LEGAL HISTORY:

CONTINENTAL LEGAL HISTORY

Tentative Syllabus and Assignments

Prof. Donahue

Meeting times. This course is also listed in the Faculty of Arts and Sciences as Medieval Studies 119. The undergraduates will meet together with the law students for lectures on Mondays and Wednesdays from 11:10 to 12:00 (room Sever 102). The law students and FAS graduate students will meet for “Section” on Tuesdays from 10:40 to 12:00 in the Law School (room Pound 201). Our section meetings will serve two purposes: (1) to do a more sophisticated number on some of the documents than is possible with undergraduates, and (2) briefly review some of the history that we will be discussing with the undergraduates in their separate classes. There is a separate section for the undergraduates on Thursdays and a separate “discussion class” for the undergraduates on Fridays from 11:10 to 12:00. Law students and FAS graduate students are not welcome at the undergraduate section meetings. You may come to the “discussion classes” on Fridays if you wish, but please don’t be offended if I ask you not participate in certain discussions or if I don’t call on you at certain times.

Under the old calendar FAS classes in the spring began two days after the Law School’s did. That gave us an opportunity to do an introduction to the course particularly for lawyers. This year we will have to jam that into our first “section meeting” on Tuesday, January 25. The slight difference in calendars also means that our “section meetings” will to be squeezed toward the end of the course to enable us to cover some of the nineteenth century developments at the end of the semester. Law school classes do meet on President’s Day (Mon., February 21), but those in the FAS do not. We’ll meet in the Law School (Room Pound 201). The FAS classes last a three days longer than do the Law School’s. We need the first of those days to finish the story. (If you have an exam on this day, let me know. I’ll post my notes on the web.)

Requirements. There are two requirements for credit in the course: (1) a short paper (no more than five double-spaced typed pages exclusive of notes); (2) a final exam (“take-home,” distributed in the final class and due at the end of exam period). (I will consider allowing students to write a term paper in lieu of taking the final exam. More about this below under “papers.”)

Prerequisites. None. See below under “Background.”

Work load. For a history course, the reading load is fairly light, but much of it is documentary material, and is thus relatively slow going. Give priority to the documentary materials. Almost all the classes have documentary assignments, and those which do will devote a considerable amount of time to the documents. You’ll be lost if haven’t read them in advance. You should bring the multilithed Documents (see below under “Readings”) with you to every class.

The Course. This course is an attempt to discover how the distinctive features of the “civil” law of the European Continent arose and why these distinctions persisted. It is also an attempt to discover how the legal systems of Continental Europe developed and were influenced by a group of ideas about politics and public order that are frequently invoked today when we speak of the “Western legal tradition.” In order to do this we have to conduct a “Cook’s tour” of European legal history, to survey the sources and literature of the law from the fall of Rome (roughly 500 A.D.) to the codifications of the 19th century. That gives the course something of the quality of “if-this-is-Tuesday-it-must-be-Belgium.” I have attempted to give focus to the course by emphasizing three topics, the capture of wild animals as the foundation of “property,” the formation of marriage, and the rules about the use of witnesses in criminal and civil procedure. I wish there were a more strictly public-law topic that we could use as well, but no public-law topic has deep enough
roots to allow us to trace it over this long period of time. Hence our examination of public law will have to come about as we unfold the history of institutions within which the law operated. We focus on France. We will also deal with Germany, Italy, Spain and the Low Countries, but France give us the backbone, while the other areas give us examples (as does England by way both of comparison and contrast). The rest of the European Continent will get only an occasional mention.

We will proceed largely by way of lecture, interspersed with examination of documents that are contained in Documents. These documents will largely carry the story of wild animals, marriage and witnesses. In each period we will ask two questions: (1) how does the way people were thinking about law in this period proceed from what had gone before and lead to what was to come next (a largely diachronic question)? And (2) how was the way that people were thinking about law in this period relate to the broader political, social and intellectual developments in the period (a largely synchronic question)? The ultimate question is comparative: why did Continental law develop its distinctive features?

