Justices, Books, Laws, and Courts in Seventeenth-Century Virginia*

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Professor Billings explores the origins of law in seventeenth-century Virginia by examining the interplay between the social origins of colonial justices of the peace and English legal literature of the times.

I. Introduction

Virginia drew few lawyers to its shore in the seventeenth century. Most of the councillors of state, members of the House of Burgesses, sheriffs, clerks of court, and justices of the peace on the Virginia county courts from 1634 to 1699 were nonlawyers. In other words, amateurs laid the foundations of the Old Dominion’s courts, legislature, and laws.¹

Such a discovery, on its face, is not startling. It was an article of English cultural faith that men of affairs, by reason of their exalted station, were naturally blessed with talents necessary to rule. Great social position distinguished those persons as individuals of power and influence. Their standing in the community obliged them to use their superior endowments for the benefit of all. One might enhance his gifts through university training, practical experience, or, in the case of members of the bar, a stint at one of the Inns of Court.

While such observations cannot be gainsaid, they miss an essential quality of difference between seventeenth-century English jurists and their Virginia counterparts. English magistrates came from traditional ruling classes; Virginia lawmakers did not. Until they emigrated to the New World, few colonials had any previous judicial or legislative experience. Yet, those very individuals took one of England’s more complex cultural

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¹ This profile derives from an electronic database I have developed on Virginia officeholders from 1619 to 1699. The data include such characteristics as date of birth, place of origin, education, occupation, time of arrival, residence in Virginia, offices held, dates of appointment, land ownership, and kin connections.
institutions—the law—and fashioned it into a device for defining the Creole society they helped to raise up in the Old Dominion. That circumstance leads to several obvious questions. Who were the justices? What did they know of English law? How had they come by their knowledge? Was there any link between their social origins and their crafting of the colony’s legal structure? How did the courts work to maintain order? Answers to these questions inform the substance of this article.

II. Contributions of the Royal Governors-General

While the Virginia Company of London managed Virginia between 1607 and 1624, its officials recruited the colony’s leaders from the English ruling classes. The men the company selected were well acquainted with the realm’s law. Possessing the advantages of privilege, they had been educated at the universities or the Inns of Court, and they enjoyed close connections to the crown and to Parliament. Despite those credentials, these individuals left a negligible mark upon Virginia’s courts and its laws. The severity of settlement drove some off. Many never intended to remain there any longer than it took to sate their appetite for adventure, and Virginia proved too hellish for others to endure. Their inability to adjust to frontier conditions, plus the backers’ own uncertainty about the direction in which to take the colony, stayed necessary decisions regarding suitable legal arrangements. Thus, the hands that crafted English law to colonial needs were those of the settlers, who filled seats in local government and the General Assembly in the years after the Virginia Company lost its charter.2

Once Charles I proclaimed Virginia a crown colony in 1625, the men who rose to lead belonged to two distinct groups: the royal governors-general and the new colonists. Royal governors-general comprised the smaller group, and their office invested them with an enormous potential to shape colonial law. A fair assessment of their collective impact is not easily obtained, owing to the dearth of information for all but a few: Sir Francis Wyatt (governor from 1625-26, 1639-41), Sir John Harvey (governor from 1630-35, 1637-39), Sir William Berkeley (governor from 1641-52, 1660-77), Thomas Culpeper, 2d Baron Culpeper of Thoresway (governor from 1677-83), and Francis Howard, 5th Baron Howard of Effingham (governor from 1683-92).3

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This much is uncontrovertible. Governors shared their lawmaking responsibility, first with the General Assembly and then with the county courts. Gradually, after the inception of the Assembly in 1619, the legislature enjoyed a larger measure of authority. After 1634, as the Assembly assigned wider powers to the county courts, justices of the peace were largely responsible for administering and enforcing colonial law. Gubernatorial influence lessened during the Interregnum (1652-1660), when governors saw their importance dwindle as Cromwellian notions of parliamentary supremacy enhanced the General Assembly's prestige, and during Sir William Berkeley's long administration, because Berkeley acquiesced in the leading colonials' thirst for aggrandizement.

Berkeley's successors were under strict royal orders to make colonial law conform to English practice, but they had limited success in carrying out those orders. Colonel Herbert Jeffreys, a devoted servant of Stuart imperialism who succeeded Berkeley in 1677, died too soon to make much of a mark. Governor Thomas Culpeper, Jeffreys' successor, displayed a greater fancy for stuffing his purse than for obeying his sovereign, but he did curb the Assembly's right to act as a high court of appeals. Governor Effingham attempted to draw colonial law nearer to that of the mother country by regularizing existing practices in accordance with those at home instead of introducing more of the common law or altering the substance of what the colonists had already appropriated. The restraints that both Culpeper and Effingham managed to place on the Virginians' autonomy made a potential enemy of the royal governor, and that alteration of politics had significant consequences for Anglo-Virginia relations throughout the rest of the colonial era.4

