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# HISTORY OF THE COMMON LAW

*The Development of Anglo-American Legal Institutions*



JOHN H. LANGBEIN | RENÉE LETTOW LERNER | BRUCE P. SMITH



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# HISTORY *of the* COMMON LAW

*The Development of  
Anglo-American Legal Institutions*

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**JOHN H. LANGBEIN**

*Sterling Professor of Law and Legal History  
Yale Law School*

**RENÉE LETTOW LERNER**

*Associate Professor of Law  
George Washington University Law School*

**BRUCE P. SMITH**

*Dean  
Guy Raymond Jones Faculty Scholar  
Co-Director, Illinois Legal History Program  
University of Illinois College of Law*



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## PREFACE

We have written this book to serve as the text for an introductory course in Anglo-American legal history.

**Coverage.** The book explores the origins and development of the main legal institutions that have come to characterize the Anglo-American legal tradition, and to set it apart from the European legal systems. Two great themes dominate this book: (1) the emergence and incessant transformation of the jury system, including judge/jury relations, across eight centuries of Anglo-American civil and criminal justice; and (2) the law-equity division, from the emergence of the Court of Chancery in the fourteenth century down through the Judicature Acts of the 1870s and equity's "conquest"<sup>1</sup> of common law in the Federal Rules of Civil Procedure of 1938.

Other major subjects include the development of the legal profession, from the serjeants, barristers, and attorneys of medieval times, to the transnational megafirms of the twenty-first century; the literature of the law, especially law reports and treatises, from Bracton and the Year Books down to the American reports, digests, and electronic services; and legal education, from the founding of the Inns of Court to the emergence and growth of university law schools in the United States.

The chapters on criminal justice explore the history of pretrial investigation, policing, trial, sanctions, and sentencing. The movement over the past two centuries toward nonjury and nontrial resolution of cases in both criminal and civil procedure is underscored. The book devotes considerable attention to such distinctively American developments as the elective bench, the student-edited law review, and the pervasive influence of race relations on the law of criminal procedure.

Our premise, to borrow Judge Kaplan's phrase,<sup>2</sup> is that the core institutions and procedures studied in this book constitute the "grand discriminants" that distinguish the Anglo-American legal tradition from the European. We devote attention throughout the book, especially in the early chapters, to the ways in which the two great Western legal traditions came to diverge, and the reasons why.

1. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pennsylvania L. Rev. 909 (1987).

2. Benjamin Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 Michigan L. Rev. 821, 841 (1971).

Our emphasis on legal institutions comes at a price. This is a course-book, not an encyclopedia. To keep the book manageable for a one-semester course, we have had to exclude or provide only skeletal coverage of many strands of legal historical inquiry that are full of interest, such as the history of legal doctrine and legal theory, constitutional and political history, and many of the social and economic dimensions. For teachers wishing to supplement this book with greater content in such areas, excellent teaching books are available, many of which are cited in our chapter notes.

*Predecessors.* Our starting point for this book was a set of unpublished materials assembled and modified across the 1990s and early 2000s for Professor Langbein's course at Yale Law School. Courses in the history of legal institutions have a history of their own in American law schools, beginning with Julius Goebel's course at Columbia Law School in the 1920s.<sup>3</sup> Parts of this book (especially portions of Chapters 1 through 3 on the medieval system, and Chapter 5 on the emergence of Chancery) take their footprint, and some of their content, from a set of unpublished materials<sup>4</sup> developed by John P. Dawson at Harvard Law School in the 1960s.<sup>5</sup> We express our gratitude to the Dawson heirs for permitting us to draw upon the Dawson materials.

*Format and editorial conventions.* This book contains a mix of historical documents and extracts from the historical literature as well as our own text. We think it is important for students to see some of the foundational documents of Anglo-American law, as well as characteristic examples of the sorts of sources from which legal historians work. In selecting and editing the sources and extracts, we have followed some conventions that are meant to make the book easier to use while remaining faithful to the originals. We disclose deletions with ellipses, and we show interpolations with square brackets. Words that were abbreviated or rendered partially in superscript in the sources have been written out, missing punctuation has been supplied, and obvious misspellings have been corrected, all without disclosure. Spelling has been modernized and Americanized, but not in book titles. Punctuation is overwhelmingly original, but modernized when required for clarity. We do not preserve italic typeface when an original source has used it merely as a convention (for example, italicizing all proper names or place names). Capitalization in quoted material is original, except that in citing book titles we follow modern standards of initial capitalization.

3. First published as Julius Goebel, *Cases and Materials on the Development of Legal Institutions* (1929); revised as Joseph H. Smith, *Cases and Materials on the Development of Legal Institutions* (1965).

4. John P. Dawson, "Development of Law and Legal Institutions" (unpublished, 1963 ed.).

5. Other course books in the institutions tradition include the materials developed at the University of Michigan Law School in the 1960s, published as Spencer L. Kimball, *Historical Introduction to the Legal System* (1966); and Daniel Coquillette, *The Anglo-American Legal Heritage: Introductory Materials* (2d ed. 2005).



*Images.* We think that illustrations powerfully enliven and instruct, and we have made a determined effort to locate suitable images for this book, which contains more than 200 of them. The range spans fifth-century mosaics and medieval illuminated manuscripts down to quite recent photographs; among the images are paintings, etchings, caricatures, manuscripts, and pages from books and pamphlets. We are deeply grateful for the work of a skilled art editor, Naomi Kornhauser, who helped us locate images and obtain permissions. The images are credited to their sources in the chapter-by-chapter image acknowledgments at the end of the book. We particularly thank Michael Widener, Rare Book Librarian at the Yale Law Library, and Mindy Spitzer Johnston, Mary Person, and Lesley Schoenfeld of the Special Collections staff of the Harvard Law Library, for helping us locate and reproduce the many illustrations that come from those collections. We thank the Oscar M. Ruebhausen Fund at Yale Law School for a grant that helped defray costs of obtaining images and paying permission fees.

We take the occasion to express our gratitude to Steve Errick and Carol McGeehan of Aspen Publishers, who welcomed this program of extensive use of images. Aspen undertook to produce the book in full color (a first for law school teaching books), and to provide the design and production support needed to bring it about. The inspired book design is the work of Meri Keithley. We thank her, and also the Aspen production and editorial professionals who have worked on this book with evident care: Susan Boulanger, Melody Davies, Christine Hannan, and Eric Holt.

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*John H. Langbein*  
*Renée Lettow Lerner*  
*Bruce P. Smith*

June 2009

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HISTORY  
*of the*  
COMMON LAW

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