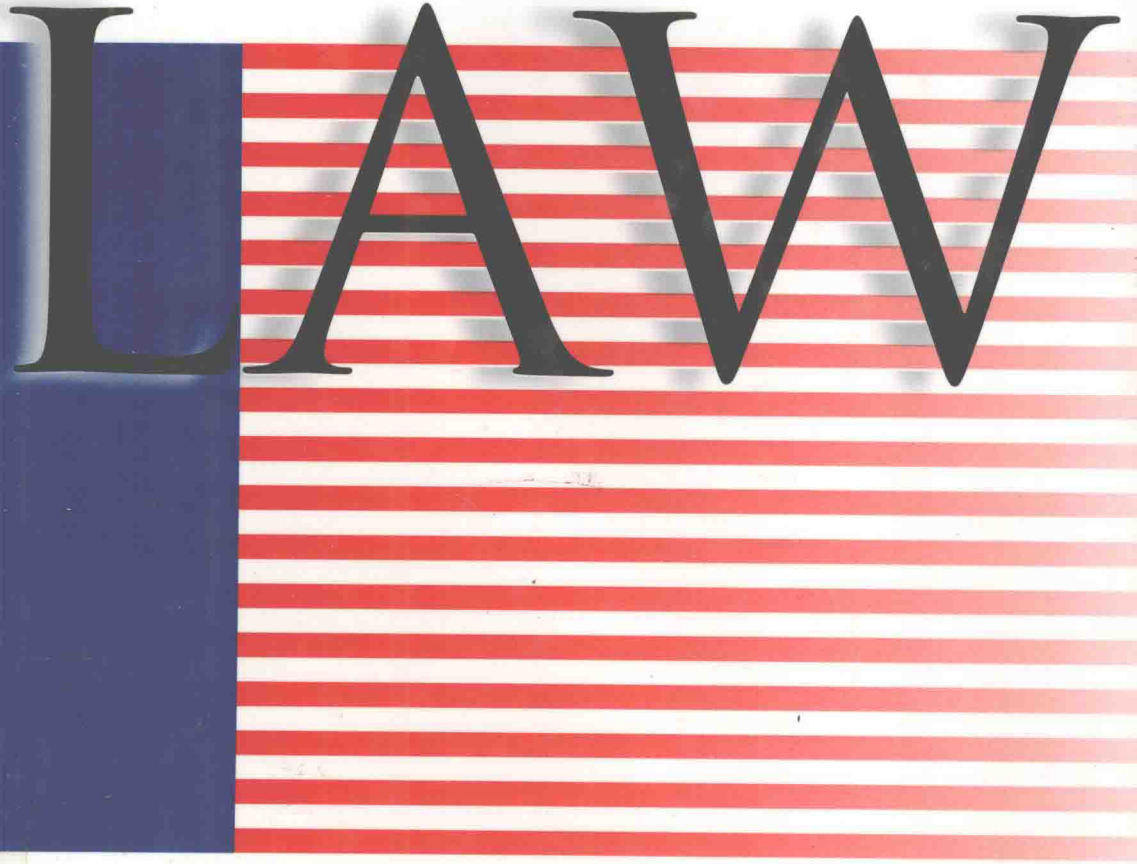
COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM

IMAGINING THE LAW



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The law is unknown to him that knoweth not the reason thereof, and the known certainty of the law is the safety of all.

—Sir Edward Coke, c. 1630

The huge mass of historical stuff that is now-a-days flowing from the press goes . . . to make the mind of the nation. It is of some moment that mankind should believe what is true, and disbelieve what is false. . . . Literature and art, religion and law, rents and prices, creeds and superstitions have burst the political barrier and are no longer to be expelled. The study of interactions and interdependencies is but just beginning, and no one can foresee the end.

—Frederic William Maitland, 1901

We cannot study separately the institutions and mentality of a people. Only by investigating them side by side, by seeing how certain ideas correspond to certain social arrangements, can both aspects become intelligible.

—Bronislaw Malinowski, 1915

What a time it has taken us to shake off the shackles of the law—to make a reality of emancipation of history from the lawyers.

—Sir Geoffrey Elton, 1984

Preface

THIS BOOK IS WRITTEN for the layman and the beginning student, although some practicing attorneys may find it interesting and useful. It is an attempt to explain how the legal systems of Britain and the United States and most other English-speaking countries got to be the way they are.

These countries live under English common law, and this book explains the social, political, and cultural factors that shaped the emergence and development of common law and examines the strengths and weaknesses of the common-law system, which has come to play a great role in our lives. There is also a focus on the legal profession, its composition and behavior pattern, which has played a central role in English society from the thirteenth to the mid-twentieth century.

