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ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE. Edited by *Morris S. Arnold, Thomas A. Green, Sally A. Scully*, and *Stephen D. White*. Chapel Hill, N.C.: The University of North Carolina Press. 1981. Pp. xx, 426. $25.

Blackstone and Viner had urged it, while Gibbon and Bentham ridiculed its contemporary condition in England. One year before Blackstone's death in 1780, Thomas Jefferson had helped launch the American commitment to it. A century later, Frederic William Maitland accepted it but only if it rested on a rigorous distinction between training and education: the separate college of law. "It" was meant to provide both the narrow training requisite to a practicing lawyer and the broader education in legal history, jurisprudence, even legal anthropology, that one needs for any understanding of law's function and social context.[1]

Now, seventy-six years after Maitland's death in 1906, his distinction rules on both sides of the Atlantic, but it has been institutionalized differently in the two countries. The legal training that opens the lawyer's gate into England's bench and bar remains, after seven centuries, exclusively through London's four Inns of Court and definitely outside all British universities; what has developed more recently within their universities is formalized, systematic legal education, where undergraduates can at least "minor" in the law and (in some courses) prepare for solicitor's exams.[2] In the United States, legal training has insulated itself within university colleges of law; at the same time, legal education remains a free-market hodge-

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1. *See* F. LAWSON, THE OXFORD LAW SCHOOL 1850-1965 at 1-7 (1968); T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 11-18 (1958); Davis, *Some Influences of American Lawyers on the Growth of English Law*, in MORRISON FOUNDATION LECTURES 261, 272-75 (1940). Jefferson helped found America's first Chair of Law, in the College of William and Mary, in 1779.

Lawyers generally, and the ABA since 1878, speak exclusively about "legal education" when referring to studies in law school, so I choose the training-education dualism despite that conventional usage and with confidence that many legal scholars besides Maitland have accepted the juxtaposition.

2. Undergraduates at Oxford, Cambridge, and elsewhere can "read" law, and a minority then proceed to one of the Inns for final preparations for bar exams.

podge of courses offered among competing undergraduate departments, many allowing just enough law to attract prelaw enrollees.[3] More to the point, the American Bar Association recently ended, after only three years, its attempt to encourage and develop "undergraduate education in law and the humanities."[4]

Professor T.F.T. Plucknett's observation in 1950 about legal training remains valid and urgent: "The real question is . . . whether we can give to students law, and nothing but law, and still call it a liberal education."[5] Modern American law schools in practice have long since answered mainly in the negative, opting both for their narrow "nuts-and-bolts" training and for the agnostic posture assumed by law admissions' officers concerning prelaw education. Once safely admitted, the law student is swamped by a three-year curriculum designed with limited electives and a focus on technical skills; before admission prelaw students are told, by way of law school handbooks, that there are no specially relevant undergraduate courses, and that admission will depend primarily on their grade average (plus their LSAT score). Too many undergraduates quickly see that taking an "easy way" becomes inescapably logical, even rewarding. The result is a prescription for intellectual myopia, even bankruptcy, that few American law schools seem willing to acknowledge and correct.[6]

The choice of training over education was at the heart of Oliver Wendell Holmes, Jr.'s maxim about the law's life being experience, not logic. Although he was a significant historian of the law, Holmes certainly saw no reason for fellow lawyers to invite historians and philosophers into a share of the research, argumentative, and synthetic training that educates legal minds. Jefferson would probably have been appalled at such an attitude and at the self-sustaining iso-

3. The few U.S. programs of substance and success include those at Brown, Rice, the University of California-Berkeley, and the University of Massachusetts-Boston.

4. The ABA's Commission with this title, chaired by Edward H. Levi, existed from October 1977 to September 1981 and has produced a nine-volume series of curriculum materials, available through Random House (I am grateful to Gerald Fetner, former ABA administrator of the program, for this information).