Background. No one (including the instructor) comes to a course like this with all the necessary background information. I will try to say everything that I think you need to know to make sense out of what is going on, and so, I will assume that you do not have any of the relevant background. On the other hand, in a survey course as broad as this one, I can say things only once. For this reason, I would suggest, particularly if you have not taken a course in medieval and/or early modern European history, that you read a good textbook on one or both of these topics. In the past I have asked the Coop to stock H. G. Koenigsberger’s, Medieval Europe, 400–1500 (1987) and the same author’s, Early Modern Europe, 1500–1789 (1987). The books are now out of print, but second hand copies are readily available. Both books are a relatively quick read, particularly if you’re not trying to memorize kings and battles and dates. I have included the page numbers below at the relevant spots enclosed in square brackets at the end of the assignment.

If you have taken a medieval and/or early modern European legal history course someplace else or if you have had a European history course that devoted some time to legal development in the same periods, you probably should not take this course. There is a seminar this semester (Legal History: Continental Legal History: Seminar) for which you are ready.

Readings. There is, unfortunately, no really good textbook in English of European legal history. In the past we asked the students to buy a relatively short paper-back: Manlio Bellomo’s, The Common Legal Past of Europe: 1000–1800. Raoul van Caenegem’s An Historical Introduction to Private Law is equally good, and slightly, but not much more, expensive; for this reason we did not ask the Coop to stock it. That was probably a mistake. When I went back over the course evaluations from the last time that I offered the course, several students said that they thought that van Caenegem was more helpful than Bellomo. Hence, that is the book that I am asking you buy this year.

Neither Bellomo nor van Caenegem is really a textbook. Probably the best textbook in English is Robinson, Fergus and Gordon, An Introduction to European Legal History (2d ed., 1994) [RFG2], which is on reserve in the Law School and Lamont. (There’s a third edition of RFG2 [RFG3], which is shorter and focuses more on the later period. It is available only in the Law School.) As an alternative to Bellomo and van Caenegem, we have listed below readings in number of different books, including both editions of RFG. One of them is a classic: Paul Vinogradoff’s, Roman Law in Medieval Europe. Two others are relatively new and controversial, Alan Watson’s, The Making of the Civil Law and Harold Berman’s Law and Revolution. Bellomo, Berman, RFG2, Vinogradoff and Watson are available in Lamont and the Quad Library. All the books are on reserve in the Law School. (The Law School also has on reserve a couple of copies of the extracts from these books assigned for the course in “course-pack” form. Ask for the “Readings” for Donahue’s course.)

By and large, I think that the books other than RFG do a better job of covering the topics to which they refer than does RFG. On the other hand, some people really like a textbook, and none of the books extracted is a textbook, though Bellomo and van Caenegem come close. You should read either RFG or the
extracts from the other books for class, and you might want to read what you haven’t read when you’re reviewing the course for the exam.

The multilithed Documents\(^1\) contains, as the name implies, a number of documents, legal sources in translation. These vary greatly in the length of their extracts. When they are long, we want you to get a sense for the overall structure; when they are short, you should focus on the detail. The Syllabus contains some notes as to what is important.

Outlines for most of the classes are posted on the course’s website: http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/. I will probably be revising these as we go along, but you should bring them with you to class either in your computer or in paper form. Having this kind of material already written down saves you time in taking lecture notes.

**Papers and Exams.** There will be a short paper required for the course. It should be no more than five double-spaced typed pages exclusive of notes. It may analyze one or a couple of the documents in the Documents (or you can choose a document on your own). The basic idea is to present an idea supported by evidence (primary sources please). For the first draft of the paper, you need not look at any secondary sources; focus on analyzing the document. You may do the first draft of the paper any time during the semester. You should have chosen a topic no later than Tuesday, March 22. You should turn in your first draft no later than Tuesday, April 12. I will comment on the draft, perhaps suggest some secondary reading, and return the draft to you. The final draft should be turned in before the beginning of the 1L exam period (Fri., May 6Friday, May 6).

