This course is devoted to the study of the history, theory, and modern applications of the Rule of Law as a legal and political ideal. We will look at the aspiration to have a society ruled by laws rather than by powerful people, and we will examine some of the difficulties and controversies surrounding this ideal, and its relation to other issues in modern law and legal theory.

Class times: Wednesday 2:10-3:25pm and Friday 12:00-1:15pm, in Vanderbilt Hall Room 204

Teaching: The course will be taught through lecture, rather than Socratic format. I hope the lectures will be interrupted with frequent questions and interventions. You should come to each class with a list of two or three issues from the reading that you want clarified (or that you want to raise in discussion) and I will be happy to address them.

Reading: The course is quite demanding on reading. You should cover all the reading suggested on this syllabus. Unless I indicate otherwise, all required reading is liable to be tested in the final exam. There will be a further list of books and articles that are relevant to our various topics and are worth reading, but which you will not be directly examined on. These and they will certainly be helpful to you in but they may not be discussed to any extent in the lectures nor will they be directly tested in the exam.

I also recommend purchase of the following books as background reading for the class:


Tom Bingham, The Rule of Law (Allen Lane 2010)

They are not perfect but they both work as fine introductions. I will occasionally ask you to read chapters from these books. The NYU Bookstore claims that Lord Bingham’s book is not available; but it can be bought through Amazon and elsewhere.

Web-site: The class has a web-site (NYU Classes) on which various readings and additional materials will be posted. You should look at the NYU CLASSES site under MATERIALS for the up-to-date details of what we are doing for each class. Most materials are provided on the NYU CLASSES site. For some, you will have to click on a url provided in the syllabus; for a very few, materials will be photocopied an distributed. Cases you can look up yourselves.

Office Hours: My office hours are Fridays, 2:30pm to 3:30pm, in VH 424. I am also available by appointment; just send me an e-mail
READING (all readings on NYU Classes under “Materials” unless otherwise stated)

(1) INTRODUCTION TO THE RULE OF LAW (Wednesday, January 17)
Required reading:

- WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX at http://worldjusticeproject.org/factors

(2) PLATO & ARISTOTLE ON RULE BY LAW (Friday, January 19)
Required reading:

- PLATO, THE STATESMAN (360 BCE), extract
- ARISTOTLE, THE POLITICS, NICOMACHEAN ETHICS and RHETORIC (350 BCE) extracts
- Stephen Burton, Particularism, Discretion and Rule of Law, (reply to Solum), ibid.
- Riggs v. Palmer115 NY 506, 22 NE 188 (1889)

(3) NATURAL LAW THEORIES (Wednesday, January 24)
Required reading:

- MARTIN LUTHER KING, LETTER FROM A BIRMINGHAM JAIL (1963), at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html
- THOMAS AQUINAS, SUMMA THEOLOGICA (1274), extract
- JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689), extract
- JEREMY BENTHAM, ANARCHICAL FALLACIES & SUPPLY WITHOUT BURTHEN (1793), two extracts
(4) SOVEREIGNTY AND THE SEPARATION OF POWERS (Friday, January 27)
Required reading:
- THOMAS HOBBES, LEVIATHAN (1651), extract
- JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), extract
- LOCKE, TWO TREATISES, II, Ch. 7 (§§87-94) & Ch. 12 (§§143-8)

(5) COURTS AS THE KEY TO COSTITUTIONAL RULE OF LAW
(Wednesday, January 31) Required reading:
- THE FEDERALIST PAPERS no. 78 (Hamilton)
- Marbury v. Madison, 5 U.S. 137 (1803)
- Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861)
- Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579 (1952)—read Justice Black’s opinion for the Court (582-92) and Justice Jackson’s concurrence (634-55)
- Jeremy Waldron, Constitutionalism—A Skeptical View in his collection POLITICAL POLITICAL THEORY (2016)

(6): DISCUSSIONS OF LEGAL CULTURE & EXPERTISE (Friday, February 2)
Required reading:
- ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1831), from Chs. 14-16.
- JEREMY BENTHAM, OF LAWS IN GENERAL (1782), extract
- Jeremy Bentham, Truth versus Ashhurst (on “dog law”)
- Tom Bingham, The Accessibility of the Law, Ch.3 of his book THE RULE OF LAW
- Jeremy Waldron, Desanctification of Law and the Problem of Absolutes, NYU LAW SCHOOL PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES: WORKING PAPER No. 16-47, esp. pp. 2-6

- Optional / difficult reading: the passage from MAX WEBER, ECONOMY AND SOCIETY, referred to in the Waldron essay.
(7) DICEY AND THE RULE OF LAW v. DROIT ADMINISTRATIF
(Wednesday, February 7)
Required reading:

