



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

Introduction

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(Article begins on next page)

Introduction

BRUCE H. MANN

The articles in this issue are drawn from the papers delivered at the conference “*Ab Initio*: Law in Early America,” held in Philadelphia on June 16–17, 2010—the first conference in nearly fifteen years to focus on law in early America. It was sponsored by the Penn Legal History Consortium, the McNeil Center for Early American Studies, the American Society for Legal History, the University of Michigan Law School, and the University of Minnesota Law School, under the direction of Sarah Barringer Gordon, Martha S. Jones, William J. Novak, Daniel K. Richter, Richard J. Ross, and Barbara Y. Welke. For two days, fifteen mostly younger scholars presented their research to a packed house, with formal comments by senior scholars and vigorous discussion with the audience. That earlier conference, “The Many Legalities of Early America,” which convened in Williamsburg in 1996, had illustrated the shift from what was once trumpeted as the “new” legal history to something that never acquired a name, perhaps because it was less self-conscious in its methodology. “*Ab Initio*” offered the opportunity to ask how the field has changed in the years since.

The “new” legal history, which flourished in the decades surrounding the 1970s, was a socio-legal history that treated law as one social institution among many and sought to explain legal change in terms of social and economic change. For a variety of reasons, and with only occasional exceptions, early socio-legal historians rarely looked beyond economic issues to questions of social structure, community, or religion. Their principal focus was the economy, which had the effect of reducing the larger

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field of law and society to a subset, law and economy. For the nineteenth century, attempts to prove or disprove the “Horwitz thesis” reinforced this focus, a testament to how thoroughly Morton J. Horwitz’s exceptionally incisive and provocative questions about the relationship between law and economy transformed the field. The “new” legal historians of early America, on the other hand, took a somewhat broader approach. Coming of age when early Americanists were on the cutting edge of social history, they imbibed the social historian’s impulse to study society from the bottom up and the social historian’s method of immersing oneself in large quantities of diverse sources to discern meaning from patterns rather than from individual instances. As social historians of law, they studied how law looked to people who were not themselves lawyers or judges.

By the time of the “Many Legalities” conference, the intellectual focus of early American legal history had shifted. Whereas the “new” legal historians had seen the challenge of doing legal-history-as-social history as how to connect the intricacies of legal substance and procedure to economy and society, their successors were less centrally engaged with law. The inner workings of practice and procedure, the interplay between internal and external pressures for legal change or stability, the continuities and discontinuities between changes in law and in society, played fainter roles in their inquiries. Instead, they tended to take law as a given—less an object of study than a tool to study questions of gender, ethnicity, family, patriarchy, culture, dependence, and the like. This is not to say that they were not doing legal history or that they were not extending our knowledge of law and society; far from it. Rather, what was often missing was an equal marriage of legal and historical sophistication—a recognition that attention to seemingly mundane matters of legal procedure and sensitivity to the complexities of gender, race, culture, class, and the like, can complement one another. There were, of course, powerful exceptions—the work of Cornelia Hughes Dayton and Holly Brewer come first to mind—but for the most part our understanding of early American law was not deepening apace with our understanding of early American society.

In one sense, this changed focus could be said to have fulfilled the desire of the “new” legal historians to treat law as so deeply embedded in the world that one can look anywhere and see its reflection. But it left something out. Law is unquestionably a social phenomenon, but it retains enough autonomy to be an actor in its own right. This was one of Christopher Tomlins’ points in his introduction to the volume that came out of the “Many Legalities” conference, in which he argued that law was not just a framework, but a central actor in the extended processes of colonization—an argument he has fleshed out brilliantly in his recent Bancroft Prize-winning book.

So, what has changed in fifteen years? For one thing, there are signs of a reengagement with things legal. This may reflect the rising popularity of joint J.D./Ph.D. degree programs, although they tend to attract people more interested in the nineteenth or twentieth centuries than in the seventeenth or eighteenth. Another influence is undoubtedly William E. Nelson, whose Legal History Colloquium and Golieb Fellowship Program at New York University have been almost mandatory for young legal historians. In addition, some of the papers for the *Ab Initio* conference reflected an interest in public law that was simply not there earlier.

Looking back over the last decade and a half, it is clear that the scholarly migration forward in time that was already well under way has continued, much as it has for the field of early American history generally. The seventeenth century has largely disappeared as a period of study for legal historians. In fact, for most of the papers at the conference—apart from the articles by Terri Snyder and Honor Sachs published here and one or two others—the Revolution itself is receding in the rear-view mirror. The pages of the *William and Mary Quarterly* reveal much the same trend for early American history generally, albeit not quite as pronounced. The two major institutional players in early American studies, the Omohundro Institute for Early American History and Culture and the McNeil Center, have both extended their purviews deeper into the nineteenth century. In part, this is a natural consequence of two seemingly inconsistent, yet not quite contradictory, changes in how we view the American Revolution.

