

Law 6702/Hist 8644
Fall 2010, Thursday, 4:05-6:00 p.m.
Room N202, Law School
Office hours: Wednesdays, 4:30-6 p.m. or by appointment

Prof. Susanna Blumenthal
blumen047@umn.edu
(612) 624-5694
Office: 436 Mondale Hall

**UNIVERSITY OF MINNESOTA LEGAL HISTORY SEMINAR/WORKSHOP
FALL 2010**

Course description

This seminar brings in leading scholars engaged in projects at the intersection of law and history. The goal of the seminar is to provide students with an introduction to the field of legal history and an opportunity to engage with scholars working on innovative projects ranging across both time and space. Workshop sessions will be devoted to the presentation and discussion of works-in-progress and recently published monographs provided by the guest scholars. Collectively, their works will encourage students to think comparatively about the role of law in defining the nature and limits of state power, and more broadly about the historical dynamics of law and society, with particular attention to the ways in which law has served not only as a mode of governance, but also as a cultural resource, enabling individuals to contest conventional ideas about race, class, and gender difference, and the meaning of social justice.

Course mechanics and requirements

Most of the readings for the term will that produced by our guest speakers. I have asked the speakers to send me their papers two weeks in advance of their presentation; they will be made available to the seminar participants electronically. In the first weeks of the course and at critical junctures during the semester, we will meet without a speaker to discuss shared readings intended to orient ourselves to the field of legal history. These readings will also be available electronically. Students enrolled in the course for credit are expected to attend all class sessions, complete short (1-2 pages, single-spaced) response papers addressing the weekly readings, and actively engage in class discussions. Although such engagement may take many forms, all students should aim to contribute regularly during weekly sessions in ways that reflect thorough preparation and serve to advance the discussion. This can be accomplished by raising questions, building on points raised by others in the class, and generally exhibiting critical thinking about the works under consideration this semester.

In addition, class participants will be required to complete two essays or a research paper depending upon whether the course is being taken for two or three credits. Law students enrolling in Law 6702 may elect to take the course for two or three credits; those electing the latter option should register for 1-credit Independent Research (Law 7608) with me. This will effectively make the seminar a 3-credit course for law school

purposes. The seminar satisfies the law school's writing requirement. Graduate students enrolling in History 8644 will take the course for three credits. The differing requirements for two versus three credits are as follows:

Option 1: (1) weekly response paper and discussion questions (30%); (2) participation (10%); and (3) two short essays (10-12 pages each)(30% each). The essays are intended to give you the opportunity to pursue in greater depth themes or issues raised in the presented works. One of the two essays should be historiographic; in it, you will focus upon one of the presented works and consider it in relation to previous scholarship, drawing from the author's suggested readings, as well as those you identify yourself. The other essay should compare and contrast at least two presented works, with the aim of analyzing uses of evidence, modes of exposition, and underlying assumptions about the dynamics between law and social change. Collectively, your essays must address at least three of the guest works presented in the seminar. Essays are due no later than December 22th, 2010.

Option 2: (1) weekly response paper and discussion questions (30%); (2) participation (10%); and (3) an original research paper (20-25 pages) (60%). The research paper assignment includes 4 interim deadlines: approval of initial topic (9/25); outline & primary and secondary source bibliography (10/21); draft (11/22); and final paper (12/22). I will work with those students who are writing research papers on topic development, research strategies, and research and writing schedule. We will also workshop and/or peer-edit drafts of the papers. The research paper in final form is due no later than December 22th, 2010.

UNIVERSITY OF MINNESOTA PROGRAM IN LAW & HISTORY
Legal History Workshop/Seminar
Professor Susanna Blumenthal
Fall 2010

Schedule of Guest Speakers

SEPTEMBER 9

No Class—Jewish Holiday

SEPTEMBER 16

First class meeting

Reading Assignment:

Hendrik Hartog, "Pigs and Positivism," 1985 Wisc. L. Rev. 899.