III. Contributions of the Post-Company Immigrants

The second group of leaders came from the ranks of post-Virginia Company immigrants. They were part of a great migration of Englishmen who left a troubled country in hopes of finding prosperity in Virginia. What began as a trickle freshened by the 1630s into a surge of colonists that did not abate for half a century. Arriving in the thousands, the new settlers soon overbore Virginia's existing legal order beyond its capacity to meet the requirements of a proliferating, scattered frontier community. The General Assembly responded by establishing county courts as the mechanism of local governance. This itself led to further appropriations of English law. Beyond that, the new arrangement swelled the number of public offices throughout the colony, and the prospect of acquiring one of

those posts lured ambitious colonists. Immigrants thus became the clerks, justices of the peace, sheriffs, burgesses, and councillors who effected the transfer of England's legal patrimony to Virginia.\(^5\)

How this transformation happened may be illustrated by considering the shared characteristics of the justices of the peace who flourished between 1634 and 1699. Most were substantial landowners who owned between five hundred and fifteen thousand acres, and some became the dominant economic presences in their respective communities. Collectively, they monopolized the important county offices, served in the House of Burgesses, and took seats on the Council of State. Ties of kin and personal affiliation intertwined their families into a tangled network of relationships.\(^6\)

The justices had similar backgrounds and origins. They arose from the variegated social class that Stuart Britons graphically styled "the middling sort." Assuredly, some were gentlemen, but mostly they were merchants, bakers, salters, or of some other skilled occupation, though they were not part of the London mercantile establishment that had promoted colonization during the Company years. Instead, they ranked with the commercial men who assumed controlling interest in the Virginia trade after 1624. A majority resided in London or Bristol at the time they quit England for Virginia, but many were of country stock and had gone to town in search of their fortunes. Discovering none, they cast their lot in the New World. Sometimes they had benefitted in their formative years from the improved educational opportunities that were an English hallmark of the period, but the merest of handfuls were university graduates or matriculants at the Inns of Court. Most had no more than a grammar school education or an apprenticeship. They rounded off their education with experiences gained in the rough-and-tumble world of their respective callings. In a word, these collective characteristics placed the justices amidst a socio-political elite that began to dominate Virginia in the decades after 1624, and continued until after the Revolution. The noteworthy effect of such markings in the seventeenth century was the impact upon the colony's emerging legal order.\(^7\)

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5. Colonial Virginia, supra note 2, at 54-66.


7. The composite profile derives from the database cited in supra note 1.
IV. The Effect of Social Origins

Virginia drew freewheeling Britons who wished to exchange the intricate legalities of home for a perceived opportunity to chase private gain in Virginia in nearly perfect freedom. Their mercantile origins gave such colonists competitive advantages, enabling them shamelessly to exploit any opportunities that fell in their way. Once in the Old Dominion, however, they soon learned that there was much more to living in their new world than the mere hunt for achievement. Survival was the first requisite, and, as many a settler discovered, ambition alone guaranteed neither survival nor success. Merely staying alive in a strange place was chancy, but as proficiency at coping with the wilderness grew, the rhythms of colonial life demanded increased regulation. Without rules there was no order; debts could not be collected, estates could not descend, and property—human or real—could not be acquired or disposed of. Because these and dozens of other social needs remained imperatives of intense concern throughout the seventeenth century, the colonists could not escape the restraints of their background. Perfect freedom meant both perfect chaos and the loss of cultural identity. The latter possibility was a terrifying prospect, made the more frightful by the separation from England and the discontinuities that punctuated Virginia throughout its first century. Confronted by these grim realities, justices looked to their legal roots in order to find the means of giving their society definition and direction. The justices became the instruments by which common law was fashioned to the colonial setting.

Their feelings of immediacy were intensified by their cultural heritage. They sprang from a society that emphasized the primacy of law as the cord that drew everyone together into a civilized community. Like other Western legal systems, English law comprehended the citizen's priceless belongings—beliefs and family, property and reputation, life and liberty. Its form gave common law its distinctiveness. Common law likewise represented an ageless wisdom about the right construction of the English polity. It afforded the realm protection by maintaining peace among the populace, and it fixed standards of taste, manners, and morals. Its forms and rituals served to remind all sorts and conditions of men that it was the arbiter of their conduct. It was all of these things, and it was more than these things. Taken in its broadest sense, common law was the ultimate statement of English culture because it defined an identity that set Britons apart from their fellow Europeans and the peoples of the New World.8

Englishmen required little formal instruction to appreciate how common law gave meaning to their lives; it pervaded their daily existence. Everywhere they looked about them, they found themselves enfolded in some corner of common law's ample fabric. They imbibed from birth precepts that regulated their households as they observed the relations between themselves and their parents. As they grew older, they came upon rules that governed political power, social gradations, the church, and the distribution of wealth in the larger society. When they took up a calling, got married, had children, changed residences, acquired property, or committed crimes, they again discovered themselves bound by time-honored forms of behavior. No matter where they turned, they found law an inescapable part of life. Little by little, they came to understand that a well-ordered kingdom was a regulated community that kept its subjects peaceful and out of harm's way. Hence, by the time they were adults, they had learned to appreciate a basic tenet of common law: "salus populi suprema lex est," that is, "the safety of the people is the chief law."

