

## HISTORY 500: THE LEGAL CULTURES OF EARLY AMERICA, 1600-1760

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This seminar will explore the social and intellectual history of American law in the colonial period. While we will pay some attention to the development of legal rules and institutions, we will concentrate on legal culture—on that configuration of values and habits of mind that shaped the operation of the legal system and informed how colonists understood the law’s purposes and meanings. In so doing, the course will stress the multiple roles of law: as a way of resolving disputes, distributing resources, channeling politics and social development, shaping personal identities, and creating authoritative categories of knowledge.

In line with this ambitious and capacious understanding of law and legal culture, the seminar’s reading list contains a wide variety of sources. There will be, of course, the traditional materials of legal history: statutes, cases, and instructions to officials. We will also read materials that are not specifically “legal,” but that illuminate the values and social pressures playing upon the law. These sources include diaries, correspondence, satires, sermons, proclamations of grievances by rioters, town covenants, maps of settlement, demographic tables, church excommunication proceedings, plans for governmental and social reform, and an essay by the teenage George Washington on “Rules of Civility and Decent Behavior in Company and Conversation.” A selection of articles by historians and a book on the transformation of legal culture in colonial Connecticut will round out the assignments.

The seminar is organized into five main parts. The first section examines the legal foundations and justifications of English colonization in North America. The second charts how colonization produced divergent regional legal cultures in the seventeenth century Chesapeake and in Puritan New England. The third looks at the regulation of slavery and of gender relations. The fourth returns to the problem of seventeenth-century legal culture, exploring not regional variation, but the important and distinctive characteristics of that legal culture evident throughout the American colonies, characteristics that lent it a flavor or style. Finally, the fifth section asks how and why the legal culture of the eighteenth century displaced that of the seventeenth. Stronger imperial oversight, the growing importance of trained lawyers, and the expansion of population and commerce are all considered as causes of this transformation. The seminar ends by asking if there is a rubric that aptly describes the course of colonial legal development from 1600 to 1760—perhaps modernization, or anglicization, or the formalization of informal law?

Format: The seminar will meet once per week for two hours of intensive discussion. Regular attendance and thoughtful participation are essential. While the instructor will provide background information and introduce questions for discussion, the heart of a seminar will be the students’ analysis of the readings and debate about historical interpretive problems.

Reading: A packet of required readings has been duplicated and is available at the Humanities Copy Center in the Humanities Building (room 1650). In addition, please purchase

from the University book store on State Street: Bruce Mann, Neighbors and Strangers: Law and Community in Early Connecticut (Chapel Hill: University of North Carolina Press).

Background Reading: There is no “textbook” in early American legal history. Should you wish to supplement the course’s assigned readings with one or more books that approach the comprehensiveness of a textbook, you may wish to consult, at your discretion, Peter Charles Hoffer’s Law and People in Colonial America, 2nd ed. (Baltimore, 1998), or the chapters on colonial law in Lawrence M. Friedman’s A History of American Law, 2nd ed. (New York, 1985), or Kermit L. Hall’s The Magic Mirror: Law in American History (New York, 1989).

Assignments: There will be two writing assignments. A ten-page paper evaluating New England Puritan legal thought will be due at the beginning of class #5. A ten-page paper critically examining the transformation of the colonial legal system between the seventeenth and eighteenth centuries will be due at the beginning of class #12. We will discuss expectations for the writing assignments in class. There will be no final examination.

Grading: Each of the two papers counts for 40% of the final grade. Class participation counts for 20%. Class participation will be evaluated based on the quality (insightfulness, pertinence) of discussion, not the number of comments.

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## I. INTRODUCTION (Class 1)

James Willard Hurst, “Old and New Directions of Research in United States Legal History,” American Journal of Legal History 23 (1979): 1-9.

Michael Grossberg, “Social History Update: ‘Fighting Faiths’ and the Challenges of Legal History,” Journal of Social History 25 (1991): 191-201.

