

# The Lawfinding Power of Colonial American Juries

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Three decades ago I published an article, based mainly on research in published primary sources, arguing that eighteenth-century American juries had the right to decide law as well as fact in the cases, both civil and criminal, that came before them.<sup>1</sup> I am now in the middle of a decade-long project of examining nearly all extant manuscript sources for colonial American law.<sup>2</sup> On the basis of the material I have studied so far, I already know that the story of the jury's power is far more complex than I had thought before.

If the question is simply whether colonial juries had power to find law, the answer is sometimes yes and sometimes no. In New England, I remain convinced that the answer is mainly yes. In Virginia, where I have yet to research eighteenth-century manuscript sources, published sources suggest that the answer is yes. But in other major colonies—New York, Pennsylvania, and both Carolinas—the answer is no.

But that simple question is the wrong one. We care about jury power because it serves as a proxy for a more important issue—the issue of how much power local communities enjoy to live by their own law rather than the law of some central authority. When appellate judges determine what is law and trial judges possess power to take a case from a jury if the jury does not follow their instructions on that law, then central bureaucrats or polity-wide majorities will possess ultimate governance authority. When juries, in contrast,

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<sup>1</sup> See William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–17 (1978).

<sup>2</sup> The first volume growing out of the project was published in 2008. See WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA, VOLUME 1: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660* (2008).

determine the law, ultimate power remains in the local communities from which the juries are drawn.

Accordingly, the right question to ask when we inquire into how law was made in colonial courts is this: was law under the control of local communities, or did law represent the enforceable will of central political authorities? This Article represents a preliminary attempt, based on the research I have completed so far, to provide the broad outlines of a very complex answer to this question. It will proceed on a colony-by-colony basis, turning first to New England and Virginia, where juries and, hence, local communities possessed the power to determine the law, and then to Pennsylvania, where they did not. Finally, it will examine New York and the Carolinas, where the lawfinding power of juries was under a greater degree of judicial control but central political authorities nonetheless could not impose their will on localities.

## I. NEW ENGLAND

In Massachusetts, the answer is clear—in the decades prior to the American Revolution, juries and, hence, local communities had final power to determine the law.<sup>3</sup> Few in eighteenth-century Massachusetts would have disagreed with the sentiments of the Middlesex County Convention when in 1774 it observed that “no state can long exist free and happy . . . when trials by juries . . . [are] destroyed or weakened.”<sup>4</sup> For, as John Adams explained, the jury system introduced into the “executive branch . . . a mixture of popular power”; as a result, “the subject [was] guarded in the execution of the laws,”<sup>5</sup> and “no man [could] be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people.”<sup>6</sup>

As a result of such sentiments, none of the devices available at common law to control jury lawfinding were used in Massachusetts. Special pleading beyond the initial plea by the defendant and replication by the plaintiff was rare, and most cases were tried under the general issue.<sup>7</sup> A second device for controlling juries—judicial instructions on the law—was ineffective. In many civil cases no instructions were given at all, and even in those cases where the

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<sup>3</sup> See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 20–35 (1975) [hereinafter NELSON, *AMERICANIZATION*].

<sup>4</sup> *Resolves of Middlesex County Convention, August 1774*, in LEMUEL SHATTUCK, *A HISTORY OF THE TOWN OF CONCORD* 84 (1835).

<sup>5</sup> 3 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 481 (Charles F. Adams ed., 1851).

<sup>6</sup> 2 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 253 (Charles F. Adams ed., 1850).

<sup>7</sup> See NELSON, *AMERICANIZATION*, *supra* note 3, at 23.

jury was charged, the charges were often brief and rudimentary.<sup>8</sup> Detailed charges were often unnecessary because the courts could and did assume that the “general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange[d] themselves, [were] well enough known to ordinary Jurors.”<sup>9</sup> “A further reason for the ineffectiveness of instructions was that they were often contradictory.”<sup>10</sup> One source of contradiction was counsel, “who on summation could argue the law as well as the facts.”<sup>11</sup> “Most confusing of all was the court’s seriatim charge; each judge sitting on the multi-member panel that tried every case gave his own statement of the law—a statement that could and sometimes did differ from the statements of his brethren.”<sup>12</sup> Most important, post-verdict motions in arrest of judgment and motions for a new trial on the ground that a jury verdict was contrary to the law or the evidence were never granted.<sup>13</sup>

The power of juries over the legal aspects of cases was therefore great. In the words of John Adams, “a general Verdict . . . assuredly determin[e] . . . the Law,” for it was “not only [every juror’s] right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.”<sup>14</sup>

The power of Massachusetts juries to determine law dated back to the 1670s. Prior to then, conflicts between jurors and magistrates had been referred to the General Court, which after 1649 sat as a single body when hearing judicial matters.<sup>15</sup> As a result, the deputies in the lower house, which represented local communities, had the controlling voice, since they outnumbered the magistrates in the upper house by about three to one.<sup>16</sup> “This triumph of local community power never would be effectively challenged thereafter” in colonial Massachusetts.<sup>17</sup>

But the manner in which local power functioned in the judicial process would be questioned. In the late 1660s, a dispute lasting five years developed

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<sup>8</sup> *Id.* at 26.

<sup>9</sup> 1 JOHN ADAMS, LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

<sup>10</sup> NELSON, AMERICANIZATION, *supra* note 3, at 26.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 26–28.

<sup>14</sup> 1 ADAMS, *supra* note 9, at 230.

<sup>15</sup> See William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630–1686*, 47 AM. J. LEGAL HIST. 183, 198–200 (2005) [hereinafter Nelson, *Utopian Legal Order*].

<sup>16</sup> *Id.* at 200.

<sup>17</sup> *Id.*

over the oaths that the members of each house should take when sitting as judges.<sup>18</sup> The clergy was called in to arbitrate the dispute, and in 1672 it proposed repeal of the legislation authorizing the General Court to review judge-jury conflicts. In its place the ministers recommended:

[T]he magistrates may be, by expresse law, directed to accept the juries verdict and to grant judgment accordingly, unlesse they shall judge the juries verdict to be evidently contrary to law and evidence, in which case they may bee empowered by law to cause the jurie to answer for their default, in the same court before a jury of twenty four persons chosen by the freemen, or otherwise to bee liable to bee served by the party aggrieved with a writ of attainder out of the same court.<sup>19</sup>

The General Court agreed. In 1672 it “enacted an elaborate statute in general conformity to” this recommendation, abolished appeals to the General Court in cases of bench-jury disagreement, and required trial judges to accept all jury verdicts, subject only to the cumbersome procedure of attaint.<sup>20</sup>

Since attaint juries usually sustained the verdicts of trial juries, the attaint process atrophied over time, and trial juries were left with ultimate power to find law.<sup>21</sup> “The presence of ultimate power in juries does not mean, however, that they used their power with any frequency in a fashion adverse to the wishes of the bench. Most of the time juries acted with self-restraint and cooperated with the judges.”<sup>22</sup>

Even when the bench and jury seemed at loggerheads, they may, in fact, not have been. Consider, for example, a case brought by Edward Randolph, the collector of customs for the Crown in the late 1670s and early 1680s, against George Hutchinson, a merchant whom Randolph accused of smuggling.<sup>23</sup> Randolph was not a popular man in Massachusetts Bay,<sup>24</sup> and not surprisingly,

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<sup>18</sup> Mark DeWolfe Howe & Louis F. Eaton, Jr., *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 *NEW ENGLAND Q.* 291, 306–11 (1947).

<sup>19</sup> *Id.* at 311 (citing 2 THOMAS HUTCHINSON, *LEGAL PAPERS OF THOMAS HUTCHINSON* 169 (Boston, 1865)) (quoting the recommendation of the clergy).

<sup>20</sup> *Id.* at 312; see Nelson, *Utopian Legal Order*, *supra* note 15, at 200–01.

<sup>21</sup> See Nelson, *Utopian Legal Order*, *supra* note 15, at 201–02.

