Fall 2006
Legal 297C: Law in the Historical Context
Instructor:
Prof. Bernie D. Jones

Class Meeting Time: Mondays and Wednesdays, 11:15am-12:30pm

Classroom: Bartlett 207

Office Hours: 9:30-10:30 am, Mondays and Wednesdays, and by appointment

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Course Description and Objectives:

If lawyers, judges, law professors, clients and witnesses contribute to the development of law, as do lay people who respond to the law by supporting or resisting legal change, how has the law and its institutions acted as historical forces throughout American history? How has history wielded its influence upon law? Through the assigned readings, in-class discussion and lectures, we will learn about the development of American law from the colonial period to the present day.

Regular attendance will be worth 25% of the final grade and discussion assignments will be worth 10% of the final grade. There will be two in-class midterm exams (in essay format) and a final paper assignment, all based upon the lectures and readings. Each exam will be worth 20% of the final grade, and the final paper will be worth 25% of the final grade.

Regular attendance: According to the registrar’s, there are approximately 29 days of class, and I’ll be counting 23 days from the end of add-drop on September 19. For the purposes of checking regular attendance, then, I’ll begin counting from September 20. Basic attendance with no class participation will result in 1 point. Attendance with participation results in 2 points. Excellent in class participation will result in 3 points. Unexcused absences: zero points. As for excused absences, I am to be informed of the absence beforehand. These absences will earn a half point. Extra credit: I will increase the final grade by half a grade point of those who never miss a class, counting from the first day of class after the end of add-drop, and who also do eleven, rather than the ten discussion assignments required.
Discussion assignments: This is not the kind of class where you can blow off the reading and then learn everything in time for the midterm exams and final paper. Everything builds upon what we previously read and talked about in class, so do the readings on a regular basis. During the course of the semester, I’ll be putting onto Webct, discussion guidelines for you to refer to as you do the reading for class. Each guideline will be comprised of at most 5 questions to be answered in paragraph format: 4-8 sentences. Each discussion guideline will be worth a maximum of 5 points. These discussion guidelines will help you identify the major questions that are significant for the readings and help you in understanding the material. These guidelines will be the basis of our in class lecture. They will be placed onto Webct by Friday afternoon and will be due the following Monday in class. Draft responses to 10 during the course of the semester. Your responses should be well-written and proofread; points will be taken off for responses that are not. As you answer the questions, cite to specific references from the text, and provide the page number of your citations.

Please note that your responses should be your own, and based upon your own understanding of the readings, not based upon your latest web searches, including wikipedia and google, or the conversation you had with your roommate or friends on myspace. Please note also, taking others’ ideas and presenting them as your own is plagiarism, an academic offense which can result in failure!

The in class exams and final paper: to be graded on a scale of 0-100. Note that: A 92-100; A- 90-91; B+ 88-89; B 82-87; B- 80-81; C+ 78-79; C 72-77; C- 70-71; D+ 68-69; D 66-67; D- 65; F 64 and below. The in-class exams will be modified open-book, where you can bring only a one-page outline of points that you identify as significant for understanding the material: no notebooks, no textbooks. This should be an outline that you make up on your own, without the help of others, based upon the readings and your notes that you studied beforehand. The final paper will in essay format, based upon the materials covered during the course of the semester: discussion assignments, lecture, and the assigned readings only. Along with the final paper assignment, I’ll provide guidelines on how it should be written, and a checklist for how it will be graded. Remember once again, that your work should be your own, based upon your own ideas, not based upon your web searches or your conversations with others.

Maximum Enrollment: 40

Prerequisite: Legal Studies majors only

Important Deadlines:

1 http://www.oit.umass.edu/webct/campus/index.html. On WebCt, you will find important information and links. I urge you to refer to WebCt regularly, in particular for any announcements. This syllabus is subject to change; a revised syllabus will not be provided when there are changes. As a result, you are responsible for keeping up-to-date through WebCt prior to coming to class.
September 19, last day to drop with no record appearing on transcript  
October 30, last day to drop with a “W” appearing on transcript

Required Texts:


Schedule of Class Meetings:

**Part I: American Legal History, the Colonial Period, the Early Republic and the Jacksonian Era—The Anglo American Common Law**

September 6: Introduction to the class.  
Read the American Legal History Study Guide on WebCt and the preface to the assigned text.


September 18, 20: 78-91, 91-92, 108-109, 115-123

September 25, 27: 124-137, 139-144

October 2, 4: 145-161, 167-184, 196-208

October 9: No class: Columbus Day

October 11: Monday is Wednesday Schedule  
Midterm exam 1. Late exams: 5 points off per day for unexcused lateness.

