American Legal History (Law 698)
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What is “Legal History”? “Legal History” is a term as varied in its meaning as in the purposes and methods of those who study it. It may emphasize empirical study, as in the analysis of historically fluctuating conviction rates or patterns of appellate opinion. The same opinions might be examined as episodes in the history of ideas, in which timeless principles exert a force of their own, or they might be deconstructed as examples of the social construction of ideology. Which method one chooses, however, often reflects a forensic agenda – to find in legal history support for competing present-day policy goals, whether they be the preservation of a status quo, the protection of property rights, or the destabilizing critical theories of race, class, and gender.

It is, therefore, as true today as it was in 1787 when Thomas Jefferson observed, “The moment a person forms a theory his imagination sees in every object only the traits which favor that theory.” It is one purpose of this course to expose you to the varieties of “legal history” and the paradigms they employ, and not to present any holistic theory of law or legal change.

“Legal History” also poses the dilemma of steering between two dangerous but seductive oversimplifications. On the one hand, we face the problem of presentistic assumptions that our own lived experiences or collective memory suffices to explain how lawyers and judges in the past thought and to what purposes they were using the law. Alternatively, we can err by assuming that it is possible to rid ourselves of all that we know and recapture the past entirely on its own terms – to achieve an “immaculate perception,” as this fallacy has been called. That is, either we force legal actors of the past to think and act like us though dressed in wigs and odd clothing, or we reject any common human experience.

How does Legal History fit into Legal Education? The “seamless web” of law and history. It is another the purpose of this course to use the history of law and legal change to understand the role that law played in the American past as best we can, and to use that knowledge to enhance your professional and personal lives. This course is conceived as being in the tradition of the liberal arts – humanities, social sciences, and natural sciences -- as well as in that of the law. Combining those perspectives will, I hope, supply a coherence to the study of law that might be lost in the specialization of the legal curriculum.

In 1898 the great English legal scholar F. W. Maitland wrote in his Prologue to a History of English Law, “Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web.” Soon the remark was applied to law being a “seamless web,” because the metaphor expresses the connectedness of legal rules: a change in one area will have effects in other areas as well. To provide these many perspectives and to examine these connections, this course will present the foundational information needed to engage the legal past, and will examine many of the important (and misunderstood) aspects of that past. Though it eschews any
claim of providing a crystal ball for the future, it nevertheless also aspires to train you in
the tools you will need to comprehend how law changes over time.

This course thus is designed to introduce you to the use and abuse of “legal
history” in the courtroom as well as in law reviews, and to equip you to challenge bad or
ill-founded legal history with solidly grounded legal history. In that way it is intended to
arm you with the knowledge and conceptual tools to expose myths and fallacious
historical arguments invoked in the courtroom, and to make convincing historical
arguments of your own.

Finally, this course also has a humanistic purpose addressed not only to the study
of law, but to its practice. An anecdote may help convey this idea. While Associate
Justice on the Supreme Court, Harry Blackmun received a copy of Scott Turow’s One L
for his seventieth birthday and was so taken by it that he wrote to the author,
You certainly captured and poignantly described life at the [Harvard] Law School,
with its worry and concern, its tension, its competitiveness, and its deep-seated
discomfort. Surely there is a way to teach law, strict and demanding though it
may be, with some glimpse of its humaneness and its basic good – the art of getting along together
– as well as its demands for perfection. You so properly point out that there is room for flexibility
and different answers, and that not all is black or white. If ever I learned anything on the bench, it
is that.

I agree, and would extend the application to your own careers in the law: that this course
presupposes your participation in, and impact on, the larger questions of the world around
you. The study and practice of law should be part of a tradition of public engagement
with the basic questions of the human condition.

Organization and Requirements of this Course.

Class Attendance and Participation.

