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Edited by Michael Grossberg and Christopher Tomlins

Excerpt

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I

LAW, COLONIZATION, LEGITIMATION, AND
THE EUROPEAN BACKGROUND

ANTHONY PAGDEN

The conquest, occupation, and settlement of the Americas was the first large-scale European colonizing venture since the fall of the Roman Empire. Like the Roman Empire, various occupying powers acquired overseas possessions in territories in which they had no clear and obvious authority. Their actions demanded an extensive reexamination, and sometimes reworking, of whole areas of the legal systems of early modern Europe, just as they threw into question earlier assumptions about the nature of sovereignty, utterly transformed international relations, and were ultimately responsible for the evolution of what would eventually come to be called “international law.”

Broadly understood, the legal questions raised by this new phase in European history can be broken down into three general categories: the legitimacy of the occupation of territories that, *prima facie* at least, were already occupied; the authority, if any, that the colonizers might acquire over the inhabitants of those territories; and – ultimately the most pressing question of all – the nature of the legal relationship between metropolitan authority and the society that the colonists themselves would establish.

Of the five major European powers to establish large-scale and enduring settlements on the American mainland – Spain, Portugal, Holland, France, and England – the English were relative latecomers. Although there are more similarities between them and the other European colonial powers than has sometimes been supposed, in many respects both the legal character and the administration of their colonies were unusual. The overseas possessions of the Spanish, despite early incorporation into the Crown of Castile, were legally identified as separate kingdoms – the *reinos de Indias* – governed by a separate body of legislation (codified in 1680) and administered by a royal council whose functions were similar to those of the councils that administered the European regions of the empire: Italy, Flanders, and Castile itself. The Spanish possessions were thus a separate but legally incorporated part of a single imperium, embodied in the person of the monarch – what has often be referred to as a “composite monarchy.” The Portuguese

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overseas dependencies were, with the exception of Brazil, trading stations (*feitorias*) not dissimilar to the factories the English later established in Asia and were under the direct control of the crown. The French kings looked on New France – what would later become Canada – as part of the royal demesne. However, unlike their English neighbors, the French settlers were governed according to a body of local administrative law called the *Coutume de Paris*, a situation that would determine the ideological shape of the empire until the collapse of the monarchy itself. The Dutch Republic's possessions in America, both in the New Netherlands and, while it lasted, New Holland (a part of Portuguese Brazil that the Dutch held between 1630 and 1654), were held by the Dutch West Indian Company, which had a monopoly on all land and trading concessions. The governors appointed to the regions by the Dutch Republic were officers in the Company's employ. The laws they administered were those of the Dutch Republic, and Dutch settlers in the Americas never thought of themselves as anything other than Dutchmen overseas.

By contrast, each of the thirteen colonies that were eventually to make up the United States, from Puritan New England to Catholic Avalon, had a different foundation, a different form of administration, and represented different demographic and cultural aspects of the of the British Isles. The legal status of the English colonies was also both more varied and much less precisely defined than that of their Spanish, Portuguese, French, or Dutch (or even later their Swedish, Russian, and German) counterparts. Some colonies were proprietary, like Maryland; some were corporate, in which the King had granted powers of self-government to a company or to a body of settlers, like Massachusetts. Virginia (after 1624) and New York were administered directly by the Crown (as was Maryland between 1689 and 1715). As Edmund and William Burke noted in 1757, "There is scarce any form of government known, that does not prevail in some of our plantations."¹

The same applied to the various legal systems employed throughout the colonies. As one anonymous settler in Virginia complained in the early eighteenth century, "No one can tell what is law and what is not in the Plantations."² The English common law, unlike the law in Spain and France during the sixteenth century, was uncodified. The absence of any accepted body of legislation made the resulting conflict between the Parliament,

¹ Edmund and William Burke, *An Account of the European Settlements in America*, 2 vols. (London, 1757), II: 288–9.

² Quoted in Craig Yirush, *From the Perspective of Empire: the Common Law, Natural Rights and the Formation of American Political Theory, 1689–1775*. Unpublished PhD diss., Johns Hopkins University, 2004, Chapter 2.

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the Crown, and the various colonies and overseas dependencies difficult to resolve. It was this lack of any single constitutional definition of empire that led the historian Sir Robert Seeley in 1883 to make his famous remark that it seemed as if England had “conquered and peopled half the world in a fit of absence of mind.” And it would remain a defining feature of the British Empire until its final demise in the twentieth century.

