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# Faithful Magistrates and Republican Lawyers: Creators of Virginia's Legal Culture, 1680-1810

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#### **BOOK REVIEW**

FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA'S LEGAL CULTURE, 1680-1810. By A. G. Roeber. Chapel Hill: University of North Carolina Press, 1981. pp. xix, 292. \$24.00.

#### Reviewed by E. Lee Shepard\*

That well-known but inadequately understood institution, the county court, was brought to life and placed in clear perspective as an integral part of the life of colonists of every variety of status and calling nearly thirty years ago in Charles Sydnor's classic, albeit impressionistic, study, Gentlemen Freeholders: Political Practices in Washington's Virginia (1952). Sydnor proclaimed that in eighteenth-century Virginia planters, not lawyers, dominated the political scene and thus dispensed with the legal profession. Sydnor's domain was politics; his discussion centered on the "county oligarchies." In recent years scholars have recognized the pressing need for a deeper understanding of the operations and impact of the early Virginia bench and bar. To answer this need for research which will take us through the door Sydnor opened but beyond which he only peered, we now have, in A. G. Roeber's new book, a well-crafted guide to this relatively uncharted territory of the Old Dominion's legal history.

Roeber professes that his is a study of the "professionalization of the law and modernization of society," in part a "straightforward recounting of what happened to Virginia's legal culture during more than a century of change." He locates early lawyers and justices of the peace in the framework of a Court versus Country political ideology, a dichotomy he sees pervading not just colonial, but all American history. This dichotomy was rooted in the English experiences of political conflict between the Stuart sovereigns and their presumably corrupt "party" on the one hand and the "virtuous" country gentry on the other. Given the potential for patronage by the king and thereby for manipulation and corruption of the bar, seventeenth-century Englishmen viewed the legal profession as the natural adherent of the Court party under this scheme.

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<sup>1.</sup> A. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia's Legal Culture xvi-xvii (1981).

Roeber traces this same conflict in Virginia as it is played out on a grand scale, but with interesting divergences from the English pattern. How is it, he wonders in the introduction, that Virginia justices should eventually be associated with the Court, while lawyers assumed the mantle of Country virtue with a great degree of success? Having posed this question, the author establishes a track from which he rarely swerves as he attempts to trace the exertions of lawyers and justices as they struggled with the Court and Country traditions in a rapidly changing, increasingly complex society. Their views, their actions, and their reactions drastically altered the nature of Virginia's legal environment.

In Roeber's view conflict between the bench and bar begins the earliest emergence of the legal profession in Virginia. Once the General Assembly actually lifted restrictive legislation against lawyers, attorneys trained in England sought to practice in the General Court or in some of the county courts. Their training, which stressed the utilitarian nature of the law, also inculcated practitioners with a love for procedural niceties and an expectation of efficiency. This immediately set lawyers at odds with the lay justices who comprised both the county courts and the bench of the General Court and who operated their courts in a rather relaxed, simplified manner. In the earliest years of the colony, this approach was perhaps appropriate for the lay justices who served primarily to keep the peace and to act collectively as local administrative units. By the 1680's, however, these justices found that the increasingly complex economy of Virginia required that they devote more time each session to the adjudication of civil litigation, primarily actions for the recovery of debts and breaches of contract. Thus, as the bar was emerging as a viable unit in the legal structure of Virginia, a corresponding drive for judicial reform developed which was only fulfilled in the momentous years following the American Revolution. The bar was then triumphant in securing major revisions in the judicial structure, including the creation of district courts of common law and equity, and in securing for those courts a bench composed of qualified professional lawyers. The county courts lay in virtual ruin, stripped of their most awesome discretionary powers, abandoned by the bar and by litigants in large numbers because of their inefficiency and because of the great accessibility of the superior courts. Lawyers by 1800 were in the ascendant, and the justices were no longer a major factor in politics or law.

This synoposis of Roeber's analysis of this period fails to do justice to his contribution to our understanding of the county bench and of the bar in Virginia. For example, while we have known that the justices suffered severe censure in the post-Revolutionary years, especially for their handling of civil litigation, Roeber demonstrates that this dissatisfaction had emerged by the mid-eighteenth century, and while it was encouraged by the Revolution, it did not necessarily derive from it. Likewise, his analysis of court records provides a wealth of information on civil litigation, the prosecution of misdemeanors, and the overall role of the county court in country life in colonial and Revolutionary Virginia. He is obviously familiar with the published sources of his period. He makes excellent use of manuscript court records and of that too often neglected source, the petitions directed to the Virginia legislature after 1776. Equally important, he exhibits a respectable grasp of the technicalities of eighteenth-century legal practice, including the various forms of action, writs, and myriad procedural details.

