

**SYLLABUS (provisional)**

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Lecture T Th 8:10 –10:am (Via Zoom)

Introduction:

This course examines core issues about the nature and function of a 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, the social sciences, judicial opinions, and for the most part include chapters from books, articles, and judicial opinions. If you are attentive to these materials and engage during lectures and discussion sections, you will become knowledgeable one of society's most important institutions, law and the legal system.

Required Materials:

All required readings for LS 182 (Summer 2021) 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 and Plans for the Course

The class is scheduled to meet regularly on Zoom from 8:10 am to 10:00 am (PDT), Monday – Thursday, beginning Monday July 5) and winding up Thursday August 13. With luck, this will be the last time any of us will have classes on Zoom. Apart from two or three times when we schedule videos or films in lieu of class, the course will be synchronous, and meet during the scheduled times. I hope to organize some break out groups to work carefully through some materials that lend themselves to especially close reading.

Ten hours per week on line per class 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. The

The midterm and final exams are scheduled during the normal class times. The midterm is on Thursday July 22, and the final exam is on Thursday August 13.

A note on class readings. It will make all the difference if you read the assigned materials before they are discussed in class. My comments are usually divided into three parts. A brief introduction setting the context and background for the article and author; a brief review of the main points of the article; and then the largest part, a wide-ranging discussion of its implications of the readings for the themes of the class and some connection to other earlier and later, future readings. That is the reading materials are integrally related to each other, so the more of the pieces you read, the more you will be able—and expected—to relate them to each other.

When I lecture, I assume that you are familiar with the main points and themes in the readings assigned for the day, and my job is to explore variations on the themes, background, context, and implications, and connections with other readings. If you are not familiar with the main points, you will, I am afraid, miss much of the meaning in my comments about variations and implications. Of course, if after reading the material, you have questions, you are encouraged to bring them up at the beginning of each class session, raise your hand during my presentation, and I'll stop to address it. Or contact me during my office hours. As you will see, I both know and love the materials. I think the raise important questions about law, politics, and civic responsibility. I'm anxious to share my interest with you.

I assure you that you will be much better off, learn the materials much more thoroughly and see connections among them more easily if you do the readings *before* rather than after the day they are discussed in class. The reading load is moderately heavy, and students are expected to keep up throughout the course. So, keep up.

The GSI's discussion sessions will last for one hour, rather than two, but will be followed by an open office hour where you can ask any questions about the readings, lecture, or class generally. We will be using Zoom's "breakout rooms" function from time to time to allow you to talk to your fellow students in smaller groups before a larger class discussion, so please come to class prepared to discuss the readings and lecture material in small groups, and through the chat function on Zoom.

As a guide, I have included a set of questions after most of the assigned readings. I recommend that you address these questions before you start reading the assignment, and then again afterwards. If you can't answer a question, I advise you to go back through the reading again, talk to others in the class, the GSI, or me. However, just about all the readings merit a second (and third) close reading.

Malcolm M. Feeley

## Graded Assignments

Midterm (Thurs. July 22)	25%
* Five one page response papers to assigned readings	30%
Final Exam (Thurs. Aug. 13)	35%
Class and Section discussion, oral presentations, Participation, at discretion of GSI and instructor	<u>10%</u>
TOTAL	100%

### \*Response papers.

Eleven readings or sets of readings have been identified for this assignment. Students must write responses to any three of them. Papers should be around 350 words long, and address the question(s) posed for the particular assignment. Deliver responses Mr. Akdemir no later than 8 pm the evening BEFORE the assigned reading is to be discussed in class, and expect to be first among equals in commenting on them. Note that to complete the course, you must submit a total of five response papers, but that no response papers will be accepted after 8 pm on date due. If you submit a late paper (you can always turn it in early), it will not be accepted, and you will have to submit another one for the assignment to count. Absolutely!

**NOTE:** Our recommendation is for you to write one response paper every other week for the six week the course. Above all, do not procrastinate so that you are unable to complete three assignments and turn them in on time. As we say, late papers will not be accepted.

The readings designated for response papers are indicated by an asterisk (\*) in the syllabus below, and the *question(s)* posed for the response papers are found below the questions on the date that assignment is to be covered in class. NOTE that the response paper assignments do not ask you to address all the questions raised about them found in the syllabus, but are for the most part more limited and specific. Still, if you can answer the questions about them in the syllabus, you should be able to address the question posed for the response paper very quickly and with confidence.

