ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM

STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW

Robert J. Janosik
Editor

I

Encyclopedia of the AMERICAN JUDICIAL SYSTEM

Studies of the Principal Institutions and Processes of Law

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Volume I

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PREFACE

IN the 1930s, a group of critics of the legal profession upbraided lawyers and judges for their habit of obscuring the nature of their professional work. Jerome Frank, one of these critics, spoke of the "cult of the robe" and of the gloss on the law created by trial lawyers that hides the dynamics and chanciness of the enterprise from the public. Another, Karl Llewellyn, concurred and called lawyers the shamans of the modern world. Whatever the merit of these criticisms, it is certainly clear that the voluminous literature on the law is often inaccessible to the layperson, university student, and academic researcher not trained in the ways of the law library.

The *Encyclopedia of the American Judicial System* is an effort to remedy this problem. Like the three reference works which preceeded it in the Scribner's American Civilization Series—the *Encyclopedia of American Political History,* the *Encyclopedia of American Economic History* and the *Encyclopedia of American Foreign Policy*—these three volumes bring together current scholarship on a variety of topics. This *Encyclopedia* encompasses both the substance of American law and the process that produces and utilizes legal precepts. Although some of the subjects discussed are by their very nature technical and difficult, the essays included here were written as self-contained units, providing enough information to guide the reader without legal training. Thus, these essays are accessible to a wide audience and serve as introductory studies of subjects that previously may have been difficult to approach or explore.

The initial selection of the topics in this collection was a simple process. In consultation with a group of teachers, we sought to identify and include essays of interest to students and scholars doing basic research on the American legal system. Hoping to reflect our efforts to produce a series that attends both to the substance and process of the law, we organized the work into six categories across the three volumes.

It seemed necessary to consider major topics in Constitutional law and to add a list of topics that surveyed non-Constitutional, substantive areas of the law. We also wanted to include a set of entries describing and detailing the structures of the judicial system as well as selections about the personnel who inhabit and use those institutions. The behavioral revolution in the social sciences instructed us in the need to include essays on the actual operations of these institutions, whatever their formal configurations; hence, the topics concerning the processes of American legal institutions. To reflect a developmental perspective we commissioned essays concerning topics which consider the activities of the judiciary, especially the Supreme Court of the United States. And, finally, under the catch-all rubric "Methodology," we have included essays on the historiography of American law, jurisprudence and behavioral studies of the legal system.

Authors were not given a specific format. Discussions were held to reach agreement on the appropriate content for an essay, but the products of these discussions illustrate a wide range of techniques for approaching any broad topic. The essays covering Supreme Court history, for example, vary considerably. Some authors employ detailed case analysis. Others emphasize the social

context of a historical period and the impact of such events on the judiciary. Still others develop the topic from the point of view of intra-court blocs and pressures. This variation is an asset rather than a liability; it allows the student of court behavior to experience the many ways scholars have productively investigated the broad topic of judicial history. In the same spirit, the editorial staff did not impose a particular critical perspective on authors. Indeed, in commissioning authors, an effort was made to identify a variety of points of view concerning the American legal system. Authors were asked to express a personal voice in their essay, a feature warranted by the length of the entries. We are confident that the authors provide readers with sufficient information to understand the various dimensions of a controversy, thereby permitting them to reach informed conclusions about such topics. The perceptive reader will find in these essays a range of postures concerning American law and the legal system. Criticism of important aspects of American legal practice is well represented; so, too, are voices that find the system to be strong and astonishingly resilient.

A number of individuals contributed their support and enthusiasm over the period during which these volumes were conceived and assembled. The editorial board proved to be essential in identifying the authors who contributed essays. Judge Marvin E. Frankel, Professors Sheldon Goldman, Thomas M. Franck, and C. Herman Pritchett, and Mr. David Kairys, Esq. offered interesting and helpful suggestions. I also owe a debt of gratitude to the three managing editors at Charles Scribner's Sons who have seen this project through. Mr. David William Voorhees, there at the outset, lent his professional experience and wide-ranging knowledge. His successor, Mr. Steven Sayre, brought efficiency and humor to the project during the long commissioning phase and the early editorial work. Mr. Jonathan Aretakis added new, much-needed energy as the editorial process was completed and the manuscripts went to press. I would also like to thank the fine editorial staff who reviewed manuscripts—Martha Cooley, Kathleen Erickson, Joan Field, and Leland Lowther. And my special thanks to Ann Manning, the secretary in the Department of Political Science at Occidental. Her help and good cheer throughout have been greatly appreciated.

