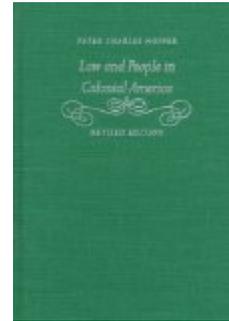




Peter Charles Hoffer. *Law and People in Colonial America: Revised Edition*. Baltimore and London: Johns Hopkins University Press, 1998. xvii + 193 pp. \$19.95 (paper), ISBN 978-0-8018-5816-1; \$39.95 (cloth), ISBN 978-0-8018-5822-2.

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Published on H-Law (January, 1999)



Early Americans and their Passion for Law

In the last two decades, the history of early American law has become a major focus of scholarly concern. Social historians, who recognized the intimate relationship between law and social behavior and the need to explore once-dreaded legal sources to understand social change more fully, joined forces with legal historians, who understood how the legal system worked. The union was a happy one because most legal historians subscribed to the “law and society” school that studied “law in the context of social thought and action (p. 166).”

By the early 1990s, social and legal historians had produced enough work to warrant a synthesis. To fill this need, in 1992 Peter Charles Hoffer, professor of history at the University of Georgia and a practitioner of the law-and-society approach, published *Law and People in Colonial America*, a terse survey (five chapters and 156 pages) that sought “to integrate legal history into courses on Early America (p. x).” Now, Hoffer has published a revised and updated edition, splicing into his earlier text recent historical scholarship on gender, ethnicity, and European rivalries in America. He also has added a new chapter on Euro-Indian law. As he portrays legal and social development in early America, Hoffer solicitously defines legal terms and theories; identifies lawyerly pursuits and ploys; outlines historiographical trends; and evaluates the vast English and American historical literature.

To identify the legal baggage that the first English settlers carried to America in the seventeenth century,

Hoffer’s first chapter describes English common, statute, and corporate law and English legal institutions, especially courts and justices of the peace; and explores how the harsh law and complex institutions affected the lives of Englishmen. To facilitate settlement and to share in America’s wealth, the English Crown gave corporate charters to merchant companies, whereby settlers received the rights and privileges of Englishmen and, inadvertently, a considerable degree of self-government. During the first century of settlement, England allowed (with minimal interference) the colonies to evolve into self-governing commonwealths, having their own political and legal systems.

Early Americans were passionate and pragmatic about the law, which pervaded their social, economic, and political relationships. The settlers shaped and reformed the harsh law and complex legal institutions of England to meet their everyday needs; they also helped to create new law to meet new needs. The law developed differently from colony to colony. For example, in Virginia’s dynamic and mobile entrepreneurial society, dominated by planters, the law’s principal concern was the monitoring of the labor system (indentured servants and slaves) by the House of Burgesses, a representative assembly not contemplated by Virginia’s corporate charter. In the stable communitarian society of Massachusetts, where the intent was to create a Bible Commonwealth, the law promulgated by the colony’s legislature and town-meeting governments dictated people’s lives. However, their rights, liberties, and property were

protected by an historic code of laws—the *Laws and Liberties* (1648).

Hoffer's second chapter depicts the diverse colonial court systems; this diversity was rooted in the colonies' different origins and legal interests. For instance, the proprietary colony of Maryland and the former Dutch colony of New York had feudal manorial courts. Toward the end of the seventeenth century, courts began to take the place of community institutions in resolving legal disputes. American court days were important in bringing together the entire community—the rich and the poor. Resisting sophisticated and cumbersome English procedures, these early courts were informal, open, and responsive. Judges and justices of the peace, rarely possessing the legal training and knowledge of their English counterparts, dispensed swift, simple justice, tempered with mercy. Distrusted and unwelcome, lawyers hardly existed as a profession.

The colonies had created and developed distinct and utilitarian legal cultures, but their legal isolation began to end with the Glorious Revolution of 1688-89. The intensely bureaucratic imperial system established under William III (and enforced in varying degrees by his successors) began to monitor more closely colonial legislation and court systems.

Chapter three, on Euro-Indian law, describes how Native Americans interacted with the Spanish, French, and English. Europeans learned the importance of gift-giving among Indians, and a "gift-based diplomacy became the lubricant of law on the edge (p. 52)." Europeans and Indians borrowed each other's law; like European societies, Native American societies were law-based. The uncompromisingly harsh Spanish legal system was infused with religious concepts and Spain forcibly attempted to impose its laws upon Indians, whom they believed to be racially inferior. Spaniards tried to convert Indians to Christianity or to enslave them, but Indians resisted and eventually made the legal system work for them. Native Americans also successfully resisted French laws—whereupon, the French, assuming the roles of good fathers, became less demanding and more receptive to Native American ways. The French found a "middle ground" by willingly negotiating with Indians, raising gift-exchanging to an art. The English, a commercial people, located their middle ground in trade; they introduced the concept of commodities, under which everything was a commodity to be exchanged. To further the prospects of trade and peace, the English, who did not rigorously attempt to force their legal system on Na-

tive Americans, negotiated treaties and exchanged gifts with them. In particular, they learned the importance of reciprocity to the Indians. After 1763 the English, now masters of North America, tried to remake law for the edge, but land speculators and settlers, who were moving into Indian territory, seriously disrupted English relations with Indians.

