

Columbia Law School

## **L6184 LAW AFTER NEOLIBERALISM**

Spring 2024

T, R: 1:20-2:40 PM (WJWH 207)

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JGH 500/5

### **Course Overview**

This is an interdisciplinary course that examines the impact of neoliberalism on legal thought and practice. Neoliberalism refers to a body of ideas regarding the relationship between capitalism and democracy. Neoliberal theory holds that in a capitalist democracy markets rather than the state should serve as the preferred medium for resolving problems of political economy. Some of its proponents maintain more broadly that neoliberal market rationality provides a model, and a mode of governance, which ought to be extended beyond the economy into non-economic (and non-market) domains of public and private life. Focusing on cases, statutes, regulations, scholarship and other materials, class meetings will explore the “neoliberalization” of contemporary American law across a number of fields. Our investigation of “legal neoliberalism” and of U.S. law “after” neoliberalism will focus on a number of areas, *inter alia*, contracts, torts, civil procedure, criminal law and criminology, constitutional law, anti-discrimination law, and family law. In addition to issues of substantive law, the course will consider how neoliberal theory and its critiques offer a framework for understanding and addressing a number of current topics in legal sociology, law and the professions, legal ethics and legal education.

By the end of the semester, students enrolled in the course can expect to acquire (1) a working knowledge of the history and core ideas of neoliberal theory in the U.S. and abroad; (2) a solid understanding of the influence neoliberal concepts and categories have had in contemporary U.S. law and legal theory; (3) the ability to identify and critically discuss the key terms, enabling assumptions, analytic procedures and modes of argument that characterize neoliberal legal methods across several areas of public and private law; and (4) a values-based experiential perspective on U.S. legal education and law school culture “after” neoliberalism.

## Learning Objectives & Course Goals

In summary, by the end of this course, course participants can expect to have a foundational understanding of 4 core topics:

1. A working knowledge of the history and core ideas of neoliberal theory in the U.S. and abroad
2. A solid understanding of the influence neoliberal concepts and categories have had in contemporary U.S. law and legal theory
3. The ability to identify and critically discuss the key terms, enabling assumptions, analytic procedures and modes of argument that characterize neoliberal legal method in several areas of public and private law
4. A values-based experiential perspective on U.S. legal education and law school culture "after" legal neoliberalism

### Readings

Any changes or additions to the readings will be announced in class and/or through the Canvas system.

### Resources

*Law After Neoliberalism Reader*

We have prepared a reader containing the vast majority of the readings for this course. You can find the most up to date version [here](#).

*Columbia University Law Library*

Columbia's extensive library system ranks in the top five academic libraries in the nation, with many of its services and resources available online: <https://www.law.columbia.edu/library>.

In addition, the Arthur W. Diamond Law Library offers its researchers one of the finest collections of legal materials in the country in both digital and print formats. In addition to a near comprehensive United States Law collection, there are strong collections in International, Foreign, and Comparative Law and a special section devoted to Japanese Law. The Law Library has significant collections from at least thirty different countries and a useful core of materials from many other jurisdictions. Many of the resources available from the Law Library can be accessed online including databases and indexes, Lexis, Westlaw, BloombergLaw, HeinOnline, and electronic research guides. For more information, see here: <https://www.law.columbia.edu/library/online-resources>.

*Columbia University Information Technology (CUIT)*

[Columbia University Information Technology](#) (CUIT) provides Columbia University students, faculty and staff with central computing and communications services. Students, faculty, and staff may access [University-provided and discounted software downloads](#).

### Guidelines

- This syllabus is provisional. The assigned readings as well as the order of topics may change as the semester progresses.