For all this vast accumulation of hitherto unanalyzed data, Faithful Magistrates should not be construed as a definitive history of lawyers or justices of the peace in Virginia. Indeed, there are several areas into which Roeber did not, and probably could not, venture because of his adherence to the theme of Court and Country conflict in the shaping of legal culture. We are told very little, for instance, about the actions of individual justices of the peace, who themselves exercised limited judicial and administrative duties in their magisterial districts.<sup>2</sup> The emphasis on Court and Country also obscures the early history of the bar, which is placed squarely in the center of controversy and treated as if it were a handy political football rather than a practical entity with a specific purpose in the legal structure. Not until Roeber's discussion reaches the 1720's does he really begin to develop a portrait of the bar. Even then he tends to emphasize the General Court bar at the expense of the vast number of country practitioners who, though they may have wielded much less political power, certainly outnumbered their brothers in Williamsburg, and were influential in determining how the bar was perceived by justices and litigants alike. They, too, affected the development of legal culture in their own ways. Similarly, Roeber acknowledges the presence and potential of court clerks trained in the secretary's office in Williamsburg, but fails to address the question as to what degree their training or their mere presence influenced the uniformity of procedure from county to county, the move toward anglicization of the legal system, and the rise of the legal profession.

Criticism of an author for what he did not do comes easily. Within the limits Roeber set for himself he performed most admirably. Most questions raised by Roeber's analysis of this period regard points of very limited technical importance, and to offer them here would seem unquestion-

<sup>2.</sup> This may be due to the fact that records kept by individual justices in this period are extremely hard to locate.

ably pedantic. I am concerned, however, that Roeber's picture of the county courts after the judicial reform following the Revolution leaves the impression of an institution pervaded by absolute decay, lethargy, and powerlessness. Court day continued to be the occasion for major communal gatherings throughout the antebellum years, and the courts did continue to hear litigation (albeit in greatly reduced quantity) and to exercise executive and administrative powers. The continued use of called courts to try slaves and examine accused white and free black felons meant that justices still retained significant say in local criminal justice. Although lawyers did begin to increase in number in the legislature<sup>3</sup> and justices of the peace consequently declined, initial (and quite rudimentary) investigations suggest that many of the planters, merchants, physicians, and manufacturers elected to the assembly sessions in the antebellum era were or had been justices themselves.<sup>4</sup>

What is perhaps most difficult in any study of the bar is the attempt to produce a composite picture of the profession at any one period. Not only do the so-called "two-tiered" arrangements, which separated appellate attorneys on the one hand from nisi prius practitioners on the other, work against this, but divisions based on geography (urban/rural), education, age, experience, and even social status do also. Lawyers did not speak, in fact did not perceive, as a uniform whole. Even some of the best attorneys did not favor all the judicial reforms enacted in the early years of the Commonwealth which a few attributed to the wild innovations of young lawyers in the legislature. Admittedly, we must rely on the spokesmen of the bar for most of our impressions, and these men, more often than not, were those situated in Williamsburg or Richmond, the appellate attorneys, the crème de la crème of their era. We need to learn more of those men who comprised the vast bulk of the bar outside Virginia's urban centers.<sup>5</sup>

Roeber concentrates on the records of twelve Tidewater counties and on those of two hustings courts (Richmond and Yorktown), arguing that that region was "the nucleus of everything that the colony would later be noted for" and that "the political, social, and legal culture of Virginia would be determined largely by the families who lived east of the fall line

<sup>3.</sup> The actual numbers are not yet available but see Shepard, Lawyers Look at Themselves: Professional Consciousness and the Virginia Bar, 1770-1850, 25 Am. J. LEGAL HIST. 1 (1981).

<sup>4.</sup> This statement is based on the tentative conclusions derived from the reviewer's continuing research into the political activism of the antebellum Virginia bar.

<sup>5.</sup> Further research in the area depends, of course, on the availability of additional sources of information.

and between the Potomac and the James Rivers." Unfortunately, we thus receive no insight into the development of the law on the "frontiers" of Virginia society. Considering the influence of such men as Archibald Stuart, William Cabell, and, certainly not the least, Thomas Jefferson, this seems particularly disappointing. Sectional conflicts appeared even before the Revolution and continued to exert the most pervasive influence upon internal politics in the Old Dominion up to the Civil War. We are left wondering whether, or by how much, the legal culture of Virginia's Piedmont, Southside, and transmontane counties resembled or diverged from that of the Tidewater, and thus added to those conflicts.

Despite these caveats, however, the ultimate appraisal of Faithful Magistrates must be decidedly positive. Roeber has provided a fascinating account of the meeting of law and culture in the rarefied air of Virginia. Were it for the vast corpus of data alone which he has amassed, we should be grateful. But his insights are important and his sensitivity acute as he traces the human factors which influenced the administration of justice in early Virginia.

<sup>6.</sup> A. ROEBER, supra note 1, at 37-38.

