5. A British Legal Culture Overseas? Law and Society in the North American Colonies

Robert v. Friedeburg

In his ruling in the case Giddings vs. Brown, Judge Samuel Symonds of the Court of Assistants for Essex County, Massachusetts, argued in 1657 against the imposition of a tax assessment and in favour of the "fundamental right" of property: "that every subject shall and may enjoy what he hath a civil right or title unto . . . that not withstanding in England, it cannot be denied, but that men's estates were sometimes unduly taken from them: Some by force . . . and sometimes of law himself as about . . . shipmoney etc." In 1735 Philadelphia attorney Andrew Hamilton reminded the jury, in John Peter Zenger's trial for seditious libel, of its duty to acquit the defendant if he had said the truth: "It is true," he tried to convince the jury, "in times past it was a crime to speak truth, and in that terrible court of Star Chamber many worthy and brave men suffered for so doing . . . But to conclude; the question before the court and you gentlemen of the jury is not of small nor private concern, it is not the course of a poor printer, nor of New York alone, which you are trying: No! It may in its consequences affect every freemen that lives under a British government on the main of America." Finally, the American Declaration of Independence was deliberately put in the form of a Bill of Equity - a traditional English legal instrument permitting aggrieved inhabitants to seek justice from the Chancellor in instances not recognized under existing Statute or Common Law.

These three cases provide examples of what one might call a "British legal culture". They may be called parts of a culture because the arguments essential in them contained a whole "matrix of values, attitudes and assumptions" best summarized by that rather elusive term. It was "British" because those values, attitudes and assumptions were rooted in an English political, legal and constitutional background, which exerted its influence in England and in the American colonies and which, for that reason, might be

termed "British". It was a legal culture, because the courtroom was the theatre of arguments and lawyers, judges and juries the main protagonists in the discussion.[1]

The question I want to address is, to what degree did English legal institutions change in America over time or fulfill different purposes than in England, and did they, at least until the Revolution, contribute to a "Britishness" of life in the colonies? To address these questions, I want to make three points. The first concerns the specific ambiguity inherent in the English legal tradition, the second the degree of transference of English legal institutions across the Atlantic and the third, their application, not in the field of constitutional questions, but in the field of labour relations and the upkeep of morality. I will try to argue that what was most "British" about American legal culture, its vulnerability to social change, served to make it increasingly different from what it had been in England.

---

[1] See K. L. HALL et al. (eds.), American Legal History. Cases and Materials, New York/Oxford 1991, pp. 26, 27 f; on the Zenger trial see E. M. JAMES, Decoding the Zenger trial: Andrew Hamilton's "fraudful dexterity" with language, in: W. PENCAK, W. W. HOLT, Jr. (eds.), The Law in America 1607-1861, Albany 1989, pp. 1-27; on Jefferson and the Declaration of Independence see P. C. HOFFER, The Declaration of Independence as a bill in equity, in: PENCAK, HOLT, Law in America, pp. 186-209; on the definition of "Law" and "Legal Culture" see K. L. HALL, The Magic Mirror. Law in American History, Oxford 1989, pp. 4 ff; on the term "British" see J. G. A. POCOCK, The limits and divisions of British History. In search of the unknown subject, in: American Historical Review 87 (1982), 311-336, p. 312; IDEM, States, republics, and empires: the American founding in early modern perspective, in: J. G. A. POCOCK, T. BALL (eds.), Conceptual Change and the Constitution, Lawrence (Ka.) 1988, pp. 55-77, on different ways to interpret the meaning of the term "British Empire"; A. MACFARLANE, The Justice and the Mare's Ale, Oxford 1981; on "little communities" see D. B. RUTMAN, Assessing the little communities in early America, in: William & Mary Quarterly 43 (1986), pp. 163-178.