That maxim constituted a significant article in the justices' learning. It was readily bent to Virginia purposes, even by men who were not lawyers. Colonials needed an awareness of the axiom, a concern for their own well-being, and a willingness to act—endowments that they all possessed in some abundance.

Of course, the justices received more than a cultural brush with English law. Their backgrounds in commerce and the skilled trades often caused them to participate in various legal proceedings. In the routine course of doing business, they acquired the experience of drawing up instruments such as bills of exchange, bonds, charter parties, conveyances, indentures, and wills. Clearing debts or settling business disputes provided contact with other legal processes. That exposure gave them valuable instruction in bringing suit, collecting and giving evidence, or discharging the duties of attorneyship. Taken together, these and similar encounters gave the justices a layman's working grasp of how England's legal institutions operated, just as they were led to view law from a particular collective turn of mind.

To men lacking in formal legal education, the crucial expression "the common law" signified something quite different from what it meant to the governors. For example, Sir William Berkeley, who studied at the Middle Temple, knew the several shades of meaning that contemporary lawyers and commentators attached to the phrase. To him, it could be used to differentiate between English and continental law, as well as between

9. William Fulbeck, A Direction, or Preparative to the Study of the Lawe ch. 1 (1600). Unless specified otherwise, citations to this and other seventeenth-century legal literature throughout this essay are to the editions in the author's personal library.
law and equity, or the case law that regulated the proceedings in the courts of king’s bench and common pleas, and it could distinguish the unwritten law of immemorial usage from the statutes. To Virginia justices, however, the words conjured a more restrictive meaning: they referred mainly to those branches of law with which the justices had the greatest familiarity—equity, the law merchant, and the customary law of the localities from which the justices sprang.10

V. The Influence of Legal Texts

No less important than these practical exposures was the instruction the justices took from a storehouse of law books that abounded in print and circulated readily on both sides of the Atlantic down to 1700. Law books had been a staple of printers and booksellers almost from the moment William Caxton introduced movable type to England in the 1470s. By 1607, dozens of legal titles lay within the reach of any literate colonist. Thereafter, the number and variety of available texts increased as the political and constitutional crises of the seventeenth century energized the enthusiasms of Britons for their law. Given the range of legal information that Virginia justices could potentially command, how does one identify which books circulated in the colony and determine their collective impact?

Identifying a representative sampling of volumes presents no particular challenge. Estate inventories often listed contents of libraries by title. That information, combined with studies by modern scholars of colonial reading habits, libraries, and intellectual history, afford the basic data. What is more problematic to any such inquiry, however, is resolving the relationship between ownership and use of books. Did ownership signify usage? The answer is yes. Law books were not prohibitively priced, but still represented no small investment to the purchaser. Purchasers of law texts were not likely to squander precious capital on bagatelles. Also, legal works were bulky tomes; shipping them to Virginia required precious cargo space in the small, leaky vessels of the day, and colonists were unwilling to squander limited hold capacity on useless items. Then, too, the reading habits of literate Englishmen were such that they collected books for instruction and not for entertainment or pleasure. Given such considerations, the inference that colonists who owned or purchased law books intended to use them is undeniable.11

11. See generally H.A. Holland, English Legal Authors Before 1700, 9 Cambridge L.J. 242 (1945-47); Howard J. Graham, The Rastells and the Printed English Law Book of the Renaissance, 47 Law Libr. J. 6 (1954); An Inventory of the Goods Chattells Wares and Merchandizes Belonging to the
The range of titles ran the gamut of available works. Of the various abridgments of English statutes, for instance, those of Sir Robert Brooke, Sir Anthony Fitzherbert, Ferdinando Pulton, William Rastell, and Edmund Wingate were among those most often owned by Virginians. The extent of their influence on colonial law is speculative, however, because no causal connection between an abridgment and a Virginia statute or lawsuit has ever surfaced.

