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**06.15.20 (draft)**

**Legal Studies 182  
Law, Politics and Society**

**Feeley, Sangster  
Summer 2020**

### **SYLLABUS**

Professor: Malcolm M. Feeley ([mfeeley@law.berkeley.edu](mailto:mfeeley@law.berkeley.edu))  
GSI: Douglas Sangster ([doug.sangster@berkeley.edu](mailto:doug.sangster@berkeley.edu))  
Lecture T Th 8:10 –10:am (Via Zoom)

#### Introduction:

This course examines core issues about the nature and function of the legal system: what is the nature of legal authority? Why do we obey it? What is the adversary system? How does it work—receive information, resolve conflicts, adjust to change? What are its strengths? Weaknesses? Alternatives? How do courts respond to and contribute to social change? Do courts make policy? Should they? How successful are they when they try? What resources do courts have to effect their rulings?

Readings will be drawn from a variety of fields: philosophy, history, judicial opinions, and scholarly articles and books. If you are attentive to these materials and engage during lectures and discussion sections, you will become knowledgeable one of society's most important institution, the legal system.

#### Required Materials:

All required readings for LS 182 (Summer 2020) are posted on the course site, and easily accessed on the dashboard on b-courses. Additional readings and videos may be posted from time to time, so stay tuned.

#### Zoom Instruction (plans as of 06.01.20)

The class is scheduled to meet regularly on Zoom from 8:10 am to 10:00 am, Monday – Thursday, beginning Monday July 6 and winding up Thursday August 13. This will be a first time for me (though Mr. Sangster has had some experience and no doubt many of those enrolled in the course have had some experience.) Ten hours per week on line per class, whether synchronous or asynchronous, is a lot for anyone, so I've tried to adapt to the situation, by replacing a few sessions with videos or movies that can be watched at your leisure sometime before the scheduled class at which they are discussed. Also, for purposes of convenience, I've scheduled the midterm and final exam during scheduled class periods.

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As a guide, I've also appended questions to most reading assignments to help guide your readings. You should look at them before you start the reading assignment and be able to answer them afterwards. Depending on how things go, I may require you to write up short summaries of these readings. It is a great way to learn the material and to review for the exams.

A note on class readings. It will make all the difference if you read the assigned materials before I discuss them in class. My lectures assume that you are familiar with the readings (though I'm happy to be interrupted for questions about meaning—the authors's and mine). My lectures can usually be divided into three parts. A brief introduction setting the context and background for the article and author; a brief review highlight the main points of the article; followed by a wide-ranging discussion of the implications of the article's main points relate to other readings for the day, for previous readings, for the main themes of the course, and at times for a head's up for how they related to future readings. So, I assume that you are familiar with the readings, and my job is to explore variations on the theme. However, some of the readings, particularly at the outset require close attention to the text. Among other reasons this is why their lengths are so short as compared to assignments later in the course.

I ask that you all be patient. We—or at least, I—are all new at this, and there will be need to adjust as necessary. At a minimum, I'm confident that the readings are wonderful, and that I can help make important connections among them. What I may lack in skill in zoom presentations, I hope I will make up with in enthusiasm. Class sessions rarely consume the full class period, and when the don't I'll hang around on zoom to field questions and comments. I'll also have zoom additional zoom office hours and will be available by email.

You are also fortunate to have an experienced, informed, and enthusiastic GSI, in Douglas Sangster. He recently graduated from Berkeley Law School, and is in the midst of his PhD studies in the Jurisprudence and Social Policy Program at the Law School.

More information on the class format and access to class materials will be forthcoming.