I. The Ambiguity of the English Tradition

However enthusiastic Judge Samuel Symonds was about the "fundamental right" of property, or attorney Andrew Hamilton about the trial jury and however clearly they condemned royal prerogative courts, Englishmen at the beginning of the sixteenth century had good reasons to be sceptical about each of them. Thomas More lamented in 1515, "where possessions be private, where money beareth all the stroke, it is hard and almost impossible that there the weal-public may justly be governed". More was alluding, at least in part, to the English experience with the jury system during the fifteenth century and right into the sixteenth, when magnates influenced both juries and judges to get the verdicts they wanted. Then it seemed almost impossible to gain a favourable verdict unless one obtained the patronage of a magnate. It was the increasing use of royal prerogative courts, in particular the Star Chamber, that served as one instrument to terminate that kind of influence on the courts and with it the "landwars" of Bastard Feudalism. Not least those prerogative courts helped to re-establish the trust of the public in the relatively fair administration of justice and the chance of a fair trial. That juries and Common Law courts were bulwarks of freedom rather than instruments in the hand of powerful patrons was a relatively new view in a new situation.[2] But even after the Common Law courts and their juries had regained their reputation and finally triumphed in the Seven Bishops' Case in 1688, the English original provided no easy path to follow. For one the power

[2] T. MORE, Utopia, Book I (1515); on More see L. L. MARTZ, Thomas More: The Search for the Inner Man, New Haven (Conn.) 1990; on the concept of property see E. F. PAUL, H. DICKMAN (eds.), Liberty, Property, and the Foundations of the American Constitution, Albany 1989; in particular M. KAMMEN, "The Rights of Property, and the Property of Rights": The problematic nature of property in the political thought of the founders and the early republic, in: PAUL, DICKMAN, Liberty, pp. 1-22; J. G. BELLAMY, Bastard Feudalism and the Law, London 1989, esp. pp. 123-144; C. C. WESTON, J. R. GREENBERG, Subjects and Sovereign. The Grand Controversy over Legal Sovereignty in Stuart England, Cambridge 1981, pp. 3, 12, on the Stuart Star Chamber.

of juries within the English legal system was ambiguous. Before the Civil War, royal prerogative courts competed with Common Law courts, and increasingly even within the Common Law system Justices of the Peace were allowed to exercise summary jurisdiction out of session. Moreover, the English example included the discretionary power of judges and juries in matters of misdemeanours and labour regulation. To sum up, despite the English rhetoric of juries, property and freedom, in dealing with the poor the discretionary power of judges was not considered problematic, and juries had a record of being vulnerable to pressures from influential men out of court.[3]

II. The Transference to America

Not only the rhetoric of property and liberty or court vs. country, but also such potential conflicts between the discretionary power of judges and the influence of juries were taken across the Atlantic. Social hierarchy did influence the American judicial system, and from time to time Americans complained about that influence. Take the case of the Pynchon family, whose members obtained a licence to administer a local magistrate court in Springfield, Massachusetts, and sat as judges on the county court of Hampshire county, Massachusetts, as well. Being the richest family in the county and the employer and source of credit for many of the inhabitants of

[3] On the "Seven Bishops' Case" see: HALL et al., American Legal History (above n. 1), p. 6; on the juries see J. M. MURRIN, Magistrates, sinners and a precarious liberty: trial by jury in seventeenth-century New England, in: D. D. HALL (ed.), Saints and Revolutionaries. Essays in Early American History, New York 1984, pp. 152-206; J. A. SHARPE, Crime in Early Modern England 1550-1750, New York 1984, pp. 24-28; D. R. COQUILETTE (ed.), Law in Colonial Massachusetts, 1630-1800, Boston 1984; C. F. LEE, Discretionary justice in early Massachusetts, in: Essex Historical Collections 112 (1976), pp. 120-139.

Springfield, judge Pynchon could secure the trade monopolies of the merchant Pynchon by fining those inhabitants of Springfield who challenged his monopoly, who had to get credit from the moneylender Pynchon in order to pay their fine. Hampshire county in its early years may have been exceptional, but Essex county was not. Although Essex was one of the counties with a jury regularly sitting for both private and public cases, Ipswich inhabitant Robert Cross complained in 1662 that he could get no justice as long as Daniel Denison, Ipswich's richest inhabitant, chief of the local militia and judge of the local magistrate court, sat on the bench, a statement for which he was instantly fined. Or take Governor Dudley of Massachusetts, who "sought to carry out a vendetta" against two carters, who had "obstructed the moving of his carriage in the highway". Or take the feud between the Morris and the DeLancey-Cosby groups, both representing big estates in the colony of New York. New York's new governor Cosby had replaced Judge Lewis Morris with his client James DeLancey and was engaged in a legal feud with Morris over salaries and land titles. Morris was the head of the New York Weekly Journal Group, whose newspaper regularly attacked Cosby and DeLancey for miscarriage of justice. DeLancey sought more than once to suppress the paper, but two grand juries had already refused to indict the printer Peter Zenger for one of the attacks on the governor.