- A.V. Dicey, An Introduction to the Study of Law and the Constitution (1887)
- A.V. Dicey, ibid., additional extract on droit administratif
- K.C. Davis, Discretionary Justice (1969), extract

(8) F.A. HAYEK ON THE RULE OF LAW: (i) EARLY WORK (Friday, February 9)
Required reading:

- F.A. Hayek, The Road to Serfdom (1944), Ch. 6: Planning And The Rule Of Law
- Joseph Raz, The Rule of Law and its Virtue, last 4 pages (299-302)
- Cass Sunstein, Rules and Rulelessness at http://www.law.uchicago.edu/files/files/27.CRS_.Rules_.pdf (focus on pp. 29-33; we'll read the rest of this article later)
- Brian Tamanaha, On the Rule of Law (2004), pp. 65-72

(9) HAYEK ON RULE OF LAW: (ii) SPONTANEOUS ORDER
(Wednesday, February 14) Required reading:

- John Hasnas, Hayek, the Common Law, and Fluid Drive, NYU J. Law & Liberty (2005)
(10) LON FULLER: (i) THE INNER MORALITY OF LAW (Friday, February 16)
Required reading:

- LON FULLER, THE MORALITY OF LAW (1964), two extracts

For deep background on the Hart v. Fuller debate (positivism v. anti-positivism) and the debate about whether Nazi Germany satisfied the Rule of Law, you might look at:

- Lon Fuller, extract from Positivism and Fidelity to Law: A Reply to Hart, 71 HARV. L. REV. 630 (1958), section II-V on Nazi "law"

Optional reading for this topic:


(11) LON FULLER: (ii) RETROACTIVITY (Wednesday, February 21)
Required reading:

- Lon Fuller, THE MORALITY OF LAW, longer extract from Ch. 2
- Jeremy Waldron, Retroactive Law: How Dodgy was Duynhoven? 10 OTAGO LR (2004), 631
- Material on abolition of marital rape doctrine in the UK
(12) CLARITY, VAGUENESS, AND INDETERMINACY (Friday, February 23)
Required reading:

• Lon Fuller, THE MORALITY OF LAW, longer extract from Ch. 2, pp. 63-5
• Papachristou v. City of Jacksonville 405 U.S. 156 (1972)
• Jeremy Waldron, Vagueness and the Guidance of Action, in Marmor & Soames (eds.) PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW
• McBoyle v. United States 283 U.S. 25 (1931)
• “I know it when I see it” – from Jacobellis v. Ohio 378 US 184 (1964)
• Robert Post, Reconceptualizing Vagueness: Legal Rules and Social Orders, 82 CALIFORNIA LAW REVIEW 491 (1994) -- OPTIONAL

(13) RULES AND THE RULE OF LAW (Wednesday, February 28)
Required reading:

• Fred Schauer, Playing By the Rules (1991), extract

(14) STARE DECISIS AND THE VALUE OF SETTLEMENT (Friday, March 2)
Required reading:

• Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 854-69 (1992)—focus on 854-869 on stare decisis (and also the dissents on stare decisis: 953-66 (Rehnquist) and 993-1001 (Scalia)
• Richard Fallon, Stare Decisis and the Constitution, 76 N.Y.U. LR 570 (2001)
• Jeremy Waldron, Stare Decisis and the Rule of Law, 111 MICHIGAN LAW REVIEW (2012)
  OPTIONAL
(15) THE RULE OF LAW AND PROCEDURAL VALUES (Wednesday, March 7)
Required reading:

- Lon Fuller, *Forms and Limits of Adjudication*, HARVARD LR (1978): read Parts I, III, IV, VI, and VII.
- **TOM BINGHAM, THE RULE OF LAW**, Chs. 8-9

OPTIONAL:

(16) THE RULE OF LAW AND RULE BY LAW (Friday, March 9)
Required reading:


(17) THE RULE OF LAW AND THE CONCEPT OF LAW (Wednesday, March 21)
Required reading:

- **N.E. SIMMONDS, LAW AS A MORAL IDEA** (2008), extract
(18) THE RULE OF LAW AND PROPERTY RIGHTS (Friday, March 23)
Required reading:
- JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689), extract (1)
- JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE (1802), extract
- Richard A. Epstein, Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State

(19) SUBSTANTIVE CONCEPTIONS OF THE RULE OF LAW
(Tuesday, March 28) Required reading:
- Ronald Dworkin, Political Judges and the Rule of Law, from his book, A MATTER OF PRINCIPLE (1985) -focus mainly on pp. 261-70
- Tom Bingham, Human Rights, Ch. 7 of his book THE RULE OF LAW

