

LEGAL HISTORY

Hamline University School of Law
Fall 2008

Sundays · 1:15-3:15 · Room 04

Professor Tom I. Romero, II
tromero01@hamline.edu

Office: 211E
Office Hours: TBA or by appointment

I. COURSE DESCRIPTION AND LEARNING OUTCOMES OR WHY STUDY THE LEGAL PAST?

Why study legal history? Why do we as lawyers and citizens care about the past? Nearly 200 years ago, one Englishman provided an answer to such questions: “A lawyer without history and literature is a mechanic, a mere working mason; if he possess some knowledge of these, he may venture to call himself an architect.”¹ While it is true that studying our legal past gives us the skills upon which to craft our legal arguments, history also provides a window that helps us connect the oftentimes impersonal doctrines of law and jurisprudence to the dynamic lives and contentious social experiences of those navigating a complex legal process. Legal history thus helps us comprehend the justness of the laws that we make, the disparate social experiences of the people we represent, and the utility of a legal system and regime we pledge to defend.

As you will discover, “legal history” is a term as varied in its meaning as in the purposes and methods of those who study and deploy it as a means of legal analysis. It may emphasize empirical study, as in the analysis of prosecution rates over time or patterns of appellate opinion in a particular era. The same opinions might be examined as episodes in the history of ideas, in which ostensibly rational or scientific principles exert a force of their own, or they might be deconstructed as examples of the social construction of ideology. Which method one chooses, particularly for lawyers or legal scholars, 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 or other “fundamental” rights, or the destabilizing of race, class, gender or other social privileges. One outcome of this course is 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.

During the course of the semester, our study of legal history will expose us to the protean forces

¹ SIR WALTER SCOTT, GUY MANNERING 259 (1815; New York: E. P. Dutton & Co., 1906).

and paradigms that shaped modern American law. While the course rejects the presentation of any holistic theory of law or legal change, “legal history” as both a body of intellectual study and tool to be deployed by lawyers 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, judges and litigants 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. A second objective of the course is thus to find a rigorous and intellectually honest middle-course between these two paths.

This course is not meant to be exhaustive in its scope or breadth, though it will feel so at times. Rather, we will focus on select issues so by the conclusion of this course, you will be able to: 1) Understand the utility of history in the practice of a lawyer; 2) identify how and in what ways there are multiple and contested meanings of the law over time; and 3) recognize the impact of laws, jurisprudence and legal administration in the everyday lives of diverse peoples and communities.

This course is rooted the tradition of the liberal arts – humanities, social sciences, and natural sciences -- as well as in that of the law. An inter-disciplinary or perhaps, more accurately, trans-disciplinary perspective will, I hope, supply a coherence to the study of legal history that might be lost in the specialization of the legal curriculum. By exploring such topics in our legal past, we—as one noted American jurist explains—can “better understand the history we cannot escape and [as a consequence] cause us to assume responsibility we owe to our future.”² Ultimately, the final objective of this legal history course is to make us more skilled lawyers AS WELL AS better and more informed citizens.

II. COURSE MATERIALS

a. Required Texts

1. Kermit Hall, Paul Finkelman, and James W. Ely, Jr., eds. *AMERICAN LEGAL HISTORY: CASES AND MATERIALS*, 3RD ED. (2003).
2. John Ruston Pagan, *ANNE ORTHWOOD’S BASTARD: SEX AND LAW IN EARLY VIRGINIA* (2003).
3. María E. Montoya, *TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900* (2005).
4. Kevin Boyle, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).
5. Materials on TWEN.

² A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS* x (1978).

- b. The reading assignments are an essential part of this course. Although they are chosen to illustrate, expand, and explain the topics covered in the lectures, they are not intended as a basis for Socratic dialog. Rather, I intend for the readings to raise questions and provide illumination for a discussion of the variety of complex material that you will need to master. If you do not read the assignment for a particular week, you will find it difficult to follow the lecture material or to engage in discussions. Failure to keep up with the readings will make it very difficult for you to perform well in this course.
- c. For those whose background in History may benefit from a review, Lawrence M. Friedman's *History of American Law* (third edition) is a very readable survey of the major topics covered in this course, interpreted within the context of American social and cultural history. This will be available on Course Reserve at the Law Library.

