

Fall 1998

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Recommended Citation

Stanton D. Krauss, An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, 89 J. Crim. L. & Criminology 111 (1998-1999)

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AN INQUIRY INTO THE RIGHT OF CRIMINAL JURIES TO DETERMINE THE LAW IN COLONIAL AMERICA

STANTON D. KRAUSS*

It was late August, 1814. The British army had scattered the American force at Bladensburg, burned the Capitol, the Executive Mansion (which has been known as the White House since the soot was painted over), and much of official Washington. The road to Baltimore was open, and the northward march was on.

During the redcoats' advance, four stragglers and a deserter were taken into custody by civilians from a nearby town that had previously surrendered to the British. When the invaders learned of this treachery, they took hostages and warned that the town would be razed and the townspeople killed if the five

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men were not returned by the following noon. Leaders of the defenseless town, including John Hodges, decided to capitulate. Hodges, along with others, was directed to satisfy the British demands. He did so, putting the deserter in mortal danger, but in the end the town was saved and no one was harmed.

A grateful federal government rewarded Hodges by charging him with treason.¹ Because the return of British troops amounted to giving "aid and comfort" to the enemy,² the only issue at his trial was whether the underlying circumstances provided a good excuse for this conduct. Treason being defined by Article III of the Constitution,³ this was ultimately a question of constitutional law.⁴

The prosecutor claimed that nothing but a threat to Hodges' own life could justify his conduct,⁵ and he asked the court for an instruction that Hodges' defense was legally insufficient. Defense counsel William Pinkney vigorously disputed this view of the law in his closing argument. After giving the matter

¹ This account of Hodges' case is drawn from Report of the Trial of John Hodges, Esq., on a Charge of High Treason. . . (1815) (S# 35768) [hereinafter Hodges' Trial]. A slightly abridged version of this report appears in 10 Am. St. Trials 163 (1815). A much more abbreviated version can be found at 26 F. Cas. 332 (C.C.D. Md. 1815) (No. 15,374). [Editors' Note: Charles Evans' AMERICAN BIBLIOGRAPHY (1903-1959), Roger P. Bristol's SUPPLEMENT TO EVANS'S AMERICAN BIBLIOGRAPHY (1970), and Ralph R. Shaw & Richard Shoemaker's AMERICAN BIBLIOGRAPHY (19 vols. 1958-1963) have catalogued every book published in America before 1820. These catalogues list all the libraries at which these scholars were able to find each book. Readex Microprint Corp., in association with the American Antiquarian Society, has made microfiche sets of all the locatable books in Evans or Shaw & Shoemaker's catalogues (the titles of these respective microfiche sets are EARLY AMERICAN IMPRINTS and EARLY AMERICAN IMPRINTS SECOND SERIES). The author has included the catalogue number, preceded by (Evans #) or (S #), whenever he cites to a book that has not been reprinted in modern times.]

² "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. III, § 3.

³ See *id.*

⁴ The prosecution was brought under a statute following the Treason Clause *in haec verba*, Act of April 30, 1790, 1 Stat. 112, ch. 9, § 1, and no one suggested that there was any difference in meaning between the two. In any event, were the Act to have been broader in scope than the Clause, it would have been to that extent invalid.

⁵ This seems to have been a correct statement of the law, as interpreted by the judges. See JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 223 n.28 (1971).

some thought, Supreme Court Justice Gabriel Duvall, one of two judges presiding at this circuit court trial,⁶ told the jury that he believed Hodges had no legally cognizable defense. He continued, however, by saying, "The jury are not bound to conform to this opinion, because they have a right, in all criminal cases, to decide on the law and the facts."⁷ At this point, the other jurist on the bench, District Judge James Houston, "said he did not entirely agree with [Justice Duvall] in any, except the last remark."⁸ Pinkney then arose again and addressed the jury. "Gentlemen of the jury," he proclaimed, "The opinion which [Justice Duvall] has just delivered [denying the validity of Hodges' defense] is not, and I thank God for it, the law of this land."⁹ Evidently the jury agreed, as Hodges was acquitted.

This incident bears vivid testimony to the fact that the jury was once widely said to have the "right" to judge "the law and the facts" in American criminal trials. Although Alexander Hamilton once argued otherwise,¹⁰ that "right" imported more

⁶ Multi-member circuit courts vested with trial and appellate jurisdiction were created by the Judiciary Act of 1789, 1 Stat. 74, ch. 20, § 4 (1789). At the time Hodges' case was tried, each circuit court consisted of one Supreme Court Justice and one federal district court judge. See CHARLES ALAN WRIGHT, *THE LAW OF THE FEDERAL COURTS* 4-6 (5th ed. 1994). For more on the historical use of multi-judge trial courts in colonial America and the early Republic, see *infra* note 54 and accompanying text.

⁷ Hodges' Trial, *supra* note 1, at 28, 10 Am. St. Trials at 176, 26 F. Cas. at 334. Before the judges retired to consider the prosecutor's requested jury charge, indeed, before arguments on the motion had begun, Pinkney questioned the propriety of the court's giving binding instructions on the law at the request of the State. Presumably speaking through Justice Duvall, "the Court said they were bound to declare the law whenever they were called upon, in civil or criminal cases; in the latter, however, it was also their duty to inform the jury that they were not obliged to take their direction as the law." Hodges Trial, *supra* note 1, at 20, 10 Am. St. Trials at 170, 26 F. Cas. at 332. Thus, the comment quoted in the text doesn't simply reflect the view that a jury must determine the law for itself when the judges are evenly divided. Similar charges were given by federal judges in the absence of any division on the bench. See, e.g., *United States v. Hoxie*, 26 F. Cas. 397, 402-03 (C.C.D. Vt. 1808) (No. 15,407).

⁸ Hodges' Trial, *supra* note 1, at 28, 10 Am. St. Trials at 176, 26 F. Cas. at 334.

⁹ Hodges' Trial, *supra* note 1, at 28, 10 Am. St. Trials at 176, 26 Fed. Cas. at 335.

¹⁰ See *People v. Croswell*, 3 Johns. 336, 355, 362 (N.Y. 1804); GEORGE CAINES, *THE SPEECHES AT FULL LENGTH OF MR. VAN NESS, . . . AND GENERAL HAMILTON, IN THE GREAT CAUSE OF THE PEOPLE AGAINST HARRY CROSWELL . . .* 72, 75-76 (1804), reprinted in 1 *THE LEGAL PAPERS OF ALEXANDER HAMILTON*, at 823, 828-29 (Julius Goebel ed., 1964). See also 16 Am. St. Trials 40, 66-67, 72-73 (1804).

than even an unchecked power. A moment's reflection identifies both the distinction and its significance.

A spiteful or malicious jury has the power to convict a defendant it does not believe to have been proven guilty of the crime charged, and its verdict will generally stand if there is enough record evidence to allow a reasonable person to believe the defendant guilty. A perverse or puckish acquittal of a defendant whom the jury believes to have been proven guilty beyond a reasonable doubt will also stand. In neither case will the jurors who rendered the improper verdict be subject to punishment. Of course, as the fact that you did not blink at my use of the word "improper" in the last sentence shows, this does not mean that juries have a right to decide criminal cases without regard to the facts; it just means that they have the power to do so, and that in some cases that power is absolute. Moreover, just as the commonality of political corruption doesn't make graft a right, the frequency of convictions of defendants believed by juries to be innocent wouldn't make it [a] right.¹¹

Juries have a similar power to decide for themselves what legal principles should govern decisions in criminal cases and to implement them. They have the power, that is, to decide what the applicable substantive rules are, what those rules mean, whether they are legally valid (i.e., constitutional), and whether (despite their validity) they should be followed.¹² And sometimes that power—like the factfinding power—is absolute.

It matters whether the jury's exercise of this lawfinding power is considered rightful or a dereliction of duty. For one thing, if the former view were accepted, courts presumably would be forbidden to strip juries of everyone unwilling to implement the judges' opinions on the law.¹³ Beyond that, as the

¹¹ Indeed, if Hamilton really believed that an unchecked power is a right, it is hard to see how he could have denied that Parliament had the right to pass the legislation that the colonists said caused and justified the Revolution.

¹² The first three of these powers are shared with judges. The fourth parallels the prosecutor's discretion not to charge people believed to be demonstrably guilty of violating valid criminal laws.

¹³ While jurors whose *voir dire* testimony manifests a commitment to reject (or to follow) the judges' law might be excludable for cause in a jurisdiction recognizing the criminal jury's lawfinding authority (on the theory that they had prejudged the case),

televised jury deliberations in *Wisconsin v. Reid* so graphically showed,¹⁴ juries are uncomfortable about breaking the rules. And a jury that is told it has the right to determine the law (as was Hodges') will probably approach its job differently than one that is not, or is told otherwise.¹⁵ Indeed, it is for just these reasons that virtually all American judges now refuse to give¹⁶—and groups like the Fully Informed Jury Association (FIJA) are campaigning to require that juries be given¹⁷—instructions telling jurors that they may nullify (i.e., refuse to enforce) valid laws. They are doubtless also among the reasons why Justice Duvall gave the charge he gave in *Hodges*.

jurors vested with such authority couldn't be dismissed because they decided during their deliberations on a case not to follow the judge's charge on the law. Cf. *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997) (approving the removal of jurors on this basis).

¹⁴ These deliberations, along with the trial in Reid's case, were broadcast on the PBS television program *Frontline: Inside the Jury Room* (PBS television broadcast, April 8, 1986).

¹⁵ See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 158-60 (1986); Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 *LAW & HUM. BEHAV.* 439 (1988); Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 *LAW & HUM. BEHAV.* 25 (1985); Gary Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 *WASH. U. L.Q.* 571.

¹⁶ The leading modern decision is *United States v. Dougherty*, 473 F.2d 1113, 1117, 1130-37 (D.C. Cir. 1972) (affirming trial court's refusal to inform the jury of power to nullify law). Recent federal appellate cases taking this position are listed in *United States v. Edwards*, 101 F.3d 17, 19-20 (2d Cir. 1996). Among the many contemporary state court cases endorsing this view are *People v. Dillon*, 668 P.2d 697, 726 n.39 (Cal. 1983), and *State v. Bjerkaas*, 472 N.W.2d 615, 619-20 (Wis. Ct. App. 1991) (collecting cases). *But see* *State v. Bonacorsi*, 648 A.2d 469 (N.H. 1994) (holding that approved model charge saying jury "must" acquit if reasonable doubt about guilt, but "should" convict if none, properly and adequately informs jury of nullification power, though noting that "nullification is neither a right of the defendant nor a defense recognized by law"). *But cf.*, *People v. Goetz*, 532 N.E.2d 1273 (N.Y. 1988) (upholding instruction that jury "must" convict if elements proven beyond reasonable doubt).

¹⁷ On FIJA's activities, see Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 *U. CHI. L. REV.* 433, 434-35, 439-41, 482-94 (1998); Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 *WASH. & LEE L. REV.* 165, 176-79 (1991); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 *CASE W. RES. L. REV.* 1101, 1115-1130 (1993); Erick J. Haynie, Comment, *Populism, Free Speech, and the Rule of Law: the "Fully Informed" Jury Movement and Its Implications*, 88 *J. Crim. L. & Criminology*, 343 (1998); Nancy J. King, *We, The Jury*, 26 *CUMB. L. REV.* 165, 171 (1995) (book review).

No judge in England is known ever to have given such a charge. It seems that English courts have always held that juries are obligated to follow their instructions on the law in criminal, as well as civil, cases.¹⁸ We don't know when, where, or why British North Americans first decided otherwise. However, the conventional wisdom is that their juries acquired the right to determine the law as well as the facts in colonial times and that, while they lost that right in civil cases somewhat earlier, they retained it in criminal cases until well into the nineteenth century. This view has it that Justice Joseph Story's circuit court decision in *Battiste v. United States*¹⁹ and a later series of opinions by Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court²⁰ inspired an almost irresistible judicial crusade against the criminal petit jury's lawfinding function. The *coup de grace* is said to have been delivered in 1895 by the Supreme Court in *Sparf and Hansen v. United States*.²¹

The *fons et origio* of this understanding of American jury history is Justice Horace Gray's dissenting opinion in *Sparf and Hansen*.²² That opinion, which drew heavily upon an essay written thirty years earlier by Samuel Quincy,²³ set out exhaustively

¹⁸ Regarding criminal cases, see generally, J. S. COCKBURN & THOMAS A. GREEN, *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800* (1988); THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE* (1985). As for civil cases, see Edith Guild Henderson, *The Background of the Seventh Amendment*, 50 HARV. L. REV. 289, 299-317 (1966).

¹⁹ 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).

²⁰ See *Commonwealth v. Anthes*, 74 Mass. (5 Gray) 185 (1857); *Commonwealth v. Abbott*, 54 Mass. (13 Met.) 120 (1847); *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263 (1846).

²¹ 156 U.S. 51 (1895). It remains the stated doctrine in Georgia, Indiana, and Maryland that a jury has the right to judge the law and the facts in a criminal case, although that right has been wholly gutted in the first two states and only a bit less so in the third. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 911 (1994). There are also (meaningless) provisions like TENN. CONST. art. I, § 19 ("in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases") and OR. CONST. I, § 16 ("In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law").

²² 156 U.S. 51, 110-83 (1895) (Gray, J., dissenting).

²³ Samuel M. Quincy, *Powers and Rights of Juries*, in JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772*, at 558-72 (Samuel M. Quincy ed.,

to recount the story of the criminal jury's lawfinding authority in Anglo-American law. It concluded that, "from the time of [America's] settlement until more than half a century after the Declaration of Independence, the law as to the rights of juries, as generally understood and put in practice, was more in accord with the views of" the British proponents of the jury lawfinding right than the views of its opponents.²⁴ In fact, Gray identified only one possible exception to "the almost unanimous voice of earlier and nearly contemporaneous [(with the adoption of the Constitution)] judicial declarations and practical usage."²⁵ Driving his point home, he emphatically summed up his findings in the following language:

Until nearly forty years after the adoption of the Constitution of the United States, not a single decision of the highest court of any State, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue—except . . . two or three cases . . . concerning the constitutionality of a statute.²⁶

These caveats aside, Gray recorded only two instances before 1830 in which *any* American judge disavowed the jury's right to "determine the law and the facts" in a criminal case: Pennsylvania common pleas judge Alexander Addison did so in the 1790s and two New York Supreme Court Justices followed suit in the

1865). (Although no one seems to want to give him the credit for writing this essay, see MORTON H. SMITH, *THE WRITS OF ASSISTANCE CASE* 180 n.70 (1978); *Editorial Note*, in 1 *LEGAL PAPERS OF JOHN ADAMS* 214 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 *NOTRE DAME L. REV.* 505, 516–18 (1996), Samuel M. Quincy appears to have been its author. See Quincy's Reports iv.)

Justice Gray contributed a study of the writs of assistance to Quincy's Reports, see *id.*, and he was obviously far more intimately familiar with Quincy's essay than one might infer from the single explicit reference to it in his dissent in *Sparf and Hansen*. See 156 U.S. at 146 (Gray J., dissenting).

²⁴ 156 U.S. at 142 (Gray, J., dissenting).

²⁵ *Id.* at 169. Oddly enough, this possible exception was colonial Rhode Island. See *id.* at 146; but see *infra* text accompanying notes 312–27.

²⁶ 156 U.S. at 168 (Gray, J., dissenting).

famous *Croswell* libel case in 1804.²⁷ However, these exceptions seemed to prove the rule, as Addison was impeached on apparently related grounds in 1803²⁸ and the instructions reported to have been delivered in criminal cases in New York courts between *Croswell* and *Battiste*, like the 1735 *Zenger* libel case,²⁹ seemed to show those courts' acceptance of the lawfinding right.³⁰

The second pillar of the current understanding of the criminal jury's historical lawfinding function is a 1939 article by Mark DeWolfe Howe.³¹ Accepting Gray's claim that juries were once acknowledged to have the right to judge the law in criminal cases, Howe set out to examine "the processes by which . . . [that] right has been destroyed."³² Although it wasn't part of his stated mission to do so, Howe added significantly to Justice Gray's treatment of the history of this right before its "demise." He more closely examined its status in pre-Revolutionary times, adducing evidence of its recognition in colonial New England and Pennsylvania³³ and (while noting that the matter had not been "conclusively settled by accepted practice" in Massachusetts Bay Colony³⁴) suggesting that colonial practice was the reason for its presence elsewhere after the Revolution.³⁵ He also presented evidence that, in some of the newly independent states, this right was embraced at an earlier date than Gray's

²⁷ *People v. Croswell*, 3 Johns. Cas. 336 (N.Y. 1804). See 156 U.S. at 148, 151 (Gray, J., dissenting). Gray's inconclusive evidence from colonial Rhode Island, see *supra* note 25 and accompanying text, consisted of the acts discussed below in notes 313-14 and the accompanying text and a further statute guaranteeing trial by jury.

²⁸ See THE TRIAL OF ALEXANDER ADDISON (Thomas Lloyd ed., 1803) (S# 3631).

²⁹ *Rex v. Zenger* (1735). This case is reported in JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., Belknap Press 1972) (1736). It also appears in 17 Howell's St. Trials 675 (1735), and at 16 Am. St. Trials 1 (1735). For a discussion of the *Zenger* case, see *infra* text accompanying notes 289-93.

³⁰ See 156 U.S. at 146-50 (Gray, J., dissenting).

³¹ Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

³² *Id.* at 590.

³³ See *id.* at 591, 594-95, 601.

³⁴ *Id.* at 605.

³⁵ See *id.* at 590.

authorities established.³⁶ Finally, he cited the House of Representatives' debate on the Sedition Act of 1798³⁷ as evidence of the general acceptance of the jury's right to judge the law in the Federalist Era.³⁸

In recent years, the role of the American criminal jury—including its place in judging the law—has received a lot of scholarly attention.³⁹ Much has been written on the history of its right to determine the law as well as the facts of any case entrusted to it, but this literature includes very little new research on the subject. Rather, these works tend to do little more than cite the two “authoritative” texts or review the most prominent authorities mentioned by Quincy, Gray, and Howe. Still, although Howe warned that his evidence of colonial criminal jury practice was “spotty,”⁴⁰ recognized that he knew little about the criminal jury's lawfinding authority in most states in the early Republic,⁴¹ and stressed that his suggestions about early doctrine were merely that,⁴² modern scholars generally write as if these three men possessed comprehensive knowledge of the relevant data and it conclusively proved that the authority of American juries to judge the law in criminal cases was well-established even before the Revolution.⁴³

³⁶ See, e.g., *id.* at 597 n.58 (citing GA. CONST. art. 41 (1777)).

³⁷ Act of July 14, 1798, ch.124, 1 Stat. 596.

³⁸ See Howe, *supra* note 31, at 586-88.

³⁹ In the wake of such media events as the trials of O. J. Simpson, William Kennedy Smith, the Menendez brothers, and the police officers who beat Rodney King, the public's attention, too, has been focused on the criminal jury. Some segments of the public have even taken an active interest of late in the criminal jury's right to determine the law. See *supra* note 17 and accompanying text.

⁴⁰ Howe, *supra* note 31, at 590.

⁴¹ See, e.g., *id.* at 594-95 (Pennsylvania), 596-97 n.57 (New York and Virginia), and 605-06 (Massachusetts). Moreover, Howe never mentioned the status of the jury lawfinding doctrine in Delaware, the Carolinas, or Kentucky in the article. Nor did he say anything about jury practice in early Maryland, or in Tennessee before 1832.

⁴² See, e.g., *id.* at 590-92, 594-95, 606.

⁴³ See, e.g., JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 30-31, 37, 63-64, 75-76 (1994); DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 61 (1992); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 30 (1995); JOHN GUINTEH, THE JURY IN AMERICA 221 (1988); FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 40-41 (1985); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 104-08 (2d ed. 1988); SHANNON C. STIMSON, THE AMERICAN

REVOLUTION IN THE LAW (1990); Alschuler & Deiss, *supra* note 21, at 902-21; Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 367-78 (1994); Todd Barnet, *New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law*, 65 N.Y. ST. B.J., Nov. 1993, 40, 40-41; Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 887-90; David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 93-95 (1995); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1154-55 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700-03 (1995); Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 8-9 (1997); W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1088 (1996); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 287-88 (1996); Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 176, 190-91 & n.80 (1998); David Millon, *Juries, Judges, and Democracy*, 18 L. & SOC. INQUIRY 135, 136-38 (1993); Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1284-85 (1993); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 174, 177 (1972); Alan W. Schefflin & Jon M. Van Dyke, *Jury Nullification: The Contours of A Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, 51, 56-58.; Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 416-17 (1989); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 496-98 (1976); *Development in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1417-20 (1997); Creagan, *supra* note 17, at 1109-11; R. Alex Morgan, Note, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be*, 29 ARIZ. ST. L.J. 1127, 1130 (1997); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 198-201 (1996); Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105, 107-10 (1971); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170, 172-74 (1964).

The work of William E. Nelson, WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975) [hereinafter NELSON I]; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978) [hereinafter Nelson II], is in two respects an important exception to this rule. In the first place, he has done significant original research on the historical power of juries to determine the law in the colonies, which he relates to their right to do so. In the second place, his work has become part of the canon. I do not mention him at this point in the text, however, because his work has focused so greatly on civil jury power, rather than on criminal jury rights. Nonetheless, the discussion in this article of things like the difference between power and right, see *supra* text accompanying notes 10-17, and some of the "resistable temptations", see *infra* text accompanying notes 62-85, is in good part a response to Nelson's remarkable work. I will have more to say about it below, in notes 387-90 and accompanying text.

Another exception worthy of note is the small group of contrarians (and they are hard to find today) who challenge the view that colonial criminal juries had the right to judge the law. The most striking thing about their work is that they, too, don't seem to deny the completeness of the canonical body of research. Thus, Hiller B. Zobel's *Some Agonies and Misuses of Legal History*, 50 N. ENG. L.Q. 138, 147 n.21 (1977), questions the authority of criminal juries to determine law in colonial Massachusetts, but does so on the basis of evidence within this corpus. And Stephen Presser, who

If American criminal juries had this right from colonial times until the mid-nineteenth century, several important consequences might follow. On the one hand, a powerful originalist argument could be made that the criminal jury's right to determine the law is of constitutional dimension.⁴⁴ On the other hand, even if the courts were to prove unreceptive to an originalist argument of this sort,⁴⁵ the existence of a tradition pre-dating the founding of the Nation might lend a greater sense of legitimacy (and more political force) to campaigns like the one now being waged to obtain statutory recognition of the criminal jury's right to nullify the law.⁴⁶

But does the prevailing view of jury history square with the historical record? Was the criminal jury's right to determine the law as well as the facts widely recognized in colonial times? Or was it forged in the crucible of the Revolution, or even later? Indeed, was there *ever* "a" jury lawfinding doctrine? If so, what was it? And was it really universally accepted law until the 1830s?

In this article, I will begin to address these questions by examining the doctrinal history of the right to judge the law in the colonial period.⁴⁷ My conclusion is that the published records I

appears to believe that colonial criminal juries—at least outside of Massachusetts, Virginia, and Pennsylvania—were never authorized to reject the judges' law, provides no justification whatsoever for his skepticism. See STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 109-12, 125, 128-29, 137-40, 185 (1991) [hereinafter PRESSER I]; Stephen B. Presser, *Et tu Raoul? or The Original Misunderstanding Misunderstood*, 1991 BYU L. REV. 1475, 1486-88 [hereinafter Presser II].

⁴⁴ Indeed, Raoul Berger, for one, has made it. See Berger, *supra* note 43, at 887-90.

⁴⁵ It might be argued, for example, that, whatever the intent of the generation that adopted Article III's jury clause and the Sixth Amendment, the original understanding was supplanted by the Fourteenth Amendment. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1195 (1991). Or that originalism is not the proper mode of constitutional interpretation.

⁴⁶ See *supra* notes 16-17 and accompanying text.

⁴⁷ As noted above, see *supra* note *, this article is part of a larger study of the history of the American criminal jury's right to determine the law. Although a comprehensive understanding of the criminal jury's lawfinding role would include an examination of what the law has said about what these juries were supposed to do, what they have done, and how the courts and the public have reacted to both, the focus of my present research is exclusively on the first of these issues. In this article, I examine the criminal jury's formal lawfinding authority in the colonial period. In the next piece in this series, I will explore the criminal jury's formal lawfinding authority from

have studied⁴⁸ do not support the conventional wisdom. In fact, this data only proves that the criminal jury's right in any real sense to determine the law was firmly established in one colony, offbeat Rhode Island. While there is sporadic evidence that criminal juries may have had some form of lawfinding authority at times in colonial Pennsylvania and New York, there is at least as strong an indication that they had no such right for much of the colonial era in Georgia, Maryland, and Massachusetts. For the most part, however, we just don't know enough to say what lawfinding authority colonial criminal juries had.⁴⁹ Nonetheless, given the prominence of the discussion of history in the current debates about jury nullification,⁵⁰ it is important to note that the evidence reviewed in this paper quite strongly indicates that these juries had no right to nullify laws they deemed valid. Indeed, there is no indication that any colonist even suggested that such authority existed.

the outbreak of the Revolution until the Revolution of 1800. Later installments will consider issues such as the significance of Joseph Story's decisions in this field and the implications of certain developing rules of evidence (e.g., relevancy rules) and jury selection (i.e., rules authorizing the exclusion for cause of prospective jurors unwilling to be bound by the judges' law) for the stated jury lawfinding doctrine.

⁴⁸ My study has largely been limited to the published historical record. Even with respect to that data base, it is not complete: for example, I haven't reviewed all of the surviving colonial newspapers. Such a survey, like a systematic review of unpublished manuscripts (including, but not limited to, court papers, lawyers' and judges' notebooks, and diaries), would certainly shed greater light upon this problem. I have begun to review all of these materials, and some of my findings are reported here. But this research is far from complete.

⁴⁹ As is implied in the text accompanying note 12, above, lawfinding authority could be of various kinds. It should be borne in mind, however, that judges or others who said (or denied) that juries had a right to determine the law may not have meant any of these things, but something else—i.e., that a jury had the right to return a general verdict, which was to be reached by applying the judges' law to the facts found by the jury. (That is how Stephen Presser claims Justice Samuel Chase understood this maxim at the turn of the nineteenth century. See PRESSER I, *supra* note 43, at 111, 128-29, 137-38, 185; Presser II, *supra* note 43, at 1488.)

⁵⁰ As the titles of the works listed in note 43 suggest, scholarly discussion of the history of the criminal jury's right to find the law is mainly found in pieces on jury nullification, and papers on jury nullification generally discuss that history. This is also true of court decisions, examples of which are cited in note 16. With respect to the lobbying and other extra-judicial efforts of FIJA, see *supra* note 17 and accompanying text.

I. THE INQUIRY

John Lilburne is the first person known to have argued in an English court that a petit jury has the right to determine the law and the facts of a case entrusted to its charge.⁵¹ Although this claim was rejected by the judges in England in Lilburne's 1649 treason trial and every other case in which it was ever made, the idea would not die. Rather, it spread—even across the Atlantic, where the issue was joined in many colonial American courts before the end of the century. In the years leading up to 1776, American Whigs became more and more convinced of the virtue of trial by jury in civil and criminal cases at least in part because juries throughout the thirteen colonies used their formidable powers to prevent the enforcement of unpopular British laws.⁵² Moreover, London's threats—and actual attempts—to bypass these juries helped bring about the Revolution, as well as the many jury-related provisions in the Constitution and the Bill of Rights.⁵³ But had colonial legal systems embraced a jury lawfinding doctrine? Were these juries understood to be rebelling or doing their job?

Howe had it right when he noted that our knowledge of colonial criminal procedure is fragmentary. We do know that criminal trials were a lot different than they are now. These trials were generally conducted before multi-judge tribunals.⁵⁴

⁵¹ For a report of this argument, see *Rex v. Lilburne*, 4 Howell's St. Trials 1270, 1379-81, 1400-03 (1649). As to its primacy, see GREEN, *supra* note 18, at 153, 175. *But see infra* text accompanying notes 148-60.

⁵² See, e.g., Alschuler & Deiss, *supra* note 21, at 871-75; Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 595-96 (1993).

⁵³ See U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amends. V, VI, VII; JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 190-92 (1986); Landsman, *supra* note 52, at 595-600; Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 742-45 (1993).

⁵⁴ See, e.g., Nelson I, *supra* note 43, at 3, 26, 166-68; Nelson II, *supra* note 43, at 911; Wilfred J. Ritz, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 10, 27-30, 36 (Wythe Holt & L.H. LaRue eds. 1990). This continued to be a common practice through the early nineteenth century, perhaps the most well-known instance of which being the federal circuit courts mentioned in connection with *Hodges*. See *supra* note 6.

Judges and jurors could question witnesses.⁵⁵ In some colonies, statutes gave jurors the right to seek advice from anyone they wished, as long as they did so in open court.⁵⁶ Jurors could hear debates about the admissibility of evidence⁵⁷ and about the law.⁵⁸ Jurors also might have heard defendants speak in their own behalf, but not under oath.⁵⁹ What jurors might not have heard, particularly in trials for minor crimes, was a defense lawyer.⁶⁰ At times, judges even had the right to refuse to accept verdicts—acquittals as well as convictions—they thought were wrong.⁶¹

There is, however, a lot about colonial criminal procedure that we don't know at all, or with any certainty. With respect to the question at hand, in fact, the extent of our ignorance is truly breathtaking. We are sorely lacking in direct evidence of the scope of the jury's authority in most of the colonies; the circum-

⁵⁵ See, e.g., *The Trials of Major Stede Bonnet, and Thirty-three Others, . . . for Piracy*, 15 *Howell's St. Trials* 1231, 1270, 4 *Am. St. Trials* 652, 684 (1718).

⁵⁶ See *infra* text accompanying notes 260, 357. But see *infra* text accompanying note 266.

⁵⁷ See, e.g., 1 PAUL M. HAMLIN & CHARLES E. BAKER, *SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691-1704*, at 214 (1959). On the corresponding practice in eighteenth-century England, see John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 *COLUM. L. REV.* 1168, 1188-89 (1996).

⁵⁸ Since the admissibility of evidence might depend upon the content of the substantive law, evidentiary motions were one setting in which juries might have heard debates about the substantive law. These might also have been heard before, or in lieu of, a jury charge.

⁵⁹ See generally, John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 *MICH. L. REV.* 1047 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 *MICH. L. REV.* 1086 (1994).

⁶⁰ See Moglen, *supra* note 59. But see W. Roy Smith, *SOUTH CAROLINA AS A ROYAL PROVINCE 127-28* (1903); David H. Flaherty, *Criminal Practice in Provincial Massachusetts, in LAW IN COLONIAL MASSACHUSETTS 1630-1800*, at 191, 205-16 (Daniel Coquillette ed., 1984).

⁶¹ See *infra* notes 90, 105, 121-28, 130-33, 148-49, 195, 234-35, 257, 267, 288, 306, 309, 323-26, 335-36, 351-53, 358, 361-64 and accompanying text. A study of how and why American judges lost this power would be a valuable, and interesting, contribution to the literature. (Oddly enough, the earliest American criticism of this practice that I have found was made in the Loyalist press during the Revolution. See *Charlestown, April 6*, *The Royal Gazette* (Charlestown, S.C.), Apr. 3-6, 1782, at 3.) On the corresponding practice in England, see John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 *U. CHI. L. REV.* 1, 118-19 (1983), and John H. Langbein, *The Criminal Trial before the Lawyers*, 45 *U. CHI. L. REV.* 263, 291-95 (1978).

stantial evidence, while somewhat more abundant, is largely inconclusive; and a number of seductive gap-filling hypotheses must be rejected.

