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Criminal Justice in Colonial America, 1606-1660

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CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660. By *Bradley Chapin.* Athens, Ga.: University of Georgia Press. 1983. Pp. xvi, 203. $18.

The process by which the common law of England was received by American jurisdictions has long been a matter of dispute among legal historians.[1] While there seems to be a consensus that English precedent did not come to dominate American law until after the American Revolution,[2] the early period of colonial law, from initial colonization until the influx of English lawyers and heightened royal interest,[3] still sheds important light on the "transfer and transformation of common law in its American setting."[4] It is here that Bradley Chapin's book, *Criminal Justice in Colonial America, 1606-1660*, begins to fill what has been described as a glaring gap in American legal history.[5]

Chapin's work is apparently the first thorough survey of the criminal law in all of the original colonial jurisdictions.[6] Recent ef-

1. For a thorough examination of the reception issue, see J. GOEBEL & T.R. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) (1944); Chafee, *Colonial Courts and the Common Law*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 53 (D. Flaherty ed. 1969).

2. *See, e.g.,* Chafee, *supra* note 1, at 71-72, 74-75; Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676-82 (1912); Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907).

3. The development in the colonies of a legal profession in the latter half of the seventeenth century produced growing reliance on the English common law, which was familiar to contemporary legal practitioners. Concurrently, the crown began to assert more control over the colonies as their strategic importance in the mercantile structure became more apparent. *See* Flaherty, *An Introduction to Early American Legal History*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 3-4, 15-16 (D. Flaherty ed. 1969).

4. Billings, *Law in Colonial America: The Reassessment of Early Legal History* (Book Review), 81 MICH. L. REV. 953, 954 (1983).

5. A major inadequacy of extant studies of the history of American law in the seventeenth century is the absence of studies that compare the colonies with the mother country and one colony with another. At the present time such an approach to the study of legal history would appear to have great possibilities. Such undertakings may well do away with the traditional lament about having to study thirteen separate jurisdictions, for in colony after colony the historian is often much more impressed with the similarities than the differences. The distinctions between colonies exist, of course, but even they have not been explained or described except in the broadest terms. The uniqueness of the New England Puritans' reforms of English law can be questioned, for example, once one has examined the legal records of seventeenth-century Virginia.

Flaherty, *supra* note 3, at 13 (footnote omitted).

6. Much of the work in this area has focused on only one jurisdiction or region. *See, e.g.,* J. GOEBEL & T. NAUGHTON, *supra* note 1; Hilkey, *Legal Developments in Colonial Massachusetts, 1631-1686*, XXVII COLUMBIA STUDIES IN HISTORY ECONOMICS, AND PUBLIC LAW (1910). Other works have focused on much narrower issues. *See, e.g.,* C. KARRAKER, THE SEVENTEENTH-CENTURY SHERIFF: A COMPARATIVE STUDY OF THE SHERIFF IN ENGLAND AND THE CHESAPEAKE COLONIES, 1607-1689 (1930). For an extensive review of the literature on early American law, see Flaherty, *supra* note 3.

forts in the resurgent field of legal history[7] have been characterized by close scrutiny of primary sources,[8] and Chapin follows this lead, drawing heavily on the records of legislative and judicial proceedings. His book is obviously the product of a comprehensive and thoughtful consideration of these sources. The author has identified dozens of noteworthy cases and has amassed empirical data concerning the occurrence of crime and the sources of colonial law and procedure.

Chapin uses this information to review four major facets of colonial criminal justice: the substantive criminal law, the judicial process it entailed, the courts and officials involved in its administration, and the nature of colonial crime. He examines the colonial jurisdictions[9] individually and with reference to geographic and demographic groups. He then compares the results of these analyses with parallel developments in the English common law.

Chapin devotes systematic attention to each facet of the colonial criminal justice system. For example, the chapter on judicial proceedings progresses from arrest to post-conviction relief, much like any modern criminal procedure casebook. Within this highly structured survey format, Chapin integrates the work of other legal historians with illuminating anecdotal digressions. Accounts of cases involving crimes such as homicide, bestiality and witchcraft[10] transform what might otherwise be a dry, specialized study to one with more general appeal.

