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Essays in the History of Early American Law. Edited by David H. Flaherty.

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ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW. Edited by David H. Flaherty. Chapel Hill, North Carolina: University of North Carolina Press. 1969. ix + 534 pages. \$12.50.

JOHN PHILLIP REID*

It is a rare experience when reading the literature of American law to find a book that makes you wonder why it has not been written earlier. The more general question with law books is why they are written at all. *Essays in the History of Early American Law* is one of those exceptions. The plan is simple enough: to gather under one cover the best articles in colonial and federalist legal history. Yet it has never been done before,¹ and unlike most law books there may even be a need if we believe one recent general historian who complains that law review articles² are not readily accessible on many campuses and hence are unavailable to most historians.³

David H. Flaherty, the editor and an assistant professor of history at the University of Virginia, has included all the important articles, and some not very important. They range in quality and significance from Thorp L. Wolford's insipid summary of the contents of *The Laws and Liberties of 1648*,⁴ to Julius Goebel's monumental study of the influence upon early Plymouth of the "half remembered," noncommon law, local customs of seventeenth-century England.⁵ There have been qualifications expressed concerning Professor Goebel's theme. It has been suggested that it is overstated (as most revisionist historical theories are) and that its relevance is limited to the Plymouth colony (which is probably not true⁶), yet the fact remains that he saw something other scholars before him had missed and he pointed out an error that lawyers would continue to make long after he wrote this article.⁷ Sumner Chilton Powell has shown what great work can be done by carrying the threads of institutional origins back to England and following individual settlers from old Suffolk to Massachusetts Bay,⁸ but few other scholars have accepted the challenge that Goebel first laid down. It is certainly an American task for we can anticipate little help from English legal historians. They are still wandering about in the middle ages. The seventeenth century is too recent to interest them.⁹

There is little point to reviewing these well-known articles, except to note

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1. *But see* LAW AND AUTHORITY IN COLONIAL AMERICA (G. Billias ed. 1965), a collection of original essays on legal history that did reprint one article by George Haskins.

2. Not every article in the volume comes from a law review, but some of the other sources are also of limited circulation.

3. Zornow, Book Review, 31 THE HISTORIAN 642 (1969).

4. Pp. 147-85, reprinted from 28 B.U.L. REV. 426 where it might have been allowed to rest in peace.

5. Pp. 83-120, originally printed in 31 COLUM. L. REV. 416 (1931).

6. See Goebel making the same point with regard to Long Island law at p. 251.

7. That for the seventeenth century, as now, the term "common law" can be used interchangeably with "English law." See E. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE, 1640-1700, 89 (1959).

8. S. POWELL, PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN (1963).

9. See Flaherty's discussion, at pp. 6-7.

that they are about all we have. The complaint has recently been made that it is difficult to develop theories concerning American colonial history since what we know is "largely of New England and largely of New England in the seventeenth century at that."¹⁰ Professor Flaherty's selections bear this fact out. Probably the only surprise for the knowledgeable reader is to discover the amount of historical work contributed by Zechariah Chafee, Jr.¹¹

Professor Flaherty made no effort to edit the articles. They appear as originally printed, lengthy footnotes and all.¹² The restraint is commendable, but inconsistencies may cause some readers to be confused. Thus we read in the article by Charles McLean Andrews, appearing in the second half of the book, the surprising fact that the Massachusetts intestacy statute, providing a double portion to the eldest son within an otherwise general scheme of partible inheritance, was not enacted until 1692; moreover, it is said the statute developed from New England customary law.¹³ Yet earlier, other authors told us that Plymouth had passed such a statute before the settlement of Massachusetts Bay,¹⁴ and that Massachusetts Bay enacted the double-portion rule in *The Laws and Liberties of 1648*¹⁵ (if not sooner), as well as in subsequent acts.¹⁶ The point raised here is one that goes beyond the question of editing for the sake of clarity. It has substantive significance as well, because Andrews' theme is that, "The Connecticut law was not the arbitrary act of the assembly; it was the sanctioning of a custom that had grown out of the consent of heirs to an intestacy, and which had been proved to be the best adapted to the needs of the colony."¹⁷ By citing the Massachusetts statute of 1692 as new legislation incorporating custom, Andrews was turning a theory into a fairy tale. To support the attractive theme of indigenous custom originating in economic conditions, he misused evidence that might have proved a theory of biblical origins¹⁸ or of legal diffusion¹⁹ but little else.