There is a close connection, easy to perceive in the round and at a distance but difficult to articulate in detail and close-up, between the common law and English liberal political institu-

tions. Since English common law was perpetuated after the American Revolution as the basis of the United States legal systems at both the federal and state levels, the constitutional and political significance of the English common-law heritage has been an enduring if complex theme in American history. The same may be said of course for Anglophone Canada, Australia, and several other modern states that were products of the British Empire.

Amazingly, in the United States in the past quarter of a century the legal profession has drawn into itself perhaps half of the best students graduating from American colleges, with important consequences for both the profession and society in general. The common-law culture of the three-quarters of a million U.S. lawyers is explicated in this book.

Another theme of this book is how closely intertwined was the making of common law in England with the development of the social class called gentry—roughly speaking, the rural upper middle class—and how the law in Britain took on the mind-set of the gentry and at the same time molded this dominant class's own culture and behavior. The history of English common law presents a fascinating case study in historical sociology—namely, how a set of institutions and regulatory concepts founded in a rural aristocratic society became adapted (advantageously or not) to the needs of an increasingly commercial and eventually industrial society. Much of the controversy about the common law in early modern England and to some extent still today, in both Britain and the United States, stems from this sociological condition, not unknown elsewhere but existing in a particularly vibrant form in English legal development.

The system of trial by jury—distinctive to Anglo-American common law and a subject of much current debate in the United States—is examined in its development. It will be seen that the strengths and weaknesses of trial by jury have long been prevalent and are not recently emerging characteristics of this central aspect of common law.

Also highlighted is the way theorists have interpreted the common law, pointing to the cultural and intellectual contexts that have conditioned these efforts at theoretical judicial constructions, which have always fallen somewhat short of the dynamic and productive qualities of the common-law system.

This story of the common law is here set in contrast with the other great legal system that developed in the Western world, that of Roman law, which since the later Middle Ages has been the legal system prevailing on the European continent and many overseas areas settled by the continental powers, such as Latin America, or even to some extent Quebec and Louisiana. Roman law was also the basis of the canon law of the Roman Catholic church, which is still operative today.

There are very important differences between common law and Roman, or, as we may also call it, continental law. It has been traditional in accounts of common law to assume its superiority to Roman law. That assumption does not prevail in this book, not only because Roman law was solidified a millennium before common law and the latter owes quite a bit to the former, but because intrinsically, as they currently function, continental law is by no means inferior as a legal system to common law, and in the area of criminal justice, it can be plausibly argued, is actually superior to common law.

I am not a lawyer, but I have taught legal history in various American universities for four decades and for a year in an Israeli university. I was introduced to the study of common law by the greatest of American medieval historians, Joseph R. Strayer, at Princeton in the early 1950s. He also was not a lawyer but had mastered the forms of action at common law and perceived them as part of the rise of the medieval state. Over the years I discussed many of the issues in this book with Sir Geoffrey Elton, who held the chair of constitutional history at Cambridge, although himself not a lawyer. I gained much from these discussions. From 1982 to 1989 I taught English and once American legal history in

the New York University School of Law. In that context I also participated in a vigorous legal history seminar conducted by William E. Nelson and learned much from Professor Nelson, and from two other continuing participants, Professor John Philip Reid and Mr. Lawrence Fleischer.

Anyone who undertakes to write legal history stands in the shadow of Frederic William Maitland, who was a law professor at Cambridge at the beginning of the century and was in equal parts a great historian and a pioneering sociologist of the law. A scholar of almost equal stature and influence on the side of American legal history was James Willard Hurst, of the University of Wisconsin Law School, who wrote in the 1950s and 1960s. This book owes much to these giants and to a host of later writers. Among the recent writers on legal history, Brian Simpson, R. C. van Caenegem, Michael Clanchy, and Lawrence Friedman have had perhaps the greatest influence upon me.

It must be noted, however, that legal history as a discipline is in a relatively early stage of development. With very few exceptions professional historians lack the technical capacity to read legal documents, and law schools are rarely and at best marginally interested in appointing and rewarding historians of law. In American law schools a legal historian can only be appointed if he or she can teach one of the basic introductory courses, such as property or liability. In England, aside from less than a handful of chairs, there are virtually no appointments available for legal historians. The continental law schools have almost no interest in history; their approach is structural and philosophical rather than developmental.

