

Summer 1960

## Law and Authority in Early Massachusetts, by George Lee Haskins

William F. Swindler

*Marshall-Wythe School of Law, College of William and Mary*

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Law and Politics Commons](#), and the [Legal History Commons](#)

### Recommended Citation

Swindler, William F. (1960) "Law and Authority in Early Massachusetts, by George Lee Haskins," *Indiana Law Journal*: Vol. 35 : Iss. 4 , Article 9.

Available at: <https://www.repository.law.indiana.edu/ilj/vol35/iss4/9>

This Book Review is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# BOOK REVIEWS

LAW AND AUTHORITY IN EARLY MASSACHUSETTS. By George Lee Haskins. New York: The Macmillan Co. 1960. Pp. xvi, 298. \$5.00.

Legal history is a no-man's land of scholarship. Entrenched interests glower at each other from various sectors; the camp of the professional historians is a principal strong point, and others are manned by law or political science, while supporting areas of the other social sciences are deployed in the rear. Whoever has the temerity to venture into this unworked field—the attraction of the vast resources therein overriding the tacit warnings to keep out—is almost certain to get caught in a cross-fire.

Perhaps it is not quite as bad as all that. It depends upon the individual's viewpoint, whether he himself has been hit, and how recently—or whether he himself has been doing some sniping. The author of the present book, well enough armed with scholarly qualifications, nevertheless is aware of the general situation, although he describes it in his Preface in milder terms:

Unfortunately, the domain of the law is terrain upon which the historian without formal legal education has been reluctant to intrude. One reason for this reluctance has been the traditional isolation of the law from other disciplines as a result of the professionalization of legal study in this country. Moreover, the complexities of legal doctrine and the intricacies of legal procedure have understandably tended to deter those without professional legal training from investigating the sources and operation of law even in a past civilization. Yet, because law is a social product, reflecting not only social organization but the incidence of political and economic pressures, the discovery of its past particularly requires the techniques and insights of the social scientist. Unhappily, as Professor Mark Howe has said, "lawyers consider the historians incompetent and irresponsible, and the historians consider the lawyers unimaginative and narrow." If the history of American law is to be written, this mutual distrust must be dispelled, and the outlooks of both disciplines combined.

The existence of such a problem may come as a surprise to the average practicing attorney, who has probably assumed that so little has been done in legal history because it has so little practical applicability. Law practice is essentially pragmatic—one of the sources of the historian's criticism cited by Professor Howe above. As to this misconception on the part of the practitioner with reference to legal history, Professor Haskins' entire book is a powerful brief addressed to the proposition that the essence of modern American law is only to be discovered by historical studies in depth. Of this, more later.

Professor Richard B. Morris of Columbia, whose *Studies in the History of American Law* is happily back in print in a second edition after three decades, points to the slowly gathering momentum of research reflected in the widening activity of the American Society for Legal History, the increasing number of individual research projects in this area, the documentary history of the ratification of the Constitution and the Bill of Rights now going forward under the National Historical Publications Commission, and the multi-volume history of the Supreme Court of the United States being sponsored by the Oliver Wendell Holmes Devise of the Library of Congress. It is also noteworthy to mention the several projects under way with reference to the papers of various American statesmen such as Jefferson, Hamilton, Webster, Madison, Calhoun and Clay. To this list of projects it is hoped soon to add one on Chief Justice John Marshall, whose documents are currently being canvassed by the College of William and Mary.

Still, the work of Morris, Howe, Julius Goebel and a handful of others in the past quarter of a century has only penetrated a short distance into this rich vein of research. Many more hands are needed for the job, and studies of the caliber of theirs, like the present Haskins volume and the work of Willard Hurst of Wisconsin, are avidly to be welcomed. One can readily agree with Morris' statement that we need, "and need desperately, a group of dedicated and trained minds who will be prepared to assume the task of editing our legal records, a task which summons those prepared to master the disciplines of law and history. . . . The great body of statutes still remains to be systematically reviewed, and collated; the business of the courts still awaits study and interpretation. We must do first things first. The voyages of discovery preceded the age of colonization. Before we can write the history of the law we must discover for ourselves what the law really was."

Professor Haskins, of the University of Pennsylvania, has admirably discharged this function in his study of the nature of law during the first twenty years of the history of the Massachusetts Bay colony—from

1630 to 1650. His is, to use Morris' figure, a colonizing effort following the voyages of discovery, which have been plentiful in the Massachusetts area. The effort begins—the author indicates that this volume will be followed by others—with good prospects of success from the nature of the area: the unique character of the early Massachusetts Bay colonists, the wealth of archival material which they assembled and which is now accessible, and the significance of their accomplishments in law and government, all add up to the most bountiful harvest of research to be gathered.