The final exam will be a “take-home” exam distributed in the last class and due no later than May 6. (You do not turn in the exam to the registrar’s office; rather, you turn it into my assistant, Ms. Reader, in Room 518 in Hauser Hall.) The exam will contain two questions (it may also contain some identification questions). The first question will give you a document drawn from the Documents and will ask you to comment on the document and its significance. The second will call for a more wide-ranging essay. Once more, it will be due before the beginning of the 1L exam period (Fri., May 6Friday, May 6).

If you wish to write a term paper in lieu of the final exam, you must get my approval of your term paper topic. The term paper should cover material in at least two of major time periods of the course (e.g., early medieval and late medieval, or late medieval and early modern). It may trace the history of a particular idea or institution from one period to another or it may compare ideas and institutions in two different periods. In order to get my approval of a term-paper topic, you will need to have completed the first draft of your short paper and to turn in a one-page statement or outline of what you plan to write about by Tuesday, April 12. Students who have taken the paper option in the past thought that it was fun but that it involved more work than taking an exam.

**Offices.** My office is in Hauser 512 in the Law School. My assistant is Ms. Reader in Hauser 518. My office hours are currently scheduled from 1:00–3:00 on Tuesdays, or by appointment. An appointment is usually not necessary for the office hours, but there is a sign-up sheet on the door.


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\(^1\) Previous editions of this have been called *Outlines and Documents*. We did not include the outlines this year, because they change constantly and are better served up on the web.

A calendar follows the syllabus, which allows you to see at a glance the date, title of the class, and the assignment number.

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<td><strong>Week 1</strong></td>
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<td>Section 1. 2.</td>
<td>The structure of Roman law and of the European civil codes. RFG2 1–10; RFG3 1–11; Watson 1–38. Justinian’s <em>Institutes</em>; D.23.2; C.5.4; D.22.5; C.4.20; selected 19th-century European codes on marriage, wild animals, and witnesses (<em>Documents</em>, Parts I, XX). [Focus on the overall structure of Justinian’s <em>Institutes</em> (Outline for Lecture 2) rather than on the detail. In the case of the <em>Digest</em> and the <em>Code</em>, try to get a sense for how the material is organized. Try to think about “fundamental legal categories”: <em>ius</em> vs. <em>lex</em>, public vs. private, criminal vs. civil, persons vs. things vs. actions, property vs. contract vs. delict (tort). Then ask yourself how these categories are reflected in Justinian’s <em>Institutes</em> and in the 19th century codifications. Then try to figure out what the rules were about the capture of wild animals, marriage, and witnesses both in Roman law and in the 19th-century codes.] The legacy of the ancient world: Christianity. Paul’s letter to the Romans (<em>Documents</em>, Part II.A).</td>
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<td>Lecture 2. 3.</td>
<td>Reflections on the distinction between “common law” and “civil law” and on what we mean by the “Western legal tradition.” The legacy of the ancient world: Roman law. RFG2 1–10; RFG3 1–11; Watson 1–38. Justinian’s <em>Institutes</em> (<em>Documents</em>, Part I.A). [Focus on the overall structure of Justinian’s <em>Institutes</em> and on the specifics about wild animals and marriage (there’s nothing about witnesses.) How the story came out. (<em>Documents</em>, Part XX). [Ask yourself about the overall structure and the rules about wild animals, marriage and witnesses in the 19th century codifications. Are the different codes more notable for their similarities or their differences?]</td>
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<td><strong>Week 2</strong></td>
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<td>Lecture 3. 4.</td>
<td>Two “Barbarian” Law Codes—Aethelberht (<em>Documents</em>, Part III.A). [Ask yourself two questions: (1) What is the overall structure of this material? (2) What, if anything, does it have to say about wild animals, marriage and witnesses?]</td>
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<td>Section 2. 5.</td>
<td>The basic structure of Roman law (cont’d). Justinian’s <em>Institutes</em>; D.23.2; C.5.4; D.22.5; C.4.20; selected 19th-century European codes on marriage, wild animals, and witnesses (<em>Documents</em>, Parts I, XX). [Review the first part of Assignment 2. After a week in the course are your thoughts on these topics any different?] New Testament extracts on marriage (<em>Documents</em>, Part II.B). [K1500 1–66.]</td>
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Lecture 4. 6. Two “Barbarian” Law Codes—Gundobad (compared with the *Lex romana burgundionum*) (*Documents*, Part III.B). [Same questions as Assignment 4.]