Case reports by Sir James Dyer, Edmund Plowden, Edward Bulstrode, Sir George Croke, and Sir Edward Coke also appear in colonial inventories, but their effect on the law is equally difficult to calculate. Early editions were in law French, which probably precluded their widespread use in the colony. Although Sir Thomas Ireland published a single volume abridgment in English of Coke's Reports in 1651, a complete translation was unavailable before 1658, approximately the same period when English renditions of other reporters came on the market. What may have occurred, then, is that reports of any kind did not leave much of a mark until the 1650s, when the English versions began to be among the law books of men who migrated to Virginia or who rose to adulthood after that decade. William Fitzhugh, Ralph Wormeley II,
Richard Lee II, and Arthur Spicer, for example, all owned some parts of Coke's Reports, and Fitzhugh's surviving correspondence shows that at least he consulted an English edition of Coke frequently. Moreover, in two 1685 cases—an admiralty cause heard in the Westmoreland County Court and a murder trial before the General Court—Coke's authority was invoked by the defendants.

Then there were those texts which expounded legal philosophy or procedures, as well as an occasional judicial biography or treatise on parliamentary practices. Coke's Institutes and the writings of Sir Henry Finch, Sir John Fortescue, Christopher St. Germaine (or Saint German), William Fulbeck, and Sir Thomas Littleton achieved widespread circulation throughout the English-speaking world. By the seventeenth century, Fortescue's, St. Germaine's, and Littleton's books were already recognized as classic commentaries on English law. Fortescue intended A Learned Commendation of the Politique Lawes of England to instruct the young Prince Edward in the mysteries of England's legal customs, and it was in the form of a dialogue between the author and the prince. He stressed two main themes, the rule of law and the limited character of the monarchy—ideas whose time had come by the 1600s. St. Germaine cast his Doctor and Student in the Socratic form, too; his intended readers were prospective lawyers. Indeed, the book was nearly like a modern textbook in its scope and content. Littleton's Tenures was a technical treatise on fifteenth-century property law, wherein the author described estates, types of tenures, joint ownerships, and the special doctrines of real property in an intelligent style that distilled complex law into a logical system of principles. Finch and Fulbeck were more obscure authors who produced rather pedestrian books. Virginian ownership of their writings is what renders them noteworthy. It suggests an eagerness by the justices to seize upon any theoretical study that might confirm them in their search for serviceable legal traditions.


Law Library Journal

Judicial biography afforded the reader the inspiration of exemplary lives in the law. None was more deliberately calculated to serve that purpose than Burnet’s *The Life and Death of Sir Matthew Hale*. Hale, a noted jurist and scholar, served King Charles II as Chief Justice of the Court of King’s Bench. Bishop Burnet cast his subject as a pious, learned man who feared God, honored his sovereign, and strove to be just: Hale was “a great Example while he lived, so I wish the setting him thus out to posterity . . . may have its due influence on all persons; but more particularly on those of that profession, whom it more immediately concerns, whether on the Bench or at the Bar.”

An understanding of the proceedings of Parliament could be gained from Sir Thomas Smith’s well-known *De Republica Anglorum* (1583) or from procedural manuals such as Henry Elsynge’s *The Ancient Method and Manner of Holding Parliaments in England* (1660), Henry Scobell’s *Memorials of the Method and Manner of Proceedings in Parliament in Passing Bills* (1656), and William Hakewill’s *The Manner of Holding Parliaments in England, Collected Forth of Our Ancient Records* (1641). Which of these actually provided guidance to the members of the General Assembly is impossible to say, though their collective influence is evident in earliest surviving rules of order in the House of Burgess, which date from 1659.

Of all the law books, none proved more vital to colonial justices than how-to manuals. Such practical works, esteemed for the instruction they afforded to their readers, were eagerly snapped up in numerous editions.

For example, William Lambarde, the author of the much-used *Eirenarcha: or, Of the Office of the Justices of Peace* and a member of the bench in Kent, noted that he was moved to write his book because upon coming to his office he had “very little or none acquaintance” of the office’s responsibilities. Accordingly, he hoped his work would be an inspiration to others, and it was. First published in 1581, it remained in print for more than a century.

*Eirenarcha* was but one in a large list of manuals for justices of the peace. There were similar directories for clerks, sheriffs, constables, and

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19. *Id.*, at Preface.
attorneys, as well as dictionaries and guidebooks for pleading cases, writing wills, conveying property, or drafting countless other legal documents. All such books were similar in form. Their authors wrote in plain, direct, even pungent language and arranged their subject matter in a logical, easily followed order. Of all the manuals colonial justices owned, William West’s Symboleographie, Michael Dalton’s The Countrey Justice, Henry Swinburne’s A Treatise of Testaments and Last Wills, and Dr. John Cowell’s The Interpreter merit particular comment.23 These are not only superb examples of the genre, but, more significantly, they stamped visible impressions upon Virginia law, providing many of the models for both law and procedure in the colony’s courts.

West’s Symboleographie, a clerk’s manual, dealt primarily with legal instruments and their uses. West explained the derivation, variety, purposes, and conditions under which the various documents should be employed. Most importantly, he furnished the reader with samples in English and Latin. Colonial clerks modeled their record-keeping duties on West’s advice and examples.24

Like Lambarde, Michael Dalton discussed in The Countrey Justice the duties of an English justice of the peace. He began with an examination of the office and traced its development to 1618, when the first edition of The Countrey Justice was published. Dalton described the justice’s duties and powers of office, and gave instruction in what constituted criminal offenses, describing how to make arrests, collect evidence, and hold trials. The discussions were arranged alphabetically, according to subject matter. Dalton included tables of authorities, copious annotations, and indexes.