Aside from the unquestioned merit of making these articles readily available, the value of this book must rest on Professor Flaherty's introductory essay. He is the first scholar to survey the legal-historical literature and to evaluate the results. He does a thorough and competent job, noting especially recent dis-

10. Stoebeck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 395 (1968).

11. Pp. 53-82 and 489-513. Chafee's major contribution is not included as it appeared in book form, but it is reviewed by George E. Woodbine, pp. 192-203. As the author's swordnote on page 192 indicates, Samuel E. Morison was the only editor but Chafee wrote the introduction.

12. A brief introduction is omitted from Chafee's review p. 489; Andrews' article pp. 336-66 is not as originally published, but as "extracted" for Dean Wigmore in 1907.

13. P. 341.

14. P. 131.

15. Pp. 176 and 239.

16. The act of 1649. P. 239.

17. P. 342.

18. See pp. 140-41, 176, and 236-39 and Andrews at p. 342.

19. Admittedly, if there were no prior statute on this point in Connecticut, the affected heirs had to consent. Their consent, however, can be said to have come from the legal culture, borrowed from Massachusetts Bay, as much as from economics.

sertations that otherwise might be missed by students. On the whole, however, it is a less distinguished effort than the comparable (and equally unique) survey of the legal-anthropological materials recently completed by Laura Nader,²⁰ mainly because Flaherty is too kind to too many people: for example, Perry Miller. Moreover, he fills his precious pages with bland statements that are either unexplained, make little sense, or are obvious—as when he tells us that Clifford K. Shipton's *Early American Imprints, 1639-1800* is "a collection especially useful for the eighteenth century."²¹ Or consider the following:

Historians of early American law should undertake the stimulating experience of reading the great primacy sources of English legal history, especially Glanville, Bracton, Coke, and Blackstone. One can often learn more from direct exposure to these major figures than from tedious study of secondary sources replete with the details of controversies and encounters that are of little relevance to the particular interests of American legal historians.²²

While it might be asked what is stimulating about reading Glanville,²³ a more pertinent question is just how the reading of Glanville is of "relevance to the particular interests of American legal historians." Flaherty is speaking of the historians of American law not of Americans working in English legal history, and their particular interests have to do with law as it was in America. What does Glanville tell them about the law? Why stop with Glanville? Why not go back to the code of Ethelbert? The fact is that a code or practice book is not legal history and that the historical ancestors of today's law have little to do with today's law.²⁴ Glanville (d. 1190) was explaining the law of his own era, and had he read the provisions of the code of Edmund (939-946), freeing the kin from liability in homicide, he not only would have found them of no practical value, he would not have understood what they meant.²⁵ By the same token, the colonial lawyer reading Glanville on *essoins* and *novel disseisin* would have learned less from these terms concerning his law than today's law student learns about our land law when he reads in *The Laws and Liberties of 1648* that fines and heriots were abolished in early Massachusetts Bay.

20. Nader, *The Anthropological Study of Law* 67 (number 6, part 2), *AM. ANTHRO.* 3-25 (1965).

21. P. 21. In the same vein: "Alexander Hamilton's legal career has begun to receive more attention since the appearance of the first volume of *The Law Practice of Alexander Hamilton*. . . . The topical arrangement of cases, prefaced by an introduction of each group, is of practical value in the study of substantive law." Pp. 23-24.

22. P. 8.

23. Or Coke for that matter? Another Flaherty statement: "The scholar who attempts a perusal of Coke's *Institutes* will be made aware of the need for a modern scholarly edition of this seminal work." P. 7. What need? Flaherty does not say.

24. "Not only are the cases of the England of Elizabeth I irrelevant to the England of Elizabeth II, but the law of fifty years ago is irrelevant to the law of today." Frederick, Discussion in *THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEAL* 56 (D. Haber & J. Cohen ed. 1968).