- This course follows a lecture format, with each lecture available in outline form at
  its Westlaw TWEN site. I’d advise you to download the outline before each class
  meeting and use it as a template for the lecture so that you need not become
  stenographers and can engage the intellectual substance of the lectures in class.
- There is no attendance requirement. My philosophy of teaching is that if I cannot
  make the lectures interesting enough to bring you to class, then I should not
  compel you to endure them. I am also well aware that the bar exam has no Legal
  History section, but I believe that everyone should have a proper appreciation of
  the history of one’s profession and the meaning of the life’s endeavor one is
  undertaking. No lawyer jokes: you should be proud of what you’re doing.
- I welcome (and encourage) class participation, but “American Legal History”
  differs from most other advanced law school courses, which build on previous
  course work and whose students arrive in class with a more uniform preparation
  (e.g., Con Law II after Con Law I). This course, of necessity, operates on
  another assumption – that some of you may have advanced degrees in History
  while others have not had a History course since the one taught by the assistant
  football coach in high school.
- Some discussions, I hope, will be spontaneous, initiated by your questions, which
  I strongly encourage. Please know that I am receptive to questions, both in class
  and after class, but that I will not be turning the discussions into graded Socratic
dialogs. I prefer to think of the class meetings as Socratic monologs, into which you should feel free to enter.

**Reading Assignments.** The readings chosen for this course are to illustrate, expand, and explain the topics covered in the lectures. They are not intended as a basis for Socratic dialog, but I will make reference to them in lecture, and I hope that they will raise questions that you will want to bring up in class. If I plan to use them as a basis for discussion, I will announce that in advance of the class meeting.

- For those whose background in History may benefit from a review, Lawrence M. Friedman’s *History of American Law* (third edition; cited in the syllabus as HAL) is a very readable survey of the major topics covered in this course, interpreted within the context of American social and cultural history. I have noted on the syllabus those parts of his book that explain or complement the lectures. Neither duplicates the other, and you may consider the book an optional assignment. In any case, I believe that it merits the accolades in the blurbs on its cover. Its Bibliographic Essay, at 385-93, will provide the basis for a much more extensive foray into the subject.
- The cases and materials in *Law and Jurisprudence in American History*, ed. Stephen Presser and Jamil Zainaldin (sixth edition; cited in the syllabus as LJAH).
- Supplemental materials (cited as SM, in a packet that can be picked up in Room 301), or through Westlaw, Lexis, or the TWEN site, provide matter useful in the classroom. I will occasionally refer directly to them, and to the questions that the Casebook editors pose, using them as an opening to broaden and deepen the lecture coverage.

**Final Exam.**

- All the assigned reading materials and lecture information will be required for the take-home, 24-hour, open book final exam, which will involve short answers and an essay question.

**Office Hours.** I will gladly meet students at their convenience, with “instant office hours” on request. I will hold regular office hours every morning from 9 to 10 in Busch Hall 203, in the old quad at the east end of campus, not Anheuser-Busch Hall (the difference is more than semantic). I will also be available with office hours in Anheuser-Busch as soon as I can obtain office space there. My campus phone number is 935-5459, and my e-mail address is konig@wustl.edu.
SCHEDULE OF CLASS MEETINGS AND READING ASSIGNMENTS

Part 1: English and Colonial Foundations: The Varieties of Legal Experience

(HAL, 1-61, provides a good overview.)

Class 1 (Aug. 21) The English Background; or, “Dude, where’s my courtroom?”
- HAL, “Prologue”
- The series of six “Prefaces” to the casebook, pp. v-xxvii. Read the six in chronological order to see the way the subject has been defined and re-defined in 1980, 1989, 1995, 1999, 2003, and 2006.

Class 2 (Aug. 22) Law as an Instrument of Conquest: Ireland and Virginia as Case Studies

Class 3 (Aug. 24) Law as Communal Purpose: Puritan New England
- Preface to Massachusetts Lawes and Liberyes (SM)

Class 4 (Aug. 28) Puritanism: Baron and Feme become Husband and Wife
- Blackstone, Commentaries, on Coverture (SM)
- Massachusetts Divorce Statistics (SM)

Class 5 (Aug. 29) Themes of Subversion: The Witch Hunts
- Thomas Brattle on the witchcraft trials (SM)

Class 6 (Aug. 31) Creating a Property Regime: Law for the Empire

Class 7 (Sep. 5) Property in People: Creating a “Law” of American Slavery
- LJAH, 422-40, 468-73

Class 8 (Sep. 7) The (Failed) Challenge to the Entrenchment of Slavery
- David Brion Davis, The Problem of Slavery in the Age of Revolution, on the limits of antislavery [excerpts] (SM)

Class 9 (Sep. 11) Higher Law, Higher Courts, and Hyperlexis: Creating Appellate Justice
- Peter Charles Hoffer, “Honor and the Roots of American Litigiousness” (SM)
Part 2: The American Revolution and the Meaning(s) of the Framers: History and Originalism
(HAL, 65-119, provides a good overview.)