SEPTEMBER 23

Manfred Berg, Curt Engelhorn Professor of American History, University of Heidelberg

Presentation Title: "Criminal Justice, Law Enforcement, and the Decline of Lynching in the Southern United States"

Abstract: According to conservative counts, nearly 4,000 persons, including 3, 245 African Americans, were lynched in the American South between 1882 and World War II, representing more than 80 percent of all lynchings in the United States during this period. Lynch law reached its peak in the 1890s with an annual average of 100 to 200 mob killings but then dropped into the double-digits. Between 1936 and 1940, a total of 30 incidents were recorded, all of which took place in the Deep South. By mid-century, lynching as a public ritual had virtually ceased in the United States, although other forms of racial violence persisted. In my paper I will probe the reasons for this gradual decline of lynching in the South. While most historians refer to the efforts of anti-lynching activists and a generic modernization process, I will focus on two specific factors, namely on the growing willingness of Southern law enforcement to confront lynch mobs and on the expansion of the death penalty as a substitute for popular justice. Both phenomena reflect the strengthening of the state's claim to a monopoly of legitimate violence yet they also epitomize the ambiguities of modernity, especially from the African American point of view. While weak legal institutions had exposed them to lynching, an "efficient" system of criminal justice hit them harder than any social group.

SEPTEMBER 30

Christina Duffy Burnett, Associate Professor of Law, Columbia University

Presentation Title: "The Monroe Doctrine Rightly Understood: Empire and Law in the Americas on the Eve of World War I"

Abstract: This paper is a draft of the fifth chapter of a manuscript entitled *Contingent Constitutions: Empire and Law in the Americas*, a work-in-progress on the constitutional and international legal history of American empire in the nineteenth and early twentieth

centuries. The fourth and fifth chapters examine the debate over “American international law.” Chapter four looks at the early stages of that debate, beginning with an 1883 exchange between the international lawyers Amancio Alcorta and Carlos Calvo in an Argentinean journal, in which they argued over the existence—and desirability—of a regional body of international law originating in the Americas: Was there such a thing? Should there be? What was it? Would recognition of its existence help to secure a place among the “civilized” nations of the earth for the nations of Latin America? Or would it further marginalize them, retarding their acceptance as full members of international society? And what about the United States? Was it an equal contributor to the creation of “American international law,” or a hegemonic threat to its viability? Chapter five turns to the effort to give American international law an institutional home through the creation of the American Institute of International Law in 1912. This chapter surveys the collaboration between the two international lawyers who co-founded the AAIL—Alejandro Álvarez (Chile) and James Brown Scott (U.S.)—and attempts to make sense of how two men with two very different perspectives on and relationships to U.S. power found common cause in an institution dedicated to the development, codification, and promotion of international law in the Americas. Their joint efforts featured a heady and unstable mix of motivations—imperialist, anti-imperialist, collaborationist, subversive—and nowhere was the delicate balance they were striving to achieve more evident than in their efforts to handle the problem of the Monroe Doctrine. One simply could not suggest that a distinctive body of “American international law” existed without addressing the status of the Monroe Doctrine in it, and so the proponents of American international law attempted to re-appropriate the doctrine, purporting to restore the original, correct, and (as they saw it) anti-imperialist understanding. In the wake of the events of 1898, it was a stretch, to say the least. But ignoring the Monroe Doctrine would have been futile. And so, instead, they sought to tame it, by recasting it as a multilateral security pact for the Americas—and, perhaps, the world. Had they succeeded, it would not have been the first time that imperialist practices gave rise to international law. Or so goes my argument....

OCTOBER 7

William Novak, Professor of Law, University of Michigan

Presentation Title: “Law and the Social Control of American Capitalism, 1877-1932”

Abstract: (forthcoming)

OCTOBER 14

No Guest

Reading Assignment:

Robert W. Gordon, “Critical Legal Histories,” 36 *Stan. L. Rev.* 57 (1984).

OCTOBER 21

No Guest

Reading Assignment:

Ariela Gross, “Beyond Black and White: Cultural Approaches to Race and Slavery,” 101 *Colum. L. Rev.* 640 (2001).

OCTOBER 28

Laura Edwards, Professor of History, Duke University

Presentation Title: “The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South

Abstract (of her recently published book, from which we will read excerpted selections): In the half-century following the Revolutionary War, the logic of inequality underwent a profound transformation within the southern legal system. Drawing on extensive archival research in North and South Carolina, Laura F. Edwards illuminates those changes by revealing the importance of localized legal practice. Edwards shows that following the Revolution, the intensely local legal system favored maintaining the “peace,” a concept intended to protect the social order and its patriarchal hierarchies. Ordinary people, rather than legal professionals and political leaders, were central to its workings. Those without rights--even slaves--had influence within the system because of their positions of subordination, not in spite of them. By the 1830s, however, state leaders had secured support for a more centralized system that excluded people who were not specifically granted individual rights, including women, African Americans, and the poor. Edwards concludes that the emphasis on rights affirmed and restructured existing patriarchal inequalities, giving them new life within state law with implications that affected all Americans. Placing slaves, free blacks, and white women at the center of the story, *The People and Their Peace* recasts traditional narratives of legal and political change and sheds light on key issues in U.S. history, including the persistence of inequality--particularly slavery--in the face of expanding democracy.