Thank you.  
Malcolm M. Feeley  
Douglas Sangster

### Graded Assignments

Midterm (Thurs. July 23)	30%
** Three two page response papers to assigned videos or readings	15%
Final Exam (Thurs. Aug. 13)	40%

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*Section participation and abstracts of reading assignments	<u>15%</u>
TOTAL	100%

**\*\*Response papers.** Several readings and videos have been identified with a double asterisk (\*\*) for this assignment. Individual students must write responses for any three of them, and must turn in three papers. Papers should be about 450-500 words, and address the question(s) posed for the particular assignment. They should spend no more than a few sentences summarizing the article, and most comments should focus on the implications of the article for themes of the course and other related readings. Deliver responses Mr. Spenser no later than 9 pm the evening before the assigned reading is to be discussed in class. No response papers will be accepted after 9 pm on date due. Absolutely!

The readings designated for response papers are indicated by an asterisk (\*) in the syllabus below, and the assigned questions for the response papers are found at the end of this syllabus, following the list of assigned materials.

\*Articles requiring 75 word (or so) abstracts are marked by an asterisk (\* or \*\*). They must be submitted weekly, and be graded by rough system of high or OK (assuming all meet a minimum standard). Students are encouraged to undertake this collectively, so that say two or three or four students can turn in the same set of materials. But note, in this collective enterprise, you do not carry a free rider. Nor should you depend upon someone else to do your work—while one of you might write the first draft, everyone should weigh in, and revise and add as necessary, to be sure that the abstract is accurate and complete.

## READING ASSIGNMENTS

### I. Introduction to Law (and Politics)

#### M. and T. July 6 and 7

##### A. Introduction

##### Assignment:

L. Fuller, "The Case of the Speluncean Explorers,"

##### Questions:

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Which judge's opinion do you most agree with?

Can you write a more convincing opinion, now that you have read the other judges' opinions (remember, they/you are not asked to express your feelings or what you think, but what you know the law requires)?

Consider the sources of legal authority that the various judges identify in their opinions. Where does law come from? What is its purpose?

What do the judges' opinions suggest about the relationship between law and morality?

The prosecutor, the jury, and the executive all have the power to allow the defendants to escape judgement and punishment. What is it about the nature of the judiciary that does not allow them this discretion? Does it make sense?

## **W. July 8**

### Assignment:

\*\*T. Hobbes, Leviathan (excerpts),

\*\*John Locke, Second Treatise on Government (excerpts)

\*J.S.Mill, On Liberty (excerpts)

### Questions:

What is the source of law for Hobbes?

Why was this revolutionary?

What is the purpose of law for Hobbes?

In what respects does Hobbes consider all persons as fundamentally equal?

Why does he think this is a source of insecurity that leads to a state that he describes as war of all against all?

Does Hobbes seem to think that the law should have limits?

How is Locke's theoretical approach similar to Hobbes'?

How is it different?

On what ground does Locke anchor his basic assertions on which he builds his argument?

What is the source of law for Mill? Was this revolutionary in Mill's day?

What is the purpose of law for Mill?

On what grounds does he defend this purpose?

Does Mill think that the law should have limits?

What is the tyranny of the majority?

What is Mill's harm principle?

Why does he suggest that we adopt the harm principle?

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Why does he insist on a sharp distinction between collective preferences and individual liberty?

### **Th. July 9**

#### Assignment:

\*J.B.White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life"

\*\*R. Cover, "Violence and the Word"

#### Questions:

What is White's central premise about the nature of law?

Does White intend for his account of the law to replace other accounts, or to complement them?

How does Cover respond to White's central premise?

Think carefully about Cover's message. He tells us that "legal interpretation takes place in a field of pain and death," yet he never suggests that we don't need law, or that law should not generate "credible threats and actual deeds of violence." What is it that he wants us to understand about law's violence, then?

### **M. July 14**

#### C. How Much Law?

#### Assignment:

\*\*J. Noonan, "Persons and Masks of the Law"

#### Questions:

What does Noonan mean by "person?"

What does Noonan mean by "mask"?

What is the difference between a "role" and a "mask"?

What is the "Virginia Paradox?"

Can you think of two examples of "masks" of the law!

