

UNIVERSITY OF MINNESOTA PROGRAM IN LAW & HISTORY

Legal History Workshop/Seminar Professor Susanna Blumenthal

Schedule of Speakers—Spring 2012

All sessions, unless noted otherwise below, will be held on Wednesdays from 3:35 p.m. to 5:30 p.m. in Room 55 of Mondale Hall. Papers will be circulated one week in advance. To receive a copy, contact Meghan Schwartz at schwa859@umn.edu.

February 1

Ari Bryen, ACLS Faculty Fellow in Rhetoric and Classics, University of California, Berkeley
Title: “Martyrdom, Rhetoric, and the Politics of Procedure”

Abstract: An odd form of literature begins to appear in the Roman provinces in the 2nd and 3rd centuries AD. In form, this literature looks like documents otherwise well-known from the provinces, namely, transcripts of trial proceedings (*acta, commentarii*) which are found on stone and papyrus - but in fact these “proceedings” are pieces of imaginative literature. They dramatize the last moments of (usually Christian) martyrs as they stand before provincial governors demanding not to be spared, but rather, that the state follow procedure to the letter - that the martyr get to speak, that the formalities of the trial be carried out, and that the execution take place. The state, in these moments, has been charged (by imperial edict or by popular pressure) with dealing with an unpopular minority; yet rather than engage happily in full-bore slaughter, the state is portrayed as anxious and awkward about deploying violence. Why? What is the importance of procedure for a martyr? What is the importance of judicial speech? What, if anything, can these practices tell us about the emergence of a distinctly Christian understanding of law? This paper will suggest that a politics of procedure came to emerge in the Roman world as a result of an attempt to depoliticize the provincial landscape as a whole, and that the Christian martyrs, far from being other-worldly saints, can be located within a particular set of juridical politics peculiar to empires.

February 10 (Friday, 12:15-2:10 p.m., room 55)

Adam Kosto, Professor of History, Columbia University

Title: “Medieval Hostages, Contract Theory, and the History of International Law”

Abstract: In the European Middle Ages, as in premodern societies generally, hostages were given, not taken. They were a form of personal surety used to guarantee agreements ranging from interstate treaties to wartime undertakings to financial transactions. The present paper explores two aspects of medieval hostages of interest to legal historians. The first part attempts to understand the logic of the medieval hostage-as-guarantee with reference to modern scholarship on contract theory, in particular work on credible commitments. While the analogy between the medieval hostage and, for example, modern sunk costs quickly runs aground, such comparisons are nonetheless fruitful.

The second part of the paper looks to the writings of medieval canon lawyers for the origins of the objections to premodern hostageship that contributed to its decline in the Early Modern era; it then demonstrates how this decline led the Nuremberg tribunals to ground its decisions on hostages in a flawed understanding of the history of the institution.

February 24 (Friday, 12:15-2:10 p.m., room 55)

Samuel Moyn, Professor of History, Columbia University

Title: “From Antiwar Politics to Antitorture Politics”

Abstract: The intense contemporary focus on the law of armed conflict naturally raises the question of where that focus came from. This paper returns to the law of war during the Vietnam era as a basis for historicizing our own concerns. Why was there no comparable public focus during Vietnam on the law of war, though violations of it were so much worse? And why was attention to it so focused on aggression to the detriment of our current interest in atrocity? Why the change since?

February 29

Oren Gross, Irving Younger Professor of Law, University of Minnesota

Title: “Words as Power: The Rhetoric of War in Historical Perspective”

Abstract: Rather than being formed by, and discoverable through, exogenous situational contexts, rhetoric precedes and informs the impact of such situations. Meaning “is not discovered in situations, but created by rhetors.” In the United States, no one plays the role of the national rhetor more than the president—“the nation’s chief storyteller, its Interpreter-in-Chief.”

The paper examines closely the features of presidential war rhetoric and focuses on what Campbell and Jamieson identify as “strategic misrepresentations” of facts and events. In this context the paper examines the influence of “framing” as heuristic, a mental shortcut that individuals (including decision-makers) use when making decisions—either private or public policy ones.

Frames are “powerful nudges” as Thaler and Sunstein explain. Individuals use frames as interpretive emotional filters through which to make sense of events around them and messages they receive. The role that frames play in shaping outcomes increases, I argue, in contexts of crisis, emergency and war. So too does the capacity of those who control the framing process to influence and shape outcomes.

