

**Foundations of Legal Studies**  
**Professor: Mark Leinauer**

**Syllabus<sup>1</sup>**

**Lectures.** Lectures will be held Monday, Wednesday and Friday from 3:00 p.m. to 4:00 p.m. (Pacific Time) in Morgan Hall, room 101.

**Email contact.** The best way to contact me is through the course webpage (there is an “email / inbox” tab for within course messaging). Please note that messages to other email addresses may not be received. I aim to answer all emails within 48 hours. Substantive questions are best addressed in office hours.

**Office Hours.** I will hold office hours every Tuesday from 11 a.m. to 12 p.m. (Pacific time) via zoom. A general invite for office hours will be released to the entire class as an announcement about 5 minutes before 11 a.m. Your GSIs, Jorge Cortes-Monroy and Brianne Felsher, will hold office hours as well. Please consult their syllabuses for that information.

**GSIs.** Your G.S.I.s will be Jorge Cortes-Monroy and Brianne Felsher. Needless to say they are both extremely knowledgeable. If you are struggling with any aspect of the material you are strongly encourage to use them as a resource.

**Attendance & Participation.** I will not take attendance but I *highly recommend* attending lectures live. This material is best presented in a conversational format, with students asking questions in real time. The material for this course will also largely consist of insights drawn from the readings and those insights will be discussed in class. Each lecture will also conclude (time allowing) with a question and answer period designed to address lingering confusion. That process, obviously, requires live attendance. Some classes also have an assignment attached (answering a brief question etc.). These assignments are designed to prompt class discussion. While they will be graded only on a pass/fail basis, completing them will contribute to your participation grade.

One final note, if this class has a waitlist then we will take attendance during the first week to determine if anyone has dropped the class. It behooves you, therefore, to attend the first week live. If you cannot attend the first week live and yet intend to remain in the course, please contact your GSI via email to let them know.

**Materials.** The course utilizes the following materials. Additional readings will be provided through the course website.

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

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<sup>1</sup> This syllabus may be adjusted slightly to accommodate topics of students’ interest and other circumstances.

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

**Prerequisites.** No previous course work is required.

**Homework.** There is no written homework *per se*, but the occasional lecture will have an “assignment” attached to it. These assignments mostly consist of short questions designed to stimulate discussion during lecture and they will be graded pass/fail. There are no “wrong answers” but please take them seriously. Thoughtful responses will be appreciated. They will also benefit the class (and they will influence your participation grade). You will find these assignments on the “assignments tab” in B-Courses.

**Grading.** There are three exams. The first two will be shorter and will count for 25% of your final grade each (50% total). The final exam will be longer and it will cover the entire course. The final exam will count for 40% of your final grade. Participation will count for the remaining 10% of your final grade.

**How to do well in this course.** This class will rely heavily on insight pulled from the readings, and that insight will typically be established and discussed during lecture. Accordingly it is imperative that you attend lecture and take notes. Each lecture will be based on a digital “chalkboard” that I will provide immediately following the class. This chalkboard is essentially an outline of the material covered during lecture, and it provides a framework for your notes. If you do the readings, attend class and take notes you should be well prepared.

**Accommodations.** If you need disability-related accommodations in this class, if you have emergency medical information you wish to share with me, or if you need other special arrangements, **please inform me immediately**. Please see me privately after class or in office hours. You may also email me.

**Help Available.** And finally, I know that dealing with post-pandemic instruction (and dealing with college life in general) can be very difficult. There are, however, some resources available.

Confidential counseling: <https://uhs.berkeley.edu/caps>

LGBTQ+ & gender equity support: <https://cejce.berkeley.edu/geneq>

Guide to Campus Wellness Resources: <https://recalibrate.berkeley.edu/home>

## Sequence by Week

### Week of August 22<sup>nd</sup> (W & F Class)

**August 25<sup>th</sup>** will be an introductory class, but there is a discussion question that I intend to address. You will find that question under the “assignments” tab (on the course website) listed as Assignment One. Please provide a response (a paragraph or two) in the space allotted. The assignment is not graded (and there are no wrong answers) but completing the assignment will impact your participation grade.