Chapter four shows that, by about 1700, the swift, simple system of justice was declining, as people turned increasingly to the courts. The number of lawsuits rose dramatically, "amounting to a veritable explosion of litigation (p. 79)." This litigation—concerned largely with mundane matters such as debts and contracts—was an outgrowth of an expanding commerce, the development of a market economy (especially the use of commercial paper), and a weakening in the power and influence of local institutions. Most litigants instituted lawsuits, a public and dignified process, to right wrongs done to their persons and property. Sometimes, however, one social class used the courts to strike at another class, while influential and powerful individuals employed the courts to persecute and punish personal enemies.

The explosion of lawsuits promoted the growth of a large professional class of lawyers, and the adoption, by the rising provincial assemblies, of a multitude of statutes that were more precise, technical, and enforceable. Such legislating made the law the personal preserve of lawyers, and, in fact, ever more lawyer-politicians sat in and helped to control these assemblies, which represented and promoted property interests. Since the informal law of the early years did not meet the needs of litigation, Americans turned to English "book law" (legal precedents and parliamentary statutes) and the anglicization of American law began. American law became safe, settled, orderly, and repetitious; lawyers were better trained, many of them receiving their education in England; law books, dictionaries, manuals, and reports were common; and pleading in courts, following the English model, became more lawyerly. A surprisingly modern legal culture had evolved. [1]

Chapter five demonstrates that colonial substantive law was English substantive law, but that significant differences between English and American law existed. Hoffer discusses an imposing range of topics: real estate; inheritance; marriage and divorce; church and state; criminal law; criminal procedure, trial, and representation by legal counsel; juries; criminal penalties; and slavery. Some of the distinctive aspects of colonial substantive law, separating it from that of England, are strik-

ing. Employing the “deed and record” system, Americans simplified land transfer, making it a more egalitarian system. Breaking away from the practice of primogeniture, they made the chief concern of inheritance law the family, not the individual. Criminal law was less class-ridden; and the burden of proof rested in criminal cases with the prosecution. But “the most striking American exception... was chattel slavery (p. 121),” the very existence of which under English law required the enactment of statutes, such as black codes, unknown in Great Britain.

Because chapter five attempts too much, its detail overwhelms, even though it only scratches the subject’s surface. Land law, the courts, church-state relations, and slave law each would be worthy of a chapter. For example, *Slavery & the Law*, ed. Paul Finkelman (Madison House, 1997), an extremely useful collection of essays on the law of slavery unavailable to Hoffer at the time of writing, demonstrates the centrality of race-based slavery to the development of the American legal system that protected the property of slave holders and institutionalized racism.

Hoffer’s last chapter teaches us that the turn to law produced considerable tension. Virtually every group in the relatively open society of early America used the law as a problem-solving weapon to pursue its own agenda. Protective and proud of their political and legal systems, Americans reacted vigorously and angrily after 1760, when the British Parliament imposed additional customs regulations and taxes upon them. “A crisis of law and order” (p. 126) erupted. In particular, Americans believed that imperial authorities were usurping the power of their legislative assemblies, which had become miniature parliaments, capable of governing and nurturing a burgeoning society. Legislatures had extensive legislative, administrative, and judicial powers because the concept of separation of powers was basically only that—a concept.

Resistance to the growing centralization of imperial administration was led by canny, well-educated, self-confident, and experienced lawyer-politicians, who justified dissent first in the name of the common law and then of fundamental law. They employed common-law courts, where they had honed their lawyerly skills, as an avenue of political protest in such famous cases as the Parson’s Cause, the writs of assistance case, the Alexander McDougall case, and the Boston Massacre trials. These lawyer-politicians also argued in numerous pamphlets (which read like legal briefs) that Britain had violated

their ancient rights and liberties as Englishmen, embedded in founding charters. Americans incorporated these revered charters into fundamental law. By their actions, lawyer-politicians transformed a political dispute into a legal contest, in which they utilized the law to resolve the controversy.

In 1776 Americans renounced their allegiance to the King because the King and his functionaries had breached English common law and the compact with the colonists. By abjuring their fealty, Americans separated fundamental from common law. “American fundamental law,” states Hoffer, “made the people sovereign” (p. 146); the people became the source of all power and their will was channeled through the law. After the Revolution, the law that had justified rebellion replaced the King as the people’s protector.