## **II. Legal Reasoning in the Common Law (19<sup>th</sup> century cases on the right of husband's to chastise their wives)**

### **T. July 24**

#### Assignment:

[Type here]

\*K. Llewellyn, the Bramble Bush, and cases on domestic violence.  
C. Talbot, New Yorker column on domestic violence  
M. Shapiro. Judges as Liars

Questions:

What does Llewellyn mean by comparing the law to a bramble bush?

What type of case was *State v. Pendergrass*?

What type of cases was *Joyner v. Joyner*?

The rest of the cases deal with crimes, so why were Pendergrass and Joyner included here?

What is the truly *unique* situation common to all cases except *Oliver*?

Why was *Joyner* included in the cases to read?

What was the rule of law in *Joyner*? What was the explanation?

What was the rule of law in *Rhodes*? What was the explanation for it?

Why is *Mabrey* important?

What was the rule of law in *Oliver*?

Did *Oliver* put an end to the problem?

Must judges be liars?

### III. The Adversary System

#### W. July 15

##### A. The Adversary System: Theory

##### Assignment

\*M. Feeley, "The Adversary System"

##### Questions:

What are the distinctive features of the adversary system?

How is "truth" found?

Are you convinced it is a sound process for resolving disputes?

What is an "inquisitorial" system?

How is "truth" found in it?

##### B. Other Legal Systems.

##### Assignment:

M. Volkansky, "Legal Traditions," from Comparative Legal Politics, pp. 23-40

[Type here]

Questions:

Describe the major differences between common law and civil law systems?  
Between Islamic law and traditional systems?

What are the two quite different meanings of “civil law”?

**Th. July 16**

C. The Adversary System in Action

*\*\*Movie, the Anatomy of Murder?*

(Note: In the opinions of a great many people, including me, this is the single best movie about the criminal trial process.)

Questions:

Does the defense lawyer conform to the role of set out Feeley’s account of the adversary system?

Does the prosecutor? The judge?

How might you imagine this case proceeding in an inquisitorial system?

**M. July 20**

D. The Adversary System in Action (con’t.)

Assignment:

Discuss Anatomy of Murder

*\*\*K. Bumiller, Victims in the Shadow of the Law, MATERIAL*

Questions:

Be prepared to summarize Bumiller’s argument in just a few words.

Where do the rights she discusses come from?

What does she mean by “civil rights model”?

What does she mean by the “ethic of survival”?

What evidence does she marshal to support her arguments?

Are you convinced of her arguments? If so, explain. If not, explain.

How might the law overcome the problems she has identified?

**T. July 21**

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### C. Critiques of the Adversary System

#### Assignment:

*Video on plea bargaining*

\*J. Langbein. "Torture and Plea Bargaining," MATERIALS

\*M. Feeley, Legal Complexity and the Transformation of the Criminal Process, MATERIALS

#### Questions:

What is plea bargaining?

According to Langbein was torture an extra-judicial form of punishment, or a highly structured and controlled technique for obtaining evidence?

According to Langbein, what led to torture?

What does both torture and plea bargaining tell us about the aspirations of the architects of the criminal process?

According to Langbein, why did plea bargaining arise?

According to Feeley, why did plea bargaining arise?

Many legal scholars argue that the rise of plea bargaining led to the decline of the adversarial trial.

Does Feeley find this to be the case?

Which criminal proceeding do you prefer, the "golden age of the trial," or contemporary plea bargaining?

If we don't like plea bargaining, how might we put an end to it?

Can you think of some types of cases where plea bargaining might be appropriate?

### **W. July 22**

#### Supplements and Alternatives to the Adversary System

#### Assignment:

\*S. Talesh, Lemon Laws and Internal Dispute Resolution  
NY *Times*, Arbitration articles

#### 1. Mediation

*(Judge Jonathan Silbert on Mediation... via zoom)*

*J. Silbert, Mediation ???*



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## Th. July 23

### MIDTERM

Two hour exam to be completed between 8 and 10 am

**M. July 27 (No class. Heavy reading/watching assignment in preparation for class on T. July 28)**

### Alternatives to Conventional Courts

#### Assignment:

#### 1. Problem-Solving Courts.

VIDEO.Red Hook Community Justice Center. allow="accelerometer; autoplay; encrypted-media; gyroscope; picture-in-picture" allowfullscreen></iframe>

\*\*G. Berman and J. Feinblatt, Good Courts (Problem-Solving Courts)

#### Questions:

What are problem solving courts?