For class:

**Complete discussion assignment one**

**Module One: Is Justice Blind, or at least *blindfolded*? (judicial decision making, the rise of realism and impermissible bias).**

**August 27<sup>th</sup>: Formalism and the ideal judicial decision maker**

Read for class:

(read first) Legal Formalism [PDF].

Testimony of Robert Alt (during the nomination hearing for Judge Elena Kagan) [PDF].

Judicial Restraint (Encyclopedia Britannica) [PDF].

Scalia nomination hearings [PDF]. Page 43 only.

Week of August 29<sup>th</sup> (M, W & F Class)

**August 30<sup>th</sup>: The Rise of Realism**

For class:

Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939–1941, Pritchett [PDF].

Bryan Leiter, *American Legal Realism* (only read his chapter, starting on page 50) [PDF].

**September 1<sup>st</sup>: Judges as Political Actors**

Read for class:

Ideological Values and the Votes of U.S. Supreme Court Justices Revisited [PDF “Attitudinal model – Spaeth”]

The Supreme Court as a Strategic National Policymaker (feel free to skim the statistical analyses, the findings and discussion are most important) [PDF]

**September 3<sup>rd</sup>: Impermissible bias against individuals.**

Read for class:

*Implicit Bias in the Courtroom*, Jerry Kang (beginning to page 1166 – stop at “Interventions”).

Week of September 5 (W & F Class)

**September 6<sup>th</sup>: No Class (Holiday)**

**September 8<sup>th</sup>: Epistemic Exceptionalism (or the Lack Thereof)**

Read for class:

Epistemic Exceptionalism, James R. Dillon. [PDF]

**Module Two: Does the law protect the discrete and insular? Does the law protect civil liberties?**

**September 10<sup>th</sup>: The Hollow Hope?**

Read for class:

McCann, M. W. (1992). Reform Litigation on Trial. *Law & Social Inquiry*, 17(4), 715–743.

[PDF “Hollow Hope Review”]

Week of September 12 (M, W & F Class)

**September 13<sup>th</sup>: Does the Law Protect Civil Liberties in Other Ways?**

Read for class:

Rosenberg, G. N. (1996). Positivism, Interpretivism, and the Study of Law. *Law & Social Inquiry*, 21(2) [PDF].

**September 15<sup>th</sup>: Impact on the Moral Order?**

Read for class:

Upham, "Litigation and Moral Consciousness in Japan" (excerpted in Milhaupt et al., eds., 2001, pp. 275-281) [PDF]

Hull, "The Cultural Power of Law" (*Law and Social Inquiry* Summer 2003, 629-643) [PDF]  
*Obergefell v. Hodges* (excerpts) [PDF]

**September 17<sup>th</sup>: Review session for first exam.**

For class:

Come with questions prepared! This is your opportunity to clear up misconceptions before the test.

Week of September 19 (M, W & F Class)

**September 20<sup>th</sup>: First exam (in class).**

Bring blue-books (or green-books)!

**Module Three: Does the adversarial system yield true, fair results? Does it serve other functions?**

**September 22<sup>nd</sup>: Introduction to the Adversarial System**

Read for class:

"The Prototype of Courts," in McCann, M. W. (1992).