- You should treat the assignments as cumulative and interactive, in the sense that we will continue to refer back to and reconsider past texts and screenings even as we discuss new material.
- **How should I read or view the material for each class?** The assigned materials for each session have been chosen to maximize your exposure to a wide range of ideas, methods and arguments. As you read or view the assigned materials, focus on identifying the key concepts and claims from each assigned item. Read or watch with an eye to bringing your critical response to those claims and concepts to our weekly discussions. **Your participation in class will be evaluated principally on your ability to offer and defend claims about the topic(s) under discussion that refer to and engage with the readings and other assigned materials.** In other words: this is a course whose *modus operandi* is evidence-based analysis, interpretation and argument, not ungrounded personal opinion or belief.

### Evaluation/Grading

Your grade for this course will be based on three components. The *first* is regular class attendance and, when you are on call, the quality of your contribution to class discussion. Each student should expect to be on call during two of our twice-weekly meetings. You should be prepared to address the “Question and Comments” fellow classmates (discussed below) will have posted about the readings or other material assigned for that day. Students who demonstrate a consistent depth of preparation and engagement with the topics and readings we discuss in class *over the course of the semester* (i.e., on days other than those for which they have “on call” duty) *may* have their grades raised by as much as one-half a grade level (e.g., from B+ to A-). Conversely, students who consistently fail to attend or prepare for class or participate in class discussion *may* have their final grades lowered by as much as one half (e.g., from A- to B+). ***Students who miss three or more classes without the instructor’s advance written permission may be denied permission to take the final course examination.***

The *second* component of your grade will be based on the quality of your “Question and Comment” (“Q&C”) submission. Your Q & C should not be longer than 500 words (double-spaced typed pages in 12 point font, please). In your Q&C submission, you will have an opportunity to comment on the readings or other material assigned for one of our class meetings. Ideally, your Q&C should engage and focus the critical attention of the rest of the class on an issue, question, or problem raised by the assigned reading or other material that you find interesting and relevant. One of the chief goals of this course is to sharpen your critical reading and analysis skills. Accordingly, the most helpful Q&C interventions will offer a clearly stated question and critical commentary regarding a *specific* point, passage or position in one or more of the assigned materials on the syllabus for the day. The least useful reflections are those that attempt no more than a reiteration or description of a point, passage or position in a judicial opinion, constitutional text, administrative regulation, or work of scholarship. When students are on call they will be expected to read and actively respond to the Q&C produced for that day’s class meeting. **Since discussion of the Q&C submission is an important component of each class meeting, each student’s Q & C submission will be a significant measure of their overall performance in the course. It will represent 20% of your final grade.** We will post an annotated syllabus during the first week of class listing the class for which each student will be assigned Q&C responsibility. Each Q&C must be posted on Courseworks *no later than 5 p.m. the day before the class meeting during which it will be discussed.*

The *third* and main component of your final grade will be based on the quality of your final examination essays (an eight hour take home assignment). The examination will consist of two essay questions, which will be equally weighted in determining your examination grade. This year you will be given a menu of questions from which to respond. Each of your essay answers must be typed (12 point font), double-spaced and at least four pages long (depending on the number of examination questions). The combined total of your essays must not be more than ten double-spaced typed pages. **Your examination grade will represent 65% of your course grade.** The following factors will be considered in evaluating your examination essays: (1) the substance of your analysis, (2) the care, clarity and comprehensiveness with which you organize and develop your argument(s) and (3) the quality of your English prose style (“readability”). In preparing your examination essays, make sure you allocate sufficient time to review and, where necessary, revise, each of these aspects of your work.

For more information about the Columbia Law School Grading policy, please visit <https://www.law.columbia.edu/academic-rules/jd-rules/letter-grades>.

This course will be calculated as described below:

*Grade Calculation*

Assignment	Weight
Class Session Attendance and Participation*	15%
Q&C Submissions	20%
Final Exam	65%

\*As noted above, satisfactory attendance is required to take the final exam, while exceptional attendance and participation may raise your grade. ***Students who miss three or more classes without the instructor’s advance written permission may be denied permission to take the final course examination.***

**Course Policies**

*Participation and Attendance*

You are expected to attend and be prepared for all classes, beginning with the first meeting of our course. Adequate preparation of assignments and informed participation in class discussion are expected of every student. The quality of a student’s preparation and of the in-class discussion participation may be considered by the instructor, without special notice, in determining the student’s grade in the course. Regular attendance is expected of every student at all meetings of the other courses in which he or she is registered, and many instructors factor absences into the final grade if a student has more than two or three unexcused absences. If a student has excessive absences in a course, academic credit cannot be earned and a final grade of Failure may be recorded.