Henry Swinburne was a judge of the Prerogative Court of York, an ecclesiastical tribunal. His Treatise of Testaments and Last Wills, published in 1590, began with a lengthy exposition of the origins and purposes of wills, followed by analyses of who could make testaments, what could be passed on by will, the correct form of wills, and the duties of executors. Swinburne grounded his commentary in assorted bits of practical advice and copious citations to English inheritance law. Indeed, Swinburne intended A Treatise of Testaments and Last Wills to serve “as a Directory, whereby [readers might] understand what Laws Testamentary are now in


24. Even the most cursory reading of any of the extant manuscript court records reveals the influence of West.
force within this Realm of England." Like Dalton, Swinburne's prose style is elegantly direct and readily accessible to any literate person.

Cowell, a doctor of civil laws at Cambridge, published the first edition of *The Interpreter* in 1607. As a lexicographer, he was perhaps unrivaled for his helpful, plain definitions, which included clear etymological discussions of words and phrases. He buttressed the dictionary with references to appropriate precedents, statutes, and other authorities. The lucid explanation of sometimes quite arcane terms is the strength of *The Interpreter*.

"[F]or the better conformity of the proceedings of the courts of this country to the lawes of England," an act of the General Assembly in 1666 required the purchase of Dalton and Swinburne by the county courts, the General Assembly, and the General Court. Both circulated in Virginia as early as the 1640s, well before the legislature mandated their use. They were cited in local court cases of that decade as well, while the Lower Norfolk County Court bought its first copy of *The Countrey Justice* around 1650. Copies of *The Interpreter* and *Symboleographie* showed up there and elsewhere about the same time.

The appeal of these four works to Virginia lawmakers is palpable. Each afforded textbook guidance in the early stages of the county courts' evolution. The statutes, precedents, and other authorities cited by these works were invoked to provide a foundation of tradition upon which to rest law and procedure in Virginia. The books not only provided useful examples, but they were the authoritative sources that sanctioned the justices' handiwork. To men who possessed only practical learning in a complex, difficult branch of English culture, the written word carried a validity that their own recollections could not. Consequently, Cowell, Dalton, Swinburne, and West solaced uncertain men by providing a direct, tangible link to England.

25. SWINBURNE, supra note 23, n.p. ("To the Reader").

26. After *The Interpreter* first appeared, Cowell became embroiled in a controversy that led to the separation of the dictionary. Cowell was mildly critical of Sir Thomas Littleton's *Tenures*, which offended Sir Edward Coke and members of the House of Commons. The Commons made Cowell confess his error, and in 1610 James I issued a proclamation that banned *The Interpreter*. It remained out of print until 1637. Thereafter, it was reissued and expanded until 1727. The final 1727 edition contains a biographical sketch of Dr. Cowell, as well as an account of the controversy and a copy of James's proclamation.


29. On more than one occasion, colonial lawmakers sought guidance from the four authors to validate practices that had no precedent in England. The clearest example of such usage is to be seen in
VI. Colonial Attitudes Toward Attorneys

Experience reinforced the suspicions of Virginia justices toward trained attorneys and abetted their hostilities toward the complexities of common law. The justices shared a conviction that barristers were tricksters who used Latin and law French to mystify the unlearned, even as the intricacies of procedure were employed to delay or frustrate the resolution of disputes. Accordingly, they would have found comfort in the pronouncements of the Shakespearian character, Jack Cade:

Is not this a lamentable thing that the skin of an innocent Lambe should be made Parchment; that Parchment being scribbled ore should undue a man. Some say a Bee stings, but I say 'tis the Bee's waxe: for I, did but seale once a thing, and I was never mine owne man since.  

Antipathies such as these illustrate the early Virginians' attitudes towards lawyers and lawmaking.

Aside from the colonists' dislike of professional attorneys, there was not much need or work for lawyers in Virginia before 1700. Criminal defendants were seldom accorded the right of counsel, and litigation in civil causes was generally uncomplicated and not especially lucrative, so most actions were simple enough to be handled by a layperson.  

In the seventeenth century, the word "attorney" denoted any person who represented another in legal proceedings. Attorneys could be men schooled at one of the inns and called to the bar, or they could be wives, relatives, friends, or associates. The vast majority of individuals who filled the colonial branches or who discharged the duties of lawyers before 1700 fell into this broader category of attorney.