A. ASSUMPTIONS WE MUST REJECT

First, the resistible temptations. To begin with, we may not simply assume that all of the colonies expected criminal juries to do the same thing.⁶² The thirteen colonies had very different histories and characters. Moreover, we know that they did not always have the same attitude toward criminal juries. Thus, for a time in the seventeenth century, jury trial was nonexistent in New Haven, disfavored for non-capital offenses in Massachusetts Bay and Connecticut, and favored for all crimes in Rhode Island.⁶³ Neither did the colonies that did use criminal juries employ uniform rules of jury practice. For instance, judges gave these juries instructions on the law in some colonies, but not in all of them.⁶⁴ Even in the former group of colonies, there is no reason to assume that this diversity didn't carry over to the question of the jury's right to determine the law.⁶⁵ Nor may we assume that jury lawfinding doctrine was uniform over time or unidirectional in development within any single colony.

This leads to a further point. We may not simply project onto these colonies the jury practices they followed after the Declaration of Independence, as Howe would have us do. This is so for two reasons. To begin with, we know just as little about the jury lawfinding doctrine prevailing in many of the new states between 1776 and the Revolution of 1800 as we know about the doctrine prevailing in them before the Revolution of 1776.⁶⁶ Beyond this, while inertia is a powerful force in law as elsewhere, the successful rebellion from England provides ample reason to doubt the continuity of lawfinding doctrine. For one thing,

⁶² Kathryn Preyer makes a similar point in *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 326 (1982).

⁶³ See generally John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in SAINTS & REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152-206 (David D. Hall, et al. eds., 1984).

⁶⁴ Compare *infra* text accompanying notes 265 and 316-17.

⁶⁵ As Hodges' case shows, instructions need not be meant to bind the jury.

⁶⁶ See *supra* note 47.

many of the new states enrobed new judges after Independence, many of whom were non-lawyers ignorant of prior practice and disinterested in, if not downright contemptuous of, lawyer's law.⁶⁷ Even when these judges knew what colonial jury practice was, anti-British sentiment ran so high among the patriots that the judges might have replaced British lawfinding doctrine with a practice more reflective of the prevailing revolutionary democratic impulses.⁶⁸ More broadly, those same impulses may also have prompted the adoption of provisions like Article Forty-One of the Georgia Constitution of 1777, which states, "The jury shall be the judges of law, as well as fact, and shall not be allowed to bring in a special verdict . . ."⁶⁹ On the other hand, the

⁶⁷ We are sorely lacking in systematic studies of the impact of the Revolution on the membership and jurisprudence of colonial judiciaries. In fact, there is no colony for which such a history has been written. We do, however, have some indications of the turnover (or continuity) of membership on individual courts. See, e.g., WILLIAM PLUMER, JR., *LIFE OF WILLIAM PLUMER* 150 (A. P. Peabody ed., 1857) (New Hampshire Supreme Court); ALFRED B. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK* 50-60 (1859) (New York Supreme Court); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 452 n.7 (1967) (Middlesex, Massachusetts County courts); John Whitehead, *The Supreme Court of New Jersey* 3 *THE GREEN BAG* 401, 402-04 (1891); John D. Cushing, *A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810*, at 92, 100-05 (unpublished dissertation on file with *The Journal of Criminal Law and Criminology*) (Massachusetts Superior Court of Judicature); cf. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 212-14 (William S. Hein & Co. 1990) (1961) (discussing effect of Revolution on Massachusetts bar); John L. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 553 n.29 (1993) (discussing effect of Revolution on membership of New York bar). On the pre- and post-Revolutionary practice of using lay judges, see, e.g., FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 34-42 (1940), RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 115 (1971), PLUMER, *supra*, at 149-59, and Langbein, *supra*, at 567. On the hostility that some judges (and others) felt towards a formal system of law (and procedure), see, e.g., PLUMER, *supra*, at 150-58. On the relative lack of information about, and the resulting ignorance of, colonial precedent after the Revolution, see, e.g., Langbein, *supra*, at 571.

⁶⁸ See, e.g., Langbein, *supra* note 67, at 567-68. As William Nelson has observed, even without regard to any such antipathy, judges in the newly independent states felt freer than colonial judges to reject British authority of which they disapproved. See Nelson I, *supra* note 43, at 475-76.

⁶⁹ GA. CONST. art. 41 (1777), which may be found at DIGEST OF THE LAWS OF THE STATE OF GEORGIA 14 (Robert & George Watkins eds., 1800), reprinted in THE FIRST LAWS OF THE STATE OF GEORGIA—PART I (John D. Cushing comp., 1981). This surprising provision continues, "but if all, or any of the jury, have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give

fact that the end of Royal and Parliamentary authority over the former colonies made them truly self-governing could have led to the rejection of that view of the jury's right in jurisdictions in which it had previously been held.

Fourth, we may not blithely project what little we know about colonial civil jury practice onto criminal juries. The rules applicable to civil and criminal juries haven't always been the same, and the differences haven't always cut the same way. Consider a few pages of Connecticut legal history. In 1796, Zephaniah Swift wrote that Connecticut judges gave juries instructions on the law before sending them out to deliberate in criminal, but not civil, cases.⁷⁰ By 1810, Swift could report that the Superior Court judges (of whom he was one)⁷¹ had started giving such charges to civil juries and promulgated a rule requiring that this be done by the presiding judge in every case.⁷² Two years later, the legislature made this requirement statutory.⁷³ By 1821, the situation had so changed that the revised laws of that year made it clear that while the charge in a criminal case should merely inform the jury of the judge's "opinion[s]" about the law, the judge was supposed to "decide" the law in civil cases and "direct the jury to find accordingly."⁷⁴ While this shift from the greater regulation of criminal to civil juries occurred after the Revolution, civil and criminal jury practice differed in a non-uniform manner in some of the colonies before the Revolution as well.⁷⁵

their opinion." *Id.* For further speculation as to why this article was adopted, see *infra* note 126.

⁷⁰ See 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 258-59, 401 (Arno Press 1972) (1796).

⁷¹ Swift was elected to the Superior Court in 1801 and served until 1819. He was Chief Justice for the last four years of his tenure. See Simeon E. Baldwin, *Zephaniah Swift*, in 2 GREAT AMERICAN LAWYERS 99, 130-39 (William Draper Lewis ed., 1907).

⁷² See ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 169-70 (Arno Press 1972) (1810). The rule can also be found at 3 Day's Reports 28 (1807).

⁷³ See 1812 Conn. Pub. Acts 106.

⁷⁴ See 1821 Conn. Pub. Acts 49 & n.6, 174. (The chair, and most influential member, of the three-person revisory committee, was Zephaniah Swift. See Baldwin, *supra* note 71, at 140-41. Swift also wrote the notes accompanying the Code. See *id.*)

⁷⁵ Two examples should suffice. Colonial New York allowed courts to set aside guilty verdicts, but it isn't clear that they could set aside civil verdicts. See Nelson II,

Fifth, the fact that a colony allowed people to argue the law before the jury wouldn't necessarily prove that its juries had the right to determine the law.⁷⁶ Thus, in the 1760 trial of some of the soldiers charged in the Boston Massacre,⁷⁷ defense lawyer Josiah Quincy told the jury what he believed the applicable law to be, but he also admonished the jurors that they were bound to follow the law they would receive from the Bench. Though Justice Trowbridge told the jurors that Quincy was right about their duty, neither he nor any of his brethren interfered with Quincy or his co-counsel, John Adams, when they argued the law to the jury.⁷⁸ In the same vein, eighty-five years later the Massachusetts Supreme Judicial Court asserted that a criminal jury must take its law from the court but held that a trial judge had erred by barring the defense from arguing the law to the jury.⁷⁹ Of course, that case may reflect the Court's reluctance to prohibit arguing law to juries before the lawfinding doctrine was rejected in a holding of the Court. Still, the practice of arguing the law before the jury may originally have developed because colonial courts lacked the kind of motion practice we have today or because of an affirmative sense that arguments about factual guilt had to be put into some legal context to make sense,⁸⁰ rather than as a result of a belief in any jury lawfinding right.

supra note 43, at 915-16. Massachusetts Bay sometimes used attaint to attack civil, but not criminal, verdicts. See Quincy, *supra* note 23, at 559-60.

⁷⁶ Nor would a jurisdiction's refusal to allow lawyers to argue law to the jury necessarily mean that juries had no right to determine the law. Argument on the subject might simply have been deemed unnecessary or an undue temptation to reject the judge's opinion. Cf. *United States v. Dougherty*, 473 F.2d 1113, 1117, 1130-37 (D.C. Cir. 1972) (affirming for these reasons trial court's refusal to allow counsel to inform jury of its right to nullify the law). But see *Virginia v. Zimmerman*, 28 F. Cas. 1227 (C.C.D.C. 1802) (No. 16,968) (Cranch, J., dissenting) (arguing jury's right to determine law implies right to hear argument).

⁷⁷ This case, *Rex v. Wemms*, and the incident mentioned in the text, are discussed below. See text accompanying notes 378-86.

⁷⁸ For more on Adams' views, see *infra* notes 391, 392 and accompanying text.

⁷⁹ *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263 (1846).

⁸⁰ With respect to the former possibility, see *supra*, text accompanying note 57. With respect to the latter, consider, for example, the following passage from the opening argument of Massachusetts Attorney General James Sullivan in the 1805 rape trial of Ephraim Wheeler:

This leads to some final points. When there was no dispute about the law, which was probably true in most cases, it wouldn't have been necessary for the judges to say anything about the law. Thus, we can't infer anything from the isolated, or even routine, absence of jury instructions on the law. Furthermore, if this condition was sufficiently common, colonies may occasionally have had no known "law" or "practice" with respect to the right of the jury to determine the law in a criminal case. Third, as previously noted, we can't infer from the fact that juries returned verdicts inconsistent with their instructions that they had a right to do so. Moreover, although the lack of judicial guidance would have forced juries to decide the law as well as the facts, the practice of giving legal instructions wouldn't necessarily mean that juries were bound to obey them. Hodges' case proves that.⁸¹ Nor would the fact that the members of a multi-judge panel might give conflicting legal instructions necessarily mean that juries were supposed to decide what the law was.⁸² After all, the fact that United States Supreme Court Justices deliver conflicting opinions in a case does not mean that the lower courts aren't bound by the Justices' views. This is so because the Court acts by majority rule, a principle well known to colonial Americans, who may have applied it in this context, as well.⁸³

It is my duty, as Attorney-General of the Commonwealth, to lay before you the evidence which exists against [Wheeler]. Previous to which, it may be expected, that I shall give you some definition of the crime, with which he is charged, and a general arrangement of the proof I am about to offer. This will enable you to apply, or rather to understand, the propriety of the testimonies as they may be given.

REPORT OF THE TRIAL OF EPHRAIM WHEELER. . . 8 (1805) (S# 9720).

⁸¹ More generally, a "charge" might have been a purely hortatory command to "do right," *see, e.g.*, PLUMER, *supra* note 67, at 153-55, judicial advice on the law and/or facts (as in Hodges' case), or a binding instruction (on either or both). *See infra*, note 100.

⁸² *But see, e.g.*, NELSON I, *supra* note 43, at 3, 26; Nelson II, *supra* note 43, at 911-13.

⁸³ A number of colonies had statutes providing that judges' disagreements about the law were to be resolved according to the majority rule principle. *See, e.g.*, 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 42 (Robert C. Cumming ed., 1894) [hereinafter COLONIAL NEW YORK LAWS], which is reproduced in facsimile in THE EARLIEST PRINTED LAWS OF NEW YORK 1665-1693 (John D. Cushing ed., Michael Glazier, Inc. 1978) [hereinafter EARLIEST NEW YORK LAWS] (one of the Duke of York's Laws). Assuming that they applied to divergent jury instructions,

Finally, neither the power nor the inability of the bench to reject a verdict because it felt the jury to have misunderstood or ignored the law has any necessary implications with respect to whether the criminal jury had a right to decide the law and the facts; the former could simply reflect a courtroom bicameralism,⁸⁴ the latter deference to jury factfinding.⁸⁵

B. ANALYSIS OF THE PUBLISHED HISTORICAL EVIDENCE

Having eliminated the easy alternatives, it's necessary to examine the evidence contained in the historical records. For the most part, a survey of the published data reveals a series of informational voids. We generally don't know whether colonial juries had the right to determine the law as well as the facts in a criminal case. There are exceptions to this rule, but they are few, and modest.

South Carolina is the colony about whose juries' work we know the least. We have exactly one published bit of datum from that colony, a report of the 1718 piracy trials of the infamous Steede Bonnet and his associates.⁸⁶ The only issues in these prosecutions were purely factual: who did what to whom.

these laws would have left unanswered what a jury was supposed to do if the bench was evenly divided. Perhaps there were unwritten rules giving one member of an evenly divided court the casting vote. Cf. SAMUEL SMITH, *THE HISTORY OF THE COLONY OF NOVA-CAESARIA, OR NEW JERSEY . . . TO THE YEAR 1721*, at 572 (The Reprint Co. 1966) (1890) (proprietors' 1701 proposal that tie votes in court consisting of council and judges be resolved in favor of position taken by oldest voting council member). Or maybe, as in modern practice, the moving party was understood to have lost the argument. Or maybe the jurors were expected to decide what law to apply under these circumstances. But that would be a very limited lawfinding right, indeed.

⁸⁴ See Amar, *supra* note 45, at 1188-89, 1193.

⁸⁵ Cf. Bushell's Case, 6 Howell's St. Trials 199, 124 Eng. Rep. 1006 (C.P. 1670), which is discussed in Green, *supra* note 18, at 221-36. The celebrated civil case from Massachusetts Bay, *Erving v. Graddock*, Quincy's Reports 553 (1761), might also signal that trial courts' impotence to challenge jury verdicts inconsistent with the law was a product of the division of labor among judges, not between judges and juries. Although no colonial court could have done so, the Board of Trade was competent to reject the jury's verdict in that case.

⁸⁶ The Trials of Major Steede Bonnet, and Thirty-three Others, . . . for Piracy, 15 Howell's St. Trials 1231, 4 Am. St. Trials 652-722 (1718). HUGH T. LEFLER & WILLIAM S. POWELL, *COLONIAL NORTH CAROLINA—A HISTORY* 81-86 (1973), and ROBERT M. WEIR, *COLONIAL SOUTH CAROLINA—A HISTORY* 86-89 (1983), locate these trials in the context of the war on piracy that affected both colonies at the time.

Thus, it is not surprising that, although we learn that the juries in these trials were instructed, no one is reported to have said anything at all about their right to judge—or their obligation not to judge—the law. For the same reason, however, the fact that they seem to have been charged to convict if they decided that the defendants had done what they were accused of doing tells us very little about the criminal jury's right to judge the law in the colony.⁸⁷

We have a somewhat more extensive set of published court records from colonial Delaware. These archives establish that judges in the Lower Counties routinely charged juries at the end of criminal trials until at least 1710, when the published records run out.⁸⁸ Unfortunately, except for one case tried while the area was under the jurisdiction of New York,⁸⁹ these records don't indicate what the charges said. The records also show that judges could reject verdicts of which they disapproved.⁹⁰

⁸⁷ WEIR, *supra* note 86, at 256-59, notes the extreme informality of proceedings in the colony's courts and the fact that the judges' ignorance of law led the colony to permit criminal defendants to have the assistance of counsel. Neither point, however, implies that the even less law-trained jurors were allowed to determine the law in criminal cases.

⁸⁸ See, e.g., COURT RECORDS OF KENT COUNTY, DELAWARE 1680-1705, at 93-97 (1697 trials of Walter Price, Annanias Turner, & John Hillyard), 234-37 (1702 trials of Adam Latham, Joan Mills, & Andrew Mills) (Leon De Valinger, Jr., ed., 1959) [hereinafter KENT COURT RECORDS]; 1 RECORDS OF THE COURT OF NEW CASTLE ON DELAWARE 1676-1681, at 16 (Symon Gibson's Case, 1676), 88 (John Johnson's Case, 1677), 105 (Symon Gibson's Case, 1677) (The Colonial Soc'y of Pa. 1904) [hereinafter NEW CASTLE COURT RECORDS]; 1 RECORDS OF THE COURTS OF SUSSEX COUNTY, DELAWARE 1677-1710, at 548 (Edward Morgan's Case, 1688), 593 (Henry Bowman's Case, 1688) (Craig W. Horle ed., 1991) [hereinafter SUSSEX COURT RECORDS]; 2 SUSSEX COURT RECORDS, *supra*, at 756 (Sarah Willshire's Case, 1690), 758 (Harculus Shepheard's Case, 1690), 1298 (Alexander Windford's Case, 1710), 1299 (Patrick White's Case, 1710).

⁸⁹ See 7 PENNSYLVANIA ARCHIVES (2d series) 728-29 (John B. Linn & William H. Egle eds., 1878) (Marcus Jacobson's Case, 1669) (trial judges ordered to instruct jury "to find the matter of Fact according to the evidence"). JOHN A. MUNROE, COLONIAL DELAWARE—A HISTORY (1978), discusses Jacobson's activities and trial against the backdrop of the Anglo-Dutch struggle for North American territory. See *id.* at 59-71. Finally, Delaware was "an administrative appendage" of New York from its conquest in 1664 until 1682, when it was granted to William Penn. See *id.* at 81-85.

⁹⁰ See 1 NEW CASTLE COURT RECORDS, *supra* note 88, at 16 (accepting Symon Gibson's 1676 not guilty verdict); 1 SUSSEX COURT RECORDS, *supra* note 88, at 548-49 (divided court rejecting Edward Morgan's first 1688 not guilty verdict, accepting second one over dissent); 2 SUSSEX COURT RECORDS, *supra*, at 756 (rejecting special verdict in 1690 trial of Sarah Willshire), 758 (accepting Harculus Shepheard's 1690 not guilty

However, the cases documenting this fact, too, shed no light on the lawfinding authority of criminal juries in this colony. Thus, we have no greater insight into the colonial criminal jury's right to judge the law in Delaware than in South Carolina.

We have somewhat more data with respect to colonial Virginia, but we still don't know whether criminal juries ever had the right to determine the law in its courts. Our principal evidence about Virginia practice, George Webb's 1736 justice of the peace manual,⁹¹ is intractably ambiguous. Webb's book says four things potentially relevant to the question at hand. The first sentence of its discussion of juries says that the job of every jury, be it civil or criminal, petit or grand, is to decide "the Matter of Fact in Issue,"⁹² and Webb repeats this message time and again.⁹³ But if this means jurors were supposed to make purely factual judgments about guilt, why does Webb also say that if a person charged with a non-capital offense "traverse[s] the Indictment, or challenge[s] it for Insufficiency," the case "is referr'd to another Jury?"⁹⁴ Was the petit jury to determine the sufficiency of the indictment? If so, was it also to determine the applicable law as a predicate for resolving the factual question of the defendant's guilt? Or did Webb mean that while traversing a criminal charge would lead to the empaneling of a petit jury, persuading the court of its insufficiency would lead to the empaneling of another grand jury?⁹⁵

verdict), 914 (accepting Ann Row's 1694 guilty verdict), 1299 (rejecting two not guilty verdicts in 1710 trial of Patrick White; no reported response to third). *But see* WILLIAM H. LOYD, *THE EARLY COURTS OF PENNSYLVANIA* 59-62 (Fred B. Rothman & Co. 1986) (1910) (discussing 1684 impeachment of Chief Justice Nicholas Moore for, *inter alia*, rejecting civil jury's verdict, threatening jury until it returned contrary verdict).

⁹¹ GEORGE WEBB, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* (1736) (Evans # 4101).

⁹² *Id.* at 192 (citation omitted).

⁹³ *Id.* at 193, 194, 198 (citations omitted).

⁹⁴ *Id.* at 193 (emphasis added) (citation omitted).

⁹⁵ The interpretive difficulty noted in the text could be attributable to the fact that this book is a pastiche of selections from leading English texts; comparing the language of each included excerpt might lead us to see problems where none really existed. (Although Eben Moglen has written that Webb's book was largely derived from Michael Dalton's *The Country Justice*, see Moglen, *supra* note 59, at 1098, these passages weren't.) Naturally, Webb, a Virginia magistrate, knew how criminal trials were conducted in Virginia and wouldn't have been confused by these quotations. His failure to describe Virginia jury practice plainly and in his own words may reflect his agree-

Turning to the subject of juror misconduct, Webb notes that no sworn juror was allowed to “go from the Bar until the Evidence is given, *and the Direction of the Court,*” without its permission.⁹⁶ Later in the same discussion, after observing that a juror who refused to consent to a verdict for no reason at all could be fined,⁹⁷ Webb states that no such fine would lie if he acted for a reason that the judges found less reasonable than the majority’s or even if the whole jury went “against the Direction of the Court.”⁹⁸ These comments are consistent with the surviving records of the Richmond County Court, which show that judges (in this case justices of the peace) did give charges in criminal cases.⁹⁹ But were those charges comments on the law or only on the facts? If instructions covered the law, were they supposed to bind the jury?¹⁰⁰ If civil juries were still subject to attain for returning a bad verdict,¹⁰¹ and if both criminal and

ment with Richard Starke, who penned a successor volume to his manual. Starke wrote, “The Method and Ceremony of arraigning and trying Criminals *being known to most Persons*, and foreign to the Purposes of this Book, are omitted.” RICHARD STARKE, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* 120 (1772) (Evans # 13637) (emphasis added). (Of course, even if the English authorities quoted by Webb had a clear and coherent meaning in England, we don’t know whether he would have known what it was.)

⁹⁶ WEBB, *supra* note 91, at 198 (emphasis added) (citation omitted).

⁹⁷ Webb commented that such a juror “may be committed and fined, because he is sworn well and truly to try the Issue, and therefore to be obstinate without Cause . . . is a Misdemeanor, and finable.” *Id.* at 198 (citation omitted). For a recent attempt to punish jurors for refusing to deliberate in a criminal case, see *Reg. v. Barclay* (Eng. C.A. 1997) and *Reg. v. Schot* (Eng. C.A. 1997).

⁹⁸ WEBB, *supra* note 91, at 198 (citation omitted).

⁹⁹ See *CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA* 25 (John Henderson’s Case, 1716), 137 (Joan Stephen’s Case and Benjamin Hind’s Case, 1731), 146 (Anthony Morgan’s Case, 1733), 164 (William Tillery’s Case, 1736) (Peter Charles Hoffer & William B. Scott eds., 1984).

¹⁰⁰ On the ambiguity of the word “direction” in eighteenth century jurisprudence, see *Editorial Note*, in 1 *LEGAL PAPERS OF JOHN ADAMS*, *supra* note 23, at 199, 214-15; John Adams, *Notes of Authorities*, in *id.* at 227.

Whatever the jury’s authority to determine the law in criminal cases, Edward Baradall’s notes of trials held before the General Court show that criminal juries could—and sometimes did—leave legal questions to the judges by returning special verdicts. See *King v. Moore* (1733) (special verdict leaving court to determine effective date of statute on which charge based), reported in 2 *VIRGINIA COLONIAL DECISIONS* B38 (R. T. Barton ed., 1909), and in THOMAS JEFFERSON, *REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA*. . . . 8 (William S. Hein & Co., Inc. 1981) (1829).

¹⁰¹ See WEBB, *supra* note 91, at 197.

civil juries were supposed to decide “just the facts,” why shouldn’t criminal jurors who defied “the Direction of the Court” have been punished as misdemeanants? Did they have a right to defy the court by determining the law for themselves, or did the law simply intend to privilege their determination of disputed facts? Neither Webb nor the Richmond County Court records answer these questions, and so they ultimately fail to enlighten us as to the colony’s position on the jury’s right to judge the law in a criminal case.

Finally, a word about the famous (albeit unreported) 1763 case known as the *Parson’s Cause*.¹⁰² This was a civil suit for a clergyman’s unpaid salary. Upon a demurrer, the court ruled that the parson’s claim was valid as a matter of law. At the hearing on damages, defense counsel Patrick Henry appears to have been allowed in his closing argument to attack the court’s previous ruling on the merits and (successfully) to urge the jury to nullify that ruling by awarding the parson a mere penny in damages.

Even if we were to assume that the colony’s civil and criminal procedure were identical in this particular, Henry’s speech seems sufficiently to have stunned his audience to suggest that his argument—which appears to have stopped short of an explicit claim that the jury had and should exercise a right to determine the law—was unprecedented. At the very least, the meaning of presiding judge Colonel John Henry’s failure to silence or correct his son is hopelessly ambiguous. While the frustrated plaintiff and some supportive onlookers were outraged, we simply do not know how the court or the legal system viewed Henry’s conduct,¹⁰³ or the jury’s.

¹⁰² For an account of this case, see HENRY MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC* 58-66 (1991); ROBERT DOUTHAT MEADE, *PATRICK HENRY: PATRIOT IN THE MAKING* 114-38 (1957); MOSES COIT TYLER, *PATRICK HENRY* 36-55 (Cornell U. Press 1962)(1898); WILLIAM WIRT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 19-31 (2d ed. 1818)(S # 46839).

¹⁰³ We do know that Colonel Henry later told a friend that he was proud of Patrick’s performance and impressed by the breadth of knowledge displayed in his argument. See MAYER, *supra* note 102, at 66; WIRT, *supra* note 102, at 27. In light of the awesome rhetorical power that Patrick unveiled on this occasion and the tumultuous popular response to his speech—which marked his emergence as a political figure as well as an orator—, can we blame his father for strutting? But a father’s exultation in

An opaque justice of the peace manual is also a major source of information about the criminal jury's lawfinding role in colonial North Carolina. James Davis' volume,¹⁰⁴ which was published in 1774, built on Webb's book, and it repeats the confusing statements mentioned above. But Davis didn't stop there. Quoting William Hawkins' classic treatise, he noted that verdicts could be rejected and juries told to think again, and that recorded convictions could be set aside when "contrary to Evidence[] and the Directions of the Judge."¹⁰⁵ Nonetheless, while Davis went on to say that the "better" practice, followed in the superior courts, was for instructions (at least sometimes) to explain the law in civil cases, all he said about the court's responsibility in closing criminal cases is that "the Evidence is summed up by the court to the jury."¹⁰⁶ If we assume that Davis' own words more accurately described North Carolina criminal practice than the passage he copied from Hawkins, and that his words meant criminal juries got no instructions on the law, those juries would, of necessity, have had both a right and a duty to be judges of the law as well as the facts in the cases before them.

However, Davis also wrote that

Jurors are to try the Fact, and the Judges ought to judge according to the Law that ariseth upon the Fact. 1 Inst. 226

But if they will take upon them the Knowledge of the Law upon the Matter, they may; yet it is dangerous, for if they mistake the Law, they run into the Danger of an Attaint: Therefore to find the Special Matter is the safest Way, where the Case is doubtful. 1 Inst. 228¹⁰⁷

his son's prowess isn't the same thing as a judge's ruling on the propriety of a lawyer's argument. And with respect to the propriety of Patrick's behavior, we can't tell whether (or to what extent) he (like the lawyers in O. J. Simpson's recent trial) was allowed to violate the normal rules of practice because of the intense public interest in the case.

¹⁰⁴ JAMES DAVIS, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* (1774) (Evans # 13236).

¹⁰⁵ *Id.* at 223-24 (quoting 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 442 (1721)).

¹⁰⁶ Compare *id.* at 328 (civil juries) with *id.* at 326-27 (criminal juries).

¹⁰⁷ *Id.* at 223 (citations in original).

Yet, as Davis reported, attaint lay only to challenge a corrupt civil verdict.¹⁰⁸ So was this cautionary word—this hedging on the jury's right to judge the law—relevant to criminal juries? If not, why is it surrounded by passages concerning criminal juries? Moreover, if criminal juries were supposed to be bound by the courts' interpretations of the law, how could these juries have done their job if instructions commented exclusively on the facts? Or did Davis' comment about judicial recapitulation of the evidence mean something else—i.e., that his colony rejected not the London judges' practice of instructing juries on the law, but their practice of commenting on the evidence?¹⁰⁹

As was the case with respect to colonial Virginia, the published records include some additional information about North Carolina's colonial jury practice, but nothing that resolves the ambiguities of Davis' manual. One of these bits of data is the account of a 1769 larceny trial found in the journal of Waightstill Avery, who went on to become the first attorney general of the State of North Carolina.¹¹⁰ In this entry, Avery wrote that his closing "spoke to all the Law & Evidence, that any way affected the Cause at Bar."¹¹¹ This indicates that legal arguments could be addressed to someone at the end of a criminal trial. However, it tells us nothing about what, if anything, the judge (or anyone else) said to the jury. Or about what the jury's job was.

A second item, a set of instructions written in 1773 by unknown persons to two members of the colony's legislature,¹¹² is equally tantalizing and equally opaque. One issue addressed by these instructions is the Crown's right to create courts in the colony, which was an issue because the Governor, acting pursuant to royal instructions, had recently set up prerogative courts

¹⁰⁸ *Id.* at 221.

¹⁰⁹ See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 188 n.2 (1898).

¹¹⁰ See *Biographical Sketch of Waightstill Avery, With Illustrative Manuscripts*, 4 N.C.U. Mag. 242, 242 (1855).

¹¹¹ *Id.* at 254 (Paul Crosby's Case, 1769).

¹¹² 9 COLONIAL RECORDS OF NORTH CAROLINA 699-706 (William L. Saunders ed., 1886-1890) [hereinafter NORTH CAROLINA COLONIAL RECORDS].

of oyer and terminer after the King disallowed a provincial court law.¹¹³ The constituents/authors of these instructions directed their representatives to deny that the Crown had the right to establish such courts without the colonists' consent.¹¹⁴ The reason: only consent legitimates the exercise of the state's authority, and none had been given. Not even by the customary acquiescence of the inhabitants of England. The colonists' response to the claim of customary right clearly demonstrates their belief that juries had the right in at least certain cases to determine the law.¹¹⁵ But it isn't clear who wrote these instructions, for whom the authors were speaking, and whether their statements about jury lawfinding reflected the colony's accepted practice in criminal, or any other, cases.

Whatever authority North Carolina criminal juries might have had in 1773, a newspaper report strongly suggests that they had no right in 1764 to nullify the law or engage in a form of "pious perjury."¹¹⁶ This article tells the extraordinary story of Mr. Crooker and Mr. Conner. Their paths first crossed when pirates captured a ship and started slaughtering everyone on board. In an isolated and apparently random act of mercy, pirate Conner saw to it that Crooker's life was spared. At their

¹¹³ See HUGH T. LEFLER & WILLIAM S. POWELL, *COLONIAL NORTH CAROLINA—A HISTORY* 256-57 (1973).

¹¹⁴ See 9 NORTH CAROLINA COLONIAL RECORDS, *supra* note 112, at 704-05.

¹¹⁵ In pertinent part, the instructions read as follows:

Where [English] usage is not Just, or of no use to us (which may depend on our Circumstances) we think our Judges and Juries have a right to refuse them, but they have no right to refuse Acts of Assembly; yet we think there is a Power in the Crown of applying remedies to very pressing Evils for which no Law has provided, and the necessity and manner of exercising this Power must afterwards be Judged of by the People, either as Juries in Courts or as an Assembly, and if they find there was Necessity, that an expedient remedy was applied, that the manner of applying it was not oppressive, and in a Word that the power was not abused, we think the persons employed in it ought to be excused, but severely punished if the Contrary appears. We think the Courts we are now speaking of were a Necessary and useful remedy for very pressing Evils. . . .

Id. at 705.