American historians disagree how to assess the link between such feuds among leading families for influence, office and patronage and the rhetoric of liberty used by their legal representatives. However, two points should be kept in mind when assessing British legal tradition in America: First, the Morris-Cosby feud serves as a reminder of the high vulnerability of the judicial system to pressures from outside. Although Morris and Cosby were no fifteenth-century English magnates, rhetoric of lawfulness and of the common good had to coexist, not for the first time, with feuds for land, office and influence waged in the courtroom. Second, Massachusetts Judge Sewall and his fellow judge agreed to grant bail to the two carters against the wishes of Governor Dudley; and the New York jury did acquit the printer Zenger. To

a remarkable degree, Anglo-American legal institutions kept their reputation of providing relatively fair trial. They did so, because not only juries but judges as well, even if they "desired to support parliament", hesitated to act "contrary to the general sentiments of their fellow citizens". That is, pressures affecting the courtroom from outside worked both ways, offsetting each other to a large degree. This vulnerability of the legal system to pressures from outside and the uncertain consequences of these pressures were carried across the Atlantic to America.[4]

Despite the constitutional discrepancies among proprietary- (after 1730 only Pennsylvania and Maryland), charter- (after 1692 only Connecticut, Rhode Island and, although also under a Royal Governor, Massachusetts) and royal colonies, the main legal framework below the level of Governor and Assembly was very much the same in all the North American colonies.[5] Massachusetts, to take one example, had established by 1639 inferior Quarterly Courts around which, after 1642, the later shires were erected. The legislative assembly served then as the highest appeal court. Below these county courts there were local magistrate courts with petty juries and below those selectmen with specified and restricted judicial powers. Since 1660,

[4] On Hampshire: S. INNES, Land and Labour in a New Land. Economy and Society in Seventeenth-Century Springfield, Princeton (N.J.) 1983; on Ipswich: G. F. DOW (ed.), Records and Files of the Quarterly Courts of Essex County, Massachusetts, vols. I-VIII, 1636-1683, Salem 1911 cont., III, p. 65; and E. S. PERZEL, The First Generation of Settlement in Colonial Ipswich, Ph.D. thesis Rutgers University 1967, p. 166; on Governor Dudley: D. H. FLAHERTY, Chief Justice Sewall, 1692-1728, in: PENCAK, HOLT, Law in America (above n. 1), 114-154, pp. 126-127; on the Morris-Cosby feud: JAMES, Zenger Trial (above n. 1), pp. 7-9; on the interpretation of such feuds and their role for understanding the American Revolution see J. M. MURRIN, The great inversion: or court vs. country. A comparison of the revolution settlements in England (1688-1721) and America (1776-1816), in: J. J. G. A. POCOCK (ed.), Three British Revolutions: 1641, 1688, 1776, Princeton (N.J.) 1980, pp. 368-454; on a general assessment of the "Politics of Justice": C. MENAND, Juries, judges, and the politics of justice in pre-revolutionary Boston, in: PENCAK, HOLT, Law in America (above n. 1), 155-185, p. 176.

