New York University School of Law  
Fall Term, 2006

COMPARATIVE LAW: PUBLIC POLICY APPROACHES  
Syllabus of Topics and Readings

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There is no casebook for this course. Two required texts have been ordered: Robert Kagan, Adversarial Legalism, and John Merryman, The Civil Law Tradition. The remainder of the readings for the course will be posted on blackboard.

This is an examination course, with a paper option. Students interested in writing a paper for the course should consult the instructor.

The following syllabus is an outline of topics to be covered in the course, along with reading assignments.

Topic I: The American Common Law: A Strange System in Comparative Perspective

(1) No Right Answer  
Comparative Law Readings # 1 (on blackboard--REQUIRED)  
Damaska, A Comparative Lawyer in an American Law School (on Blackboard--REQUIRED)

(2) American “adversarial legalism”  
Kagan, Adversarial Legalism, 1-58 (REQUIRED)

(3) A Study in Contrasts: Long Contracts versus Short Contracts


(4) Common Law vs. Civil Law: The Traditional Distinctions

Comparative Law Readings # 2 (on blackboard--REQUIRED)

Alan Watson, Evolution of Western Private Law, 1-18 (on blackboard—REQUIRED)

J. Whitman, The Legacy of Roman Law, 99-112 (on blackboard—REQUIRED)


Comparative Law Readings # 3 (on blackboard--REQUIRED)


Merryman, Civil Law Tradition, 1-110 (REQUIRED)

(5) The sophistication of Continental thought

Jhering’s Assault on Conceptualism et al. (on blackboard)

(6) A contrast in intellectual style and social policy: Pre-contractual liability

Whittaker and Zimmermann, Good Faith in European Contract Law 7-48 (on blackboard—REQUIRED)

Pham, The Waning of Promissory Estoppel, 79 Cornell L Rev. 1263 (on Blackboard—REQUIRED)

Zweigert and Kötz, Introduction to Comparative Law (on blackboard—RECOMMENDED)

(7) Bureaucratic versus non-bureaucratic law

Mirjan Damaska, The Faces of Justice and State Authority, Introduction (on blackboard—REQUIRED)

Kagan, Adversarial Legalism, Chapters 2, 3, 9 (REQUIRED)

M. Lasser, Judicial Deliberations (on blackboard—REQUIRED)

Brown and Bell, French Administrative Law (on blackboard—REQUIRED)


Topic II: Common Law vs. Civil Law: Contemporary Public Policy Questions

(1) Western law in the developing world:


Glaeser and Schleifer, Legal Origins, 2202 Q. J. Econ. 1193 (on blackboard—REQUIRED)


(2) Is borrowing possible? Permissible?
Alan Watson, Legal Change: Sources of Law and Legal Culture, 123 Pa. L. Rev. 1121 (1983) (on blackboard--REQUIRED)


Roper v. Simmons, 543 U.S. 551 (2005) (on blackboard--REQUIRED)

(3) Functionalism and Meliorism

Zweigert and Kötz, Introduction to Comparative Law, 1-47 (on blackboard--REQUIRED)

(4) Two Worlds of Procedure

a. Civil
   Merryman, Civil Law Tradition, Ch. 16 (REQUIRED)
   Kagan, Adversarial Legalism, Ch. 6 (REQUIRED)
   Amalia Kessler, Our Inquisitorial Tradition, 90 Cornell L. Rev. 1181 (2005) (on blackboard--REQUIRED)

b. Criminal
   Kagan, Adversarial Legalism, Ch. 4,5 (REQUIRED)

Topic III: “Soft” Law versus “Hard” Law and the question of “Rights”

E. Blankenburg, Dutch Legal Culture (on blackboard--REQUIRED)

Milhaupt et al., Disputes in Japan (on blackboard--REQUIRED)
Haley, The Spirit of Japanese Law (on blackboard—REQUIRED)

S. Angle, Should We All be More English? (on blackboard—REQUIRED)

G. Jellinek, Les Garanties du Droit Public ((on blackboard—RECOMMENDED)

**Topic IV: Criminal Punishment**


Whitman, Harsh Justice (2003), Chaps. 2 and 3 (on blackboard—REQUIRED)

**Topic V: Personhood, Discrimination, Harassment**

**Defamation**


The Lüth Case; The Mephisto Case (Germany) (on blackboard—REQUIRED)

Whitman, Two Western Cultures of Privacy (on blackboard—REQUIRED)

**Hate Speech**


UEJF and LICRA v. Yahoo! Inc. and Yahoo France, Tribunal de Grande Instance decision, May 22, 2000 (on blackboard—REQUIRED)

Yahoo v. LICRA, 169 F.Supp.2d 1181 (N.D. Cal. 2001) (summary judgment order) (on blackboard—REQUIRED)

Yahoo v. LICRA, 399 F.3d 1010 (9th Cir. 2005) (on blackboard—REQUIRED)

Law No. 90-615 of July 13, 1990, tending to repress every racist, anti-Semitic, or xenophobic act (France) (on blackboard—REQUIRED)

**Racial Equality and Affirmative Action**


Gwénaëlle Calvès, Color-Blindness at a Crossroads in Contemporary France, in Race in France (Chapman & Frader eds. 2004) (on blackboard—REQUIRED)
Daniel Sabbagh, Affirmative Action at Sciences Po, in Race in France (Chapman & Frader eds. 2004) (on blackboard—REQUIRED)

Gender Equality: The Case of Workplace Harassment
Susanne Baer, Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law, in Directions in Sexual Harassment Law (MacKinnon & Siegel eds. 2003) (on blackboard—REQUIRED)
Abigail C. Saguy, French and American Lawyers Define Sexual Harassment, in Directions in Sexual Harassment Law (MacKinnon & Siegel eds. 2003) (on blackboard—REQUIRED)
Yukiko Tsunoda, Sexual Harassment in Japan, in Directions in Sexual Harassment Law (MacKinnon & Siegel eds. 2003) (on blackboard—REQUIRED)

Mobbing


Topic VI: Religion and Law

Jewish Law
Menachem Elon, The Legal System of Jewish Law, in Jewish Law and Legal Theory (Golding ed. 1993) (on blackboard—REQUIRED)

Islamic Law
Lawrence Rosen, The Justice of Islam (2000), Ch. 9 (on blackboard—REQUIRED)

Hindu Law

Whitman, The Separation of Church and State in Europe and the United States: Why the Difference?, MS (on blackboard—REQUIRED)

Topic VII: Managing the Economy: The Governance of Firms and the Welfare of Consumers

Corporate Governance

Mark Roe, Some Differences in Germany, Japan and the United States, 102 Yale L. J. 1927 (1993) (on blackboard—REQUIRED)


The Welfare of Consumers

Whitman, Consumerism versus Producerism: On the Global Menace of “Consumerism” and the Mission of Comparative Law, MS (on blackboard—REQUIRED)

Kagan, Adversarial Legalism, Ch. 8


Topic VIII: The Law of Citizenship

Readings TBA