5. T. PLUCKNETT, *supra* note 1, at 17.

6. AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: FALL 1980-81 (1981), elicits the following data, by my analysis: Of 171 ABA-approved law schools in 1980, only 20 offered joint degree work in the humanities (14 in history, 7 in philosophy, 4 in English, and 1 in "humanities"). A total of *six* such degrees were awarded in U.S. law schools in 1980-81. Of the 36,795 total degrees given in that year, 2 were in Library Science, 19 received the research degree of Doctor of Juridical Science, and 148 obtained either a Master's in Comparative Law or in Comparative Jurisprudence. This suggests that our law schools are not encouraging research and study outside areas of immediate vocational interests.

More than one third (66) of the 171 law schools allow no joint degree work within their universities, and another 27 provide only for the Master's in Business Administration. As academic affiliations for only business and public administration studies continue, the move away from basic legal education within law schools looks all the more deliberate.

lation and pragmatism that rules most American colleges of law; given his commitment to natural law, he probably would have categorically opposed that peculiar American "legal realism" that still gives philosophical shape to what law students study.[7] Maitland, however, could have explicated and condoned this state of affairs. His oft-quoted and pithy distinction remains our clearest guide to the epistemological problem separating legal training from legal education: "[W]e are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better." Maitland said this as a lawyer defending legal history's autonomy, to keep it out of what he saw as the lawyer's search for orthodoxy and rules that could "make history the handmaid of dogma."[8]

Yet lawyer and historian share the same evidence, specifically cases and legislation, albeit for differing purposes and with differing analytic methods: Should their separate works be complementary and not mutually irrelevant? What can lawyers, particularly those teaching in law schools, learn alongside historians that might produce better, possibly even more successful lawyers? Dare one suggest, against the traditional Anglo-American divide between training and education, that the two should remain distinct but no longer separate and that they should co-exist within law schools?

* * *

Occasionally we get lawyers who, like Maitland, bridge the gap between authority and evidence. None has done so with greater and easier eminence than Professor Samuel E. Thorne. His retirement from Harvard Law School, and the *Festschrift* that this has inspired, offer an opportunity to reflect on these broader implications in legal pedagogy, particularly because his career embraces work as a legal historian, law school librarian, and professor of law. For American legal studies he has created a special link between modern scholarship and Maitland's academic legacy. Thorne's four-volume translation and reinterpretation of Bracton's *De Legibus et Consuetudinibus Angliae* gave major extensions to the one treatise central in Maitland's monumental scholarship. More generally, Thorne has given a lead and a model for the unity that ought naturally to exist between legal training in law schools and legal education in universities. His scholarly friends and students have now honored this unity with individual essays of the highest quality, presented to him after

7. The single most helpful summary, extensively documented, for all of this is Forkosch, *What is Legal History?*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 2 (M. Forkosch ed. 1966).

8. 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 491-92 (H. Fisher ed. 1911).

many months of secret labors, under the worthy title: *On the Laws and Customs of England*. Four Thorne students — two lawyer-historians and two historians of law — have carefully edited the work of fourteen other scholars, among whom are seven of England's most distinguished legal specialists. The combination has produced a volume of definitive scholarship on the premodern bases of the modern world's most influential legal system.

Such an impressive feat notwithstanding, it remains fair to ask what is in such studies for American lawyers and judges in 1982. The question is central to the training-education dichotomy. It also points up further the issue of legal history's relevance to the law school curriculum.

Although law schools often gear their curricula to what is essentially an inexorable search for up-to-date, valid, workable *rules*, these essays take one well beyond this, into the legal historian's search for themes and categories that define *contexts* for the rules. That is something that law students rarely find in casebooks and statutes, possibly because establishing a rule's authority requires only the two dimensions of lawful definition and applicability, but not the third dimension of historical meaning. The Thorne essays, according to their editors, "proceed from the study of legal texts to the reconstruction of legal doctrine" (p. x) and courtroom practices. Most essays topically touch that which matters most to all working lawyers throughout time: knowing strategic choices regarding the nature of available legal remedies, and knowing the best techniques for pleading and proof.