## II. THE COLONIZING ENTERPRISE (Class 2)

### A. English New World Colonization in Early Modern Perspective

#### Types of Colonies

Jack P. Greene, Negotiated Authorities: Essays in Colonial Political and Constitutional History (Charlottesville, 1994), 1-24.

Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (Athens, Ga., 1987), 7-12.

#### Composite States, Multiple Monarchies, and Colonization

## B. The Constitutional Relationship of England and the Colonies

Calvin's Case (1608)

Selected Colonial Charters

- Trading Company: The First Massachusetts Charter (1629)
- Proprietary Colony: Maryland Charter (1632)
- Corporate Colony: Connecticut Charter (1662)

Privy Council Memorandum (1722).

William Blackstone, Commentaries on the Laws of England (1765), I, 104-105.

Colonists' Opinions about the Extension and Reception of English Law, in Joseph H. Smith, ed., Cases and Materials on Early American Law and Legal Institutions (1969), 42-46.

Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (Athens, Ga., 1986), 23-28

## III. CLAIMING AMERICAN LAND (Class 3)

### A. Justifications for Taking America

#### 1. Introduction

#### 2. Arguments from Scripture

John White, The Planters' Plea: Or the Grounds of Plantations Examined and Usual Objections Answered (1630), 1-3, 5-6

#### 3. Arguments about the European Civilizing Mission

Robert Gray, A Good Speed to Virginia (1609), C2<sup>r</sup>-C4<sup>v</sup>

Nicholas Canny, "The Ideology of English Colonization: From Ireland to America," William and Mary Quarterly 30 (1973): 575-98

#### 4. Arguments about Land Use and Vacant Territory

Sir Thomas More, Utopia (1516)

Sir Walter Raleigh, "A Discourse of the Original and Fundamental Cause of Natural, Arbitrary, Necessary, and Unnatural War"

John Winthrop, "General Considerations for the Plantation in New England" (1629)

Solomon Stoddard, An Answer to Some Cases of Conscience Respecting the Country (1722)

B. The Problem of Defining Native American Land Titles: The Distinction between Sovereignty and Property, and the Debate over What Counts as Property

William Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (New York, 1983), 37-39, 54-75

Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest (New York, 1975), 128-130

Documents on Native Americans in Colonial New England: Statutes, Royal Commissioners' Reports, and Deeds of Sale

"Speeches of Canassateego for the Six Nations and Lieutenant Governor George Thomas of Pennsylvania" (1742)

IV. THE SETTLING OF AMERICAN LEGAL SYSTEMS: INHERITANCE, EXPERIMENT, AND IDEOLOGY

A. Utopian and Dystopian Impulses (Class 4)

William Shakespeare, The Tempest (1611), Act II, scene 1

View of Savannah, Georgia (1734)

B. Virginia: From Marchland Rule to Common Law Culture (Class 4)

Maps of Virginia in 1607-1624 and in 1634

Jack P. Greene, Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture (Chapel Hill, 1988), 7-18

Laws Divine, Moral and Martial [Dale's Laws] (1611)

David Konig, "Colonization and the Common Law in Ireland and Virginia, 1569-1634"

"A Report of the Manner of Proceeding in the General Assembly Convened at James City in Virginia" (1619)

"Sir John Harvey and the Council of Virginia" (1635)

County Court Records of Accomack-Northampton, Virginia, 1640-1645

C. The Carolina Blueprint: Reactionary Utopia? (Class 4)

"The Fundamental Constitutions of Carolina" (1669)

## D. The New England Way (Classes 5 and 6)

**\*Paper #1 Due:** At the beginning of class 5, please turn in a ten-page paper on the following topic: How might John Winthrop have criticized William Aspinwall's prescriptions for the ideal polity and legal system offered in A Brief Description of the Fifth Monarchy (1653)? To prepare for this paper, please read the material on "The New England Way" with particular attention to section D(4), "Puritan Biblicism and the Law."

"Biblicists" wanted to remodel society, government, and law as closely and literally as possible upon Scriptural models and commands. Aspinwall was a thoroughgoing Biblicist. While Winthrop also wanted to bring Massachusetts law and Biblical injunctions into harmony, his approach was more moderate than Aspinwall's. Winthrop represents the mainstream of New England Puritanism.