III. REQUIREMENTS

- a. Students will be evaluated on the basis of class attendance and participation, a midterm examination, and a final examination. No rescheduling or make-ups will be allowed outside of documented extraordinary circumstances.

IV. ATTENDANCE, PARTICIPATION, AND CLASS PREPARATION

- a. Given the premise that history is 10% fact and 90% interpretation, I expect regular attendance and engaged participation. Accordingly, I expect you to attend all sessions unless you are ill or otherwise cannot attend.
 1. It is your responsibility to inform me via e-mail immediately if such a situation should arise that would prevent you from attending.
 2. More than two excused **and or** unexcused absences will result in 10% deduction from your final grade.
 3. More than four excused **and or** unexcused absences will result in failure of the course.
- b. Please note that attendance does not just include your physical presence; attendance requires critical thinking, listening attentively, and constructive speaking. Consequently, I expect you to contribute for that particular day's class by:
 1. Verbally asking a question, making an observation, or crafting an argument during class; **AND**
 2. Posting to this course's TWEN discussion board, **at least twice**, during the semester, a written question that is responsive to that week's readings, lecture, or classroom discussion.
- c. This course contains material that some students may find offensive. For example, the readings document instances of racism, fornication, genocide, domestic abuse, and violence.
 1. To ensure that everyone will feel comfortable sharing their ideas, we will all listen and respond respectfully and intellectually.

2. This course is an elective, and any student likely to be upset by this material should consider dropping the course.
- d. I expect all students to be prepared for any questions that may arise during class. If there is any reason why you will not be prepared, please inform me via email no later than 10:00 pm the evening prior to class.
- e. I expect class to begin promptly at the scheduled time.

V. Grading

- a. Your final grade will be based on the following:

1.	Attendance and Participation	10%
2.	Midterm	30%
3.	Final Examination:	60%

- b. For all written material in this class, I expect clear, concise, and logical arguments utilizing the readings, lectures, class discussion, and your own intellectual and creative thought.
- c. Below is an approximate guide to letter grades:
 - A: Signifies outstanding work. You not only completed the required coursework, but did so exceptionally well. Your writing and argumentation were clear and concise, and you showed on all written assignments and in-class examinations excellent mastery of the material.
 - B: Signifies good work. You completed the coursework well. Your writing and argumentation were up to standard and you showed good understanding of the material in your written and exam work.
 - C: Signifies acceptable work. You completed the coursework, but just adequately. Your writing and argumentation could use improvement, and/or you did not demonstrate a sufficient mastery or effective understanding of the material

VI. OFFICE HOURS

- a. Please come by during office hours any time to talk about the readings, lectures, assignments or anything else that may happen to be on your mind. If you cannot make my office hours, do not hesitate to schedule an appointment. E-mail me or call me if there is an emergent matter.

VII. OTHER MATTERS

- a. If you qualify for an accommodation because of a documented disability, please consult with the Law School's Assistant Dean of Students to determine an appropriate accommodation based on documented disabilities.

b. I will make every effort to reasonably accommodate all students who, because of religious and other obligations, have conflicts with scheduled quizzes, assignments, or required attendance.

1. **In order to receive the accommodation, you need to notify me at least two weeks in advance of the scheduled conflict.**

c. The course will be utilizing Westlaw's *TWEN* server. We will use *TWEN* for discussion of issues outside of the classroom, posting of assignments, announcements, supplementary material, and up to date information on the course. I will also post an outline no later than midnight the day before each day's class that you can download and bring to class. *TWEN* will also contain a syllabus that will be updated should revisions become necessary.