¹¹⁶ See *The North-Carolina Magazine*; or, *Universal Intelligencer* (New Bern) 127 (1764).

next, and presumably final, encounter, things were rather different. This time, Crooker found himself sitting on the jury at Conner's trial for horse theft, a capital offense. Unfortunately for the (former?) pirate, Crooker's gratitude didn't stop him from joining the other jurors in condemning Conner to die. As the newspaper report put it, Crooker felt "a sensible Concern" that his duty as a juror "necessitated [him] to find [Conner] guilty of a Capital Offense." Since the article contains no hint that Crooker misunderstood his duty, this report implies that Crooker had no right to grant Conner mercy by acquitting him or voting to convict him of some lesser, non-capital, charge. Of course, that would still leave unclear just what the criminal jury's authority was.

We have better information on the responsibilities of criminal juries in colonial Georgia, and it suggests that they had no lawfinding authority in the first dozen years of that colony's existence. Our earliest insight into the rights of Georgia's criminal juries dates from 1734, the year after the colony's founding.¹¹⁷ It was a particularly busy year for hard-drinking colonist and Indian trader Captain Joseph Watson.¹¹⁸ For starters, he called Mary Musgrove, a half-Indian interpreter who was

¹¹⁷ On the founding of Georgia, see KENNETH COLEMAN, *COLONIAL GEORGIA—A HISTORY* 13-35 (1976).

¹¹⁸ Watson's *annus horribilis* and its sequelae are chronicled in SARAH B. GOBER TEMPLE & KENNETH COLEMAN, *GEORGIA JOURNEYS* 82-89 (1961). The following are the best primary sources on these events: 20 *THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 87-88 (letter from Samuel Eveleigh to James Oglethorpe, Oct. 19, 1734), 172-76 (letter from Thomas Causton to the Trustees, Jan. 16, 1735), 253-54 (letter from Joseph Watson to Peter Gordon, Mar. 10, 1735), 256-62 (letter from Thomas Causton to the Trustees, Mar. 10, 1735), 283-84 (letter from Thomas Causton to James Oglethorpe, Mar. 24, 1735) (Allen D. Candler et al eds., 1904-) [hereinafter *GEORGIA COLONIAL RECORDS*]; 29 *id.*, at 47-48 (letter of Benjamin Martyn to Thomas Causton, Mar. 17, 1735), 60 (letter of Harman Verelst to the Bailiffs and Recorder of Savannah, May 15, 1735); 32 *id.* at 112-14 (Common Council Instructions of the Bailiffs and Recorder of Savannah in the Case of Joseph Watson, Jan. 17, 1735); 2 *DIARY OF VISCOUNT PERCEVAL, AFTERWARDS FIRST EARL OF EGMONT* 141 (entry for Mar. 8, 1735), 368 (entry for Mar. 14, 1737) (1923) [hereinafter *DIARY OF VISCOUNT PERCEVAL*]; THOMAS STEPHENS, *A BRIEF ACCOUNT OF THE CAUSES THAT HAVE RETARDED THE PROGRESS OF THE COLONY OF GEORGIA* (London 1743), *reprinted in* 2 *COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY* 132-36 (1842); *A TRUE AND HISTORICAL NARRATIVE OF THE COLONY OF GEORGIA BY PAT. TALIFER AND OTHERS WITH COMMENTS BY THE EARL OF EGMONT* 56-57 (Clarence L. Ver Steeg ed., 1960) [hereinafter *A TRUE AND HISTORICAL NARRATIVE*].

his partner's wife and a trusted friend of General James Oglethorpe,¹¹⁹ a witch, for which he was successfully sued. Watson then tried to shoot Mary, for which he was fined. Next, he defrauded and assaulted Esteechee, an Indian warrior whose tribe was Georgia's ally. Watson was fined for this misconduct, and a number of Indians told the judge that they wanted to do no more business with him. Watson soon engaged one of these men—a Creek warrior named Skee, whom Oglethorpe had made a Captain of the Indian militia—in a fatal drinking spree.¹²⁰ To make matters worse, when Skee took ill, Watson proclaimed that his goal had been to get Skee to drink himself to death, and he bragged of this accomplishment after Skee died. An enraged Esteechee tried to kill him, and the Indians demanded that Watson be turned over to them.

Georgia's magistrates were unwilling to do this, because Watson's execution following a tribal murder trial would have been unacceptable to many colonists. But something had to be done, to placate the Indians, protect Watson against tribal vigilantes (like Esteechee), and stop Watson from further inflaming the situation by word or deed. The colony's valuable relationship with the Indians was at stake.

Thus, the chief judge of Georgia's only court¹²¹ (bailiff Thomas Causton) was delighted when the grand jury to which he proffered an indictment charging Watson with "misdemeanors" in connection with Skee's death—our records don't mention the precise charges; they just say that he "was indicted for stirring up animosities in the minds of the Indians, &c. tending to the ruin and subversion of the colony"¹²²—brought in a true

¹¹⁹ On Mary Musgrove, see COLEMAN, *supra* note 117, at 25, 79-88.

¹²⁰ For reasons unknown to me, Oglethorpe and the Indians also believed that Watson had poisoned Skee. See 2 DIARY OF VISCOUNT PERCEVAL, *supra* note 118, at 368 (entry for Mar. 14, 1737).

¹²¹ For a discussion of colonial Georgia's court system, see JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 198-225 (1917).

¹²² A TRUE AND HISTORICAL NARRATIVE, *supra* note 118, at 57. Our sources do not explain why Watson was not charged with murder. Perhaps Causton knew that no jury would condemn him to die for killing an Indian. Or maybe, as Oglethorpe later suggested, see 2 Diary of Viscount Perceval, *supra* note 114, at 368 (entry for Mar. 14, 1737), the problem was that the testimony of Indians would have been needed to convict Watson of murder, but was inadmissible in Georgia's courts. Be that as it may,

bill. But the petit jury seems to have returned a verdict declaring only that Watson was "guilty of unguarded expressions."¹²³ Causton, who had testified in the trial, twice refused to accept this apparently incomplete verdict. Finally, the foreman accompanied this written verdict with an oral statement recommending that Watson be treated leniently because the jury believed him a lunatic. This satisfied Causton, who (with the blessing of the Trustees) ordered that Watson be kept in close confinement in his own home until he came to his senses.¹²⁴ This incarceration lasted for several years, until the Trustees ordered his release to prevent the Privy Council from deciding whether it could exercise appellate jurisdiction with respect to a Georgia court's decision.¹²⁵

In the meantime, the colony's dissidents had taken up Watson's cause. These men seem to have been offended by the no-

the Trustees decided that principles of double jeopardy barred his subsequent prosecution for murder. *See id.*

¹²³ STEPHENS, *supra* note 118, at 135-36. *See* 20 GEORGIA COLONIAL RECORDS, *supra* note 118, at 175 (letter from Thomas Causton to the Trustees, Jan. 16, 1735); A TRUE AND HISTORICAL NARRATIVE, *supra* note 118, at 57. The Earl of Egmont wrote that the latter account was "false," *see id.* n.84, but it isn't clear wherein he thought it in error. If his point was that this jury also convicted Watson for assaulting Mary Musgrove, it appears that the mistake was Egmont's. But Egmont may have felt that the Narrative's authors had misdescribed the verdict in another way, either by stating that the declaration that Watson was a lunatic was not part of the verdict or by otherwise misstating what the verdict found him guilty of.

¹²⁴ The Trustees initially interpreted the outcome of the trial as having decided that Watson, as a lunatic, had been incapable of defending himself on the misdemeanor charges, so that his return to sanity would lead to a new trial on those charges, if not murder. *See* 29 GEORGIA COLONIAL RECORDS, *supra* note 118, at 48 (letter of Benjamin Martyn to Thomas Causton, Mar. 17, 1735); 32 *id.* at 112-13 (Common Council Instructions to the Bailiffs and Recorder of Savannah in the case of Joseph Watson, Jan. 17, 1735); THE JOURNAL OF THE EARL OF EGMONT . . . 1732-1738, at 241 (Robert G. McPherson ed., 1962) (entry for Mar. 7, 1737). In time, however, they came to see the proceedings as having decided that Watson was guilty of a crime and a lunatic, and that the end of what we would call his civil commitment would lead to the imposition of a sentence on his conviction. *See* 2 DIARY OF VISCOUNT PERCEVAL, *supra* note 118, at 368 (entry for Mar. 14, 1737); 32 GEORGIA COLONIAL RECORDS, *supra* note 118, at 234 (Trustees Instructions to the Bailiffs and Recorder of Savannah about Joseph Watson's mental state, June 6, 1737). As such, they also decided that Watson could not then be tried for murder. *See supra* note 122.

¹²⁵ Watson's case, the only Georgia case appealed to the Privy Council during the Proprietary period, is also discussed in COLEMAN, *supra* note 117, at 108, and MCCAIN, *supra* note 121, at 209-12.

tion that a colonist could be imprisoned for abusing an Indian, but they also condemned Causton's behavior toward the jury. In their view, Causton bullied it into declaring Watson insane, to which finding four jurors later denied they had ever assented.¹²⁶

The Trustees in England, who served as the colony's appellate court,¹²⁷ never wavered in their support of Causton's handling of this case, but it is not clear what this incident tells us about the provinces of judge and jury in the colony. In part, that's because we don't know whether (or to what extent) the authorities were deviating from the normal legal rules in this intensely political case. In part it's because we don't know whether (or to what extent) the dissenters' complaints were hyperbolic sour grapes. In part, though, the problem is that we don't know what the real bone of contention between Causton and the jury was: did the jurors doubt Watson's lunacy, or were they attempting to nullify the law by suppressing the true facts of the case? Given the partial written verdict the jurors returned on the misdemeanor counts, their evident unwillingness to rewrite it to include a finding of insanity, and what we know about Watson, the latter seems more likely to reflect what was really going on. In either event, Causton's rejection of the unadorned "guilty of unguarded expressions" verdicts says nothing about the jury's right to decide what the law was. However, the jury's

¹²⁶ The authors of *A True and Historical Narrative* wrote that Causton "hected" the jury and that he generally made juries "afraid . . . to act as their consciences directed them." A TRUE AND HISTORICAL NARRATIVE, *supra* note 118, at 53, 57. Thomas Stephens wrote that Causton "intimidated" petit juries. STEPHENS, *supra* note 118, at 95. His evidence included an eyewitness' affidavit that said Causton "treated . . . [Watson's] jury with very indecent language" and a letter from four members of the jury saying that the foreman's statement "was extorted by menaces" from Causton "and not assented to by us." *Id.* at 132, 136. Robert Parker wrote about this case, "We know how Jewreys are managed hear and what dirty works they have been made to do." 20 GEORGIA COLONIAL RECORDS, *supra* note 118, at 373 (letter from Robert Parker to the Trustees, June 3, 1735). In *The Constitutions of the Several States*, Theodor Bland later speculated that the memory of Causton's conduct in Watson's trial may have led to the adoption of the provision of Georgia's 1777 Constitution that is quoted *supra* in note 69 of this paper and the accompanying text. See THEODORIC BLAND, THE CONSTITUTIONS OF THE SEVERAL STATES 468 (undated manuscript) (Maryland Historical Society Library, Manuscripts Division, Bland Papers, MS.134, Box 1).

¹²⁷ See *supra* note 121

failure to bring in a simple “not guilty” verdict suggests that the jurors didn’t believe they had a right to nullify the law. And the dissenters’ failure to complain about Causton’s rejection of the partial verdict (as opposed to the language with which he addressed the jury when he directed it to continue its work), as well as the Trustees’ approval of his performance, indicate that the colony’s judges had a right (at least under some circumstances) to reject a jury’s verdict.

The journal of William Stephens—a former Member of Parliament who served as the Trustees’ official observer of colonial affairs, President of Savannah county, and finally President of the entire colony¹²⁸—casts a bit more light on the rights of judge and jury in the colony’s early years. Stephens’ thorough journal includes reports of cases considerably less extraordinary than Watson’s. Moreover, in a colony with no lawyers, law books, or experienced magistrates,¹²⁹ Stephens was a legal advisor to the court and probably the most knowledgeable authority on law around, which means he was singularly capable of providing us with accurate reports of the proceedings he witnessed.

Two sets of cases in Stephens’ journal are particularly instructive. The first is a trial for violation of one the colony’s first three laws, the 1735 act barring the importation and sale of rum and kindred spirits.¹³⁰ As Causton and Stephens noted, this was an unpopular law and juries were loath to convict people for its violation.¹³¹ Thus, in the case at hand, although the evidence was

¹²⁸ William Stephens, *A Journal of the Proceedings in Georgia Beginning October 20, 1737 (1740)*, 4 *GEORGIA COLONIAL RECORDS*, *supra* note 118 [hereinafter *Stephens I*]; William Stephens, *A Journal of the Proceedings in Georgia Beginning October 5, 1740*, Supplement to 4 *GEORGIA COLONIAL RECORDS*, *supra* note 118 [hereinafter *Stephens II*]; *THE JOURNAL OF WILLIAM STEPHENS, 1741-1743* (E. Merton Coulter ed., 1958) [hereinafter *STEPHENS III*]; *THE JOURNAL OF WILLIAM STEPHENS, 1743-1745* (E. Merton Coulter ed., 1959) [hereinafter *STEPHENS IV*]. Stephens’ career is discussed in *COLEMAN*, *supra* note 117, at 95-102, and *MCCAIN*, *supra* note 121, at 167-69, 206.

¹²⁹ See *MCCAIN*, *supra* note 121 at 212-15.

¹³⁰ The *Scott* trial, discussed in the text, is reported at *Stephens I*, *supra* note 128, at 90. The rum act, passed by the Trustees on January 9, 1735, and approved by the Privy Council on April 3, is found at 1 *GEORGIA COLONIAL RECORDS*, *supra* note 118, at 44-48.

¹³¹ See 20 *GEORGIA COLONIAL RECORDS*, *supra* note 118, at 285 (letter from Thomas Causton to James Oglethorpe, Mar. 24, 1735); *Stephens I*, *supra* note 128, at 90-91 (entry for Feb. 23, 1738). See generally, *MCCAIN*, *supra* note 121, at 215.

so strong that Causton "directed" the jury to convict Scott, who had obviously violated the act, the jury returned a verdict of "not guilty."¹³² Not willing to give up without a fight, Causton rejected that verdict and ordered the jury to deliberate further. When a second "not guilty" verdict was returned, however, he accepted the inevitable and entered a judgment of acquittal.¹³³

This case makes it clear that Causton instructed criminal juries on the law and the fact before sending them out to deliberate on a case.¹³⁴ It also makes it clear that when a jury returned a non-partial verdict with which he disagreed, he felt free to refuse to accept the verdict and order the jury to resume its deliberations. But a jury insistent upon returning a general verdict of "not guilty" could always prevail in the end. That means that juries had the power to frustrate the rum act, but did they have the right to do so?

Nothing in Stephens' journal squarely answers that question, but a number of entries, considered together, offer some slender evidence that Stephens' answer to that question would have been "No."¹³⁵ In most of the relatively few criminal trials reported in his journal, usually after noting the prosecution's evidence and the gist of the defense, Stephens simply identifies the jury's verdict.¹³⁶ In two other instances, however, Stephens states that the jury was so thoroughly convinced "of the Fact"

¹³² See *supra* note 100 on the meaning of the term "direction."

¹³³ Not all defeats are complete. Causton imposed a good behavior bond on Scott, which he was, at least temporarily, unable to pay. Thus, despite his acquittal, Scott was incarcerated.

¹³⁴ This seems also to have been the practice in civil cases. See Stephens I, *supra* note 128, at 91 (entry for Feb. 23, 1737, report of *Watson v. Matthews*).

¹³⁵ Although Stephens described the verdict in Scott's case as "barefaced" and "scandalous," Stephens I, *supra* note 128, at 90, that tells us nothing about whether he thought the jury had the right to determine the law. It is not, after all, unknown for someone to use a rightful power in a way of which others disapprove. (Causton's complaint about the difficulty of enforcing the rum act, see *supra* note 131 and accompanying text, is similarly unilluminating.)

¹³⁶ See, e.g., Stephens I, *supra* note 128, at 90-91 (entry for Feb. 23, 1738, Smith's trial for clipping coins, woman's trial for petty larceny), 169 (entry for July 11, 1738, trial of Hetherington & Bishop for killing cattle), 170-71 (entry of July 12, 1738, trial of Hetherington, Bishop, & Francis Elgar for killing cattle), 372 (entry of July 18, 1739, trials of Cozens & Levett for murder); STEPHENS IV, *supra* note 128, at 67-68 (entry of Feb. 3, 1744, trial of unnamed black man for murder), 152-53 (entry of Aug. 9, 1744, trial of Ambrose Morrison for murder).

that it brought in a speedy guilty verdict.¹³⁷ Perhaps these entries mean nothing more than that there were no legal issues in those cases. But the quoted phrase may be a formulaic expression of the jury's limited role in every criminal case. Four facts support this theory. First, an entry in connection with the magistrates' post-verdict efforts to get to the bottom of one of these cases shows that Stephens distinguished between "the Fact" and legal questions arising thereon.¹³⁸ Second, his records show that the court could determine the legal sufficiency of a presentment and that legal rulings made at trial could be reviewed by means of a motion of arrest of judgment.¹³⁹ Third, when a number of people charged with missing guard duty presented their excuses to the court, Stephens tells us that some were acquitted, others convicted, and a third group, those "who made Excuses that appeared a little plausible," had their cases put off for jury trial, which suggests that the court decided the legal sufficiency of the excuses and left only their factual validity to the jury.¹⁴⁰ Finally, while discussing the procedure to be followed by a civil jury faced with a mass of documentary evidence, Stephens notes matter-of-factly that, before the jury began its deliberations on the case, the court would "Charge" it "according to Law, whereon to find their Verdict."¹⁴¹ This is very circumstantial evidence, indeed, but it suggests that Georgia's criminal juries had no right to decide the law in a criminal case before

¹³⁷ See Stephens I, *supra* note 128, at 372 (entry for July 17, 1789, report of Brixy's murder trial); Stephens II, *supra* note 128, at 9 (entry for Oct. 9, 1740, report of William Shannon's murder trial). He also speaks of "the Fact" at *id.* at 372 (entry for July 18, 1739, trials of Cozens & Levett for murder).

¹³⁸ See Stephens I, *supra* note 128, at 376 (entry for July 26, 1739).

¹³⁹ On the former point, see STEPHENS III, *supra* note 128, at 81-82 (entry for May 19, 1742). On the latter point, see Stephens I, *supra* note 128, at 168-69, 171 (entries for July 11 and 12, 1738) (challenge to number of peremptories allowed the defense).

¹⁴⁰ This incident is reported in STEPHENS IV, *supra* note 128, at 248-49 (entry for Nov. 5, 1745).

¹⁴¹ Stephens I, *supra* note 128, at 91 (entry for Feb. 23, 1738). It is interesting to note that the parties in this case were Joseph Watson and Mary Musgrove's second husband, Indian trader Jacob Matthews. Watson and Matthews were business partners, and this trial involved an accounting between them. The friction between himself and Watson led Thomas Causton to find a convenient excuse for not sitting on the bench during the trial.

1746, which is the only period for which we have any evidence at all.

Colonial Maryland provides our first direct evidence of the status of the jury lawfinding right during a substantial portion of the colonial era. This data suggests that Maryland criminal juries may never have had such a right as of 1724, when our evidentiary trail ends.

That trail begins in 1642, with the adoption of An Act For Rule of Judicature.¹⁴² The Act stipulated that Maryland's criminal law would govern criminal trials in the province. If that law were not "certaine," the Act forbade the imposition of any serious punishment. However, the Act authorized provincial judges to fix substantive rules to govern the trial of minor crimes under such circumstances. No comparable delegation of lawmaking "discretion" was (ever) made to juries.

Later that year, Giles Brent¹⁴³ was charged in the Provincial Court with subverting that year's military expedition against the Susquahannock Indians.¹⁴⁴ Brent replied that his conduct in that affair was proper, and he asked that the issue be put to a jury. Prosecutor John Lewger, who was also the colony's Secretary and a member of the Governor's Council¹⁴⁵ (and thus of the Provincial Court¹⁴⁶), objected to Brent's plea on the ground that

¹⁴² 1 ARCHIVES OF MARYLAND 147, 184 (William Hand Browne et al. eds., 1883).

¹⁴³ At various times, Brent served as Maryland's Acting Governor, a member of its Council and Assembly, political leader of Kent County, and its military and judicial chief. On his life generally, see BERNARD C. STEINER, BEGINNINGS OF MARYLAND, 1631-1639, at 103-05 (1903) [hereinafter STEINER I]; BERNARD C. STEINER, MARYLAND DURING THE ENGLISH CIVIL WARS, PART I (1906) [hereinafter STEINER II]. On Brent's relations with Governor Calvert during this period, see STEINER II, *supra*, at 41-55.

¹⁴⁴ These proceedings are reported at 4 ARCHIVES OF MARYLAND, *supra* note 142, at 159-61, 164. This case is discussed in its historical context at STEINER II, *supra* note 143, at 41-55.

¹⁴⁵ On Lewger's position as Secretary and Councilor, see STEINER I, *supra* note 143, at 44. On his appointment as Proprietor's attorney, see *id.* at 52. Carroll T. Bond tells us that Lewger was a lawyer, as well. SEE CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND, A HISTORY 16 (1928). For more on Lewger's life, see SEBASTIAN F. STREETER, PAPERS RELATING TO THE EARLY HISTORY OF MARYLAND 218-76 (Maryland Historical Society Fund Pub. No. 9, 1876).

¹⁴⁶ The Governor and the members of his Council were members of the Provincial Court, see BOND, *supra* note 145, at 4-5. The Governor and members of his Council were also the superior court judges in seventeenth century East Jersey, see JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1683-1702, at 18

it raised a legal question not determinable by a jury, but by the court upon a demurrer. We don't know Brent's reaction to this argument. What we do know is that the court agreed with Lewger, ordering Brent to replead or show cause why judgment shouldn't be entered against him.¹⁴⁷

Further evidence that Maryland juries were not thought to have the right to determine the law in a criminal case may be found in the record of John Elkin's 1643 trial in the Provincial Court for the murder of the chief of a local Indian tribe.¹⁴⁸ When Elkin's jurors told the court they thought that killing a pagan wasn't a crime and that there was no precedent under Virginia law for treating it as murder, Governor and President judge Leonard Calvert advised them that they were wrong about the first point and that British, not Virginia, law governed this case. The jurors stood fast in support of their fellow settler, finally declaring him innocent on the ground that he'd acted in self-defense. Presumably because the confessions of Elkin and his two cohorts proved that Elkin had not so acted, Calvert refused to accept this verdict, dismissed the jury, and ordered that the case be presented before a second jury.¹⁴⁹

(Preston W. Edsall ed., 1937) [hereinafter JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY], and elsewhere, see LEONARD W. LABAREE, ROYAL GOVERNMENT IN AMERICA 99 (Frederick Ungar Pub. Co. 1958) (1930). In fact, the same magistrates performed judicial, executive, and legislative functions in almost all of the colonies. See LOYD, *supra* note 90, at 62-69; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 159 (1972). This serves to remind us that the notion that judges belong to an independent branch of government is profoundly modern. See WOOD, *supra*, at 159-60.

¹⁴⁷ Choosing the former option, Brent successfully presented his excuse to the court.

¹⁴⁸ The record of this case can be found in 4 ARCHIVES OF MARYLAND, *supra* note 142, at 176-84. For a discussion of its historical context, see AUBREY C. LAND, COLONIAL MARYLAND—A HISTORY 42-45 (1981).

¹⁴⁹ The court's rejection of the first jury's verdicts, its dismissal of that jury, and its decision to resubmit the case on the same evidence to a second jury appear to have been based on a statute enacted in August, 1642, and reenacted in modified form the following month. See 1 ARCHIVES OF MARYLAND, *supra* note 142, at 151-52, 187. The relevant portion of this act, in its final form, reads as follows:

If the Judge think any verdict greivous to either party, or exceeding the issue, committed to their inquiry, he may returne them to consider better of it, or charge another Jury wth it, at the instance of either party desiring it, & undertaking the charge. . . .

The question posed by Elkin's case is why Calvert sought to "satisfy" the jury that it was wrong about the law. Why didn't he just tell the jury that, if it believed that Elkin killed the chief as alleged in the indictment, it was bound by its oath to return a guilty verdict? Did he think that, although the jury was obligated to accept his view of the law, persuasion was the best way to get the jurors to do his bidding? Or did he believe, seven years before Lilburne's trial, that juries had the right to judge the law?

If the date of this case didn't make the latter possibility unlikely enough, the Calverts' general preference for exercising personal control over their domain,¹⁵⁰ including its courts,¹⁵¹ would make it even less probable. And the subsequent turn of events in Elkin's case further supports this hypothesis. A new jury convicted Elkin of manslaughter two days after his first trial ended. Two days later, in accordance with a recently enacted statute,¹⁵² Lewger (who had been one of the judges presiding over Elkin's trials) filed an information requesting that the members of Elkin's first jury be fined for their verdict. The same afternoon, the only proceeding that seems to have occurred pursuant to this information resulted in the imposition of a hefty fine against George Pye, who had represented Elkin's hundred in the Assembly since 1640 and appears to have been the most prominent member of Elkin's first jury.¹⁵³ When the

And if the Judge find the Jury evidently partiall or willfull, he may charge another Jury to enquire & try by the same evidence. And if they find contrary to the former Jury all the former Jury may be fined at the discretion of the Judge

Id. at 187.

¹⁵⁰ See 2 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 298-302 (1964); Lois Green Carr, *Extension of Empire: English Law in Colonial Maryland* (1988) (unpublished manuscript on file with author). Not surprisingly, the colonists' efforts to reduce the Calverts' power and increase their own (through the Assembly) were a prominent feature of the colony's early political history. See LAND, *supra* note 148, at 34-38; STEINER II, *supra* note 143.

¹⁵¹ See 57 ARCHIVES OF MARYLAND, *supra* note 142, at xiv.

¹⁵² See *supra* note 149.

¹⁵³ As to Pye's service as St. George's Hundred's representative in the Assembly, see STEINER II, *supra* note 143, at 15 n.28, 21 n.53 & accompanying text, 33. For evidence that Pye also served as commander of the Hundred's "fort" during the Indian trou-

court reconvened two days after that, Pye was convicted and fined yet again, this time on a new information Lewger filed against him alone. The record describes this offense as follows:

[when] the Court [was] importunately pressing & charging the Jury that were upon the triall of John Elkin, to proceed according to their evidence & conscience, & arguing & pleading the crime agst the prisoner at the bar [he] in an insolent manner upbraided & reproached the whole Court in these or the like words, viz, that [if an Englishman had been killed by the Indians there would not have beene so much words made of it]¹⁵⁴

Perhaps the gravamen of Pye's offense lay in his choice of words or his tone of voice. Both could have offended the

bles of 1642, see *id.* at 42 n.157. David Whitcliffe, who had represented St. George's along with Pye in 1642, see *id.* at 43, was also on this jury. So, too, were Robert Kedger and Arthur le Hay, supporters of Pye and prominent residents of the Hundred. See 1 ARCHIVES OF MARYLAND, *supra* note 142, at 104, 144. Finally, Elkin's residence in St. Georges'—and perhaps his political support for Pye—are documented in *id.* at 104, 144.

The 1642 sessions of the Assembly were turbulent ones. See STEINER II, *supra*, at 33-50. Although Pye cast a few independent votes in the first of these sessions, his proxy, Thomas Weston, ultimately proved one of the Calverts' stoutest allies in these struggles. See, e.g., 1 ARCHIVES OF MARYLAND, *supra*, at 137-41, 177-82. These records don't allow us to determine whether Pye was returned to the Assembly after 1642. We do know that his name doesn't appear again in the archives, and it has been suggested that he moved to the West Indies. See 2 EDWARD C. PAPENFUSE ET AL, A BIOGRAPHICAL DICTIONARY OF THE MARYLAND LEGISLATURE, 1635-1789, at 669-70 (1985). We don't know whether he was related to Edward Pye, who came to Maryland in 1682 and quickly became a member of the Council and the husband of Ann Sewall, Proprietor Charles Calvert's stepdaughter. See *id.* at 669; 2 ANDREWS, *supra* note 150, at 376-77.

Ironically, it appears that Pye voted in August and September of 1642 to enact the statute pursuant to which he was punished in this proceeding. The archives report that he nonetheless denied that he was finable for his vote. Unfortunately, they don't tell us the reason he gave for denying his liability.

¹⁵⁴ 4 ARCHIVES OF MARYLAND, *supra* note 142, at 183-84. The archives refer to many jury charges besides the ones I discuss in the text. Some of these charges were given before the presentation of evidence; others were given after. See, e.g., 10 *id.* at 295 (trial of Skigh-tam-Mongh and Couna-weza, 1653); 57 *id.* at 64 (Francis Carpenter's Case, 1666), 198 (trial of Henry Mitchell, Joseph James, & John Boulton, 1667), 355 (Walter Pake's Case, 1668), 357 (trial of Thomas Corker & William Kee, 1668); 65 *id.* at 5 (trial of James Sall, John, & Robert Speare, 1671), 10 (Isabella Yousley's Case, 1671), 26 (Philip Lyne's Case, 1672). These records tell us that the former charge was simply to determine the defendant's guilt, whether he had fled, and whether he had any forfeitable property, but they say nothing about the content of the latter charges.

court's sense of propriety.¹⁵⁵ However, disputing the Governor's view of the law would surely have seemed even more arrogant. Moreover, in light of the diplomatic necessity of obtaining a conviction,¹⁵⁶ Pye's dissension might have appeared to threaten "state security." Thus, it seems far more likely that his crime was disputing the Governor's view of the law. Two further facts militate in favor of this theory. First, the jury's retreat to the frivolous self-defense argument suggests that it considered itself bound by Calvert's "advice" on the applicable law.¹⁵⁷ Second, in defending himself against Lewger's charge, Pye appears to have asserted neither the right of a jury to argue about the law with the court nor the greater right to decide for itself what the law was.¹⁵⁸ (The existence of the latter right, it should be recalled, was not asserted in any court in England until seven years later.) Thus, while this colonial counterpoint to William Penn and Edward Bushell's later (and more famous) trials¹⁵⁹—like Brent's trial—had strong political overtones, it is powerful evidence that

¹⁵⁵ On the significance of deference in colonial America and the early Republic, see GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992). On the colonies' use of criminal law in the seventeenth century to prevent "lesser" persons from offending their "betters," especially magistrates, see LARRY D. ELDRIDGE, *A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA* 5-19 (1994). For a *fin-de-siècle* Maryland case involving a spectator's disparaging remarks about a panel of trial court judges, see 23 *Archives of Maryland*, *supra* note 142, at 512-13 (William Josephs, Jr.'s Case, 1698).

¹⁵⁶ Governor Calvert's instructions from his brother, the Proprietor, seem to have emphasized the importance of maintaining good relations with the Indians by doing justice to whites who killed them. See LAND, *supra* note 148, at 44.

¹⁵⁷ Its continuing bottom-line defiance shows that it was not simply cowed by his demands. Nor was its successor, which also failed to convict Elkin of murder.

¹⁵⁸ As anyone who has ever questioned a referee or umpire's call knows, these two rights are entirely distinct.

¹⁵⁹ See Penn and Mead's Case, 6 *Howell's St. Trials* 951 (1670); Bushell's Case, 6 *Howell's St. Trials* 999, 124 Eng. Rep. 1006 (C.P. 1670). Elkin and Pye's trials contrast with Penn and Bushell's in that they involved the use of jury nullification to acquit a killer, rather than to protect religious liberty. They thus highlight the "bad" side of jury nullification. Moreover, the colonial court's ability to bring the Indian leader's killer to justice represents a striking contrast to the impotence that a modern court would experience in a similar situation. (Indeed, many people feel that the first trial of the police officers who beat Rodney King and the first trial of Lemerick Nelson, for example, were similar situations, and were frustrated by the courts' inability to avoid the verdicts rendered therein.)