Virginia lawmakers wasted little time in regulating attorneys' practices. Within a decade of creating the county court system, the General Assembly passed an act requiring attorneys to obtain licenses from the General Court and local benches. The same statute restricted attorney fees to twenty pounds of tobacco per case in the county court and fifty pounds per case in


30. William Shakespeare, The Second Part of King Henry the Sixth, act IV, scene ii.


32. The distinction is clearly made in Cowell's Law Dictionary (compare definitions for "attorney" and "lawyer"). Failure to note the difference between seventeenth- and twentieth-century usage has been a source of confusion among modern scholars about the intent of the laws regulating attorneys. 1 Anton-Hermann Chrost, The Rise of the Legal Profession in America 268-72 (1965); Lawrence M. Friedman, A History of American Law 81 (1973).

33. Act LXI, Mar. 1642-3, 1 Henino's Statutes at Large, supra note 20, at 275.
the General (or Quarter) Court, and imposed stiff fines upon anyone who transgressed these limits. Clearly, the Assembly's intent was to reduce what the law termed "great fees" by providing regulation where none had previously existed. The act failed in its purpose, and, in November 1645, because "many troublesome [sic] suits [were] multiplied by the unskillfulness and covetousness of attorneys, who have more intended their own profit and their inordinate lucre than the good and benefit of their clients," the Assembly ordered "all mercenary attorneys be wholly expelled from such office." Subsequent legislation amplified the prohibition, which remained on the books for a decade when "many inconveniences" led to its repeal. Thereafter, attorneys were licensed by the governor or justices of the peace, depending upon the courts in which they sought to practice, and the Assembly took no cognizance of the matter until the 1680s. At that time, the question of who should qualify attorneys got ensnared in a larger political issue. Governors Culpeper and Effingham both saw their control of licensing as a means of raising money independent of the Assembly and a way of disciplining unruly burgesses. Backed by the crown, Effingham claimed as his the sole right to issue licenses, an assertion that he successfully defended and that put an end to the problem until the next century.

VII. Colonists' Social Origins and Virginia Statutes

Evidence of a relationship between the colonists' backgrounds and the evolution of statutory law in Virginia takes several forms. Few lawmakers understood Latin, the language of the acts of Parliament and court documents in England, so it therefore never figured prominently in colonial statutes, legal documents, or the records of court proceedings. Law French never caught on, either. The accident of ignorance thus guaranteed that

34. Id.
35. Act VII, Nov. 1645, id. at 302.
36. Act XVI, Nov. 1647, id. at 349.
37. Act VI, Dec. 1656, id. at 419.
38. Act VI, June 1680, 2 id. at 478 (1823).
39. Act VII, Nov. 1682, id. at 498 ("[T]he sixth act of assembly made . . . the 8th day of June 1680 . . . is found inconvenient.").
40. VIRGINIA'S VICEROY, supra note 3, at 73, 94-95; THE PAPERS OF FRANCIS HOWARD, BARON HOWARD OF EFFINGHAM, 1643-1695, at 119-20, 305-06 (Warten M. Billings ed., 1989).
41. Billings, supra note 6. In Virginia, writs, commissions, warrants and other court documents were always rendered in English. Latin occasionally appeared in colonial legal documentation. Deeds, procurations, etc., drawn in England and presented in evidence or for the record found their way into Virginia's legal archives, as did the occasional phrase or quotation, usually lifted from a manual or law book. More often than not, the Latin was incorrectly copied, which is certain evidence of the copyist's ignorance. Latin's use was declining in England, but it was still much more prevalent there than in
from an early date, English would supplant archaic tongues as the speech of Virginia law. English was used to render statutory law as plainly and directly as the members of the General Assembly and the county courts were capable of expressing it.

Rather speedily after 1619, the statutes also came to hold preeminent ground in the legal order; judicial opinion and customary law did not occupy quite the same place in Virginia as they did in England. Rather than being the result of traditions, important structures like courts, parishes, or labor relations became matters of written law, as did the establishment of the vital local offices of justice of the peace, sheriff, clerk, and vestryman. Jurisdiction was also largely defined by statute.

The use of statutory law in this fashion does not necessarily bespeak a commitment to high constitutional principles or a singular reverence for written code, nor does it reveal colonial men of law as protorepublicans. The reliance upon statutes has a more mundane explanation. New regulations arising from the peculiarities of the Virginia situation needed to be written down. Because judges knew neither English law nor their own very well, setting colonial rules to paper was an obvious necessity. More importantly, the many departures from English law required statutory enactment to dispel confusion over what was the law of the Old Dominion. This continuing requirement for a body of written laws eventually gave definition to those particular parts of the English heritage that were turned into colonial culture, just as drafting and administering laws slowly taught the lawmakers their skills. Although writing down laws certainly formed a precedent for subsequent American precepts of constitutionalism, we need to remember that it was the colonials' practical nature, not high-minded ideals, that impelled justices and assemblymen alike.