Whereas, in most of the other early settlements in North America the course has yet to be charted for research of these proportions, Massachusetts made many of the necessary charts at the outset. The colony was established with a conscious structure in view for its government, the result of a combination of what the author appropriately describes as “tradition and design.” The tradition came from English political and legal institutions, the design from the Puritan version of *civitas Dei*—although Haskins urges that the idea of a theocracy in early New England, while valid, has been overemphasized. Still, the combination of trained and perceptive leadership, a fervent politico-religious sense of mission, and the fortunate accident of freedom from surveillance by the mother country for a short though vital period, obtained nowhere else in Britain's American colonies at so early a date. Only William Penn's Quaker commonwealth may be compared with it, and then only in the most general manner.

In many respects the initial intermingling of tradition and design bred the seeds of its own undoing. Law and authority so closely combined, both in Massachusetts and in England, simply created a critical mass for a protestant revolt, both in religion and in politics. On both sides of the Atlantic, “nearly every aspect of town life was minutely regulated by public officials, far beyond what might be supposed to have been the needs of local government.” In the mother country, this was the result of “the paternalistic regulatory statutes of the Tudors and the first Stuarts,” but in Massachusetts “it resulted principally from conceptions derived from Puritan doctrine, which prescribed strictness of living and upright conduct as essential for salvation. If doctrine was to be translated into action, and if the community was to function as a unit to carry out God's purposes, society must be regimented to a far greater degree than that to which its members had been accustomed in England.”

The result was that, as migration to Massachusetts Bay accelerated, the hierarchy in control of the colony, numerically limited to begin with, became proportionately smaller—and the dissatisfaction with the com-

pleteness of their control proportionately greater. From this combination of circumstances eventually developed—even though only in the most elementary form—the proposition for more representative government and the germs of a native constitutionalism. This evolution is to be detected only by following the author's process of careful analysis of a vast amount of data over the whole of the twenty-year period covered in his present work. By and large, the government of John Winthrop was enlightened and gave little cause for hostile attitudes; moreover, as Haskins points out, both in English law and in Puritan doctrine there was the firm conviction that duly constituted authority was to be obeyed. Roger Williams and Anne Hutchinson were spectacular and rather extreme variations on the general theme of Puritanism in Massachusetts.

The point of Haskins' volume, indeed, is that an indigenous legal system evolved in Massachusetts as a result *both* of Puritan thinking and of the adaptation of English legal principles with which a number of the colony's leaders were thoroughly familiar. If the government of the earlier colonization in Virginia was essentially oriented toward royalist, or at least nationalist, institutions in the mother country, the difference between Jamestown and Massachusetts is in many respects more apparent than real. As the author points out, "influential as the Bible was in the lives of the colonists, it also held a position of extraordinary importance" in England and in English courts. The Anglican hierarchy in Virginia, like the Puritans to the north, ultimately discovered that the Scriptural endorsement of the legal principles they evolved was necessarily colored by local circumstances; and by different channels from Virginia and from Massachusetts—as well as from subsequent colonial efforts—emerged a new, native concept of government and jurisprudence.

As to the Puritan theological contribution to Massachusetts law, the dramatic climax of Haskins' book, so to speak, may be cited as page 146 where in parallel columns he demonstrates the literal reliance on the Bible in reference to a capital crime, comparing the Code of 1648 with Deuteronomy 21:12-21. On this and following pages are other striking comparisons. At the same time, however, he shows that the relationship between Scriptural authority and legal provision is also to be found in English statutes and rules of law. The parallel may be more exact in Massachusetts, but it is the author's conclusion that the Bible was "an indispensable touchstone, . . . not the cornerstone, of Puritan legal thinking." The real contribution of Puritan theology to colonial law was in its emphasis upon the worth of the individual who walked in God's way—and hence the relatively more humane definition of criminal liability.

It is in his chapters on the theological design, the English tradition and the American result that Haskins demonstrates the necessity, for an adequate study of legal history, of thorough competence in both law and history. He is equipped for—and admirably discharges—this dual requirement: First, in analyzing the whole range of Massachusetts jurisprudence as it was developed in the two decades after the Puritans arrived; second, in projecting this analysis against a background of social, economic and cultural details which for comprehensiveness puts his study in the forefront of the many histories of the Bay colony.

Nowhere is this more strikingly demonstrated than in the author's discussion of the factors influencing certain aspects of real property:

In marked contrast to English common law, whereby intestate realty passed to the eldest son by primogeniture, the colony laws provided that . . . all the children were entitled to share in both the real and personal property, and the eldest son was to have a double portion. This latter provision for the eldest son was apparently made pursuant to the Book of Deuteronomy and has led to conjectures that the intestacy law was essentially Mosaic. However, a comparison of the two systems on the basis of a seventeenth century exposition of the Hebrew law by John Selden almost certainly eliminates the possibility. Conceivably, the Massachusetts scheme was derived from Plymouth Colony, where partible inheritance, including the double portion, existed as early as 1627. However, its ultimate source appears to have been in English local customs under which, in numerous manors and towns, intestate land had been divided among all the children of a decedent. Both the Pilgrims and the Bay colonists had been familiar with these customs, for, significantly, instances of partibility are found in districts from which both groups of settlers came, notably from the manors of eastern England.