<sup>22</sup> *Id.* at 202–03.

<sup>23</sup> See *Randolph v. Hutchinson*, (Ct. Asst. 1680), in 1 *RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630–1692*, at 168 (1901).

<sup>24</sup> His unpopularity resulted both from his efforts to undermine the government of the Bay Colony and to secure revocation of its charter and from his efforts at revenue collection. See FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS 172–73* (rev. ed. 1995).

the jury returned a verdict for Hutchinson.<sup>25</sup> Then “[t]he Court sent out the Jury once & Againe w<sup>th</sup> the Case further to Consider of it. [A]t their Coming in Againe they declared by their foreman they saw no cause to Alter their verdict . . . .”<sup>26</sup> By so asking the jury to reconsider its verdict, the court performed its duty of supporting royal authority, and by adhering to its verdict, the jury did what the court probably wanted but lacked power to do—it undermined royal government. At least as it functioned in Randolph’s case, the 1672 legislation thus appears to have been an effort to conceal local community power from royal scrutiny: it transferred the power from the General Court, where royal officials could observe its exercise, to the jury room, where local people, sitting behind closed doors, could obstruct royal policy at will.

Although I have not yet fully researched Connecticut, I believe that its eighteenth-century juries, like those in Massachusetts, possessed power to determine law as well as fact. I am uncertain about New Hampshire<sup>27</sup> and Rhode Island. But Rhode Island, as well as Connecticut, had an elected governor and judges responsive to the electorate;<sup>28</sup> Rhode Island also was a tiny colony where, because of its size, everything was local. Accordingly, I remain reasonably confident asserting that localities determined the substance of law in most of New England.

*Erving v. Cradock*,<sup>29</sup> a 1761 case from Massachusetts, illustrates like the earlier case of *Randolph v. Hutchinson* why local control of the law mattered. The case arose when a Massachusetts shipowner brought a writ of trespass against a royal revenue officer who had seized his vessel for smuggling and

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<sup>25</sup> *Randolph v. Hutchinson*, (Ct. Asst. 1680), in 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630–1692, 168 (1901).

<sup>26</sup> *Id.*

<sup>27</sup> See JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE 108, 115–22 (2004) (assuming that colonial juries had power to find both law and fact; he is clear that juries in the early republic possessed both powers). It also is clear that New Hampshire followed Massachusetts procedure into the 1670s. See ELWIN L. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE, 1640–1700, at 89–90 (1959). *But see id.* at 91, which cites a 1763 case setting aside a verdict as contrary to law and evidence.

<sup>28</sup> See CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS of 1663, reprinted in 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3214 (Francis Newton Thorpe ed., 1906); CONNECTICUT COLONY CHARTER of 1662, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 253 (Benjamin Perley Poore ed., 1878).

<sup>29</sup> QUINCY’S REPORTS 553 (1761).

then had it condemned in admiralty.<sup>30</sup> All five judges of the Superior Court instructed the jury that the admiralty decree was *res judicata* and a bar to the trespass suit, but the jury ignored their instructions and returned a substantial verdict for the shipowner.<sup>31</sup> Both the court and the colonial administration nonetheless understood that the verdict was binding, even though its effect was to obstruct enforcement of Parliament's Navigation Acts. Law in New England was what local people, not Parliament, declared.

## II. VIRGINIA

Let me now turn south to more complex law. As to New Jersey, Delaware, Maryland, and Georgia, the incompleteness of my research precludes my saying anything. But Virginia is too important to ignore, even though I have not yet researched the eighteenth-century manuscript sources and cannot add to what I wrote thirty years ago. At that point, my authority was none other than Thomas Jefferson, who wrote in 1781–82 in *Notes on Virginia* that, although juries typically decided only the facts and took their law from the court, “this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.”<sup>32</sup> In short, Virginia juries, according to Jefferson, who was surely a knowledgeable observer, possessed plenary lawfinding power if they chose to exercise it.<sup>33</sup>

## III. PENNSYLVANIA

Strangely, Pennsylvania is the polar opposite of New England and Virginia. I say strangely because the leading seventeenth-century English precedent on jury power was *Bushell's Case*, decided in 1670.<sup>34</sup> That precedent probably influenced Massachusetts to enact its 1672 legislation requiring judges to accept jury verdicts even if the judges thought the jury had

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 556.

<sup>32</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J. W. Randolph ed., 1953).

<sup>33</sup> See William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 342–43 (2004) [hereinafter Nelson, *Province of the Judiciary*]; A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810, at 216 (1981) (seeing a departure after 1800 from the colonial “idea that law ought to be concerned with investigating and enforcing the moral standards of a local community whose interests were homogeneous”).

<sup>34</sup> *Bushell's Case*, (1670) 124 Eng. Rep. 1006.

gotten the law wrong.<sup>35</sup> And *Bushell's Case* was known intimately to Pennsylvanians.

The case arose when a London jury ignored judicial instructions and acquitted William Penn of a charge of sedition growing out of his Quaker beliefs.<sup>36</sup> The judge then imprisoned Bushell, the jury's foreman, for contempt, but Bushell sought a writ of habeas corpus, and the Chief Judge of Common Pleas granted the writ, holding that a juror could not be imprisoned for following his conscience in giving a verdict, even if that meant ignoring judicial instructions on the law.<sup>37</sup> For the next century, *Bushell's Case* was a leading constitutional authority, standing for the proposition that juries had the right to determine both law and fact in the cases they heard, even in opposition to judicial instructions.

A number of early Pennsylvania Quakers defended that right. One interesting case occurred when James Keith, a renowned preacher who had arrived in Philadelphia in 1689, wrote a pamphlet about some pirates who had stolen a vessel from a wharf and began an escape.<sup>38</sup> Three Quaker magistrates immediately issued a warrant for the pirates' capture, a prominent Quaker merchant offered a reward of £100, and a party of men acting under the warrant forcibly overtook and seized the pirates and received the reward.<sup>39</sup> Keith questioned whether "hir[ing] men to fight, (and giving them a Commission so to do, signed by three Justices of the Peace called Quakers[.])" was consistent with Quaker principles of pacifism.<sup>40</sup> The pamphlet was published by the only printer in Philadelphia, William Bradford.<sup>41</sup>

Bradford was then indicted for publishing a seditious attack on the magistrates.<sup>42</sup> The main issue in the case was who would determine whether or not the publication was seditious. The position of the prosecution was that the jury should find only whether Bradford had printed the pamphlet, while the court should determine whether it was seditious.<sup>43</sup> Bradford, in contrast, argued that the jury should have broad power "to find also whether this be a Seditious Paper or not and whether it . . . tend[s] to the weakening of the hands

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<sup>35</sup> See Nelson, *Utopian Legal Order*, *supra* note 15, at 201.

<sup>36</sup> *Bushell's Case*, 124 Eng. Rep. at 1006.

<sup>37</sup> *Id.* at 1009–10.

<sup>38</sup> *Proprietor v. Keith*, (Philadelphia County Quarter Sessions 1686), in SAMUEL W. PENNYPACKER'S COLONIAL CASES 117, 130 (1892) [hereinafter PENNYPACKER'S COLONIAL CASES].

<sup>39</sup> *Id.* at 130.

<sup>40</sup> *Id.* at 131.

<sup>41</sup> *Id.* at 130.

<sup>42</sup> *Id.* at 132.

