or clause, not at the end or in the middle. Try to keep subject and verb, and verb and object close together.
   e. Write with verbs and nouns, not adverbs and adjectives.
   f. Avoids meaningless little phrases at the start of sentences ("It is clear that" or "It is the fact that" or "The evidence suggests that" or "I believe that", etc. (Call that "throat-clearing". You do not need to do it).
   g. In general use the simplest form of verb you can. Better the imperfect (John ran) than the past perfect ("John has run").
i. Never use legalese. Use "these" or "those" instead of "said". (Not, "Those strawberries look good. Please pass the said strawberries"). Omit "hereinabove", idiot repetition ("null and void", "to have and to hold", "illegal and unlawful:", etc.), and Latin words.

j. Put the most important concept at the end of the sentence. This sometimes conflicts with the prohibition on the passive voice. For purposes of this paper, the passive voice prohibition controls.
LEGISLATION
AGENDA
20 January, 1992

Objectives

1. Introduction to the course.
2. Critique of the role of the study of legislation in US legal education.
3. On power and substance in writing legislation.

TASKS

1. Consider the Problem, p. Intro-1 of the readings. It directs attention to a difficulty -- corroding underground fuel tanks. The proposer of the legislation requires a legislative program apt to resolve that difficulty. How in general would you describe the agenda of steps you would take to get from the difficulty to the legislative program?

2. How has legislation entered into your legal education thus far?

3. What roles that lawyers frequently tend to fill deal with the making of legislation?

4. What reasons would you hazard to explain the relative little attention paid by American legal education to the legislative process, compared to the extensive attention paid to the judicial process? Are you persuaded by those reasons?

5. The excerpt from the Seidman article asserts (at Intro-15) "the norms for justifying legislation become norms for making it". What do you understand by that proposition? Do you agree?

6. The article asserts (at Intro-18) that without agreed-upon foundational premises or agreed-upon criteria for an adequate justification, dialogue about what constitutes legislation in the public interest becomes mere interest-group bargaining. What do you understand by that proposition? Do you agree?

7. The article asserts (at Intro-18) that "in our time, a valid justification must have the attributes of rationality". What do you understand by that proposition? Do you agree?

8. Legislation emerges from a process in which both power elements and "ideal" or "substantive" elements seemingly intermingle. (Intro-20). (Do you agree?) Is that also true of the judicial process?

FOR THURSDAY: Read Chapter I.
LEGISLATION

A RECAP OF PART ONE AND A FORECAST OF WHAT IS TO COME

(This recapitulation aims to give a brief overview of where we have travelled, and the lands into which we shall venture. It purports to do so by asking a series of questions.)

WHERE WE HAVE BEEN

INTRODUCTION

I. What constitutes the domain of study staked out by this course?

A. Can law help to solve social problems?
B. Should society use law to change its institutions?
C. How would you characterize the domain of study of this course?

II. Given a specific social problem, why could a lawmaker not:

A. Leave the law as it is, relying upon the wisdom and good judgment of the officials involved to solve the difficulty
B. Simply copy a law from some other time or place

III. What constitutes the relationship between:

A. justification for a proposal, and
B. the way we go about designing a proposal

PART ONE: THEORY

IV. What constitutes the most useful methodology for addressing the sorts of problems with which this course concerns itself?

A. In general: What constitutes "theory," and why do we study it?
   1. What function does theory play in the process of critiquing and justifying legislative proposals?
   2. Name three elements of theory, and state their relationship to theory's general function.
      a. In detail, what function does methodology play in addressing the sorts of questions with which this course concerns itself?
B. Describe ends-means methodologies, and critique them.
C. Describe creeping incrementalism, and critique that methodology.
D. Describe a problem-solving methodology, and critique it.
E. Which of the above methodologies do you believe useful, and under what circumstances? Why?

V. What constitutes the most useful set of concepts (or "vocabulary") for addressing the sorts of problems with which this course concerns itself?

A. In general:
   1. What constitutes a vocabulary?
   2. What function does a vocabulary play in critiquing and justifying legislative proposals?
B. Describe and critique the Rule of Law vocabulary.
C. Describe and critique the Law and Economics vocabulary.
D. Describe and critique the Marxist vocabulary.
E. Describe and critique the Institutionalist vocabulary.
F. Which of the above vocabularies do you believe useful, and under what circumstances?
G. What do you understand by facilitative law? How does that concept help your understanding of how law works?

(Some general considerations:
   i. To what extent ought a drafter consider whether people will obey the law she drafts?
   ii. If a drafter considers that she must concern herself with the question of the behavior of a law's addressees, what factors ought a drafter take into account?
   iii. Assuming that a drafter subscribes to a problem-solving methodology and an institutionalist vocabulary, in drafting legislation to whose behavior must she attend? (Consider the institutionalist model, p. 111-101.)
   iv. In explaining the role-occupant behavior that constitutes the difficulty, and predicting the role-occupant behavior that will result from proposed legislation, state generally the principal areas into which a drafter must inquire.)
WHERE WE ARE GOING

LEGISLATING OBEDIENCE: PRIMARY ADDRESSEES

VI Why do people obey the law?

A. In general what sorts of issues would you expect that we will discuss in this chapter?

VII What sorts of measure might legislation adopt to induce conforming behavior by it addressees? (More conventionally expressed, what sorts of sanctions ought legislation adopt?)

IMPLEMENTING INSTITUTIONS

VIII An interlude: Recapitulation and summary. Can we state an agenda to serve both as an outline for a justification for a proposal, and an agenda for thinking about what the law ought to be?

IX What are the difficulties relating to implementing institutions, and how do we explain them? (That is, what vocabulary concerning institutions can we devise useful for solving the sorts of difficulties posed by implementing institutions?)

X What constitute the advantages and disadvantages of implementation through individual dispute resolution (courts, tribunals alternative dispute resolution institutions)?

XI Implementation through bureaucratic institutions: Advantages, disadvantages, devices to insure bureaucratic conformity to law.