From this search of the background, the analysis proceeds to the local conditions which tended to confirm a new concept for the passing of title to intestate realty; "the instinct to imitate or reproduce the familiar" is not enough to explain the selective and well-thought-out colony law. Where reported debates are lacking on this subject, the facts of economic life in Massachusetts Bay are persuasive evidence:

Because of the poor soil and configuration of the terrain, New England farming was necessarily a cooperative enterprise, requiring many hands. Hired help was scarce, after the initial

terms of apprenticeship ended, and the cost, as we know from Winthrop himself, became prohibitive during the depression of the early 1640's. Moreover, primogeniture would not only have encouraged the growth of accumulated estates but, more importantly, would have resulted in the impoverishment of younger children in an economy in which land was the chief form of wealth. The alternatives of seeking industrial work or other commercial opportunities were not initially available in the sparsely settled communities of Massachusetts as they had been in England.

With a similar inventory of Puritan persuasions, English practice, and local requirements and opportunities, the book analyzes such subjects as recording statutes, domestic relations, the law of master and servant, procedure, the role of the jury, creditors' rights, and civil liberties. The latter guarantees, incidentally, limited though they were when compared with twentieth century standards, "embodied ideals which were widely held, both in England and in Massachusetts, to be the rights of Englishmen. Many of these rights were not legally recognized in England, but most of them were claimed at one time or another there, and their denial was widely regarded as a grievous wrong." On every hand the study of colonial law in Massachusetts indicates a sophisticated understanding of various English practices, a sense of desirable broad reforms, and a shrewd grasp of specific necessities and opportunities obtaining in the New World.

Thus the modern lawyer cannot but be impressed, in this and similar studies in depth in our legal history, with the fact that a native American law began to manifest its distinctive features from the earliest settlements. To the extent that older English common law features—some of which, Haskins points out, the Puritans regarded with veneration and others with hostility—ultimately became a part of American law, it was the result of a conscious reception, and a consciousness that common law was transplanted to Jamestown and ultimately to Massachusetts had undergone a sea-change. It is significant that the Virginia "reception statute" of 1776 (adopted by Indiana in 1807) was at pains to point out that common law institutions of a general nature, obtaining in England "prior to the fourth year of the reign of James the First," were still to be saved. What began immediately to generate after 1607 and 1630 was a native form of law, in the very nature of the case.

Modern legal practice, and modern American scholarship in general, needs much more of this type of perceptive study of the origins of our institutional pattern. Above all other professions, it is submitted, the

encouragement of historical research should be promoted by a profession which relies upon precedents—not as proof of immutability but of continuity in democratic processes. How many practitioners, compelled upon occasion to rely upon a rule enunciated some generations earlier, are prepared to analogize or to distinguish by an adequate understanding of the original context of the point in question? Professor Blume of Michigan has demonstrated the significance of many socio-economic factors in the evolution of territorial law on the frontier. We know something of the civil law principles implanted in Louisiana—although a study of local circumstances operating on the system from the outset, in the manner of Haskins' Massachusetts study, might be equally revealing in the case of Louisiana institutions. Mineral law is well taught in the Western states—but how thoroughly have we mined the archives for a complete understanding of this subject?

Thus the no-man's land of legal history reveals itself as a field ripe for the harvest. The swords of rival scholarly interests need to be beaten into scythes to gather what has already waited too long to be gathered, as well as into ploughshares to get to the business of new investigations.

WILLIAM F. SWINDLER†

IN QUEST OF FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE. By Alpheus T. Mason and Richard H. Leach. Englewood Cliffs, N. J.: Prentice-Hall. 1959. Pp. viii, 568. \$6.95.

THE SUPREME COURT IN A FREE SOCIETY. By Alpheus T. Mason and William M. Beaney. Englewood Cliffs, N. J.: Prentice-Hall. 1959. Pp. vi, 346. \$6.50.

*In Quest of Freedom* is a summary account of things said and written and things done in this country from the days of the Pilgrims to the days of desegregation, with a throwback to catch a few "taproots" in European literature and practical experience. The thought and practice which are summarized relate to government, public policy, and the politics which seeks to control the offices that make and enforce public policy. But the stream of argument and events which is traced out is no more a quest for freedom than a quest for conformance with rule, or quest for a place of power in a contentious world. No doubt "freedom" is a better label for a product on today's market than either "conformity" or "national power."

---

† Professor of Law, Marshall-Wythe School of Law, College of William and Mary.