<sup>43</sup> *Proprietor v. Keith*, in PENNYPACKER'S COLONIAL CASES, *supra* note 38, at 135.

of the Magistrate.”<sup>44</sup> Some jurors also “believe[d] in their Consciences they were obliged to try whether th[e] Paper was Seditious,”<sup>45</sup> and Samuel Jennings for the court so instructed them.<sup>46</sup> The case was never resolved, however, when the jury proved unable after two days of deliberation to agree on a verdict.<sup>47</sup>

No other judge in colonial Pennsylvania ever conceded such broad power to juries as did Jennings. But other Pennsylvanians thought juries should possess it. In 1686, for example, the colonial assembly seemingly objected to county courts serving as “judges of equity as well as law . . . to mitigate, alter, or reverse” the verdict of a jury,<sup>48</sup> while a Philadelphia grand jury indicted a justice of the peace “for menacing and abusing ye jurors in the triall” of a named individual, “which was an Infringement of ye rights and properties of ye people.”<sup>49</sup>

The Pennsylvania assembly similarly impeached Chief Justice Nicholas Moore when he refused to accept a compromise verdict for a plaintiff in the amount of £8 in a suit in which the declaration had sought £500.<sup>50</sup> Moore told the jury to “goe out and find according to Evidence or Else you are all perjured Persons,” and the jury did so and brought in a new verdict, this time for the defendant.<sup>51</sup> In the assembly’s view, Moore had “refuse[d] a verdict brought in by a Lawfull Jury and by Divers threats & Menaces and Threatening ye jury with ye crime of Perjury and (confiscation) of their Estates forced ye said Jury to goe out so often until they had brought a Direct Contrary Verdict to the first.”<sup>52</sup> The council, however, at a time when William Penn was in town, refused to convict Moore, who therefore retained his position of Chief Justice as well as the confidence of Penn.<sup>53</sup>

This decision of the council, as I see it, indicates that the Quaker leadership of Pennsylvania fully understood the significance of *Bushell’s*

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 138.

<sup>47</sup> *See id.* at 139.

<sup>48</sup> THE REGISTRAR’S BOOK OF GOVERNOR KEITH’S COURT OF CHANCERY OF THE PROVINCE OF PENNSYLVANIA, 1720–1735, at 75 (1941) [hereinafter THE REGISTRAR’S BOOK].

<sup>49</sup> Presentment of the Grand Jury, (Philadelphia County Quarter Sessions 1686), in PENNYPACKER’S COLONIAL CASES, *supra* note 38, at 116–17.

<sup>50</sup> Proprietor v. Moore, (Pa. Leg. 1685), in PENNYPACKER’S COLONIAL CASES, *supra* note 38, at 46.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 41.

<sup>53</sup> *Id.* at 48.

*Case*—that it was all about power. The new colony’s leaders, who assumed correctly that non-Quakers someday would constitute a majority of Pennsylvania’s people, planned to remain in control; to guarantee their control, they adopted rules of procedure insuring that judges, who served at the pleasure of the Quaker proprietor, rather than juries responsive to popular will, would control the law and the judicial process. In subsequent years, the leadership developed a changing variety of techniques to keep juries under control.

In one case, for example, in which jurors were having difficulty reaching a verdict and agreed to resolve the case by casting lots, the court held the verdict defective, set it aside, and required the jurors to “give[] satisfaction both to the plaintiff and defendant and parties concerned” so that “they were no way hurt or damnified by the said verdict;” in addition, the jurors and the constable who aided them were collectively fined some £50.<sup>54</sup> As I have reported elsewhere, other courts in Philadelphia, Chester, and Lancaster counties similarly granted motions in arrest of judgment, set aside judgments and verdicts, and also ordered new trials.<sup>55</sup>

What apparently became the favored mode of jury control in the late seventeenth and early eighteenth century was recourse to equity. We have already seen the concern of the Pennsylvania assembly that equity courts could “mitigate, alter, or reverse” jury verdicts.<sup>56</sup> In one case about which we know most, a suit for breach of a contract to survey lands where the plaintiff had made partial payment, the jury returned a verdict for the defendant even though the evidence showed he had not completed the survey work.<sup>57</sup> The plaintiff wanted the verdict set aside “because of the severitie of ye Comon law allowing him no Consideracon for ye money paid, which he doubts not but equitie will allow.”<sup>58</sup> Unfortunately, the outcome of this invocation of equity has not been preserved. In other cases, however, “it is possible to determine that defendants did turn successfully to equity to reduce the penalties juries had awarded in suits for breach of penal bonds,” or to otherwise set aside verdicts of juries that

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<sup>54</sup> See *White v. Altman*, (Bucks County Quarter Sessions Dec. 1698), in *Records of the Courts of Quarter Sessions and Common Pleas of Bucks County, Pennsylvania 1684–1700*, at 358–60 (Triane Publ’g County 1943).

<sup>55</sup> See William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 *SMU L. REV.* 3, 19–20 (2006) [hereinafter Nelson, *Government by Judiciary*].

<sup>56</sup> *THE REGISTRAR’S BOOK*, *supra* note 48, at 75.

<sup>57</sup> *Jones v. Ascom*, (Pa. Provincial Ct. 1686), in *PENNYPACKER’S COLONIAL CASES*, *supra* note 38, at 111.

<sup>58</sup> *Id.*

had been obtained only one or two days earlier.<sup>59</sup>

Pennsylvania's separate court of equity ceased to function, however, after 1735, as a result of a dispute between the governor and the provincial assembly over who had power to establish it, and the end of a separate chancery court put an end to the use of appeals to equity as a mechanism for jury control.<sup>60</sup> But a new device, the demurrer to the evidence, which already was in use in neighboring New York,<sup>61</sup> promptly appeared in Pennsylvania.

*Kuhn v. Hart*, a 1752 case from Lancaster County,<sup>62</sup> with its ethnically mixed population of English and German settlers, is characteristic. The town of Lancaster had set up a lottery to raise money for purchasing a fire engine and had appointed Adam Kuhn and John Hart as the lottery's managers. After the drawing, the winners went to Hart to collect their winnings, but he refused to pay; they then presented their winning tickets to Kuhn, who did pay and who then brought an action on the case against Hart for reimbursement.<sup>63</sup> At the close of the plaintiff's case, in which Kuhn had presented evidence to this effect, defendant demurred.<sup>64</sup> Hart's counsel, in language important enough to be quoted at length, pleaded

that the evidence and allegations aforesaid alleged were not sufficient in law to maintain the issue joined for the plaintiff, to which the defendant need not nor by the law of the land is bound to give any answer. Wherefore for want of sufficient evidence in this behalf, the defendant demands judgment, that the jurors aforesaid of giving their verdict be discharged, & that the plaintiff be barred from having a verdict.<sup>65</sup>

In response to this attempt to override the jury's power, the plaintiff declared "that he had given sufficient matter in evidence, to which the defendant has

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<sup>59</sup> See Nelson, *Government by Judiciary*, *supra* note 55, at 20.

<sup>60</sup> See THE REGISTRAR'S BOOK, *supra* note 48, at 76–77. The court had been created in 1720. See *id.* The best discussion of the history of the court is in Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY 255, 266–71 (Donald Fleming & Bernard Bailyn eds., 1971).

<sup>61</sup> For an example in print of a demurrer to the evidence, as used in New York, see *Clarkson v. Elphinston* (1729), in SELECT CASES IN THE MAYOR'S COURT OF NEW YORK CITY, 1674–1784, at 217 (Richard B. Morris ed., 1935) [hereinafter SELECT CASES].

<sup>62</sup> *Kuhn v. Hart*, (Lancaster County Ct. Com. Pl. Nov. 1752) (on file with Lancaster County Historical Society).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

given no answer,” and that the case therefore should go to the jury.<sup>66</sup> Although the parties settled the case before the court could resolve the demurrer,<sup>67</sup> demurrers to the evidence raising substantive legal issues that the demurrants wanted the court rather than the jury to decide began to appear “with some frequency thereafter.”<sup>68</sup>

At the same time as the demurrer to the evidence was blossoming, other lawyers, perhaps with less sophistication, were striving to develop analogous procedures. Over time, some of these emerged as full-fledged mechanisms for controlling jury discretion and hence reigning in the power of local communities. Indeed, by the mid-1770s, demurrers were coming to be “disused”<sup>69</sup> and replaced by these other mechanisms.