Chapin also considers the early struggle between discretionary justice and the strict rule of positive law, a theme often discussed in works on colonial American law.[11] Initially, the colonies inherited the common law principle of legal explication by judicial usage rather than statutory enactment (p. 15). Chapin notes that by 1660 the New England colonies,[12] at least in the area of criminal law, had

7. The resurgence began in the late sixties and early seventies. Billings, *supra* note 4, at 953 n.1.

8. The long neglect of primary sources is discussed in Haskins, *Law and Colonial Society*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 41 (D. Flaherty ed. 1969).

9. There were seven initial jurisdictions: Virginia, Plymouth, Massachusetts Bay, Maryland, Rhode Island, Connecticut, and New Haven.

10. For example, Chapin details the plight of George Spencer, who was accused of bestiality. Pp. 38-39, 128-29. Spencer, who had only one eye, was accused of impregnating a sow that had given birth to a hideously deformed, one-eyed piglet. P. 128. The explicitness of the official record verges on the macabre and, viewed from a modern perspective, is an absurd indictment of Puritan naiveté. Chapin quotes the official record to illustrate that bestiality was prosecuted out of a simplistic fear of half human, half animal "monsters," p. 128, as well as out of moral indignation.

11. For a presentation of a variety of issues customarily addressed in works on colonial law, see ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW (D. Flaherty ed. 1969) and LAW AND AUTHORITY IN COLONIAL AMERICA (G. Billias ed. 1965).

12. Chapin often groups colonies together in a north/south dichotomy, referring to the New England Colonies and the Chesapeake Colonies.

shifted to a predominantly statutory system. Chapin attributes the shift primarily to opposition to "discretionary" justice (p. 19). In contrast to their northern counterparts, the Chesapeake colonies adhered to a discretionary, non-codified system, a choice which Chapin attributes to political and demographic differences, as well as the absence of a strong ideological base upon which to build a code — something the New England colonies had found in the example of Moses (p. 22).

Chapin seems offended by those who would dismiss the early colonial criminal justice system as primitive. In addition to the successful shift toward simplified codes of law, he points to the relative success of reform in the colonies as evidence of sophistication. A primary example is opposition to the death penalty (pp. 55-58). Capital punishment was the norm for felony convictions in England, but in the colonies the death penalty was mandated only for murder and treason. The death penalty was virtually abolished for property crimes (p. 8) and was replaced by lesser corporal punishments. Chapin attributes the success of colonial reform to a lack of political and legal obstacles, an ability to respond to problems in a more pragmatic manner, and the greater value placed on life where labor was at a premium.

The underlying advantage of Chapin's work is that it sheds more light on the process of reception. He refutes both the orthodox view of early legal scholarship, which held that reception was an incident of initial colonization,[13] and "the frontier thesis, that beast of all American historical burdens" (p. 145), which characterized colonial law as "rude, untechnical popular law,"[14] influenced by English and

13. This theory was espoused by two of the preeminent jurists of the nineteenth century, Justice Story and Chief Justice Lemuel Shaw. *See* Chafee, *supra* note 1, at 61-64. It holds that reception can be inferred from the language of several of the original colonial charters. For example, the Massachusetts Bay Charter 1628-1629 says:

> That it shall . . . be lawfull . . . in any of their Generall Courts . . . from tyme to tyme to make, ordeine, and establishe all manner of wholesome and reasonable orders, lawes, statutes, and ordinances, directions, and instructions not contrarie to the lawes of this our realm of England, . . . and the forme of oathes warrantable by the lawes and statutes of this our realme of England . . . and for impositions of lawful fynes, mulcts, imprisonment, or other lawfull correction, according to the course of other corporations in this our realme of England . . . .

Chafee, *supra* note 1, at 57. *But see* Goebel, *King's Law and Local Custom in Seventeenth Century New England*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 85-86 (D. Flaherty ed. 1969) ("In the last analysis the charter provisions are significant only as to the relations of a particular colony with the homeland, and cannot be regarded as constituting a reliable guide to what in fact transpired in America.") (footnote omitted).

14. Reinsch, *supra* note 2, at 370, *quoted in* Chafee, *supra* note 1, at 65. Hilkey, *see* note 6 *supra*, and Reinsch were the major proponents of this view of reception. *See* Chafee, *supra* note 1, at 64-66. In the context of his study, Chapin characterizes this view of a primitive colonial law as "fantastic," p. 146, citing the success of reform and the move toward simplified codification of the criminal law in the colonies during this period. *See* text following note 11 *supra*.