[5] H. WELLENREUTHER, Der Aufstieg des ersten Britischen Weltreiches. England und seine nordamerikanischen Kolonien 1660-1763, Düsseldorf 1987, pp. 15-17; M. A. JONES, The Limits of Liberty. American History 1607-1980, Oxford 1983, pp. 1-18.

these magistrates of the county courts could, like their English counterparts, exercise summary justice out of session to punish misdemeanours such as "gaming, dancing . . . idle, runaways, night-walkers". However, summary jurisdiction was restricted to offenses with penalties below 40 shillings. The division of private and public cases was reflected in the Massachusetts judicial system only after 1686.[6] Similarly, colonial Connecticut instituted at first two jurisdictional levels, the town courts and a general court, but then county courts developed in between both levels after 1666.[7]

Although completely different from New England with respect to structure of immigration, settlement pattern, population structure and internal development, the colonies south of the Cheasapeake developed a similiar judicial system. By 1634 Virginia had county courts for both jurisdictional and organizational matters of the shires, to be run by Justices of the Peace and responsible for private and for public cases as well as for the enforcement of morals. Despite the limited jurisdiction of the county courts, almost all matters were heard first at the county level.[8] Proprietary colonies such as Maryland did develop a similiar judicial system. Following the example of Virginia, county courts bore the brunt of jurisdiction and administration. Like their English counterparts, Maryland Justices of the Peace also had the right

[6] J. H. SMITH, Introduction, in: IDEM (ed.), Colonial Justice in Western Massachusetts (1639-1702). The Pynchon Court Record, Cambridge (Mass.) 1961, pp. 65-88, esp. p. 73; B. CHAPIN, Criminal Justice in Colonial America 1606-1660, Atlanta 1983.

[7] B. C. DANIELS, The political structure of local government in colonial Connecticut, in: IDEM (ed.), Town and Country. Essays on the Structure of Local Government in the American Colonies, Middletown (Conn.) 1978, 44-71, pp. 46-50.

[8] D. H. FLAHERTY, Law and the enforcement of morals in early America, in: Perspectives in American History, ed. by the Charles Warren Center in American History, Cambridge 1971, V, 203-256, p. 228; R. WHEELER, The county court in colonial Virginia, in: DANIELS, Town and Country, pp. 111-133; W. M. BILLINGS, The transfer of English law to Virginia, 1600-1650, in: K. R. ANDREWS et al. (eds.), The Westward Enterprise: English Activities in Ireland, the Atlantic, and America 1480-1650, Liverpool 1978, pp. 215-244.

for summary jurisdiction out of session.[9] Even colonial New York witnessed the gradual development of an emerging county court system out of the older manorial structure of jurisdiction.[10] Only in the Carolinas did county courts not play a prominent role. Since most of the population was centered around Charleston, the central court there played a much more important role.[11] In most of the colonies, then, lay judges and juries handled everyday administration and jurisdiction while a professional bar developed only in the larger coastal towns during the eighteenth century.[12]

Most of the county courts sat twice or four times a year and heard both civil and criminal cases, concerning both capital and minor offences. The combination of social prestige and legal authority of the magistrates, for example, the Justices of the Peace, was similiar to that of their English counterparts, in particular where they exercised summary jurisdiction out of session. Whereas increasing social differentiation among the white population backed this superiority of some neighbours over others in most parts of England, the relatively more homogenous New England settlers complained about overmighty neighbours and their discretionary use of justice.[13] The

[9] L. G. CARR, The foundations of social order: local government in colonial Maryland, in: DANIELS, Town and Country (above n. 7), pp. 72-110.

[10] N. VARGA, The development of local government in colonial New York, in: DANIELS, Town and Country (above n. 7), pp. 186-215; S. B. KIM, Landlord and Tenant in Colonial New York 1664-1775, Chapel Hill (N.C.) 1978, pp. 115-127.

[11] R. WATERHOUSE, The responsible gentry of colonial South Carolina: A study in local government, 1670-1776, in: DANIELS, Town and Country (above n. 7), pp. 160-185; on the particular relations between backcountry and coastal settlements in the South see R. HOFFMANN et al. (eds.), An Uncivil War. The Southern Backcountry during the American Revolution, Charlottesville 1985; on the laxity of law enforcement see in particular J. P. GREENE, Independence, Improvement, and Authority. Toward a Framework for Understanding the Histories of the Southern Backcountry during the Era of the American Revolution, in: HOFFMAN, An Uncivil War, 3-36, pp. 23-24 and note 33.

[12] D. R. COQUILETTE, The countenance of authoritie, in: IDEM, Massachusetts (above n. 3), XXI-LXIV, p. XXXVII.