How do they differ from “regular” courts?

How are they similar?

What is the aim of the judicial decision in the adversary process?

What is the aim of judges in problem-solving courts—are the aims similar or substantially different?

Can problem-solving courts work?

#### 2. Restorative Justice

#### Assignment:

VIDEO.M. Umbreit, *Restorative Justice*. video <https://vimeo.com/111253366>

\*\*J. Braithwaite, Restorative Justice and Responsive Regulation

#### Questions:

What is restorative justice?

How does it differ from the adversarial system?

....the inquisitorial system?

....problem solving courts?

What do you think are the strengths of restorative justice?

The weaknesses?

[Type here]

## **T. July 28**

Come prepared to discuss videos and articles by Berman and Feinblatt, and Braithwaite

## **IV. Courts and Politics: The Power and Limits of Courts**

## **W. July 29**

A. The Constitution and Judicial Review: Historical Perspective

### Assignment:

\*Publius [Alexander Hamilton] Federalist #78, MATERIALS

\*\*Brutus, Anti-Federalist, XI, XII, XV, MATERIALS

**-New Yorker article on Sheriff, “I determine what is constitutional” (New Yorker)**

### Questions:

What is judicial review? Why is it important?

What is the rationale for judicial review?

What governmental branch is Publius most interested in constraining?

What governmental unit is Brutus most interested in protecting?

Where does he think the problem lies?

Which author do you think is most convincing? Why?

Explain, including showing how the other author is not as convincing.

## **Th. July 30**

## **The Continuing Controversy over the Power of the Courts**

\*\*R. Dahl, “The Supreme Court as a National Policy-Maker,” (Revisiting Publius)

The U.S. Constitution (Read Articles I, II, and III, and Amendments I – X (Bill of Rights), and (Civil War) Amendments XIII, XIV, and XV

Feeley and Krislov. Table of Contents, American Constitutional Law

### Questions:

Who is more powerful, the Supreme Court or Congress?

Who is most likely to win in a battle between Congress and the Court?

What was the New Deal?

What happened on the Court during the New Deal?

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Does Dahl's argument support Publius's argument in Federalist #78, or does it undermine it?

According to Dahl, what is the Supreme Court's primary function?

How does Dahl's argument relate to Brutus' argument? Does Dahl miss something that Brutus anticipates?

What is the most important section in Article I?

What difference jumps out at you when reading the first words of the Bill of Rights and the first words of the XIV Amendment?

What are the Civil War Amendments? Which one do you think is most important?

Why?

When you scan the *names* of the parties in the cases in Chapters 4 – 10, does anything jump out at you? What?

## **M. and T. August 3 and 4**

### 1. Case Study of Courts and Social Change: School Desegregation

Assignment:

*Video on Brown v. Board of Education (1954)*

\*G. Rosenberg, *The Hollow Hope*, Chapter 2 (school desegregation), pp. 39-71.

Questions:

## **W. and Th. August 5 and 6**

### 2. Case Study Controlling Police Use of Force

***Video. Police use of force***

\*\*C Epp. *Making Rights Real* (1-114)

Questions:

## **M. August 10**

### Tools of Judges in Public Law Litigation

#### 1. Special Masters

Assignment:

\*M. Feeley, *Implementing Court Orders: Judges as Executives*

[Type here]

Questions:

What is a special master?  
What are his/her functions?  
Have judges become executives?  
What do you/Feeley mean by this?  
Why do you think courts take on these thankless roles?  
What are the alternatives?