There was a further difference between the English and their European rivals. From the beginning of their colonizing ventures, the English seem to have taken a far more detached view of the possible relations between the mother country and its colonies than their continental neighbors. Spain, quite obviously, and France, less certainly, represented themselves as the true heirs to Rome. Britain, which at least until the eighteenth century had a very weak sense of itself as an empire – a word that, as John Adams said later, belonged “not to the language of the common law, but the language of newspapers and political pamphlets” – held to a far stricter distinction between a “colony,” on the one hand, and a separate, if distinct kingdom within a “composite monarchy,” on the other.³ But if there was, in effect, no true British Empire before Disraeli created one for Queen Victoria in 1878, and if the American colonies were not, as those of both Spain and France were, united to the mother country by a shared *ius publicum* embodied in the legal person of the King, what was their relationship to the metropolis? On the answer to this question hinged the entire nature of their legal identity.

To understand just how the English colonies in America acquired their distinctive legal character, we have to begin where the colonists themselves had a fortiori to begin: with the question of legitimacy. From the early sixteenth century until well into the eighteenth, Spain, France, and Britain waged a moral, theological, and legal battle over the legitimacy of the conquest and settlement of the Americas. This struggle has often been presented as a concern with the justice of the treatment of indigenous peoples. In large part this was indeed the case. What is frequently overlooked, however, is that the question of justice was also a question about the juridical status of the European settlements, both under what we would now term “international law” – then called the “law of nations” (*ius gentium*) – and under the civil law of the European states from which the settlers had come. And because it involved questions of juridical status no less than of humanity, the struggle over legitimacy had far-reaching consequences both for the legal history of the English colonies themselves and for the eventual United States.

³ Charles Francis Adams, ed., *Works*, 10 vols. (Boston, 1850–56), IV: 37.

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I. GROUNDS FOR POSSESSION

Like their European rivals the English could make no a priori claims to rights of any kind in the Americas. “[We] shall be put to defend our title,” the Virginia Company early recognized, “not yet publicly quarreled, not only comparatively to be as good as the Spaniards, but absolutely to be good against the Natural people.” Claims to both sovereignty and property in the American had thus to be sustained on two fronts: first against prior claims by another European power – in this case Spain, which by the Treaty of Tordesillas with Portugal in 1494 had stated its rights to all territory in the western hemisphere – and then against all those others, the “Natural people,” whose rights would seem to be antecedent to those of any European. Because no argument from English civil law could be applied anywhere outside the jurisdiction of the English courts, the English, like their European rivals, had to find some argument that would be considered valid in either natural law (*ius naturae*) or the law of nations (*ius gentium*), laws that were believed to be binding on all humankind no matter what their civil constitution might be. The complex and extended attempts to find this argument rumbled on well into the nineteenth century and are still being rehearsed in Canada and Australia to this day.

All the European empires faced the same dilemma. However, whereas the Spanish, the French, and to some degree the Portuguese were troubled primarily by their political (and ethical) relationship with the indigenous populations whom they sought, at one level or another, to assimilate into the new colonial order, the English were prompted far more by concerns over the consequences that the grounds for occupation might have for the rights and liberties of the colonists themselves vis à vis the Crown. Both the Spanish and the French, in their different ways, had attempted to establish not colonies but overseas dependencies and had tried to incorporate the indigenous peoples into new multi-ethnic societies. The Native Americans were peasants, serfs, and sometimes allies. A few could even be landowners with European servants, and at least in the early years in Spanish America they could occupy semi-bureaucratic positions in the new overseas dependencies. Under a law of 1664, all native inhabitants of New France who had converted to Christianity were held to be “denizens and French natives, and as such entitled for all rights of succession, goods laws and other dispositions, without being obliged to obtain any letter of naturalization.”⁴ For the English, by contrast, the indigenes were always only of secondary

⁴ “Etablissement de la Compagnie des Indes Occidentales,” *Édits, ordonnances royaux, déclarations et arrêts du conseil d’état du Roi concernant le Canada*, 3 vols. (Quebec, 1854–6) I: 46.

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importance, persons who were to be displaced, not incorporated – “savages,” in the terms of Charles II’s charter to settle Carolina – who belonged in the same general category with “other enemies pirates and robbers.”⁵ It was the manner of their displacement which was crucial since it raised substantial legal questions about the status of those who were engaged in – and benefiting from – the displacing.