Maryland juries had no right to determine the law in criminal cases in the first decade of the colony's existence.¹⁶⁰

Robert Clark and James Langworth's 1652 trial for killing Phillip Anther¹⁶¹ suggests that criminal petit juries had no right to determine the law even where no law had been declared by the court. Before the presentation of the evidence in this case, the jury was charged (the record doesn't indicate whether this was done with the defendants' consent) to bring in a special verdict informing the court whether the death was accidental, as the defendants claimed. The fact that the jury was so charged suggests that, even if the parties could choose to leave the determination of the law to a criminal petit jury, such juries did not have the right to judge the law, even when the court had not determined it.

A pair of murder prosecutions indicates that jurors so understood their province in 1668.¹⁶² The jury in each case returned a special verdict rather than a general one. In the first, the legal question thus presented to the court was whether the fact that the defendant was so drunk that he "did not know what he did at the time of Committing the [killing]" rendered his offense manslaughter rather than (capital) murder. In the second, the legal question involved the line between manslaughter and "manslaughter by misadventure." Both would seem to be cases in which the legal issue was sufficiently non-technical that juries entitled to determine the law might well have done so. Hence, these juries' apparently unsolicited decisions to bring in special verdicts suggest—although they don't prove—that the jurors thought they had no such right.

Our next evidence is again drawn from more political prosecutions, these stemming from former Governor Josias Fendall's "rebellion" of 1681.¹⁶³ The first of these is Fendall's

¹⁶⁰ The first settlements were founded in Maryland in 1634. See 2 ANDREWS, *supra* note 150, at 287-88.

¹⁶¹ This trial is reported at 10 ARCHIVES OF MARYLAND, *supra* note 142, at 143.

¹⁶² These two cases, *Lord Proprietary v. Pake* and *Lord Proprietary v. Corker and Kee*, may be found in 57 *id.* at 354-58.

¹⁶³ These trials are reported at 5 *id.* at 311-34. For their historical background, see 2 ANDREWS, *supra* note 150, at 344-51; LAND, *supra* note 148, at 54-57, 79-80, 83-84.

own trial for "false scandalous mutinous and seditious" speech (e.g., that the Proprietor was a traitor who had formed a Catholic-Indian conspiracy to ruin the colony's Protestants, that anyone who paid the Proprietor's taxes was a fool, and that Fendall would protect the people against Baltimore), attempted rebellion, and attempting to seize Lord Baltimore and several members of the Council. We have an unusually detailed account of this trial, because Baltimore had ordered the Council's Clerk, "who writes shorthand," to attend and take notes.¹⁶⁴

At the outset of the trial, the newly sworn jury was instructed (in the usual manner) that its "charge is to enquire whether [Fendall] be guilty of those false scandalous mutinous and seditious speeches practices and attempts whereof he stands indicted."¹⁶⁵ After evidence of Fendall's words had been introduced and impeached, Fendall appears to have argued that some of it could not be considered against him because any statement must be proven by more than one witness in order to justify a conviction for that statement.¹⁶⁶ But Chancellor Calvert, the President judge, then told the jury that Fendall was wrong about the law: the two witnesses did not have to testify to having heard him make the same "false scandalous mutinous and seditious" statement. At this point, the jury's foreman cut in, and the following colloquy ensued:

P. Lynes Foreman—We desire to have the Act of Assembly [on which the prosecution was based] with us to see what it directs.

Court.—You have not to do with that you have only to find whether or no the words have been spoken accordingly as the Prisoner is

Fendall's trial is also discussed in BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, at 109-11 (1983).

¹⁶⁴ 5 ARCHIVES OF MARYLAND, *supra* note 142, at 311. I don't know whether Fendall ever commented on the accuracy of this report.

¹⁶⁵ *Id.* at 318. The jury was also told to determine whether Fendall had fled and the extent of his forfeitable holdings. For similar opening charges, see *supra* note 154.

¹⁶⁶ The testimony of two witnesses was required to prove a non-confessing defendant guilty of sedition. See ELDRIDGE, *supra* note 155, at 21-22, 75-76. On the early history of the similar rule regarding treason, which was later enshrined in the Treason Clause, U.S. CONST. art. III, § 3, see L. M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95 (1968).

charged, you are not to muse yourselves with matter of Law but you are to enquire into matter of fact.

Fendall—That is a charge for a grand Jury.

Chanc:—It is properly before this Jury they have nothing more to do then to enquire into matter of fact whither such and such things have been done or not the rest lyes before the Court the Grand Jury having only found such an Information fit to be prosecuted and left it to the petit Jury to try it.

Fendall—This had not been known.

....

Chanc: as the Jury are going out—I am to tell you that if you cannot find the Indictmt as it is laid you may if you think fitt find specially—¹⁶⁷

After deliberating, the jury returned and delivered the following verdict: “We find Josias Fendall guilty of speaking severall seditious words without force or practice and if the honble Court think him guilty of the breach of the Act of Assembly we do or else not.”¹⁶⁸ The following day, the court pronounced him guilty of uttering seditious words.

It is clear from this report that the court believed that the jury was confined to determining facts, as might have been expected given the previous historical record. However, two other bits of this story complicate the picture. Foreman Lynes’ request to see the statute suggests that he was unaware of this limit on the jury’s responsibility.¹⁶⁹ Moreover, if we can believe his words, Fendall was equally surprised by the charge. This would

¹⁶⁷ 5 ARCHIVES OF MARYLAND, *supra* note 142, at 327. I don’t know on which Act this prosecution was based. Larry Eldridge suggests that 1 *id.* at 73 was the “scandalous or contemptuous words” statute, see ELDRIDGE, *supra* note 155 at 25, 151 n.14, but that bill was never enacted into law. See 1 ARCHIVES OF MARYLAND, *supra*, at 39; STEINER I, *supra* note 143, at 107.

¹⁶⁸ 5 ARCHIVES OF MARYLAND, *supra* note 142, at 327.

¹⁶⁹ The archives reveal that Lynes had served on some civil juries. See, e.g., 70 *id.* at 2, 8, 12, 17, 41 (1681 trials); 69 *id.* at 224, 257 (1680 trials); 68 *id.* at 68, 202 (1679 trials), but the records of criminal trials are too skimpy to allow us to determine the extent of his prior service on criminal juries. (To be more precise, we have no record of criminal trials in the Provincial Court between April, 1673 and March, 1684. See LOIS GREEN CARR & DAVID WILLIAM JORDAN, MARYLAND’S REVOLUTION OF GOVERNMENT, 1689-1692, at 305 (1974).) He does seem to have participated on the jury in the second trial of Edward Randolph’s case against John Blackmore, which is discussed below in the text accompanying notes 176–83. See PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 1695–1729, at 24 (Carroll T. Bond ed., 1933) [hereinafter PROCEEDINGS].

be remarkable because during his brief tenure as Governor, Fendall was the President of the very court before which he was now on trial. Had the role of the criminal jury been different then? Had the issue of the jury's authority to determine the law never arisen in a case tried during his term? Or was this jury spontaneously raising a narrower question: whether it had the right to determine the seditiousness of Fendall's speech? Was that question unresolved in the colony? If not, could Fendall's response signal his unfamiliarity with practice in sedition trials? Why would he have thought them different? One more possibility must be noted. Maybe Fendall's surprise was feigned. Maybe he was grandstanding. He seems to have done that earlier in the trial,¹⁷⁰ and we cannot rule out the possibility that this was more of the same. But grandstanding only makes sense if there is an audience receptive to the message. Therefore, this interlude may suggest that there was a popular conception in at least some quarters that in some cases criminal juries had a right to decide more than just the facts.

The other two trials held in connection with this episode are not reported in such detail. Rather, in Lord Baltimore's words, the record of these trials is nothing more than "the Records as things of this nature are usually entered."¹⁷¹ Thus, they skip from the swearing of the jury (which in each case was basically the same jury as the one that sat in Fendall's case) to the announcement of its verdict. In the case of John Coode, an Assembly member whom the Proprietor believed to be Fendall's partner in crime, the jury returned a simple verdict of "not

¹⁷⁰ After the jury was sworn and given its initial charge, when the prosecutor called his first two witnesses, Fendall complained that he wasn't given adequate notice of his trial, the charges against him, or the prosecutor's evidence. It is difficult to believe that Fendall didn't know that he should have raised this issue earlier. In any event, the Chancellor pointed out that he had been given ample notice that he would be tried at that session of the court, that no defendant had ever been given complete pre-trial discovery of the prosecution's case, and that "most of [the witnesses'] depositions were [nonetheless] read to [Fendall] before the Councill" in advance of the trial. 5 ARCHIVES OF MARYLAND, *supra* note 142, at 318. And Fendall was in fact able to present favorable evidence. Hence, his complaint appears to have been entirely for show.

¹⁷¹ *Id.* at 334.

guilty."¹⁷² But in the trial of county court judge (and militia officer) George Godfrey for his efforts to rescue Fendall from his pre-trial imprisonment, the jury returned the same kind of verdict it had rendered in Fendall's case:

George Godfrey is guilty of speaking many mutinous and seditious words and striueing as much as in him lay to raise a mutinous Company to fetch Capt Fendall out of prison and if the Court find him guilty of the Breach of the Act of Assembly whereof he stands Indicted they find him guilty our else not.¹⁷³

As in Fendall's case, the court found him guilty. But what does this say about the jury's view of its own role? Did the jury believe itself limited to finding facts in this non-sedition case? Or was it rebelling by refusing to utter the word "guilty" when it disapproved of the law's judgment that defendants had acted criminally?

An anonymous lawyer's memorandum about the 1691 trial of four men charged with the murder of John Payne contains further evidence that Maryland juries had no right to determine the law in a criminal case.¹⁷⁴ The defendants in this extraordinary case (which was part of Maryland's Protestant revolution) were apparently denied counsel, deprived of the notes drawn up for their benefit before the trial by the anonymous lawyer, and intimidated by the presence of an armed force at their trial. These circumstances prevented them from properly presenting their defense, the memorandum claimed. That defense rested on a point of law: whereas the prosecution claimed that Payne's death was a murder because he was killed while acting in his capacity as a royal collector, the defense believed the crime was not murder because Payne was killed while acting as a militia

¹⁷² For a thumbnail sketch of Coode's life, see 2 ANDREWS, *supra* note 150, at 378-79.

¹⁷³ 5 ARCHIVES OF MARYLAND, *supra* note 142, at 334.

¹⁷⁴ The official report of this trial may be found in 8 *id.*, at 245-48. The memorandum, which may have been written by Robert Carville, see CARR & JORDAN, *supra* note 169, at 141 n.90, can be found in 8 ARCHIVES OF MARYLAND, *supra*, at 250-62. The Protestant revolution that formed its background, and Payne's death, are examined in CARR & JORDAN, *supra*, which discusses the trial itself at 140-45.

leader. What is significant for present purposes is that the memorandum noted that this point should have been made "by Pleading att Barr or arrest of Judgment," not in argument to the jury.¹⁷⁵ Hence, the memorandum doesn't report that the court charged the jury to determine whether Payne had been killed while acting as royal collector, but that the bench told the jury he had been so acting, and that his killing was therefore a murder.

Two criminal prosecutions under the Navigation Acts indicate that the jury had no right to judge the law in 1696. The first pitted Edward Randolph, the Surveyor General of the Customs in North America, against John Blackmore and the ship *Ann*.¹⁷⁶ The first trial in this case ended with the entry of judgment on the jury's verdict for the defense. The prosecutor attacked this decision before the Governor and Council, sitting as the newly-reorganized Court of Appeals.¹⁷⁷ He argued that the defense's key evidence—a bond—was legally insufficient, and that the jury had wrongly construed the relevant law, which was "not determinable by a Jury"¹⁷⁸ in any event. The high court agreed that the bond was "not a good bond in Law,"¹⁷⁹ so it set

¹⁷⁵ Inasmuch as the court consisted of revolutionary leaders, it is most unlikely that the lawyer believed it would be more sympathetic than a jury towards these supporters of the Lord Proprietary who were charged with killing the revolutionary government's agent.

¹⁷⁶ This case is documented in PROCEEDINGS, *supra* note 169, at 7–12, 22–25, 647–53. (It should be obvious that I, like Carroll Bond, *see id.* at xlvii–xlviii, read these records differently than David R. Owen and Michael C. Tolley, who sketch this case in their useful book, COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634–1776, at 281–82 (1995)). For further information about Randolph, *see* MICHAEL GARIBALDI HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES 1676–1703 (1960).

¹⁷⁷ On the 1694 reorganization of the Court of Appeals, *see* BOND, *supra* note 145, at 21–34. For two other instances in which the prosecution was allowed to appeal from an acquittal, *see His Majesty v. Richard Sweatnam and Elias King*, cases involving charges of perjury and bribery, which are cited in PROCEEDINGS, *supra* note 169, at xlviii. Ironically, Randolph attacked Attorney General George Plater, who represented him in these cases and made the argument mentioned in the text, as promugger and demanded that he be dismissed from his post. *See* 1 NORTH CAROLINA COLONIAL RECORDS, *supra* note 112, at 463–64 (petition to the Lords of Trade, Sept. 6, 1696).

¹⁷⁸ PROCEEDINGS, *supra* note 169, at 11, 25.

¹⁷⁹ *See id.* at 12.

aside the verdict. A second information was then filed, identical to the first, but history repeated itself in the trial court. The prosecutor again appealed, on the same ground. Although our records are incomplete, it appears that the Court of Appeals again adjudged the bond legally insufficient.¹⁸⁰ The legal consequences of this decision were now drawn into question, and the court sought the opinions of the members of its bar.¹⁸¹ In the course of complying with this directive, four of the six respondents endorsed the proposition that juries were not to judge the law.¹⁸² None dissented from it.¹⁸³ While we do not know the Court of Appeals' response to these opinions, they strongly suggest that the legal establishment believed that the jury had no lawfinding authority. Nor is it clear that the juries' verdicts in these prosecutions reflect a different understanding of their role: several of the lawyers expressed the opinion that the prosecutor's failure to challenge the bond by demurrer effectively conceded its validity, so the jury had no choice but to treat it as sufficient.

The other trade act prosecution was the 1696 trial of Charles Carroll, one of the lawyers whose views were solicited in

¹⁸⁰ The published records include no statement of the Court of Appeals' ruling on the second appeal.

¹⁸¹ PROCEEDINGS, *supra* note 169, at 647. As this entry shows, the Court also solicited the lawyers' opinions on some jury-related issues in a second, civil, case. The lawyers' responses to the two sets of questions overlapped, and for the sake of simplicity, I shall refer to this exchange as if only one case, Blackmore's, had been involved.

On the practice of soliciting the advice of counsel, see BOND, *supra* note 145, at 45-47; John E. Douglass, *Between Pettifoggers and Professionals: Pleaders and Practitioners and the Beginnings of the Legal Profession in Colonial Maryland, 1634-1731*, 39 AM. J. LEGAL HIST. 359, 370, 372 (1995).

¹⁸² For the lawyers' opinions, see PROCEEDINGS, *supra* note 169, at 647-53. The four who endorsed this view are Charles Carroll, who had trained at the Inner Temple, *see id.* at xxv, Robert Carville, who was mentioned in note 174, *supra*, as well as William Dent and Robert Goulesborough, who represented Blackmore in this case. All four of these men are mentioned in John Douglass' article, *supra* note 181, at 364-74, where we learn, *inter alia*, that Dent was Solicitor General and that Goulesborough became the King's Councilor, one of the three King's attorneys (along with the Solicitor General and the Attorney General), in 1696.

¹⁸³ A fifth respondent, Attorney General Plater, who was Randolph's lawyer, had (obviously) previously expressed his views on this subject, and they were in accord with the views of the four. Philip Clarke, the sixth and final respondent, wrote no opinion of his own and joined one saying nothing at all about the criminal jury's right to determine the law. Hence, his views on the subject are entirely unknown.

Blackmore's case.¹⁸⁴ Carroll responded to the charges filed against him by pleading a general denial and a demurrer, which attacked the information on a number of grounds, including a claim that one English statute upon which the charges were based didn't apply to the North American colonies because it was enacted before their founding. The record says that the jury returned a verdict for the prosecution on the general issue and the court ruled in its favor on the demurrer. It does not say whether the court ruled on the demurrer before or after the jury rendered its verdict, whether the lawyers argued the law to or before the court alone, or whether the jury was confined by its charge to determining the facts of the case. Nonetheless, the record is consistent with the opinion Carroll expressed in Blackmore's case: that juries should just determine facts, leaving it to the court to decide any questions of law arising therefrom. If that is how this case was handled, it would mean that the jurors' oath "to Say the Truth in the premises" referred only to the facts. The facts would have been the jury's sole concern.

In October, 1697, Governor Frances Nicholson summoned the lawyers and judges of the Provincial Court (which, since the reorganization of the Court of Appeals in 1694, was no longer composed of the Governor and Council) for a meeting with the Council.¹⁸⁵ During this audience, Nicholson told "the Chife Iustice that in giving his charge to the Iuries, . . . such a direction [should] be given [that] where there is a matter of Law, they should then bring in special verdict, and leave it to the Court."¹⁸⁶ Assuming that this undifferentiated fiat applied to criminal trials, which would be consistent with the instructions given in Fendall and his cohort's cases (and perhaps the import of the trade act cases of the previous year), it would suggest that the Governor (who was President of the Court of Appeals) didn't think that those juries had a right to determine the law. But

¹⁸⁴ Carroll's prosecution is documented in PROCEEDINGS, *supra* note 169, at 26, 29–41. For his participation in Blackmore's case, see *supra*, note 182 and accompanying text.

¹⁸⁵ Since the reorganization of the Court of Appeals in 1694, the composition of the Council and the Provincial Court had become increasingly distinct. See PROCEEDINGS, *supra* note 169, at xxxiii.

¹⁸⁶ 23 ARCHIVES OF MARYLAND, *supra* note 142, at 253.

why was it necessary? Because the new members of the Provincial Court weren't familiar with prior court practices? Because the instruction altered those practices? Because juries were taking it upon themselves to decide legal questions involved in the general verdict? I haven't found any answers to these questions in either the legal or historical literature, but it seems unlikely that this edict reflected a change in the courts' perception of the proper role of the criminal petit jury. Rather, it seems likely that the order was meant to facilitate review by the Court of Appeals of legal questions posed by decisions in the lower courts.

The following year, Nicholson's feud with John Coode, whom he had once caned for being drunk at church, led to the prosecution of a number of Coode's adherents, including his stepson, Gerard Slye, who was tried for seditious speech.¹⁸⁷ Slye's prosecution was in many ways a partisan echo of Elkin's. Despite the fact that he seems clearly to have been guilty, Slye was acquitted. Nicholson refused to accept that verdict, empaneled a second jury (which had already convicted another of Coode's allies), and obtained the conviction he so desired. At that point, twenty-seven years after the decision in *Bushell's Case*, Nicholson initiated prosecutions against members of the first jury.¹⁸⁸

This time, however, the lower house of the Assembly intervened on the jurors' behalf. In a petition addressing several of the Coode party's concerns, the Delegates presented the following complaint to Nicholson:

. . . [W]hereas Juryes are allways Accompted An Especiall Bullworke to protect our libertyes and priviledges from Arbitrary Governmt we therefore make our humble Addresses That no Iurors may be unjustly vexed menaced overawed or Deterred for and from freely giveing their verdict according to their Conscience and Duty nor bound in any Recognizances for the peace or unjustly psecuted for so doing but that they may

¹⁸⁷ These matters are discussed in 22 *id.* at 178–82, ANDREWS, *supra* note 150, at 378–79, and DAVID WILLIAM JORDAN, FOUNDATIONS OF REPRESENTATIVE GOVERNMENT IN MARYLAND, 1632–1715, at 197–205 (1987). Slye's offense is also discussed in ELDRIDGE, *supra* note 155, at 29.

¹⁸⁸ Nicholson also hauled a bystander into court for impugning the conduct of the judges in Slye's second trial. See 23 ARCHIVES OF MARYLAND, *supra* note 142, at 512–13 (William Josephs, Jr.'s Case, 1698).

have freedom and liberty freely & Clearly to give their Verdict without any Apprehensions of fear or Danger and be saved harmless for the same unless they may Justly by Law be Attainted And that all Jurors now at present under all recognizances and prosecuted for the Causes afd may be discharged of such recognizance and that such prosecution may Cease

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....

Nicholson's response—which had the support of the Council—was prompt and direct.

As to that parte of their message containing the Jurys &c, [Nicholson] tells [the Delegates] that they are upon a nice point and that the Jury that quitted Sly were in the opinion of all persons present at the tryall perjured, That the Grand Jury had found the Bill againe, Askes them if they pretended to vindicate such a Jury.¹⁹⁰

No reply was forthcoming, and the fate of the jurors who acquitted Sly is unclear.

The lower house's message can be read to support a jury's right to nullify the law in a criminal case, but it was doubtless meant only to free Sly's jurors—presumably the Delegates' supporters—from Nicholson's clutches. The Governor's reply suggested that he viewed jury nullification (which clearly appears to have occurred in this case) as perjurious factfinding, not rightful lawfinding. It's hard to believe that this was news to the lower house, so its failure to deny that criminal jurors could be attainted for a corrupt verdict or that nullification was perjury makes it doubtful that the representatives really believed otherwise. Even if they did, the Governor and Council (i.e., the Court of Appeals) had the authority to determine the jury's rights, not the lower house.

¹⁸⁹ 22 *id.* at 179–80.

¹⁹⁰ *Id.* at 182. The Council backed up the Governor in a message charging that the Delegates' bill was really a political attack meant to allow the government's opponents to seize power by protecting rebellious judges, jurors, and assembly members against the legal consequences of treasonous acts. Thus, the Council described the petition regarding Sly's jurors as complaining "[t]hat his Excy should suffer the Law to be put in Execution agt Jurors suspected of perjury and false verdict," and noted its brazenness in opposing their prosecution "when you do not know whether they are guilty or not and before any Tryall had of what they are Charged." *Id.* at 184, 186–87.

In the final relevant item in the records of colonial Maryland, a 1724 message to the upper house, the Delegates justified an act authorizing the issuance of bills of exception in criminal cases (in part) by denying the jury's right to judge the law in criminal cases.¹⁹¹ While we have no record of any direct response of either the upper house or the Governor to this argument, they supported the legislation, which became law in the same year.¹⁹² Nonetheless, although this episode appears to be yet another sign that the law recognized no criminal jury law-finding right, it also reminds us that the issue didn't die. Some of the people seem never to have accepted the official view of the criminal jury's rightful province, but the records don't reveal the scope of the authority they felt juries possessed or the size of this group of dissenters at any point in Maryland's colonial history.

New Jersey was divided into two separate colonies, East and West New Jersey, from 1676-1702.¹⁹³ There is some reason to suspect that criminal juries in East Jersey were expected to take their law from the judges. But the evidence is far weaker than the Maryland data. And with respect to West Jersey and (after 1702) the reunited province of New Jersey, there is just too little published information to hazard a guess about the scope of the criminal jury's province.

The best place to begin an analysis of East Jersey's archival record is with *Dom Rex v. Laing*,¹⁹⁴ East Jersey's counterpart to John Elkin's case. In this 1692 murder trial, the court learned that one juror was holding out for an acquittal because of conscientious scruples about capital punishment, which would have been the automatic sentence if Laing were convicted. Rather than deny the relevance of the juror's views on the death penalty, the court (presumably speaking through Governor Hamil-

¹⁹¹ See 35 *id.* at 34-35.

¹⁹² See 36 *id.* at 571.

¹⁹³ See generally 3 ANDREWS, *supra* note 150, at 138-81; JOHN E. POMFRET, COLONIAL NEW JERSEY—A HISTORY 22-91 (1973).

¹⁹⁴ This case is recorded in JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY, *supra* note 146, at 241-43.

ton, who was sitting as its President) argued that his opinion was wrong. Its efforts were rewarded with a conviction.

Although this episode doesn't necessarily signify anything in particular about the court's position on the jury's right to judge the law and the facts in a criminal case, two other things in the archives suggest that Governor Hamilton's court recognized no such right. The first, and somewhat subtler, indication that this was so is the fact that, although the reports of criminal trials in this era often provide such a detailed account of the trial of questions of fact as to tell us the witnesses' names,¹⁹⁵ they never say that either party made a legal argument before the verdict.¹⁹⁶ The other is John Baker's 1684 trial for breach of an East Jersey statute governing private dealings with the Indians.¹⁹⁷ After the Deputy Governor charged the jury,¹⁹⁸ it retired to discuss the

¹⁹⁵ See *id.* at 281 (cases of Abegee & Tom, 1695), 298 (Mary Wainwright's Case, 1696), 312 (Josiah Stanburrouh's Case, 1698). Sometimes this was prefaced with a statement to the effect that the prosecutor "proceeded to prove the matter of Fact." See, e.g., *id.* at 184 (John Baker's Case, 1684), 213 (John Decent's Case, 1686), 230 (Joseph Frasey's Case, 1687), 298 (Mary Wainwright's Case, 1696).

¹⁹⁶ We are told, however, that in John Baker's case, see *infra* text accompanying notes 197-99, and others, see e.g., *Dyre v. Coit*, JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY, *supra* note 146, at 199-200 (1685 *qui tam* suit under the Act of Navigation & Trade); *Doms. Rex v. Frasey*, *id.* at 230 (1687 prosecution for "Ranging the woods Contrary to Act of Generall Assembly"), the prosecution read the jury the statute upon which the charge was based. Of course, in a prosecution for violation of a statute, the content of the statute could hardly be kept secret from the jury, and reading it aloud isn't making a legal (or any other kind of) argument. In most of the reported cases we are also told that some kind of pre-verdict arguments were heard. See, e.g., *id.* at 161 (Robert Vicars' Case, 1683), 230 (Joseph Frasey's Case, 1687), 281 (Agebee's Case, 1695). On the other hand, in David Dounham's 1699 prosecution for theft of hogs, *id.* at 319-20, we are told that defense counsel made (what must have been) a legal argument to the court after the entry of a guilty verdict against their client. It may not be a coincidence that this is the only criminal case in which an appeal to London was allowed. See *id.* at 130-31.

¹⁹⁷ This trial is reported in *id.* at 184-85.

¹⁹⁸ Sometimes the surviving records note that the jury was given "their Charge." See, e.g., *id.* at 164 (Robert Vicars' Case, 1683), 230 (Joseph Frasey's Case, 1687). Our report of *Baker* says that, "Summing up the Evidence together with what had been offered on both sides," the court "Committed the same to the Jury." *Id.* at 184. See also, *id.* at 199 (Peter Coit's Case, 1685). In a fifth case, we are told that the court "briefly summoned up the Evidence and also what had bin alleged by the prisoner att the barr, and left the same to the Jury." *Id.* at 213 (John Decent's Case, 1686). We don't know whether the parties disputed the law in any of these cases. Nor do we know whether these different entries reflected different kinds of closings, or whether the charge ever included instructions on the law.

case. That afternoon, it returned to ask the court what the statute meant. Once it heard the court's opinion, the jury had no trouble reaching a verdict. Baker, the jurors announced, was "guilty of the Breach of the Act of Assembly . . . —according to the strictnesse of the Letter—but not in manner and forme as is specified in the Informacion."¹⁹⁹ Under the circumstances, this verdict, which the court treated as a conviction, seems to imply that the jury didn't wish to find Baker guilty but felt bound to follow the court's interpretation of the law. In other words, that the jury didn't think it had the right to decide what the act meant, or to nullify it.

Our information on jury practice in West Jersey is even more ambiguous. Our first record is a chapter of the 1676 Concessions & Agreements that was reaffirmed in the fundamental laws adopted in 1681. This provision states

that there shall be, in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood [(i.e., the jury)], with them to hear all cases, and to *assist* the said twelve men of the neighborhood in case of law; and that they the said justices shall pronounce each judgment as they shall receive from, and be directed by the said twelve men, in whom only *the judgment* resides, and not otherwise; and, in case of their neglect and refusal, that then one of the twelve, by consent of the rest, pronounce their own judgment as the judges should have done.²⁰⁰

Even though William Penn, who had proclaimed during and after his celebrated conspiracy trial that he believed juries to be the rightful judges of the law and fact in criminal cases,²⁰¹ may have had a hand in the drafting of this guarantee,²⁰² it's not

¹⁹⁹ *Id.* at 185.

²⁰⁰ THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 396, 428 (Aaron Leaming & Jacob Spicer eds. 2d ed. 1881) (emphasis added).

²⁰¹ See Penn and Mead's Case, 6 Howell's St. Trials at 953, 958, 961, 974. This trial, and Penn's views on the jury's right to judge the law, are discussed in GREEN, *supra* note 18, at 221-49.

²⁰² See 3 ANDREWS, *supra* note 150, at 167, 273; Mary Maples Dunn, *Did Penn Write the Concessions?*, in THE WEST JERSEY CONCESSIONS AND AGREEMENTS OF 1676/77: A ROUND TABLE OF HISTORIANS 24-28 (New Jersey Historical Commission Occasional Papers No. 1, 1979).

clear whether it incorporated this notion.²⁰³ For one thing, the provision is ambiguous on its face. Judges can “assist” juries by advising or telling them about the law, and juries can render “judgments” about the facts or the law and the facts of the cases before them.²⁰⁴ Beyond this, we must remember that Penn was a pragmatist: he compromised his ideals in other instances,²⁰⁵ and we can’t assume that he didn’t do so here.²⁰⁶ Finally, our evidence of West Jersey practice doesn’t reveal whether criminal juries had lawfinding responsibility under this law, although the published records of criminal trials show a marked similarity to the comparable records from the colonies discussed above. (In particular, those records indicate that the bench charged the jury at the end of a criminal trial, and that this charge set forth the applicable law.²⁰⁷)

²⁰³ Charles Andrews appears to have thought that the Concessions provided for jury lawfinding, see 3 ANDREWS, *supra* note 150, at 273-74, 274 n.1, but he offers no support for this view. The same is true of John M. Murrin & A. G. Roeber, *Trial by Jury: The Virginia Paradox*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 109, 111 (Jon Kukla ed., 1987).

²⁰⁴ That judgment had to be entered on the jury’s verdict isn’t dispositive. While it could mean that juries were regarded as the final arbiters of the law as well as the facts of the cases before them, it could also reflect the view that verdicts couldn’t be questioned because no one could know what facts the jury had found. (Indeed, according to the leading authority, the latter position is precisely the one taken by Justice Vaughan in *Bushell’s Case*. See GREEN, *supra* note 18, at 236-49.) With respect to the former possibility, it is worth noting that judgments could be challenged on appeal. See THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY 1680-1709, at xlv-xlviii (H. Clay Reed & George J. Miller eds., 1944) [hereinafter BURLINGTON COURT BOOK].

²⁰⁵ Three examples should suffice. He significantly reduced the degree of popular sovereignty in Pennsylvania’s constitution as a result of others’ objections. See 2 THE PAPERS OF WILLIAM PENN 137-38 (Richard S. Dunn et al., eds., 1981-1987). Although the Frame of Government finally banned the elective lower house of Pennsylvania’s legislature from initiating or debating laws, a position in which Penn strongly believed, he soon allowed it to do both when the colonists insisted. See MARY MAPLES DUNN, WILLIAM PENN, POLITICS AND CONSCIENCE 85-86, 96, 104-06, 151-53, 156, 183-88 (1967); JOSEPH E. ILLICK, COLONIAL PENNSYLVANIA—A HISTORY 14-19, 38-39, 54-56 (1976). Lastly, to placate the Board of Trade, he dismissed three loyal Pennsylvania officials, at least one of whom was a very capable man. See 3 THE PAPERS OF WILLIAM PENN, *supra*, at 566.