Colonials were intellectually disposed toward some reformulation of their legal heritage. Inimical to the constraints they thought English society imposed upon them, the justices sought to build a legal order in the unfettered environment they believed Virginia offered men of their kind. Hostile to the mazes of England's courts and procedures, they greatly

Virginia. Commissions of the peace were still rendered in Latin, as was a host of other similar papers and many trial proceedings.

Law French, too, had little impact in Virginia. For one thing, it gradually fell from vogue in England as the seventeenth century wore on. For another, there are no known reports of Virginia decisions before 1700. The first Virginia reports were gathered in the eighteenth century by Sir John Randolph and Edward Barradall, but these did not appear in print until 1909, when they were gathered up and edited by R.T. Barton. See generally Virginia Colonial Decisions, The Reports by Sir John Randolph and by Edward Barradall, of Decisions of the General Court of Virginia, 1728-1741 (R.T. Barton ed., 1909).
simplified their own. Lacking the lawyer's innate conservatism, as well as his deep attachments for old customs and precedents, colonial justices had less affection for the usages of the past. Their desire to dominate inclined them to experiment and to weigh their experiments by the standard of efficacy. Solutions that answered the problems of the moment were of immensely greater value than strict adherence to the conventions of the ancients. The justices were willing to appropriate anything in their books and experience and to cut from whole cloth remedies for the economic, political, or social concerns of their time. What they deemed as the great imperatives frequently coincided with their ambitions. The laws they wrote, the supporting legal institutions they constructed, indeed the very society they helped create, all reflected their efforts to prosper and have dominion over those they governed.42

VIII. Colonial Court Houses

Except for Jamestown, buildings specifically constructed to house colonial courts were uncommon before 1700. The first such structures were erected as early as the 1650s, when the justices in Lancaster and Charles City counties contracted for buildings.43 A Northampton County magistrate, William Waters, built the first court house in that county in 1664,44 and about the same time there may have been another raised in Lower Norfolk County.45 More construction occurred during the 1680s, but court houses were still a rare sight on the Virginia landscape.

The look of those first court houses is conjectural. None survived into modern times, and there are no pictures or plans. What is known of their appearance comes from extant court records, and the amount of detail proves more tantalizing than definitive. Certain features, though, seem beyond doubt. The exteriors of those smallish, rectangular frame structures were unimpressive. Their interiors were no more compelling. Whatever the layout, builders fitted their court houses sparely. Most buildings merely housed a single courtroom, though several perhaps contained rooms for the clerks and jury deliberations as well as jail space. Apart from a fireplace, a bench for the justices, and a railing of "turned balustrades" that served as

42. There is a school of Virginia historiography that interprets the rise of the colony's institutions to lawmakers' affection for such ideals and commitments to nascent Whiggery. See, e.g., Thomas Jefferson Wertenbaker, Virginia Under the Stuarts, 1607-1688, at 29-59 (1914). While no one denies the existence of such beliefs among Virginians, what can be doubted is the primacy that Wertenbaker and his adherents often ascribed to them.
44. Northampton County Order Book, 1657-1664, fol. 191.
45. Lower Norfolk County Order Book, 1656-1666, at 283, 335, 379.
the bar, courtrooms contained little else in the way of adornment, furniture, or spatial definition. Taken as a whole, seventeenth-century court houses differed only slightly from the plain farm dwellings and taverns ("ordinaries") that dotted the Tidewater landscape of their day.

Most counties had no court houses. The court sat in a senior member's residence or in space rented at public expense from another planter or a tavern keeper. The most spacious room in a dwelling or in an ordinary sufficed for the "courthouse," which obviously lacked any trappings of authority. No bar separated justice from suitor and spectator; a strategically placed table became the bench. Where possible, members arrayed themselves so that the presiding justice occupied the middle place. If the room or the table did not permit such an array, then the justices made do as best they could. Some sort of seating accommodated the clerk, who scribbled a rough transcript of proceedings, which he later entered in fair copy in the record books. At or near the table was also a place for the sheriff or deputy to act as crier and bailiff.

IX. Court Days and Court Procedures

Whatever the venue, on court day plaintiffs, defendants, witnesses, attorneys, jurors, sheriffs, and bystanders jockeyed for place in the cramped courtroom, and overflow spilled out into the yard. At the appointed moment, the crier called the court to order and commanded suitors to come forward and prosecute their cases or have them dismissed. Despite the bailiff's efforts at maintaining some semblance of quiet, everyone milled noisily about as all awaited their turn for a hearing. The delay allowed the crowd to mingle gossip with drink, which only increased the clatter of voices and sometimes gave way to rowdy disruptions. Little about the scene inspired awe or a sense of decorum in any of the participants, yet there was an urgent intimacy and a gritty texture to courts. This quickly disappeared once the justices settled into the brick buildings they had erected after 1700.