Arrive on time, respect others and avoid disruptions, such as side conversations. You are also expected to maintain personal and professional etiquette. The Socratic Method, a teaching style used often at Columbia Law School, requires engagement, attentiveness, and preparation. You are

expected to come prepared to fully participate in a Socratic lecture style during each class session, *whether or not you are on call.*

### *Late work*

There will be no credit granted to any written assignment that is not submitted on the due date noted in the course syllabus without advance written notice to, and written permission from, the instructor.

### *Citation & Submission*

All written assignments must cite sources where applicable and be submitted to the course website (not via email).

## **School Policies**

### *Copyright Policy*

Please note—Due to copyright restrictions, online access to this material is limited to instructors and students currently registered for this course. Please be advised that by clicking the link to the electronic materials in this course, you have read and accept the following:

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted materials. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

### *Academic Integrity*

Columbia University Law School students are expected to follow the principles of academic honesty. A detailed list and description of the principles of academic honesty can be located online: <https://www.law.columbia.edu/academic-rules/certifications-academic-integrity>.

### *Academic Procedures*

A comprehensive database of Columbia Law School academic rules is available online: <https://www.law.columbia.edu/academic-rules>.

### *Accessibility*

Students who are entitled to accommodations under the American with Disabilities Act (ADA) register with Columbia University's Disability Services in order to receive confirmation of the accommodations that will be provided by Columbia Law School. Please contact Christy Pastore, Director of Registration Services and Student Records, if you have questions.

## Course Schedule

Module	Session Date	Readings due prior to respective session	Assignments
1	1/16 & 1/18	<p><i>Tuesday, 16 January</i> Required Reading:</p> <ol style="list-style-type: none"> <li>Powell, “Confidential Memorandum: Attack on the Free Enterprise System”</li> </ol> <p><i>Thursday, 18 January</i> Required Reading:</p> <ol style="list-style-type: none"> <li>Whitehouse, “The Scheme I: The Powell Memo”</li> <li>Whitehouse, “The Scheme II: Powell on the Court”</li> <li>Morrison and Murray, “Threats Then and Threats Now: the Powell Memo’s Anti-Capitalist Alarm Bell”</li> </ol>	<p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>Attend the session.</li> <li>Review syllabus and required readings.</li> <li>Complete the required reading.</li> </ul>
2	1/23 & 1/25	<p><i>Tuesday, 23 January</i> Required Reading/Viewing:</p> <ol style="list-style-type: none"> <li>Film, <i>Inside Job</i> (Ferguson, dir.) <a href="#">Watch it here</a></li> <li>Froese, “The Limits of ‘Inside Job’: Crisis, Ideology, and the Burden of Capitalism”</li> <li>Levine, “Countrywide Mortgage Hustle Turns Out Not to Be Fraud”</li> <li>Feldman, “Why Law Failed to Punish Wrongdoers in the Financial Crisis”</li> </ol> <p><i>Thursday, 25 January</i> Required Reading:</p> <ol style="list-style-type: none"> <li>Metcalf, “Neoliberalism– The Idea That Swallowed the World”</li> <li>Krein, “America after Neoliberalism”</li> <li>Konczal, “‘Neoliberalism’ isn’t an empty epithet. It’s a real, powerful set of ideas”</li> </ol> <p>Supplementary Reading:</p> <ol style="list-style-type: none"> <li>Menand, “The Rise and Fall of Neoliberalism”</li> <li>Ostry, Loungani, Furceri, “Neoliberalism, Oversold?”</li> <li>Crouch, <i>Can Liberalism Be Saved From Itself?</i></li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>Complete required readings.</li> <li>Watch assigned film.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>Attend the session.</li> </ul>
3	2/1 & 2/6	<p><i>Thursday, 1 February</i> Required Reading:</p> <ol style="list-style-type: none"> <li>Purdy, Grewal, Kapczynski &amp; Rahman, “How Law Made Neoliberalism”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>Complete required readings.</li> </ul>