[13] D. B. RUTMAN, A. H. RUTMAN, A Place in Time: Middlesex County, Virginia 1650-1750, New York 1984, pp. 71-72, 143-151; DOW, Records (above n. 4), III, p. 65; E. S. PERZEL, First Generation (above n. 4), p. 166.

role of juries reflected these differences among the colonies as well. In the relatively more differentiated Cheasapeake area, juries played hardly any role in civil cases and none in capital ones. By contrast, New England juries routinely served in civil cases and even in most capital cases.[14] The ability of the jurisdictional system to adapt to the changing social fabric from which judges and jurors were recruited was part of the English legacy to the colonies and the judicial system became, for that very reason, a framework which strengthened these particularities.

III. British Legal Culture overseas at work: Labour-Relations

The most obvious case in point, I believe, is the legal framework of labour relations which the individual colonies adopted and developed to regulate, in particular, the relations between master, servant and slave. Contrary to what one might expect, the legal framework of the "cattle slavery" of Maryland and other southern colonies in the eighteenth century on the one hand and the framework for indentured service in husbandry in New England were simply two opposing poles in a continuous spectrum of regulations concerning labour relations. Bondage, for example, the submission of men under the authority of a master outside the English system of service in husbandry with its yearly change, was legally known but had fallen into decay in late medieval England and hardly existed by the sixteenth century. The resurrection of a new kind of bondage was intimately intervowen with the migration of young men who

[14] MURRIN, Magistrates (above n. 3), pp. 160-186, esp. p. 183; an exception to this rule is, however, Hampshire county in Massachusetts in the seventeenth century; see SMITH, Introduction (above n. 6), pp. 89-101; INNES, Land and Labour (above n. 4), passim; WELLENREUTHER, Aufstieg (above n. 5), pp. 23 f.

could not pay their passage but instead signed an indenture. This indenture was bought by the highest bidder in the respective colony and the migrant became by that act the servant of his new master. The time of service differed, but in general young migrants aged 14 would sign up for about 14 years, those of 21 and older for four to five years, since the inferior work potential of the younger worker had to be developed over a longer period of time to make the bargain economical for the master.[15] The actual relationship between servant and master, as specified by the respective penal codes of the colonies that developed since the early seventeenth century, closely reflected the very different social contexts to which those servants came.

The immigrants to the Cheasapeake area were primarily single male adventurers; there was a lack of women and, not least due to diseases, a high mortality, which forced the Cheasapeake planters to seek a continuous influx of new labourers from England.[16] From the early seventeenth century onwards, a legal system of brutal disciplinary control developed to protect the colonist's property in servants, for, as the Virginia Company readily acknowledged, "our principal wealth . . . consisteth in servants".[17] Again,

---

[15] J. HORN, Servant immigration to the Cheasapeake in the seventeenth century, in: T. W. TATE, D. L. AMMERMANN (eds.), The Cheasapeake in the Seventeenth Century. Essays on Anglo-American Society, Chapel Hill (N.C.) 1979, pp. 51-95; D. W. GALENSON, British servants and the colonial indenture system, in: Journal of Southern History 44 (1978), 41-66, pp. 52-54; D. W. GALENSON, The rise and fall of indentured servitude in the Americas: an economic analysis, in: Journal of Economic History 44 (1984), pp. 1-27; D. C. SOUDEN, "To foreign plantations": Indentured Servant emigration c. 1640-1660, BA thesis Cambridge 1976.

[16] L. S. WALSH, "Till Death us Do Part": Marriage and family in seventeenth-century Maryland, in: TATE, AMMERMANN, Cheasapeake, pp. 126-152; C. V. EARLE, Disease and mortality in early Virginia, in: TATE, AMMERMANN, Cheasapeake, pp. 96-125.

