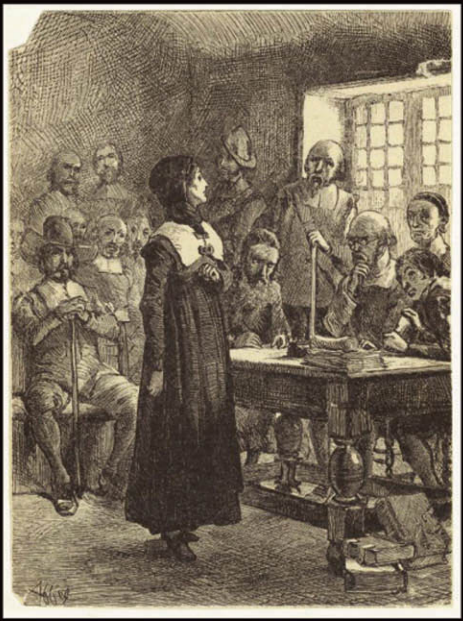
The Common Law *in* Colonial America

VOLUME I

THE CHESAPEAKE AND NEW ENGLAND, 1607–1660



William E. Nelson

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VOLUME 1

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To John Phillip Reid
Mentor and Friend

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Acknowledgments

Three factors coalesced to induce me to undertake the writing of volume one and what I hope will be three additional volumes of *The Common Law in Colonial America*.

The first is the state of the existing literature. No synthesis grounded in archival sources exists for all thirteen North American colonies for the entire colonial period. Excellent studies do exist for the legal history of some colonies and for particular legal subjects; in addition, historians have produced a wealth of scholarship on colonial political, intellectual, economic, and social history. My hope is to make use of this excellent scholarship in order to provide context for and otherwise supplement what I can extract from the archival sources. Combining archival material with existing scholarship will, I hope, produce the more general synthesis that the field of colonial legal history so far has lacked.

The second factor is the stage of my own career. After four decades of work in archival judicial records, I have developed, for better or worse, an efficient methodology for extracting information from them. It is time to put that methodology to work. In doing so, I have been and will be aided immensely by the efforts of the Genealogical Society of Utah, which has microfilmed most seventeenth and eighteenth-century court records and deposited its films in state archives and in its own archive in Salt Lake City. The Genealogical Society was kind enough to sell me a roll of film

of Middlesex County, Massachusetts, records and thereby saved me the time and expense of traveling to Massachusetts. I am most grateful. The Library of Virginia sold me a number of rolls of county records, many of them microfilmed by the Genealogical Society of Utah; I am indebted to both for not having to spend weeks in Richmond, Virginia.

Maryland possesses the most technologically sophisticated state depository: all of its seventeenth-century archival materials that have not been published in seventy-two printed volumes are available on line. I thank the Archives of Maryland for providing me with access as well as the Connecticut State Archives for permitting me to use the original manuscripts of its seventeenth-century judicial records.

The third factor that induced me to attempt a synthesis of colonial legal history is the support of my institution, New York University School of Law. The Filomen D'Agostino and Max E. Greenberg Faculty Research Fund provides generous sabbatical leaves, summer research grants, and support for travel and for purchasing research material; completion of this project would be unimaginable without the Fund's support. I also thank the Committee that administers the Fund for its patience and its faith that my work will eventually find its way into print, even when publication sometimes does not occur until several years after the Committee has provided for my research and writing. Dean Richard Revesz and his predecessors, Deans Norman Redlich and John Sexton, are responsible for the providing the wherewithal that facilitates the Committee's generosity; my colleagues and I owe them a giant debt of gratitude.

I am also grateful to the family of Samuel I. Golieb which, through the Katzenberger Foundation, supports the Legal History Colloquium at NYU. The Colloquium is simply the best seminar in the world for workshopping legal history scholarship, and its members have read some portions of this book in draft as many as three times and the entire draft once. Among the members of the Colloquium whom I thank for their noteworthy contributions to my thinking are Lauren Benton, Richard B. Bernstein, Harold Forsythe, Dan Hulsebosch, Bill LaPiana, and Deborah Malamud.

I am also indebted to the four readers of the manuscript selected by the Oxford University Press—Mary Bilder, James Ely, Peter Hoffer, and David Konig. All four of them provided helpful advice and useful

bibliographic suggestions. Konig, in addition, forced me to rethink the analytic structure of portions of the book, while Hoffer helped me to see and articulate more clearly the role that legislation played in the seventeenth-century colonies.

