

SPRING 2001  
HISTORY 396  
M: 2:30-5:00—DU-238

## HISTORY OF AMERICAN LAW

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Despite the fact that law is a big institution in American society, there is little general interest in the history and anthropology of legal systems. Thus, law students typically solely focus on the practical aspects of law such as codes and statutes, the duties and responsibilities of lawyers, the work that goes beneath the preparation of a case, and the role of judges in making the law. As to history and anthropology departments, they rarely manifest any interest in the legal aspects of the societies they normally cover, not so much because they cannot see the importance of law in society, but because such a task is delegated to professional judges and scholars, lawyers, and law schools. Yet, an abundant literature does exist which essentially covers the following aspects of law.

- *legal theory*. Studies the epistemological, philosophical, moral and ethical (normative) aspects of law as manifested in law-making (legislation), judicial decision making (rulings of judges), and the practice of law in general. Legal theory thus raises questions on the *foundations* of a particular legal system—or its jurisprudence, if you wish to call it so: Is it founded on a *systematic* set of codes, statutes, and normative values, or is it impossible for any system to be coherent and rational? In the last two decades, legal theory has vacillated between two opposing poles. On the one hand, law in its two basic components of law-making and decision making (both of which in the British and American common-law traditions are intimately related) is looked upon as a quasi-philosophical and moral (normative) system whose practice ought to be autonomous from the political and economic passions and di-visions of the times. On the other, more “realistic” theories such as the Critical Legal Studies (CLS) look upon law as an ideological system that is deeply political and social in nature. Thus, in the American case, the judicial decision-making process of, say, appellate judges reflects their inner deeper beliefs either as conservatives or liberals even though the American legal system poses itself as “above” social divisions (Kennedy 1997). In short, we’re more into a process of judicial *policy* making, not only in the sense of

judges making the law, but also in creating social policies and the like: that's particularly true of policies created for the American penitentiary since the 1960s (Feeley & Rubin 1998).

- *history of law*. A history in the strict sense of the term aims at describing the *transformations* of a particular legal system over a period of time. It is therefore concerned in explicating why and how a change became manifest in a system during a specific period. For example, what kind of changes did the New Deal era force upon the legal system? A more ambitious legal history would be based on legal theory in the sense that it would ask itself the very same questions that the latter poses: What were the foundations of that particular system in that specific period? The assumption here is that the foundations are not the same from one period to another.
- *anthropology (and sociology) of law*. Concentrates on the practice (praxis) of legal systems: How do judges adjudicate? How do social actors (disputants) make use of the court system, and how do they learn the language of the courts (the transition from daily language to the legal)? What is the role of the lawyers? How do the various parts of the system connect together (or fail to connect)? To be sure, an anthropology of law might include some history and legal theory, in the same way that legal theory might rely on anthropological and sociological field studies, often used in conjunction with a comparative perspective (comparing various societies and periods).
- *comparative law* (see Zweigert & Kötz for an introductory approach). Various legal systems are compared with one another, usually with a blend of history, anthropology, and legal theory. Roman law typically occupies a privileged place in comparative anthropology due to the fact that such a dispersed body of practices, spanning over a millennium, beginning with the Twelve Tables and culminating with Justinian's *Digest*, was the first system ever to pose itself as coherent, abstract, and rational. Beginning with the publication of the *Digest*, and since the sixth century up to the Middle Ages, follows a period of the Reception of Roman law in many of the "barbaric" or "civilized" western societies of the time. Supposedly, only the Anglo-Saxons managed to create, since the Norman Conquest in 1066, a common-law system which allegedly did not have to undergo, unlike its Continental counterparts, the influence of Roman law (van Caenegem 1988 [1973]).

This course, which could be described as an *historical anthropology of law*, aims at a broad discussion of some of the questions raised above. We'll be primarily concerned with the English common-law roots of the American system, and then come to major differences between the two. The American common law will then be presented in terms of several monographs that mostly focus on the inner workings of the system.