[17] GALENSON, Rise and Fall (above n. 15), p. 4; R. B. MORRIS, Government and Labor in Early America, New York 1946; E. S. MORGAN, American Slavery - American Freedom. The Ordeal of Colonial Virgina, New York 1975; H. S. KLEIN, Slavery in the Americas. A Comparative Study of Virginia and Cuba, Chicago 1967; P. D. MORGAN, British encounters with Africans and African Americans, c.1600-1780, in: B. BAILYN, P. D. MORGAN (eds.), Strangers within the Realm. Cultural Margins of the First British

the social context influenced the penal codes. County courts in Virginia and Maryland put into practice an increasingly rigid legislation concerning the disciplinary rights of masters over servants and concerning the punishment of runaways. In particular those runaways who had fled to the Indians to escape the increasingly harsh treatment and who were captured again faced all sorts of physical hardships legalized by the courts and unthinkable in England or New England at the same time. When the stream of servants to the Cheasapeake dried up after 1660 due to the stagnation of population in England and the changing labour market there, Virginia and Maryland planters were forced to resort increasingly to black slaves.[18]

By the late seventeenth century, Virginia had a black population of 7,000, and the ratio of white to black servants in one well-studied Virginia county had changed from 5:1 in 1668 to 1:4 just 30 years later. Yet at least until 1676 a situation prevailed very similiar to the one in England during the seventeenth and eighteenth centuries, for example, the acknowledgment of freed slaves as full legal subjects. As late as 1676 a former black slave on the Virginia coast was able to own property and act before a court like any white free man.[19] Yet in the 1660s, the legislation regarding black slaves, in particular their right to buy their own freedom and their protection as servants under the law against their masters began to change dramatically, as what historians now call "cattle slavery" was established. By 1664 Maryland passed its first specific slave laws, and by the 1670s a slave code was established. Virginia only received the first large group of 2,000 slaves from Barbados in 1674. By 1700 17% of the population were black, by 1725 25%. Cattle

Empire, Chapel Hill (N.C.) 1991, pp. 157-219.

[18] MORGAN, American Slavery; RUTMAN, Place in Time (above n. 13), pp. 71 f.

[19] KLEIN, Slavery (above n. 17), p. 147; RUTMAN, Place in Time (above n. 13), pp. 71 f; T. H. BREEN, S. INNES, Myne Owne Grounde. Race and Freedom on Virginia's Eastern Shore, 1640-1676, New York 1980; on the situation in England: MORGAN, British Encounters (above n. 17), pp. 159-161.

slavery was established alongside this increase in the absolute and relative number of blacks.[20]

The development in England and New England in regard to black slaves was quite different compared to that in the southern colonies. While black slaves were treated as part of the property of white households in all three societies, only in England and New England did a certain legal protection for slaves against maltreatment remain intact. Indeed, in England and New England freed slaves could become established heads of their own households. Philip Morgan's distinction between slave owning societies and slave societies pinpoints the social repercussions of the different socio-economical developments in both areas. Slaves made up the majority of the labour force and had become an indispensable means in the economies of the slave societies; they remained a tiny minority and were virtually irrelevant for the economies as a whole in the slave-owning societies. The former denied slaves the legal protections enjoyed by the white population. In the latter standards of appropriate behaviour towards slaves and their chances for legal protection never deteriorated the way they did in slave societies. Although the scarcity of white labourers since the outbreak of the English Civil War encouraged Emannuel Downing, one of Massachusett's leading citizens, to fear that Massachusetts would never prosper "untill we gett . . . a stock of slaves sufficient to doe our business", their legal treatment in Massachusetts followed in many ways the paths trodden by white indentured servants, just as cattle slavery in the South was indirectly introduced by the harsh penal codes against the indentured servants there. Massachusetts' white indentured servants had fought a successful legal battle against all forms of maltreatment. In the majority of legal actions of masters against their servants or servants against their masters, juries and judges protected the servants against the masters. Hence Massachusetts' servants chose to go to court in case of conflicts with their master rather than run away. By contrast,

[20] KLEIN, Slavery (above n. 17), p. 177; P. J. SCHWARZ, Twice Condemmed: Slaves and the Criminal Law of Virginia 1705-1865, Boston 1988.

Massachusetts' black slaves, although better treated than their southern brethren, had less support from Massachusetts juries and judges and resorted, in case of conflicts with their master, more to illegal absence and running away.[21] The ability to find allies for one's cause among juries and judges channelled social behaviour, influenced the jurisdictional process and, as the respective societies and their values had developed in opposite directions, led to fully divergent legal frameworks of labour relations in the American colonies by the time of the American Revolution, when slavery was abolished in Massachusetts.