Week 3


Week 4


Lecture 8. 12. The institutions of canon law. RFG2 122–152; RFG3 72–90. Substantive Canon Law. Marriage (J.I.1.10, D.23.2.5–6, Gratian C.27 q.2; Peter Lombard; selected decretals on marriage) (*Documents*, Part VIII).

Week 5


Lecture 9. 15. The revival of academic law study: Romano-canonical procedure. Witnesses (D.22.5, Gratian C.4 q.3, Tancred 3.6) (*Documents*, Part IX). Read van Caenegem, 30–114 (this takes us quite a bit further in time, but it provides a good overview of where we’ve been and where we’re going).

Week 6

Section 6. 17. Reform and the “twelfth century renaissance” (See the questions posed in the outline for this section). Usatges, Tourraine-Anjou and Beaumanoir on marriage. Usatges §§ 108, 112; Tourraine-Anjou § 57; and Beaumanoir §§ 621–8 (Documents, Part X).

Lecture 11. 18. Coutumiers and fueros. Extracts from the Usatges de Barcelona on witnesses, marriage, and wild animals (Documents Part X.A).

Week 7
Lecture 12. 19. Courts and coutumiers in France. Extracts from the coutume of Tourraine-Anjou and from Beaumanoir on witnesses, marriage and marital property, and wild animals (Documents Part X.B, C).

Section 7. 20. Political ideas of the medieval lawyers. Extracts from Bracton on kingship and from Hostiensis on sovereignty. (Documents Part XI)


Week 8

Section 8. 23. The formation of a persecuting society? Developments in the law of witnesses: Tractatus de reprobatione testium; Gandinus, Tractatus de maleficiis; Robertus Maranta, Speculum Aureum (Documents, Part XII). Commentators on marriage: Panormitanus, Consilium (15th c) (Documents Part XIV.C). Courts and case reports. The Rota Fiorentina (1780) (Gorla article) (Documents, Part XIV.B, D, E).

Lecture 15. 24. The commentators. RFG2 100–121; RFG3 59–71, 107–24. Documents, Parts XII and XIII.

Week 9
Lecture 16. 25. Commentators on wild animals: Bartolus on D.41.1.1,.5 (Documents, Part XIII.A, B); Portius and Faber on J.I.2.2.11–13 (Documents, Part XIII.C-E).

Section 9. 26. Legal humanism. Documents, Part XV.

Lecture 17. 27. Courts and case reports (cont’d)—14th through 18th centuries. Watson 39–52. Decisio S.R.R. (1360 X 1365); Decisio S.R.R. (1574); the Rota Fiorentina (1780) (Gorla article) (Documents, Part XIV.B, D, E).

Week 10
Section 10.  29.  Compilations, proto-codification, codification. *Documents*, Parts XVI and XVII. The institutes of national law (*Documents*, Part XVII). [We’ll begin to go beyond the undergraduates chronologically here.]


Week 11


Week 12


Section 12.  35.  The pandectists, the historical school and the making of the BGB. RFG2 261–92; RFG3 269–285; Watson 126–30. Windscheid (*Documents*, Part XX [Windscheid extracts]). The road away from codification?