		<p><i>Tuesday, 6 February</i></p> <p>Required Reading:</p> <ol style="list-style-type: none"> <li>1. Amended Complaint in <i>MacDonald v. Cooley Law School</i></li> <li>2. <i>Gomez-Jimenez v. NYLS</i></li> <li>3. Shaer, “The Case(s) Against Law School”</li> </ol>	<p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
4	2/8	<p><i>Thursday, 8 February</i></p> <p>Required Reading:</p> <ol style="list-style-type: none"> <li>1. Fish, “Neoliberalism and Higher Education”</li> <li>2. Kapczynski, “The Real Lessons We Should Draw From Claudine Gay’s Resignation”</li> <li>3. Soederberg, “The Student Loan Crisis and the Debtfare State”</li> <li>4. Maisano, “The Soul of Student Debt”</li> </ol> <p>Supplementary Reading:</p> <ol style="list-style-type: none"> <li>1. Coco, “Mortgaging Human Potential: Student Indebtedness and the Practices of the Neoliberal State”</li> <li>2. Tough, “Americans Are Losing Faith in the Value of College. Whose Fault is That?”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
5	2/13 & 2/15	<p><i>Tuesday, 13 February</i></p> <p>Required Reading/Viewing:</p> <ol style="list-style-type: none"> <li>1. <i>Lochner v. New York</i></li> <li>2. Sunstein, “<i>Lochner’s</i> Legacy” (excerpt)</li> <li>3. McCluskey, “Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State” (pp. 799-806)</li> <li>4. Film, <i>Free to Choose</i>, Vol. 8, “Who Protects the Worker?” (Filkin, dir.) <a href="#">Watch it here</a></li> </ol> <p>Supplementary Reading/Viewing:</p> <ol style="list-style-type: none"> <li>1. Video, Supreme Court Landmark Case: <i>Lochner v. New York</i>. <a href="#">Watch it here</a></li> <li>2. McCluskey, “Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State” (pp. 846-872 starting at final paragraph “For most of its history...”)</li> </ol> <p><i>Thursday, 15 February</i></p> <p>Required Reading:</p> <ol style="list-style-type: none"> <li>1. Balbus, “Legal Form and Commodity Form”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> <li>● Watch assigned film.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
6	2/20 & 2/22	<p><i>Tuesday, 20 February</i></p> <p>Required Reading:</p> <ol style="list-style-type: none"> <li>1. <i>Citizens United v. Federal Election Commission</i></li> <li>2. Brown, “Law and Legal Reason” in <i>Undoing the Demos: Neoliberalism’s Stealth Revolution</i></li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> </ul> <p>During this module,</p>