Unlike the Spanish, furthermore, and to some degree the French, the English lacked any initial founding charter issued by an international authority because the only such authority that existed at the time was the papacy. Henry VII’s letters patent to John Cabot of 1496 were to some degree an attempt to replicate the language of papal legislation, as were the grants made by Elizabeth I to Sir Walter Raleigh in March 1584. But for all their assumed authority neither Henry nor Elizabeth were pontiffs; neither could make the least claim to excise jurisdiction beyond their realms. In the end, possession or sovereignty in the Americas could only be made legitimate on three distinct grounds: by right of conquest; by “discovery,” which crucially, as we see, implied that the territory being “discovered” was also unoccupied; or by purchase from, or voluntary concession by, the native and legitimate owners or rulers.

II. CONQUEST

Of these grounds for legitimacy, the most contentious was indisputably conquest because no conquest could be legitimate unless it were the consequence of a just war, and there were no immediate or obvious reasons for considering the European invasions of America as in any sense just. In general, conquest as prior grounds for claims of property rights or sovereignty was looked on with mistrust throughout the entire history of the European overseas empires.⁶ “The Sea,” as the Scottish political theorist and soldier of fortune, Andrew Fletcher, declared in 1698, “is the only Empire which can naturally belong to us. Conquest is not our Interest.”⁷ The Portuguese spoke of “conquering” the seas, but rarely the land, and even the Spanish, whose American empire was so obviously and in the early years so proudly based on conquest, banned all official use of the term in 1680. In England,

⁵ “The Second Charter Granted by Charles II to the Proprietors of Carolina,” in *Historical Collection of South Carolina; embracing many rare and valuable pamphlets and other documents relating to the State from its first discovery until its independence in the year 1776*, 2 vols. (New York, 1836), II: 44.

⁶ *Second Treatise* 2.175 in *Locke’s Two Treatises of Government*, 2nd ed. (Cambridge, 1967), 403.

⁷ “A Discourse on Government with Relation to Militias” in *The Political Works of Andrew Fletcher* (London, 1737), 66.

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furthermore, there existed a long-standing distrust of conquest – to which I shall return – that originated in the Norman occupation after 1066 and resulted in the “continuity theory” of constitutional law in which the legal and political institutions of the conquered are deemed to survive a conquest.

Yet, at least during the first phase of the colonization of America, from the moment of Raleigh’s short-lived settlement at Roanoke, the English Crown and its agents maintained consistently that the American colonies were “lands of conquest,” no matter what the realities of their actual occupation. Virginia, New York, and Jamaica, for instance, were consistently referred to as conquests. The “Emperor” of Virginia, Powhatan, was even crowned by Christopher Newport in an attempt to create the image of a North American Atahualpa. (The Privy Council, however, sent a copper crown for the ceremony rather than gold, thus carefully indicating the inferior status of James I’s new tributary ruler.) As late as 1744, in the negotiations which led to the treaty of Lancaster with the Iroquois, the Virginia delegation declared that “the King holds Virginia by right of conquest, and the bounds of that conquest to the westward is the great sea.” The Virginia colony, that is, reached all the way to the Pacific.

Virginia was the clearest instance of a land of conquest, but it was by no means the only one. The early charters and letters patent are all liberally scattered with references to conquests and occupations, which for some jurists at least, seem to have been taken to be the same thing. Occupation, declared the most influential of them, Sir Edward Coke, “signifieth a putting out of a man’s freehold in time of warre . . . *occupare* is sometimes taken to conquer.”⁸

The initial claim that America was a land of conquest, was not, however, made in isolation. It was but one, of which the annexation of India by the British Crown in 1858 was to be perhaps the last, of a long series of “conquests,” some more obviously so than others: the conquest of Wales, completed in 1536; the conquest, or at least the seizure, of the Channel Islands (although this was not completed until 1953); the conquest of the Isle of Man in 1406; the prolonged conquests of Ireland between 1175 and 1603; and the initial attempt at union with Scotland or of the subordination of Scotland to an English Parliament, which was to become one of the issues at stake in the Civil War, in 1603. For more than two centuries before the first colonies were established on the eastern seaboard of North America, England had been in a state of constant and determined expansion. It was to remain more or less uninterruptedly in this state until World War I.

In all previous cases, and in the protracted English attempts to seize parts of northern France, conquest had been justified on grounds of dynastic

⁸ *First Institute of the laws of England* (Philadelphia, 1826–7), II: 249b.

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inheritance: a claim, that is, based on civil law. In America, however, this claim obviously could not be used. There would seem, therefore, to be no prima facie justification for “conquering” the Indians since they had clearly not given the English grounds for waging war against them.