A less obvious but none the less equally telling example of the interaction of law and society in the American colonies is the enforcement of morals. Both English lay and ecclesiastical jurisdiction were responsible for the regulation of social behaviour among English villagers and townsmen alike, and in particular the Puritan zeal for a reformation of manners rested mainly on the trust that magistrates would be willing to enforce Puritan standards of acceptable behaviour. Therefore, Puritan preachers reminded Assize and Quarter Session juries of their responsibilities to punish moral offences as much as capital crimes, and emphasized the alliance of preachers and magistrates as they had done in England. Although the Puritan leadership did not reintroduce an ecclesiastical jurisdiction specializing in the enforcement of the moral law, this was due to their negative experience with the Laudian ecclesiastical jurisdiction in England, and not due to any lack of zeal for moral betterment in New England. However, such a "zeal for successful implementation of moral legislation was not pervasive in colonial society", at least not among juries and those selectmen and constables responsible for presentments.[22]

---

[21] L. J. GREENE, The Negro in Colonial New England 1620-1776, New York 1942; the quotation from a letter of Emmanuell Downing, Winthrop's brother-in-law, in 1645, ibid., p. 60; L. W. TOWNER, "A Fondness for Freedom": Servant protest in puritan society, in: William & Mary Quarterly 19 (1962), 201-219, pp. 208-215.

[22] FLAHERTY, Law (above n. 8), p. 237; C. B. HERRUP, Law and moral in seventeenth-century England, in: Past & Present 106 (1985), pp. 102-123; R. V. FRIEDEBURG,

Although New Englanders did resort to legal action and made full use of the opportunities to overturn sentences by appealing to the next court, thereby continuing legal feuds between competing sections of a town or village, it was not the regulation of illicit sexual contact or absence from church service which came to the fore. Whereas English ecclesiastical jurisdiction had mainly punished sexual offences and bridal pregnancy even apart from cases of illegitimacy, American courts accepted bridal pregnancy and concentrated on the cases of illegitimate childbearing. In Maryland, in periods of the seventeenth century one third of all brides were pregnant at marriage, but Maryland courts chose not to regulate this offence. Whereas the increasingly rigid control of household-founding and hence bridal pregnancy in England resulted mainly from fears of overpopulation there, the lack of such fears in the American colonies influenced directly the composition of presentments and the social composition of offenders.[23]

IV. Conclusion

Let me conclude with three remarks on the "Britishness" of American legal culture. First, Colonial America's legal institutions were even more English in their origin than the settlers of British North America were. Even settlers

---

Reformation of manners and the social composition of offenders in an East Anglian cloth village: Earls Colne, Essex, 1525-1642, in: Journal of British Studies 29 (1990), pp. 347-385; D. T. KONIG, Law and Society in Puritan Massachusetts. Essex County 1629-1692, Chapel Hill (N.C.) 1979, pp. 8-33; R. THOMPSON, Sex in Middlesex. Popular Mores in a Massachusetts County 1649-1699, Amherst 1986, p. 19; WALSH, "Till Death us Do Part" (above n. 16), pp. 137-151; M. INGRAM, Church Courts, Sex and Marriage in England, 1570-1640, Cambridge 1987, pp. 234-279; L. F. SOLT, Church and State in Early Modern England, 1509-1640, New York 1990; C. BRIDENBAUGH, Mitre and Sceptre. Transatlantic Faiths, Ideas, Personalities, and Politics, 1689-1775, New York 1967.