To replace royal government, Americans created state governments and wrote republican constitutions, whereby law preceded, legitimated, and limited power. The writing of state constitutions, asserts Hoffer, was the “most audacious legal program” (p. 145) of revolutionary Americans. By limiting power, constitutions (some of which included bills of rights) protected rights, liberties, and property. Representing a sovereign people, state legislatures were supreme, but constitutions also provided for checks and balances and separation of powers—core concepts of revolutionary constitutionalism. The implementation of these concepts was a break with the English and colonial past. Lastly, constitutions allowed for the participation of most people in politics—another historic development. [2]

Law and People in Early America is a solid, well-organized synthesis, although the new third chapter on Euro-Indian law breaks the volume’s narrative flow. The introduction of Spanish and French laws and how they interacted with Native-American law, although informative when comparing them to English law, seem misplaced in a volume that concentrates on British North America.

A graceful stylist, Hoffer has a flair for the descriptive phrase and the telling quotation. His penchant for the latter, however, is perhaps overdone. His chapter titles are quotations that most historians use as epigraphs to embellish traditional chapter titles. This technique makes it more difficult for the student to determine a chapter’s content. For example, the fifth chapter—mostly concerned with substantive law—is entitled: “Just so th’ Unletter’d Blockheads of the *Robe*; (Than Whom no Greater Monsters on the Globe); Their Wire-Drawn, Incoherent,

Jargon Spin, Or Lug a Point by Head and Shoulders In.”

Hoffer’s command of the secondary literature is impressive. The shrewd and well-annotated twenty-one-page bibliographic essay testifies to this fact, as do the references to the writings of about thirty-five historians that Hoffer effectively incorporates into his text. Hoffer’s discussions of differing interpretations are well within the reach of students, although they also profit the specialist. His bibliography includes only a few references to law-journal publications—a resource insufficiently exploited by most historians. Since many agenda-driven legal scholars ignore or minimize historical context, historians often dismiss their writings, thereby producing a “professional bifurcation” in the field of legal history. [3]

As stated earlier, state-constitution writing was “most audacious.” Bills of rights, Hoffer declares, were important features of state constitutions, but he essentially ignores the number and variety of rights protecting individuals and community that are contained in these declarations, preferring instead only to stress the fact that “slaves, women, aliens, non-Protestants, Indians, and the poor... were not accorded status equal to that of free, Protestant men of property (p. 147).” This statement is irrefutable, but hardly in character with much of his study which does not focus on law’s moral dimension.

Hoffer does not concentrate sufficiently on the origins, meaning, and significance of rights and liberties in England and America. Englishmen and Americans frequently discussed rights and liberties in founding and settlement documents; legislative resolutions, laws, and statutes; court records and law reports; addresses, petitions, remonstrances, and memorials; legal, constitutional, and political treatises; newspapers, broadsides, and pamphlets (including sermons); resolutions of committees, towns, counties, congresses, conventions, and private political, social, and economic organizations; bills or declarations of rights; state constitutions; and the Declaration of Independence (1776)—that historic document justifying rebellion. [4]

Peter Charles Hoffer has given us a solid (though not comprehensive) synthesis and a thoughtful analysis of the recent scholarship in the field of early American legal history that enhances our understanding of the centrality of law to life in Early America. The writing is precise and graceful; the narrative flows easily and rapidly; the illustrative material is well chosen and effectively presented; and the depiction of recent scholarship is evenhanded and balanced. *Law and People in Colonial America*

belongs on the bookshelf of any serious student of Early America.

NOTES

[1] For an illustration of the sophistication of American lawyering circa 1770, see Bernard Schwartz, Barbara Wilcie Kern, and R. B. Bernstein, eds., *Thomas Jefferson and Bolling v. Bolling: Law and the Legal Profession in Prerevolutionary America* (San Marino, Calif.: Huntington Library Press, 1997), the first scholarly edition of the pleadings and arguments drafted by Thomas Jefferson and George Wythe in a complex 1770 lawsuit involving legal issues having to do with wills, inheritance, property, and slavery.

[2] For a study on state-constitution making, unavailable to Hoffer, one should consult Marc W. Kruman’s *Between Authority: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997). Kruman questions the prevailing wisdom which contends that constitutions entrusted virtually all power to legislatures.

[3] Stanley N. Katz briefly discusses this bifurcation in “The Problem of a Colonial Legal History,” in Jack P. Greene and J.R. Pole, eds., *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore and London: Johns Hopkins University Press, 1984), 478ff., and Laura Kalman fully considers it in *The Strange Career of Legal Liberalism* (New Haven and London: Yale University Press, 1996).

[4] For the student, a valuable book on rights in England and America from 1603 to 1791, unavailable to Hoffer, is Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston and New York, 1998); this volume includes a sound essay on the interdisciplinary literature of rights. A more comprehensive treatment of rights and liberties in early America, also designed for the student, is Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison, Wis.: Madison House, 1992). On the Declaration of Independence, see, e.g., Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred A. Knopf, 1997; Vintage paperback, 1998).

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Citation: Gaspare J. Saladino. Review of Hoffer, Peter Charles, *Law and People in Colonial America: Revised Edition*. H-Law, H-Net Reviews. January, 1999.

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