Our suggestion is that early on you team up with two or three other people in the class, share your response papers after you have turned them in, discuss them among yourselves, write still more papers like them on other assignments, and share them too. Discussing these assignments among yourselves and perhaps in groups with me or Mr. Akdemir is a great way to learn the materials and prepare for the exams.

## READING ASSIGNMENTS

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

**Tu. and W. July 6 and 7**

A. Introduction

Assignment:

[L. Fuller, "The Case of the Speluncean Explorers."](#)

Questions:

Which judge's opinion do you most agree with?

One of the justices withdrew from the case, so the chief justice decided to add one more judge to the court (why?). That judge was you. By 8:00am Tuesday, send a copy of your option, outlining your opinion and vote in the case. No need to summarize, facts.

Keep in mind, you are a judge and your views as a private citizen are not important. You are to interpret and apply the law. That is, you are to speak truth about the law, not your feelings or opinion about the case! Must be sent by the time class starts on Tues! Late papers not accepted. This NOT one of the three response papers you must write.

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?

**Th. July 8**

Assignment:

[\\*T. Hobbes, Leviathan \(excerpts\),](#)

[\\*John Locke, Second Treatise on Government \(excerpts\) Response paper addresses both Hobbes and Locke 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?

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

**Response Paper #1 (Due 9 pm, July7).** Who gives the more rigorous explanation for their particular form of social contract, Hobbes or Locke? Explain

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?

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

## **M. July 12**

### 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?

**Response Paper #2 (Due 9 pm, Sunday July 11).** How would Cover respond to the assertion below? Agree or disagree? Explain?

"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."

**T. July 13**

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!

**Response Paper #3 (Due 9 pm, July 12).** 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

**II. Legal Reasoning in the Common Law (19<sup>th</sup> century cases on husbands' to chastise wives)**

**W. July 14**

Assignment:

[K. Llewellyn, the Bramble Bush, and cases on domestic violence.](#)  
[M. 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

#### Th. 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.

##### **B: Alternatives to the Adversary system and Schools of Law**

[M. Volcansek, "Legal Traditions," from Comparative Legal Politics, pp. 23-40](#)

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”?

## **M. July 19**

### C. The Adversary System in Action

#### Assignment (Watch sometime the week before)

*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.)

<https://lumiere.berkeley.edu/students/items/34082>

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

#### 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?

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?

### **Response Paper #4 (Due Sunday July 18, 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?

## **Tu. July 20**



## 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 think that the rise of plea bargaining led to the "twilight of the jury trial."

Does Feeley think this to be the case? Explain.

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

If you 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?

## **Reponse Paper #5 (Due Monday July 19, 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.

## **W. July 21**

### Supplements and Alternatives to the Adversary System:

### Assignment:

1. Specialized tribunals

[\\*S. Talesh, Lemon Laws and Internal Dispute Resolution](#)

## 2. Arbitration

[NY Times, Arbitration articles](#)

## 3. Mediation

Go on-line and find some articles about mediation (note: not all you read on-line is accurate). So, read enough to be confident that you know what mediation is, and can distinguish it from adjudication and arbitration.

(Note: Come to class prepared to respond to the several problems posed in the hand-out distributed on July 20.)

**Response Paper #6 (Due Tues. July 20, 9 pm).** 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?

**Th. July 22**

**MIDTERM during class hours**

**M. July 26**

Problem-Solving Courts

Assignment:

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 from standard courts?

**Response Paper #7 (due Sunday July 25, 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?

**Tu. July 27**

*VIDEO. Mark Umbreit, Restorative Justice. video <https://vimeo.com/111253366> or another video on restorative justice*

[\\*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?

**Response Paper #8 (due July 26, 9 pm).** Problem Solving Courts vs. Restorative Justice (Address both Berman and Feinblatt and Braithwaite.)

Although they both offer significant departures from the standard adversary process and share some commonalities, nevertheless, these two alternatives are quite different from each other. Can you identify the main perspective of both approaches and their sharp differences?

#### **IV. Administrative Agencies. Law making and dispute resolution**

#### **V. Courts and Social Policy: The Power and Limits of Courts**

##### **M. Aug 2**

A. The Constitution and Judicial Review: Historical Perspective

Assignment:

[Publius \[Alexander Hamilton\] Federalist #78, MATERIALS](#)  
[Brutus. \[Robert Yates?\] Anti-Federalist, XI, XII, XV, MATERIALS](#)

[R. Dahl, the Supreme Court as a National Policy Maker](#)

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.

