This seminar will explore the social and intellectual history of American law in the colonial period. While we will pay some attention to the development of legal rules and institutions, we will concentrate on legal culture—on that configuration of values and habits of mind that shaped the operation of the legal system and informed how colonists understood the law’s purposes and meanings. In so doing, the course will stress the multiple roles of law: as a way of resolving disputes, distributing resources, channeling politics and social development, shaping personal identities, and creating authoritative categories of knowledge.

In line with this ambitious and capacious understanding of law and legal culture, the seminar’s reading list contains a wide variety of sources. There will be, of course, the traditional materials of legal history: statutes, cases, and instructions to officials. We will also read materials that are not specifically “legal,” but that illuminate the values and social pressures playing upon the law. These sources include diaries, correspondence, satires, sermons, proclamations of grievances by rioters, town covenants, maps of settlement, demographic tables, church excommunication proceedings, plans for governmental and social reform, and an essay by the teenage George Washington on “Rules of Civility and Decent Behavior in Company and Conversation.” A selection of articles by historians and a book on the transformation of legal culture in colonial Connecticut will round out the assignments.

The seminar is organized into five main parts. The first section examines the legal foundations and justifications of English colonization in North America. The second charts how colonization produced divergent regional legal cultures in the seventeenth century Chesapeake and in Puritan New England. The third looks at the regulation of slavery and of gender relations. The fourth returns to the problem of seventeenth-century legal culture, exploring not regional variation, but the important and distinctive characteristics of that legal culture evident throughout the American colonies, characteristics that lent it a flavor or style. Finally, the fifth section asks how and why the legal culture of the eighteenth century displaced that of the seventeenth. Stronger imperial oversight, the growing importance of trained lawyers, and the expansion of population and commerce are all considered as causes of this transformation. The seminar ends by asking if there is a rubric that aptly describes the course of colonial legal development from 1600 to 1760—perhaps modernization, or anglicization, or the formalization of informal law?

Format: The seminar will meet once per week for two hours of intensive discussion. Regular attendance and thoughtful participation are essential. While the instructor will provide background information and introduce questions for discussion, the heart of a seminar will be the students’ analysis of the readings and debate about historical interpretive problems.

Reading: A packet of required readings has been duplicated and is available at the Humanities Copy Center in the Humanities Building (room 1650). In addition, please purchase
Background Reading: There is no “textbook” in early American legal history. Should you wish to supplement the course’s assigned readings with one or more books that approach the comprehensiveness of a textbook, you may wish to consult, at your discretion, Peter Charles Hoffer’s *Law and People in Colonial America*, 2nd ed. (Baltimore, 1998), or the chapters on colonial law in Lawrence M. Friedman’s *A History of American Law*, 2nd ed. (New York, 1985), or Kermit L. Hall’s *The Magic Mirror: Law in American History* (New York, 1989).

Assignments: There will be two writing assignments. A ten-page paper evaluating New England Puritan legal thought will be due at the beginning of class #5. A ten-page paper critically examining the transformation of the colonial legal system between the seventeenth and eighteenth centuries will be due at the beginning of class #12. We will discuss expectations for the writing assignments in class. There will be no final examination.

Grading: Each of the two papers counts for 40% of the final grade. Class participation counts for 20%. Class participation will be evaluated based on the quality (insightfulness, pertinence) of discussion, not the number of comments.

I. INTRODUCTION (Class 1)


II. THE COLONIZING ENTERPRISE (Class 2)

A. English New World Colonization in Early Modern Perspective

Types of Colonies


Composite States, Multiple Monarchies, and Colonization
B. The Constitutional Relationship of England and the Colonies

Calvin’s Case (1608)

Selected Colonial Charters
• Trading Company: The First Massachusetts Charter (1629)
• Proprietary Colony: Maryland Charter (1632)
• Corporate Colony: Connecticut Charter (1662)

Privy Council Memorandum (1722).


III. CLAIMING AMERICAN LAND (Class 3)

A. Justifications for Taking America

1. Introduction

2. Arguments from Scripture

   John White, The Planters’ Plea; Or the Grounds of Plantations Examined and Usual Objections Answered (1630), 1-3, 5-6

3. Arguments about the European Civilizing Mission

   Robert Gray, A Good Speed to Virginia (1609), C2r-C4v


4. Arguments about Land Use and Vacant Territory

   Sir Thomas More, Utopia (1516)

   Sir Walter Raleigh, “A Discourse of the Original and Fundamental Cause of Natural, Arbitrary, Necessary, and Unnatural War”

   John Winthrop, “General Considerations for the Plantation in New England” (1629)