NOVEMBER 4

Steven Wilf, Joel Barlow Professor of Law and Associate Dean for Research and Faculty Development, University of Connecticut Law School

Presentation Title: “Law, Storytelling, & Popular Politics in Revolutionary America”

Abstract (of his recently published book, from which we will read excerpted selections): *Law's Imagined Republic* shows how the American Revolution was marked by the rapid proliferation of law talk across the colonies. This legal language was both elite and popular, spanned different forms of expression from words to rituals, and included simultaneously real and imagined law. Since it was employed to mobilize resistance against England, the proliferation of revolutionary legal language became intimately intertwined with politics. Drawing on a wealth of material from criminal cases, Steven Wilf reconstructs the intertextual ways Americans from the 1760s through the 1790s read law: reading one case against another and often self-consciously comparing transatlantic legal systems as they thought about how they might construct their own legal system in a new republic. What transformed extraordinary tales of crime into a political forum? How did different ways of reading or speaking about law shape our legal origins? And, ultimately, how might excavating innovative approaches to law in this formative period, which were constructed in the street as well as in the courtroom, alter our usual

understanding of contemporary American legal institutions? *Law's Imagined Republic* tells the story of the untidy beginnings of American law.

NOVEMBER 11

Jonathan Levy, Assistant Professor of History, Princeton University

Presentation Title: “‘The Perils of the Seas’: The Case of the Creole and the Maritime Origins of Assumption of Risk”

Abstract: A risk was first a commodity. In the US, the very word "risk" was in fact not anglicized fully from its French derivative "risque" until sometime in the 1820s and 1830s. Up until then a risk was simply the commodity bought and sold by long-distance trading merchants in a marine insurance contract. This paper traces the maritime origins of the 19th-century legal doctrine of "assumption of risk" in the early modern international law of marine insurance. It does so by juxtaposing two cases, the first a 1845 Louisiana dispute, *Thomas McCargo v. New Orleans Insurance Company*, and the second the more famous 1842 *Farwell v. Boston Rail Road Corp.* *McCargo* concerned an insurance dispute over a successful slave revolt on the brig *Creole*, and asked whether a slave revolt was a "peril of the seas," or an Act of God. *Farwell* concerned the question of employer's liability for a workplace accident, and, relying upon crucial precedents in the international law of marine insurance, helped christen the legal doctrine of "assumption of risk." The counterpoint between the two cases explores the legal construction of a particular model of personhood, which linked together freedom and self-ownership with the individual bearing of risk.

NOVEMBER 18

Research/Writing Week

NOVEMBER 25

No class—Thanksgiving Holiday

DECEMBER 2

Tomiko Brown-Nagin, Justice Thurgood Marshall Distinguished Professor of Law & Professor of History, University of Virginia

Presentation Title: “Rights Lawyers and the 1960s ‘Movement of Movements’”

Abstract (of her forthcoming book, from which we will read excerpted selections): In a sweeping history of the Civil Rights movement in Atlanta from the end of World War II to 1980, Tomiko Brown-Nagin shows that long before "black power" emerged and gave black dissent from the mainstream civil rights agenda a name, African Americans in Atlanta questioned the meaning of equality and the steps necessary to obtain a share of the American dream. The book uncovers the activism of visionaries--both well-known figures and unsung citizens--from across the ideological spectrum who sought something different from, or more complicated than, "integration." Local activists often played leading roles in carrying out the agenda of the NAACP, but some also pursued goals that

differed markedly from those of the venerable civil rights organization. Brown-Nagin documents how the remarkable battle over school desegregation in the 1970s, which featured opposing camps of black plaintiffs, had its roots in the years before *Brown v. Board of Education*. Exploring the complex interplay between the local and national, between lawyers and communities, between elites and grassroots, and between middle-class and working-class African Americans, *Courage to Dissent* tells a compelling story about the long and unfinished struggle for racial equality.

December 7
Last Class Meeting
Assignment TBA