Just as the Pennsylvania Court of Equity was closing down, a jury in Lancaster County returned a plaintiff’s verdict. The defendant’s lawyer moved in arrest of judgment, perhaps on procedural or perhaps on substantive grounds.<sup>70</sup> The court’s decision suggests, however, that the grounds were substantive.<sup>71</sup> Because it viewed the argument in arrest of judgment and the authorities quoted on behalf of the plaintiff as stronger than those produced by the defendant, the court overruled the argument of the defendant and granted judgment for the plaintiff.<sup>72</sup>

Eight years later in Chester County, “ambiguous motions challenged jury verdicts in two separate actions.”

In the one, after a verdict had been set aside on unspecified grounds, a second jury found a new verdict; the losing party moved for yet another new trial, but the court denied the motion. In the other, a defendant filed reasons to stay a judgment based on a verdict for the plaintiff.<sup>73</sup>

Nine years after these challenges,

just as the Lancaster Court of Common Pleas was deciding *Kuhn v. Hart*, another defense attorney in Lancaster moved for a new trial and a repleader following a jury verdict for the plaintiff. No record remains of the grounds of

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Nelson, *Government by Judiciary*, *supra* note 55, at 22.

<sup>69</sup> See Hurst v. Dippo, 1 U.S. (1 Dall.) 20–21 (Pa. Sup. Ct. 1774).

<sup>70</sup> See McCoan v. Morrrough, (Lancaster County Ct. Com. Pl. Feb. 1735) (on file with Lancaster County Historical Society).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> Nelson, *Government by Judiciary*, *supra* note 55, at 22.

the motion, but the fact that the lawyer requested a repleader along with a new trial suggests that substance was at issue.<sup>74</sup>

Substance was clearly at issue in the 1763 Supreme Court case of *Lessee of Fothergill v. Stover*,<sup>75</sup> a suit over title to land. At trial, the court accepted the defendant's offer of an informal letter from the secretary of the land office as proof of his title, and the jury returned a defendant's verdict.<sup>76</sup> The plaintiff, contending that the letter did not suffice to confer title, thereupon filed a bill of exceptions to the court's evidentiary ruling and took an appeal to the Privy Council, which accordingly was forced to rule on the substantive issue of whether the informal land grant procedures adopted in Pennsylvania following William Penn's death sufficed to grant valid title.<sup>77</sup> The use of this procedure of a bill of exceptions, followed in local Pennsylvania practice by a writ of error (rather than an appeal) to bring a case before a higher court, became routine in colonial Pennsylvania in the decade prior to the American Revolution.<sup>78</sup>

Whatever the ambiguities, it seems clear that by the 1770s, Pennsylvania's lawyers and judges had developed a number of mechanisms—the demurrer to the evidence, the writ of error and the bill of exceptions, and, perhaps, the motion in arrest of judgment—to deny lawfinding power to juries and place it in the hands of the bench. As Chief Justice Benjamin Chew announced less than two years before Americans declared their independence in Philadelphia, “the law [was] not uncertain.” It was “a settled rule, that courts of law determine Law; a Jury Facts.”<sup>79</sup> “Upon which maxim,” he added, “every security depends in an English Country.”<sup>80</sup> As long as counsel took the necessary steps to make it so, “the opinion of the Court” on points of law was “conclusive to the Jury.”<sup>81</sup>

The Pennsylvania judiciary's control over the law was not without opposition. One pamphleteer in 1772, for example, declared that, “if a Jury will take upon them the knowledge of the law . . . they may” and that the judiciary's efforts to deny the jury its rightful power had transformed the jury

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<sup>74</sup> *Id.*

<sup>75</sup> 1 U.S. (1 Dall.) 6, 7 (1763).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Nelson, *Government by Judiciary*, *supra* note 55, at 23–24.

<sup>79</sup> *Hurst v. Dippo*, 1 U.S. (1 Dall.) 20, 21 (1774).

<sup>80</sup> *Id.*

<sup>81</sup> *Anonymous*, 1 U.S. (1 Dall.) 20 (1773).

into an “engine of oppression.”<sup>82</sup> And when, as a consequence of the Revolution, the Quaker elite lost its power and radical democrats assumed control in the new Commonwealth, juries may have received the right to determine law as well as fact.<sup>83</sup>

#### IV. NEW YORK

Now let me turn to New York, where the Judicature Act of 1691,<sup>84</sup> as amended by the Judicature Act of 1692,<sup>85</sup> which, in the main, continued in force until the Revolution,<sup>86</sup> protected the role of juries by declaring explicitly that only juries could determine matters of fact.<sup>87</sup> Unfortunately, the act was somewhat ambiguous in specifying the matters of fact to be left in the hands of juries.<sup>88</sup> How was one to distinguish matters of fact from mixed questions of law and fact? Would a court be free, that is, to overturn a jury verdict resolving the facts if the jury also had applied law to those facts contrary to what the court thought the law ought to be?

In most cases before the 1730s, little conflict occurred between trial judges and juries. Juries returned their verdicts, and judges typically and routinely accepted them. If juries had doubt about the law, they could return a special verdict, in which they found only the facts and left it to the court to apply the law to the facts; juries returned special verdicts with some frequency. And when conflicts arose in cases employing general verdicts, judges had several procedural devices available at trial to keep control of the law in their hands rather than the hands of the jury.

Thus, numerous post-verdict motions for new trials and in arrest of judgment were granted, although the court records usually do not state the

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<sup>82</sup> *The Englishman's Right: A Dialogue between a Barrister at Law and a Juryman*, THE PA. CHRON., Feb. 3, 1772, at 22.

<sup>83</sup> See Patrick Kehoe Spero, *Creating Pennsylvania: The Politics of the Frontier and the State, 1682–1800* (2009), at 340–65 (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author). Beginning in 1805, Federalists and moderate Jeffersonians began the process of recovering control of the law from juries. See Nelson, *Province of the Judiciary*, *supra* note 33, at 342 (thereby suggesting that juries had gained control over the law sometime after the Revolution).

<sup>84</sup> 1 THE COLONIAL LAWS OF NEW YORK 226 (1894).

<sup>85</sup> *Id.* at 303.

<sup>86</sup> After 1698, the validity of the court system rested on gubernatorial proclamation. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 54 (2005).

<sup>87</sup> THE COLONIAL LAWS OF NEW YORK, *supra* note 84, at 230.

<sup>88</sup> *Id.*

legal grounds of those motions. At the other end of the litigation, defendants could interpose a demurrer to a plaintiff's action, seeking its dismissal for lack of legal merit even before it reached a jury; plaintiffs similarly could obtain rulings on the legal sufficiency of defendants' defenses.<sup>89</sup>

However, the demurrer to the evidence was the "most frequently used jury-control device," and was used in New York some two decades before its appearance in Pennsylvania.<sup>90</sup>

Trial judges thus possessed ample procedures with which to control juries.<sup>91</sup> It was unclear, however, whether they were prepared to use them. Thus, one chief justice in an early eighteenth century case instructed a jury that "if You will take upon you to judge of Law, you may, or bring in the fact specially,"<sup>92</sup> while three decades later another judge told a jury that the evidence against defendants warranted a conviction "if you have no particular reasons in your own breasts, in your own consciences to discredit [it]."<sup>93</sup> These judges, and others as well, were quite willing to let juries determine the law. As a result, it was unclear whether officials of the central administration in New York City could rely on the power of trial judges in their effort to impose imperial policies on the colony—whether the Crown, in short, could control the outcome of cases in local trial courts.

The simplest form of control would have been the governor's appointment and removal power, but by mid-century that power had atrophied. The removal power arguably disappeared entirely after Governor Cosby discharged Chief Justice Morris; the commission of Morris's successor, James DeLancey, and of several other judges explicitly granted them tenure during good behavior,<sup>94</sup> and all judges may have had such tenure by implication once DeLancey obtained it. Moreover, the governor did not possess a free hand in the appointment process.<sup>95</sup> By the mid-eighteenth century, he appointed judges at

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<sup>89</sup> William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664–1776*, 38 HOFSTRA L. REV. 69, 129–31 (2009) [hereinafter Nelson, *Legal Turmoil*].