The old view was that the Revolution marked a break with the past so decisive that everything was transformed—so much so that if one was an early Americanist, one's courses and scholarship stopped no later than 1776, and the next shift did not take over until 1787, with a course on the Revolution and Confederation sandwiched in between. To be sure, the American Antiquarian Society, Charles Evans's *Early American Imprints*, and the Omohundro Institute (back when it was just the Institute), all maintained that everything up to 1815 or 1820 was fair game, but few scholars went along. A newer view does not deny the revolutionary nature of the Revolution, but it is more inclined to see the Revolution as accelerating changes that were already underway rather than wiping the slate clean. In terms of law, this meant that changes previously attributed to the Revolution were now seen to have occurred or at least begun much earlier. Large swaths of the legal history of the eighteenth century thus became part of an interpretive arc that continued long after the Revolution. Ironically, this may have helped isolate the legal history of the seventeenth century by detaching it from that of the eighteenth century.

The second change in how we view the Revolution has been to make it even bigger and more transformative; to say that its influence, not simply

its legacy, remained vital deep into the nineteenth century, doubling down, as it were, on the traditional portrayal of the decisiveness of the Revolution. In this interpretation, the Revolution does not so much echo through the decades as it rings loudly and reverberantly, almost forcing successive generations to measure themselves against the founding one.

The first change is, in part, one of periodization. It is, of course, a truism that temporal and physical divisions are human constructs and that what historians see changes dramatically when they shift or expand their field of view. We saw this happen geographically when Britain's Canadian and Caribbean colonies were put back into the picture by expanding the thirteen colonies that became the United States into the larger entity of British North America. We saw it happen again with the historiographic invention of "the Atlantic world." And it is happening yet again with the addition of the Asian Pacific rim and India. Some of the best recent work in early American legal history builds on this kind of expanded perspective, such as Lauren Benton's work and Tomlins', which are about so much more than just early America.

These scholars aside, for legal historians the most productive change in perspective has been temporal. In the new periodization, there is much more continuity between the eighteenth century and the nineteenth. Law in the middle of the eighteenth century was very different from what it had been a century earlier and not as different from what it would be a century later. For all its importance in other matters, and for all that law was part of it, the Revolution was not a revolution in law, with the possible exceptions of the law of slavery and some minor changes in rules of inheritance. It may have accelerated certain legal changes by removing the constraint of empire, but the process of change was already well under way.

Simply revising the periodization of American legal history, without more, is, of course, a bit of a parlor trick. Admittedly, the urge to stop there is great. After all, legal historians once dismissed law in early America as either British or as not law at all. Grant Gilmore dismissed the colonial period in his 1974 Storrs Lectures with a short wave of his hand as of "no more relevance than the law of the Sioux or the Cheyennes." Even the great Willard Hurst, a genuinely kind and gentle man, would try to persuade every young legal historian he met that working in the colonial period was a misuse of scarce intellectual resources. So there is a sense in which reperiodization is a form of revenge, if not outright patricide.

The real question about periodization is the "So what?" question Bernard Bailyn would put to his graduate students after their seminar presentations. The reminder that however curious or entertaining the objects of study are, they must also be illuminating; they must cast light on the larger questions

that historians seek to answer. The question about this reperiodization of legal history—about detaching the eighteenth century from the seventeenth and connecting it to the nineteenth—is whether it will make any difference in how historians write about the eighteenth century generally, or is it simply a variation on the time-honored game of trying to pinpoint the decline of community in early New England?

What, then, is the “beginning” to which the “from the beginning” of *ab initio* refers? The best answer may be that, as with many legalities, there can be many beginnings, which vary according to one’s field of view. But if scholars of early American legal history are moving forward into the nineteenth century, and if the Revolution is receding in the rear-view mirror, we should not be tempted to rip out the mirror and say, with a flourish, that what is behind us does not matter.

The articles published here attest to the robust diversity of scholarship in the ever-changing field of early American legal history. Terri Snyder offers a new perspective on families under slavery by examining how free women of color married to enslaved men resorted to law in their efforts to protect themselves and their children from exploitation and enslavement. Honor Sachs similarly explores the shifting boundaries of slavery and freedom, as multiple generations of an Afro-Indian family asserted their freedom in the face of a tightening legal nexus between race and enslavement. Alison LaCroix draws on her deep knowledge of federalism to argue that extending general federal-question jurisdiction to the inferior federal courts was a key element of the Federalists’—and, in particular, John Marshall’s—project of building national supremacy into the structure of the new republic. And Kevin Arlyck shows us how Spanish and Portuguese consuls cannily, and largely successfully, turned to federal courts to protect the commercial claims of their clients and, in effect, to shape foreign relations, when the federal government itself failed or refused to do so. Together, these articles offer a fine snapshot of where the field is now.