25. Oddly enough, the Creeks, Cherokees, Chickasaws, and thousands of other American Indians living during the colonial epoch would have understood more of the code of Edmund on kin and *wergilds* than would a British lawyer—but that is defining American law in a wider context than does Professor Flaherty in his introduction.

To be sure, Flaherty has many valuable suggestions, as when he asks about the priority that once was assigned to the editing of court records. He would prefer "that mature scholars will shun this outlet for their energies in favor of some of the more pressing needs of early American legal history."²⁶ For some of us who agree with him, this priority appears to have been recently shifted to the editing of personal law papers, an activity that seems little different, yet one that Flaherty praises. He is, moreover, correct when he points out that "[t]he history of early American law has been too concerned with origins and with institutional studies."²⁷

A major inadequacy of extant studies of the history of American law is the absence of studies that compare the colonies with the mother country and one colony with another. . . . Such undertakings may well do away with the traditional lament about having to study thirteen separate jurisdictions, for in colony after colony the historian is often much more impressed with the similarities than the differences. The uniqueness of the New England Puritans' reforms of English law can be questioned for example, once one has examined the legal records of seventeenth century Virginia.²⁸

Professor Flaherty's concern is that the "jurisdictional" approach has tended to narrow the perspective of American legal history, causing the general scholar and even the graduate student "to leave legal history works in their arcane corner."²⁹ We must, he argues, get "to the heart of the matter in the study of legal history," especially "by asking broadly significant questions."³⁰ How are we to accomplish that feat? The answer is obvious—by saving legal history from the lawyers.

No one would deny that lawyers are more narrow than historians, just as historians are more narrow than anthropologists and behavioral scientists. This truism is not limited to but generally turns on disagreements regarding the relevancy of evidence and the usefulness of generalities. The debate is as old as legal history itself, and not a year goes by but much water passes over this dam.³¹ Indeed, Flaherty offers a small contribution when, after praising studies by Chafee and Joseph H. Smith, he adds the reservation "that their work tends to

26. P. 31.

27. P. 33.

28. P. 13.

Scholars have been so busy studying individual colonies that they have not taken cognizance of the enormous similarities in all aspects of law in the British colonies. As one studies colony after colony the dominant impression is not one of differences but of similarities. The significant deviations readily stand out. While most studies should initially begin in one jurisdiction—and the legal history of each colony might well be studied separately, especially in the format of doctoral dissertations—such difficulties should no longer be invoked as an almost sacrosanct ban on presentation of the legal history of early America from a general point of view. P. 34.

29. P. 32.

30. *Id.*

31. For samples from the debate, see the legal historiography section of the "Legal History" article published for any of the past five years in *THE ANNUAL SURVEY OF AMERICAN LAW*.

be carefully descriptive and lacking in historical analysis and generalization on a broad scale."³² In other words, they are lawyers.

The *raison d'être* of Flaherty's essay is to offer a way out of the lawyer-historian dilemma. His problem, of course, is to get more general historians interested in legal history, for as every historian knows, legal history can be saved from the lawyers only by historians.³³ If the historians will take over legal history, it may be supposed, we will no longer suffer from lawyer style, a style that has been described "as tough to chew on as a piece of old leather—more nourishing, to be sure, but hardly more palatable."³⁴ Nor will we be told that a book on frontier justice has "a verve and wit which can only be compared with a legal brief. . .,"³⁵ or that a study of constitutional history "is intelligible, even reasonable, but it is as exciting as a series of lectures by a law professor."³⁶ Yet how, it must be asked, will the historians be persuaded to make the move. Professor Flaherty has an answer that he admits will not be easy to implement. A major "stumbling block" at the present time, he suggests, is the technical nature of law, and as the technicalities cannot be reformed (as they are already incased in the legal records) it is the historians who must reform. "A degree of formal or informal legal training is certainly essential for serious work in the field, and the guild of lawyers has tended to reflect unkindly on those who attempted to study the history of law without prior immersion in the mysteries of the sect."³⁷