1. **Information contained on *TWEN*—including but not limited to readings, quiz dates, and course policy—should be considered the definitive version.**

d. Classroom Etiquette and Technology Policy

The classroom environment must be conducive to learning for all students. Proper conduct in the classroom is intended to encourage everyone to participate in, to derive benefit from, and ultimately to enjoy the class. It is perfectly acceptable and indeed professionally required, that you demand professional behavior of your classmates in and out of class.

Certain technological devices, in particular, can be distracting to your classmates and me and thus undermine that goal.

- In order to facilitate focused interactive class discussion, there will be occasions when the class will be asked to close their notebook computers and/or turn off technology they have been using. If a student uses classroom time to read or send e-mail messages, visits web sites that the class has not been instructed to visit at that particular time, or engages in any other online or technology based activities (including cellular telephones, text-messaging, etc. .) not directly related to the current classroom discussion, **then that student will be asked to leave and will not be permitted to bring their laptops to class for the duration of the course.**
- **Behavior which interferes with the learning ability of your classmates will be sanctioned accordingly.**

Class Schedule

Week One: What is “legal history” and why do we care?

- Readings: **Found on TWEN/Westlaw**
John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993).
Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997).
Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L. J. 537 (1990).
Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997).
Ariela Gross, *When is the Time of Slavery?: The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283 (2008).
Harold P. Sutherland, *The Case for American History in the Law School Curriculum*, 29 W. New Eng. L. Rev. 661 (2007).

Week Two: Law and Its Multiple Meanings and Contexts: The Early Modern Atlantic World

- Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 1-40.
TWEN: Review Justinian Institutes & Iroquois Constitution
Pagan, ANNE ORTHWOOD’S BASTARD, Chapters 1-5.

Week Three: Colonial America: “Creolized Dialect of the Common Law”

- Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 41-77, 102-106.
Pagan, ANNE ORTHWOOD’S BASTARD, Chapters 6-10 & Conclusion.

Week Four: Early Republic America and the Formation of a Constitutional Order

- Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 78-101, 107-123.
TWEN: TBA.

Week Five: The Formation of Law in the Borderlands

- Readings: Montoya, TRANSLATING PROPERTY, Introduction and Chapter 1
TWEN: Peter L. Reich, *Siete Partidas In My Saddlebags: The Transmission of Hispanic Law From Antebellum Louisiana to Texas and California*, 22 TUL. EUR. & CIV. L.F. 79 (2007).
Tom I. Romero, II, *Bound Between & Beyond the Borderlands: Region, Race, Scale and a Subnational Legal History*, 9 Or. Rev. Intl. L. xxxx (2007).

Week Six: The Laws of Man, the Rights of Women

- Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 312-332.
Montoya, TRANSLATING PROPERTY, Chapters 2-3.

Week Seven: Conquest & the Transformation of Property and Citizenship in the 19th Century

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 168-202, 307-312; 363-369.
Montoya, TRANSLATING PROPERTY, Chapters 4-6.

Week Eight: The Meaning of Law, Order, and Equality in Industrial America*****Midterm Examination*****

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 332-350, 385-410.

Week Nine: Constructing the Color Line in a “United States”

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 215-242, 255-257, 262-272.
Boyle, ARC OF JUSTICE, Prologue & Chapters 1-3.

Week Ten: “Separate But Equal” in the Eyes of the Law

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 273-282, 450-458.
Boyle, ARC OF JUSTICE, Chapters 4-7.

Week Eleven: Progressive America and the Re-Imagination of Justice

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 360-362, 411-416, 449.
Boyle, ARC OF JUSTICE, 8-10 & Epilogue.

Week Twelve: World Wars, Depression, and the Challenge to Legal Orthodoxy

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 417-443; 469-492.
TWEN: G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).
Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

Week Thirteen: Rights and Revolution in the Post-World War II United States

Readings: Hall, et al., AMERICAN LEGAL HISTORY, pages 495-534.
Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, (1988).
Tom I. Romero, II *¿La Raza Latino?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the 20th Century*, 37 N. MEX. L. REV. 245 (2007)(on TWEN).

***** Final Examination Requirements, TBA*****