Whose position does Dahl's central finding tend to support? Explain.

What types of cases did Dahl explore? What limits are implied by this choice of focus?

Response Paper # 9. (due Sunday August 1, 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.

## The Continuing Controversy over the Power of the Courts

### Tu. Aug 3

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

Assignment:

*Brown v. Board of Education (1954)*

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

Recent Article, Brown at 65, to be added

Reread K. Llewellyn's *Bramble Bush* piece (see assignment for July 14).

#### Questions:

What was (the single) question posed by Brown?

What was (the single) answer provided by Brown?

If you are a judge and wanted to narrow *Brown*, what might you do? If you were a judge and wanted to read *Brown* expansively, what would you do?

\*Response paper #10. (Due Monday August 2 by 9 pm.) On p. 51 of the **Hollow Hope (chapter two), Rosenberg** has a graph showing that after the Court's ruling in *Brown v. Board of Education* students in Southern schools started attending mixed race schools. Yet, Rosenberg argues that Brown was not very effective. If *Brown* did not force the dramatic increase shown in the graph, what did? Is Rosenberg wrong?

### W. Aug 4

#### 2. Case Study Courts and Social Change: Controlling Police Use of Force

Assignment:

**Video. Police use of force (???)**

[C Epp. Making Rights Real \(1-114\)](#)

Questions: (see M. Feeley, "Study Guide" to Epp. in course materials)

**Thurs. Aug 5. Voting Rights Act**

**Aug 9 Mon. Abortion and Women's Rights**

Roe v. Wade (1973)

Planned Parenthood v. Casey (1992)

Kristen Luker, Abortion and the Politics of Motherhood

**Aug 10. Prison Conditions and Judges as Policy Makers**

Assignment:

1. Case Study of Prison Conditions

M. Feeley and E. Rubin, Judicial Policy Making (chapter 3, Arkansas case study)

Questions:

What do F&M mean by policy making?

How does it differ from interpretation?

What was the vision or policy objective of the Court in the Arkansas case?

How were the judges able to implement their policy?

Who were the real adversaries in this case?

2. Special Masters

[M. Feeley, Implementing Court Orders: Judges as Executives](#)

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?

Why didn't the first judge in the Arkansas case initially appoint a special master?

## 2. 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? (con't. next page)

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?

What constituted the "class" in the Arkansas case?

### **Response Paper # 11 (due Aug 8 by 9 pm). Derrick Bell, Serving Two Masters**

Bell's view complicates Fiss's political theory of class action? Explain how. 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

## **Tu. Aug 10**

### **3. Standing**

#### Assignment

Sarah Stazsak, Realizing the Rights Revolution (add)

## **W. Aug 11**

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

Come to class with questions

**Th. Aug 13**  
**FINAL EXAMINATION**

## **APPENDIX**

### **Response Paper Assignments.**

Fifteen readings have been identified for this assignment. You must write responses to any five of them, preferably spaced out one per week for five of the six weeks of the course.. Papers should be around 300 words long, and address the question(s) posed for the particular assignment below. Send them to Mr. Sangster by email no later than 9 pm the evening before the assigned reading is considered in class, the dates indicated below. 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 the readings, so that you see the bigger picture or multiple sides of an issue. Also, they should be useful aids in preparing for the midterm and final exams.

Authors of the response papers are expected to be first among equals in opening discussion of the assigned readings in the zoom class in which they are discussed, so if you have written one expect to be called upon at random during the class period. Advice. Start early and space out your papers to one per week for the first five weeks on the class.

**Note: No late papers accepted**

1) Paper due Sunday July 11, by 9 pm  
**Robert Cover. Violence and the Word**

“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? Agree or disagree? Explain?

2) Paper due Monday, July 12, 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.

3) Paper due Sunday, July 18, 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?

4) 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.

5) 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?

6) Paper due Sunday, July 25, 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?

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

7) Paper due Monday, July 26, by 9 pm

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

Although both Berman and Feinblatt on the one hand and Braithwaite offer significant departures from the standard adversary process and share some commonalities, nevertheless, the two alternatives they propose are quite different from each other. Can you identify the main perspective of both approaches and their sharp differences?

8) Paper due Sunday August 1, 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.

9) Paper due Sunday, August 8 by 9 pm

**Derrick Bell, Serving Two Masters**

Does Bell's view complicate Fiss's political theory of class action? 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.