Courts routinely met in general sessions at least six times a year. Meeting dates conformed to a calendar prescribed by the General Assembly, a schedule designed to aid litigants who had suits pending in more than one jurisdiction. For instance, court day was the first day of the

47. In York County, which was one of the original counties, the justices routinely sat at the house of their colleague, John Utie, throughout the 1630s. York County Record Book, 1634-94, at 1-5.
48. See, e.g., Accomack County Deeds, Wills, and Orders, 1678-82, at 109; Northampton County Deeds, Wills, and Orders, 1632-40, at 111; Lower Norfolk County Order Book, 1675-86, at 230.
month in Henrico County, the third day in Charles City County, the sixth
day in James City County, and so on at similar intervals for as many days
as there were counties. Court began as early as seven o'clock and ran well
into late afternoon, but there was no fixed limit to the length of a sitting.
Once convened, the justices continued court for as many days as it took to
clear their docket of its cases. 49

Preparing a docket was the duty of the clerk. Little evidence about this
aspect of the clerkship has survived the rigors of time. This much,
however, may be deduced from the way court proceedings were entered in
the extant order books. In advance of court day, the clerk drew up an
outline for the justices, enumerating everything that the court would
confront. He grouped these items according to type of business and
organized the groupings in roughly this manner. First, he listed
communications or orders from the governor that required action by the
justices. Next, he put down any administrative matters that bore upon
county governance. Third, he scheduled motions for judgments or
hearings. Finally, he arranged pending cases in the order of filing, which
established the precedence of their hearing. 50

Civil actions made up the bulk of the caseload, and a specific
procedure known as bill pleading governed such suits. Bill pleading was
familiar to anyone who had ever sued in the English High Court of
Chancery, Court of Requests, or Court of Wards. In Virginia a plaintiff,
either personally or through an attorney, filed a document known variously
as a bill of complaint, a declaration, or a petition. The bill, which was not
acceptable unless presented "in a faire legible hand," 51 alleged a cause of
action and prayed for relief. Acting on the complaint, the justices arrested
or summoned the defendant for the purpose of eliciting a response to the
allegations. Once a defendant replied, the plaintiff might enter a written
rebuttal on the record, and the defendant had another opportunity to
present a rejoinder. The intent of these maneuvers was to resolve the case
without a trial. If no such solution was possible, the defendant had to
plead to the bill. A plea of no contest or an admission of responsibility
ended the matter and judgment passed; however, if the defendant pleaded
to the bill, there was a trial. Both sides, at that point, presented witnesses
and any other supporting documentation and argued their evidence. Then,
either the justices rendered a summary verdict or the case went to a jury. 52

49. Act XXXI, Mar. 1661-62, 2 Henning's Statutes at Large, supra note 20, at 69 (1823).
50. Despite the considerable volume of scholarship on the Virginia county courts, the role of the
clerks in shaping the colony's legal order has gone largely unremarked. The loss of documentation is
clearly the major obstacle to close scrutiny of the office.
52. Billings, supra note 31, at 581-84.
An act of assembly passed in 1642 first sanctioned jury trials in a limited way, though in actual practice few colonists availed themselves of juries. That habit perhaps derived from the nature of both the county courts and the litigation. The General Assembly originally conceived the local jurisdictions to handle routine causes in a way that was devoid of complications or procedural niceties. Consequently, they were assigned authority only over suits involving small sums of currency or no complex points of law. Those were the very kinds of actions that the justices could settle summarily or that juries might hear. Calling the juries, however, took time and added an expense to suitors, who, by law, incurred the costs of summoning and maintaining jurors.

The justices also decided criminal cases summarily. Here, too, the explanation for the absence of jury trials seems rooted in practical considerations. County courts could not try felonies because they had no power to put the lives or limbs of defendants at risk. Accordingly, petty infractions were the stuff of local criminal jurisdictions. A presentment or an indictment brought the miscreant to trial. Both carried the automatic presumption of guilt, which says why culprits customarily confessed to the charges. Free women or men most often elected not to add jury costs as an extra expense of their indiscretions, while servants were without means to pay the costs of jurors. Then, too, the view prevailed that trial by jury should be reserved for offenses more threatening than whoring, Sabbath breaking, drunkenness, pilfering, bastard bearing, or cursing.

X. Conclusion

Just as former Speaker of the House Thomas P. O'Neill claimed that all politics were local, it might be said that for most of the seventeenth century in Virginia all law was local. For six decades, justices of the peace and suitors used the county courts to discover which parts of their common law heritage, as they knew it, they could bend to their uses. They set the groundings for Virginia's legal system, and that order verged on maturity as the century closed. The invention of amateurs, early Virginia law carried the earmarks of its English ancestry, though it differed strikingly from that parentage. Colonial Virginia law remained open to injections from parts of common law other than those that had predominated since 1619. Such infusions would come in the next century at the hands of more professional
men of law, who knew and honored the totality of common law much better than their predecessors.