(20) CRITICAL VIEWS OF THE RULE OF LAW:
(i) AUTHORITARIANISM AND JUSTICE (Friday, March 30)
Required reading:
- ROBERT COVER, JUSTICE ACCUSED (1975), extract
- Miller v McQuerry 17 F. Cas. 335 (1853)
- Ronald Dworkin, extracts on civil disobedience from his book TAKING RIGHTS SERIOUSLY (1977)
  - OPTIONAL: Lynn Henderson, Authoritarianism and the Rule of Law, 66 INDIANA L.J. 379 (1991) --omits pages 402-10 and 422-47; just skim the rest and try to get the gist of what she means by "formal authoritarianism" and its connection to the Rule of Law
(21) CRITICAL VIEWS OF THE RULE OF LAW: (ii) LEGALISM AND COMPLEXITY (Wednesday, April 4)
Required reading:

- CHARLES DICKENS, brief extract from BLEAK HOUSE (1853), Ch. 1, available at http://ebooks.adelaide.edu.au/d/dickens/charles/d54bh/chapter1.html
- E.P. THOMPSON, WHIGS AND HUNTERS (1975), extracts and background
- ROBERT BOLT, A MAN FOR ALL SEASONS (1961), video clip: https://www.youtube.com/watch?v=PDBiLT3LASk --- plus movie synopsis
- extract from TVA v Hill 437 US 153 (1978) in which "A MAN FOR ALL SEASONS" is quoted in the opinion of the Court.

(22) DISCRETION AND REASONED ELABORATION (Friday, April 6)
Required reading

- HENRY HART AND ALBERT SACKS, THE LEGAL PROCESS (1958), especially pp. 113-58
- Peter Shane, The Rule of Law and the Inevitability of Discretion, 36 HARV. J. LAW AND PUBLIC POLICY 21 (2013)
- TOM BINGHAM, THE RULE OF LAW, pp. 48-54

OPTIONAL
- Look again at the piece on discretion by K.C. Davis from Topic 7
- Ed Rubin, Discretion and its Discontents, 72 CHICAGO KENT LAW REVIEW 1299 (1977)
(23) THE RULE OF LAW AND THE MODERN ADMINISTRATIVE STATE:  
(i) FULLER AND RUBIN (Wednesday, April 11) 
Required reading: 
- Lon Fuller, *The Morality of Law*, last 4 pages of the extract (pp. 241-244)

(24) THE RULE OF LAW AND THE MODERN ADMINISTRATIVE STATE:  
(ii) WELFARE RIGHTS (Friday, April 13) 
Required reading: 
  -- read Simon's article in the following order:  
  - introduction 1198-9;  
  - then general discussion 1222-1235;  
  - then outline of actual changes that took place in the welfare system 1201-1222;  
  - then, if you have time, the stuff on professionalism at 1240-1254 
(25) THE RULE OF LAW, SECURITY & THE WAR ON TERROR
(Wednesday, April 18)
Required reading:

- NICCOLÒ MACHIAVELLI, THE DISCOURSES, extract
- RICHARD POSNER, extract from NOT A SUICIDE PACT (2006), Chs. 1 & 2
- Tom Bingham, Terrorism and the Rule of Law, Ch. 11 of his book, THE RULE OF LAW
- ERIC POSNER and ADRIAN VERMUELE, extract from THE EXECUTIVE UNBOUND (OUP 2010)

OPTIONAL READING

(26) THE RULE OF LAW IN THE INTERNATIONAL ARENA
(Friday, April 20)
Required reading:

- BRIAN TAMANAH, ON THE RULE OF LAW, Ch. 10: International Level
- Tom Bingham, The Rule of Law in the International Legal Order = Ch. 10 of his book THE RULE OF LAW

- OPTIONAL: Stéphane Beaulac, An Inquiry into the International Rule of Law, EUI Working Papers, MWP 2007/14
(27) THE RULE OF LAW AND OFFICIAL CORRUPTION (Wednesday, April 25)
Required reading:

- Corruption as a Threat to the Rule of Law, Council of Europe Parliamentary Assembly, May 2013
- Mark Philp, Corruption: Definition and Measurement, from Measuring Corruption, ed. Charles Sampford et al. (Ashgate Books 2006)
  - Kevin Davis, Who Should Regulate Transnational Corruption?, NYU Colloquium Presentation, Fall 2016 [OPTIONAL]
  - Susan Rose-Ackerman, Bribes, Patronage, and Gift-Giving, from her book, Corruption and Government: Causes, Consequences, and Reform (1999) [OPTIONAL]

(28) RULE OF LAW IN NATION-BUILDING (Friday, April 27)
Required reading:

- Thomas Carothers, Rule of Law Temptations, FLETCHER FORUM OF WORLD AFFAIRS (2009)
- Jeremy Waldron, Legislation and the Rule of Law, 1 LEGISPRUDENCE 91 (2007)