<sup>90</sup> See *id.* at 131. On occasion, trial courts engaged in even stronger, though quite irregular, manhandling of juries, as, for example, by increasing a jury's damage or by setting aside a jury verdict of not guilty in a criminal case. *Id.* at 132.

<sup>91</sup> See DEBORAH A. ROSEN, COURTS AND COMMERCE: GENDER, LAW, AND THE MARKET ECONOMY IN COLONIAL NEW YORK 62–64, 181 n.21 (1997).

<sup>92</sup> See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 666 (1944) (quoting Chief Justice Mompesson's charge in the Trial of Makemie).

<sup>93</sup> See *id.* at 667 (quoting Chief Justice Horsmanden's charge in the Trial of Hughsons).

<sup>94</sup> See HULSEBOSCH, *supra* note 86, at 123–24.

<sup>95</sup> *Id.* at 56, 120.

the county level following nomination by the Assembly, which almost certainly meant nomination by local assemblymen, and to the Supreme Court only from members of the bar, nearly all of whom had enjoyed long careers in New York practice.<sup>96</sup> The Assembly had even further influence over judges, in that it controlled their remuneration.<sup>97</sup> Another device used with some frequency—proceedings against local judges and other officials for failure to perform the duties of their office—superficially appears to have provided a means of centralized control, but it was used only in cases of egregious misconduct.<sup>98</sup>

Therefore it became necessary to exercise control through the appeals process—the process by which higher courts, mainly the Supreme Court but ultimately the Governor and Council and the Privy Council, controlled lower courts. If appellate courts sitting without juries could review the entirety of the proceedings below, they would have even more power over jury verdicts than trial judges. If, on the other hand, they could review only what was contained in the record below, their power would be limited by the scope of that record.

Three writs existed for transferring cases from a lower to a higher court—habeas corpus, certiorari, and error.<sup>99</sup> In addition, transfer of criminal cases could occur prior to verdict through more informal procedures.<sup>100</sup>

Habeas corpus lay to transfer jurisdiction over a litigant from a lower to a higher court at any time prior to final judgment. But it could only be used if the lower court had sufficient control over the body of a litigant to deliver that control to the higher court—that is, if a litigant was in custody or had given bail to insure his or her appearance. That requirement somewhat limited the utility of the writ to criminal cases and in civil actions instituted by *capias* rather than attachment of property. In addition, habeas presented another problem: it did not allow a litigant to seek victory in a lower court and appeal only if he lost; he or she would have had to waive whatever opportunities the lower court offered. Finally, since habeas was used invariably before juries began deliberation, it could not serve as a device for controlling jury lawfinding.<sup>101</sup>

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<sup>96</sup> *Id.* at 127–29.

<sup>97</sup> *Id.* at 56, 120, 122–29; Eben Moglen, *Settling the Law: Legal Development in New York, 1664–1776*, at 217–22, 228–35 (1993) (unpublished Ph.D. dissertation, Yale University); see also Richard B. Morris, *Introduction*, in *SELECT CASES*, *supra* note 61, at 52–57.

<sup>98</sup> See Nelson, *Legal Turmoil*, *supra* note 89, at 133–34.

<sup>99</sup> See MOGLEN, *supra* note 97, at 182–84.

<sup>100</sup> *Id.* at 183–84.

<sup>101</sup> Nelson, *Legal Turmoil*, *supra* note 89, at 134–35.

The writs of certiorari and error were available to all litigants—certiorari before and error after final judgment, but brought only the record of the proceedings below before the appellate court.<sup>102</sup> Matters outside the record, such as jury verdicts, were not within the scope of the writs.<sup>103</sup> Since New York did not use the Pennsylvania bill of exceptions, the record that came up from a trial court on a writ of error was extremely thin, in most cases containing “no more than a writ directing a court officer to serve process, a declaration or formulary statement of the plaintiff’s claim, a defendant’s general denial, and an inscrutable jury verdict.”<sup>104</sup> Even when there was a demurrer to the evidence, the record usually did not indicate the evidence to which the demurrant was objecting.<sup>105</sup> The real matter in dispute and the evidence with which to resolve it were kept hidden from the appellate bench. Thus, while a judge on the ground who presided over a trial would have known in rich detail what the case was about and would have possessed the information necessary to a fair judgment and the power to impose one, transmission of the record did not give similar power to appellate judges, especially the ultimate ones—first, the Governor and Council and second, the Privy Council.<sup>106</sup>

Two colonial governors tried to solve the problem that the limitations of the common law record placed on their power. Both William Cosby and Cadwallader Colden failed when their efforts resulted instead in two of the great constitutional cases of the eighteenth century.

When an opposition newspaper, the *New York Weekly Journal*, began publishing vehement denunciations of his administration, Cosby decided to prosecute the printer of the *Journal*, John Peter Zenger, for seditious libel in the Supreme Court, which was the colony’s highest court with criminal jurisdiction.<sup>107</sup> For Cosby to succeed, however, it was necessary to circumvent ordinary criminal processes, in particular the power of the jury.

Cosby began effectively enough by having Zenger arrested on a special warrant of the Governor’s Council rather than by ordinary legal process.<sup>108</sup> He next tried to induce a grand jury to indict Zenger, but it refused and Cosby had to proceed by having the Attorney General file an information, “generally

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<sup>102</sup> *Id.* at 135.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 151.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See generally* Stanley Nider Katz, *Introduction* to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL 1–35 (Stanley N. Katz ed., 1963) [hereinafter Katz, *Introduction*].

<sup>108</sup> *Id.* at 16–17.

regarded as a high-handed, unfair procedure which undercut the popular basis of the jury system.”<sup>109</sup> Still, the petit jury remained; how could Cosby and his minions circumvent it?

Their technique was to have the Attorney General argue that the jury had power only to return a verdict on the narrow question whether Zenger had actually published the allegedly libelous words—a fact that Zenger conceded.<sup>110</sup> Whether the words amounted to libel was, according to the Attorney General, a question of law solely for the court.<sup>111</sup> On the other side, Andrew Hamilton, Zenger’s lawyer, argued that the jury should return a general verdict of not guilty.<sup>112</sup> Chief Justice James DeLancey, pressured by the Governor, but loyal to the profession and holding tenure during good behavior, equivocated, declining to use his power to control the jury. He instructed the jury that “as [the] facts or words in the information are confessed the only thing that can come before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt which you *may* leave to the court.”<sup>113</sup> Note the use of the word “may,” rather than “must.” DeLancey also read from a charge in an earlier English libel case in which a jury had been instructed “to consider whether the words tended to beget an ill opinion of the government.”<sup>114</sup> As the Chief Justice thus had left it open for them to do, the jurors accepted Hamilton’s argument, decided the law in Zenger’s favor, and returned a general verdict of not guilty.<sup>115</sup>

New Yorkers cheered the jury’s verdict as a great victory for liberty, and much of the Anglo-American world reacted noisily to the news.<sup>116</sup> And, to ensure that that world understood what the Zenger victory was about, James Alexander, one of Zenger’s lawyers, in 1736 published the proceedings of the case in *A Brief Narrative of the Case and Trial of John Peter Zenger*.<sup>117</sup>

The main thrust of Alexander’s narrative, which summarized all the arguments in the case but focused on Andrew Hamilton’s, was that freedom of the press was the primary bulwark of a free society and truth a defense to any

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<sup>109</sup> *Id.* at 19.

<sup>110</sup> *Id.* at 22–23.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 22.

<sup>113</sup> See GOEBEL & NAUGHTON, *supra* note 92, at 666 (quoting Chief Justice DeLancey’s charge in *King v. Zenger*) (emphasis added).

<sup>114</sup> *See id.* at 666.