²⁰⁶ We can’t look to Pennsylvania practice to resolve this uncertainty: even if the practice in the later colony was the same as in the earlier one, we don’t know what it was. See *infra* notes 226-35, 238-47 and accompanying text.

²⁰⁷ For entries reflecting the giving of instructions, see, e.g., BURLINGTON COURT BOOK, *supra* note 204, at 79 (Charles Sheepsey’s Case, 1687), 119 (Thomas Wright’s

We are at least as uninformed about jury practice in New Jersey after its reunification.²⁰⁸ We do know that juries were given charges (of unknown content) in criminal cases.²⁰⁹ And that judges were allowed to determine whether the conduct with which a defendant was charged in an indictment or information was actually a crime.²¹⁰ Our only other relevant data is the fact

Case, 1690), 177 (trial of Peter Groome and Anne Wright, 1695), 200 (Daniell England's Case, 1697), and BLOOD WILL OUT, OR, AN EXAMPLE OF JUSTICE IN THE TRYAL, CONDEMNATION, CONFESSION, AND EXECUTION OF THOMAS LUTHERLAND . . . 12 (William Bradford pr., 1692) (Evans # 588). In his opening statement in Thomas Lutherland's 1692 trial for murder and larceny, the Attorney General proclaimed that the accused was going to get a fair trial according to English law. This meant, he explained, that the job of the judges would be "but to inform the Jury in matters of Law, and to pronounce the Sentence and Judgment written against the Prisoner, and to order the same Judgment to be put in Execution." *Id.* at 8.

However, I have only found one case in which the records give any hint of what the charge actually said, the 1694 trial of servant Jannett Monro for infanticide. BURLINGTON COURT BOOK, *supra*, at 166-67. The Attorney General in that case argued that an English statute placed upon Monro the burden of proving that her illegitimate child was stillborn, to which the court (cryptically) replied "that Law was made Ad Terrorem." *Id.* at 167. Monro then said that the child was stillborn. The report continues: "The Governour gives the Charge to the Jury, that if they finde what has been Evidenced is prooffe Sufficient of the Prisoner's murdering or killing the Child, they are to find her Guilty, otherwise not guilty." *Id.* The jury brought in a verdict of not guilty. *Id.*

The only non-factual issue raised in this case involved the burden of proof. It isn't clear whether the bench resolved that question or left it to the jury. But even if such procedural questions were reserved for the judges, it wouldn't necessarily follow that substantive legal questions would have been beyond the jury's purview. Thus, the instruction given in this case doesn't answer our question about the authority of criminal juries in West Jersey.

The only other criminal case in which the published court records show a legal question was raised was Daniell England's 1697 trial for violating the import laws. *See id.* at 199-200. England seems to have made a pre-trial motion questioning the authority of the magistrate who seized his vessel. Not surprisingly, this issue was resolved by the court. *See id.* at 200. Once again, however, this does not tell us the province of a jury to which a criminal case had been submitted for decision.

²⁰⁸ While there are (sometimes detailed) minutes of the proceedings of the New Jersey Supreme Court from its first sitting in 1703 through the Revolution, they remain almost entirely unpublished. *See* CAMERON ALLEN, A GUIDE TO NEW JERSEY BIBLIOGRAPHY AND LEGAL HISTORY 326 (1984). (Similar records exist for other colonies, and they, too, are largely unpublished.)

²⁰⁹ *See, e.g.*, RICHARD S. FIELD, THE PROVINCIAL COURTS OF NEW JERSEY 55 (3 Collections of the New Jersey Historical Society 1849) (Walter Pomphrey's 1705 sedition trial before the Supreme Court); BURLINGTON COURT BOOK, *supra* note 204, at 294 (Robert Edwards' Case, 1705), 298 (Mouns Cocks' Case, 1705).

²¹⁰ *See* EDWIN P. TANNER, THE PROVINCE OF NEW JERSEY 1664-1738, at 491-92 (1967); *infra* text accompanying note 219.

that Penn's English lawyer, Roger Mompesson, served as its Chief Justice from 1704 until 1710.²¹¹ Although the published records don't reveal anything about the jury doctrines that Mompesson adumbrated in New Jersey, we do know that in 1707, while sitting as Chief Justice of the New York Supreme Court, he is said to have informed the jury in Francis Makemie's trial for unlicensed preaching that it had the right to decide the difficult legal questions posed by that case.²¹² A pro-jury bias is also manifest in a 1699 memorandum he wrote for Penn arguing (unsuccessfully) in favor of a right to jury trial in cases brought in colonial vice-admiralty courts to enforce the trade laws.²¹³

Unfortunately, the fact that Mompesson was New Jersey's Chief Justice tells us no more about the lawfinding responsibilities of that colony's criminal juries than the fact that those juries were given charges of unknown content. The first problem is that it's hard to know what to make of Mompesson's conduct at Makemie's trial.²¹⁴ No London judge would have said what he

²¹¹ 3 HAMLIN & BAKER, *supra* note 57, at 132. For biographical material on Mompesson, see *id.* at 130-42; FIELD, *supra* note 209, at 56-73, 89.

[Shortly before this article went to press, I discovered some evidence of the jury's lawfinding authority in New Jersey after Roger Mompesson's tenure as that colony's Chief Justice. This 1758 magazine article, which reports on the recent trial of John Henry Rice for stealing a mare, indicates that, while juries may have exercised the power to nullify the criminal law, their right to do so was (at least) debatable. See *New Jersey*, 9 *The New Am. Mag.* 243 (Sept., 1758). According to this account, after Rice was apprehended riding the mare, he

confessed the fact before the justice of peace, and even again at the bar, and would have pleaded guilty, had he not been otherwise advised; yet the jury, to the surprise of the whole court, acquitted him; thereby assuming to themselves, (*contrary to their oath*) the power of extending that mercy to the criminal, which was grantable only by the king himself, or his vice-[regent], the governor of the province.

Id. (*emphasis added*).

²¹² See *infra* notes 281-88 and accompanying text for a more detailed account of Makemie's case.

²¹³ See 4 ANDREWS, *supra* note 150, at 170 n.2, 259-60.

²¹⁴ Indeed, Mompesson's entire tenure as New York's Chief Justice has proven difficult to assess: he has been said both to have made no "substantial change" in the New York court's practice or procedure and to have been responsible for bringing the practice in New York and New Jersey's courts into closer conformity with the practice in the courts in London than were any other colony's courts. See 3 HAMLIN & BAKER, *supra* note 57, at 140.

did to Makemie's jury. If this charge simply reflected a traditional New York practice that Mompesson followed because he was not an innovator, it would only suggest that he followed the established jury practice in New Jersey, if there was such a thing in this newly reconstituted province. If Mompesson followed a traditional practice in Makemie's case because he approved of it, or if the charge was innovation introduced by him for the same reason, the implications for New Jersey practice during his tenure as Chief Justice would be quite different. Yet another set of New Jersey consequences might ensue if Mompesson's charge in *Makemie* reflected a New York tradition that he disliked but lacked the political clout to reject or felt he shouldn't choose that case to repudiate. Finally, if *Makemie* was merely an aberrational response to the politics of an extraordinary trial, it might tell us nothing at all about the prerogatives of criminal juries in Mompesson's New Jersey court. Because, as will be seen below, we can't identify *Makemie*'s place in New York law, we can't even begin to judge its relevance for New Jersey juries.

There is, however, a second problem. We can't safely assume that, because Mompesson once wrote a brief advocating one pro-jury position, he believed in, and later used his position as New Jersey's Chief Justice to advance, a different pro-jury position. Most obviously, supporters of jury trial needn't be supporters of jury lawfinding. Moreover, and again stating the obvious, lawyers don't always agree with the positions they argue on behalf of their clients. Nor do judges invariably convert their personal preferences into law. In any event, Mompesson wasn't just any judge and New Jersey's Supreme Court wasn't just any court.

Which brings us to Edward Cornbury, the Governor of New York and New Jersey from 1703-1708.²¹⁵ A rapacious, unscrupulous, High-Church Tory who despised Quakers and has been said to have paraded around dressed like his first cousin, Queen

²¹⁵ For more on Cornbury and the events discussed in the following paragraphs of the text, see FIELD, *supra* note 209, at 39-89, DONALD L. KEMMERER, *PATH TO FREEDOM: THE STRUGGLE FOR SELF-GOVERNMENT IN COLONIAL NEW JERSEY 1703-1776*, at 47-77 (1940), POMFRET, *supra* note 193, at 87-88, 123-36, JOHN WHITEHEAD, *THE JUDICIAL AND CIVIL HISTORY OF NEW JERSEY* 382-84 (1897), and Patricia U. Bonomi, *Lord Cornbury Redressed: The Governor and the Problem Portrait*, 51 *Wm. & Mary Q.* 106 (1994).

Anne, Cornbury had little in common with William Penn. But Cornbury's father, like Penn, was Roger Mompesson's friend and patron, so the Governor named Mompesson Chief Justice and Council member in both of the colonies he was sent to govern.²¹⁶ Mompesson, in turn, served as a faithful member of Cornbury's New Jersey party, the "Ring," whose principal activities seem to have been securing its power, committing graft, and oppressing the colony's Quaker inhabitants.

Mompesson's participation in the Ring earned him the contempt of many of his fellow New Jerseyans and the scorn of modern commentators. In part, this condemnation is based upon his servile behavior on the bench, from which (often under Cornbury's watchful eye) he was said to have helped the Governor's friends and oppressed his enemies.²¹⁷ Two examples of his judicial misconduct were particularly infamous (and innovative).

One grew out of the first three indictments presented to a grand jury during Mompesson's tenure. Each charged someone with sedition. The flavor of these proceedings is reflected in the prosecution of John Hollingshead, who was charged with saying that, at the end of a stormy session, "the Governor had dissolved the Assembly" (which he had), and that his opponents "could get another just as good, and if the Governor liked it not, he might go from whence he came."²¹⁸ When the grand jury refused to return a true bill against him, Mompesson allowed the prosecutor to proceed by information. Hollingshead asked that the trial be postponed, but Mompesson conditioned this relief on his entering an issuable plea, which the judge ordered him to do. As doing so would have had the effect of admitting that the information stated an offense, the defendant refused to comply with this order, and Mompesson jailed him for contempt. When the case finally came to trial, Hollingshead was

²¹⁶ Penn also named Mompesson to the Pennsylvania Council and Chief Justice-ship, which positions he held from 1706-1709. See 3 HAMLIN & BAKER, *supra* note 57, at 130-39.

²¹⁷ Ironically, William Penn complained that Mompesson did not go after the opposition party in Pennsylvania. See 4 THE PAPERS OF WILLIAM PENN, *supra* note 205, at 531 (letter from William Penn to James Logan, Feb. 9, 1706).

²¹⁸ FIELD, *supra* note 209, at 53; WHITEHEAD, *supra* note 215, at 383.

acquitted, but Mompesson had him held until he paid the costs of his prosecution.²¹⁹

Mompesson's behavior in this case may seem disgraceful, but at least he did not introduce New Jersey's courts to the practice of imposing costs on some acquitted defendants.²²⁰ However, this practice expanded in a new direction during his tenure when courts began imposing costs on suspected wrongdoers whom grand juries refused to indict.²²¹ Members of the Council, including Mompesson, defended this practice by asserting that judges in England did the same thing, but the mother country's legal authorities finally agreed with the Assembly that the practice was illegal in England and New Jersey.²²²

And this prompts a third question about Roger Mompesson's conduct as Chief Justice of New Jersey's Supreme Court: how can we reconcile his apparent embrace of the harsh English precedent on fining uncharged suspects with his indulgent departure from a much clearer English practice in *Makemie*? Was this behavior the product of the two colonies' legal traditions? Their differing politics? Did Mompesson feel differently about these two practices? Or did *Makemie* happen to come before him on a day when he was angry with Cornbury?²²³

²¹⁹ See FIELD, *supra* note 209, at 56; WHITEHEAD, *supra* note 215, at 384. Consistent with New York practice, Mompesson imposed a similar sanction on *Makemie* a few years later. See *infra* note 287. The practice of imposing court costs on acquitted defendants was also followed in other colonies. See, e.g., Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 320-21 (1976); *infra* note 336; cf. *supra* note 133.

²²⁰ See JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY, *supra* note 146, at 131; BURLINGTON COURT BOOK, *supra* note 204, at xliii.

²²¹ See BURLINGTON COURT BOOK, *supra* note 204, at xliii.

²²² See *id.* The Assembly's remonstrance, and the Council members' reply, addressed several other issues, as well. Although Mompesson claimed he never read this reply before signing it, it is inconceivable that, as Chief Justice, the Governor's chief legal advisor, and Council member, he had not known of and approved of this practice virtually from the start. I would therefore have no compunction about referring to this as his judicial misconduct even if he never personally mulcted anyone in this manner. However, the unpublished Supreme Court records make it clear that he did do so. See, e.g., Dom. Reg. v. Rogie, Dom. Reg. v. Cole & Pangborn, Minutes, Rules, &c of the Supreme Court of the State of New Jersey, 1704 to 1715 (liber B) page 44 (1707) (New Jersey State Archives).

²²³ Evidence of one period of strained relations between the two men may be found in 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 410

These questions are presently unanswerable. We therefore don't know what inferences it is appropriate to draw about the lawfinding authority of New Jersey's criminal juries from the fact that Roger Mompesson was the colony's Chief Justice. And that means that we have no reliable indication of what the criminal jury's lawfinding authority was in the reconstituted province of New Jersey.

We also know very little about the lawfinding role of criminal juries in the province with which William Penn's name is more commonly associated. The Dutch colonies on the Delaware were seized by the English in 1664 and placed within the jurisdiction of New York, where they remained until 1682. As a result, the New York code known as the Duke of York's Laws was in force in the area from 1676-1682.²²⁴ Other than what has already been said about jury practice in Delaware,²²⁵ we know nothing more about the scope of the criminal jury's responsibilities in the lands that were to become part of Pennsylvania (or elsewhere in the Duke's American domain) before 1682, when Pennsylvania's first laws were adopted under Penn's charter.

In a draft of the Fundamental Constitutions, his first proposal for a constitution for his new colony, Penn wrote that criminal trials

shall [be] by the verdict and Judgement of twelve of the neighbourhood to the Party or Partys concerned, . . . : And thes twelve men shall sitt with the Judges six on a side, or on a bench on purpose at an other Side of the Court, . . . the Charge given the 12 men or verdictors by the Judges to be audibly in open court, . . . the verdict being given, the Judges in a grave and Sober manner to pronounce Sentance accordingly.²²⁶

(E.B. O'Callaghan & Berthold Fernow eds., 1853-1871) [hereinafter NEW YORK HISTORICAL DOCUMENTS] (memorandum written by Mompesson after Cornbury's departure).

²²⁴ On the jurisdiction of New York, *see supra* note 89. The Duke's Laws are discussed *infra* notes 255-61 and accompanying text. On their introduction into the Delaware settlements, *see* CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA iv, 455-57 (Staughton George et al., eds. 1879) [hereinafter PENN'S CHARTER]. There is no reason to believe that they had any continuing effect on jury practice in Pennsylvania after 1682.

²²⁵ *See supra* notes 88-90 and accompanying text.

²²⁶ 2 THE PAPERS OF WILLIAM PENN, *supra* note 205, at 150.

This language wasn't included in the Frame of Government or the Laws Agreed Upon in England, both of which were adopted in 1682. The Laws provided only "that all Tryals shall be by Twelve Men" and that, in capital cases, the jury "shall have the final Judgment."²²⁷ But Benjamin Furley, one of Penn's advisors, wrote that there was no substantive difference between these provisions, and he presumably knew whereof he spoke.²²⁸

As noted above, the meaning of the comparable portion of the East Jersey Concessions is unclear. This provision, however, is more opaque still. Even its more expansive formulation in the Fundamental Constitutions says nothing about fact or law, or about the judges' relationship with juries.

No other statutes shed any light on its meaning, and the reported decisions aren't much more helpful.²²⁹ Those decisions show that Penn, as Proprietor and Governor, did "Charge" the jury in two criminal cases tried before the Provincial Council in 1683 and 1684, respectively.²³⁰ But because the content of the "Charges" is unspecified, we can't say whether they discussed the law at all, or (if they did) whether they authorized the juries to determine the law for themselves. The archives also reveal that, at the end of the trial of a civil case (in 1684 or 1685), Nicholas Moore, the first Chief Justice of the Pennsylvania Supreme Court, "charged" the jury to convict a witness of perjury, which it did.²³¹ Moore's subsequent impeachment was partly based on his treatment of this witness, but no one seems to have

²²⁷ *Id.* at 221-22. This provision was reenacted, without significant alteration, on several occasions by the provincial assembly. *See, e.g.,* PENN'S CHARTER, *supra* note 224, at 117, 199.

²²⁸ *See* 2 THE PAPERS OF WILLIAM PENN, *supra* note 205, at 227-29.

²²⁹ The bulk of the published records of criminal trials in colonial Pennsylvania, which are contained in RECORD OF THE COURTS OF CHESTER COUNTY, PENNSYLVANIA 1681-1697 (The Colonial Soc'y of Pa. 1910), and RECORD OF THE COURTS OF QUARTER SESSIONS AND COMMON PLEAS OF BUCKS COUNTY 1684-1700 (The Colonial Soc'y of Pa. 1943), are just too sketchy to tell us anything significant about the jury's prerogatives. They mention neither charges nor arguments. Nor do they suggest that there were disputes about the law.

²³⁰ *See* 1 COLONIAL RECORDS OF PENNSYLVANIA 88 (Charles Pickering's Case, 1683), 96 (Margaret Mattson's Case, 1684) (1852-1853).

²³¹ *See* SAMUEL W. PENNYPACKER, PENNSYLVANIA COLONIAL CASES 42, 47 (1892).

objected to the fact that he gave the jury instructions.²⁵² As mentioned above, the records of trials held in the Lower Counties before their 1701 separation from Pennsylvania²⁵³ show that criminal juries were routinely given instructions (of unknown content) before retiring for deliberations, and that judges could reject verdicts of which they disapproved.²⁵⁴ None of these facts tells us whether criminal juries had the right to judge the law as well as the facts of the cases before them.

The special verdict returned in the 1715 prosecution of Peter Evans for challenging Francis Phillips to a duel²⁵⁵ is more provocative than the data noted above, but ultimately no more illuminating. The jury found that Evans sent Phillips a letter that was plainly a challenge. Yet the jury didn't bring in a guilty verdict. Rather, it passed the buck, returning a verdict saying he was guilty if the Court judged the letter to be a challenge. Inasmuch as there weren't any apparent grounds for debate on that score, the verdict might seem to signify the jury's perceived lack of authority to make this decision, or to nullify a law it didn't like. However, it is also possible that the jury wanted Evans to be convicted but didn't want to be blamed for his conviction, in which event the case would only tell us that criminal petit juries could return special verdicts. And that wouldn't materially advance our inquiry.

Although the 1774 decision in *Hurst v. Dippo*²⁵⁶ invoked the principle that "judges decide law, juries decide facts" to uphold the use of demurrers in civil cases, four other Pennsylvania case reports from the previous decade clearly suggest that, at least under certain circumstances, civil juries in that colony could properly determine the law.²⁵⁷ One of these reports says that counsel agreed the charge should be binding.²⁵⁸ This would

²⁵² The impeachment is discussed in *id.*, at 39-48, and LOYD, *supra* note 90, at 59-62.

²⁵³ On the separation, see ILLICK, *supra* note 205, at 69-70.

²⁵⁴ See *supra* notes 88-90 and accompanying text.

²⁵⁵ Various records concerning this case are collected in 1 COLLECTIONS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 262-63 (1853).

²⁵⁶ 1 Dall. 20, 21 (1774).

²⁵⁷ Anon., 1 Dall. 19 (1773); Proprietary v. Ralston, 1 Dall. 17 (1773); Boehm and Shitz v. Engle, 1 Dall. 14 (1767); Albertson v. Robeson, 1 Dall. 8 (1764).

²⁵⁸ See Anon., 1 Dall. 19.

seem to indicate that the jury's liberty to determine the law in these civil cases was not a manifestation of *its* right to do so, but of *the litigants'* (and perhaps the judges') authority to give juries this responsibility when they wished to do so. Be that as it may, we have no comparable reports of criminal cases.

The closest thing we have to an exception to this rule is the 1692 sedition trial of printer William Bradford. In that case, which was reported by co-defendant George Keith,²³⁹ the Court of Quarter Sessions held "for the first time . . . in the history of English jurisprudence" that a jury could judge "the seditious character of an alleged libellous paper."²⁴⁰ If Keith's account is correct—and I do not know of any contemporaneous charge that it was erroneous in any relevant respect—this came to pass in the following way: Bradford moved to exclude two veniremen for having prejudged the case, as evidenced by their having called Keith and his followers criminals and enemies of the government. The prosecutor argued that the veniremen had expressed no view about whether Bradford had published the allegedly seditious paper, and that this being all they would have to decide as jurors, they were not biased. Consistent with the position taken by the Justices at Westminster,²⁴¹ Bradford agreed that the papers' seditiousness was a legal question. However, unlike the prosecutor, who thought it followed that this was a question for the bench alone,²⁴² Bradford argued that his motion should be granted because "the Jury are Judges in Law, as

²³⁹ Bradford's trial is reported in GEORGE KEITH, *NEW-ENGLAND'S SPIRIT OF PERSECUTION TRANSMITTED TO PENNSYLVANIA; AND THE PRETENDED QUAKER FOUND PERSECUTING THE TRUE CHRISTIAN-QUAKER IN THE TRYAL OF PETER BOSS, GEORGE KEITH, THOMAS BUDD, AND WILLIAM BRADFORD . . .* (1693) (Evans # 642). Another account of this trial, based upon Keith's report, may be found in PENNYPACKER, *supra* note 231, at 117. Samuel Jennings responded to Keith's attack in *THE STATE OF THE CASE, BRIEFLY BUT IMPARTIALLY GIVEN BETWIXT THE PEOPLE CALLED QUAKERS IN PENSILVANIA, &C. IN AMERICA, WHO REMAIN IN UNITY; AND GEORGE KEITH . . .* (1694). For more on Bradford's run-ins with the authorities in Pennsylvania, see 1 DAVID PAUL BROWN, *THE FORUM* 272-83 (1856), and LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 22-26 (1985). Finally, for a review of Keith's tumultuous relationship with Quakerism, see KEMMERER, *supra* note 215, at 51-52, and POMFRET, *supra* note 193, at 110-15.

²⁴⁰ PENNYPACKER, *supra* note 231, at 138.

²⁴¹ See 8 WILLIAM S. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 343, 345 (1922).

²⁴² See KEITH, *supra* note 239, at 33-34.

well as in matter of Fact."²⁴³ If our report is correct, some of the veniremen even entered the fray on behalf of Bradford's view of the jury's responsibility to judge the paper's seditiousness. Justice Jennings voiced agreement with the prosecutor, and the motion was denied by a divided bench.²⁴⁴ Yet, without explaining his apparent change of mind, Jennings later instructed the jury to decide the seditiousness of the paper in question.²⁴⁵

Is Keith's report accurate? Had Bradford simply stated the established view of the criminal jury's responsibility? If so, why did Jennings initially disagree with him? Did the court wind up making new law? Had it concluded that seditiousness was a question of fact, which made it a jury question by anyone's lights? Or did the court, confident of the final outcome—or concerned about the political palatability of the process—simply want to throw Bradford (and the dissenters for whom he spoke) a sop? And what of the jurors' support for Bradford's position during *voir dire*? Were they speaking as his partisans, experienced lawfinders, or believers that seditiousness was a question of fact? We have no idea what the correct answer to this riddle is.²⁴⁶

The only other published data pertaining to the criminal jury's lawfinding role in colonial Pennsylvania is at least equally ambiguous. Although Roger Mompesson was Chief Justice of the Pennsylvania Supreme Court from 1706-1709,²⁴⁷ we have no information on whether criminal juries were authorized to determine the law as well as the facts of the cases submitted to them during his tenure.²⁴⁸ And then there is the testimony of

²⁴³ *Id.* at 34.

²⁴⁴ *See id.* at 34.

²⁴⁵ *See id.* at 36. This case thus provides further evidence that Pennsylvania criminal juries received instructions. Moreover, it shows that those charges at least sometimes told the jury what its responsibilities were.

²⁴⁶ It is also worth noting that the jury returned a special verdict against co-defendant Thomas Budd, *see id.* at 36; PENNYPACKER, *supra* note 231, at 129-30, that smacks of the special verdict in Evans' case, which is discussed above, in the text accompanying note 235.

²⁴⁷ *See supra* note 216.

²⁴⁸ For a discussion of Mompesson's Justiceships in New Jersey and New York, see notes 211-23, *supra*, and accompanying text, and notes 281-88, *infra*, and accompanying text. The sources discussed in notes 88-90, *supra*, and accompanying text, include

William Lewis and Edward Tilghman, two of Pennsylvania's best lawyers, at the 1805 impeachment trial of United States Supreme Court Justice Samuel Chase.²⁴⁹ Lewis and Tilghman spoke as witnesses against Chase, attacking his alleged interference five years earlier with the ability of defense counsel (including Lewis) to argue the law to the jury in John Fries' treason trial. They told the Senate that, in their vast experience in Pennsylvania's courts, lawyers argued the law to juries in criminal cases.²⁵⁰ According to one account of his testimony, Tilghman went on to remark that (possibly after expressing an opinion on the law) the judges instructed these juries that the juries were the judges of the law and the facts.²⁵¹ However, Lewis began his apprenticeship in 1770 and, like Tilghman, was admitted to practice in 1774.²⁵² Thus, even if we give the most generous reading imaginable to their 1805 testimony, it would only establish that jury lawfinding in criminal cases was accepted in Pennsylvania in 1770. (Whether it would have been a recent, pre-Revolutionary, development or a more established tradition in the colony would be an important unknown.) But there's no reason to suppose that Tilghman and Lewis meant to be referring to colonial practice at all. If so, that leaves us in the familiar position of knowing next to nothing about the status of jury lawfinding doctrine before the Revolution in the land of Penn.²⁵³

cases decided during Mompesson's tenure as Chief Justice of Pennsylvania, which then included the Lower Counties.

²⁴⁹ This trial is reported in CHARLES EVANS, REPORT OF THE TRIAL OF THE HONORABLE SAMUEL CHASE . . . (1805) (S# 8173), and SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE . . . (Da Capo Press 1970) (1803).

²⁵⁰ See EVANS, *supra* note 249, at 20-21, 27; 1 SMITH & LLOYD, *supra* note 249, at 132-35, 148.

²⁵¹ See EVANS, *supra* note 249, at 27. Smith and Lloyd's report of this testimony is slightly different. They do not say that Tilghman stated that judges "charged" juries that they were judges of the law as well as the facts. Rather, this account reports Tilghman's testimony as follows: "the court . . . states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury." 1 SMITH & LLOYD, *supra* note 249, at 148.

²⁵² See EVANS, *supra* note 249, at 21, 27; 1 SMITH & LLOYD, *supra* note 249, at 134, 147; 6 DICTIONARY OF AMERICAN BIOGRAPHY 225 (2d ed. 1961); 9 *id.* at 542 (2d ed. 1963-64).

²⁵³ Three manuscripts in the Historical Society of Pennsylvania are relevant to the question of the lawfinding authority of criminal juries in colonial Pennsylvania, but

We have much more information about colonial New York. For one thing, New York judges gave juries instructions on the law in criminal cases. Further, counsel was apparently allowed to argue the law before these juries.²⁵⁴ There is even direct evi-

they do not resolve it. The first of these documents appears to be John Dickinson's undated notes for his closing argument for the defense in the murder trial of Joseph Jordan. These notes indicate that Dickinson admonished the jury that, in determining the validity of Jordan's insanity defense and the presence of malice aforethought in his mind, it should "consider what the Law means by the Terms used—and then apply the Testimony to the Definitions given." *Dom. Rex v. Joseph Jordan* (n.d.) (Historical Society of Pennsylvania, R.R. Logan Collection, John Dickinson—Official Report, Box 6, folder 2). This stricture clearly counseled the jury to be governed by "the Law," but it doesn't say whose law or by whom (if anyone) it would be "given." (It isn't even clear whether the relevant legal rules were disputed in this case.)

The second manuscript is a lawyer's notes on the 1769 trial of James Davis and others for interfering with the arrest of Andrew Boyd. *The King v. James Davis* (1769) (Historical Society of Pennsylvania, Yeates Papers—Misc. Legal, 1739-1772, folder 5). The defendant in this case denied that the arrest warrant was legal and argued that the officers used excessive force in its execution. The first point that our report notes one of the defense lawyers to have made in closing is "Jury can judge of Law & Fact blended." But did this mean it could judge the validity of the warrant, the excessiveness of the force, or both? And did the court agree that this was its right? We have no record of the prosecution's argument or the judges' charge in this case, and no further details of the defense's argument on this point, so these questions cannot be answered.

The third manuscript, an unknown author's notes on the 1774 murder trial of Harry Hartman, is even more intriguing. These notes report that one lawyer's closing argument made the point that English subjects were fortunate in that they could only be convicted of a crime if two juries, in two trials, voted against them. Unlike the grand jury, which "hear[s] nothing but Witnesses on [the] part of [the] Crown," the petit jury "hear all Witnesses on both sides—hear Arguments—Law Cases." *The King v. Harry Hartman* (1774) (Historical Society of Pennsylvania, Pennsylvania Court Papers, 1773-1845, Hartman-Miles, Box 2, unnumbered folder). This language, which doesn't mention judges or instructions, may be read to imply that the jury heard counsel's legal arguments and then determined the law itself. However, there was no question about the law in *Hartman*, and this passage may have meant merely that the lawyers could help give petit juries a clearer and more complete picture of the facts and the law than grand juries received, without implying anything whatsoever about who would decide what if there was any dispute about the law. Indeed, if (as seems likely) the law was rarely in dispute in a criminal trial and was not an issue in this case, why should we imagine that counsel would have had anything else in mind? Still, if this comment doesn't signal the pre-War existence of the practice mentioned by Lewis and Tilghman, it at least makes it clear that a procedural condition for that practice—i.e., the presentation of legal arguments before the jury—did precede Independence.)

²⁵⁴ See JULIUS GOEBEL & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 600-06 (1944).

dence that criminal juries had a right to disregard the judges' views of the law. However, the data isn't strong enough to allow us to have any real assurance about the jury's lawfinding role in this province.

The Duke of York's Laws, promulgated in 1665, contain our earliest information. The Duke's Laws were to some extent based on Massachusetts Bay Colony statutes, the chapter on juries being patterned on (but by no means copied from) that colony's code of 1660.²⁵⁵ Julius Goebel and T. Raymond Naughton justly observed that the Duke's Laws confused criminal and civil procedure,²⁵⁶ and this is certainly true of their provisions on juries. Beyond that, the jury regulations give a very confusing picture of the criminal jury's duty.