3. Class Actions

Assignment:

\*O.Fiss, The Political Theory of Class Action  
\*\*D. Bell, Serving Two Masters: Problems Class Action

Questions:

What does Fiss mean when he compares class actions suits with litigation by attorneys general?  
Identify a situation where a class action case has obvious benefits?  
Who are the two “masters” that Bell has identified? What is the problem with them?  
Return to consider Epp’s work. What does he see as the value of the cases he examined? Were they class actions?

**T. August 11**

Assessment: The Symbolic function of law and courts (?)

Assignment:

\*\*G. Rosenberg, The Fly Paper Court  
*Michael McCann, (Youtube video. 13 minute version)*

Question:

What is fly paper?  
What does he mean by the “fly paper court”?  
Is McCann more or less optimistic than Rosenberg about courts effecting social change? Why/why not?

[Type here]

## **W. August 12**

### **Catch-up, Assessment, and Review**

Come to class with questions

## **Th. August 13**

### **Final Examination**

Two hour final exam to be completed between 8 and 10 am.

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### **CONTENTS of COURSE MATERIALS (in rough order)**

**L. Fuller, "The Case of the Speluncean Explorer"**  
**T. Hobbes, Leviathan (excepts)]**  
**J. Locke, Second Treatise on Government**  
**J.S. Mill, "On Liberty,"**  
**J.B.White, "Law as Rhetoric, Rhetoric as Law,"**  
**R. Cover, "Violence and the Word,"**  
**J. Noonan, "Persons and Masks of the Law,"**  
**K. Llewellyn, The Bramble Bush and Cases on Legal Reasoning**  
**M.Shapiro. "Judges as Liars"**  
**M. Feeley, The Adversary System**  
**M. Volkanssek, "Legal Traditions"**  
**K. Bumiller, Victims in the Shadow of the Law**  
**J. Langbein. "Torture and Plea Bargaining"**  
**M. Feeley. "Legal Complexity and the Transformation of the Criminal Process"**  
**Video. Plea Bargaining**  
**S. Talesh, Lemon Laws**  
**NY Times. Arbitration**  
**Video (?) Mediation (Judge Jonathan Silbert)**  
**--Greg Berman and John Feinblatt, Good Courts**  
**Video. Red Hook Community Court**  
**John Braithwaite, Restorative Justice and Responsive Regulation**  
**Video. The Theory of Restorative Justice**  
**Stuart Macaulay, Continuing Relations....**  
**D. Black, Crime as Social Control**

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**U.S. Constitution**

**Publius [Alexander Hamilton] Federalist #78**

**Brutus, Anti-Federalist**

**A. Bickel. The Counter Majoritarian Difficulty**

**New Yorker, Sheriff article**

**R. Dahl, "The Supreme Court as a National Policy-Maker"**

**M. Feeley and S. Krislov, Table of Contents, American Constitutional Law.**

**U.S. Constitution**

**Video. Brown v. Board of Education**

**G. Rosenberg, The Hollow Hope (school desegregation)**

**C. Epp. Making Rights Real (Curbing Use of Force by Police), pp. 1-114; and**

**Study Guide**

**M. Feeley, Implementing Court Orders: Judges as Executives (Special Masters)**

**O.Fiss, The Political Theory of Class Action**

**D. Bell, Serving Two Masters: Integration Ideals and Client Interests (Class Action)**

**G. Rosenberg, The Fly Paper Court**

**Video. Michael McCann, The Impact of Litigation and Courts (13 minute video)**

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**Response Papers.**

Fourteen readings or videos have been identified for this assignment. You must write responses to any five of them. Papers should be around 300 words long, and address the question(s) posed for the particular assignment. E-mail responses Mr. Spenser no later than 9 pm the evening before the assigned reading is considered in class, the dates indicated below. Assignments will be posted separately. No response papers will be accepted after 9 pm on date due. Absolutely! Note: This assignment is designed to aid you in connecting the dots among several readings, and to aid for you in preparing for the midterm and final exams. As well authors of the papers are expected to be first among equals in opening discussion of the assigned readings in zoom classes and discussion sections. In the list of readings below, those readings which are subjects for the response papers are identified by an asterisk (\*). Advice. Start early and space out your papers. Writing a brief response is a good way to assure that you have read it carefully.

