

Foundations of Legal Studies
Professor: Mark Leinauer

Syllabus¹

Lectures. Lectures will be held on Tuesdays and Thursdays from 12:30 p.m. to 2:00 p.m. (Pacific Time) in room 101 of Morgan Hall.

Email contact. To contact Mark Leinauer, please simply email Mark 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 Wednesday from 10 a.m. to 12:00 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 10 a.m. Your G.S.I.s, Rafael Grillo Avila and Celina Romano, will hold office hours as well. Please consult their syllabuses for that information.

GSI. Your G.S.I.s will be Rafael Grillo Avila and Celina Romano. Both are currently doctoral students in the Jurisprudence and Social Policy department. Needless to say they are both extremely knowledgeable. If you are struggling with any aspect of the material you are strongly encouraged to use your G.S.I. 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. Each lecture will also conclude (time allowing) with a question and answer period designed to address lingering confusion. That process, obviously, requires live attendance.

Exams are currently scheduled to occur live, on campus, but last semester covid forced one exam to occur online. Please keep track of where and when the exam is occurring. An excused absence from an exam is rarely granted (it must be a very serious issue). If you believe that you require an excused absence from an exam you must contact me beforehand to obtain it. Do not assume that you will be allowed to retake an exam.

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 G.S.I.

Materials. This course utilizes the following materials. Additional readings will be provided through the course website. Please note, **THE MATERIALS BELOW MUST BE PURCHASED.**

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

You can find them quite cheaply if you look around. The Kagan book is also available as an E-book.

- 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”]

Prerequisites. No previous course work is required.

Exams and grading. There will be three exams, each worth 30% of your grade. Participation will account for the remaining 10%. The first exam will cover modules one and two, and the second exam will cover module three. The final exam will cover the entire course (modules one, two, three *and* four), though it will cover module four in slightly more depth.

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, attend section 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.

Excused absences from an exam: If you believe that you will not be able to attend an exam please note that such absences will be excused only in cases of *extreme* hardship (a death in the family, hospitalization, severe [documented] illness, etc.). Do not assume that you will be excused from an exam, it is best to contact me before the exam to discuss the matter if possible.

Incompletes: If you believe that you will be seeking an incomplete please contact me as soon as possible during the semester (incompletes will almost never be granted *after* the final exam). You should not assume that you will receive an incomplete in any event.

Help Available. And finally, I know that dealing with post-pandemic instruction (and 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 January 16th (Tu & Th Class)

January 18th: Introduction

Read for class:

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

Module One: Is Justice Blind, or at Least *Blindfolded*? (Judicial Decision Making)

January 20th: 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 January 23rd (Tu & Th Class)

January 25th: 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].

January 27th: Judges as Political Actors

Read for class:

Decision Making in a Democracy, Robert Dahl

Week of January 30th (Tu & Th Class)

February 1st: Judges as Political Actors Continued

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]

February 3rd: Implicit Bias and Judicial Decision Making

Read for class:

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

Optional reading (you will not be tested on it):

Epistemic Exceptionalism, James R. Dillon. [PDF]

Week of February 6th (Tu & Th Class)

Module Two: Can the courts create meaningful social change (law and social movements)?**February 8th: 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”]

February 10th: Can the Law Create Social Change in Less Direct Ways?

Read for class:

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

Optional Reading (will not be tested or discussed): How does the law impact moral order?

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]

Week of February 13th (Tu & Th Class)

Module Three: Does the adversarial system yield just results? Does the adversarial system come with a social cost?**February 15th: 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)

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

February 17th: Exam Number One on Modules 1 & 2

Week of February 20th (Tu & Th Class)

February 22nd: Disputes and Selection Bias

Read for class:

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

February 24th: The Adversarial System 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]

Optional Reading (will not be tested or discussed):

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

Desmond, *Evicted* ch. 15 [pdf]

Week of February 27th (Tu & Th Class)

March 1st: The Adversarial System and Tort Law

Read for class:

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

Optional Reading (will not be tested or discussed):

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

March 3rd: Too much claiming or not enough?

Read for class:

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

Week of March 6th (Tu & Th Class)

March 8th: 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]

March 10th: The role of lawyers

Read for class:

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

Week of March 13th (Tu & Th Class)

Module Four: Is criminal justice just?

March 15th: 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.](#)))

March 17th: Exam Two on Module Three

Week of March 20th (Tu & Th Class)**March 22nd: Spring Break (No Instruction)****March 24th: Spring Break (No Instruction)**Week of March 27th (Tu & Th Class)**March 29th : Neither fair nor speedy**

Read for class:

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

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

March 31st: The use of lethal force by police

Read for class:

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

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

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

Optional Reading (will not be tested or discussed):

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]

Week of April 3rd (Tu & Th Class)**April 5th: Order, Maintenance and Bias**

Read for class:

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

April 7th: Profiling and the Problems of Predictive Policing

Read for class:

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

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]

Week of April 10th (Tu & Th Class)**April 12th: The Carceral State (Mass Incarceration)**

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]

April 14th: Punishment, efficiency and reform

NOTE: This class may occur online at another time. Updates will be provided.

Read for class:

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

Week of April 17th (Tu & Th Class)

April 19th: 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)

April 21st: 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]

Week of April 24th (Tu & Th Class)

April 26th: Review for Final Exam (Modules One and Two)

For class:

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

April 28th: Review for Final Exam (Modules Three and Four)

For class:

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

Week of May 1st (Reading Week. No class)

No class

Week of May 8th (Exam Week. No class)

FINAL EXAM DATE TO BE ANNOUNCED