Four sections of this chapter are relevant to the present study. The first of these passages says that juries in cases "between party and party . . . shall find the matter of fact . . . according to the evidence; whereupon the Justices in the absence of other Superior Officers, shall pronounce the sentence directing the Jury in point of Law. . . ."²⁵⁷ The last declares, "The Bench is briefly to sume the Evidence by way of Information to

²⁵⁵ The Duke's Laws may be found at 1 COLONIAL NEW YORK LAWS, *supra* note 83, at 1-100. See GOEBEL & NAUGHTON, *supra* note 254, at 16-17, 1 HAMLIN & BAKER, *supra* note 57, at 5, MICHAEL KAMMEN, COLONIAL NEW YORK—A HISTORY 77-78, 129-130 (1975), MORTON PENNYPACKER, THE DUKE'S LAWS: THEIR ANTECEDENTS, IMPLICATIONS AND IMPORTANCE (N.Y.U. Anglo-American Legal History Series, Series 1, No. 9) (1944), George L. Haskins and Samuel E. Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, 106 U. PA. L. REV. 413 (1958), and George L. Haskins, *Influences of New England Law on the Middle Colonies*, 1 LAW & HIST. REV. 238 (1983), on their derivation and promulgation. For the 1660 code's jury provisions, which are discussed below in notes 350-59 and accompanying text, see THE COLONIAL LAWS OF MASSACHUSETTS. REPRINTED FROM THE EDITION OF 1660. . . , at 167 (William H. Whitmore ed., 1889) [hereinafter MASS. LAWS 1660-1672].

²⁵⁶ See GOEBEL & NAUGHTON, *supra* note 254, at 387.

²⁵⁷ 1 COLONIAL NEW YORK LAWS, *supra* note 83, at 42. On its face, this section regulates only civil procedure. Two other sections of the chapter expressly apply to criminal cases. See *id.* at 42 ("No Jury shall exceed the number of Seaven nor be under Six unless in Special Causes upon Life and Death, The Justices shall thinke fitt to Appoint twelve."), 43 ("A Verdict shall be so exteemed, when the Major part of the Jury is agreed . . . Except in Case of Life and Death where the whole Jury is to be unanimous in their Verdict"). The remainder of the chapter, including the other provisions quoted in the text, facially apply to civil and criminal cases alike.

On the meaning of the final phrase quoted in the text, see *infra* notes 306, 362, 364 and accompanying text.

the jury."²⁵⁸ In between are clauses providing that a jury may return a special verdict "if the Law is obscure, so as the Jury cannot be Satisfied therein,"²⁵⁹ and that jurors may seek advice "in open Court" from anyone "they shall think fitt to Resolve and direct them before they give in their verdict."²⁶⁰

Was the first of these provisions, which has no criminal counterpart, supposed to apply to criminal cases? Was the second designed to prohibit judicial instructions on the law, ban the English practice of judicial comment on the evidence, neither, or both? Did the third reflect the jury's right to determine the law as well as the facts, or did it merely authorize the return of special, rather than general, verdicts? Did the fourth license jurors to get advice about the law, the facts, or both? If jurors were free to seek outside legal counsel, were they authorized to seek opinions in opposition to the judges' views, or only to clarify the court's law?²⁶¹

We don't know how these questions would have been answered by Richard Nicolls, who purportedly wrote the Duke's

²⁵⁸ 1 COLONIAL NEW YORK LAWS, *supra* note 83, at 43. This provision doesn't come from the 1660 code. It does, however, resonate with a passage in James Davis' justice of the peace manual. See *supra* text accompanying notes 106-109.

²⁵⁹ *Id.* at 43.

²⁶⁰ The relevant text is:

Whensoever any Juror or Jurores are not Clear in their Judgments concerning any Case, they shall have liberty in open Court (but not otherwise) to advice with any particular man upon the Bench, or any other whom they shall think fitt to Resolve and direct them before they give in their verdict.

Id.

²⁶¹ Goebel and Naughton suggested that the provision quoted in the previous note was meant for the benefit of Dutch New Yorkers who had difficulty with the English language. See GOEBEL & NAUGHTON, *supra* note 254, at 560 n.31. (On the persistence of the use of the Dutch language in New York after 1664, see DAVID E. NARRETT, INHERITANCE AND FAMILY LIFE IN COLONIAL NEW YORK CITY 18-24 (1992).) They seem not to have noticed that this law was borrowed from the Massachusetts Bay Colony's code. See *infra* note 357 and accompanying text. The Bay Colony lawmakers surely didn't adopt it to accommodate foreign language-speakers in their midst. See *infra* note 366. While that doesn't necessarily mean Goebel and Naughton were wrong, see *infra* note 262 and accompanying text, it does mean that other possible reasons for its inclusion in the Duke's Laws—including the possibility that it was borrowed from the Massachusetts code simply because it was there—should also be considered.

Laws.²⁶² But surviving records of criminal cases tried pursuant to those laws give us some insight into the role accorded criminal juries in colonial New York.²⁶³ While this data is neither unambiguous nor conclusive, it points toward official acceptance of the criminal jury's right to determine the law and the facts.

In their careful study of the history of the New York Supreme Court, which was the province's highest court after 1691 and had jurisdiction over the trial of all major crimes,²⁶⁴ Paul Hamlin and Charles Baker report that one "function of the judge's charge to the jury [was] to explain the law as it applied to the issue (or matter in the indictment) and to the evidence, and to direct the jury respecting what verdicts were possible according to the evidence and the law."²⁶⁵ Moreover, they tell us that the judges of this court "generally confined" the list of people whom juries could ask about the criminal law "to the mem-

²⁶² Even if we knew how the Massachusetts courts would have answered some of these questions, given the hurried manner in which the Duke's Laws were composed, there is no reason to think Nicolls was aware of, or in agreement with, their views. Moreover, I know of no reason to question Goebel and Naughton's observation that "we have no evidence that the new officials in New York were familiar with more than the bare language of the New England law book." Goebel & Naughton, *supra* note 254, at 386.

²⁶³ Although the Judiciary Act of 1691 remodeled the New York court system, *see generally* 1 HAMLIN & BAKER, *supra* note 57, at 3-77, there is no reason to think that it altered or superseded the trial practice reflected by these provisions. (Indeed, echoing part of the section of the Duke's Laws set forth in the text accompanying note 257, *supra*, the 1691 act provided, in part, that when a case involved contested issues of fact, "no Persons Right or property shall be . . . Determined . . . unless *the fact* be found by the verdict of Twelve Men of the Neighbourhood, as itt ought of Right to be Done by the Law." 1 COLONIAL NEW YORK LAWS, *supra* note 83, at 230; LAWS AND ACTS OF THE GENERAL ASSEMBLY OF THEIR MAJESTY'S PROVINCE ON NEW-YORK . . . 5 (William Bradford ed., 1691) [hereinafter LAWS AND ACTS], *reprinted in* EARLIEST NEW YORK LAWS, *supra* note 83, at 9 (emphasis added).) Hence, Hamlin and Baker cite later cases, including the cases discussed in the text below, as throwing light on their meaning. *See, e.g.*, 1 HAMLIN & BAKER, *supra*, at 215-16. More importantly, even after 1691, "the Duke's Laws were cited by counsel in the Supreme Court in the same manner as other statutes." Note, *Law in Colonial New York: The Legal System of 1691*, 80 HARV. L. REV. 1757, 1770 n.44 (1967). (For other evidence of the continued life of the Duke's Laws after 1691, *see id.*)

²⁶⁴ 1 HAMLIN & BAKER, *supra* note 57, at 3-4, 67-77.

²⁶⁵ *Id.* at 215. For charges of an unknown nature given in the Delaware counties during the period in which they were ruled from New York, *see supra* note 88. For another Delaware instruction of this era, which seems to have limited the jury to finding facts, *see supra* note 89.

bers of the bench.”²⁶⁶ What’s more, Hamlin and Baker identify two 1702 cases in which Chief Justice Atwood directed juries to return guilty verdicts. In *Dom Rex v. Baker*, Atwood “gave charge to the Jury to bring Baker in guilty” and rejected three defiant verdicts before a threat to fine disobedient jurors finally led to the conviction he so ardently desired.²⁶⁷ And in Nicholas Bayard’s treason trial, Atwood is said to have told the jurors that they “could not do otherwise than bring in the prisoner guilty.”²⁶⁸

Nonetheless, on balance, the surviving judicial record suggests that juries in colonial New York may have had the right to find the law in criminal cases. To begin with, the evidence from Atwood’s tenure as Chief Justice is not preclusive. The jury in Baker’s case seems to have disagreed with Atwood about the facts, not the law.²⁶⁹ And it’s not clear what transpired in Bayard’s case. In his summation, one of Bayard’s lawyers apparently argued that juries were judges of the law as well as the facts and that Bayard’s jury would have to decide a purely legal question—i.e., whether the act for which Bayard was on trial was treason or a legitimate exercise of his right to petition for redress of grievances.²⁷⁰ In the published account of the case, which was written by Bayard’s party,²⁷¹ neither Atwood nor the prosecutor is said explicitly to have denied the truth of this ar-

²⁶⁶ 1 HAMLIN & BAKER, *supra* note 57, at 216 & n.197.

²⁶⁷ *See id.* at 220-21; 4 NEW YORK HISTORICAL DOCUMENTS, *supra* note 223, at 956-57.

²⁶⁸ *Dom. Rex v. Bayard*, 14 Howell’s St. Trials 471, 504 (1702). An abridged version of this report appears in 10 Am. St. Trials 518, 536 (1702). Goebel and Naughton report that Atwood was equally directive (to the point of being threatening) in the instructions he gave to the jury in the trial of Bayard’s ally, Alderman John Hutchins. *See* GOEBEL & NAUGHTON, *supra* note 254, at 670-71 & n.232. *See* 15 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA & WEST INDIES 759 (Noel Sainsbury et al. eds., 1860-) [hereinafter CALENDAR OF STATE PAPERS]. (On the political and social background of these trials, beginning with Leisler’s Rebellion, see 3 ANDREWS, *supra* note 150, at 122-37, GOEBEL & NAUGHTON, *supra*, at 83-86, 274-76, 1 HAMLIN & BAKER, *supra* note 57, at 303-08, KAMMEN, *supra* note 255, at 118-51, LEVY, *supra* note 239, at 35, and Adrian Howe, *The Bayard Treason Trial: Dramatizing Anglo-Dutch Politics in Eighteenth-Century New York City*, 47 WM. & MARY Q. 3d 57 (1990).)

²⁶⁹ *See* 4 NEW YORK HISTORICAL DOCUMENTS, *supra* note 223, at 956.

²⁷⁰ *See* 14 Howell’s St. Trials at 502, 503, 10 Am. St. Trials at 535. *See also id.* at 505, 10 Am. St. Trials at 537 (argument repeated in later part of trial).

²⁷¹ *See* 1 HAMLIN & BAKER, *supra* note 57, at 206.

gument. Moreover, after the jury is said to have told him that it had factual and legal problems with the case, this report doesn't suggest that Atwood denied that the resolution of legal questions fell within its domain. Rather, he is alleged to have said that "if they were under any difficulty, whether the matters of fact alleged in the indictment, and which were proved to them, were treason or no, they might find the prisoner guilty"²⁷² and let the court decide that purely legal question on a motion in arrest of judgment. Indeed, Atwood's response to this report denies that "the Court, or the King's Counsel had declared, that if the Jury found the Fact, they were to have no regard to matter of Law,"²⁷³ a claim which should not lightly be dismissed.²⁷⁴ Given all of this, perhaps Bayard's account of Atwood's charge is an exaggerated or ambiguous redaction of a charge that really just expressed Atwood's strongly stated belief that Bayard's guilt was clear and urged the jury to convict him, or an accurate summary of a deliberate effort to intimidate or fool the jury into foregoing its legitimate option of deciding the law and the facts of Bayard's case.²⁷⁵

In any event, Atwood's attitude towards the criminal jury (if he rejected its authority in rendering a general verdict to judge the law as well as the facts) can scarcely be assumed to reflect the criminal jury's true role in colonial New York. Atwood was

²⁷² 14 Howell's St. Trials at 505, 10 Am. St. Trials at 536-37.

²⁷³ William Atwood, *The Case of William Atwood, Esq. . . .* (1703), in 13 COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY 305 (1880).

²⁷⁴ Atwood wrote this response in England as part of his unsuccessful campaign to get the Board of Trade to help him defeat the Bayardites' attempt to remove him from his position as Chief Justice. New Yorkers and their Governor listed many reasons why he was unfit to remain in office, see 15 CALENDAR OF STATE PAPERS, *supra* note 268, at 756-59; 4 NEW YORK HISTORICAL DOCUMENTS, *supra* note 223, at 1010-12, and a denial that Bayard's jury had the right to judge the law as well as the facts of his case was not among them. Given this, and the fact that such a denial would have been consistent with the practice of the courts in England (as well, doubtless, as with the views of the Lords of Trade), it's hard to imagine why Atwood would have fabricated the denial noted in the text.

²⁷⁵ Partisanship may well color our accounts of Bayard's trial and that of his friend Hutchins, which is mentioned in note 268, *supra*. There is, however, another reason to doubt the literal accuracy of the report of these cases: Atwood "limited the taking of notes in the courtroom" in these cases. 3 HAMLIN & BAKER, *supra* note 57, at 15. See 14 Howell's St. Trials at 484.

an import from the mother country who had no experience with colonial law or practice before his eighteen month tenure as Chief Justice.²⁷⁶ His conduct in Baker's trial violated both the Duke's Laws and his own standards of judicial ethics²⁷⁷ and his actions in Bayard's case led to his being thrown off the bench.²⁷⁸ Although Atwood's ouster was politically inspired,²⁷⁹ he may never have understood the roles that the colony felt judges and jurors were to play in the trial of criminal cases, and he may therefore have given his opponents a popular ground for attacking him.²⁸⁰

And we do get a very different impression of colonial New York's vision of the criminal jury's lawfinding responsibilities from two of the other relatively full reports of criminal trials held in the province. The first of these trials is Francis Makemie's 1707 prosecution for delivering a sermon without a license.²⁸¹ Makemie, leader of the Presbytery of Philadelphia,²⁸² was asked to preach in some of New York's dissenting churches. Application was made on his behalf for a license, but Governor Cornbury, zealous to promote Anglican power, denied the request. Makemie preached anyway, and he and a colleague were arrested. The applicability in the province of various Parliamentary acts and the legal status of royal instructions—less ab-

²⁷⁶ See 1 HAMLIN & BAKER, *supra* note 57, at 88-89.

²⁷⁷ See *id.* at 224. Goebel and Naughton also state that his "statement of the law" of treson in Bayard's case "was incorrect." GOEBEL & NAUGHTON, *supra* note 254, at 666.

²⁷⁸ See 1 HAMLIN & BAKER, *supra* note 57, at 89, 91 n.18, 307; 3 *id.* at 13-15. For more on Atwood's dismissal, see the colonial documents cited in note 274, *supra*.

²⁷⁹ See 1 HAMLIN & BAKER, *supra* note 57, at 412.

²⁸⁰ Even though the denial of the jury's right to decide the law as well as the facts in a criminal case was not one of the stated reasons for Atwood's removal, see *supra* note 274, the suggestion that he had taken this position in the trials of Bayard and Hutchins may have inflamed public sentiment against him. Indeed, this could have been true even if these allegations were false.

²⁸¹ This case is reported in FRANCIS MAKEMIE, A NARRATIVE OF A NEW AND UNUSUAL AMERICAN IMPRISONMENT, OF TWO PRESBYTERIAN MINISTERS, AND PROSECUTION OF MR. FRANCIS MAKEMIE ONE OF THEM, FOR PREACHING ONE SERMON AT THE CITY OF NEW YORK (1707) (Evans # 1300), which can also be found at 4 TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN . . . OF THE COLONIES IN NORTH AMERICA, no.4 (Peter Force ed., 1846). KAMMEN, *supra* note 255, at 157-58, and LEVY, *supra* note 239, at 35-36, put this case in historical perspective.

²⁸² The birth of this organization, and Makemie's role therein, are sketched in POMFRET, *supra* note 193, at 103-06.

stractly, the extent of religious liberty in New York—were the only disputed issues at Makemie's trial. These were purely legal questions. The Attorney General sought a special verdict, for "the matter of fact is plainly confessed by the Defendant, as you have heard, . . . [and] you are not Judges of Law."²⁸³ Citing a concern about delay, Makemie opposed this request.²⁸⁴ Although we are told that the court initially favored the Attorney General's motion,²⁸⁵ Makemie's refusal to join it did not fall on deaf ears. Chief Justice Mompesson charged the jury as follows:

. . . . Gentlemen, *You have heard a great deal on both sides, and Mr. Attorney says the fact is confessed by the Defendant, and I would have you bring it in specially, for there are some points I am not now prepared to answer; How far [Royal] Instructions [to the Governors] may go, in having the force of a Law, especially when not published, or made known: And there is one objection made by Mr. Makemie, and that is the Oath of Supremacy of England is abolished; & how far it will go in this matter, I confess I am not prepared to answer: If you will take upon you to judge of Law, you may, or bring in the fact specifically. This is*

²⁸³ *Id.* at 34. It is not clear whether the Attorney General was asking the jury to return a special verdict or requesting that (with or without the defendant's consent we cannot tell) the court ask or tell the jury to return one.

Be that as it may, Hamlin and Baker say that this language shouldn't be read as denying the jury's authority to determine the law, *see* 1 HAMLIN & BAKER, *supra* note 57, at 218 n.201, but they offer no justification for their view.

²⁸⁴ *See* Makemie, *supra* note 281, at 35. *Cf.* Brown v. Clock (Sup. Ct. of Judicature 1695), reported in COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY 69-70 (1913) (the parties agreed in chambers that "the Jury [should] go out upon a special verdict" but the jury returned a general verdict, which the court refused to quash).

Although the defense argued that the jury should acquit because the alleged law that was violated was in fact not law, *see* MAKEMIE, *supra*, at 21-34, Makemie replied to the Attorney General's remark about jury lawfinding with the facetious claim, "I cannot see one point of the Law to be judged." *Id.* at 35. Was Makemie, who was both a new arrival to New York and a non-lawyer, unsure of the propriety of jury lawfinding in the province? Of course, he did have counsel. Would an experienced New York practitioner have had reason to share such uncertainty? Even if a lawyer familiar with Atwood's account of Bayard's trial might have believed the Chief Justice hadn't denied the right, *see supra* notes 270-75 and accompanying text, no one suggested that he affirmed it. And we don't know whether lawfinding was otherwise part of the colony's customary jury practice. Maybe these considerations explain why the Attorney General seems not to have regarded the issue as settled in favor of the jury's lawfinding authority. (As far as I am aware, no one has ever questioned the accuracy of these aspects of the report of Makemie's trial.)

²⁸⁵ *See* MAKEMIE, *supra* note 281, at 34.

*the first Instance I can learn, has been of a Tryal or Prosecution of this nature in America.*²⁸⁶

Believing Makemie to have done nothing wrong,²⁸⁷ the jury brought in a general verdict of acquittal, and when the jurors explained their decision to Mompesson, he accepted it without complaint.²⁸⁸

A third well-documented criminal trial from this era, the Zenger libel case of 1735,²⁸⁹ also indicates that criminal juries in

²⁸⁶ *Id.*, at 36 (italics in original).

Stanley Katz believed this discussion showed that Mompesson left the law to the jury because he "was unfamiliar with the proper procedure for such an unusual crime, and consequently was unsure that he could limit the jury to a special verdict." Stanley Nider Katz, *Introduction to ALEXANDER*, *supra* note 29, at 218 n.34. The last sentence quoted in the text above is the only one that could conceivably support this interpretation, but I highly doubt that this is what it meant. I think it more likely that Mompesson was telling the jury that there was no precedent to guide his or its judgment in deciding the validity of Makemie's legal arguments.

My skepticism about Katz' reading of the text is supported by several considerations. To begin with, Mompesson's charge doesn't say that he felt any uncertainty about the jury's province in the case. Moreover, as far as we know, no one suggested that unusual procedures were to be employed because of the nature of the crime. Beyond this, Mompesson didn't say that the jury had the choice of rendering a general or special verdict; rather, the choice he said it had was between deciding the facts and deciding the law, and he told the jurors that they had the right (not just the power) to decide both. Further, if Mompesson had thought himself faced with a purely procedural problem, it's hard to understand why he would have commented on the novelty of this trial "in America." After all, he was well-trained in English practice, and (were reference to practice out of New York to have been relevant to his decision) he would presumably have referred to, and followed, it. Finally, Makemie's defense involved legal issues that wouldn't have been presented by a similar prosecution in England.

²⁸⁷ Leonard Levy suggests that the verdict may also have been sparked by the jury's anger about the fact that the warrant issued by Cornbury ordering Makemie's arrest implied that the Church of England was the established church in New York. See Levy, *supra* note 239, at 36.

²⁸⁸ See MAKEMIE, *supra* note 281, at 36. Two aftereffects of this trial should be noted. First, Mompesson's order that the victorious defendant pay fees to the prosecutor, jailer, and others (a traditional practice in the colony, see GOEBEL & NAUGHTON, *supra* note 254, at 731-48) led the colonial Assembly to pass a law forbidding the practice. (The act was disallowed. See *id.* at 741.) Second, Lord Cornbury was recalled to England and imprisoned. With respect to both points, see KAMMEN, *supra* note 255, at 158.

²⁸⁹ See *supra* note 29. Much has been written about this trial. The leading commentaries are Katz, *supra* note 286, and LEVY, *supra* note 239, at 37-45, 119-43. For an excellent, more recent contribution to our understanding of these events, see Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495 (1994).

the province were believed to have the right to decide the law as well as the facts in arriving at a general verdict. The issue in *Zenger* was whether the jury could determine the criminality of the article Zenger had printed criticizing the colony's Governor. According to our account of the trial, which was written by the defense but seems never to have been challenged in any relevant respect, defense counsel Andrew Hamilton argued that the jury should find Zenger innocent because the criticism was accurate, even though Chief Justice De Lancey had excluded his evidence of its truth on the ground that, pursuant to the classic rule of English libel law, truth was not a defense.²⁹⁰ In the climactic confrontation between advocate and judge, Hamilton asserted that the jurors "*must*" decide if the words were libelous to return a verdict, to which De Lancey responded that (as libel juries generally did) they "*may*" return essentially a special verdict and decide only if "Zenger printed and published [the] papers."²⁹¹ Hamilton, in turn, replied,

I know, may it please Your Honor, the jury *may* do so; but I do likewise know they *may* do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so.²⁹²

It appears that De Lancey didn't answer this retort at the time. Later on, however, he seems to have conceded the point in his charge to the jury. Our account of this charge begins with the Chief Justice's bitter observation that Hamilton had probably persuaded the jury to ignore whatever he might say, but what he evidently went on to say was precisely what Hamilton had said before: "as the facts or words in the information are

²⁹⁰ In fact, the English rule was that the greater the truth the greater the libel. See 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 194 (Garland facsimile ed. 1978) (1716). Consequently, one can only wonder why De Lancey allowed Hamilton to argue as he did. Was De Lancey unsure of the law or hungry for a good fight? Would an attempt to silence Hamilton have been bad politics? Or did the bench have no right to require that the arguments of counsel stay within "the law"? If the last of these answers is the right one, what would it imply about the jury's province? Did counsel have a right to greater latitude in arguing the law than the jury had in reaching a verdict?

²⁹¹ ALEXANDER, *supra* note 29, at 78 (emphasis added).

²⁹² *Id.* (emphasis added).

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, and which you *may* leave to the Court.²⁹³

Thus, *Bayard*, *Makemie*, and *Zenger* all seem to suggest that New York juries had the right to determine the law and the facts in criminal cases. This would be consistent with one plausible interpretation of the relevant provincial statutes. Moreover, it would be consistent with the fact that Roger Mompesson has been said to have “instituted no substantial change in the practice, rules or procedure” of the New York Supreme Court.²⁹⁴

Yet these three cases are too slender a reed on which to build with great confidence. The jury lawfinding issue may not have been contested or resolved in *Bayard*. Five years later, in *Makemie*, the Attorney General claimed that no such right existed. Although *Makemie* contains an express acknowledgment of the right to decide the law and Mompesson has been said not to have changed established practice greatly while on the New York bench (a view he seems not to have shared),²⁹⁵ *Makemie* may be a fluke, the exception that proves the rule. After all, no one in *Zenger* claimed that *Makemie*, *Bayard*, or any other case had already decided the question.²⁹⁶ Nor did anyone suggest

²⁹³ *Id.* at 100 (emphasis added).

²⁹⁴ 3 HAMLIN & BAKER, *supra* note 57, at 140. *But cf. supra* note 214.

²⁹⁵ *See supra* note 214.

²⁹⁶ *Cf. supra* notes 283-84 and accompanying text. The author of a 1738 critique of Zenger's defense, who may have been the King's Attorney of Barbados, *see* ALEXANDER, *supra* note 29, at 229 n.1, agreed that “juries in criminal cases may determine both law and fact when they are complicated, if they will take such a decision upon their consciences” and that Hamilton was correct about the jury's right to reject the rule that truth was no defense to a charge of libel. *Id.* at 158. He failed, however, to adduce any New York (or other) authority in support of this notion. This report of Zenger's trial was reprinted in New York in 1770 in response to the attempted libel prosecution of Alexander McDougall, a leader of the Sons of Liberty. Appended to this edition was an essay arguing, *inter alia*, that juries had the right to decide the law and the facts. *See Observations, on the Right and Duty of Juries, to judge and determine of Law as well as Fact, in A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER . . .* 50-52 (1770). This writer, too, made no reference to *Bayard* or *Makemie*. Nor did he even cite *Zenger* as having decided the question. Like Hamilton, and Bayard's lawyer before him, he argued (as to New York precedent) only that the jury's right to determine whether a homicide was manslaughter or murder (about which our published sources tell us nothing) showed that juries had the right to decide the

that jury charges had traditionally sanctioned the practice. As for the *Zenger* case itself, perhaps De Lancey was outmaneuvered, but not persuaded that juries had the right to determine the law and the facts, even in criminal libel cases. That would explain why our report doesn't say that he explicitly conceded that juries had that right.²⁹⁷ Moreover, it would shed light on why, even after *Zenger*, Attorney General John Tabor Kempe several times argued that juries were not the judges of the criminal law.²⁹⁸ The significance of this claim, and the court's response to it, are entirely unknown to us; but we cannot assume that it was a frivolous position. It is at least possible that these three extraordinary political trials had not decided the legitimacy of the jury lawfinding claim, or that they had been governed by "special" rules,²⁹⁹ and that the province had otherwise rejected or not clearly passed on the claim that criminal juries have a right to determine the law before the Revolution.³⁰⁰

law and facts of criminal cases before them generally. Cf. KATZ, *supra* note 286, at 13 (asserting *Makemie* wasn't a "respectable precedent" for a jury right to determine law and facts in seditious libel cases).

²⁹⁷ Perhaps De Lancey's "may" was meant not to suggest a right to find the law, but sarcastically, in recognition of the fact that he couldn't force the jury to return a special verdict or to follow his law.

²⁹⁸ See GOEBEL & NAUGHTON, *supra* note 254, at 678 (Dom. Rex v. Lydius); J.R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q.3d 123, 130 (1993) (As Pole notes, Kempe's father—and predecessor as Attorney General—had earlier denied the jury's right to determine the law in civil cases. See *id.*) Although the younger Kempe could have been arguing for a change in the law, he may also have been making an argument that was clearly a correct statement of the law or presenting his view on an issue that was still unresolved.

²⁹⁹ See Moglen, *supra* note 59, at 1093 n.24; *supra* note 103; *supra* note 277 and accompanying text. Indeed, it is possible that such "jury rights" talk was really political rhetoric reserved exclusively for political trials. *But see supra* note 296.

³⁰⁰ Goebel and Naughten mention a few additional criminal jury charges from the colonial period, see GOEBEL & NAUGHTON, *supra* note 254, at 667-68, but those charges shed no light on this problem. In three of these cases, the charge as we have it says nothing at all about the law; but in none of these cases was there any debate (or room for debate) about the law. In the fourth, *King v. Van Rensselaer*, our sketchy account indicates that the court told the jury about a rule of construction to which neither party seems to have objected, and the account says nothing about whether the jury was told it was bound by the rule. See also *supra* note 89 and accompanying text.

Chief Justice Lewis Morris's notes of yet another charge say that the jury "must" return particular verdicts if it finds specified facts to have been proven. See *King v. Andrew Broostead* (charge in murder trial before New York Supreme Court, June Term, 1716), contained in LEWIS MORRIS, MANUSCRIPT NOTES OF CASES BEFORE MORRIS AS

Howe didn't claim to know what the jury's rightful province was in any of the colonies discussed above. By way of contrast, he asserted that the jury's right to determine the law as well as the facts in a criminal case was clearly established in colonial Connecticut, Rhode Island, and New Hampshire.³⁰¹ Upon careful analysis, however, the available data only partially supports this claim.

The evidence Howe adduced with respect to jury practice in colonial Connecticut consists, on examination, of four state-

CHIEF JUSTICE OF THE SUPREME COURT OF NEW YORK . . . , at 4-5 (Yale Univ., Beinecke Rare Book and Manuscript Library, Law Deposit, Morris Collection). However, the manuscript doesn't reveal—and I don't know—whether these notes were meant to be read verbatim to the jury, whether they were so read, or whether the law was contested in this case. Thus, it's not clear what we properly can infer from the mandatory language appearing therein.

In 1764, Chief Justice Daniel Horsmanden refused to order the jury verdict in *Forsey v. Cunningham* to be submitted for review by the Governor and his Council. See generally 9 COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY 407-35 (1876). One reason given for this decision was that verdicts could not be reexamined by judges. In Horsmanden's words, "By the common Law of England the Trial of Facts is intrusted to the Jury, and the power to declare the Law upon them, is committed to the Kings Judges. These are distinct Provinces, and the Limits between them guarded by invariable usage & the most incontestable authorities . . ." *Id.* at 409. However, we don't know whether Horsmanden felt that the same division of authority applied in criminal cases. (For an analysis of *Forsey* and its place in colonial New York history, see Milton M. Klein, *Prelude to Revolution in New York: Jury Trials and Judicial Tenure*, 17 WM. & MARY Q. 3d 439 (1960).)

Finally, it should be noted that nothing was said about any of this history in *People v. Crosswell*, 3 Johns. Cas. 336 (N.Y. 1804), which comprehensively examined the jury's lawfinding authority in libel cases.

³⁰¹ See Howe, *supra* note 31, at 591. His reference to "other New England colonies" obviously includes Connecticut, as he cited Connecticut sources in the footnote accompanying the text at this point. But Howe said "colonies," so he must have had at least one other in mind. His later remarks make it obvious that he did not mean to refer here to Massachusetts Bay. See *id.* at 604-05. If he meant to include Vermont, one of four New England states he had just mentioned, see *id.* at 591, his reference to other "colonies" would have been an uncharacteristically egregious error—Vermont was not a colony—or uncharacteristically sloppy writing. In any event, Howe cited no evidence that "Vermont" juries had the right to judge the law in colonial times, and I am aware of none. I therefore assume that the other colony he had in mind was New Hampshire, about which he had just noted that "colonial judges exercised very limited powers in the trial of both civil and criminal cases." *Id.* (citing Daniel Chipman, *Preface* to 1 D. Chip., at 9-36 (1824); THOMAS DURFEE, GLEANINGS FROM THE JUDICIAL HISTORY OF RHODE ISLAND 43, 83 (1883)).

ments about the authority of juries in civil cases.³⁰² Only two of the four say anything about the lawfinding responsibility of civil juries before the Revolution.³⁰³ Happily, both of them say the same thing: that Connecticut judges didn't instruct civil juries on the law until 1807.

