

SYLLABUS

1. Text

There are two textbooks that will provide the primary reading. The first is KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (3rd ed. 2005), ISBN 9780195162257,¹ and MARY ANN GLENDON, *A NATION UNDER LAWYERS*, ISBN 0674601383. Other materials will be posted on the website as needed.

2. Course Expectations

The original course description expresses my aspiration for this course: “The goals of the course are that students will (1) become familiar with competing claims about the nature of law and how it exercises binding force, and (2) reflect on the ways in which incorporation of jurisprudential ideals in the practice of law will lead to a more satisfying professional career.” The course will offer three basic types of reflection. The first is a historical perspective on the law. Along the way a number of substantive concepts will be introduced and evaluated, but the primary goal is to place the current study of law in historical perspective. Of course, much of the study of law is itself a study of history. But this course will provide a more systematic and organized view.

The second perspective is an introduction to the competing claims about what law is or should be. While lawyers in practice assume a unified and coherent “rule of law,” there is little agreement about what makes the law something more than organized coercion. As we study the historical development of the legal system in the United States we will also observe recurring controversies over whether law is founded on some kind of transcendent authority (in which case those who enforce the law are answerable to that transcendent authority) or instead should be candidly recognized simply as a means of control (in which case the primary struggle concerns the identity of those whom this system of control should benefit). Related to this larger philosophical issue is the more immediate question of whether our primary source of authority for legal rules is the legislature or the courts (recognizing that the executive has substantial authority to implement the legal rules that the other branches declare).

The third perspective is more personal. Law students should be interested in the “big picture,” but they have a more immediate question: how do *I* take my place in this profession? To put it another way, “What kind of lawyer do I want to be?” In one sense it is easy to answer this question – “I want to be a *good* lawyer.” But what does it mean to be a good lawyer? What is the relationship between technical competence and a concern for one’s fellow human beings? What is the relationship between a lawyer’s loyalty to client and loyalty to the court? How does one balance professional obligations with obligation to family and oneself? Not only are there competing visions of how to strike the appropriate balance, but there are unique gifts and characteristics of the individual lawyer. In trying to become a good lawyer, it is necessary to take stock of oneself. It is not only a question of how to I become a *good* lawyer, but how do *I* become a good lawyer? Obviously, no single course (much less a part of one course) will answer this question, but it is my hope that this course will be a fruitful initiation of that conversation.

¹ There is a 4th edition of the same book, but it differs from the 3rd edition mostly in the material it includes from the recent past. Since my coverage in the course ends before the new material begins, there is no advantage in getting the newer (and more expensive) edition.

3. General Structure of the Course

American Legal History. The beginning of the course will consist of readings from the Hall textbook. My goal in assigning these pages is to help you get a solid grasp of the broad narrative of American legal history. While other courses will dwell in greater detail on the intricacies of various legal doctrines, particularly the constitutional questions, the chronological framework will help you see the details of American law in the larger context. In addition, you should identify two continuing themes. The first has to do with the role of law generally. What is its relation to other social institutions such as family, religion, commerce? Second, and more particularly, what is the relationship between the power of the national government and that of state and local governments and institutions? No better illustration of that principle can be seen than in the treatment of slavery. But even after the Civil War resolved that particular question, the continuing difficulty in answering the larger philosophical question remains, exemplified most recently in the questions over how state law enforcement interacts with national immigration policy, and how health care is provided.

A Nation Under Lawyers. Later in the semester I will assign another book, written by Mary Ann Glendon, one of the nation's most thoughtful commentators. Unlike HALL, et al., which consists of original documents and often requires a kind of translation for the modern reader, Glendon's book should be a welcome respite. Although the book is now more than 15 years old, most of her description of law practice is still accurate. Admittedly, her experience is not necessarily typical – Harvard, and all that – but I think you will find that her critical view of the “elite” of the profession helps demonstrate that the challenges faced by the “average” lawyer don't go away if you are lucky enough to find yourself in the top echelon. The failure of the elite to resolve fundamental conflicts in the practice of law makes it all the more important not to trust that if you just keep pedaling faster you will eventually reach your goal. You may need to reconsider whether the goal toward which you set out is really where you want to be.