The course materials contain no direct commentary by Winthrop on Aspinwall. You will need to reconstruct how Winthrop would react to Aspinwall's proposal based on Winthrop's expressed opinions on the relationship of law and Bible found in several places in section D (the New England Way). Section D(4) contains part of a treatise by the English Puritan minister William Perkins and a discussion among New England clergy recorded in "How Far Moses' Judicials Bind Massachusetts." These two excerpts represent mainstream Puritan opinion similar to Winthrop's position and should be treated as illuminating what Winthrop actually wrote.

Among the questions you might discuss—and this list is a starting point, not an ending point: Do Winthrop and Aspinwall think that all Scriptural laws bind polities in the seventeenth century? If not, who decides which parts of the Bible are binding? What is the extent of permissible legislation by present day societies? According to Winthrop and Aspinwall, what role should covenants and the election of officials play in a godly polity? What makes a government "arbitrary?" How should a Christian move his polity and legal system away from a compromised state towards a godly state?

### 1. Puritan Caricatures

Nathaniel Hawthorne, "The Maypole of Merry Mount" (1837)

J. Rinaldo, Psychoanalysis of the Reformer (1921), quoted by Justice William O. Douglas, Ginsberg v. New York, 390 U.S. 629, 667 (1967)

Edmund S. Morgan, The Puritan Dilemma: The Story of John Winthrop (Boston, 1958), xi-xii

### 2. Early New England Society

Jack P. Greene, Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture (Chapel Hill, 1988), 18-26

Wethersfield, Connecticut: The Pattern of Settlement

Plan of Deerfield, Massachusetts (ca. 1671)

### 3. The Puritan Vision of State, Society, and Law

David Underdown, Fire From Heaven: Life in an English Town in the Seventeenth Century (New Haven, 1992), 20-22.

Perry Miller and Thomas H. Jackson, "The Theory of the State and of Society," in Miller and Jackson, eds., The Puritans (New York, 1938), I, 181-194

Edmund S. Morgan, "Introduction," in Puritan Political Ideas, 1558-1794 (Indianapolis, 1965), xx-xxv

John Winthrop, "A Model of Christian Charity" (1630)

"Articles of Agreement, Springfield, Massachusetts" (1636)

### 4. Puritan Biblicism and the Law

William Perkins, A Discourse of Conscience (1608)

William Aspinwall, A Brief Description of the Fifth Monarchy (1653)

"How Far Moses' Judicials Bind Massachusetts" (c. 1643)

J. F. Maclear, "New England and the Fifth Monarchy: The Quest for the Millennium in Early American Puritanism," William and Mary Quarterly 32 (1975): 223-260. [This is optional reading. It is available for those who want to know more about Fifth Monarchy thought.]

### 5. Massachusetts Debates on Codification and the Scope of Magistracy

Mark DeWolfe Howe, Readings in American Legal History (New York, 1971), 181-219.

The Laws and Liberties of 1648 [read with special care the introduction, capital laws, and laws on heresy and lying]

### 6. English Law Reform in Early Massachusetts (Class 6)

G. B. Warden, "Law Reform in England and New England, 1620 to 1660," William and Mary Quarterly 35 (1978): 668-690

### E. Concluding Thoughts on the Settling of the American Legal Systems: The Taming of Authoritarianism and the Domestication of Utopia (Class 6)

Editor's Table, "Providence in Human History," Harper's New Monthly Magazine (1858).

## V. THE LEGAL REGULATION OF SLAVERY (Class 7)

### A. Overview

Orlando Patterson, Slavery and Social Death: A Comparative Study (Cambridge, 1982), vii-ix.

David Brion Davis, Slavery and Human Progress (New York, 1984), 8-13, 19-21.

Orlando Patterson, Slavery and Social Death: A Comparative Study (Cambridge, 1982), 1-14.

### B. The Process of Enslavement in Colonial Virginia

Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812 (Chapel Hill, 1968), 44-63.

