

SYLLABUS

Professor: Malcolm M. Feeley (mfeeley@law.berkeley.edu)

GSI: Anthony Carrasco (anthonycarrasco@berkeley.edu)

Lecture M, Tu, W, Th 8:10 –10am

Section W 10 am and Th noon

Lecture Classroom: All days - Anthropology and Art Practice Building (room 155)

Section Classroom: W – Social Science Building (room 136) Th – Dwinelle (room130)

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 affect 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 2022) are posted on the Bcourse site, and easily accessed on the dashboard on b-courses. Additional readings and videos may be posted from time to time, so stay tuned.

The midterm and final exams are scheduled during the normal class times. The midterm is on Thursday June 9, and the final exam is on Thursday June 30.

A note on class readings. Summer sessions is one long sprint. To do well, you must keep up with the readings, and it will make all the difference if you read the assigned materials before they are discussed in class. 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 they raise important questions about law, politics, and civic responsibility. I'm anxious to share my interest with you. In order to

give you extra incentives to do so, be prepared for unannounced pop quizzes that I will require from time to time.

As a guide to your reading, I have included a set of questions after each 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, go back through the reading again, talk to others in the class, the GSI, or me to seek clarification. However, just about all the readings merit a second (or third) close reading.

Response Paper Assignments

Nine readings or sets of readings have been identified for this assignment (by an asterisk *). Students must write responses to any three of them. The assignment assumes that you can answer the questions posed for the day's assignment and directs you to a more specific question(s) immediately after the description of the assignment. Your paper should address this question(s).

Response papers should be around 350 words long and posted no later than 8 pm the evening BEFORE the assigned reading is to be discussed in class. Expect to be first among equals in commenting on this reading. Note that to complete the course, you must submit a total of three 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!

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.

Section Discussion and GSI Office Hours

Every week, 2 hours of section discussion will be available to each enrolled student: the first hour is required; the second is optional. A section discussion is where you can practice discussing the course material among a collection of eager and engaged peers. It is very important to bring to section whatever questions or confusions which may have sprung from the week's readings. Every section will begin with an opportunity for anyone in the class to begin a discussion of any concerns regarding the course material.

The point of section is to begin playing with new ideas (many of which you may be engaging with for the first time thanks to this course). Read before class, read before section, and you should have a great time!

Every week, 2 office hours will be available to each enrolled student. An office hour is where you can ask any questions about the readings, lecture, or class generally. One "walk-in" hour will be after Monday's lecture (1 pm) at the Kaddish Library; 2240 Piedmont Street, Berkeley. For the second office hour, you can sign up [here](#) -- same time and place Thursday after class. Email if

you have any questions or need to schedule another time to meet via anthonycarrasco@berkeley.edu

Graded Assignments *

Midterm (Thurs. June 9th)	25%
Three one-page response papers to assigned readings	24%
Final Exam (Thurs. June 30th)	35%
Class and Section discussion, pop quizzes, oral presentations, participation, at discretion of GSI and instructor	<u>16%</u>
TOTAL	100%

*Note that each component above is enough to make a difference, so pay attention to the quality of work in each of these areas.

READING ASSIGNMENTS and CLASS QUESTIONS

I. Introduction to Law (and Politics)

M. and T. May 23 and 24

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 opinion, 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?

W. MAY 25

Assignment:

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

[*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?

Response Paper #1 (Due 8 pm, Tu. May 24). 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?

Is liberty a means to an end or an end in itself, for Mill?

Th. May 26

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 8 pm, Wed. May 25). 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."

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

M. May 30 HOLIDAY Memorial Day

Tu. May 31

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 8 pm, Mon. May 30). 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 (19th century cases on husbands' to chastise wives)

W. June 1

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. June 2

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?

[Ribeiro et. Al. “Decision-Making in an Inquisitorial System: Lessons from Brazil.” Law & Society Review 56\(1\): 101– 121. 2022](#)

Questions:

What is an “inquisitorial” system?

How is “truth” found in it?

B.Other Legal Systems.

M. June 6

C.The Adversary System in Action

Assignment: VIEWING *The Anatomy of Murder*

<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 8 pm, Sunday June 5). 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. June 7

C. Critiques of the Adversary System

Assignment:

<https://www.youtube.com/watch?v=lUfEov7QGGw>

[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 8 pm, Monday June 6). 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. June 8

Supplements and Alternatives to the Adversary System:

Assignment:

Law without the State

[Richmond, Diamond Dealers](#)

[Malcolm M. Feeley, Private Criminal Courts](#)

Th. June 9

MIDTERM during class hours

[M. June 13](#)

A. Arbitration

[NY Times, Arbitration articles](#)

Sarah Saszack, Paper on Arbitration

Tu. June 14

Problem-Solving Courts and Restorative Justice

Assignment:

[*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 #6 (due 8 pm Sunday June 12). 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 you think is more effective? Are there limits to either?

Assignment

[*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 #7 (due 8 pm, Sun. June 12). 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?

V. Courts and Social Policy: Sources of Judicial Power

Wed. June 15

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 # 8. (due 8 pm, Monday June 13) 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.

VI. The Power and Limits of Courts

Th. June 16 and Tu. 21

A. Framework for thinking about courts as change-agents

Assignment:

G. Rosenberg. The Hollow Hope, Chapter 1

B. Case Study: Courts and Social Change--School Desegregation

Assignment:

Plessey v. Ferguson (1896)
Mendez v. Westminister (1947)
Brown v. Board of Education (1954)

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

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? (Go back and reread the cases on the right of a husband to chastise his wife.)

M. June 20 HOLIDAY Juneteenth Day

Tu. June 21 (See assignment for June 16)

Wed. June 22

[C. Case Study: The Voting Rights Act and the Courts](#)

Assignment:

[Rosenberg, Chap. 2, The Hollow Hope, pp. 57-71](#)
[Shelby County v. Holder](#)

Th. June 23

[Tools used by Courts to effect sweeping decisions.](#)

A. Special Masters

Assignment:

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

B. Class Actions

Assignment:

[O.Fiss, The Political Theory of Class Action](#)

[*D. Bell, Serving Two Masters: Problems Class Action](#)

[Sarah Staszak, Realizing the Rights Revolution](#)

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?

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.

Identify a situation where a class action case is highly problematic.

Response Paper # 9 (due 8pm, Wed. June 22). Contrasting Owen Fiss, The Political Theory of..., and 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

Fri. June 24. THIS FRI. SESSION IS BUILT INTO THE ACADEMIC CALENDAR

Assignment

Tools used by the court to contract the scope of the law

Feeley and Swearingen, Devolving Standards: California's Structural Failures in Response to Prisoner Litigation

M. June 27 and Tu. June 28

Case Study: The Supreme Court and Abortion (the new jurisprudence)

Griswold v. Connecticut (1965)

Roe v. Wade (1973)

Planned Parenthood v. Casey (1992)

Dobbs v. Jackson Health Center (2022)

Rosenberg, The Hollow Hope, pp. 173-201, "Transforming Women's Lives? The Courts and Abortion"

Rosenberg, The Hollow Hope, Chapter 14, "Conclusion: the Fly Paper Court"

W. June 29. Catch up and review

Come to class with questions

Th. June 30

FINAL EXAMINATION (in class)