The paper then looks at two rhetorical tools and mechanisms that have been used to shape the public’s schemas of interpretation through framing. One is the use of affect-neutral or affect-minimizing euphemisms that seek to desensitize our emotions by masking any emotive affect. The other is the rhetoric of “war” that makes us hyper-sensitive to particular narratives and heightens particular types of strong emotions. Such emotions carry a pronounced effect on people’s perceptions of, and reactions to, risk as they act as multipliers of the perceived likelihood of risk.

The paper then details the uses of the rhetoric of war by presidents, looking at FDR’s war rhetoric in dealing with the Great Depression, LBJ’s “war on poverty,” Nixon’s “war on crime” and Reagan’s “war on drugs.” It dovetails this discussion by looking at President Bush’s rhetoric in the context of the “global war on terror.”

March 7 *Erickson Lecture, Room 50, 3:30 pm*

Lauren Benton, Professor of History and Affiliate Professor of Law, New York University School of Law

Title: “The Trial of Arthur Hodge: Petty Despots and the Making of an Imperial Legal World”

Abstract: In April, 1811, a wealthy planter named Arthur Hodge was tried, convicted, and hanged for the murder of a slave on the island of Tortola. Often appearing as a footnote in the history of abolition or treated as a minor incident in colonial criminal law, the trial and its context illuminate broader legal trends. Conflicts over the exercise of local authority were prompting calls to contain “petty despotism” in subordinate jurisdictions across the British empire. Interimperial wars were

highlighting the role of prize courts within the Atlantic world and placing strains on elite access to colonial sinecures – trends that urged new interest in imperial legal hierarchies. Together such practices transformed the early nineteenth century into a distinctive legal period. The hallmark of the age was not, as some scholars have suggested, a pivot from natural to positive international law, a new kind of human rights law forged by abolitionists, or the legal consequences of a wave of anti-imperial revolutions. In responding to the Hodge trial and other similar events, diverse sets of legal actors in European capitals and remote colonies joined in elaborating a vision of imperial law as a uniquely effective framework for local, regional, and global order.

March 21

Rebecca Rix, Assistant Professor of History, Princeton University

***Title:* “‘We, the People?’ Representation and ‘The Public’ in Progressive-Era United States”**

Abstract: “No taxation without representation,” a rallying cry since the Revolution, evokes key issues in understanding the processes and structures of government by, for and of the people. Who governs? On whose behalf? How? In a post-revolutionary nation, what should be the balance between order and popular legitimacy? Historians, political scientists, legal scholars and scholars of civil society are interested in these questions, since they are central to the nature of American belonging, governance, and the state. Yet the highly contested reforms of representation of the early twentieth century, from the initiative and referendum, to the Australian ballot, to the Constitutional Amendments for woman suffrage and the direct election of senators, are more often observed than analyzed in terms of their transformative impact on American republicanism. Building on insights from feminist scholarship and my historical project on the basic unit of society and government, I argue that these reforms marked a fundamental departure from traditionally hierarchical, status-bound, family-based republicanism. Understanding these reforms as a departure from a traditional meaning of the “franchise” that meant not just the vote, but also a private sphere of jurisdiction, private property, and elevated standing at law reserved for male heads of household and local elites, allows us to understand the 1910s as a “constitutional moment” akin to the more often identified Revolution, Reconstruction, and the New Deal.

March 28

Sophia Lee, Assistant Professor of Law, University of Pennsylvania Law School

***Title:* “The Workplace Constitution: Race, Labor, and Conservative Politics from the New Deal to the New Right”** (chapters to be drawn from Professor Lee’s book manuscript by the same title)

Abstract: This book a legal and political history of the workplace Constitution: the idea that workers have constitutional rights on the job and in the union. American workers’ current lack of constitutional rights on the job was not inevitable. In fact, from the vantage point of the mid-twentieth century, this outcome appeared unlikely. In the 1930s and 1940s, two movements began challenging the state action doctrine in an effort to extend the Constitution to the workplace. Their chances of success seemed high. One, the civil rights movement, would go on to capture the attention of the nation and win startling changes to its legal regime. The other, the right-to-work movement, which fought the unionization of the workplace, had the support of some of the nation’s most powerful politicians and opinion-makers. These two movements created a strange and contentious but potentially powerful combination. *The Workplace Constitution* explains why the state action doctrine survived the civil rights and conservative revolutions, and explores the implications of this history for the workplace and beyond.