Like the other European powers, therefore, the English turned to rights in natural law, or – more troubling – to justifications based on theology. The Indians were infidels, “barbarians,” and English Protestants no less than Spanish Catholics had a duty before God to bring them into the fold and, in the process, to “civilize” them. The First Charter of the Virginia Company (1606) proclaimed that its purpose was to serve in “propagating of Christian religion to such people, [who] as yet live in darkness and miserable ignorance of the true knowledge and worship of God, and may in time bring the infidels and salvages living in these parts to humane civility and to a settled and quiet government.” In performing this valuable and godly service, the English colonists were replicating what their Roman ancestors had once done for the ancient Britons. The American settlers, argued William Strachey in 1612, were like Roman generals in that they, too, had “reduced the conquered parts of our barbarous Island into provinces and established in them colonies of old soldiers building castles and towns in every corner, teaching us even to know the powerful discourse of divine reason.”⁹

In exchange for these acts of civility, the conqueror acquired some measure of sovereignty over the conquered peoples and, by way of compensation for the trouble to which he had been put in conquering them, was also entitled to a substantial share of the infidels’ goods. Empire was always conceived to be a matter of reciprocity at some level, and as Edward Winslow nicely phrased it in 1624, America was clearly a place where “religion and profit jump together.” For the more extreme Calvinists, such as Sir Edward Coke who seems to have believed that all infidels, together presumably with all Catholics, lay so far from God’s grace that no amount of civilizing would be sufficient to save them, such peoples might legitimately be conquered; in Coke’s dramatic phrasing, because “A perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action or get any thing within this Realm. All infidels are in law *perpetui inimici*, perpetual enemies, (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with devils, whose subjects they be, and the Christians, there is perpetual hostility and can be no peace.”

⁹ *The Historie of Travell into Virginia Britania*, ed. Louis B. Wright and Virginia Freund (London, 1953), 24. I am grateful to David Armitage for drawing my attention to this text.

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Like all Calvinists, Coke adhered to the view that as infidels the Native Americans could have no share in God's grace, and because authority and rights derived from grace, not nature, they could have no standing under the law. Their properties and even their persons were therefore forfeit to the first "godly" person with the capacity to subdue them. "If a Christian King," he wrote, "should conquer a kingdom of an infidel, and bring them [sic] under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature contained in the Decalogue."¹⁰ Grounded as this idea was not only in the writings of Calvin himself but also in those of the fourteenth-century English theologian John Wycliffe, it enjoyed considerable support among the early colonists. As the dissenting dean of Gloucester, Josiah Tucker, wrote indignantly to Edmund Burke in 1775, "Our Emigrants to *North-America*, were mostly Enthusiasts of a particular Stamp. They were that set of Republicans, who believed, or pretended to believe, that *Dominion was founded in Grace*. Hence they conceived, that they had the best Right in the World, both to *tax* and to *persecute* the *Ungodly*. And they did both, as soon as they got power into their Hands, in the most open and atrocious Manner."¹¹

By the end of the seventeenth century, however, this essentially eschatological argument had generally been dropped. If anything it was now the "papists" (because the canon lawyers shared much the same views as the Calvinists on the binding nature of grace) who were thought to derive rights of conquest from the supposed ungodliness of non-Christians. The colonists themselves, particularly when they came in the second half of the eighteenth century to raid the older discussions over the legitimacy of the colonies in search of arguments for cessation, had no wish to be associated with an argument that depended upon their standing before God. For this reason, if for no other, it was, as James Otis noted in 1764, a "madness" which, at least by his day, had been "pretty generally exploded and hissed off the stage."¹²

Otis, however, had another more immediate reason for dismissing this account of the sources of sovereign authority. For if America had been conquered, it followed that the colonies, like all other lands of conquest, were a part not of the King's realm but of the royal demesne. This would have made them the personal territory of the monarch, to be governed at the King's "pleasure," instead of being subject to English law and to the English Parliament. It was this claim that sustained the fiction that "New England

¹⁰ *The Reports of Sir Edward Coke*, Book VII (London, 1658), 601–2.

¹¹ *A Letter to Edmund Burke, Esq., A Member of Parliament for the City of Bristol . . . in Answer to his Printed Speech* (Gloucester, 1775), 18–20.

¹² "The Rights of the British colonies asserted and proved" [Boston, 1764], in Bernard Bailyn, ed., *Pamphlets of the American Revolution. I 1750–1765* (Cambridge, MA, 1965), 422.

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lies within England,” which would govern the Crown’s legal association with its colonies until the very end of the empire itself. As late as 1913, for instance, Justice Isaac Isaacs of the Australian High Court could be found declaring that, at the time Governor Arthur Phillip received his commission in 1786, Australia had, rightly or wrongly, been conquered, and that “The whole of the lands of Australia were already in law the *property* of the King of England,” a fact that made any dispute over its legality a matter of civil rather than international law.