Two librarians who provided all sorts of assistance were Elizabeth Evans of the New York University Law School Library and Jeff Mason of the Hewlett-Woodmere Library. Tom Attanasio and Barbara Kern checked citations in the footnotes for accuracy, and Shirley Gray, as always, efficiently performed innumerable clerical chores. I thank them all.

Chapters 2 and 3 were delivered in an earlier form as the 2002 Kormendy Lecture at Ohio Northern University School of Law and were then published as "Authority and the Rule of Law in Early Virginia," *Ohio Northern University Law Review,* 29 (2003), 305. I am indebted to Dean David Crago and Professor Liam O'Melinn for inviting me to speak. An earlier version of chapters 4 and 5 appeared as "The Utopian Legal Order of the Massachusetts Bay Colony, 1630–1686," *American Journal of Legal History*, 47 (2005), 183. Both articles, as revised, are reprinted here with permission.

I first met John Phillip Reid forty-four years ago as a second-year law student in his legal history class. At the time my ambition was to become a scholar of English legal history. He is responsible for making me an American historian by persuading me that, while the past may have been in England, the future would be in America. He sent me to Harvard to study for a Ph.D. under his mentor, Mark DeWolfe Howe, but there his responsibility ended, when circumstances led me to work instead with Bernard Bailyn, whose work Reid has criticized. Over a decade later, when I was in desperate need of an academic appointment, Reid at long last obtained one for me at NYU. I have rountinely rejected his guidance ever since.

My family—Elaine, Leila, and Greg—is, as always, most responsible for this book. Elaine, at least, is eager for me to retire, but I trust she, Leila, and Greg are geared up for however many years three more volumes will take.

New York, NY
February, 2008

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The Common Law in Colonial America

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Introduction

Half a century ago law professors such as Julius Goebel, George L. Haskins, Mark deWolfe Howe, and Joseph H. Smith were among the leading students of American legal history.[1] Unsurprisingly, the academic milieu in which they worked affected their scholarship. In particular, their history was influenced by the search of their colleagues—Henry M. Hart, Albert M. Sacks, and Herbert Weschler are the most prominent who come to mind—for "an architecture for thinking about a dynamic public law that was nonetheless accountable to the rule of law in a democracy."[2]

Colonial American law appeared to offer a model for that architecture in the story of the reception of the common law. On the one hand, the common law could be seen as a set of fixed principles and procedures by which judicial discretion was constrained, policy choices handed off to other institutions, and the rule of law thereby preserved. On the other hand, reception had occurred as part of a dynamic policy process; the American colonists ended up receiving only so much of the common law as was appropriate to their needs and circumstances.

Except for J. Willard Hurst, all the great mid-twentieth-century legal historians, at one point or another in their careers, set out to examine in detail how the common law came to America. They all devoted considerable effort to studying colonial legal history,[3] "at least prior to 1700, when our jurisprudence had in all important respects taken the pattern that it

retained until well after the American Revolution, and to a great degree retains today."[4] The issue of reception was the nub of their work.

In studying the common law's reception, however, this old school of legal history confronted an immense obstacle. The obstacle was this: A historian can never comprehend the law of a past society merely by reading legislation and treatises; particularly in a common law system, it is also necessary to understand how judges and other officials applied law on the ground.[5] To determine whether Americans actually received England's common law, historians accordingly must delve deeply into English as well as American case law. That is a daunting task indeed. Although I have not systematically surveyed England's judicial records and have not yet completed my work in colonial American ones, I know enough to be confident that the source material for sixteenth-, seventeenth-, and eighteenth-century English legal history exceeds the material available for colonial America by many multiples. Sir John Baker tells us, for example, that the plea rolls for the first four decades of the sixteenth century alone are more than twenty-five miles in length; if they were cut and bound in books as colonial court records were, they would amount to some 250 volumes.[6] In contrast, because America was much smaller in population than England and because many American legal records have been lost, I doubt whether that much legal material exists for the entire period from 1607 to 1776 for all thirteen colonies; in Massachusetts Bay prior to 1685, for example, there are only fifteen extant volumes of court records, nearly all in print, covering its fifty-five-year history.

I do not imagine that a single scholar in a single lifetime could write a comprehensive history of sixteenth-, seventeenth-, and eighteenth-century English law; indeed, it is with great trouble that a small, dedicated group is striving collectively to accomplish the task.[7] From this it follows that, if we conceptualize colonial legal history around the issue of reception as Goebel, Haskins, Howe, and Smith did, we cannot write about it comprehensively either.