Under these circumstances vast areas of legal history remain underresearched and conceptually underdeveloped. Thus there are literally tons of English court records from the period 1300–1500 that have never been looked at since the multilingual court clerks wrote down a near-verbatim record of the cases. American law professors today are quite active in applying literary theory to legal texts, but almost nothing has been done to write

legal history in the context of this vanguard humanities theory.

The field of legal history conceptually exhibits a strong parallel to the history of science, which has benefited, as legal history has not, from lavish funding provided by learned foundations and universities. The history of science can be written narrowly and simply as science that takes place in the past; this kind of history of science is highly technical and is concerned mainly with recreating the thought processes of great scientists who happened to live in the past. Another approach to the history of science interprets the development of science interactively with present-day concerns and within the contexts of past culture, society, and politics; it frequently takes a critical attitude to the behavior of scientists. Not surprisingly the latter approach is not popular among scientists and has been condemned as subversive, judgmental, and amateur in its understanding of science.

Similarly writings on legal history can be divided into, first, those that are devoted to close professional study of the law that happened in the past. They are highly technical works and focus on the operations and techniques of the legal profession. A prime example of this genre is J. H. Baker, *Introduction to English Legal History* (London/Boston: Butterworths, 1990), 3d ed. The other group of writings on legal history is similar to the second approach to the history of science, taking a broad cultural, social, and political perspective from present-day concerns.

Mine is the latter approach. It may be called, pejoratively or otherwise, social constructivist or relativist. I prefer to call it the sociological and cultural history of law. Nevertheless I have read closely and tried to understand what the masters of the more narrowly technical approach to legal history have to say, not always an easy task, since frequently they seem to be addressing only London barristers or American law school professors.

Several lawyers and historians accepted my invitation to read an earlier draft of this book and provided valuable criticism: Louis

Knafla, William Nelson, Judith Nolan, Michael Stein, R. C. van Caenegem, and Arthur Williamson. They are of course in no way responsible for any shortcomings or errors in this book.

I wish to thank the staff of the Bobst and Law Libraries of New York University and of the Firestone Library at Princeton University for their unfailing courtesy and cooperation. The Office of the Dean of the Faculty of Arts at NYU funded secretarial assistance.

My secretary, Eloise Jacobs-Brunner, contended with my bad typing and handwriting and through various drafts put the book on computer disk for HarperCollins. Dawn Marie Hayes helped me prepare the bibliography. Sue Llewellyn copyedited the text of the book with her customary intelligence and skill.

I wish to thank my editor at HarperCollins New York, Hugh Van Dusen, and my literary agent, Alexander Hoyt, for their encouragement and patience.

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Law and Legal History

LAW IS THE SYSTEM of state-enforced rules by which relatively large civil societies and political entities operate. This programmed social functioning is backed up by the exercise of power by a politically sovereign body.

What constitutes law among the behavioral codes by which groups or individuals in society live has been defined by legal philosophers in three different ways. Some say that law is the command of a sovereign power to obey a rule, with a penalty for transgressing it. This view is called legal positivism and has been particularly associated with the nineteenth-century English philosopher John Austin.

On the other side are those who say that law is the application within a state or other community of rules that are derived from universal principles of morality rooted in turn in revealed religion or reason or a kind of ethical communal sensibility. This view is associated with Thomas Aquinas, in the Middle Ages, who

articulated it in the form of natural law theory, and with Lon Fuller and Ronald Dworkin, among recent American legal philosophers.

In the 1960s the widely esteemed Oxford philosopher H. L. A. Hart tried to find an intermediate position between these two opposing definitions of law according to positivism and natural law. He argued that there are "rules of recognition" in which the obligation of rule conformity is brought about by "social pressure" and customary social behavior rather than by sovereign command and penalty.

Many stipulations, Hart claimed, are recognizable as law that are pragmatic rules for transactions between private parties and functionally lie outside the sphere of sovereign command and penalty. No sovereign power, no matter how ambitious and aggressive, can enforce more than part of the spectrum of laws we live by. Even the concept of sovereign power is problematic and vulnerable.

Whether Hart really established an intermediate position between the two standard positions in legal philosophy or simply found a new way—subtle, perhaps, or confusing—of associating law with ethics in a context of linguistic analysis and pragmatic theory remains a matter of dispute.

The law is divided into two kinds. There is criminal law, by which peace and security are maintained, and whose violation results in publicly administered punishment of greater or lesser severity and brings upon the transgressor the stigma of moral turpitude. Second, there is civil law, which regulates relationships between individuals, families, and corporations involving other than criminal activities and provides state-enforced techniques for accumulating and distributing property and other forms of wealth. For example, murder and robbery fall within the jurisdiction of criminal law. Contracts, personal liability, and marriage and divorce are within the purview of civil law.