Such themes, emphasizing the early stages of the judicial process, will be as familiar to readers of James Willard Hurst's work on latter nineteenth-century United States law as they are to these specialists in medieval English law. Knowing when and how to begin a lawsuit has always marked the point where a lawyer's talents are most often taxed. Knowledge of any rule, therefore, remains useless until the lawyer adds professional judgment for a specific case. It is precisely at this point that knowing the relevant legal history enriches, with evidence and context, both the search for the rule and the judgment about its applicability. Like Professor Hurst, the scholars writing in the Thorne *Festschrift* have worked primarily from judicial evidence (medieval plea rolls, Year Books, court reports) and only secondarily from the lawyers' literature (guides, treatises, abridgments). This does shift the perspective into the courtroom. And, like Hurst, they deduce from such evidence that law courts exist essentially for the peaceful formalization and resolution of conflicts. Such "judicialization" means delimiting the scope of conflicts between parties by forcing particular circumstances (the alleged injury) into more general procedural molds (the available legal remedies).

Quantitative studies of judicial business, which give firm bases to essays on sixteenth- and seventeenth-century courts by John H. Baker (Cambridge) and Thomas G. Barnes (Berkeley), indicate that only a small minority of judicialized conflicts ever get resolved within the courts. Many of the *Festschrift* authors thus look outside the judicial evidence. And they find that the expectations, even demands, of litigants — and social attitudes generally — do much more to shape procedural rules than "governmental dictate or . . . intellectual propaganda" (p. xiii). The insight is not novel to medieval English law, but it gives just the sort of contextual definition that legal history can bring to the training of lawyers. And if nothing else, legal history here reinforces the modern law school curriculum's emphasis on skills in pretrial counseling of clients and on the preliminaries for courtroom action.

Each essay moves quickly beyond the trained lawyer's requirement for "knowing the rule" into the legal historian's need for "thinking the process" behind each rule. Recalling Maitland's two logics (evidence and authority), we see in each instance that the legal historian's answer to every question of "why" does not stop with an authority cited but moves naturally into a broad variety of evidence. Thus, when Charles Donahue, Jr. (Harvard), examines "Proof by Witnesses" and Paul R. Hyams (Oxford) studies "Trial by Ordeal," we are transported by way of twelfth-century cases into a generic problem facing all lawyers: What evidence is admissible, and how? Knowing both the rule and its legal and historical justification allows the lawyer much greater intellectual agility, whether in private consultation or in court. Donald Sutherland (Iowa) gives an excellent model — first defining a particular courtroom strategy and then explaining why lawyers continue to think the way they do about that procedure. Similarly, in reconstructing "The Invention of 'Color' in Pleading," and the uses of legal fictions generally, Sutherland employs fourteenth-century cases to speak directly to modern lawyers. He concludes that the medieval "lawyers' conscious loyalty to several rules of pleading [was such] that we of the twentieth century can admire as well as they: lean, hard rules, well designed to expedite business, exclude cant, and induce precision. Every reply to an opponent's statement must comprise a plain yes or no, a confession or a traverse" (p. 193). Such disciplined wisdom from time out of memory is both comforting and informative, especially to modern judges. And again, the way we know about law becomes as important as what we know about law.

Rules of "Inheritance by Women" have always revealed more about a society's view of family, property, and contractual obligation than might first appear, and that is precisely what S.F.C. Milsom (Cambridge) reveals with evidence contemporary to Glanvill *(circa* 1189). Because marriage and female heirs could confuse the trans-

mission of feudal interests, Milsom's article complements nicely the essay by Emily Tabuteau (Michigan State) on definitions of obligations in transfers of property. Such studies can direct the modern lawyer toward more trenchant questions and answers that remain relevant for today's property-troubled clients. John Beckerman (Yale) shows how this kind of analysis might further our understanding of civil liability for wrongs in his essay on the "Origins of Trespass." Compensation for injuries remains a nettling legal issue, particularly when defamation includes one's honor and reputation, but Beckerman here is able to explain how the element of dishonor got lost before modern tort law developed.