Making reception the central focus of colonial legal history also presents another difficulty, best illustrated in Paul Reinsch's monograph, *English Common Law in the Early American Colonies*. In view of the dearth of scholarship about colonial law at the time he was writing, his book was truly extraordinary. Reinsch was very perceptive, and he got much

right. But his attention to "[t]he first question" of "the influence upon our system of the English common law" misled him. He concluded that the common law had scant influence during the colonial period; in its place, the early colonists adopted a system "of rude, untechnical, popular law."[8] By so misfocusing on reception and assuming that the alternative to common law was the implementation of unsophisticated law, Reinsch failed to study how the law of the early colonies was both a refined product of the social forces within them and a complex instrument affecting the course of their development.

More recent scholars, professionally trained as historians and teaching mainly in history departments, have begun to study the relation of colonial law to society. Several outstanding random monographs that contribute to our understanding of the legal development of particular localities are especially valuable.[9] Meanwhile, many social historians have used colonial legal records, which constitute some of the best source material available to them, in order to reconstruct the life experiences of colonial Americans, particularly members of underclasses such as slaves and women. Their valuable work is one of the foundations on which this and subsequent volumes rest.[10]

Nearly everything known about colonial American law grows out of the work of underclass historians, local historians, and the earlier generation of historians who studied the reception of the common law. But studies of local legal development and of the impact of law on underclasses cannot generate comprehensive hypotheses about the legal structure of society or the workings of the colonial judicial system as a whole, and work on common-law reception necessarily must remain tentative until historians know much more about case law on both sides of the ocean than is currently known. Accordingly, the study of colonial legal history demands a new beginning—a new lens through which to focus on the vast body of source materials that exist.

The key to a new beginning is to ask the right question. As we have seen, an inquiry into how colonial American law developed out of English common law is a poor question, in part because of our lack of knowledge about English law. In contrast, legal historians have devoted significant efforts during the past half century to the study of nineteenth-century American law and have learned a great deal about it.[11] Thus, a good start

might be to ask how colonial law developed into post-Revolutionary American law.

This question, in turn, gives rise to a simple hypothesis underlying this and what I hope will be several subsequent volumes. The thirteen mainland American colonies were founded by different groups—indeed, by different nations—for many different purposes. Insofar as law reflects the societal conditions[12] under which it operates, tremendous differences had to exist among the legal systems of the early colonies. As this volume will show, the mid-seventeenth-century colonies functioned under Maryland law, New England law, and Virginia law. After 1800, if not by 1776, in contrast, it became possible to speak of American law, not as a body of perfectly uniform doctrine—there remained significant differences among the laws of the several states, especially in regard to slavery—but as a set of organizing principles around which authors such as St. George Tucker and James Kent could write treatises, teachers such as Tapping Reeve and James Gould could organize lectures, and judges such as John Marshall and Lemuel Shaw could decide cases.

This hypothesis gives rise, in turn, to further questions. How did the law of the early colonies differ? In what ways were the legal systems of all the colonies similar? What impact did various economic, social, political, and religious forces have in promoting similarity and difference? These are the central questions for this first volume, which examines the founding of the Chesapeake and New England colonies. They also will be important in volume two on the founding of the middle colonies and the Carolinas. A third volume will then address a powerful force toward legal convergence—the effort of British authorities to transform the largely independent English provinces of North America and the Caribbean into a coherent empire. A final volume will examine the state of the mainland colonies' law on the eve of the Revolution; it will present a detailed picture of the gestation of an emerging body of national, though far from perfectly uniform, American law even before the birth of a nation-state.

This first volume, as already noted, focuses on how the law of the early Chesapeake colonies differed from the law of early New England, as well as on the differences among the legal systems of the colonies within the two regions. It explores the legal history of the Chesapeake colonies—Virginia and Maryland—and the New England colonies—Massachusetts

Bay, Connecticut, New Haven, Plymouth, and Rhode Island—from their initial settlement until approximately 1660. The choice of this date—the year when Charles II was restored to his throne—is not an arbitrary one. Prior to 1660, the government of England frequently was distracted first by conflicts between the king and parliament, later by Charles I's financial straits resulting from his attempt to rule without parliament, and ultimately by civil war. As a result, the North American colonies were in large part left free to govern themselves. Various holders of power, occasionally in London but usually in the Chesapeake or New England, fought each other to determine the direction each colony would take. Since the individuals and groups that controlled the colonies had different agendas, the legal system of each colony developed in somewhat different directions. Only after 1660, when the crown launched a long-term effort to fashion England's colonies into a coherent empire, did these legal orders begin to converge in the direction of a single common-law system.