April 4

Hendrik Hartog, Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Professor of History, Princeton University

Title: *Someday All This Will Be Yours: A History of Inheritance and Old Age* (Harvard University Press, available for purchase online and at U of M Bookstores)

Abstract: We all hope that we will be cared for as we age. But the details of that care, for caretaker and recipient alike, raise some of life's most vexing questions. From the mid-nineteenth to the mid-twentieth century, as an explosive economy and shifting social opportunities drew the young away from home, the elderly used promises of inheritance to keep children at their side. Hendrik Hartog tells the riveting, heartbreaking stories of how families fought over the work of care and its compensation. *Someday All This Will Be Yours* narrates the legal and emotional strategies mobilized by older people, and explores the ambivalences of family members as they struggled with expectations of love and duty. Court cases offer an extraordinary glimpse of the mundane, painful, and intimate predicaments of family life. They reveal what it meant to be old without the pensions, Social Security, and nursing homes that now do much of the work of serving the elderly. From demented grandparents to fickle fathers, from litigious sons to grateful daughters, Hartog guides us into a world of disputed promises and broken hearts, and helps us feel the terrible tangle of love and commitments and money. From one of the bedrocks of the human condition—the tension between the infirmities of the elderly and the longings of the young—emerges a pioneering work of exploration into the darker recesses of family life. Ultimately, Hartog forces us to reflect on what we owe and are owed as members of a family.

April 11

Paul Halliday, Professor of History and Law, University of Virginia

Title: “The Courtroom, the Clerk’s Archive, and the Judge’s Voice: Technologies of Judicial Authority in Eighteenth-Century England”

Abstract: Print sources are seductively easy to use. But extensive scholarship has revealed their many shortcomings as sources of early modern law. I respond to this problem by suggesting why and how we must work in court archives. While this is a commonplace among legal historians, I want to explore how the problem and its solution must carry us into cultural as well as legal history. Here, we follow insights from the recent historiography of science and epistemological communities; of the ways in which speech, manuscript, and print interacted as forms of knowledge; and of archives as instruments of state formation. I argue that we can mark early modernity as an epoch according to the ways in which distinctive technologies of knowledge—aural, scribal, and printed—interacted. By exploring one court case, we can watch this interaction; we can go into the archives to see how court clerks helped to make what counted as legal authority. We find that authority was made more by communities than by individuals; that it arose from and ran through manuscript more than print; and that authority was stored in, and thus made by, the archives constructed and maintained by court clerks.

April 18

Bernadette Meyler, Professor of Law and English, Cornell University

Title: “Seventh Amendment Common Law: British or American?”

Abstract: The only section of the U.S. Constitution that refers explicitly to its common law backdrop is the Seventh Amendment, which specifies that, “In suits at common law, where the value in

controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” Because of this allusion to common law, even justices who do not ordinarily espouse originalism tend to concur that historical analysis is appropriate in the Seventh Amendment context. In addition, the almost univocal consensus has been that the Seventh Amendment should be read within the framework of British rather than American common law.

As this piece contends, it is appropriate to examine the common law backdrops of the Seventh Amendment to determine the kinds of features that rendered a question one of “fact” rather than “law,” or to ascertain the types of trials in which a jury would have been used; at the same time, however, because a number of other kinds of proceedings have arisen subsequent to the founding, it would be inadvisable to limit the grant of a jury trial to cases that could have occurred in the late eighteenth century. Instead, it is necessary to update the areas of application of the Seventh Amendment’s categories while keeping in view the various reasons why certain kinds of cases were considered part of the common law, or whether and for what reason their status as such was disputed during the founding period.

Likewise, the division of labor and authority between the courts of equity and common law, as well as the distribution of trial by jury as opposed to by chancellor, diverged among the colonies. It is a mistake, this piece argues, to neglect that situation by simply relying on the British version of the common law as opposed to its multiple American variants. It is important, rather, to consider the range of differences, assess their causes and import, and deploy them to establish a range of original meanings out of which a contemporary controversy can be decided.