The basis for this claim was a treatise written in 1810 by State Supreme Court Judge Zephaniah Swift. Since Swift wasn't

³⁰² Howe cited *Witter v. Brewster*, Kirby 422 (Ct. 1788), 2 SWIFT, *supra* note 70, at 258-59, Thomas Day, *Preface* to 1 Conn., at xxiii (1848), and DWIGHT LOOMIS & J. GILBERT CALHOUN, *THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT* 163 (1895). See Howe, *supra* note 31, at 591 n.29. All four of these authorities discuss the jury's province in civil cases only.

Witter is an appeal of a civil judgment. One objection raised before the court was "that the jury had mistaken the law and the evidence in the case." *Witter*, Kirby at 422. The court rejected this claim, on the ground that "[i]t doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both. . . ." *Id.* at 423. Neither criminal nor colonial practice are mentioned anywhere in our report of this case, or in the court file (which I have examined).

The cited pages of Swift's treatise, *supra*, which has been called "the first American law text," AUMANN, *supra* note 67, at 74 n.22, say that contemporary civil practice in Connecticut—and colonial practice there—followed the pattern of judge-jury communication set forth below in note 306 and accompanying text. The same work's discussion of criminal procedure shows that it was different in this respect: judges in 1796 did instruct criminal juries on the law before the start of jury deliberations. See 2 SWIFT, *supra*, at 401; *infra* text accompanying note 307. This treatise says nothing about when or why criminal and civil practice first diverged on this point, or what the relevant colonial criminal practice was.

Taken together, these facts demonstrate that the reference to early Connecticut practice in Swift's 1810 Digest, see *supra* note 72, at 169, was made with an eye to civil, not criminal, procedure. (If further proof were needed, the existence and placement of a footnote Swift wrote, see *supra* note 74, by way of commentary on the 1821 Code, see 1821 CONN. PUB. ACTS 49 n.6, should suffice.) Because this would have been self-evident to Thomas Day, whose essay citing the Digest (and the court rule mentioned above at note 72 and the accompanying text) in a discussion covering the same ground is the third of Howe's sources, we can presume that he, too, had civil cases in mind in the passage cited by Howe.

Citing no authority whatsoever, Howe's final source, Loomis and Calhoun's book, says that the practice "in charging the jury" before 1807 "was to submit to [the jury] the law as well as the facts, without expressing any opinion or giving any direction how to find their verdict." LOOMIS & CALHOUN, *supra*, at 163. Because Swift's work seems to be the only data on this question of which scholars were aware, and because Loomis and Calhoun's language echoes Swift's comments about civil procedure, I believe that they were not speaking about, had no independent evidence about, and thus give us no further insight into, Connecticut criminal practice before 1807.

³⁰³ See *supra* note 302.

born until 1759³⁰⁴ and didn't begin to read law until the 1780s,³⁰⁵ it isn't clear how he knew what colonial jury practice was. In any event, both of Howe's oracles mischaracterized Swift's account. According to Swift's treatise, before giving a civil case to the jury, the court just summarized the evidence and the arguments of counsel. However, Swift went on to note that the court had the right to refuse to accept a verdict with which it disagreed, in which case the bench could air its views on any legal issues in the case before ordering the jury out to resume its deliberations.³⁰⁶ Hence, the assertion that Connecticut judges didn't instruct civil juries on the law before 1807 is only half right.

³⁰⁴ See BALDWIN, *supra* note 71, at 101; Donald F. Gerardi, *Zephaniah Swift and Connecticut's Standing Order: Skepticism, Conservatism, and Religious Liberty in the Early Republic*, 67 N. ENG. Q. 234, 236 (1994).

³⁰⁵ See BALDWIN, *supra* note 71, at 105; Gerardi, *supra* note 304, at 239.

³⁰⁶ See SWIFT, *supra* note 72, at 169; *see also* 2 SWIFT, *supra* note 70, at 258-59. It is to this civil practice that Daniel Chipman referred in his work, which Howe cited elsewhere. *See supra* note 301. *See also* BRUCE H. MANN, *NEIGHBORS AND STRANGERS* 70 (1987) (saying judges didn't use this power often in the seventeenth century).

The same practice may have been reflected in a 1643 law which required deadlocked juries to explain their disagreement to the court, listen to its "answer" to their problem, and resume their deliberations. *See* 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 84-85 (Charles J. Hoadly & J. Hammond Trumbull eds., 1850-1890) [hereinafter *CONNECTICUT COLONIAL RECORDS*]. A 1645 act went further, empowering the judges to reject a jury verdict, order further deliberation, and (if the second verdict wasn't what the court felt "the evidence given in Court" required) remit the case to another jury. *Id.* at 117-18. In the Code of 1650, this law was slightly amended and joined with other provisions to form a chapter on Juries and Jurors. *See id.* at 535-36. As amended, the law now provided that verdicts could be rejected when the court felt the jury had failed "to haue attended the euidence given in, and true issue of the Case." *Id.* (emphasis added). Did either version of the act apply to criminal cases? What (if anything) did the italicized language from the 1650 Code add to the law? Did it represent a change in the judge-jury relationship? I have no answers to these questions.

This provision was retained in the Revision of 1672, but new matter was also introduced into the chapter. *See* THE GENERAL LAWS AND LIBERTIES OF CONNECTICUT COLONIE . . . 37 (Samuel Green ed., 1673) [hereinafter *CONNECTICUT LAWS AND LIBERTIES*], *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639-1673, at 111 (John D. Cushing ed., 1977). Section two of the revised chapter stated that, after receiving a civil verdict, the bench could either "declare the Sentence, or direct the Jury to find according to the law." *Id.* This passage, which was doubtless based upon the Massachusetts Code of 1649, *see infra* text accompanying note 351; *cf.* Haskins & Ewing, *supra* note 255, at 414-15 (discussing influence of that code on the Connecticut Code of 1650), appears to have authorized the court to reject a verdict, give the kind of charge noted by Swift, and send the jury back to recon-

However, in two sections of Swift's 1796 treatise on Connecticut law that Howe seems not to have discovered, Swift commented directly on the relevant aspects of Connecticut's criminal procedure. What he said was that contemporary judges gave instructions on the law before sending the jury out in a criminal case.³⁰⁷ While Swift traced the contrary practice in civil cases to colonial times,³⁰⁸ his work is devoid of any hint of the vintage of the practice followed in his day in criminal cases. And I have found nothing that bridges this gap.³⁰⁹ In any event,

sider the case. If so, it presumably spelled out a prerogative already enjoyed by the judges under the 1650 Code.

The 1672 Revision also included the chapter's first two explicit references to criminal juries. Section four authorized "Grand or Petty Jur[ies]" to return a *non liquet* or a special verdict. See CONNECTICUT LAWS AND LIBERTIES, *supra*, at 37. (A *non liquet* was a verdict of, "It's not clear what verdict we ought to return." See BLACK'S LAW DICTIONARY 951 (5th ed. 1979).) Section six, on the other hand, required that cases involving the penalty of death or banishment be tried before special juries of twelve men, and that their verdicts be unanimous. See *id.* Obviously, neither of these provisions tells us whether the petty jury had the right to determine the law as well as the facts in a criminal case.

A 1693 enactment allowed criminal juries to ask the court for help concerning "the matter giuen them in charge," 4 CONNECTICUT COLONIAL RECORDS, *supra*, at 98, but this doesn't mean the jury had already received any instructions. The quoted language may simply have meant "the case given them for decision" (i.e., put in their "charge"). It might also have been a reference to the jurors' oath (in which they were "charged" to decide the case fairly), or a later judicial exhortation to "do your job" or "do right." Finally, it could have referred to judicial guidance or instruction about how to go about deciding the case. Cf. *supra* notes 81, 100.

The 1702 Revision made three relevant changes. First, it eliminated the chapter on juries and moved these provisions into a chapter entitled "Actions." See ACTS AND LAWS OF HIS MAJESTIE'S COLONY OF CONNECTICUT IN NEW-ENGLAND 1-3 (1702) (Evans # 1043) [hereinafter CONNECTICUT ACTS & LAWS]. Second, the former jury chapter's two references to criminal cases were deleted from the code, which now said nothing about jury practice in criminal cases. Finally, the Revision authorized the judges to reject a civil jury's second verdict and direct it to reconsider the case for a third, and final, time, but they lost power to refer the case to a second jury. See CONNECTICUT ACTS & LAWS, *supra*, at 3.

The chapter on "Actions Civil" in the Code of 1784 embodies the same civil practice as the 1702 Revision, see ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 5, 6 (Richard Law & Roger Sherman comps., 1784), reprinted in facsimile in THE FIRST LAWS OF THE STATE OF CONNECTICUT (John D. Cushing ed., 1982), which comports with Swift's description of his own experience of Connecticut civil practice prior to 1807.

³⁰⁷ See 2 SWIFT, *supra* note 70, at 401.

³⁰⁸ See SWIFT, *supra* note 72, at 169.

³⁰⁹ Except for sections four and six of the 1693 act, which were expressly directed toward criminal cases, I don't know whether any of the provisions discussed in note

two pages later, having moved on to the subject of verdicts, Swift wrote that, while a jury with “a doubt about the law” in a criminal case could return a special verdict, criminal juries “have full *power* to determine the law, as well as the facts, and to find a general verdict” instead.³¹⁰ Whether he believed the exercise of this power to be within the jury’s proper province, even in 1796, is unclear.³¹¹ Thus, we don’t know whether Swift believed that criminal juries ever had the right to determine the law in colonial Connecticut, and we have no other evidence to resolve the point.

As for Rhode Island, one nineteenth century commentator wrote that, from the “infancy” of the colony, its judges sat “not for the purpose of deciding causes, for the Jury decided all questions of law and fact; but merely to preserve order, and to see that the parties had a fair chance with the Jury.”³¹² Although it exaggerates the judges’ impotence and the jury’s power, this assessment accurately captures the scope of the jury’s authority.

A 1647 law directed judges to administer the juror’s oath before trial³¹³ and, in civil cases only, to sum up the arguments

306 applied to criminal cases. Of course, even if they did, the fact that judges were authorized to reject disfavored verdicts doesn’t prove that judges had the exclusive right to determine the law. See *supra* text accompanying note 84. Nor would the fact that a jury was ultimately to prevail prove that juries had any, much less the decisive, right to do so. See *supra* text accompanying note 85.

³¹⁰ 2 SWIFT, *supra* note 70, at 403 (emphasis added).

³¹¹ In his parallel discussion of civil verdicts, Swift says that juries “*may* take it upon themselves to judge of the law, as well as the facts,” *id.* at 260 (emphasis added), a phenomenon he called “a defect in our judicial system,” *id.* at 259. This condemnation is repeated in the Digest. See SWIFT, *supra* note 72, at v, 169.

³¹² Chipman, *supra* note 301, at 18.

³¹³ PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY OF “THE INCORPORATION OF PROVIDENCE PLANTATIONS,” AND THE CODE OF LAWS ADOPTED BY THAT ASSEMBLY IN 1647 (Williams R. Staples ed., 1847), reprinted in THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719, at 53-54 (John D. Cushing ed., 1977) [hereinafter FIRST RHODE ISLAND ACTS]. The court was to charge civil jurors “to do justice between the parties contending, according to [the] evidence.” *Id.* at 53. Criminal jurors were to be sworn “to deal faithfully and truly in the matter, it being a matter of consequence and moment, and to proceed to determine according to the light of their consciences, upon the evidence given in.” *Id.* at 54.

Given that the founders of Rhode Island had experienced oppression at the hands of the law in the Puritan colonies, see SYDNEY V. JAMES, COLONIAL RHODE ISLAND—A HISTORY 13-32 (1975), their Assembly may not have equated “justice” and “conscience” with whatever happened to be the “law” in the colony at any given moment

and evidence after the trial and "advise" the jury "to go forth and do justice and right between their neighbors, according to the evidence that has been brought, for what has been pleaded."³¹⁴ In 1666, this act was amended to require that the court "remind" a civil jury "of wt Is law in ye case then In play" before jury deliberations begin.³¹⁵ Notwithstanding these statutes, a report written by Governor Bellomont to the Board of Trade in 1699 tells us that Rhode Island judges "give no directions to the jury, nor sum up the evidences to them, pointing unto the issue which they are to try."³¹⁶ This situation remained unchanged until 1827.³¹⁷

in time. The fact that seventeenth-century Rhode Island was the home of religious toleration and diversity, as well as the separation of church and state, *see id.* at 34-38, 68-74, can only fortify this doubt. These first laws contain some language concerning the common law that may suggest that the "law" is "discoverable" by the application of conscience, *see* FIRST RHODE ISLAND ACTS, *supra*, at 14; JAMES, *supra*, at 61-62, but, as Charles Andrews observed, 2 ANDREWS, *supra* note 150, at 29, they "were modeled after the law of England and, unlike those of the Puritan colonies, were founded not on the word of God but on the statutes of parliament."

³¹⁴ FIRST RHODE ISLAND ACTS, *supra* note 313, at 54. In addition, the President judge was directed in all cases to "see that order and course of Law . . . be duly observed" at trial. *Id.* at 47.

³¹⁵ LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS (Sidney S. Rider ed., 1896), *reprinted in edited form in* THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719, at 74 (John D. Cushing ed., 1977). The 1666 act says that the civil and criminal jury oaths shall follow a prescribed format, the latter oath being expected to direct the jury "to Proceed According to the Evidences Given them & ye light of their Consciences." *Id.* Oaths were themselves promulgated the same year. Whereas the civil jury's oath bound it to decide "according to Law and Evidence," the criminal jury's oath was to decide the case "according to Law and Evidence, and the Light of your Conscience upon the Evidence." *Id.* at 152. In 1729, the latter oath was modified, becoming a pledge to decide the case "according to Law and Evidence." ACTS AND LAWS, OF HIS MAJESTY'S COLONY OF RHODE ISLAND . . . 183, 195-96 (1730) (Evans # 3346). It underwent no further changes during the colonial era. *See Charge to the Grand Jury*, Rhode-Island American & Providence Gazette, Nov. 13, 1827, at 2.

³¹⁶ 3 RECORDS OF THE COLONY OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 387 (John Russell Bartlett ed., 1858). Amasa Eaton seems to have believed that this failure to give "directions" or "sum up the evidence" violated the 1647 act. Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L. J. 150, 153 n.* (1905). He was only partly right. The 1647 act didn't require that "directions" ever be given. It did, however, require that judges sum up the evidence and arguments in civil cases, and to this extent Governor Bellomont claimed they were disregarding that law.

³¹⁷ *See* DURFEE, *supra* note 301, at 83, 86; Eaton, *supra* note 316 at 153 n.*; BENJAMIN F. HALLETT, TRIAL OF REV. MR. AVERY . . . 36 (2d ed. 1833); RICHARD HILDREDTH, A

But the published records of the Court of Trials,³¹⁸ which cover the years 1647-1670, paint a different picture than this data might suggest. Yes, there is a clear indication that juries had the right to determine legal questions in criminal cases: the record of a 1662 prosecution for forcible entry shows that the jury in that case was even expected to decide whether an indictment not written in the King's name was valid.³¹⁹ But these

REPORT OF THE TRIAL OF THE REV. EPHRAIM K. AVERY, BEFORE THE SUPREME JUDICIAL COURT OF RHODE ISLAND, ON AN INDICTMENT FOR THE MURDER OF SARAH MARIA CORNELL . . . 142 (1833).

In addition to reviewing this general history, Durfee recounts a specific story illustrative of the division of authority between judge and jury that existed before 1827. John Randall won a jury verdict in a civil suit, but the court ordered a new trial on the ground that the verdict was contrary to the law and the evidence. Randall sought relief from the legislature, arguing that this decision was improper because the "jurors are judges of both law and fact." Randall won, and the legislature awarded him a judgment on the verdict. *DURFEE, supra*, at 39, 41-43.

Perhaps inspired by the court's action in Randall's case, Durfee then remarks that, while "[t]here seems to have been a feeling, then more or less prevalent, that the jury not only had, but was entitled to have, a large discretion in matters of law as well as of fact in both civil and criminal cases[,] . . . there is no reason to think that it was ever recognized as legitimate by either the bench or the bar." *Id.* at 43. With respect to the bar's views, Durfee's own account (and perhaps the legislature's action in Randall's case) contradicts this claim. *See id.* at 84, 121. Nor is the court's behavior in Randall's case inconsistent with the idea that juries have "a large discretion in matters of law as well as of fact." "Large", after all, is not the same as "absolute." *Cf. supra* text accompanying note 84. Moreover, as will be seen below, *see infra* notes 318-20 and accompanying text, there is direct evidence that the superior court accepted such a right in the colony's early years. Governor Bellomont's report to the Board of Trade, *see supra* note 316 and accompanying text, indicates that the judges acknowledged the jury's lawfinding authority through the end of the seventeenth century. As Chief Justice Eddy noted in the first grand jury charge given after the enactment of the 1827 law, which a newspaper pronounced "the first instructions to a Grand Jury touching their responsible duties that were ever given by a Court in this State," *Charge to the Grand Jury*, RHODE-ISLAND AMERICAN & PROVIDENCE GAZETTE, Nov. 13 1827, at 1, because of the judges' "uniform" refusal to give juries any charge whatsoever, Eddy had "no recollection of having ever heard or read what is called a charge to a Grand Jury, and but twice to a Petit Jury." *Id.* Hence, as another article observed, cases tried that term featured another procedural novelty—lawyers' closing arguments on the law were made to the court, rather than the jury. *See New Supreme Court, id.*, Sept. 21, 1827, at 2. Given this clear and unvarying historical record, I find Durfee's professed ability to find "no reason" to believe the courts "ever" considered jury lawfinding "legitimate" incomprehensible.

³¹⁸ This superior court was established in 1647. *See* FIRST RHODE ISLAND ACTS, *supra* note 313, at 45-48. The magistrates were its judges. *See id.*; JAMES, *supra* note 313, at 70.

³¹⁹ *See* 2 RHODE ISLAND COURT RECORDS 12 (trial of William Burton et al, 1662) (Howard Miller Chapin ed., 1920-1922).

records also show that when a jury was unwilling to decide a case due to the lack of an indictment, or unable to reach a verdict due to a disagreement about the law, it could leave the decision to the court.³²⁰ Moreover, these court records prove that the judges didn't always need a jury's permission to determine the law in a criminal case. Thus, in one 1657 case, the court dismissed an indictment it found not to have charged the defendant with "the breach of any law in the Colony."³²¹ The following year, it put off the trial of another case so it could be determined whether the accused's conduct violated English law.³²² In two cases, individual judges (in one instance the Governor) are recorded as having "dissented" from the jury's verdict.³²³ In a 1668 case, we read that the court thrice "sent [the jury] forth" before obtaining a not guilty verdict.³²⁴ Whatever this report means,³²⁵ these skimpy court records do make it clear that the judges could set aside a jury's "guilty" verdict on the ground that the jury had mistaken the law. Hence, after the jury convicted the defendants in the 1662 forcible entry case mentioned above, the defendants asked the judges not to enter

³²⁰ For cases of the former variety, see 1 *id.* at 22 (Joshua Coggeshall's Case, 1656), 36-37 (trial of Thomas Gould et al., 1657). For a case in which the jury returned a special verdict because of an inability to agree on a general verdict, see 2 *id.* at 13 (Zachary Rhoads' Case, 1662). The jurors in this case added that, for this failure to return a general verdict, they "must Stand to the triall of law if any will procicute them." *Id.*

³²¹ 1 *id.* at 33 (Thomas Layton's Case, 1657).

³²² See *id.* at 44 (Anthony Parrent's Case, 1658). In due course, Parrent pleaded guilty to "Attempting to procure an unlawfull assembly." *Id.* at 49-50.

³²³ See 2 *id.* at 17 (Andrew Harris' Case, 1663); *id.* at 45 (William Coddington's Case, 1666). The latter case is the one in which the Governor dissented. Coddington was one of the founders of Rhode Island, see 2 ANDREWS, *supra* note 150, at 8-11; JAMES, *supra* note 313, at 25-26, a magistrate in 1647, see 2 ANDREWS, *supra*, at 31, the colony's chosen President in 1648, see *id.*, JAMES, *supra*, at 62, and its Governor in the 1670s, see JAMES, *supra*, at 93-94. At the time of Coddington's trial, a prosecution brought by General Solicitor William Dyer for "Uttering words of Contumacie &c," he was a magistrate—and thus a member of the Court of Trials. 2 RHODE ISLAND COURT RECORDS, *supra* note 319, at 42. Coddington was acquitted.

³²⁴ 2 RHODE ISLAND COURT RECORDS, *supra* note 319, at 72 (Mathew Boomer's Case, 1668).

³²⁵ It isn't clear whether the court twice refused to accept a verdict or a declaration that the jury was unable to reach one. (The Records report a civil case in which a jury thrice sent out proved unable to reach a verdict and was discharged. See 1 *id.* at 64 (Taelman v. Mott, 1660).)

a judgment on that verdict because the jury had erred in upholding the indictment. The court granted this request, noting that it was “not soe Cleare to give Judgment on the verdict.”³²⁶ If, after consultation, it was determined that the indictment was illegal, the report makes it clear that the judges were going to enter a judgment in the defendants’ favor, rather than a conviction.³²⁷ In other words, despite the judges’ failure to give criminal juries instructions on the law before their deliberations began, the published court records strongly suggest that (at least in the colony’s early years) no conviction could be entered unless the judges shared the jury’s view of the law.

Jury practice in colonial New Hampshire, which became part of Massachusetts Bay Colony after 1640 and remained united with it until 1679,³²⁸ was decidedly different. A serious student of that state’s legal history, commenting on a 1672 Massachusetts law which is discussed below, says “instructions to the jury had always been in vogue” in that colony.³²⁹ Although this remark appears in a chapter on civil procedure, it was obviously meant to refer to criminal cases as well: *Rex v. Oliver*, a 1696 mutiny trial, is immediately cited as an example of judges charging juries.³³⁰ Moreover, the same source informs us that these instructions covered law as well as fact.³³¹

It turns out that the record in *Oliver* says nothing about jury instructions.³³² Neither does the report of the 1683 treason trial of Edward Gove and his confederates, the only other post-Union

³²⁶ 2 *id.* at 12.

³²⁷ *See id.*

³²⁸ *See* JERE R. DANIELL, *COLONIAL NEW HAMPSHIRE—A HISTORY* 39-79 (1981).

³²⁹ ELWIN L. PAGE, *JUDICIAL BEGINNINGS IN NEW HAMPSHIRE 1640-1700*, at 90 (1959). This law, one of the statutes alluded to below in the text following note 345, is set forth in the text accompanying note 360, *infra*. Contrary to Page’s assertion, the Bay Colony’s practice of expressing reasons for rejecting a verdict and ordering the jury to deliberate further didn’t begin in 1672. It can be traced back at least as far as a 1642 Massachusetts Bay law, *see infra* note 351 and accompanying text, which applied in New Hampshire as well. *See supra* text accompanying note 324.

³³⁰ *See* PAGE, *supra* note 329, at 90. The case is discussed at greater length at *id.*, at 58-59.

³³¹ *See id.* at 89-90.

³³² The court papers, on which Page relied, may be found at 11 Court Papers 143, 147-57 (original court files, on file at State Archives, New Hampshire Historical Society).

prosecution of which we have a reasonably full published account.³³³ Instructions are also unmentioned in our report of David Camball's 1670 prosecution for illegal wine sales, the Union-era case about which the published records reveal the most.³³⁴

Of course, these omissions don't prove that instructions weren't given. Indeed, even if the 1672 act hadn't mandated charging juries on law and fact, it would have been inconceivable for the judges who four times rejected the *Oliver* jury's verdict and sent the jurors back for further deliberation to have failed to explain why they found the verdict unsatisfactory.³³⁵ But the silence of the published records is important, because it means they don't reveal what jury charges said.

If New Hampshire judges really did instruct criminal juries on the law, *Hodges* reminds us that it wouldn't necessarily follow that the jurors were bound to accept the judges' opinions as the law. Moreover, as *Oliver* shows, New Hampshire juries didn't always obey the judges' wishes.³³⁶ The question is whether colonial New Hampshire criminal juries were expected to take their law from the court. And the answer to that question is that we don't know.

Beyond the Massachusetts decisions examined below,³³⁷ the published case reports only provide us with a few tantalizing

³³³ This report, prepared by the presiding judge, appears in WILLIAM HENRY GOVE, *THE GOVE BOOK: HISTORY AND GENEALOGY OF THE AMERICAN FAMILY OF GOVE AND NOTES OF EUROPEAN GOVES* 29-33 (1922).

³³⁴ This trial is reported in 40 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 260 (Nathaniel Bouton et al. eds., 1867-) [hereinafter *NEW HAMPSHIRE STATE PAPERS*].

³³⁵ For a contemporaneous Massachusetts case in which such an explanation was given, see *infra* text accompanying notes 362-64.

³³⁶ See PAGE, *supra* note 329, at 59. The court rejected four verdicts before accepting a fifth. Page doesn't say whether the jury or the bench finally relented. Nor does he tell us whether the judges disagreed with the jury about the law or the facts of the case. Neither point is clarified by the court papers. They do inform us that court costs were imposed upon the one acquitted defendant, a practice we have encountered in other colonies. See *supra* notes 219-20 and accompanying text; note 288.

³³⁷ See *infra*, notes 355, 358, 361-64, and accompanying text. Although New Hampshire county court benches were largely, and then entirely, staffed by New Hampshire natives during the Union period, see DANIELL, *supra* note 328, at 46, the published court records don't allow us to determine whether those courts diverged from Massachusetts procedure with respect to the issue herein under consideration. After the Revolu-

scraps of information. The report of David Camball's trial says that the jury, "having heard & considered of pleas & evidences presented in ye case which are on file, brought in their verdict" of guilty.³³⁸ What those "pleas" were, however, is not reported, so we can't tell whether or not this passage meant that Camball's jury decided any legal questions.

Two entries in the report of the prosecutions stemming from Gove's Rebellion provide similarly ambiguous data. This event seems to have been prompted by Assemblyman Gove's anger about the Governor's veto of popular legislation and Gove's false belief that King Charles II had died and been succeeded by the Duke of York (later King James II), which seems to have led Gove to fear that Governor Cranfield would try to make New Hampshire a Catholic province. There was widespread opposition to Cranfield, and Gove rounded up eleven other malcontents (ten armed men and a trumpeter) before his mounted band was arrested, without having attacked anyone, near Hampton.³³⁹ At the rebels' trial, Gove admitted the facts but argued in his own defense that Cranfield's commission was invalid and that Cranfield's conduct otherwise justified the rebellion. This defense would appear to have raised several questions of law, but there is no word in the report about to whom it was directed or about what, if anything, the court told the jurors to do with it. We do know that the jury convicted Gove, and that brings us to the second interesting aspect of this case: the jury returned special verdicts with respect to his co-defendants. Although the court's unhesitating acceptance of these verdicts shows that courts (at least sometimes) had a right to decide the law in a criminal case, it doesn't indicate whether that right was exclusive. Moreover, unlike the many special verdicts rendered

lution, we know that practice in the courts of the two former colonies was generally very different, *see, e.g.*, PLUMER, *supra* note 67, but that is another story.

³³⁸ 40 NEW HAMPSHIRE STATE PAPERS, *supra* note 334, at 260.

³³⁹ These events are discussed in FRANKLIN B. SANBORN, EDWARD GOVE AND WALTER BAREFOOT, 1653-1691: THE SO-CALLED REBELLION OF 1683 (n.d.), and DANIELL, *supra* note 328, at 85-95, as well as the original documents, which include the presiding judge's report of the case, *see supra* note 334, and papers published in 1 NEW HAMPSHIRE STATE PAPERS, *supra* note 334, at 493-96 (letter from Edward Randolph to the Lords of Trade, 1684), and 6 CALENDAR OF STATE PAPERS, *supra* note 268, at 387-89 (documents no. 952, 954).

in civil cases during this period,³⁴⁰ these verdicts didn't state a legal issue for the court to resolve. Thus, we have no idea whether the jury returned them because it deemed itself incompetent to decide the legal guilt of Gove's followers, or whether it was simply unwilling to do so.³⁴¹

Finally, there is the ketch *George* affair of 1682.³⁴² The critical issue in this condemnation suit brought under the Navigation Acts was whether the *George* was a foreign vessel manned by a foreign crew, points concerning which there was conflicting evidence. When told that the jury had brought in a verdict against the King, Cranfield ordered that the jurors be attainted. Upon hearing of this threat, the jury backed down and returned a verdict for the plaintiff. Although the jury may simply have viewed the facts differently than the Governor, he was convinced that their initial verdict was a punishable act of jury nullification. Cranfield was not a judge, but the jurors' quick retreat may indicate that they agreed that they had no right to nullify the law in a civil case, even a quasi-criminal one like this.³⁴³ But would they have felt the same about their prerogatives in a criminal case?³⁴⁴

The scope of the criminal jury's province in colonial New Hampshire can't be determined by consulting statutory law, either. Between 1641 and 1672, Massachusetts Bay Colony en-

³⁴⁰ See, e.g., 40 NEW HAMPSHIRE STATE PAPERS, *supra* note 334, at 193 (Wade v. Fox and Pendleton v. Payne, 1664), 245 (Waldren v. Fford, 1669), 363 (Stevenson v. Drew, 1680), 381 (Thurtin v. Palmer and Clarke v. Nath, 1681).

³⁴¹ It should be noted that this was a handpicked jury, selected pursuant to a newly-passed law effectively empowering the Governor to tell the sheriff who to summon for jury duty. See 6 CALENDAR OF STATE PAPERS, *supra* note 268, at 389 (document no. 954); PAGE, *supra* note 329, at 51, 147-49.

³⁴² This episode is discussed in PAGE, *supra* note 329, at 144-49, 1 NEW HAMPSHIRE STATE PAPERS, *supra* note 334, at 492-93 (letter from Edward Randolph to the Lords of Trade, 1684), and 17 *id.* 575-78 (letter from Governor Cranfield to Lords of Trade, Dec. 30, 1682). On its relation with Gove's Rebellion, see DANIELL, *supra* note 328, at 87-90.

³⁴³ Of course, it may also reflect the jurors' fear that they would be found to have perjured themselves with respect to the facts of the case.

³⁴⁴ Jurors couldn't have been attainted under 23 Hen. 8 (1532), the statute invoked by Cranfield, for a verdict rendered in a criminal case. However, even if other sanctions couldn't have been visited upon them, *but see supra* notes 149-60, 187-90 and accompanying text, it wouldn't necessarily follow that the jury would have had the right to nullify the law.

acted a number of ambiguous laws which may or may not imply that jurors were expected to play a role in determining the law in criminal cases entrusted to them. Although these statutes were in effect in New Hampshire during the Union, I will discuss them in greater detail in my examination of Massachusetts' colonial jury practice.³⁴⁵

The only other statutes bearing on this question are a pair of laws adopted by New Hampshire in 1754. These acts (which remained in force until 1792) contain tantalizing, but ultimately indecipherable, signals about the proper role of petit juries in criminal cases. The preamble to one of these laws proclaims "knowledge of [the] Laws" a prerequisite for "the Proper Discharge" of the office of grand juror.³⁴⁶ That declaration has no parallel in the second act, which governs the selection of petit jurors.³⁴⁷ This asymmetry could be accidental, it could reflect the ability of lawfinding trial jurors (unlike grand jurors) to hear arguments on the law from the defense, as well as the prosecutor and the court, or it could mean petit juries were to confine themselves to deciding facts. The answer to this interpretive riddle, and the scope of criminal jury's prerogatives in colonial New Hampshire, are presently unknown.³⁴⁸

Massachusetts Bay, the last colony to be examined in this survey, is probably the one that is most famous for its juries' rebellion against the British trade laws. But Professor Howe was largely right about colonial Massachusetts: for the most part, its position on the right of a criminal jury to determine the law is unclear. However, the historical data points toward official rejection of this doctrine during much of the colonial era, and there is clear evidence that no lawfinding right was recognized on the eve of the Revolution.