[23] INGRAM, Church Courts, pp. 234-279.

from Germany or Holland did apply and make use of English legal institutions. What is more, English legal institutions in Colonial British North America displayed the same vulnerability to pressures from outside the courtroom as English institutions did. The legal regulation of labour relations and the enforcement of morals are examples of this vulnerability of the British legal system to pressures and interests from outside the courtroom. The consequences of this fact were ambiguous. Would-be Americans, like Englishmen, preferred to follow their interests through the courts rather than to disregard the law. As Catherine Menand has pointed out in her study on "Politics and Justice" in pre-revolutionary Boston, most parties involved in the courtroom battles respected the law and tried to work through it rather than around it. This holds true even for the tense situation between Boston citizens and English soldiers from 1768 to 1776. The only obstacle to the use of force there, Menand claims, was respect for the law, for "Massachusetts was not yet Ireland, it was not yet used to force . . . and no justice was willing to order out troops against civilians". To be sure, this is not to say that Ireland was lawless in comparison with New England. What I would like to stress is that American colonists did perceive the law as something serving their particular interests as well as higher causes, not least because, for example, martial law was not a legal means easily applied against them.[24]

Second, this respect for the law and this obstacle to the use of force had repercussions on the relation of the colonies to England. As late as January 1776, Delaware lawyer and deputy to the second Continental Congress John Dickinson, who himself later joined the Revolutionary Army, "viewed the greatest danger to the inhabitants in the loss of protection of the law at the hands of corrupt British authorities". American settlers did not fight British legal culture, but a specific interpretation within that culture of their relation to the Crown. They exchanged governors and judges, not the legal system. To

[24] MENAND, Politics of Justice (above n. 4), p. 178; N. CANNY, The marginal kingdom: Ireland as a problem in the first British Empire, in: BAILYN, MORGAN, Strangers (above n. 17), 35-66, pp. 57-62.

be sure, once American settlers were convinced that the legal system could not protect their right or was manipulated against their interests, they did resort to force. However, it is questionable whether, even then, the bloodshed between American settlers and English soldiers ever reached "Irish" dimensions. The theme of this collection of essays is whether there is a common British History shared by the three nations Ireland, England and Scotland. My paper has been about Colonial British America, the part of the British Empire which much earlier than Ireland successfully rebelled to receive independence. Historians have rightly come to stress the increasing divergence, after the Glorious Revolution, between the American and English interpretation of colonial government and representation. Yet despite these huge differences which finally led to the establishment of a sovereign United States, the American colonies were a part of the English Realm with regard to the use of the law and its institutions, which both English and Americans respected. Even the differences in interpretation of the colonists' status and their parliamentary representation did not rest on the different traditions of different societies merged together by conquest or treaty, but rather on different interpretations within the same framework of law and politics. Indeed, Governor Hutchinson from Massachusetts came to believe, that it were these similiarities which made it so difficult to govern the American colonies: "I doubt whether it is possible, to protect a system of government in which a colony 3,000 miles distant form the parent state enjoy all the liberties of the parent state . . . I wish to see the good of the colony when I wish to see some restraint of liberty rather than [that] the connection with the parent state should be broken." As a consequence, Thomas Hutchinson believed, to maintain the tie to England "an abridgement of what is called English liberty" would be neccessary.[25]

[25] HOFFER, Declaration (above n. 1), p. 188; MURRIN, Great inversion (above n. 4); on Hutchinson see B. BAYLIN, The Ordeal of Thomas Hutchinson, Cambridge (Mass.) 1974, pp. 91, 227; C. RUSSELL, The Causes of the English Civil War, Oxford 1990, pp. 131-160.

Third, that framework of a British legal culture had repercussions not only on the relation of the colonies to the Crown, but on the colonists' relation to their own magistrates as well. Kenneth A. Lockridge has described the political struggles in the colonies as a "fruitless struggle to achieve a legitimate political order". American colonists did not only question the authority of the British Crown, they also learned to question the authority of their own social betters as well. The debate of American historians over the role of social conflict in the American Revolution continues. Yet the arguments involved both in the conflict against the Crown and in social conflicts within the colonies were essentially reformulations of what had been debated earlier in England, just as the Declaration of Independence took the form of an English Bill of Equity and the claims for freedom of the American Revolution had antecedents in the Putney Debates of 1647.[26]

[26] K. A. LOCKRIDGE, Settlement and Unsettlement in Early America. The Crisis of Political Legitimation before the Revolution, Cambridge 1981, p. 3; D. M. WOLFE (ed.), Leveller Manifestoes of the Puritan Revolution, New York 1967, pp. 104-106.