Kagan, ch. 1 "The Concept of Adversarial Legalism" (pp. 1-17)

**September 24<sup>th</sup>: Politics and the Adversarial System**

Read for class:

Kagan, ch. 3 "The Political Construction of Adversarial Legalism" (pp. 34-58)

Week of September 26 (M, W & F Class)

**September 27<sup>th</sup>: Disputes and Selection Bias**

Read for class:

Sarat, ch. 15 ("Emergence and Transformation of Disputes") (pp. 99-104)

**September 29<sup>th</sup>: Dual structure of U.S. Courts**

Read for class:

Miller, *Primer on American Courts* ch. 3 (pp. 55-68)

Kagan, ch. 6 “Adversarial Legalism and Civil Justice” (pp. 99-125)

**October 1<sup>st</sup>: Adversarialism and the Disadvantaged**

Read for class:

Galanter, “Why the Haves Come Out Ahead,” excerpted in Diascro & Evers, eds. (2006, pp. 316-321) [PDF]

Desmond, *Evicted* ch. 8 (pp. 94-107) [PDF]

Seron et al. “Impact of Legal Counsel on Outcomes for Poor Tenants” in Larson & Schmidt, eds. (2014, pp. 159-165) [pdf]

Week of October 3 (M, W & F Class)

**October 4<sup>th</sup>: Amplifying systemic bias**

Read for class:

Milhaupt et al. *The Japanese Legal System*, “Property” (2006, pp. 394- 400) [pdf]

Desmond, *Evicted* ch. 15 (pp. 94-107) [pdf]

**October 6<sup>th</sup>: Tort Law**

Read for class:

Kagan, ch. 7 “Tort Law System” (pp. 126-155)

**October 8<sup>th</sup>: To much claiming or not enough?**

Read for class:

Sarat, chs. 16 (“Liability”) & 17 (“Crisis is Injuries”) (pp. 105-117)

Week of October 11 (M, W & F Class)

**October 11<sup>th</sup>: Tort stories and tort reality**

Read for class:

Sarat, chs. 18 (“How the Jury Decided”) & 19 (“Jurors’ Judgments”) (pp. 118-129)

Nottage, *Katsurakawa v. McDonalds* (in Milhaupt et al. eds. 2006, pp. 386-393) [PDF]

**October 13<sup>th</sup>: Regulation and Social Welfare**

Read for class:

Kagan, ch. 9 “Adversarial Legalism and Regulatory Style” (pp. 181-206)

**October 15<sup>th</sup>: Law and the work of lawyers**

Read for class:

Sarat, chs. 20 (“Lawyers & Consumer Protection”) & 21 (“Justice Broker”) (pp. 131-149)

Week of October 17 (M, W & F Class)

**October 18<sup>th</sup>: The adversarial system and the modern welfare state**

Read for class:

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)

**October 20<sup>th</sup>: Review for Second Exam**

For class:

Come with questions prepared! This is your opportunity to clear up misconceptions before the test.

**October 22<sup>nd</sup>: Second exam (in class).**

Bring blue-books (or green-books)!

**Module Four: Is criminal justice just?**

- 1) Topic One: Criminal Legal Procedure and its Consequences

Week of October 24 (M, W & F Class)

**October 25<sup>th</sup>: Burdens of proceduralism**

Read for class:

Kagan, ch. 5 “Deciding Criminal Cases” (pp. 82-96)

**October 27<sup>th</sup>: The American workaround**

Read for class:

Sarat, chs. 30 (“American Courts”) & 32 (“Torture & Plea Bargaining”) (pp. 261-266, 275-282)

PBS Frontline *The Plea* (Links to an external site.) (and its supplementary material (Links to an external site.))

**October 29<sup>th</sup>: Proceduralism and case selection, adversarialism as the norm**

Read for class:

Sarat, chs. 33 (“Convictability”), 34 (“Lawyers’ Ethics”) (pp. 284-299)

Halloween outfits appreciated

Week of October 31 (M, W & F Class)

**November 1<sup>st</sup>: Neither fair nor speedy**

Read for class:

Kagan, ch. 4 “Adversarial Legalism & American Criminal Justice” (pp. 61-81)

Halloween outfits still appreciated

2) Topic Two: Police Discretion and Risk

**November 3<sup>rd</sup>: Police and Lethal Force**

Read for class:

Sarat, chs. 47 (“Justice Without Trial”), 52 (“Tennessee v. Garner”), 53-54 (Amadou Diallo) (pp. 394-403, 456-467)

**November 5<sup>th</sup>: The Politics of Police Violence**

For class:

<http://www.pbs.org/wgbh/frontline/film/policing-the-police/> (Links to an external site.)