Week 13

**CALENDAR**

**Mon., Jan. 24**  = Assignment 1  Introduction to the course. Introduction to Roman law

**Tue., Jan. 25**  = Assignment 2  The structure of Roman law and of the European civil codes. The legacy of the ancient world: Christianity

**Wed., Jan. 26**  = Assignment 3  The legacy of the ancient world: Roman law. How the story came out

**Mon., Jan. 31**  = Assignment 4  Two “Barbarian” Law Codes—Aethelberht

**Tue., Feb. 1**  = Assignment 5  The basic structure of Roman law (cont’d). New Testament extracts on marriage.

**Wed., Feb. 2**  = Assignment 6  Two “Barbarian” Law Codes—Gundobad

**Mon., Feb. 7**  = Assignment 7  Carolingian institutions and “feudalism.”

**Tue., Feb. 8**  = Assignment 8  The “barbarian” invasions. Aethelberht and Gundobad compared. The Collection in 74 Titles.

**Wed., Feb. 9**  = Assignment 9  Eleventh-century reforms and a glimpse at *regnum* and *sacerdotium*, to the end of the 13th century. The Collection in 74 Titles (cont’d).

**Mon., Feb. 14**  = Assignment 10  The revival of academic law study: Roman Law

**Tue., Feb. 15**  = Assignment 11  Eclectic sources of law. Wild animals and marriage in the glossators

**Wed., Feb. 16**  = Assignment 12  The institutions of canon law

**Mon., Feb. 21**  = Assignment 13  The institutional history of the 12th and 13th centuries.

**Tue., Feb. 22**  = Assignment 14  Romano-canonical procedure on witnesses: *Smith c. Dolling*

**Wed., Feb. 23**  = Assignment 15  The revival of academic law study: Romano-canonical procedure

**Mon., Feb. 28**  = Assignment 16  Marriage litigation in the High Middle Ages

**Tue., Mar. 1**  = Assignment 17  Reform and the “twelfth century renaissance”. Usatges, Tourraine-Anjou and Beaunanoir on marriage

**Wed., Mar. 2**  = Assignment 18  Coutumiers and fueros

**Mon., Mar. 7**  = Assignment 19  Courts and coutumiers in France

**Tue., Mar. 8**  = Assignment 20  Political ideas of the medieval lawyers.

**Wed., Mar. 9**  = Assignment 21  Political ideas of the 12th and 13th centuries

**Mon., Mar. 14**  = Assignment 22  Spring Vacation

**Mon., Mar. 21**  = Assignment 23  The 14th and 15th Centuries—political and constitutional developments

**Tue., Mar. 22**  = Assignment 24  The formation of a persecuting society? Commentators on marriage. Courts and case reports.

**Wed., Mar. 23**  = Assignment 25  The commentators. (Short paper topics must be chosen by this date.)

**Mon., Mar. 28**  = Assignment 26  Commentators on wild animals

**Tue., Mar. 29**  = Assignment 27  Legal humanism (Section will meet in the Root Room of the HLS Library)

**Wed., Mar. 30**  = Assignment 28  Courts and case reports (cont’d).
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<td>“Renaissance” Europe. Humanists, humanism and the law.</td>
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<td>Tue., Apr. 5</td>
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<td>Compilations, proto-codification, codification. The institutes of national law</td>
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<td>The 17th and 18th centuries—political, constitutional and intellectual developments (Paper drafts must be handed in by this date.)</td>
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<td>Wed., Apr. 20</td>
<td>Assignment 36</td>
<td>The academics in action</td>
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<td>Mon., Apr. 25</td>
<td>Assignment 37</td>
<td>Final Lecture. Take-home exams passed out.</td>
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<td>Fri., May. 6</td>
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<td>Take-home exam and final papers due by 4:30 p.m. in Room 518, Hauser Hall.</td>
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