   Solomon Stoddard, An Answer to Some Cases of Conscience Respecting the Country (1722)
B. The Problem of Defining Native American Land Titles: The Distinction between Sovereignty and Property, and the Debate over What Counts as Property


Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest (New York, 1975), 128-130

Documents on Native Americans in Colonial New England: Statutes, Royal Commissioners’ Reports, and Deeds of Sale

“Speeches of Canassateego for the Six Nations and Lieutenant Governor George Thomas of Pennsylvania” (1742)

IV. THE SETTLING OF AMERICAN LEGAL SYSTEMS: INHERITANCE, EXPERIMENT, AND IDEOLOGY

A. Utopian and Dystopian Impulses (Class 4)

William Shakespeare, The Tempest (1611), Act II, scene 1

View of Savannah, Georgia (1734)

B. Virginia: From Marchland Rule to Common Law Culture (Class 4)

Maps of Virginia in 1607-1624 and in 1634


Laws Divine, Moral and Martial [Dale’s Laws] (1611)

David Konig, “Colonization and the Common Law in Ireland and Virginia, 1569-1634”

“A Report of the Manner of Proceeding in the General Assembly Convened at James City in Virginia” (1619)

“Sir John Harvey and the Council of Virginia” (1635)

County Court Records of Accomack-Northampton, Virginia, 1640-1645

C. The Carolina Blueprint: Reactionary Utopia? (Class 4)

“The Fundamental Constitutions of Carolina” (1669)
D. The New England Way (Classes 5 and 6)

*Paper #1 Due: At the beginning of class 5, please turn in a ten-page paper on the following topic: How might John Winthrop have criticized William Aspinwall’s prescriptions for the ideal polity and legal system offered in A Brief Description of the Fifth Monarchy (1653)? To prepare for this paper, please read the material on “The New England Way” with particular attention to section D(4), “Puritan Biblicism and the Law.”

“Biblicists” wanted to remodel society, government, and law as closely and literally as possible upon Scriptural models and commands. Aspinwall was a thoroughgoing Biblicist. While Winthrop also wanted to bring Massachusetts law and Biblical injunctions into harmony, his approach was more moderate than Aspinwall’s. Winthrop represents the mainstream of New England Puritanism.

The course materials contain no direct commentary by Winthrop on Aspinwall. You will need to reconstruct how Winthrop would react to Aspinwall’s proposal based on Winthrop’s expressed opinions on the relationship of law and Bible found in several places in section D (the New England Way). Section D(4) contains part of a treatise by the English Puritan minister William Perkins and a discussion among New England clergy recorded in “How Far Moses’ Judicials Bind Massachusetts.” These two excerpts represent mainstream Puritan opinion similar to Winthrop’s position and should be treated as illuminating what Winthrop actually wrote.

Among the questions you might discuss—and this list is a starting point, not an ending point: Do Winthrop and Aspinwall think that all Scriptural laws bind polities in the seventeenth century? If not, who decides which parts of the Bible are binding? What is the extent of permissible legislation by present day societies? According to Winthrop and Aspinwall, what role should covenants and the election of officials play in a godly polity? What makes a government “arbitrary?” How should a Christian move his polity and legal system away from a compromised state towards a godly state?

1. Puritan Caricatures

   Nathaniel Hawthorne, “The Maypole of Merry Mount” (1837)


   Edmund S. Morgan, The Puritan Dilemma: The Story of John Winthrop (Boston, 1958), xi-xii

2. Early New England Society


   Wethersfield, Connecticut: The Pattern of Settlement

   Plan of Deerfield, Massachusetts (ca. 1671)
3. The Puritan Vision of State, Society, and Law


John Winthrop, “A Model of Christian Charity” (1630)

“Articles of Agreement, Springfield, Massachusetts” (1636)

4. Puritan Biblicism and the Law

William Perkins, *A Discourse of Conscience* (1608)

William Aspinwall, *A Brief Description of the Fifth Monarchy* (1653)

“How Far Moses’ Judiciales Bind Massachusetts” (c. 1643)

J. F. Maclear, “New England and the Fifth Monarchy: The Quest for the Millennium in Early American Puritanism,” *William and Mary Quarterly* 32 (1975): 223-260. [This is optional reading. It is available for those who want to know more about Fifth Monarchy thought.]

5. Massachusetts Debates on Codification and the Scope of Magistracy


*The Laws and Liberties of 1648* [read with special care the introduction, capital laws, and laws on heresy and lying]

6. English Law Reform in Early Massachusetts (Class 6)


E. Concluding Thoughts on the Settling of the American Legal Systems: The Taming of Authoritarianism and the Domestication of Utopia (Class 6)

Editor’s Table, “Providence in Human History,” *Harper’s New Monthly Magazine* (1858).
V. THE LEGAL REGULATION OF SLAVERY (Class 7)

A. Overview

Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, 1982), vii-ix.


Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, 1982), 1-14.

B. The Process of Enslavement in Colonial Virginia


Materials on the Origins of Slavery in Colonial Virginia, 1619-1682

C. The Slave Code of Colonial Virginia

Allan Kulikoff, *Tobacco and Slaves: The Development of Southern Cultures in the Chesapeake, 1680-1800* (Chapel Hill, 1986), 37-44.

Selected Tables and Charts on Colonial Virginia’s Population Growth


“An Act for the More Speedy Prosecution of Slaves Committing Capital Crimes” (Virginia, 1692)

The Virginia Slave Code of 1705

VI. THE LEGAL REGULATION OF GENDER (Class 8)

A. Overview: The Rise and Fall of the “Golden Age” Hypothesis


B. Coverture


*Manby v. Scott* (Exchequer Chamber [England], 1664)


C. Gender and the Criminal Law


D. The Multiplicity of Experience: Regulation of Sexuality, Civil Litigation, and Slander; Regional Variation

VII. NOTES ON EARLY AMERICAN LEGAL CULTURE: THE UNSTEADY RULE OF THE STATE’S LAW (Class 9)

Legal Culture: What is it? How might we use it?


A. Ethnic Enclaves and Legal Pluralism

Stephen Botein, Early American Law and Society (New York, 1983), 14-16

Map and Table of the Ethnic Composition of the Colonial Population

Christopher Saur, “Continuation of a Conversation between a Newcomer and a Resident of Pennsylvania,” in Der Hoch-Deutsch Americanische Calender (Germantown, Pa., 1753-54).

B. Displaying Authority and Deference: Carriage, Countenance and the Law as Drama

John Winthrop, Journal (January 1636)

George Washington, “Rules of Civility and Decent Behavior in Company and Conversation” (1745)

Melvin Yazawa, From Colonies to Commonwealth: Familial Ideology and the Beginnings of the American Republic (Baltimore, 1985), 33-58 [optional reading]


VIII. THE TRANSFORMATION OF THE EARLY AMERICAN LEGAL SYSTEM

A. The Texture of Seventeenth-Century Law (Class 10)

   Baker v. Andrews (Essex County, Massachusetts, 1659)

   Giddings v. Brown (Essex County, Massachusetts, 1657)


B. Eighteenth-Century Adjudication (Class 10)

   Alcock v. Warden (Massachusetts Superior Court of Judicature, 1766)

   Banister v. Henderson (Massachusetts Superior Court of Judicature, 1765) [skim--try to get a sense of the style of argument]

C. Empire (Class 10)

   Francis Fane, “Reports on the Laws of Connecticut” (1733-1741)


   Robert Beverly, The History and Present State of Virginia (1705; reprint, 1947), 255-56


D. Commercialization (Class 11)

E. The Legal Profession (Class 12)

*Paper #2 Due*: At the beginning of class 12, please turn in a ten-page paper on any of the following questions:

--What was the most important cause of the transformation of the early American legal system between the seventeenth and eighteenth centuries? Be sure to explain why you view your chosen cause as more significant than rival explanations.

--We have looked at three causes for the transformation of the colonial legal systems: imperial pressure, commercialization, and the rise of trained lawyers. The course explored these causes one after the other. This way of presenting the material slights interactions among the causes. Which interactions deserve special attention from historians? (If you are so inclined, part of your paper may lay out a research agenda for historians interested in uncovering interactions among the causes.)

--Design a question that you wish to answer, preferably one that focuses on weeks 10-12 of the course (though I am open to other possibilities). If you want to design your own question, please discuss it with me in advance. I reserve the right not to accept papers on topics that I have not cleared with students in advance.

1. The Colonial Lawyer in the Seventeenth Century

   John Winthrop, *Journal* (June 1641)

   Virginia Statutes Regulating Lawyers, in Walter Hening, ed., *Statutes at Large of Virginia*


2. A Colonial Paradox: Respect for Law, Disdain for Lawyers

   Thomas Overbury, “A Mere Pettifogger,” in *New and Choice Characters* (1615)

   Cotton Mather, “Bonifacius, an Essay upon the Good that is to be Devised and Designed by those Who Desire . . . to Do Good While they Live” (1710)


   Grievances of Monmouth County, New Jersey (1769).
3. The Development of a Trained Bar in the Eighteenth Century