Robert J. Janosik

Encyclopedia of the AMERICAN JUDICIAL SYSTEM

Part I
LEGAL HISTORY

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COLONIAL LAW AND JUSTICE

Stephen Botein

THE history of early American law sometimes seems forbiddingly complex because it lacks a focal institution at the center, such as a Supreme Court resolving urgent public issues by reference to a written national statement of constitutional principles. The ingredients of law in colonial America were variously combined and recombined in numerous jurisdictions. Nevertheless, its history has a certain thematic unity. Colonial law was responsive to broad configurations of social power, as revealed in military strength, population growth, and trade. The rules of early American law, even when formulated and applied inconsistently, had the effect of recognizing or maintaining the priority of some group interests over others and of strengthening or weakening different patterns of social organization.

Although government in the American colonies normally conducted its business at minimal expense, without large-scale programs implemented bureaucratically, it was far from lighthanded in its efforts to realize public goals. It tried to act through everyday regulation of activity that in later times would be regarded as essentially private. By so intervening to guide the behavior and the belief of individuals, the public authorities in colonial America significantly altered the lives of ordinary men and women.

RACE AND ETHNICITY

Two hundred and seventy-five years after John Cabot first saw the coast of Newfoundland, an English population of approximately 1.5 million occupied the seaboard region of northeastern America, from Penobscot Bay to Georgia. Inevitably, law had been developed both to justify control by this one people of territory in which others claimed rights and to define the status of those who stayed or came to live there under English sovereignty.

Despite frequent citation of Cabot's voyage as the basis of English title in the New World, it was often acknowledged that "visual apprehension" of territory was legally insufficient for such a claim. The essence of the English position was phrased in terms that reflected domestic land law. Actual possession was what established title. In disregard of papal grants to Spain and Portugal, the English government was free to authorize settlement of land uninhabited by other Europeans.

When English colonization of North America finally got under way, there were only the broadest of legal guidelines. Two clauses were repeated in most patents and charters. According to one, English colonists would remain English subjects, and their children born overseas would be English by birthright. The other clause granted the power to frame governmental regulations, stipulating that they conform as far as possible to the laws and policies of the mother country.

It was generally agreed that English royal authority could be asserted over the native "heathen" of America by reason of conquest in a "just war." This convenient doctrine skirted the issue of Native American rights. The simplest rationale for dispossession of Native Americans was to cite the fundamental right of self-defense against "barbarians" said to be capable of gruesome atrocities. Possibly it was disappointing to some impatient settlers that their first contacts with Indians were peaceful.

In Virginia, the devastating native attack of 1622 put an end to white restraint. Without such

a violent incident to create legitimacy in other colonies, Englishmen buttressed proclamations of sovereignty by legal devices or argumentation that purported to establish their property rights in particular North American lands. Most English efforts to acquire territory from native leaders were temporary expedients, usually undertaken to rebut claims to title by other Englishmen or by rival European interests. Deceit might well be involved—presentations of trinkets along with rum, accompanying promises misrecorded or later broken at will. In New England, Puritan ideologues brusquely and inaccurately dismissed the Indians as nomadic hunters and foragers who should no more be allowed to "usurp" the land than wild beasts of the forest.

Even when the English dealt with the Indians in good faith, they ignored alternative conceptions of property that prevailed among the woodland tribes of the Northeast. Land was thought to have been transmitted by descent from ancestors who had lived and died and been buried in the same area; it belonged to each Indian nation as a whole, not to individuals. A chief might agree to transfer territory to other Indians or to Europeans, but this was regarded as a free gift, perhaps to promote a fraternal alliance. Merchandise received during such a voluntary transfer was understood to be a form of ceremonial reciprocity, not payment as part of a mutual bargain. European gifts might then be distributed within a tribe as a means of recording what had taken place. To the bewilderment of most English leaders, their native counterparts preferred to rely on oral tradition for agreements rather than on written documents.

During the decades that Englishmen were removing one alien race from their new American territories, they were beginning to import another and to lay the legal groundwork for its enslavement. Despite the rapid expansion of black chattel slavery in the British West Indies, it took the mainland tobacco colonies in the Chesapeake region almost half a century to write such a labor system into law. One reason for this delay was that Englishmen needed that much experience to appreciate how enslaving Africans was a way to avoid the worst consequences of restricting the freedom of their own countrymen.