32. P. 11.

33. There is an assumption (or perhaps it should be called a generalization) so often repeated that its validity is surely self-evident: that historians would prove much superior to lawyers if they would only show an interest in legal history. Thus it was recently argued:

As L. H. Butterfield comments in his preface to the *Legal Papers of John Adams*, the writing of American legal history has had little relation to the social and economic affairs of the people. Except for legislative and constitutional history, legal history in a broader sense has been undernourished. A recent surge of interest in legal records indicates that historians have become aware that these sources may yield data for a wide variety of subjects. The exploitation of these records by non-legal historians may even broaden the traditionally narrow scope of legal historians.

Rundell, *Southern History from Local Sources: A Survey of Graduate History Training*, 24 J. So. Hist. 214, 222 (1968). Undoubtedly the prediction is correct: legal historians can be taught new ways if their brethren will only show an interest. Yet the lessons are not always instructive. As E. R. Elton, even more recently, has observed:

every Tudor historian soon learns that to the men of the sixteenth century the courts and their work formed a major private concern, and he quickly comes to appreciate that he cannot quite ignore them. The consequences are predictable: rather superficial generalization unburdened by technicalities. . . .

Elton, Book Review, 84 ENG. HIST. REV. 354 (1969).

34. Hoebel, Book Review, 70 AM. ANTHRO. 767, 768 (1968). Hoebel is an anthropologist, not an historian and includes in his indictment the style of Frederic William Maitland whom many historians revere as the "historians' historian," despite the fact that he was a lawyer. See, e.g., Schuyler, *The Historical Spirit Incarnate: Frederick (sic) William Maitland*, 57 AM. HIST. REV. 303, 312 (1952); H. HOLLOND, *FREDERIC WILLIAM MAITLAND: 1850-1906*, 4 (1953) (quoting Lord Acton); D. Brogan Cilo, *A Muse*, N.Y. Times, Feb. 14, 1965, sec. 7 (Book Review) 2; F. POWICKE, *MODERN HISTORIANS AND THE STUDY OF HISTORY* 55 (1955).

35. Knight, Book Review, 56 J. AM. HIST. 403 (1969).

36. MacDonald, Book Review, 55 J. AM. HIST. 858, 859 (1969).

37. P. 34. Professor Flaherty's twit must not be allowed to pass without comment. True enough, lawyers have been "unkind" but seldom because the historian is a pagan,

The legal historian should be an historian with some legal training. . . . If, as appears likely, it is too much to ask that a person complete law school before being trained as a professional historian, or vice versa, than the emphasis should be on training as a historian, coupled with some basic law courses relevant to a particular interest. The greatest danger is that the person writing legal history will not be a 'historian.' In the entire corpus of secondary works on early American legal history, many of the weakest productions are those of professional lawyers who have ventured into the field of legal history without comprehending the demands of historical study. . . . Whether one is formally trained as a lawyer or historian or both, the governing consideration is to write legal history as history.

Some legal training is essential, then, and all legal historians should be exposed to the ways of the legal profession through study in a law school.³⁸

It is possible to accept Professor Flaherty's estimate of the seriousness of the problem, without agreeing with why he thinks it is serious or endorsing his solution. His university apparently has accepted it, and has inaugurated degree programs in American or English history with concentration in legal history, requiring one basic law course for credit in each of the first four semesters of graduate work.³⁹ While the endeavour is encouraging to the future of legal history, its utility remains to be demonstrated and it is not impossible