Materials on the Origins of Slavery in Colonial Virginia, 1619-1682

### C. The Slave Code of Colonial Virginia

Allan Kulikoff, Tobacco and Slaves: The Development of Southern Cultures in the Chesapeake, 1680-1800 (Chapel Hill, 1986), 37-44.

Selected Tables and Charts on Colonial Virginia's Population Growth

Philip D. Morgan, "British Encounters with Africans and African-Americans, circa 1600-1780," in Bernard Bailyn and Philip D. Morgan, eds., Strangers Within the Realm: Cultural Margins of the First British Empire (Chapel Hill, 1991), 163-164, 167-169, 171-174, 175-178, 180-183, 190-193, 195-198, 212-217 [optional reading]

"An Act for the More Speedy Prosecution of Slaves Committing Capital Crimes" (Virginia, 1692)

The Virginia Slave Code of 1705

## VI. THE LEGAL REGULATION OF GENDER (Class 8)

### A. Overview: The Rise and Fall of the "Golden Age" Hypothesis

Mary Beth Norton, "The Evolution of White Women's Experience in Early America," 89 American Historical Review (1984): 593-619 [optional reading]

### B. Coverture

William Blackstone, Commentaries on the Laws of England, (1765), I, 430-33

Manby v. Scott (Exchequer Chamber [England], 1664)

Joan R. Gundersen and Gwen V. Gampel, "Married Women's Legal Status in Eighteenth-Century New York and Virginia," William and Mary Quarterly 39 (1982): 114-34.

Cornelia Hughes Dayton, Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789 (Chapel Hill, 1995), 69-104.

### C. Gender and the Criminal Law

Mary Beth Norton, "Gender, Crime, and Community in Seventeenth-Century Maryland," in James Henretta et. al., eds., The Transformation of Early American History: Society, Authority, and Ideology (New York, 1991), 123-150

### D. The Multiplicity of Experience: Regulation of Sexuality, Civil Litigation, and Slander; Regional Variation

## VII. NOTES ON EARLY AMERICAN LEGAL CULTURE: THE UNSTEADY RULE OF THE STATE'S LAW (Class 9)

Legal Culture: What is it? How might we use it?

The Model of Legal Centralism: Marc Galanter, "Notes on the Future of Social Research in Law," in Lawrence Friedman and Stewart Macaulay, eds., Law and the Behavioral Sciences, 2d ed. (Indianapolis, 1977), 18-21.

### A. Ethnic Enclaves and Legal Pluralism

Stephen Botein, Early American Law and Society (New York, 1983), 14-16

Map and Table of the Ethnic Composition of the Colonial Population

Christopher Saur, "Continuation of a Conversation between a Newcomer and a Resident of Pennsylvania," in Der Hoch-Deutsch Americanische Calender (Germantown, Pa., 1753-54).

### B. Displaying Authority and Deference: Carriage, Countenance and the Law as Drama

John Winthrop, Journal (January 1636)

George Washington, "Rules of Civility and Decent Behavior in Company and Conversation" (1745)

Melvin Yazawa, From Colonies to Commonwealth: Familial Ideology and the Beginnings of the American Republic (Baltimore, 1985), 33-58 [optional reading]

A. G. Roeber, "Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750," 37 William and Mary Quarterly (1980): 29-52.

E. P. Thompson, Customs in Common: Studies in Traditional Popular Culture (New York, 1991), 43



## VIII. THE TRANSFORMATION OF THE EARLY AMERICAN LEGAL SYSTEM

### A. The Texture of Seventeenth-Century Law (Class 10)

Baker v. Andrews (Essex County, Massachusetts, 1659)

Giddings v. Brown (Essex County, Massachusetts, 1657)

Jeremiah Dummer, A Defence of the New England Charters (1721), 20-21.

Richard Morris, Studies in the History of American Law (New York, 1930), 46-61.