For most of the seventeenth century, the great majority of field hands in the Chesapeake tobacco fields were white indentured servants from the mother country. Many were young and poor. If they had signed their indentures in England, in exchange for ocean passage under miserably crowded and unsanitary conditions, they would then be sold on arrival for the period of service specified in their contracts—anywhere from one or two years to seven years or more. At the end they could set out on their own, with some clothing and tools as "freedom dues" and perhaps an official grant of acreage. Indentured servants were unable to vote, engage in trade, or marry without the consent of their masters. Most important, their obligation of service was transferable without their consent.

Indentured service was effective in moving people to the New World to meet a growing demand for labor, especially in the Chesapeake colonies. But how could English settlers hope to prosper if they continued systematically to reduce their own people to a condition that would have been intolerable in the mother country? This situation led to an effort to distinguish and degrade the status of black labor.

Before the middle of the seventeenth century, there were evidently some African slaves in the Chesapeake region who served for life, with the same obligation passing to their children; other Africans worked with and on the same terms as white servants or were free. Gradually, the position of blacks deteriorated. Over several decades following 1660, statutes appeared on the books in Maryland and Virginia confirming the formula that all blacks and no whites would be slaves for life. Baptism would no longer imply a possibility of freedom; miscegenation was banned. A slave was just another asset, attachable for debts and part of the owner's taxable property. In 1705 Virginia declared slaves to be the equivalent of real estate and therefore subject to the usual rules of inheritance. Nothing comparable to slavery was to be found in the legal system of the mother country.

Because English law suited a population that was more or less homogeneous, there was also difficulty dealing with some of the non-English white groups that populated the mainland American colonies south of New England. For example, New York's Dutch inhabitants posed problems. England had never recognized Dutch sovereignty there and could readily justify royal transformation of the New Netherlands after 1664 by right of conquest; but this took time to

achieve. For several decades, in the interest of conciliating a sullen local majority, English courts allowed Dutch residents to retain their own customs concerning inheritance and to settle contracts made before 1664 according to Roman civil usages observed in the New Netherlands. Subsequently, as English settlers poured into the colony, it became feasible to suppress most Dutch forms, but not without stubborn Dutch resistance, which continued through the eighteenth century.

Some whites entering the colonies in the eighteenth century seemed nearly ungovernable. Immigrants from Ulster in Northern Ireland, the Presbyterian Scotch-Irish, streamed through the backcountry of the middle and southern colonies quite indifferent to jurisdictional boundaries and English legal conventions, squatting on whatever vacant land appealed to them. Large numbers of German-speaking immigrants also spread out through the same backcountry. They included numerous pietistic sects—Mennonites, Dunkers, Schwenkfelders, Moravians—espousing various degrees of nonaccommodation with civil government. Further, coming as they did from the Continent, their legal status as subjects or citizens was unclear. In theory, they could be declared citizens of the realm either by a royal patent of denization or by a parliamentary naturalization act, but these were expensive, individualized procedures. Some colonial governors and assemblies devised less costly and intricate means of conferring a rather dubious kind of local citizenship on the new arrivals.

In 1740, trying to clarify the situation, Parliament passed a general act that allowed foreign settlers in the colonies to acquire certificates of naturalization, valid in all parts of the empire, after seven years of residence. Brief absences were permitted by this legislation, the costs of application were minimal, and there were some exemptions from its requirement of avowed Protestantism. In the next three decades, however, fewer than seven thousand colonists were naturalized accordingly. Seven years could be an inconveniently long time to have to be classified as an alien, whose land would revert to the government in case of death.

In the course of the eighteenth century, English law proved less than adequate for regulation of an increasingly diversified white population on the colonial mainland. Meanwhile, the number of black slaves in the colonies was growing prodigiously. One result, particularly in areas where whites were not numerous enough to feel safe, was an immense volume of legislation to keep blacks in order. Special courts were erected to try slaves accused of committing felonies, according to rules of evidence that differed from those of English law; special patrols were authorized to protect the countryside, sometimes with extraordinary powers of search and seizure in slave quarters; special punishments were decreed for slaves; and special regulations governed their movements.

Finally, there were more Indians to contend with, not along the coast but toward the interior —where large and well-organized tribes could resist white encroachment by adept maneuvers with rival European nations. This political reality, in turn, vastly complicated official handling of legal disputes within the colonies which involved long-dormant Indian claims to land.

The difficult task of determining what English law applied in America was magnified by the presence of non-English peoples. A century and a half after the founding of Jamestown, it appeared that the laws of the mother country and those of her mainland colonies could not be harmonized as easily as proponents of unitary English nationhood had once assumed.