Cobb, “Three Terrible Days of Violence,” *The New Yorker*. [PDF]

Cobb, “Baton Rouge and a Reservoir of Wrongs,” *The New Yorker* [PDF]

*Washington Post*, “Sessions Orders Justice Department” (3 Apr 2017) [PDF]

*The Atlantic*, “Can Trump’s Justice Department” (4 Apr 2017) [PDF]

*Guardian* [database \(Links to an external site.\)](#) of police killings

Week of November 7 (M, W & F Class)

**November 8<sup>th</sup>: Order, Maintenance and Bias**

Read for class:

Sarat, chs. 48 (“Broken Windows”) & 49 (“Policing Disorder”) (pp. 404-423)

**November 10<sup>th</sup>: Profiling and the Problems of Predictive Policing**

Read for class:

Sarat, chs. 50 (“Profiles in Justice”) & 51 (“Myth of Racial Profiling”) (pp. 424-455)

**November 12<sup>th</sup>: Stop and Frisk (Bias in Police Encounters).**

Read for class:

*Floyd v. City of New York* (the “stop and frisk” decision), pp. 1-15 (and whatever else interests you) [PDF]

“Ferguson Feeds off the Poor” [PDF]

3) Topic Three: Punishment and the Death Penalty

Week of November 14 (M, W & F Class)

**November 15<sup>th</sup>: The Carceral State**

Read for class:

Sarat chs. 57 (“Punishment, Power, & Justice”) pp. 480-489; optional: 58 (“U.S. v. Bailey”) pp. 490-500

Simon (2014), *Mass Incarceration on Trial*, ch. 1 “Total Incapacitation” (pp.17-46) [PDF]

**November 17<sup>th</sup>: Inside and Outside Orders of Race and Class**

Read for class:

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Sarat ch. 59 (“Deadly Symbiosis”) (pp. 501-510)  
Conover, *Newjack: Guarding Sing* ( pp. 12-56) [PDF]

**November 19<sup>th</sup>: The High Cost of Punishment**

Read for class:

Simon (2016), *AAPSS Annals*, “The New Gaol” (pp. 280-301) [PDF]

Week of November 21 (M Class)

**November 22<sup>nd</sup>: American Divergence (Capital Punishment)**

Read for class:

Zimring, *The Contradictions of American Capital Punishment* (pp. 3-13) [PDF]

Sarat, chs. 60 (“Furman v. Georgia”), 61 (“Gregg v. Georgia”) (pp. 512-536)

**November 24<sup>th</sup>: No class**

**November 26<sup>th</sup>: No class**

Week of November 28 (M, W & F Class)

**November 29<sup>th</sup>: Normalizing Capital Punishment**

Read for class:

Zimring, *The Contradictions of American Capital Punishment*, (pp. 42-64) [PDF]

Sarat, chs. 62 (McCleskey v. Kemp) & 63 (“Folk Knowledge”) (pp. 537-562)

Benner, “U.S. To Resume Executions,” *New York Times* (25 July 2019) [PDF]

**December 1<sup>st</sup>: Review for Exam / Modules One and Two**

Come with questions prepared! This is your opportunity to clear up misconceptions before the test.

**December 3<sup>rd</sup>: Review for Exam / Modules Three and Four**

Come with questions prepared! This is your opportunity to clear up misconceptions before the test.

Week of December 5 (Reading Week. No class)

**Review classes may be held if the class desires.**

Week of December 12 (Exam Week. No class)

**December 14<sup>th</sup> (7:00 p.m. – 10:00 p.m.): Final exam**

Bring blue-books (or green-books)!

Note the odd time. The exam is in the evening.