<sup>115</sup> Katz, *Introduction*, *supra* note 107, at 22.

<sup>116</sup> *See id.* at 26–28.

<sup>117</sup> *See id.*

libel prosecution.<sup>118</sup> But Hamilton's second main point concerned the power of the jury. Hamilton "insist[ed] that where matter of law [was] complicated with matter of fact, the jury" had "at least as good a right" in a seditious libel case as in any other "to determine both."<sup>119</sup> He urged

*that in all general issues, as upon non cul. in trespass, non tort., nul disseizen in assize, etc., though it is matter of law whether the defendant is a trespasser, a disseizer, etc. . . . yet the jury . . . find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately.*<sup>120</sup>

Hamilton explained that jurors were entitled to a different opinion than the court because one man could not "*see with another's eye, nor hear by another's ear, no more [could] a man conclude or infer the thing by another's understanding or reasoning.*"<sup>121</sup> He therefore found it "very plain *that the jury are by law at liberty . . . to find both the law and the fact*" in all cases submitted for their verdict.<sup>122</sup> The Chief Justice implicitly agreed when he sent the jurors out to deliberate upon the case even though the only issue that the Attorney General thought they should decide—the fact of publication—had been conceded by the defense.<sup>123</sup>

The *Zenger* case was not a precedent in the sense of binding subsequent courts to follow what it had done. The case did not establish, as a matter of law, that truth was a defense. But it cast doubt upon what had been largely accepted doctrine in New York until that time—that juries decided the facts, and judges, the law. By virtue of the publicity it received, the *Zenger* case made the politically conscious class—the men, that is, who would sit on juries—aware of their power to determine law as well as fact, and thereby made the agents of the Crown aware of the difficulty of circumventing the jury's, and hence the people's, opinions on the law.<sup>124</sup>

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<sup>118</sup> See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL 91–92 (Stanley N. Katz ed., 1963).

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.* at 91–92.

<sup>121</sup> *Id.* at 92.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* at 100.

<sup>124</sup> See Katz, *Introduction, supra* note 107, at 30. It is important to note that Andrew Hamilton did not treat juries in seditious libel cases differently than any other juries; in his argument, they all had power to determine law along with fact. Conferring such power only on libel juries and not others was a late eighteenth and early nineteenth century idea, not a mid-eighteenth century one. For an example of an early nineteenth century view, see the discussion of *People v. Crosswell*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON:

Three decades later Cadwallader Colden, who was acting Governor at the time, nonetheless tried circumvention. He had a new argument, applicable at least in civil cases. He tested it in another of the eighteenth century's great constitutional cases, *Forsey v. Cunningham*.<sup>125</sup>

The case arose when Cunningham, in what had appearances of a premeditated attack, stabbed Forsey in the chest with a sword he had concealed beneath his clothing.<sup>126</sup> Forsey commenced a civil action in the Supreme Court for battery, and in October 1764 the jury returned an astronomically large verdict of £1,500 in the plaintiff's favor.<sup>127</sup> Cunningham determined to appeal to the Governor and Council and ultimately, if necessary, to the Privy Council.<sup>128</sup> Colden, who was acting Governor at the time, was eager to consider the appeal as a means of limiting the power of juries and thereby enhancing that of the Crown.<sup>129</sup>

The difficulty for Cunningham and Colden was that no error appeared on the face of the record. The proceedings below had been legally simple: Forsey had filed his writ and declaration, Cunningham had properly pleaded the general issue and moved for a struck jury, which motion had been granted, and the case had been submitted to the jury on the evidence, not reported in the record, which the parties had presented.<sup>130</sup> Cunningham's only objection was to the size of the verdict, but if he took his appeal by writ of error, that objection could not be raised.<sup>131</sup> There simply was no error in the proceedings below.

Cunningham accordingly sought to proceed by filing an appeal rather than a writ of error.<sup>132</sup> The distinction was that on a writ of error, where a general verdict had been given, the merits of a case did not appear in the record and thus could not be considered by the higher court, only whether an issue of law had been improperly decided below.<sup>133</sup> On an appeal, in contrast, the entire case was open to reconsideration, both on the evidence below and on such new

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DOCUMENTS AND COMMENTARY 775, 836–48 (Julius Goeble Jr. ed., 1964).

<sup>125</sup> The case is most thoroughly analyzed in JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 390–416 (1950). The following discussion is based entirely upon Smith's analysis.

<sup>126</sup> *Id.* at 390.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 391–92, 395–96.

<sup>129</sup> *Id.* at 393.

<sup>130</sup> *Id.* at 390–91.

<sup>131</sup> SMITH, *supra* note 125, at 391–92.

<sup>132</sup> *Id.* at 393.

<sup>133</sup> *Id.*

evidence as the litigants might present.<sup>134</sup> Colden conceded that under prior New York practice no one had ever proceeded by this form of appeal from the Supreme Court to the Governor and Council, but he saw Cunningham's case as a device to alter this preexisting practice and thereby enhance the Crown's power to reexamine jury verdicts contrary to royal policies.<sup>135</sup> Colden sought to allow an appeal on the technical argument that a clause in the instructions of the governor specifying the writ of error as the proper mode of appeal had been omitted from those instructions in 1753.<sup>136</sup>

Relying on its precedents and on its understanding that, at common law in England, cases proceeded from lower to higher courts only by writ of error, the lawyer-dominated Supreme Court denied Cunningham's appeal.<sup>137</sup> The Council, on the advice of the judges and the Attorney General, agreed and also denied the appeal, over Colden's dissent.<sup>138</sup> In 1765, Cunningham next sought leave to appeal from the Privy Council.<sup>139</sup> The Council denied leave to appeal to it, but at the same time directed Colden to allow an appeal from the Supreme Court to the Court of Appeal, presumably the Governor and Council, in New York.<sup>140</sup> Colden thereupon issued a writ of appeal to the Supreme Court.<sup>141</sup> That court, however, declined to obey the writ on the grounds that the attorney seeking to appeal had not been properly retained, that it had no power to assign counsel to proceed in a court over which it lacked jurisdiction, and that, in any event, it had received no proper writ directing it to send up the record.<sup>142</sup> These matters rested until November 1765, when a new governor arrived with new instructions restoring the language omitted from the 1753 instructions and confining appeals to the Governor and Council to "cases of error only."<sup>143</sup>

*Forsey v. Cunningham* "shook the province and had repercussions the whole length of the Atlantic seaboard."<sup>144</sup> It resulted in petitions to Parliament and in the publication of a pamphlet, similar to Alexander's *Brief Narrative* in

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 393–95. Colden's position raised two issues: First, had the language been omitted to change practice or only because it was superfluous? Second, could the common law of a province be altered merely by a change in the Governor's instructions?

<sup>137</sup> SMITH, *supra* note 125, at 394–95.

<sup>138</sup> *Id.* at 405.

<sup>139</sup> *Id.* at 406.

<sup>140</sup> *Id.* at 408.

<sup>141</sup> *Id.* at 410.

<sup>142</sup> *Id.* at 410–11.

<sup>143</sup> SMITH, *supra* note 125, at 390.

<sup>144</sup> *Id.* at 410.

the Zenger case, that circulated widely.<sup>145</sup> Also, it left jurors with power to determine law as well as fact unless a trial judge, in the exercise of his unreviewable discretion, tried to use one of the procedural mechanisms at his command to stop them. If he declined to do so, no appellate court, not even the Governor or the Privy Council, subsequently could.

The result was that power was radically dispersed in New York. Law was not what the Governor or even the Assembly by statute commanded; law was what local people, either jurors or trial judges beholden to local constituencies, or in the case of Supreme Court justices, to the bar, declared the law to be.

