The raison d’être of the Legal Process course is the first-time hard-cover publication of a casebook that contains what many believe is the finest, most ambitious, most intellectually stimulating, and most influential set of teaching materials ever devised by American law professors.

Henry Hart and Albert Sacks assembled these materials for a course called Legal Process, which they offered as a “perspectives elective” for first-semester, second-year students at the Harvard Law School in the mid-1950s. Both the course and the materials soon became enduring classics, with the latter inspiring genuine reverence, epitomized by the following somewhat breathless observation by a young law professor:

I saw my first copy of The Legal Process during law school when a professor lent me his dog-eared photocopy of [the] manuscript. Even though I knew that the manuscript had been copied freely for many years, and that hundreds, maybe thousands, of versions sat in offices and libraries around the world, I still experienced a slight thrill as I held a copy of the famous book that never became a book . . .

The evolution of what started out (and remained for decades) as an unpublished manuscript is elegantly described by Professors William Eskridge and Philip Frickey in an article entitled “The Making of The Legal Process, 107 Harv. L. Rev. 2031 (1994), which later became “An Historical and Critical Introduction to The Legal Process,” in the hard-cover edition Foundation Press finally brought out later that same year. Hart began the task in 1940, when he put together materials for a course on Legislation, as part of which he developed a theory of appropriate judicial lawmaking, the relationship among different institutional lawmakers, and the comparative capabilities of the courts and the legislatures. His project then expanded, in the words of Eskridge and Frickey, into “a jurisprudentially deep and analytically systematic course in the legal system,” for which he and his colleague, Albert Sacks, devised a highly original set of teaching materials.

Why such a fuss about a manuscript which was never published during the lifetime of its authors, and whose last revision occurred in 1958? The simple reason is that it cast, and continues to cast, an extraordinary influence upon the American legal community. In part this was due to the fact that the authors had something very important to say, and instead of presenting their ideas in the traditional form of articles or monographs, they adopted the brilliant strategy of aiming at students with an innovative set of teaching materials. Their course became a “must-take” offering for the best and the brightest at Harvard and the many other law schools where Legal Process made its way into the curriculum. Indeed, Hart and Sacks managed, by this indirect route, to give birth to what may well be the most important American jurisprudential movement of the twentieth century, the so-called legal process theory, which has profoundly affected how scholars, judges, elected and unelected government officials and private practitioners think about the law.
Some idea of the staying power of what Hart and Sacks accomplished derives from the fact that four current justices of the United States Supreme Court have studied from the Legal Process materials while taking the Legal Process course in law school, and one can trace, in their judicial work, the influences of legal process theory.

What exactly is legal process theory? Professor Edward Rubin has summarized it as follows, in his article on “The New Legal Process” in 109 Harv. L. Rev.1393, 1394-97 ((1996):

Legal process was itself a synthesis of two major themes in prior legal scholarship. The academic study of law was originally installed on American university campuses by means of a theory currently known as formalism but regarded by its progenitors as scientific jurisprudence. According to this theory, law - and especially common law - embodies general, logically connected legal principles that can be discerned by studying judicial decisions. Formalism prevailed, despite spirited dissents, for some forty years, but it finally succumbed to a sustained attack from legal realism. Partially inspired by the statutory displacement of the common law resulting from Progressive Era and New Deal legislation, the realists maintained that general legal principles do not exist; law is always a creation of some specific lawmaker, whether legislator, administrator, or judge, and it usually reflects the policy predilections of that lawmaker.

The realist attack on legal formalism proved decisive, in part because it was consistent both with political trends and with intellectual developments in other fields. Legal realism did not provide a constructive theory of law, however. The success of the legal process movement stemmed from its ability to synthesize the insights of the realists with the aspirations of the formalists. It began by acknowledging, as the realists insisted, that all law is derived from political decisions. Thus, a theory of law must operate within a narrower ambit than the formalists claimed; there are no substantive legal principles that transcend the political process and can be invoked to invalidate political decisions. Having defined the boundaries of jurisprudence in essentially the same way as the legal realists, legal process scholars avoided the implicit nihilism of the realists by developing a theory to operate within those limits. Its central principle was that each governmental institution possesses a distinctive area of competence such that specific tasks can be assigned to that institution without reference to the substantive policies involved. Although this principle originates outside politics, it is a purely procedural one. It has no substantive implications, and thus does not commit the error of the formalists by placing legal principles above the political process. . .

Institutional competence is a concept that can readily be applied to the chief executive, the legislature, or administrative agencies, but the main concern of the legal process school was the judiciary. The particular task of courts . . . is to decide cases on the basis of reasoned argument, and only issues that can be resolved by that approach are appropriate for judicial resolution. When courts go beyond this role, they endanger their legitimacy as legal institutions - first, because they assert an unjustifiable claim to political superiority, and second, because they act beyond their area of competence. The legal process school thus reconstituted the prior separation between law and politics, not
by positing transcendent legal principles, but by identifying a separate and politically
established legal realm in which reasoned argument prevails.