Biblical law, but essentially a product of unrefined invention. He concludes:

> If we are to understand law development in America before 1660, we need to abandon the noun "reception" and replace it with the verb "carry." Emigrating Englishmen brought the law in their baggage. As immigrants always have, they left some of their possessions behind and would use some of what they carried with them for different purposes than had been intended. The law that colonists installed in the new jurisdictions was the result of conscious choice. The process of selecting from the old materials showed an awareness of the duality of the common law. [P. 146].

In the sense that Chapin has successfully undertaken the extensive comparative analysis needed in a project of this sort, his work is both ambitious and ground-breaking. Much of the work in this area has focused on only one jurisdiction or region.[15] He has embraced the difficult task of collecting and analyzing the primary sources,[16] and has made a conscious effort to avoid a problem that plagues scholarly research on colonial America — neglect of the southern colonies.[17] Chapin's work, however, is by no means flawless. Survey work, by its very nature, tends toward generalization.

For example, Chapin often illustrates points with quotations from primary sources. While this method may be both revealing and persuasive, it is not necessarily authoritative, for at best the records reveal only an approximation of what really happened. Colonial records were seldom "kept in a fashion that allows reconstruction of what they recall with mathematical precision."[18]

Similar criticisms can be directed toward some of Chapin's attempts at quantification. In an effort to make a large amount of empirical data manageable, he reduces it to chart form. The success of this technique varies greatly depending on the type of information being processed. For example, a chart detailing all of the known witchcraft trials prior to 1660 (pp. 118-19) works well, displaying a large volume of essentially objective data in an accessible manner. On the other hand, the charts devoted to the sources of colonial law and the mode of expression (judicial versus legislative) (pp. 181-85), though informative, tend to be misleading. For example, when noting the sources of the substantive criminal law, Chapin concludes that 56.5% derives from English common law, 25.1% from indigenous sources, and 18.4% from the Bible (p. 5). Chapin concedes that his assignment of percentage values is arbitrary but contends that his figures are a fair representation (p. 181). Nevertheless, they suggest

15. *See* notes 5-6 *supra* and accompanying text.

16. *See* note 8 *supra* and accompanying text.

17. *See* Billings, *supra* note 4, at 954.

18. *Id.* at 961.

mathematical precision that cannot fairly be ascribed to subjective considerations, particularly in a work relying on largely unverifiable records that are hundreds of years old.

Ultimately, Chapin's work — essentially an exposition of what the law was — is in some respects subject to the criticism that it, like other studies of the colonial period, has over-emphasized institutions and origins.[19] Yet Chapin has produced a highly informative survey of colonial criminal justice. Along the way he uses this survey to support his own observations about the reception of the common law. Chapin deserves much credit for surpassing so many of the limitations of previous works; a book such as this is necessary before broader concerns can be addressed.[20] As a foundation upon which past works may be evaluated and future work constructed, *Criminal Justice in Colonial America* is a complete and concise reference work of great value.

19. While these [origins and institutional] studies are important matters, they should not constitute the boundaries of legal history to the detriment of more broadly conceived studies. Professor Stanley N. Katz has recently criticized the traditional character of even the more recent work in American legal history, which has continued to abide by old-fashioned notions about periodization and has focused on a limited range of source materials. Katz emphasizes the need to study law broadly and to turn our concern from what law was to how law worked.

Flaherty, *supra* note 3, at 33 (footnote omitted).

20. One must begin the study of legal history by posing the right kinds of questions. For what apparent or underlying reasons were certain legislative acts enacted? How did these statutes reflect the basic values of the society? To what extent did legislatures abandon control to the forces of inertia in a particular area? On what broad principles were cases being decided in the courts? Did the laws and the judicial decisions reflect the dominant forces at work in the society? To what extent did these new laws or decisions reflect changes in a developing society? Such crucial questions overlap many areas of historical specialization and an up-to-date legal history can integrate them into a coherent whole. If the tasks of legal history are construed broadly enough and the correct questions posed, the history of American law can be a major area of historical investigation and will contribute substantially to an understanding of the history of an era.

See Flaherty, *supra* note 3, at 33.