## V. THE CAROLINAS

Let me end very briefly with the Carolinas. In South Carolina, judges subjected juries to tight control, monitoring even factfinding.<sup>146</sup> Thus, if a jury either failed to consider evidence or ruled on the basis of improper evidence, its verdict would be set aside and a new trial granted.<sup>147</sup>

Judges . . . also totally controlled the potential power of juries to find law. Often, juries cooperated by returning special verdicts that resolved only issues of fact and left the court free to determine the legal significance of those facts. But, even when juries tried to exercise greater freedom, judges kept them under tight control. As early as 1734, a motion was made in arrest of judgment on the ground that a jury had failed to address all the issues presented by the pleadings. Judges also appear to have kept rein over evidence that a jury could hear, permitting the introduction only of evidence relevant to the issues raised by the pleadings. And, the Court of Common Pleas granted motions for new trials when verdicts were “against Evidence[,] Contrary to Law, and the Directions of the Court” or damages were excessive. In one case, the court even set aside the verdict and granted judgment on the law for a defendant.<sup>148</sup>

The Court of Common Pleas was subject, in turn, to firm supervision by the Court of Chancery, which was put on an explicit statutory footing in 1721 with the governor of the colony himself sitting as presiding officer.<sup>149</sup>

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<sup>145</sup> See MICHAEL KAMMEN, *COLONIAL NEW YORK: A HISTORY* 350 (1975); SMITH, *supra* note 125, at 390 n.179.

<sup>146</sup> William E. Nelson, *The Height of Sophistication: Law and Professionalism in the City-State of Charleston, South Carolina, 1670–1775*, 61 S.C. L. REV. 1, 35 (2009) [hereinafter Nelson, *Height of Sophistication*].

<sup>147</sup> *Id.* at 36.

<sup>148</sup> *Id.* at 36–37 (quoting *Hazzard v. Wood*, (S.C. Ct. Com. Pl. 1761), microformed on S.C. Ct. Com. Pl. Civil Journals, 1754–69 (S.C. Dep't of Archives & History)).

<sup>149</sup> See JAMES NELSON FRIERSON, *Legal Introduction to RECORDS OF THE COURT OF*

Chancery exercised an intrusive jurisdiction:<sup>150</sup> in the end, as one lawyer argued, “the Court of Chancery . . . had a Concurrent Jurisdiction in many cases with the Court of Law,”<sup>151</sup> although Chancery would not require a respondent to answer to a claim that might subject him to a penalty at common law,<sup>152</sup> nor would it issue an injunction *ex parte* or in the absence of seasonable notice to the respondent.<sup>153</sup>

The result was a legal order under the tight control of the bench. It was, moreover, a completely centralized system. There had been proposals in the 1720s to establish courts to hear civil cases outside Charleston, but in 1729 the Privy Council disallowed revised legislation creating them, and, as a result, the Court of Common Pleas in Charleston remained the only court in the colony with jurisdiction over civil, common law adjudication until the 1770s.<sup>154</sup> Individual justices of the peace heard misdemeanors not requiring jury trial and petty debt cases, but the justices never met together as county Courts of Sessions; the only Sessions court sat in Charleston.<sup>155</sup> Outlying regions did not even have their own sheriffs; one provost marshal for the entire colony served

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CHANCERY OF SOUTH CAROLINA, 1671–1779, at 53 (Anne King Gregorie ed., 1950); An Act for Establishing a Court of Chancery in this His Majesty’s Province of South Carolina (Sept. 9, 1721), in 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692–1734, at 437–39 (John D. Cushing ed., 1978) [hereinafter EARLIEST PRINTED LAWS].

<sup>150</sup> See Nelson, *The Height of Sophistication*, *supra* note 146, at 38–39.

<sup>151</sup> Dering v. Elliott (S.C. Ch. 1772), in RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779, at 602–03 (1950) (argument of counsel).

<sup>152</sup> See Baker v. Moore (S.C. Ch. 1726), in RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779, at 326 (1950).

<sup>153</sup> See Trott v. Parris (S.C. Ch. 1735), in RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779, at 377–78 (1950). For the legislation and court rules requiring notice, see Order of Sept. 8 (S.C. Ch. 1762), in RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779, at 512–13 (1950); FRIERSON, *supra* note 149, at 54 (discussing legislation and court rules requiring notice).

<sup>154</sup> See M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY, 1663–1763, at 142–44, 159–60, 166 (1966); see also Repeal of the Act for Settling the Courts of Justice (Mar. 11, 1726), in EARLIEST PRINTED LAWS, *supra* note 149, at 540 (disallowed fees for courts located outside of Charleston). Of course, the Privy Council heard appeals from civil judgments as well as passing on legislation. See, e.g., Ogilvie v. Ward (S.C. Ch. 1774), in RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779, at 625 (1950). Prior to 1720, appeals had lay to the proprietors. See FRIERSON, *supra* note 149, at 12.

<sup>155</sup> See WILLIAM SIMPSON, THE PRACTICAL JUSTICE AND PARISH-OFFICER, OF HIS MAJESTY’S PROVINCE OF SOUTH CAROLINA 67–70, 124, 126–27 (photo reprint 1972) (1761); SIRMANS, *supra* note 154, at 251; An Act for the Speedy Recovery of Small Debts (Sept. 2, 1721), amended by An Additional Act to an Act for the Trial of Small and Mean Cases (Mar. 11, 1726), in EARLIEST PRINTED LAWS, *supra* note 149, at 424–25, 533–34.

all writs and executed all judgments;<sup>156</sup> and local constables were appointed by the chief justice of the colony and his associate judges sitting in the colony-wide courts in Charleston.<sup>157</sup>

In short, South Carolina judges decided law, and juries only matters of fact. Nonetheless, judges could not enforce their law beyond a small zone surrounding the capital in which they sat; no courts existed outside Charleston, the colony's capital, prior to 1772.<sup>158</sup> The colony was a small city-state tightly controlled by an alliance of planters, merchants, royal officials, and lawyers, who all resided in Charleston, knew each other well, and profited collectively from the colony's vast wealth.<sup>159</sup> A few hundred men dominated their women and children as well as lower class whites economically dependent on them, and they brutalized the colony's majority, its African-American slaves.<sup>160</sup> But they made no effort to impose law on outlying localities.<sup>161</sup>

In North Carolina, as in South Carolina, the judiciary controlled jury lawfinding.<sup>162</sup> Thus, courts sustained demurrers to declarations, arrested judgments, set aside jury verdicts, and reserved judgment whether particular testimony was properly admitted in evidence and whether it was sufficient as a matter of law to support a verdict.<sup>163</sup> At other times, juries were willing to leave important issues of law to the court by returning special verdicts.<sup>164</sup> And, in one criminal case a court dismissed a prosecution after concluding that the evidence was insufficient to support a guilty verdict, while in another prosecution there was a motion in arrest of judgment following a jury verdict of guilty of a lesser crime than the one charged.<sup>165</sup>

But, as in South Carolina, the North Carolina Supreme Court proved unable to enforce the law beyond in its bailiwick in the East. Trouble began in the West as early as 1759, little more than a decade after significant settlement

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<sup>156</sup> See SIMPSON, *supra* note 155, at 112. For the relevant legislation, see An Act for Establishing County and Precinct Courts (S.C. Ch. 1721), in EARLIEST PRINTED LAWS, *supra* note 149, at 505, 516–17.

<sup>157</sup> See SIMPSON, *supra* note 155, at 84–85.

<sup>158</sup> See Nelson, *Height of Sophistication*, *supra* note 146, at 37.

<sup>159</sup> *Id.* at 44.

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> See William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775*, 88 N.C. L. REV. 2133, 2171 (2010) [hereinafter Nelson, *Politicizing the Courts*].

<sup>163</sup> *Id.* at 2146–47.

<sup>164</sup> *Id.* at 2180.

