

## INTRODUCTION

One course with two names:

Law: English Legal History, Prof. Donahue

FAS: Medieval Studies 117: Constitutional and Legal History of Medieval England, Prof. Donahue, Dr. Bartlett

The course meets for lectures on Mon. and Wed. at 10:30 in Sever 213 in Harvard Yard. It meets for a 'section' meeting for the law and FAS graduate students on Tue. at 10:30 in Hauser 102.

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Sources of Law</i>	<i>Roman Influence on England</i>	<i>Roman Influence on Continent</i>
600–1150	Age of Tort	Tribal → Feudal Monarchy	Barbarian Codes, Custom	Almost non-existent	Weak
(1000?, 1066?) 1150–1300	Age of Property	Feudal monarchy	Custom, Case Law, Statute	Strong on Method	Same
(1250) 1300–1500 (1602)	Age of Trespass	National monarchy	Case Law	Weak	Quite Strong
(1375) 1500–1700	Age of Equity	Absolute Monarchy → Const. Monarchy	Case Law, Statute	Strong in spots	Strong
1700–1900	Age of Reform	Const. monarchy	Case law, Some Codification	Submerged but there	Very strong

## THE CRIMINAL LAW AND PROCEDURE

1. S.F.C. Milsom: "The miserable history of crime in England can be shortly told. Nothing worthwhile was created."
2. The "ancient pattern of lawsuit": a formal charge or complaint, a blanket denial, which is then submitted to an inscrutable decision-maker.
3. The "ancient pattern of lawsuit" may go back to Anglo-Saxons. Certainly some use of inscrutable decision-makers does. The records of criminal processes, which begin to be abundant in the 13th century, reflect this pattern, though here the inscrutable decision-maker is the jury.

4. The rise of an organized prosecution is very slow in coming; cannot be seen clearly until the 16th century. Lawyers (as opposed to judges) come into this process very late. There is little evidence of lawyers for the defense until the late 18th century.
5. The political trials of the 17th c. did much to create a catalogue of things which the criminal defendant should be able to claim as of right, and our constitutional protections for criminal defendants have their ancestry in this period.
6. Criminal vs. civil—the Roman-law distinction and *Glanvill*'s (written c. 1189)
  - a. Crime vs. tort (appeal vs. indictment, felony vs. trespass; plea of the crown or not; *contra pacem* or not). The rise of what we would call the civil action of trespass in the mid-13th century.
  - b. Felony and forfeiture. Forfeiture is older than felony. Characterizing forfeitures as felonies may have given the lords a way to get their lands back after the king had had them for a year and a day and waste.
  - c. The decline of appeals of felony. Indictment takes over for appeal of felony (by the mid-13th century). Indictment trumps trespass (unclear when, certainly by the early modern period).
7. Indictment
  - a. Coroners, assize of Clarendon (1166), assize of Northampton (1176). The rise of grand jury procedure. No police until the late 18th century at the earliest.
  - b. Ordeal replaced by petty jury after 1215 (the Fourth Lateran Council of that year may not be as important as Baker makes it out to be). Statute of Westminster I (1275) *prison forte et dure*, becomes *peine forte et dure*. *Bushel's Case* (1670) (jurors may not be punished for rendering a false verdict)
  - c. Trial procedure: Chapbooks, judges' notebooks, Dudley Ryder's (CJKB, 1754–56) notebooks, show us a procedure without lawyers. The role of the JP's.
  - d. Criminal courts: the eyre, King's Bench, the assizes (commissions of oyer and terminer, gaol delivery, trailbaston eventually consolidated into one commission along with assize commissions and commissions of *nisi prius*). Keepers of the peace become JP's and hold quarter sessions.
8. Avoidance of punishment as a device for review.
  - a. Pardons. The rise of conditional pardoning leading eventually to the prison system.
  - b. Sanctuary. Ultimately abolished in 1624.
  - c. Benefit of clergy: the "neck verse", 1489 statute that limits the number of times one could claim clergy, rise of non-clergyable offense, eventual abolition in 1827.
9. Change in substantive law
  - a. Focus on the indictment: *certiorari* to King's Bench on the words of the indictment, informal discussions among the lawyers and judges.
  - b. Change by legislation rare, a brief period in which Star Chamber developed the law of misdemeanors.

- c. If the law won't change, the facts will
  - i. Homicide and murder, societal and legal concepts.
  - ii. 1390, pardon statute on murder.
  - iii. There aren't that many walls in England, coroners' verdict
  - iv. The rise of jury trial as we know it, discussion by the judges seems to have little effect
  - v. 16th c statute on clergyability
  - vi. The role of the jury in the later period, the political cases
  - vii. Larceny cases (the goods are worth 11 pence).

10. Hay vs. Langbein as a reflection of some fundamental debates

- a. What role does the legal system play in a society? What role can it play? What role should it play?
- b. What role do rules play in the legal system? To the extent that they play a role how do they get formulated and how do they change? What role does process play in the legal system? To the extent that it controls the system where do the forces that formulate and change process come from?
- c. What are the central forces at work in the legal system (on rules or process)? Can we reduce the multiplicity of possible explanation of why the legal system works as it does? Can we see a search for principle or the workings of certain fundamental ideas or structures? Or is it a kind of market process which by groping arrives at an efficient solution? Or is it a product of interest group conflict in which the powerful interest group or groups will prevail?

11. Hay vs. Langbein

- a. The problem: Over the course of the eighteenth century a harsh criminal code with a large number of capital offenses became harsher (many more capital offenses). Over the course of the eighteenth century the use of the capital sanction declined markedly.
- b. The evidence
  - i. The liturgical function of the criminal process
  - ii. Justice and technicality
  - iii. Prosecutorial discretion
  - iv. What got prosecuted
  - v. Jury discretion
  - vi. Pardons
- c. The overall thesis. For Langbein the process is given. No police, parliament, trial court with judge and jury and no lawyers and the possibilities of pardoning. Granted that process and those actors a body of rigid rules will be mitigated at every level by the participants in the process. Langbein's underlying assumption is that the law was bad, everyone knew it and they did their best. Hay gives a much darker picture. He can be faulted for jury and pardons and the argument about justice. The question is there anything left? Yes, the liturgical, the

JP's in the countryside, the fact that this is a discretionary system. Need it have been that way? Probably not, see France.