There are instances in which criminal and civil law overlap.

Torts (liability for personal injury; the word "tort" comes from the Norman French for "wrong") can involve criminal prosecution as well as remedy to the injured party in a civil action. Manslaughter may involve civil penalties as well as punishment under criminal law and similarly, tax evasion can be countered by both criminal prosecution and restitution under civil law. But for the most part criminal and civil law are quite distinct, both conceptually and in practice.

All political entities have legal systems and law courts. But law as it has creatively developed in the Western world, from the Roman Empire to the present, has been mostly in large political units and social organizations, covering extensive territories and diverse populations.

There is much less need for law in small groups. Thus while Orthodox Jews live under the halacha, which literally means "law," in practice they are governed by heads of families and one rabbi or handful of rabbis who make ad hoc decisions to sustain the group's social functions and culture, although for authority the rabbi may judicially cite the Bible and prestigious commentaries on it.

The Greek city-states had legal codes, but since they were small populations and territories with participatory democracies or tightly run oligarchies, they needed little written law. Juries of six hundred drawn by lot from the community or a handful of dictators and oligarchs made up the law as needed.

The Germanic peoples of the early Middle Ages and the Icelanders of the thirteenth century drew up law codes, but these codes dealt only with very narrow disputed areas of their social function. Germanic kings and Scandinavian lords arbitrarily made legal decisions when they wanted to, or the community of active warriors met together over a keg of beer and jawboned a consensus.

The modern state of Israel emerged after 1948 with an unusually rich set of legal heritages—rabbinical, English, and Turkish.

But as a matter of fact, not until the 1990s was the judiciary and its determination of the legal system important in Israel. Until economic expansion and increasing size and diversity of the population, due to the Russian immigration of the 1980s, changed the context, Israel's small Jewish population was run by an exotic elite of perhaps two hundred families, and the judiciary drawn in any case from this same elite were mere adjuncts of what was decided in upscale living rooms in Jerusalem and Tel Aviv. Even in the mid–1980s a sophisticated Israeli with a problem did not retain an attorney. He phoned—or had someone else phone—a cabinet minister at home to get the latter's intercession.

This personal approach to problem solving rather than use of a public litigator is generally characteristic of small populations with narrow, powerful elites. Even in now heavily populated wealthy Japan, corporate executives, still bound by the culture of an earlier aristocratic and tribal society, with a small population, are reluctant to resort to litigation, which carries a social stigma.

The early Roman Republic had a similar ad hoc, personally shaped legal system in which a small handful of leaders of prominent families met in the senate and assembly and made sufficient judicial decisions. In the later republic, by 50 B.C., this artful system no longer worked well. The number of people involved were too many, the factional conflicts too fierce, and the entire physical area, covering large stretches of the Roman-ruled imperial Mediterranean coastline, became too expansive for this ad hoc, personal, and in-group approach to law. Therefore the Romans had to develop a formal, public, institutional, state-backed legal system with panels of judges impersonally hearing cases and rendering decisions by the authority of the emperor.

Thus emerged one of the two systems of law in the Western world. The other, English common law, developed in the later Middle Ages because—among other reasons—the territory involved and the number of people affected, even in the "scept'red isle," were too great for personal and family solutions,

especially when complicated property disputes and mayhem generated by organized crime were involved. Coming down into the modern world, English common law became much more elaborate and sophisticated as England's wealth and population multiplied and its imperial interests proliferated after 1700.

The most developed, complicated system of law in the world and the locus of the most constant resource to law courts for dispute settlement—and the largest legal profession by far—developed in the twentieth-century United States, especially after the New Deal took hold in 1937, because of the country's size, wealth, population, and international interests. Indeed, law was so necessary in the United States for conflict resolution in regard to almost every conceivable personal aspiration and social function, that a two-tier, federal and state system of courts had to be fully worked out. The tensile relationship between the two systems was in itself another cause of American legal elaboration and much judicial theorizing.

Therefore, when you are thinking about the creative side of the history of law, you are focusing mostly on large societies and major political entities—the Roman Republic and Empire, the medieval English monarchy, the modern European states and their overseas offshoots, and especially commercial, industrial, and imperial Britain and the vast, bicoastal, fiercely challenging United States.

The effort of the Russians to live in their own continental country by oligarchic power—whether of the czars or the commissars—rather than by legal systems did not work well. It resulted in unrestrained and unpunished criminality on the part of the czarist and Communist oligarchies themselves and the inability to provide the necessary legal context for modern industry, high technology, and international corporate economy, contributing to political collapse, first in 1917 and then again in 1990.

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