unbaptised in our "sect." It is usually for reasons that are opposite of those that cause historians to say unkind things about lawyers (such as that their writings sound like lectures from law professors)—because they insist upon generalizing even when generalizations will not wash. Reviewing a nonlawyer's book (in which, he says, the author fails "to appreciate why people go to law" and that "one cannot hope to understand the procedure of any age without some idea of what the parties stood to gain or lose as a result of this or that course of action") J. L. Barton makes the comment: "It is too much to expect that a lawyer and an historian should agree on the proper method of handling record evidence, but this reviewer, at any rate, could wish that the author were a somewhat less faithful disciple of Judge Jerome Frank." Barton, *Book Review*, 85 L.Q. REV. 288, 289 (1969). Another cause of criticism having nothing to do with "mysteries" or "sect" is the historian who assumes an air of smug arrogance. It is not a matter that he does or does not understand the law. It is his suggestion that there is little worth understanding. Constitutional historians particularly find this pose an attractive technique for spinning a generality. For example: "The virtue of [Charles] Sumner's position lies not in its legal soundness, but in its ranging venturesomeness which transcended the narrow view of an unbending rule of law in quest of an expansive interpretation by which to meet new conditions in a changing society." Jager, *Charles Sumner, The Constitution, and the Civil Rights Act of 1875*, 42 NEW ENG. Q. 350, 367 (1969). "The significance of Sumner's position [on the civil-rights act of 1875] lay in his conviction that law should be creatively responsive to the realities of society rather than restricted by judicial prejudice and legal anachronisms." *Id.* at 371. Another frequently encountered method is that of the biographer who can sum his biographee's law career (before getting to his political career) as "coldly legalistic." The technique is to wrap subjective judgment in objective packaging. Thus we can read of a lawyer: "once he had ascertained that his client was legally in the right, he customarily pulled no punches in bringing the full and inexorable power of the law to bear down upon all unfortunate adversaries. If, in his professional pursuit of truth and justice, he was forced to operate in a manner which by the standards of a later time might seem heartless, or even brutal, at least he had the satisfaction of knowing that he was doing the right thing. After all, if a person would not pay his debts, he was indistinguishable from a robber. . . ." C. JELLISSON, *FESSENDEN OF MAINE: CIVIL WAR SENATOR* 47 (1962).

38. Pp. 34-35.

39. *Brevia Addenda*, 13 AM. J. LEGAL HIST. 303 (1969).

that it will prove to be a waste of time. Legal training is not needed by legal historians, and few lawyers have ever suggested that it is.⁴⁰

True, the value of the Virginia solution depends upon what one understands by the term "legal historian." If we mean those scholars writing on special pleading or on other technical problems—writing not only for lawyers, but knowing lawyers will be about their only readers—then Flaherty's statement that "Some legal training is essential" may be true. But "legal historians" in this sense will always remain a small band, and will not be those who write the general, meaningful books he is looking for. Those historians, even those who say publically and loudly that law "is not something independent of human behavior," tend to ignore law partly because they think of it as "a remote and somewhat mysterious discipline, one to be resisted if only because of its alien technicalities."⁴¹ David Donald summed up their willingness to resist when he explained why there was (in 1948) no definitive study of Lincoln's law career.

For the most part his biographers have said a few words about the musty office, have noted the distinctive features of life on the circuit in the old Eighth Judicial District, and have concluded with an account of three or four cases of dramatic interest. Such a cursory treatment may easily be explained on a number of grounds. The terminology of the law itself is a sufficient barrier for investigators. Distinctions have to be made between simple trespass and trespass on the case, covenant-broken and assumpsit, replevin and ejectment. Even those obvious distinctions between traverses and demurrers, between mandamus and *quo warranto*, between real property and chattels can hardly be made in other than the formal legal language which is itself inexplicable to the layman.⁴²

Suppose that instead of avoiding the subject with an historiological excuse, Donald had decided to write about Lincoln's law practice. What difference would it have made whether or not he went to law school? No student of today is taught the technicalities of 100 years ago, and aside from a few terms (some of which have a different meaning or are surrounded by a different procedure) these "mysteries" are "intelligible only to a scholarly handful of lawyers"⁴³—that is, to the legal historians. How many contemporary courses in torts explain that before Chief Justice Shaw performed a judicial sleight of hand in *Brown v. Kendall*, the word "torts" in Anglo-American law did not have a generic significance?⁴⁴ How many contemporary law students come out of their contracts

40. In fact, on the very first page of the first article printed by Flaherty, George Haskins (who has the double prejudice of being both a practicing lawyer and a law professor) says that "formal" education in law is unnecessary for a legal historian. P. 41.