**Part II: American Legal History, the Late 19th century to the 20th century—Legal Education; The Rise of the Regulatory State and its Aftermath**

October 16, 18: 351-363, 459-464, 467-476

October 23, 25: 363-374, 376-382, 476-482

October 30, November 1: 382-395, 398-406, 486-492

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2 It is available at the Jeffrey Amherst Bookstore, 55 South Pleasant, 253-3381. The text should be brought to class daily.
November 6, 8: 581-594, 616-627

Part III: Civil Liberties, Criminal Justice and the War on Terror


November 15: Midterm exam 2. Late exams: 5 points off per day for unexcused lateness.

Part IV: Gender, Sexuality, Race and the Law--The Changing Legal, and Social Orders, from the Colonial Era to the Contemporary Period


December 4, 6: 285-296, 307-311
Final paper assignment distributed December 6

December 11: No class

December 13: Final paper assignment due in class. Papers received after class is over will be docked 5 points; papers received on any day after the deadline will be docked 5 points off per day lateness.

December 15-22: Final Exam Period

January 2, 2007: Final grades are due
American legal history as a field is not one commonly studied, particularly at the undergraduate level. Nonetheless, in a legal studies program, where we consider the development of law in society, and society’s influence of law, the historical is important.

So how then, does one begin to study it? First of all, let’s consider the components of “American legal history:” the development of American law, and the development of American history. Think back to high school, where you would have studied civics or government, and American history. Think about what you learned about the founding of America, the arrival of the colonists, their relations with the Native Americans they encountered, the Revolution, the drafting and signing of the Declaration of Independence and the Constitution. All of these aspects of historical development had ramifications in law: how the founders envisioned the society they were developing would be governed. Consider the three branches of government: the executive, the legislative and the judicial. Each can make law, and legal struggles can ensue in cases of conflicting visions of the role of each in forming law and in leading the nation. We will study some of those visions at the founding, and the conflicts that grew out of the separation of powers issue, in different times throughout American history.

But we will consider other topics too, how legal issues developed in a changing society becoming ever more complicated as a result of commercialism and industrialization. How did legislators respond? What was the judicial response to challenges to legislation? What has been the role of the courts in determining relations between the state and federal governments? Beyond that, we will ask, how has gender, race and sexual orientation been important for determining legal status? How has legal status changed over time? How has law the battleground for formulating social change?

Under the American legal system that we inherited from England, the “common law,” legal cases, matters of controversy involving lawsuits, result in legal opinions drafted by the judges who hear the cases and decide whether one party will win or the other. Adversarial parties compete to present their story, in order that their formulations of fact and law might prevail. If a jury is involved, judges instruct them on what the law

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3 For a more in-depth introduction to the field of American Legal History, see: Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. Legal Education 563 (1984); and volume 18 of the Law and History Review (spring 2000), for a discussion of J. Willard Hurst and his contributions to the development of the field.
is, but the jury members determine which story is most credible. Legal opinions then are important for an understanding of American law, contrary to other legal systems where judges’ opinions are of minimal importance. But because opinions, particularly those of high courts, provide precedent, examples for other judges to follow, and because like decisions should be decided in like manner, pursuant to stare decisis, judicial opinions matter. Thus for the legal historian interested in understanding the development of law over time, judicial opinions are a rich source of data. They can be read for language, for the rationales used by justices, for the cultural assumptions and social tensions that were at stake in the cases before the court.

Thus, legal opinions will be at the heart of much of what we will be reading and studying this semester. Since this is not a law school class, we won’t be reading them in their entirety, to understand the procedural issues of the cases and the substantive law. Instead, we will be reading them in edited form, for their historical value. There will also be some statutes, since legal controversies and cases sometimes arise out of problems with statutory law that demand interpretation. In some instances, constitutional amendments will be the focus, insofar as the parties to an action, the litigants, might have alleged that a statutory provision violated protected rights under the law, the United States Constitution that set forth the fundamental rights of Americans. But beyond that, we might read theoretical pieces, written by scholars who critique and make proposals for how the law should be interpreted, or for what ought to be the role of law in society. Other readings will be about people at the heart of some of these legal controversies. What motivated these legal actors? What motivated them to defend their cases?

So where do you begin? Think about what you learned in your high school civics classes about Constitution, the branches of government, and what you learned about American history. I presume you already know the basics. We will be taking our basic knowledge about key factors and issues in American history and learn about how they relate to American legal development. As for reading cases, don’t be intimidated; the textbook is manageable. But in case you are confused about legal terms used in some of the opinions, check the legal dictionary link on the class website on WebCt, http://www.umass.edu/webct/. I have also included a Merriam-Webster standard dictionary link.

Feel free of course, to bring your questions to class. That is why attendance and participation are important.