With but one exception, the remaining essays focus on governmental perspectives in law. Charles Gray (Chicago) questions how Plucknett used Year Book cases in arguing "that fifteenth-century lawyers talked about public questions [only] in the vocabulary of private law" (p. 196). Gray's command of the lawyer's evidence assuredly restores integrity to the "Lancastrian Constitution" and documents the pre-Reformation balance between royal prerogative and the omnicompetence of Parliament. This also adds substance to continuing debates over G.R. Elton's "revolution in government," as does the careful essay by Harold Garrett-Goodyear (Mount Holyoke) on the early "Tudor Revival of *Quo Warranto*." In that same context, Eric W. Ives (Birmingham) provides a fascinating reconstruction of a sixteenth-century homicide case that became "a rehearsal for the royal supremacy" (p. 320). Of further interest for Tudor studies in law is "Future Interests and Royal Revenues" by J.L. Barton (Oxford), which deals with contingent estates, grants in remainder, and perpetuities. And finally, having opened with a study of Anglo-Saxon legislation by A.W.B. Simpson (Kent), the *Festschrift* closes appropriately with D.E.C. Yale's (Cambridge) illustrations of "Some Later Uses of Bracton" by more modern lawyers and legal scholars.

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Different lawyers and law school teachers will find their own reasons for using this kind of scholarship. But the more one opens one's mind in these directions, the more urgent will become a simple truth: While specific laws, rules, and remedies may change over decades and centuries, the legal institutions and procedural formulas (*e.g.*, for wills, indentures, deeds, and prosecutions) remain essentially the same. Thus the cutting edge of legal history for the law student rests with learning the pertinent questions. Answers may differ with each generation, but the questions remain remarkably consistent (*e.g.*, the nature of and remedies for negligence, the evolution of contractual obligations and of debt, how to use the conflict of laws, or defining

the nature of felony). If we learn from models, then legal historians stand ready to serve them to law students in an infinitely rich variety.

Much of the legal history now taught in American law schools is there by direct or indirect influence of Sam Thorne.[9] He earned the right to teach legal history alongside fellow lawyers only after years of accepting law librarian posts in various law schools.[10] His persistence, plus his textual and synthetic studies of the law, offer a veritable model for scholarly integrity. All legal historians remain in his debt but so, too, do those lawyers in our law schools who recognize that they must do more than train students for a trade. With this book, Sam Thorne's friends, students, and distinguished fellow scholars have begun to discharge the debt publicly.

What law schools owe to their students, to prepare them best for living by the law, must remain an open issue. The debate is not new and neither is my diagnosis of the current crisis. In 1894, Princeton's President Woodrow Wilson addressed the ABA in Saratoga Springs specifically about the training-education dichotomy:

> The worst enemy to the law is the man who knows only its technical details and neglects its generative principles, and the worst enemy of the lawyer is the man who does not comprehend why it is that there need be any technical details at all.[11]

Wilson called for lawyers to help in "teaching undergraduates to understand law" and exhorted law schools to welcome specialists from the humanities. The crux of Wilson's message was that colleges of law must reestablish a two-way street within their own universities.

The spread of awareness for such responsibilities, in both law schools and humanities departments, can only serve continuance for the honor done to Samuel Thorne by this collection of essays. Long may he continue to be America's main link to Maitland.

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9. Harvard's separate, and fairly regular, offerings are: American Legal History; American Legal Thought; Roman Law; Law, History, and Society seminar; Medieval Background to Modern Law; English Legal History; and Western Legal Tradition. No other U.S. law school can match that variety, but several do offer history electives regularly, *e.g.*, at the Universities of Chicago, Michigan, California-Berkeley, Wisconsin, and Illinois at Urbana-Champaign.

10. At the end of 1981, Cornell Law School dedicated its Rare Book collection to Thorne, after securing much of his private library.

11. Wilson, *Legal Education of Undergraduates*, in 1 THE PUBLIC PAPERS OF WOODROW WILSON 232-38 (R. Baker & W. Dodd eds. 1925).