41. Cantor, Book Review, 55 J. AM. HIST. 415 (1968).

42. D. DONALD, LINCOLN'S HERNDON 34-35 (1948).

43. 1 N. WALKER, CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE 11 (1968).

44. Shaw, without proclaiming new law, applied to a plaintiff suing under a writ of trespass the factual burden that a plaintiff in an action on the case traditionally had been required to sustain, thus removing the last significant barrier between the two actions. *Brown v. Kendall*, 60 Mass. (6 Cush) 292 (1850).

examination with any idea that the contractual remedies we inherited from England were developed by counting in tort or can tell the difference between *indebitatus assumpsit* and special *assumpsit*? The two most distinguished English legal historians of the last quarter century, Theodore F.T. Plucknett and George O. Sayles, were not lawyers, and they encountered far more technicalities than any historian of American law will ever have to master. As Aubrey C. Land recently argued, historians shun court records "because of their dryness, technical language, and repetitiveness," not because only a lawyer can understand them. "Land explains that in two weeks students can learn to identify types of legal action, to distinguish between parts of a set of proceedings, and to find and extract historical data."⁴⁵ If they take that much trouble they will be better equipped than the average practicing lawyer.

It is submitted that historians need take only two law courses—English legal history and American legal history. And the reason is not to learn law but to learn history. While many topics are of vital importance to American historians, such as the methods of agriculture, the growth of cities, and the changes in transportation, there are at least two that most historians encounter in their writings, if only to ignore their issues or miss their significance. One is military affairs and the other is law, and neither is taught in most graduate programs. Surely military history should be, but not the military tactics and theory of 1970. The same is true for law. The real problem is not that few historians know today's law, but rather that few historians can spot the legal issues of yesterday, even the big ones. It is not that historians mishandle the law, it is that they often do not recognize when law is a factor. One glaring example is American-Indian relations, in which there is currently a trend to bring anthropological techniques to bear on historical writing. The idea is that judgments "of right or wrong must give way to an understanding of the process of cultural conflict that characterized the meeting of European and Indian in the New World."⁴⁶

Above all the Indian must be perceived as an Indian. Justice can be done him historically only if his special character is admitted. If he turns out to be only a vague reflection of the white man's wish for what he sees as best in himself—an idealized white man—or even if it is assumed that his behavior as a historical character can be judged by the objective definitions applied to civilized man, then the Indian will never be portrayed with the integrity he deserves.⁴⁷

Here is a trend that promises much for American historical studies, and it would be unfair for legal historians to point out that all talk of the crosscultural approach so far has ignored law. (After all, what cultural differences caused greater problems than the fact that Europeans insisted on holding the Indians

45. Rundell, *supra* note 33, at 222.

46. Sheehan, *Indian-White Relations in Early America: A Review Essay*, 26 WM. & MARY Q. 267 (1969).

47. *Id.* at 286.

to European legal values and, in law, refused to think Indian?) But it is not unfair to ask about the nineteenth century when the legal issues leap up at historians only to be ignored. Chief Joseph said that his Nez Perce would never have made their dramatic dash for Canada if they had had standing to sue in the federal courts. Someday an historian may discover that many of the Indian-British wars of the eighteenth century were the result of both sides refusing to consider the law followed by their opponents,⁴⁸ and that many of the Indian-American wars of the nineteenth century might have been avoided had the nations been able to defend their rights in some other manner. That first historian will be a revisionist and undoubtedly will overstate his case, yet a new dimension will be added to American history, making it more useful as well as more accurate. Such issues can be brought to the attention of historians in legal history courses, not in law school courses.

True, the thrust of adding legal history to the graduate school curriculum rather than bringing historians into the law school will be the production of works in general history and not the studies in legal history that are the objectives of Professor Flaherty's program. It will be less painful, however, and the general history of America will be far richer. Surely the cause of legal history will also benefit. Beyond that, the profession will have to take care of itself.

48. It could probably be demonstrated (in those instances for which we have records) that a majority of the wars between the nations themselves were dictated by legal doctrine rather than a savage thirst for blood or an aimless need for adventure as is generally supposed.