## GENERAL

There are weekly readings that we'll discuss collectively in class. Your participation is essential for the success of the course. You might be also occasionally requested to prepare a presentation on a chapter or book which are part of the weekly assignments. Presentations should be improvised and 5 to 10 minutes long. Do not prepare a written presentation. You're also requested, after submission of a first-draft, to make a short presentation of your term-paper.

Besides the two-draft research paper (see below the section on papers), you're expected to submit three interpretive essays. *The final grade will be calculated on the basis of one-fifth for each paper draft and one-fifth for each interpretive essay. All interpretive essays are take-home and you'll be given a week to submit them. The purpose of the interpretive essays is to give you the opportunity to go "beyond" the literal meaning of the text and adopt interpretive and "textual" techniques. A failing grade in all interpretive essays means also a failing grade for the course, whatever your performance in the paper is. All essays and papers must be submitted on time according to the deadlines set below.*

First Interpretive Essay	20%
Second Interpretive Essay	20%
Final Interpretive Essay	20%
Preliminary paper draft	20%
Term Paper:	20%
In case the term paper grade is superior to the preliminary draft, it will count as 40%.	

- It is essential that you complete all readings on time, and that you come to class well prepared.
- The first, second, and final interpretive essays are all based on our weekly readings. They all consist of a single essay for which you'll receive the appropriate questions at the dates below, and you'll submit them in class a week later.
- For all five papers follow the procedures outlined below in the section on papers.
- Essays and papers are to be submitted only in class. Do not send any material as an attached e-mail file or otherwise.
- It's your responsibility to submit all essays and papers on time at the deadlines below. Late papers will be graded accordingly, and papers submitted a week after the deadline will be graded F.
- Each non-submitted paper will receive the grade of F, and your final grade will be averaged accordingly.
- The mid-term paper is a free-topic exercise that you should begin researching as soon as possible.

## READINGS

- Weeks 1, 2, 3: January 22 & 29, February 5  
Lawrence Friedman, *History of American Law*.

### February 5: FIRST INTERPRETIVE ESSAY

- Weeks 4 & 5: February 12 & 19  
John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard).

- Week 6: February 26  
Richard Posner, *The Federal Courts* (Harvard).

### February 26: SECOND INTERPRETIVE ESSAY

*March 5–10: mid-semester break*

- Week 7: March 12  
Stith & Cabranes, *Fear of Judging* (Chicago).

- Weeks 8 & 9: March 19 & 26  
Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge).

### March 26: FIRST DRAFT DEADLINE

- Weeks 10 & 11: April 2 & 9  
Mercuro & Medema, *Economics and the Law* (Princeton).

### April 9: FINAL INTERPRETIVE ESSAY

*April 16: Easter*

- Week 12: April 23

*Discussion and presentation of term-papers  
(if you're unable to meet for this last session, make an appointment: you'll not receive a grade  
unless you've completed a presentation of your paper.)*

**April 23: FINAL DRAFT DEADLINE**  
**submit your final draft with your preliminary corrected one**

## PAPERS

You are requested to write one major research paper to be submitted during the last session, Monday, April 23. You will have to submit, however, a first draft of this paper on Monday, March 26. The first draft should be as complete as possible and follow the same presentation and writing guidelines as your final draft, and it will count as 20% of your total grade unless the final draft is of superior quality. The purpose of the first draft is to let you assess your research and writing skills and improve the final version of your paper. It is advisable that you choose a research topic and start preparing a bibliography as soon as possible. I would strongly recommend that you consult with me before making any final commitment. It would be preferable to keep the same topic for both drafts. You will be allowed, however, after prior consultation, to change your topic if you wish to do so.

**You may choose any topic related to the social, economic, political, or cultural legal history of any society or civilization. *Papers should be analytical and conceptual.* Avoid pure narratives and chronologies and construct your paper around a main thesis.**

Kate L. Turabian, *A Manual for Writers of Term Papers, Theses, and Dissertations*, 5th ed., Chicago: University of Chicago Press, 1987. Intended for students and other writers of papers not written for publication. Useful material on notes and bibliographies.