### B. Eighteenth-Century Adjudication (Class 10)

Alcock v. Warden (Massachusetts Superior Court of Judicature, 1766)

Banister v. Henderson (Massachusetts Superior Court of Judicature, 1765) [skim--try to get a sense of the style of argument]

### C. Empire (Class 10)

Francis Fane, "Reports on the Laws of Connecticut" (1733-1741)

Royal Disallowance of Certain Pennsylvania Laws (1706), in W. Keith Kavenagh, ed., Foundations of Colonial America: A Documentary History (New York, 1973), II, 1170-1172.

Robert Beverly, The History and Present State of Virginia (1705; reprint, 1947), 255-56

Instructions to American Governors Concerning Justice and Judicial Officers, in Leonard Woods Labaree, ed., Royal Instructions to British Colonial Governors, 1670-1776 (New York, 1935), I, 297, 298, 313, 320, 329-30, 367-68, 383.

Stephen Botein, "The Stresses of Empire," in Botein, Early American Law and Society (New York, 1983), 50-59.

### D. Commercialization (Class 11)

Bruce H. Mann, Neighbors and Strangers: Law and Community in Early Connecticut (Chapel Hill, 1987). [Optional reading: Chapter 2, "Geography of Legal Change"]

## E. The Legal Profession (Class 12)

**\*Paper #2 Due:** At the beginning of class 12, please turn in a ten-page paper on any of the following questions:

--What was the most important cause of the transformation of the early American legal system between the seventeenth and eighteenth centuries? Be sure to explain why you view your chosen cause as more significant than rival explanations.

--We have looked at three causes for the transformation of the colonial legal systems: imperial pressure, commercialization, and the rise of trained lawyers. The course explored these causes one after the other. This way of presenting the material slights interactions among the causes. Which interactions deserve special attention from historians? (If you are so inclined, part of your paper may lay out a research agenda for historians interested in uncovering interactions among the causes.)

--Design a question that you wish to answer, preferably one that focuses on weeks 10-12 of the course (though I am open to other possibilities). If you want to design your own question, please discuss it with me in advance. I reserve the right not to accept papers on topics that I have not cleared with students in advance.

### 1. The Colonial Lawyer in the Seventeenth Century

John Winthrop, Journal (June 1641)

Virginia Statutes Regulating Lawyers, in Walter Hening, ed., Statutes at Large of Virginia

A. G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810 (Chapel Hill, 1981), 53, 56-59.

Alan F. Day, "Lawyers in Colonial Maryland, 1660-1715," 17 American Journal of Legal History (1973), 145-149, 161-164.

### 2. A Colonial Paradox: Respect for Law, Disdain for Lawyers

Thomas Overbury, "A Mere Pettifogger," in New and Choice Characters (1615)

Cotton Mather, "Bonifacius, an Essay upon the Good that is to be Devised and Designed by those Who Desire . . . to Do Good While they Live" (1710)

Ebenezer Cooke, "Sot-Weed Factor," in Kenneth A. Lockridge, Settlement and Unsettlement in Early America: The Crisis of Political Legitimacy Before the Revolution (Cambridge, 1981), 63-64.

William Livingston, "The Art of Pleading" (1751).

Grievances of Monmouth County, New Jersey (1769).

### 3. The Development of a Trained Bar in the Eighteenth Century

John M. Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in Stanley N. Katz and John M. Murrin, Colonial America: Essays in Politics and Social Development, 3rd edition (New York, 1983), 540-571

William Smith, Jr., "Some Directions Relating to the Law," (c. 1756), in Paul Hamlin, ed., Legal Education in Colonial New York (New York, 1939), 197-200.

Diary and Autobiography of John Adams, L. H. Butterfield, ed. (New York, 1964), I, 47-50, 53-57, 58-59

John Adams, Legal Commonplace Book (c. 1759), in L. Kinvin Wroth and Hillier B. Zobel, eds., Legal Papers of John Adams (Cambridge, Mass., 1965), I, 4-10.

### F. The Trajectory of Eighteenth-Century American Law: Formalization of Informal Law? Modernization? Anglicization? (Class 13)

Marc Galanter, "The Modernization of Law," in Myron Weiner, ed., Modernization: The Dynamics of Growth (New York, 1966), 153-61.