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A COMPANION TO
AMERICAN
LEGAL HISTORY

EDITED BY

Sally E. Hadden and Alfred L. Brophy



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Introduction

Sally E. Hadden and Alfred L. Brophy

As early as the eighteenth century writers from Montesquieu to Joseph Priestley linked law to its intellectual, cultural, and economic context. This was followed in the nineteenth century by Oliver Wendell Holmes' *The Common Law*, which famously averred that "The life of the law has not been logic; it has been experience." Yet, those insights were too rarely utilized by historians for much of the twentieth century. The centrality of law to historical analysis – and vice versa – was submerged, with law only playing a supporting role in the development of more traditional historical fields; legal history languished while political, diplomatic, and intellectual history flourished. In the past several decades, however, few if any fields of historical study have seen as much growth as the history of law. Dominated in the 1950s and 1960s by works of hagiography that privileged biography or celebrated the Supreme Court, the history of law now spans an extraordinary range of topics from the early seventeenth century to the recent past.

Changes in the field have been great and reflect the broadening sense of people involved in the legal system, the subject matter studied, and the methods employed. The subjects of study have increased greatly. Where legal history was once mostly discussions about the opinions of great white judges, especially Supreme Court justices, the field now spans the complete spectrum of people involved in law – from traditional actors like judges, legislators, and lawyers, to humble litigants, defendants, even those protesting and seeking to reform law. Similarly, the subject matter has expanded far beyond judicial biography and doctrine as announced in appellate court opinions. For a time, historians of the law wrote only from an "internalist"

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perspective; they studied how legal doctrine evolved without much regard for exogenous factors. Now legal history is dominated by studies of how legal institutions respond to, are influenced by, and influence surrounding society. The subjects are not just appellate judicial opinions and statutes, as they once were. Now legal historians study everything from the decisions of police and trial courts to administrative agencies' adjudications, local ordinances, and social norms that have the effect of law. Economics and demography, as well as politics and ideology, are key variables that are correlated with law.

The methods have expanded, too. In the realm of cultural and intellectual history, legal historians are concerned with the ideas of people in the streets, with reformers, workers, the enslaved, and people in poverty as well as the more familiar judges, legislators, and lawyers. Social history also looms large. Such studies look to the effects of law on people, as well as how the common person's ideas and motivations provided the impetus to change law.

Following broader trends in history and scholarship generally, legal history has recently expanded further, looking beyond the United States' borders, to see how transnational politics, culture, and economics relate to domestic law and legal practices. This new perspective reduces the privilege often accorded to the United States as nation-state, while encouraging broader, more comparative scholarship (hence our title is a *Companion to American Legal History* rather than a *Companion to United States Legal History*). So now American legal history crosses borders; it encompasses intellectual, cultural, and social history; it studies institutions, like courts, prisons, and states, as well as flamboyant judges, legislators, lawyers, litigants. Sometimes the subjects are famous; at other times they are humble and almost completely forgotten. In all cases, the field of legal history appears to be expanding as rapidly as scholars can publish their findings.

Given how widely legal historians now cast their nets, one may begin to wonder whether there is still a distinct field of legal history. For when "law" is construed broadly, when the subjects used to explain "law" include such expansive categories as economics, politics, religious thought, and literature, when questions span social, cultural, and international history, and when virtually everyone is a subject of study, it is reasonable to think that legal history is becoming synonymous with American history. In fact, some recent literature, such as G. Edward White's *Law in American History* (2012) treats law as embedded in larger American history and, thus, uses law to tell the story of American development from the settlement of transplanted European cultures in the seventeenth century through the epic struggles of the Civil War.

Within law schools, especially, history is increasingly seen as a method of legal analysis, much as economics is a method of legal analysis. The historical method looks to understand how legal structures are dependent on

their context and how statutes and cases need to be interpreted based on their context, as well as frame legal institutions to solve problems that have deep roots in our culture. Legal history is not merely studied as an artifact of the past, but to reveal choices made (or yet to be made) in public policy that have implications well beyond the court house or capitol. This “applied” aspect of historical studies in law gives it added relevance for jurists, legislators, or agency administrators contemplating decisions that can affect virtually every realm of human endeavor. Historical analysis demonstrates the complexity of legal institutions. How far that will go remains to be seen, but legal history is certainly going in many different directions simultaneously.

In large part, the prospect of an ever increasing empire of legal history is positive, because it is expanding in geography and demography at the same time it is expanding in subject matter and method. Quantitative historians, those who truck in thick description, and close readers of texts all find ample room for work in this field. But there are downsides to a field growing so rapidly and in so many different directions, for that fragments the efforts of scholars into many different subfields. Likewise, the separation of legal historians into history departments and law schools (and other locales) is reflected in choices made about where to publish findings: history professors tend to publish monographs, while law professors gravitate toward law journals. It can be difficult to keep up with the assorted places where legal history appears. Many people are speaking, but often in different venues, on different themes and with different purposes. Where once there were common themes and a small array of publications to know in the field, now there are many. New areas of research seem to sprout into existence every year: legal history now collides with the history of the book, while the Internet seemingly rewrites legal concepts such as property and privacy almost daily. These developments create a problem for editors who cannot include essays on every topic in a rapidly expanding discipline. The field of legal history, grand and growing, is in search of unifying themes and questions for analysis. The *Companion to American Legal History* offers guidance on where to start, what not to miss, and in many instances, indicates fruitful avenues for future research.

This volume surveys the extraordinarily rich work that has appeared since the 1950s, when J. Willard Hurst first envisioned a field apart from constitutional history that he called legal history. It emphasizes the diverse literature of the last several decades and infuses its analysis with up-to-the-minute information – new studies like David Rabban’s *Law’s History: American Legal Thought and the Transatlantic Turn to History* (2013) that offer fresh insights about legal historians working in earlier generations. Whether a reader is looking for a subject specific guide, or one arranged by time period or school of thought, this *Companion* should be able to provide a point of entry. Our first six chapters are organized chronologically. Our

contributors cover developments from the seventeenth century up through the 1960s. We then have seven chapters that look to groups in American legal history – from Native Americans, to African Americans in slavery and then in freedom, to women, families, and lawyers. Our third section has ten chapters on topics, including the economy, poverty, religion, taxes, the administrative state, and the military. Our fourth and final section looks to jurisprudential explorations, ranging across law and literature, legal thought from the eighteenth through early twentieth century, critical legal studies, and the international context of American law. Like a scout looking down from a mountain top, the *Companion to American Legal History* provides expert guidance to the terrain of our vast scholarly enterprise. We hope it inspires, as well as guides, the next generation of American legal historians.

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