Keep in mind the following when preparing your preliminary and final drafts:

- once you've decided on a paper-topic and prepared a preliminary bibliography, send an abstract and bibliography of your topic to the class-list <h396-l@luc.edu> (see below) no later than March 19. Your abstract should include: (i) title; (ii) description; (iii) sources; (iv) methodology (e.g. suggestions on how to read sources). **Your preliminary draft will not be accepted unless you've submitted an on-line abstract.**
- preliminary drafts should be submitted on time, March 26.
- preliminary drafts should be complete and include footnotes and an **annotated bibliography**. (The Turabian reference above is annotated: it briefly spells what the book is about and to whom it might be useful.)
- do not submit an outline as a first draft.
- incomplete and poorly written first drafts will not be accepted, and you'll be advised to revise your first draft completely.
- if you submit a single draft throughout the semester, you'll receive F for 20% of the total and your final grade will be averaged accordingly.
- the oral presentation is an essential aspect of your grade; if you can't attend the last session, request an appointment. Absences will only be accepted after prior approval from the Dean's Office.
- **your final draft should take into consideration all the relevant comments provided on your earlier draft:**

- all factual and grammatical mistakes should be corrected, in addition to other stylistic revisions.
- passages indicated as “revise” or “unclear” or “awkward” should be totally revised.
- when specific additional references have been suggested, you should do your best to incorporate them into your material.
- there might be several additional suggestions in particular on your overall assumptions and methodology. It will be up to you to decide what to take into consideration.
- **Submit the final draft with your preliminary corrected one.**
- if you’re interested in comments on your final paper and interpretive essay, request an appointment by e-mail.

Please use the following guidelines regarding the format of your papers:

- use 8x10 white paper (the size and color of this paper). Do not use legal size or colored paper.
- use a typewriter, laser printer or a good inkjet printer and hand in the original.
- only type on one side of the paper.
- should be double spaced, with single spaced footnotes at the end of each page and an *annotated bibliography* at the end.
- keep ample left and right margins for comments and corrections of at least 1.25 inches each.
- all pages should be numbered and stapled.
- **a cover page should include the following: paper’s title, course number and section, your name, address, e-mail, and telephone.**

## E-MAIL DISCUSSION LIST

An open e-mail discussion list is available: each message—whether mine or from any student—will reach anyone else on the list, so that every subscriber could directly write to the list.

**H396-L@luc.edu**

- You should subscribe to this list as soon as possible, preferably by the first week of classes.
- The forum list is free speech and not subject to any censorship: each message is posted directly and not subject to review from the list’s coordinator. The contents of the messages are the own responsibility of their authors.
- Updates on the syllabus—in particular on the readings—will be posted whenever necessary.
- Discussions on the weekly readings are particularly encouraged.
- You’re expected to post at least one message regarding your term-paper so that

everyone knows what others are working on (see supra the section on papers regarding the content of your message).

- All other messages not directly related to the course, whatever their nature, are also welcomed.
- The list will be kept for an additional semester once the course is over by May. To unsubscribe, follow the instructions below.

*To join the list, please send an e-mail message to:*

**listproc@luc.edu**

and include as your e-mail message (leaving the Subject: field blank, if possible):

**subscribe H396-L first-name last-name**

e.g., Janine Doe—you would type in:

subscribe H396-L Janine Doe

GroupWise Users at Loyola University Chicago: Please preface the 'listproc' address (or subscription address) with 'internet:' in the To: field. For example:

To: internet:listproc@luc.edu

Once you've successfully subscribed (you'll receive a confirmation message with instructions), send all messages to the list's address:

**H396-L@luc.edu**

Your message will be automatically forwarded to all the list's subscribers. You should also receive a duplicate of your own message.

To unsubscribe send an e-mail to listproc@luc.edu with the following message:

unsubscribe h396-l first-name last-name

Do not send any mail to my private address <zghazza@luc.edu>, except for appointments or personal problems regarding the course. **Suggestions for term-papers topics should be posted directly at the class-list.**

Problems in joining the list? Questions? Send an e-mail to Brian Kinne <bkinne@luc.edu>.

## REFERENCES

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