To give you an opportunity to reflect on the issues raised by *A Nation Under Lawyers* I will assign some simulation exercises, described below.

Grading

My desire to help you think deeply about your future as a lawyer is somewhat in tension with the need to grade you on an objective scale. I am neither qualified nor authorized to assess the merits of your own resolution of the various dilemmas that this course will pose. What I will choose as my assessment tool is how well you can articulate the competing views that have struggled for dominance in the past, as well as those of the current competitors. As preparation for your assuming the role of advocate for your client, I am expecting you to be able to understand (and, more importantly, articulate) the best arguments for each side. I'm not suggesting that you should be neutral in this struggle. You will take much greater interest in the details if you have a stake in the outcome. And you do. You may already have a strong opinion on the topics we will cover in this course. You may find that your opinions will change as a result of new information and new perspectives. But you will still need to learn how to make the strongest case not only for the side you favor, but also for the side that you oppose, because until you understand your opponent's argument you will be ill-prepared to refute it.

There will be two exams in this course. One is a midterm, on March 6. It will count for 30% of your final grade. The other is the final (May 5, 9 am), which will count for 70%. The purpose of these exams is to assess your skill in understanding and articulating the competing views that we have discussed in the course of the readings. In addition to these two exams, you will be required to write short reflection papers after you have participated in three in-class simulation exercises. During those exercises you will be assigned to a “law firm,” in which you will be asked to wrestle as a group with some important (and challenging) situations. I hope you will use these exercises to reflect upon the aspects of law practice that represent a natural strength for you, as well as areas of practice that (at least at this stage of your preparation) don’t come naturally. Because the practice of law has many different variations, you should think about what kind of practice setting best fits your combination of strengths and preferences. For example, some people thrive in an environment with lots of personal interaction. They like the excitement of dealing with new people and the unpredictability of human relations. Other people are more comfortable with a smaller universe of human interactions, with a greater emphasis upon the ability to control one’s own work product and maintain consistent expectations. Some people want the flexibility of private practice; other people enjoy the stability of working for a public agency. As with the philosophical issues mentioned earlier, you may already have a clear idea of where you are headed. But if you are like me when I was a 1L, you will be a long way from such clarity. In order to assure you that there is no “right answer” to the personal questions you should be asking yourself, I do not calculate scores for these reflection papers. However, I reserve the right to reward what I think are particularly thoughtful papers with an improvement of a single grade adjustment (e.g., a B- to a B). By the same token, if I judge that a student has not completed the assignment in good faith, I reserve the right to lower the grade by a single adjustment (e.g., B to a B-).

Reading Assignments

Class	Date	Reading Assignment
1	1/13	HALL, et al., Preface, xxiii-xxv; 1-7; 12-18; 23; 35-41
2	1/16	80-115
3	1/20	115-148
4	1/23	167-181; 203-225
5	1/27	225-252
8	1/30	252-282
9	2/3	282-312
10	2/6	312-344
11	2/10	344-373

12	2/13	373-406
13	2/17	407-437
14	2/20	437-458
15	2/24	459-482
16	2/27	483-502
17	3/3	502-524
18	3/6	Midterm
		Spring Break
19	3/17	524-541
20	3/20	561-591
21	3/24	591-627
22	3/27	Citizens United (available on line)
23	3/31	A Nation Under Lawyers (ANUL), Intro, Chapters 1-3
24	4/7	ANUL, Chapter 4; in-class exercise #1
25	4/10	ANUL, Chapters 5-7
26	4/14	ANUL, Chapter 8; in-class exercise #2
27	4/17	Open
28	4/21	In-class exercise #3
29	4/24	Review
30	4/28	Review