RELIGION AND THE STATE

Within the legal environment that English settlers established in northeastern America, the most troublesome ideological source of disharmony was religion. At the extremes of the colonial Protestant spectrum were strict advocates of the Church of England as a state religion and radical dissenters espousing pure voluntarism. What developed eventually was a pattern of localistic deviation from English norms. The precarious role of the Church of England in colonial America was symptomatic of underlying weaknesses in the structure of transatlantic empire.

There is no reason to think that the Puritans monopolized official religiosity during the seventeenth century. In Virginia, it was taken for granted from the start that public authority had a major function to perform in collaborating with the church to supervise moral conduct throughout the territorial boundaries of its jurisdiction

and to maintain uniformity of belief. Even in the brutal early years at Jamestown, Virginians were governed by "Divine" and "Moral" in addition to "Martial" regulations. Twice a day, by drumbeat, they marched to prayers; severe penalties were prescribed for nonattendance and profanity. In 1619 the first colonial assembly passed a series of laws against gaming, drunkenness, swearing, and other moral offenses. In 1705 the legislature in Virginia was still busy seeking to enforce observance of the Sabbath. Maryland, in 1678, drew up laws to curb the "licentiousness" of its inhabitants. In New York, the same concerns underlay an "Act for Suppressing Immorality" passed by the General Assembly in 1708.

Although the colonies south of New England followed traditional Elizabethan theory in writing laws to criminalize sin and encourage righteousness, they failed to replicate the Anglican ecclesiastical system that had been largely responsible for such legal regulation in the mother country. The case of Virginia is most revealing. Like colonial Anglicans everywhere, lay members of the Church of England in Virginia self-consciously declined to erect a system of ecclesiastical courts, preferring to retain the system of moral regulation that had been developed in a series of statutes about midcentury. Local vestrymen would choose churchwardens, who twice a year reported to their county court on the morals of the parish. In cases of delinquency, the vestry itself might hear evidence and take depositions, but prosecutions—sometimes managed by a churchwarden—would be brought before the county justices. Their judgments, which commonly involved fines or whippings or public confessions in church, might be executed by either a sheriff or a churchwarden. Such procedures, characteristic of Maryland and New York as well, jumbled civil and ecclesiastical government, but they firmly established the laity's authority to oversee morals.

The net effect was irregular enforcement, because the local leaders who dominated both vestries and courts appear to have been reluctant to look closely into the sins of their neighbors. Informants were discouraged from coming forward because they were liable for court costs in the event of acquittal. Evidently it was the laissez-faire temper of planters in the Chesapeake region, rather than skepticism regarding the occult, which accounted for the tendency of Chesapeake courts to treat charges of witchcraft as actionable slander without bothering to try the accused. A similar pattern of prudent inattention characterized the response of local officialdom to the arrival of Quakers in seventeenth-century Virginia. Despite threats and passage of penal statutes, there was much de facto tolerance of Quakers at the county level.

Established state religion in Virginia declined further during the eighteenth century. While prosecutions for swearing and like offenses might be numerous in some counties, a statute of 1727 imposing fines on householders who neglected to report bastards born in their homes was a sign that legal enforcement of morality had languished in others. So had legal enforcement of religious uniformity. To promote settlement along the frontier, the House of Burgesses passed miscellaneous acts exempting foreign Protestants from parish levies. After 1740, as the religious fervor of the Great Awakening swept through the colony, dissenting itinerants preached to enthusiastic crowds in defiance of restrictive regulations. Appearing in the 1750s, Baptist spokesmen were sharply critical of lapses in virtue by local justices of the peace and by the established clergy.

In 1755, when Anglican ministers in the colony petitioned for higher salaries, the House of Burgesses was almost unanimous in rejecting their request; instead, Virginia's Two Penny Act fixed the ratio of tobacco to currency in such a way as to reduce clerical income drastically. Another such Two Penny Act, passed in 1758, was eventually disallowed by the Privy Council in London. Here was the setting for the celebrated Parson's Cause of 1763, in which the twenty-three-year-old Patrick Henry persuaded a jury to award only nominal damages to a minister suing for the back pay due him. Henry's argument, radical in its constitutional implications, questioned whether the crown government could legitimately place the welfare of the clergy over legislation in the public interest. It was clear that the English model of official state religion had not prevailed in Virginia.

The English model certainly had influenced other colonies no more, and usually less. Such eighteenth-century Anglican jurisdictions as South Carolina, Maryland, and New York included so many dissenters of English as well as other ethnic origins that it would have been fool-