- 1) Paper due Tuesday, July 7, by 9 pm  
Thomas Hobbes, The Leviathan  
John Locke, Second Treatise on Government

Who gives the more rigorous explanation for their particular form of social contract?  
Explain.

- 2) Paper due Wednesday, July 8, by 9 pm  
Robert Cover. Violence and the Word

[Type here]

“The logic of Cover’s essay is that we should do away with and find alternatives to law, since law inevitably fosters and depends on violence.”

How would Cover respond to this assertion? **8** Agree or disagree? Explain?

3) Paper due Monday, July 13, by 9 pm  
John Noonan. Persons and Masks of the Law

Noonan seems to be arguing that since law requires “masks” which support a rigid and artificial language, law should be replaced by a concern with “persons,” and thus be responsive to unique and distinctive features of humans and human behavior. This will lead to fairer and more effective forms of social control.”

Do you agree or disagree with this assertion? Explain.

4) Paper due Sunday, July 19, by 9 pm  
Movie, Anatomy of Murder

The actions of defense attorney in *The Anatomy of Murder* nicely illustrates one of the central features of the adversary system, that the central actors are not interested in truth but winning, but that nevertheless the truth is revealed as a by-product of this process.

Do you agree with both components of this assertion, i.e. the limited concerns of the attorneys and that truth will be revealed as a by-product of the process? Explain and give examples.

5) Paper due Sunday, July 19, by 9 pm  
Kristin Bumiller, Victims in the Shadow of the Law

Bumiller identifies a complicated set of reasons for why (mostly working class minority) women do not bring employment discrimination charges. Can you summarize her argument and then try to simplify it? Can you think of another possible explanation that she does not address at all?

6) Paper due Monday , July 20, by 9 pm  
Malcolm Feeley, Legal Complexity and the Transformation of the Criminal Process

Many people assert that the plea bargaining represents the demise of the criminal trial and the decline of the adversary process. Does Feeley present evidence that supports this view? Explain.

[Type here]

7) Paper due Tuesday, July 21, by 9pm

Shauhin Talesh, "How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws"

What are the two or three most important factors that account for differences between Vermont and California? Why are they important?

8) Paper due Sunday, July 26, by 9 pm

Greg Berman and John Feinblatt, Good Courts, and the accompanying video on the Red Hook Community Court

What are the major differences between the adversary process depicted by Feeley (The Adversary System) and the problem-solving approach advocated by the authors above? Which method do think is more effective? Are the limits to either?

9) Paper due Monday, July 27, by 9 pm

Greg Berman and John Feinblatt, Good Courts.

What is the purpose of problem-solving courts? Do they achieve "justice"?

10) Paper due Monday, July 27, by 9 pm

John Braithwaite, Restorative Justice and Responsive Regulation, and video by Mark Umbreit

What are the essential features of their approach? Do you think they could be applied to major criminal offenses? Why/why not?

11) Paper due Tuesday, July 28, by 9 pm

Articles by Macaulay, Christie, Black, and Feeley.

What is the commonality among the types of disputes and disputers that common to all or almost all of these articles?

Is this the reason that "informal" private alternatives are effective? Explain.

12) Paper due Wednesday, July 29 by 9 pm

Robert Dahl. The Supreme Court as a National Policy-Maker

Do Dahl's findings support or undermine Brutus' arguments in his Anti-federalist Papers? Explain.

13) Paper due Sunday, August 9 by 9 pm

Derrick Bell, Serving Two Masters



[Type here]

Who are the Two Masters in Bell's article? Why is it a problem for him? Would the problem be wholly resolved if there were not two masters? Explain.

14) Paper due Monday, August 10  
Gerald Rosenberg, The Fly Paper Court

What is his core argument here? Do you think his argument applies equally to judicial involvement in school desegregation cases and cases involving excessive use of force by police (covered in Sessions 17-20)? Explain.