This line of argument could readily generate an approach that resembles Kelsenian
positivism [a theory that law consists entirely of the sovereign’s commands and does not
embody any normative principles], leaving courts with a delimited and decidedly
nonheroic role. But legal process was an American theory, and it avoided such an
unappetizing result by means of the common law and the Constitution. The common law
grants judges the authority to legislate - to announce new legal rules - on the basis of
reasoned arguments. . . The Constitution’s role is even more noteworthy for legal
process scholars, particularly given their frequent emphasis on public law. It guarantees,
in their view, a series of basic human rights, perhaps even a system of human rights, as a
matter of positive law, and authorizes the courts to enforce these rights. . .
Legal process theorists accepted the prevailing notion that government institutions act
rationally to achieve their goals. The question they asked about these institutions
involved their legitimacy: that is, whether their actions correspond with the common
good. . .

Hart and Sacks, as has been noted above, developed legal process theory in an original
way: by means of a set of teaching materials now published under the title The Legal Process:
Basic Problems in the Making and Application of Law. The materials contain appellate
decisions, commentary and excerpts from law reviews and other secondary sources. Its seven
chapters pivot around 55 problems that put students in a wide range of roles as legal actors.
Problems are often followed by an extensive discussion of how real lawyers, legislators and
judges approached a problem, and then the authors ask a series of open-ended questions that
force deeper, critical thought about conventional solutions to the problem.

One of the highly distinctive elements of the legal process course is its focus on the way
different aspects of the legal system function together. The course analyzes how private parties,
courts, legislatures and administrative agencies “make” and administer law, each within its
assigned area of competence, and how these constituent parts interact. A particularly strong
feature of the materials is its treatment of how courts create and refine common law. Hart and
Sacks’ coverage of stare decisis is perhaps the best to be found in any legal text. Their analysis
of the indirect influence of statutes upon the development of common law - how courts “borrow”
from statutes when they fashion common law rules - is particularly provocative.

Another remarkable feature is the chapter on statutory interpretation. A contemporary
expert in the field calls it “the best materials ever put together on statutory construction - a
fabulous introduction to the subject.” Since the practice of law today involves the constant
interpreting of statutes and regulations, the course provides an indispensable framework for
discerning the meaning of both legislative enactments and administrative rules.

The Legal Process casebook is mega-sized - nearly 1,400 pages in length - which
obviously makes it impossible to cover more than a fraction of it in any single semester.
(Interestingly enough, the book is also incomplete. Hart and Sacks never included chapters that
were to deal with constitutional and administrative law, in part because Hart was a consummate perfectionist, in part for reasons that are worth speculating about as we work our way through the course.) The material is so rich, however, that the book is well worth keeping and revisiting throughout one’s legal career.

The Legal Process to be offered at GULC in the spring of 2010 will focus on the roles of, and interactions between, courts and legislatures. We’ll begin with the classic problem of the spoiled cantaloupes, which presents a brilliant overview of how virtually every law-making or law-applying institution can interact to provide a solution to a legal controversy arising when a wholesaler contracted with a distributor to purchase a car-load of cantaloupes being shipped across the country and the fruit arrived in an advanced state of spoilage.

The following list of topics, which is not meant to be exclusive, will give you a flavor of how we’ll approach the legal process theory of common law. We’ll examine:

* the process by which courts “make” common law, and examine problems such as how courts create new causes of action (herein the judicial recognition of a cause of action for invasion of privacy);

* reasoned elaboration as an essential element of judicial lawmaking (the classic example we look at here is a case of first impression wrestling with the extent of the obligation that should be imposed upon railroads for the safe carriage of goods);

* the indirect effect of statutes upon common law decision-making (we’ll read a recent U.S. Supreme Court decision, obviously influenced by legal process theory, considering whether to create, judicially, a remedy in admiralty law for the wrongful death of a longshoreman killed within the territorial waters of a state);

* whether legislatures might be a preferable forum for the resolution of certain legal issues (herein the problem of common law crimes and the creation of a quasi-property right in the gathering of news);

* the paradox of whether courts can and should make law by refusing to make law;

* the doctrine of *stare decisis* (an introduction to retroactive and prospective overruling);

* the proper function of adjudication (is the courtroom the proper forum for the fashioning of rules and doctrines that have profound effects on society at large?).

The course will then take a brief look at the legislative process, and in particular its strengths and weaknesses in performing the task of fashioning primary law, and then focus on the dilemmas faced by a legislature that disapproves of a particular judicial decision. One case study we’ll consider is how the New York legislature reacted (and should have reacted) to a decision of the highest court in the state refusing to recognize a cause of action for invasion of privacy.
The final portion of the course will be devoted to a look at the legal process theory of statutory interpretation, including the operation of *stare decisis* in a statutory context, the use of legislative history to discern the meaning of ambiguous statutory language, and the effect that should be given to statutory interpretations made by administrative agencies. As time permits, we’ll look at recent applications of legal process theory in statutory construction.

One of the goals of the course will be to encourage critical thinking about legal process theory. We shall devote special attention to identifying and analyzing its strengths and weaknesses, and to its contemporary relevance. Although the book remains remarkably fresh, from time to time supplementary materials will be distributed.