		<p><i>Thursday, 22 February</i> No Additional Reading</p>	<p>you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
7	2/27 & 2/29	<p><i>Tuesday, 27 February</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. <i>ATT Mobility LLC Concepcion</i></li> <li>2. <i>Chamber of Commerce v. Bonta</i></li> <li>3. Chemerinsky, “Justice for Big Business”</li> <li>4. Film, <i>Free to Choose</i>, Vol. 7, “Who Protects the Consumer?” (Filkin, dir.) <a href="#">Watch it here</a></li> </ol> <p><i>Thursday, 29 February</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. <i>U.S. v. Carroll Towing</i></li> <li>2. Holmes, “Excerpt” and “The Path of Law,” in <i>The Common Law</i></li> <li>3. Coase, “The Problem of Social Cost”</li> <li>4. Posner, “Toward A Theory of Negligence”</li> <li>5. Zipursky, “Sleight of Hand”</li> <li>6. Glick and Lozada, “The Erroneous Foundations of Law and Economics”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> <li>● Watch assigned film.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
8	3/5 & 3/7	<p><i>Tuesday, 5 March</i> No Additional Reading</p> <p><i>Thursday, 7 March</i> Required Reading/Viewing:</p> <ol style="list-style-type: none"> <li>1. Film, <i>The Corporation</i> (Achbar and Abbott, dirs.) <a href="#">Watch it here</a></li> <li>2. <i>Dodge v. Ford Motor Co.</i></li> <li>3. Miller, “Legal Foundations of the Corporate State”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> <li>● Watch assigned film.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
	3/11 - 3/15	<i>Spring Break - No Class</i>	
9	3/19 & 3/21	<p><i>Tuesday, 19 March</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. <i>Burwell v. Hobby Lobby Stores</i></li> <li>2. Brown, “When Firms Become Persons and Persons Become Firms: Neoliberal</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> </ul>



		<p>Jurisprudence in <i>Burwell v. Hobby Lobby Stores?</i></p> <p><i>Thursday, 21 March</i> No Additional Reading</p>	<p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
10	3/26 & 3/28	<p><i>Tuesday, 26 March</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. <i>Kelo v. City of New London</i></li> <li>2. Ramsin, “Public Purpose: <i>Kelo v. New London</i> and Neoliberal Paternalism”</li> </ol> <p><i>Thursday, 28 March</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. Wilkerson, “<i>Kelo v. New London</i>, the Institute for Justice, and the Idea of Economic Development Takings”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
11	4/2 & 4/4	<p><i>Tuesday, 2 April</i> Required Reading/Viewing:</p> <ol style="list-style-type: none"> <li>1. Film, <i>99 Homes</i> (Bahrani, dir.) Available on Course Reserves</li> <li>2. Konzcal, “The Violence of Eviction”</li> <li>3. Browdie and Bowman, “Lawyers Aren’t Rent”</li> </ol> <p><i>Thursday, 4 April</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. Gibeson, “Formal Housing Provision Under Neoliberalism in the United States”</li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> <li>● Watch assigned film.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
12	4/9 & 4/11	<p><i>Tuesday, 9 April</i> Required Reading:</p> <ol style="list-style-type: none"> <li>1. Benjamin, “The Narratives of Financial Law” (pp. 787-800)</li> <li>2. Feher, “Another Speculation Is Possible: The Political Lesson of R/WallStreet Bets” <a href="#">available here</a></li> </ol> <p>Supplementary Reading:</p> <ol style="list-style-type: none"> <li>1. Feher, “Self-Appreciation; or, the Aspirations of Human Capital”</li> </ol> <p><i>Thursday, 11 April</i></p> <ol style="list-style-type: none"> <li>1. U.S. Dept. of Justice, The Ferguson Report</li> <li>2. <i>U.S. v. Vergara</i></li> <li>3. Simon, <i>Governing Through Crime</i></li> </ol>	<p>Before the live session:</p> <ul style="list-style-type: none"> <li>● Complete required readings.</li> </ul> <p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>

		<ol style="list-style-type: none"> <li>4. Harcourt, “Neoliberal Penalty”</li> <li>5. Urie, “Ferguson and the Logic of Neoliberalism”</li> <li>6. Wacquant, “Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity”</li> <li>7. Harris, “Foreword: Racial Capitalism and the Law”</li> </ol>	
13	4/16 & 4/18	<p><i>Tuesday, 16 April</i> No Additional Reading</p> <p><i>Thursday, 18 April</i> No Additional Reading</p>	<p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>
14	4/23	<p><i>Tuesday, 23 April</i> No Additional Reading</p>	<p>During this module, you will also be responsible for the following activities:</p> <ul style="list-style-type: none"> <li>● Attend the session.</li> </ul>