Class 10 (Sep. 12) The Revolution in American Law: Constituting Vox Populi
  • LJAH, 115-53

Class 11 (Sep. 14) Reconsidering Revolution: Judicializing Vox Populi; or, Who were “the people themselves,” originally?

Class 12 (Sep. 18) Originalism: Meaning and Understanding – and Validity?
  • LJAH, 1186-1209

Class 13 (Sep. 19) Originalism and Freedom of the Press
  • LJAH, 38-62, 226-51

Class 14 (Sep. 21) Originalism and the Establishment Clause

Class 15 (Sep. 25) Originalism and “the right of the people to keep and bear arms”

Class 16 (Sept. 26) Originalism and the Criminal Trial

Class 17 (Sept. 28) Creating the Federal Judiciary

Class 18 (Oct. 2) Challenging the Federal Judiciary
  • LJAH, 252-76

Class will be videotaped so that students observing Yom Kippur will not miss lecture material.

Part 3: The Contest for American Law in the “Age of the Common Man”
(HAL, 120-249)

Classes 19, 20 (Oct. 3, 5) Marshall, Kent, and Story: The Judge as Oracle
  • LJAH, 280-304, 408-22

Class 21 (Oct. 9) Inventing the Modern American Corporation
  • LJAH, 357-89
Class 22 (Oct. 10)  The Modernization of Labor Law
   • LJAH, 689-726

Class 23 (Oct. 12)  The Public Welfare
   • LJAH, 321-53

Classes 24, 25 (Oct. 16, 17)  Gender and the Constitution of Marriage

Part 4: Law and the Second American Revolution
   (HAL, 253-500, provides a good overview.)

Class 26 (Oct. 23)  Meeting the Challenge of Slavery
   • LJAH, 464-68, 473-512

Classes 27-28  (Oct. 24, 26) The Law’s Civil War
   • Jefferson Davis, “Speech to Confederate Provisional Congress,” April 24, 1861 (SM)
   • Abraham Lincoln, “Message to Congress,” July 4, 1861 (SM)

Class 29 (Oct. 30)  Law and Self-help: Vigilantism and Self-defense
   • LJAH, 523-36
   • Thomas J. Kernan, “The Jurisprudence of Lawlessness” (SM)

Class 30 (Oct. 31)  Medicalizing Crime: The Insanity Defense
   • LJAH, 536-70

Class 31 (Oct. 31)  Criminalizing Medicine: Contraception

Class 32 (Nov. 6)  The Legal Reconstruction of Marriage: Women’s Property Rights
   • LJAH, 570-650

Class 33 (Nov. 7)  The Legal Reconstruction of the Family: Mothers and Children

Classes 34, 35 (Nov. 9, 13)  The Legal Reconstruction of Marriage: Who May Marry?
   • U.S. v. Reynolds, 98 U.S. 145 (1879) [Hein Online]

Class 36 (Nov. 14)  Race and Reconstruction
   • Plessy v. Ferguson, 163 US 537 (1896) [Hein Online]

Part 5: The Challenges of the Twentieth Century
   (HAL, 501-584, provides a good overview.)

Classes 37, 38 (Nov. 16, 20)  Big Cities, Big Crime, Big Government
Class 39 (Nov. 21)  Mass Culture and the Meaning of Intellectual Property
  • Louis D. Brandeis and Charles Warren, “The Right to Privacy,”
    Harvard Law Review, 4 (1890), 623 [Hein Online]

Class 40 (Nov. 27)  Law in an America at War (on Poverty, on Crime, on Drugs, on Terror, on ….)

Class 41 (Nov. 28)  The Lengthening Shadow of Tort Law
  • LJAH, 793-801

Class 42 (Nov. 30)  Catch up, Wrap up, and Review

Exam Period (Dec. 4-15)