By ending this volume in 1660, the initial differences between Chesapeake and New England law emerge with greater clarity than they would if the story were continued to a later date. The choice of 1660 also has another advantage. To the extent there were similarities among the legal orders of the early colonies, and there were many, the 1660 date facilitates analysis of their root causes. Similarities prior to 1660 resulted, this volume claims, from the common social and economic realities that colonists faced as they settled and tamed the continental wilderness. After 1660, another explanatory element—British imperial policy—entered into the picture. Ending this volume in 1660, in short, facilitates separate examination of the impact of local conditions, on the one hand, and imperial policy, on the other, on the development of colonial common law.

The primary thesis of this volume is that the Chesapeake and New England came into being as strikingly different places and that the law in force in each both reflected and contributed to their differences. I start with a verity on which all colonial historians agree—that Virginia was founded primarily for economic profit; New England, primarily to create a religious utopia; and Maryland, primarily to establish a haven for persecuted Roman Catholics. Of course, the profit motive was not absent in Maryland and early New England, and many Virginians cared about God and the church.[13] Nonetheless, the legal order of each of these colonies

reflected its founders' primary purposes. The common law was important to Lord Baltimore, the founder of Maryland, from the outset; one author, indeed, has urged that Baltimore granted religious toleration and adopted common-law rules protecting property rights in an effort to create a precursor to a nineteenth-century liberal state, in which minority Catholics could use their wealth to retain lawyers who, in turn, could manipulate the law to protect their clients from the whims of Protestant political majorities. Baltimore, it was suggested, appreciated the power of law to protect minorities who have sufficient wealth to retain lawyers and thereby access the courts, and understood that law protective of wealth and property furthers social stability and thereby ensures that the families and groups who are put at the top of a social order at one point in time are likely to remain at or near the top in future times.[14]

In contrast, as the following chapters will show, the leaders who initially governed Virginia and New England made little use of the common law as an instrument for social control. Virginia's rulers sought to accomplish their main chore, which was to coerce labor out of the local inhabitants, through intimidation and brutality, while New England's leaders strove to create a religious utopia by recourse to the law of God, not the law of England. The English legal heritage of the inhabitants of both Virginia and New England constituted a set of background norms to which they occasionally turned when convenient, but England's common law was not the initial foundation of their legal systems.

What began to push the law of Virginia and New England toward greater, though not complete, convergence was the concept of the rule of law, about which John Phillip Reid has recently written.[15] Although the language "rule of law" was not in vogue in the seventeenth century, Reid documents the prevalence of the idea that society ought to be governed by ascertainable and unchanging rules capable of restraining arbitrary actions by those in power. This rule of law idea was not a unitary one, however; as we shall see, it meant something different in Virginia from what it meant in New England.

The rule of law came to Virginia first. When the Virginia Company, which had founded the colony, proved unable to remain afloat and Virginia's ruling elite needed to coax investment from other sources, the colony's leaders announced that they would govern by English law, and

Virginia adopted elements of its English legal heritage that would provide investors with familiar remedies to recover the funds they had lent. In particular, the colony put into place known and certain common-law procedures by which people who lent money could recover their debts. On balance, these debt-collection mechanisms were somewhat inefficient: creditors who turned to the law often waited a long time to obtain judgment in their favor, and they did not always collect their judgments in full.

But the difficulties that creditors faced did not stop them from lending; the difficulties merely raised the price of loans, typically in the form of higher prices for goods sold on credit. In their lending and borrowing practices, creditors and debtors merely followed what we now know as basic economic theory. When markets are free, as they were after 1625 for trading between England and Virginia, traders will make deals that market conditions warrant as long as they know the background contractual rules and are confident that those rules will not be subject to arbitrary change. Background rules will only affect price: if merchants know, for example, that they will never collect payment for 5 percent of the goods they sell, they will increase their price on all sales by 5 percent; the only times they will not sell are when no mechanisms are in place for securing payment or when the operation of those mechanisms is so uncertain that they cannot estimate collection costs as an element of doing business. By announcing that they would govern by the law of England, Virginia's rulers put known law in place and promised not to alter it arbitrarily. This adoption of the rule of law thereby created the markets that enabled Virginia to thrive, even though the specific law they adopted had no particular facilitative function.

As it functioned after 1625 in Virginia, the rule of law mattered not because the law had particular content, but because its content was known, fixed, and not subject to arbitrary change.

In contrast, the content of the law mattered enormously in colonial New England, where, as we shall see, a key issue was the discretion of magistrates. The magistrates wanted to rule by the law of God, but most of the people in the towns found God's law too ambiguous. Its ambiguity, the people discerned, gave magistrates a broad discretion to resolve legal disputes and other issues however they wished. The townspeople