It was precisely because all conquered territories were a part of the royal demesne that the monarch was able to grant charters to the colonies in the first place. For however empty those charters might have been considered by some, they were indisputably concessions made by the Crown. Charters, wrote Thomas Hobbes, “are Donations of the Sovereign; and not Lawes but exemptions from Law. The phrase of a Law is *Jubeo, Injugo, I Command and Enjoyn*; the phrase of a Charter is *Dedi, Concessi, I have Given I have Granted*.”¹³ If this were so, and Hobbes is here stating a legal commonplace, then in one quite specific sense the English colonies had feudal foundations. Most of the lands in America had originally been granted in “free and common socage” as of the manor of East Greenwich in Kent. This formula allowed for what were, in effect, allodial grants, which derived from a contract between the Crown and the landowner but at the same time avoided the duties of feudal tenure – such as the need to provide *auxilium et consilium*, in effect military assistance to the sovereign. In this way the colonies were both free and unencumbered while at the same time remaining legally part of the royal demesne, and every part of the *terra regis* had to form a constitutive part of a royal manor in England. Land in Ireland, for instance, was held as of Carregrotian, or of Trim or of Limerick or of the Castle of Dublin, and when Charles II made over Bombay to the East India Company this land too was granted in “free and common socage” of the manor of East Greenwich. In the proprietorial colonies, by contrast, a large area of land was granted to a single individual, who then allocated lands more or less as he pleased. But even here the Crown still maintained that it possessed the ultimate rights of ownership and that it could therefore dispose of the territory in question as it wished. (The Spanish Crown, by contrast, although often represented as the most despotic and centralizing of the European monarchies, only ever made claims to exercise property rights in several limited areas which were described as being under “the King’s head,” or *cabeza del rey*.)

The English King’s persistent belief that the overseas dependencies remained his personal property, despite the charters that the monarchy itself had granted to each of its parts, led to some strain in the relationship between King and Parliament. When, in 1660, Charles II acquired

¹³ *Leviathan*, ed. Richard Tuck (Cambridge, 1991), 200.

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Jamaica, together with Dunkirk and Tangier, he immediately moved that these territories were also part of the royal demesne and thus his to dispose of as he willed. As a preemptive move, on September 11, 1660, the House of Commons passed a bill “for annexing Dukirke . . . and the Island of Jamaica in America to the Crown of England.” Charles rejected this law, and on October 17, 1662 sold Dunkirk to Louis XIV for £5 million. Selling off what Parliament held to be parts of the realm was an extreme measure, but there was little Parliament could do about it at the time. What was at stake here was the status of private rights as against the sovereign rights of the monarchy. The royal claim created obvious difficulties when, after the end of the Seven Year’s War, Parliament attempted to tighten its hold over the fiscal and commercial activities of the colonies.

The exceptions to the rule were those areas, Maryland and the Carolinas, which had been created as palatinates, “as of any Bishop of Durham, within the Bishopric, or County Palatinate of Durham.”¹⁴ Although much reduced in power since 1535, Durham itself remained a palatinate until 1836. The bishop had, in effect, powers very similar to those of the Spanish viceroys. The charter of Maryland also offered its proprietor, Lord Calvert, “free and common socage.” In exchange for a nominal rent of two Indian arrows and one-fifth of all gold and silver ore payable annually to the Crown, the proprietor was given the right to grant or lease any portion of the territory in fee simple or fee tail. Among other privileges he could also erect manors with courts baron and courts leet.

Both approaches, however, still preserved lands as part of the royal patrimony, albeit at one remove; consequently, both denied inhabitants any right of appeal against their immediate proprietor. For as both the bishop and the proprietor were, in effect, delegates of the Crown, the colonists could make no claim to constitute an independent sovereign body. This resulted in some very strained interpretations of the historical facts of conquest. In 1694 the inhabitants of Barbados argued before the House of Lords that they were entitled to rights under English law as “their birthright” because Barbados had been, quite literally, uninhabited when they arrived. They were told that, notwithstanding the facts of the matter, Barbados was nevertheless held to be a “conquered territory.” Any protection the settlers might have under English law was therefore at the discretion of the monarch. As Coke put it, “If a king come to a Christian kingdom by conquest, seeing that he hath *vita et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom” – a statement which, of course, was a direct contradiction of the continuity theory of conquest.¹⁵ If Coke were right then the same

¹⁴ Fundamental Constitutions of Carolina, in *John Locke: Political Essays*, ed. Mark Goldie (Cambridge, 1997), 161–2.

¹⁵ *The Reports of Sir Edward Coke*, Book VII, 601–2.