<sup>165</sup> *Id.* at 2184.

had occurred in the region<sup>166</sup> and only five years after the establishment of Supreme Court jurisdiction there.<sup>167</sup> Several vigilantes from Edgecombe County seized a land agent in the Granville District who had been taking fees that the vigilantes claimed were illegal.<sup>168</sup> After forcing him to post an alleged bond requiring a future appearance in court, the vigilantes dispersed, but, when several of them were arrested and jailed, friends broke into the jail and released them.<sup>169</sup> No further prosecutions transpired.<sup>170</sup>

The next riot occurred in 1765, when a group of squatters in disguise attacked and beat four surveyors who, on behalf of an absentee landowner, were mapping out the land on which the squatters had settled.<sup>171</sup> Governor William Tryon issued a proclamation calling for the identification and prosecution of the squatters, but nothing happened.<sup>172</sup> In the same year, a school teacher was sued for a small debt and responded by writing *An Address to the People of Granville County*, in which he pilloried lawyers, court clerks, and sheriffs and accused them of taking unlawful fees that increased the charges of litigation.<sup>173</sup> His pamphlet led to a petition to the General Assembly, but that petition was ignored.<sup>174</sup> “The next year, the January term of the Rowan County Court for unstated reasons had to be postponed; all but two theft prosecutions were continued to the April term.”<sup>175</sup>

Enter the North Carolina Regulators.<sup>176</sup> In 1767 people in the Hillsborough vicinity had sought to create formal machinery by which protests could be conveyed to the provincial government, but officials had blocked their progress.<sup>177</sup> Then, at the beginning of April 1768 the people founded the

<sup>166</sup> See HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, *THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA* 78–81, 83–87 (3d ed. 1973); HARRY ROY MERRENS, *COLONIAL NORTH CAROLINA IN THE EIGHTEENTH CENTURY* 53–60, 66 (1964).

<sup>167</sup> An Act, for Establishing the Supreme Courts of Justice, Oyer and Terminer, and General Gaol Delivery of North Carolina (Dec. 12, 1754), *reprinted in* 25 *THE STATE RECORDS OF NORTH CAROLINA* 274 (Walter Clark, C.J. ed., 1906).

<sup>168</sup> See WILLIAM S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES* 150 (1989).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 151.

<sup>174</sup> POWELL, *supra* note 168, at 151.

<sup>175</sup> Nelson, *Politicizing the Courts*, *supra* note 162, at 2190.

<sup>176</sup> See generally PAUL DAVID NELSON, *WILLIAM TRYON AND THE COURSE OF EMPIRE: A LIFE IN BRITISH IMPERIAL SERVICE* 70–89 (1990).

<sup>177</sup> *Id.* at 71.

Regulator Association with the goal of “regulating” their own affairs.<sup>178</sup> A few days later a Regulator refused to pay taxes, to which the sheriff responded by seizing his horse and preparing to sell it.<sup>179</sup> Fellow Regulators promptly tied up the sheriff, rescued the horse, and threatened a prominent local judge.<sup>180</sup> The judge called up the local militia, but when few responded to his call, he sought help from Governor Tryon.<sup>181</sup>

In July, Tryon marched into Hillsborough at the head of a militia force from three counties, but the Regulators made it plain they still intended not to pay taxes.<sup>182</sup> By September the Regulators had assembled a force of some 800 men to disrupt the forthcoming Hillsborough sitting of the Supreme Court, but Tryon had twice that number.<sup>183</sup> Ultimately the Regulators simply went home, and the Court met.<sup>184</sup>

Agitation continued for the next two years, but without violence. Then in September 1770, the Regulators burst into the Hillsborough Supreme Court session, seized and beat a lawyer, dragged the assistant Attorney General and one of the judges into the street, and demolished the judge’s house.<sup>185</sup> Other leading citizens, including the presiding judge, fled town.<sup>186</sup>

The colony’s legislature responded by enacting a statute permitting the Attorney General to obtain indictments against and prosecute rioters in any Supreme Court in the colony or in a specially convened court.<sup>187</sup> This legislation meant that, if Regulators could be captured, they could not count on protection from local juries or on being rescued by local friends—precisely the sort of allegedly unconstitutional deprivation of the right to trial by jury that would worry Anti-federalists a mere two decades later.

Next, Tryon attempted to catch them. In the spring of 1771, he gathered an army to bring the West to its knees, and on May 16, 1771, Tryon’s force of

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 71.

<sup>182</sup> PAUL DAVID NELSON, *supra* note 176, at 73–75.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 75–78.

<sup>186</sup> *Id.*

<sup>187</sup> See An Act for Preventing Tumultuous and Riotous Assemblies, and for the More Speedy and Effectually Punishing the Rioters, and for Restoring and Preserving the Public Peace of this Province (Dec. 5, 1770), reprinted in 25 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 167, at 519a–519b.

1,300 militiamen defeated 2,500 Regulators in the Battle of the Alamance.<sup>188</sup> He pardoned all but a handful of leaders and spent the next two months chasing after the leaders and seizing their property.<sup>189</sup>

In the view of the leading scholar of the Regulator war, Tryon “restore[d] the western counties of North Carolina to a semblance of the king’s peace.”<sup>190</sup> But he did not restore the rule of law. According to extant colonial court records, the Salisbury Supreme Court never met after 1770, and the Hillsborough Court met only briefly in March and September of 1772, and no one performed important governmental functions in the western counties, such as collecting taxes.<sup>191</sup> “Indeed, conditions were so bad in Rowan County as early as 1769 that the man chosen as sheriff could not obtain a performance bond, not because anyone doubted his integrity or honesty, but because” the confused and disturbed state of the county prevented anyone from performing the job.<sup>192</sup> “Two years later, Regulators were still refusing to take the oath of allegiance in support of the colony’s government.”<sup>193</sup>

In sum, Tryon’s victory at Alamance established no more than the fact that an army with superior weapons, at least in a pitched battle, could capture and kill some of its enemies. But when the bulk of the enemies simply disappeared into the countryside, the army could not govern them. Only the people could govern themselves, and when the judiciary was unwilling to seek their cooperation through the institution of the jury, government in colonial North Carolina could not function.

## VI. CONCLUSION

So what is the final score? On the issue of the lawfinding power of colonial juries, the score is roughly tied with my research not yet completed: juries possessed ultimate power over the law in New England and Virginia, but not in the Carolinas, New York, and Pennsylvania. On the more important issue of the power of localities to resist centrally imposed law, however, the localities have a big lead. Although trial judges in New York were able to control juries, the judges themselves were under the sway of local constituencies, with the result that each county in the colony was a kind of polity unto itself. Central courts in the Carolinas also controlled juries, but without the aid of independent jurors outside their immediate bailiwicks, they

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<sup>188</sup> PAUL DAVID NELSON, *supra* note 176, at 81–85.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 85.

<sup>191</sup> See Nelson, *Politicizing the Courts*, *supra* note 162, at 2193.

<sup>192</sup> *Id.* at 2194.

<sup>193</sup> *Id.*

proved either unwilling or unable to impose law on the hinterlands. Only Pennsylvania was a clear outlier during the colonial period, and when the Revolutionary conflict transferred lawfinding power there from courts to juries, even Pennsylvania fell into line.

Accordingly, I am somewhat confident in concluding that in the years of America's Founding—from the late 1770s into the early 1790s—localities, often though not always through the mechanism of jury lawfinding, typically possessed the capacity to resist the imposition of central government law. But, at the same time, it seems clear that the Constitution of 1787, as its framers intended it to do, created a national government that gradually gained increasing power to impose national law on its recalcitrant peripheries. The story of that government and its power, however, is one for another time and place. So, for me at least, is a central issue raised by this symposium: whether American courts today should be governed by the law as it existed and was known to those who adopted the Constitution in 1787–1791 or, in the alternative, by the logic of the Constitution's commitment to the enforceability of national law, as that commitment was put into practice in the decades immediately following the Constitution's adoption.<sup>194</sup>

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<sup>194</sup> For my understanding of how the logic of the Constitution's commitment to the enforceability of national law quickly played itself out, see William E. Nelson, *Province of the Judiciary*, 37 J. MARSHALL L. REV. 325 (2004).