THE COMMON LAW AND AMERICAN RIGHTS: SEMINAR (2 credits)
Joyce Lee Malcolm
Fall, 2016

Office: 418, x9150, Office Hours: Thurs. 3:00 to 3:45 pm and by appointment

SYLLABUS

Required Books


*Joyce Lee Malcolm, ed., *The Struggle for Sovereignty*, vol. 1, Liberty Press, paperback. Purchase Recommended, but also available online

Recommended Book:


“Let an Englishman go where he will, he carries as much of law and liberty with him as the state of things will bear.”

Richard West, Counsel to British Board of Trade, 1720

The individual rights Americans enjoy and the tactics the Constitution has devised to protect them are rooted in English common law. Understanding the common law tradition, therefore, is essential for an appreciation of the development of these rights and offers an insight into the minds of the Founders in incorporating them. This course will survey and analyze the key documents, cases and developments in that evolution from Magna Carta to American colonial charters, state constitutions, the federal Constitution and the drafting of our Bill of Rights. In the process the class will discuss the options and alternatives along the way, the rise and decline of strategies such as jury trial, judicial and community-based review of legislation, as well as recent Supreme Court decisions that look to common law for guidance.

Requirements:

**Reading** is assigned for each class and should be read in advance in preparation for discussion.

**Grading** will be based on a final research paper (60%), your argument in two historic common law cases (15% each) and class participation (10%).

**Handouts:** will be distributed in advance or sent by TWEN.

PLEASE NOTE: The Davies reading for the first class will be sent by email.

**TWEN:** This course will be listed on TWEN. Please register.
DATE:               TOPIC AND READING ASSIGNMENT

August 18  The Common Law Mentality,  
            Magna Carta and Modern Lists  
            Reading: Magna Carta,  
            http://context.montpelier.org/document/917?gclid=CL7h8rOmss4CFclZhgod5BoOLw  
            Plucknett, pp. 22-26, 40-top 41.  
            Universal Declaration of Human Rights,  
            www.un.org/Overview/rights.html  
            Canadian Bill of Rights, 1960, c. 44  
            http://laws-lois.justice.gc.ca/eng/acts/C-12.3/page-1.html#h-1  
            Email: Sir John Davies, Le Primer Report des Cases et  
            Matters en Ley Resolues et Adjudges en les Courts del Ireland (1615)

August 25  Checks and Balances: The King’s Prerogatives, the People’s Rights,  
            God and the Law  
            Reading: Malcolm, Introduction, xxiv-xxxv.  
            Malcolm, Roger Maynwaring, Religion and Alegiance, pp. 56-71  
            Plucknett, pp. 40-43.  
            Handout: excerpts from writings of Martin Luther, John Calvin.

September 1  King by Divine Right versus Sir Edward Coke and the Law  
            Reading: Plucknett, pp. 46-47, 443-4; Tudor Law of  
            Treason, 2nd Treasons Act, Elizabeth 1571,  
            http://franklaughter.tripod.com/cgi-bin/histprof/misc/eliz2trea.html  
            Malcolm, Coke, Prohibitions del Roi (1607), pp. 11-18;  
            Plucknett, pp. 243-4  
            Dr. Bonham’s Case (online – Wikipedia actually best for text and report)

September 8  The Struggle for Sovereignty  
            Reading: Plucknett, pp. 48- top 54  
            Handout:  
            Five Knights’ Case  
            Rex v. Hampden, Ship Money Case  
            Pym’s Speech on Grievances  
            Protestation of the House of Commons  
            Petition of Right, http://www.constitution.org/eng/petright.htm  
            Malcolm, John Pym Speech, Earl of Strafford Treason Charge, pp. 127-144.

September 15  Descent into Civil War  
            Malcolm, XIX Propositions, pp. 145-154  
            Touching the Fundamentall Lawes, pp. 261-279  
            New Model Army, Putney Debates,  
            www.constitution.org/lev/eng_lev_08.htm

September 22  Court in Session: Arguing Cases  
            Presentations: Arguments and Judgments  
            **Research Paper Topic [must be approved in advance]**
September 29  Trying the King for Treason: Prosecution and Defence
Handout: Transcript of Trial of Charles I
Charles’ speech on the scaffold
http://anglicanhistory.org/charles/charles1.html
An Act for the Abolishing the Kingly Office
http://www.revolutionsolution.com/act.html
Trial of the Regicides: Obeying the Government de facto:
Prosecution and Defence// Defending Individual Rights
Malcolm, Rous, “The Lawfulness of obeying the Present Government”
pp. 393-404
Handout: Transcript of Trials of Regicides

October 6  Martial Law vs. Common Law
The Power of the Sword and the English Bill of Rights
English Bill of Rights, 1689,
http://avalon.law.yale.edu/17th_century/england.asp
Toleration Act, 1689
http://www.jacobite.ca/documents/1689toleration.htm
Handout: Malcolm, To Keep and Bear Arms, chaps. 5, 6
Mutiny Act, 1689
Coronation Oath, old and new, 1685, 1689

October 13  The Rights of American Colonists
Virginia Charter, 1606
avalon.law.yale.edu/17th_century/va01.asp
Laws and Liberties of Massachusetts, 1648
http://plaza.ufl.edu/edale/Laws%20and%20Liberties.htm
Pennsylvania Charter of Liberties, 1701
http://avalon.law.yale.edu/18th_century/pa07.asp
Research Paper: Outline and preliminary bibliography

October 20  Slavery in England, Slavery in America: English air “too free for a slave to breathe”
Reading: Sommersett’s Case, 1772
Malcolm, “Slavery in the North and the American Revolution” (will be sent online)
Handout: South Carolina Slave Code, 1740
**Outline and Preliminary Bibliography for Paper

November 3  Key Colonial Cases on Individual Rights: Arguing American Cases
Reading: James Otis Case, http://www.nhinet.org/ccs/docs/writs.htm
Thomas Paine, Common Sense,
Handout: Rex v. Zenger, pp. 32-36; Georgia v. Brailsford, pp. 45-53,
November 10  Common Law Reflections and Departures in Declaration of Independence, the First State Constitutions, Judicial Review?  
**Reading:** Declaration of Independence, Jefferson’s drafts; Pennsylvania Constitution, 1776,  
[http://avalon.law.yale.edu/18th_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp)  
Massachusetts Bill of Rights, 1780,  

November 17  Common Law and Debates on the American Constitution and Bill of Rights  
**Reading:** Madison, excerpts,  
PICK A BRANCH OF GOVERNMENT  
State Ratification Debates, PICK A STATE, see Jonathan Elliot, *The Debates in the Several State Conventions* OR  

**RESEARCH PAPERS DUE**  
December 12, noon