The data begins with a series of statutes.³⁴⁹ Five passages from the Code of 1649, three of which were later included in

³⁴⁵ See *infra*, notes 351-66 and accompanying text.

³⁴⁶ 3 LAWS OF NEW HAMPSHIRE ch. 17, at 87 (Henry Harrison Metcalf ed., 1915).

³⁴⁷ See *id.* at ch. 18, at 89-92.

³⁴⁸ Neither of the two authorities Howe cited in regard to colonial New Hampshire practice, see *supra* note 306, ever mentions the relevant practice in that colony.

³⁴⁹ A 1623 New Plymouth statute providing, "All Criminal facts . . . should [be tried] by the verdict of twelve Honest men to be Impannelled by Authority in forme

the Duke's Laws,³⁵⁰ must be examined in any effort to ascertain the role that the criminal jury was expected to play in Massachusetts Bay's courts. Four of the five are contained in the chapter on juries. Section one of that chapter provides that civil juries "shall finde the matter of fact with the damages and costs according to their evidence, and the Judges shall declare the Sentence (or direct the Jurie to finde) according to the law."³⁵¹ There is no comparable provision regarding criminal juries.³⁵² However, while the corresponding (and derivative) portion of the New Plymouth Code of 1672 contains no criminal analogue to the first quoted clause of section one, it applies the second (which seems to license judges to reject verdicts with which they disagree) exclusively to criminal cases.³⁵³

of a Jury upon their oaths," 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 3 (AMS Press 1968) (David Pulsifer ed., 1861), is subject to the same interpretive difficulties as the first of these listed acts.

³⁵⁰ The quoted portions of sections one and three of the chapter on juries (the latter having been modified in 1657, *see infra* text accompanying notes 354-56), as well as the excerpted passage from section five, are the provisions referred to in the text. The first seems also to have been borrowed by Connecticut, *see supra* note 306.

³⁵¹ THE BOOK OF THE GENERAL LAUUES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 32 (1648), *reprinted in* LAWS & LIBERTIES OF MASSACHUSETTS, 1641-1691 (John D. Cushing ed., 1976) [hereinafter LAWS AND LIBERTIES]. This provision was first enacted in 1642. See 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 21 (AMS Press 1968) (Nathaniel B. Shurtleff ed., 1853-1854) [hereinafter MASS. RECORDS]. It was retained in the Codes of 1660 and 1662. See MASS. LAWS 1660-1672, *supra* note 255, at 167; THE COLONIAL LAWS OF MASSACHUSETTS. REPRINTED FROM THE CODE OF 1672 . . . , at 86 (William H. Whitmore ed., 1890) [hereinafter MASS. LAWS 1672-1686]. In light of this history, Emory Washburn's observation that the 1642 act was short-lived, *see* EMORY WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS 45 (1840), is misleading. And his assertion that the act was a departure from a prior practice of jury lawfinding is unsupported by any evidence whatsoever. As for the likely meaning of the parenthetical language, *see supra* note 306 and accompanying text; *infra* note 362 and accompanying text.

³⁵² A separate clause of section one guarantees a jury trial in any criminal case where the accused was threatened with capital punishment or banishment. See MASS. LAWS 1672-1686, *supra* note 351, at 86. It says nothing about the respective duties of judge and jury.

³⁵³ Section two of the New Plymouth Code's subchapter on juries says, in pertinent part, that, after being sworn "truly to try" the case, civil juries "shall finde the matter of fact with the damages and cost, according to their evidence." In criminal cases, it states only that, after the jury takes the same oath, "the Judges shall declare the Sentence, or direct the Jury to finde according to Law . . ." THE BOOK OF THE GENERAL LAWS OF THE INHABITANTS OF THE JURISDICTION OF NEW-PLYMOUTH 20 (1672), *reprinted*

Section three of the chapter on juries says that “in all cases wherein evidence is so obscure or defective that the Jurie cannot clearly and safely give a positive verdict, . . . , it shall have libertie to give a *Non liquet* or a special verdict.”³⁵⁴ In 1657, the right to return a *non liquet* was deleted and special verdicts were authorized only when “the Law is obscure.”³⁵⁵ The General Court explained this modification in this way:

Whereas, in all civill cases depending in suite, ye plaintiff affirmeth that ye defendant hath donne him wrong, and accordingly presents his case for judgment and satisfaction, it behooveth both Court and jury to see that the affirmation be proved by sufficijent evidenc, els the case must be found for the defendant: and so it is also in a criminall case; for, in the eye of the lawe, every man is honest & innocent, unlesse it be proved legally to the contrary. All evidenc ariseth partly from matter of fact, and partly from lawe or argument. The matter of fact is alwayes feazible to be judged of as well by the jury as by the Court; and concerning the lawe, or the point of lawe, in reference to the case in question, it is either more easy & generally knoune, or more difficult to be discerned. The duty of the jury is, if they doe understand the lawe to the satisfaction of their consciences, not to put it of from themselves, but to finde accordingly; but if any of the jury doth rest unsatisfied what is lawe in the case, then the whole jury haue liberty to present a speciall verdict. . . . And whereas the clause in ye laue, page thirty two, mentioning evidenc, is obscure, the jury may bring in a non-liquet, which words hath occasioned much trouble and delay in civill proceedings: this court doth heereby repeale that clause³⁵⁶

in facsimile in THE LAWS OF THE PILGRIMS (John D. Cushing ed., 1979). With respect to the meaning of the language authorizing judges to “direct the Jury to finde according to Law,” see notes 306, 351, and 362 and accompanying text.

³⁵⁴ See LAWS AND LIBERTIES, *supra* note 351, at 32. This passage was derived from Liberty 31 of The Body of Liberties of 1641. See MASS. LAWS 1660-1672, *supra* note 255, at 41. As modified, see *infra* text accompanying note 355, it also appeared in the Codes of 1660 and 1672, and the Connecticut Revision of 1672. See MASS. LAWS 1660-1672, *supra*, at 167; MASS. LAWS 1672-1686, *supra* note 351, at 87; CONNECTICUT LAWS AND LIBERTIES, *supra* note 306, at 37. On the *non liquet* verdict, see *supra* note 306.

³⁵⁵ 4-1 MASS. RECORDS, *supra* note 351, at 290-91. For examples of special verdicts in criminal cases in the Bay colony, see Flaherty, *supra* note 60, at 233-34; 29 THE COLONIAL SOCIETY OF MASSACHUSETTS, COLLECTIONS 82 (Samuel Eliot Morison ed., 1933) (Alice Thomas’ Case, 1672) [hereinafter MASS. COLLECTIONS]; 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY 1630-1692, at 10 (John F. Cronin & John Noble eds., 1901-1928) (Benjamin Goad’s Case, 1673) [hereinafter RECORDS OF THE COURT OF ASSISTANTS].

³⁵⁶ 4-1 MASS. RECORDS, *supra* note 351, at 290-91.

Section five provides that when “any Jurie . . . or Jurors are not clear in their judgments or consciences, concerning any Case wherein they are to give their verdict, they shall have libertie, in open Court to advise with any man they shall think fit to resolve or direct them, before they give in their verdict.”³⁵⁷ Moreover, according to section four, “if the Bench and Jurors shall so differ at any time about their verdict that either of them cannot proceed with peace of conscience, the Case shall be referred to the General Court who shall take the question from both and determin[e] it.”³⁵⁸ Finally, section one of the chapter on appeals states that “if the point of appeal be in matter of law then to be determined by the Bench: if in matter of fact, by the Bench and Iurie.”³⁵⁹

One more statute merits note. After noting that county court judges should “use all reasonable endeavours for clearing the case to the Jury, by declaring the Law, and comparing the matter of Fact and Damage proved therewith,” a 1672 law repealed section four of the jury chapter of the 1649 Code and required the Bench to accept “the Verdict of the Jury finally given.”³⁶⁰ However, the 1692 Salem witchcraft trials prove that

³⁵⁷ LAWS AND LIBERTIES, *supra* note 351, at 32. This passage was based on Liberty 76 of the Body of Liberties. See MASS. LAWS 1660-1672, *supra* note 255, at 51. It also appeared in the Codes of 1660 and 1672. See MASS. LAWS 1660-1672, *supra*, at 168; MASS. LAWS 1672-1686, *supra* note 351, at 87.

³⁵⁸ LAWS AND LIBERTIES, *supra* note 351, at 32. This provision was part of Liberty 31 of the Body Of Liberties. See MASS. LAWS 1660-1672, *supra* note 255, at 41. With one substantial alteration—viz., the Court of Assistants replaced the General Court as the tribunal to which those cases were to be referred—, section four was also retained in the Codes of 1660 and 1672. See MASS. LAWS 1660-1672, *supra*, at 167-68; MASS. LAWS 1672-1686, *supra* note 351, at 87. This provision was repealed later in 1672. See MASS. LAWS 1672-1686, *supra*, at 201-02, which is discussed in the text accompanying notes 360-66, *infra*.

For criminal cases in which judges utilized their power under section four, see, e.g., WASHBURN, *supra* note 351, at 45-46 (rejecting Anne Hibbins' 1656 guilty verdict); 3 RECORDS OF THE COURT OF ASSISTANTS, *supra* note 354, at 35-38 (rejecting Benjamin Saucier's 1665 not guilty verdict); *id.* at 201-02 (rejecting Paul Parker's 1671 not guilty verdict).

³⁵⁹ LAWS AND LIBERTIES, *supra* note 351, at 2. This provision was preserved in the Codes of 1660 and 1672. See MASS. LAWS 1660-1672, *supra* note 255, at 122; MASS. LAWS 1672-1686, *supra* note 351, at 3.

³⁶⁰ MASS. LAWS of 1672-1686, *supra* note 351, at 201.

this law—which left section one of that chapter undisturbed—didn't require judges meekly to accept verdicts of which they disapproved.³⁶¹ Thus, when a jury announced that it found Rebecca Nurse not guilty, the judges protested that this verdict was contrary to certain evidence.³⁶² At that point, "several of the Jury declared themselves desirous to go out again, and thereupon the honoured Court gave leave."³⁶³ Needless to say, the "final" verdict was "guilty."³⁶⁴

³⁶¹ Cf. Connecticut practice under the 1702 Revision discussed in note 306, *supra*. Samuel Quincy suggested that the 1672 law was, at least in part, limited to civil actions. See Quincy, *supra* note 23, at 559. Although its preamble does say that it represented a response to problems that had arisen in the trial of civil suits, see MASS. LAWS OF 1672-1686, *supra* note 351, at 201, and although the remedy of attain created by the act may have been used exclusively in civil suits, see *supra* note 75, the 1672 act repealed section four of the 1649 code in its entirety and required acceptance of the final verdict in *all* cases. I know of no evidence that the aspects of the 1672 act referred to in the text were deemed inapplicable to criminal cases, and Quincy didn't say otherwise. On the other hand, cases like *Rex v. Oliver*, see *supra* note 330-36 and accompanying text, the Rebecca Nurse trial (which is discussed in the text accompanying the following footnote), Thomas Maule's trial, see *infra* note 364, and the 1760 murder trial of Ebenezer Richardson, see *infra* note 362, suggest that the quoted portions of the act did apply to criminal cases.

³⁶² See 2 THE SALEM WITCHCRAFT PAPERS 607-08 (Paul Boyer and Stephen Nissenbaum eds., 1977). This appears to be an exercise of the kind of judicial authority authorized by section one of the jury chapter of the 1649 Code. A comment made by Chief Justice Hutchinson in response to the guilty verdict returned against Ebenezer Richardson in his 1760 murder trial shows that Massachusetts judges retained the power to reject a verdict and order further deliberation until the end of the colonial era. See *Editorial Note*, in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 406 (quoting 3 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 206 (Lawrence Shaw Mayo ed. 1936) (1828)).

³⁶³ 2 SALEM WITCHCRAFT PAPERS, *supra* note 362, at 608.

³⁶⁴ Of course, Massachusetts Bay judges did not always have their way. Consider the case of Thomas Maule, a feisty Quaker who was charged with libel and blasphemy for writing a book attacking the colony's leaders for (among other things) the Salem witch trials and for saying (in open court) that his book contained no more errors than the Bible. See, e.g., THOMAS MAULE, NEW-ENGLAND PERSECUTORS MAULD . . . A BRIEF ACCOUNT OF THE IMPRISONMENT AND TRYAL OF THOMAS MAULE OF SALEM, FOR PUBLISHING A BOOK . . . (1697) (Evans # 801), which forms the basis for the report contained in 5 Am. St. Trials 85 (1697); LEVY, *supra* note 239, at 27-28. After the magistrates charged the jury that Maule's conviction was necessary for the preservation of church and state, he argued that the manuscript he wrote wasn't blasphemous and that there was no proof that the printed work bearing his name—i.e., the evidence before the jury—was the book he wrote. The jury brought in a not guilty verdict. The angry magistrates demanded an explanation, and the jurors replied that they were too uneducated to determine whether the book was blasphemous and had too

On their face, these provisions are impenetrably ambiguous. Who was to determine "the law" according to which criminal juries were to decide cases? Although criminal juries were permitted to return special verdicts when "the Law [was] obscure," did that mean "when they didn't understand the law they had been told to apply to the facts," "when they couldn't determine what the applicable law was," or both?³⁶⁵ Were they licensed by these

little evidence to decide whether Maule was its author. The magistrates relented and Maule was free.

There was no proof of the obvious fact that Maule wrote the book with his name on it, but the jury seems to have used this fortuity as an excuse for acquitting a palpably guilty man. That it could do so, however, reveals nothing about the jury's right to determine the law as well as the facts in a criminal case. But it does lead to one further observation.

Despite the fact that the colony's law had long officially recognized a juror's freedom to vote his conscience, see Liberty 70, MASS. LAWS 1660-1672, *supra* note 255, at 49; LAWS AND LIBERTIES, *supra* note 351, at 52; MASS. LAWS 1672-1686, *supra* note 351, at 153; GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 197 (1960), the 1672 law mentioned in the text allowed that an action for attainder would lie against a jury whose verdict was "contrary to law or evidence." In fact, one Jacob Jesson was punished by the General Court in 1675 for refusing to join the judges and the other jurors in a verdict in a civil case tried before a jury on appeal before the Court of Assistants. See 30 MASS. COLLECTIONS, *supra* note 355, at 587-92. Jesson's unsuccessful defense was essentially that he had the right and duty to make up his own mind about what legal rules should govern the case, that he had done so, and that he could not yield to the others without violating his oath. On the facts, his conduct would seem to have been quite justified. Whether for this reason or simply to keep rebelliousness out of sight, the General Court apparently kept the affair quiet. See *id.* at 591. We don't know how common the need for, or the use of, this kind of sanction was.

The only other Massachusetts Bay case from this era in which I am aware that a claim was made that juries had the right to judge the law as well as the facts is another civil case. The defendant in *Harris v. Batt* (1675), challenging three unfavorable verdicts on appeal, argued, *inter alia*, that the jury was the judge of the law and facts and should therefore have decided the case for him. The appeal was unsuccessful, but that doesn't necessarily mean the General Court thought he was wrong about his jury lawfinding claim. See 29 *id.* at xlvi, 539-42; but see *id.* at xlvi. (Incidentally, Harris was represented on this appeal "by a woman attorney," his wife, Elizabeth. See *id.* at 540.)

³⁶⁵ See *supra* note 355 on the use of special verdicts in criminal cases.

Although he didn't say why, William H. Whitmore believed that the General Court's explanation for banning *non liquet* verdicts, see *supra* text accompanying note 356, shows that the Court thought juries had a right to determine the law and the facts. See William H. Whitmore, *Introduction to MASS. LAWS 1600-1672*, *supra* note 255, at 91 n.52. Samuel Quincy seems to have thought so too. See Quincy, *supra* note 23, at 558-59. I think that explanation, and the Court's continuing authorization of special verdicts when "the Law is obscure," could equally have been written with cases in

provisions to seek legal advice from wise non-magistrates?³⁶⁶ If so, about what the law meant, what it was, or both? Finally, did the facts that judges could reject verdicts they thought were wrong and decide legal questions without juries on appeal mean that judges were thought to have the exclusive right to determine the law in a criminal case, or simply that judges and jurors both had to be convinced of the correctness of a general verdict in a criminal case for it to stand?

A comment by Thomas Lechford, a lawyer who left the colony in 1641,³⁶⁷ has been said to show that juries in seventeenth century Massachusetts Bay had the right to determine the law and the facts in criminal cases,³⁶⁸ but I find it inconclusive. In 1642, Lechford wrote this about the colony's courts:

Matters of debt, trespassed, and upon the case, and equity, yea and of heresie also, are tryed by a Jury. Which although it may seeme to be indifferent, and the Magistrates may judge what is Law, and what is equall, and some of the chief Ministers informe what is heresie, yet the Jury may find a general verdict, if they please; and seldome is there any speciall verdict found by them, with deliberate argument made thereupon, which breeds many inconveniences.³⁶⁹

This passage could mean either that juries had the right to judge the law or that they simply had the power to do so. Read in context, the latter reading seems more plausible. This paragraph is part of an indictment of the colony's courts. It is followed by a paragraph that begins by casting doubt on the

mind in which juries "didn't understand the law they had been told to apply to the facts" in mind.

³⁶⁶ George Haskins suggested that section five's authorization to seek advice "reflected the characteristically Puritan reluctance to force the conscience, but its incidental effect may well have been to afford members of the clergy who were present in court an opportunity to be heard on matters of conscience." See HASKINS, *supra* note 364, at 213-14. However, he cited no instance of its use and I am aware of none. Cf. *supra* notes 261, 266.

³⁶⁷ For a recent sketch of Lechford's life, see Thomas G. Barnes, *Thomas Lechford and the Earliest Lawyering in Massachusetts, 1638-1641*, in LAW IN COLONIAL MASSACHUSETTS 1630-1800, 3-38 (Daniel Coquillette ed., 1984).

³⁶⁸ See QUINCY, *supra* note 23, at 558.

³⁶⁹ THOMAS LECHFORD, PLAIN DEALING 27 (1642), *id.* at 66 (J. Hammond Trumbull ed., 1867).

impartiality of juries and then attacks the courts for failing to "proceed duly upon record," which Lechford believed rendered the law "clearly arbitrary, according to the discretions of the Judges and Magistrates for the time being."³⁷⁰ The fact that he felt that the "discretions" of judges, not juries, were decisive implies that he believed juries were taking their law from the judges, and that his opposition to the widespread use of general verdicts was based upon his perception that those verdicts were being used to amplify magisterial "discretions" by keeping the law off the record.

In fact, two other pieces of evidence make it extremely unlikely that seventeenth century Massachusetts Bay juries had a right to determine the law in criminal cases: the hostility that courts showed towards criminal juries from the beginning of this era and the limited role advocated for criminal juries in the colony's contest with London at the century's end. With respect to the former point, John Murrin's careful study indicates that the magistrates strongly disfavored trial by jury in non-capital criminal cases before the 1690s, and few such trials occurred.³⁷¹ One reason for this phenomenon, he speculates, is that Puritanism regarded the punishment of sin as far too important to be left in the hands of juries.³⁷² It's hard to imagine these distrustful magistrates agreeing to place the determination of law—i.e., the decision whether the defendant's conduct was sinful—in the hands of the same juries.³⁷³ As to the latter point, after "the new charter of 1691 . . . to all intents and purposes reduced the commonwealth to the status of a royal colony,"³⁷⁴ there followed

³⁷⁰ *Id.* at 28; *id.* at 67.

³⁷¹ See Murrin, *supra* note 63, at 182-206.

³⁷² See *id.* at 188-89.

³⁷³ Since the Bible was the default source of criminal law in the colony, it is doubly hard to believe that the saintly magistrates would have trusted its interpretation to these juries. Cf. *supra* note 366. But, much to the magistrates' consternation, that's precisely what happened in Maule's case. See *supra* note 364.

Of course, it is logically possible that the magistrates disfavored jury trial in non-capital criminal cases (in part) precisely because juries had the right to determine the law therein. However, this explanation would raise further questions: how and when juries could have obtained such a right over the magistrates' opposition and why civil juries didn't have a similar right. (On civil juries, see *supra* note 364.)

³⁷⁴ 3 ANDREWS, *supra* note 150, at 43.

a period of strife during which the colonists passed laws reasserting their perceived rights and the mother country disallowed them. The statutes regarding jury trial provided that "all matters and issues in fact arising or happening within the said province, shall be tryed by twelve good and lawful men of the neighborhood."³⁷⁵ Having explicitly attempted to secure a right to jury factfinding,³⁷⁶ it is doubtful that the colonists would have failed expressly to claim a right to jury lawfinding had they regarded it as part and parcel of their justice system.³⁷⁷

On the other hand, there is significant direct evidence that jury lawfinding in criminal cases was not accepted practice in the colony on the eve of the Revolution. In *Rex v. Wemms*,³⁷⁸ one of the Boston Massacre trials,³⁷⁹ defense lawyer Josiah Quincy repeatedly told the jury that it would be bound to take its law from the judge.³⁸⁰ We have both the trial notes and diary of Quincy's co-counsel, John Adams, and there is no hint that he

³⁷⁵ 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY ch. 33, § 10, at 74 (1692), ch. 9, §10 at 286 (1697) (Ellis Ames & Abner Cheney Goodell eds., 1869) [hereinafter ACTS & RESOLVES].

³⁷⁶ I read the phrase "in fact" as modifying "all matters and issues" rather than "arising or happening within the said province." That this was also the view of the editors of the Acts and Resolves is shown by the marginal notes accompanying these provisions: these notes state, respectively, that "matters of fact" and "matters and issues in fact" are "to be tried by a jury." *Id.* at 74, 286.

³⁷⁷ The colonists might have been deterred from asserting this right by the fear that the claim—and the statutes—would be rejected by the Lords of Trade. However, this theory is undermined by the facts that the statutes were designed to protect endangered rights and that the statutes were disallowed by the Lords anyway, *see id.* at 74, 286.

After acknowledging that the record before her was hopelessly opaque, the author of one valuable study nonetheless asserted that seventeenth century Massachusetts juries had the right to nullify the law. *See* Deirdre A. Harris, Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U.L. REV. 968, 977-85 (1978). It should be obvious that, having reviewed a more substantial pool of data, I am unpersuaded.

³⁷⁸ *See* JOHN HODGSON, *THE TRIAL OF WILLIAM WEMMS . . .* (1770) (Evans # 11683), which was reprinted (with some modifications) as *THE TRIAL OF THE BRITISH SOLDIERS . . .* (1807) (S# 13739). Large portions of *The Trial of William Wemms*, are excerpted in 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 98-314. An abbreviated version of *The Trial of the British Soldiers* may be found at 10 Am. St. Trials 415 (1790).

³⁷⁹ For the leading scholarly account of the events surrounding the Boston Massacre, including this trial, *see* HILLER ZOBEL, *THE BOSTON MASSACRE* (1970).

³⁸⁰ *See* HODGSON, *supra* note 378, at 69, 136, 143-44, 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 159, 228, 10 Am. St. Trials at 433, 471.

dissented (even privately) from this assertion, although he did disagree publicly with Quincy about the latter's conduct of this case on at least one other occasion during the trial.³⁸¹ In any event, neither Adams nor anyone else denied in court that Quincy was right, which would strongly suggest that his view wasn't outlandish. Moreover, Justice Trowbridge, who has been called "the most scholarly lawyer and judge" in the colony before the Revolution,³⁸² echoed this assertion in the instructions he gave to Wemms' jury.³⁸³ Thus, both a patriot lawyer and the only judge in the colony whom the records show ever to have addressed the matter (and Trowbridge was a neutral party in the Revolution³⁸⁴) rejected the lawfinding doctrine in *Wemms*. And their position was consistent with what we know about the other judges' charges in *Wemms*, with Chief Justice Hutchinson's earlier lament about jury nullification of the law of seditious libel, and with comments made in Justice John Cushing's 1742 charge to the grand jury of Nantucket.³⁸⁵ Finally, when John

³⁸¹ See *Editorial Note*, in 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 25-27. Clearly, the fact that Adams, like Quincy, argued the law to the jury before the court gave the jury its instructions does not show that Adams thought Quincy was wrong about the jury's obligation to take its law, in the end, from the court.

³⁸² See L. Kinvin Wroth & Hiller B. Zobel, *The Massachusetts Bench and Bar: A Biographical Register of John Adams' Contemporaries*, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at cxi.

³⁸³ See HODGSON, *supra* note 378, at 102, 106-07, 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 283-84, 290-91. Trowbridge seems to have given a similar charge in the earlier trial of Boston Massacre participant Preston. See *id.* at 94 n.160 and accompanying text, 98. Given the cursory summaries now extant of the other judges' remarks in *Rex v. Preston*, see *id.* at 96-98, it is quite possible that they also endorsed this view in that case.

³⁸⁴ See Wroth & Zobel, *supra* note 382, at cxi-cxii.

³⁸⁵ As to *Wemms*, note the mandatory tone of Justice Oliver's charge and the statement that the remaining Justices "gave their opinion of the construction of law upon the evidence[,] but . . . differed in no material point" from Trowbridge and Oliver. See HODGSON, *supra* note 378, at 197-207, 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 302-09, 310 n.317; cf. 10 Am. St. Trials at 508 (omitting Oliver's charge and including him among the remaining Justices referred to above). As to Hutchinson's complaint, see *Jury Charge*, QUINCY, *supra* note 23, at 306, 308-09, 312-13 (1769). Finally, Cushing's remarks may be found in John J. Cushing, Jr., *The Charge to the Grandjury of Nantucket*, Aug. 25, 1742 (Massachusetts Historical Society, William Cushing Papers, 1664-1814) (describing virtue of trial by jury, "one's Peers & Neighbours who are to Determine all matters of Fact, & Judge of the Credibility of Evidence").

Adams finally did argue that juries were rightfully judges of the law,³⁸⁶ he neither claimed that Quincy and Trowbridge's views were unprecedented nor that his position reflected the colony's traditional practice.

As this last comment implies, at least one eighteenth-century Massachusetts lawyer did claim that juries had the right to judge the law and the facts. In fact, William Nelson claims to have found evidence that three did, and he treats their comments as establishing the truth of the proposition.³⁸⁷ However, on closer inspection, they do no such thing.

The first of these remarks comes from Robert Treat Paine's notes on the 1769 trial of a contract case, *Lyon v. Cobb*.³⁸⁸ As is true generally, Paine's notes on this trial are sketchy and, on occasion, impossible to decipher. After summarizing the testimony, he reports what appear to be a list of points made in defense lawyer Daniel Leonard's closing argument, and that's it—nothing about anyone else's arguments, the charge, or the verdict. (In fact, the next time the case is mentioned in Paine's notes, it is before referees two years later.³⁸⁹) While it's hard to know what to make of some of Paine's entries (e.g., "The contract to pay"), Leonard seems to have laid out a number of reasons why his client should win, including that Lyon had been paid and that he hadn't fully performed his end of the contract. In the middle of this list, the following entry appears: "The Superior C^t rule abt. articles under 40/ Jury has a right to do as it please." The latter portion of this line is the text cited by Nelson, but I see no justification for assuming that it has anything

³⁸⁶ See *infra* text accompanying note 391.

³⁸⁷ See Nelson I, *supra* note 43, at 28; Nelson II, *supra* note 43, at 916. Nelson makes no attempt to reconcile with this claim the fact that John Adams was prohibited from arguing the law to the jury in *Cotton v. Nye*, a civil slander case tried before the Barnstable Superior Court in 1767. See *Editorial Note*, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 142; John Adams, *Diary*, in *id.* at 149. I'm not sure what to make of *Cotton* either. At least part of the problem is that Adams' account of this incident doesn't identify the basis for the judges' ruling.

³⁸⁸ (Bristol County Ct. of C.P. 1769) (original on file in Massachusetts Historical Society, Robert Treat Paine Papers, Minutes of Law Cases, 1760-1774) (Robert Treat Paine Papers on Microfilm reel 12).

³⁸⁹ On the use of referees, see *Introduction*, in 1 Legal Papers of John Adams, *supra* note 23, at xliii.

to do with lawfinding. Part of the problem is that the content of the Superior Court rule is unknown. For all we know, Leonard could have been saying nothing more than that the jury's decision as to the amount of Cobb's damages was within its absolute discretion.

Nelson's second piece of evidence offers even less support for his claim. It comes from Paine's notes on a 1770 case involving the boundary between several pieces of land.³⁹⁰ The dispute in this case seems to have involved a purely factual question: where Howard and the prior owner of the plaintiffs' land had drawn the boundary between their lots. Accordingly, the isolated comment that Nelson incompletely quotes from the defense counsel's closing argument, "no verdict for y^e Land thrown out," presumably had nothing whatsoever to do with lawfinding.

That cannot, however, be said about John Adams' appellate argument in a case tried after the Boston Massacre Trials, *Wright v. Gill and Mein*. This argument, the logic of which is not limited to civil juries, is easily the most celebrated brief ever written on behalf of the jury's lawfinding authority. The notes on which Adams based his argument, which are found in an entry in his diary, include the following passages:

As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judgicatur. No Wonder then that the same restless Ambition, of aspiring Minds, which is endeavouring to lessen or destroy the Power of the People in Legislation, should attempt to lessen or destroy it, in the Execution of Lawes. The Rights of Juries and of Elections, were never attacked singly in all the English History. The same Passions which have disliked one have detested the other, and both have always been exploded, mutilated or undermined together.

....

³⁹⁰ Ames v. Howard (Bristol County Ct. of C.P. 1770) (original manuscript on file in Massachusetts Historical Society, Robert Treat Paine Papers, Minutes of Law Cases, 1760-1774) (Robert Treat Paine Papers on Microfilm reel 12). Paine's handwriting is so bad that Nelson cites this case as "Quincy v. Howard."

The Oath of a Juror in England, is to determine Causes “according to your evidence”—In this Province “according to Law and the Evidence given you.” It will be readily agreed that the Words of the Oath at Home, imply all that is expressed by the words of the Oath here. And whenever a general Verdict is found, it assuredly determines both the Fact and the Law.

It was never yet disputed, or doubted, that a general Verdict, given *under the Direction of the Court* in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an issue upon a general Verdict. And if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment and Conscience.

. . . The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air.

Now should the Melancholly Case arise, that the Judges should give their Opinions to the Jury, against one of these fundamental Principles, is a Juror obliged to give his Verdict generally according to this Direction, or even to find the fact specially and submit the Law to the Court. Every Man of any feeling or Conscience will answer, no. It is not only his 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.

. . . .

The English Law obliges no Man to decide a Cause upon Oath against his own Judgment, nor does it oblige any Man to take any Opinion upon Trust, or to pin his faith on the sleeve of any mere Man.³⁹¹

This appellate argument may well have reflected good revolutionary, democratic, ideology. And it may have had the support of many colonists, even some Loyalists. But our sources suggest that—at least as to criminal trials—it may never have been good law in colonial Massachusetts.³⁹²

³⁹¹ John Adams, *Diary Notes on the Rights of Juries*, in 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 23, at 229-30 (emphasis in original).

³⁹² It may not even have reflected Adams' personal views on jury practice or theory. In the wake of the Stamp Act crisis of 1765, Adams' third Letter From the Earl of Clarendon to William Pym spoke very differently about the roles of judge and jury:

II. CONCLUSION

Where did the charge given by Justice Duvall in Hodges' case come from? The prevailing view is that it reflects a colonial heritage, the jury's right (not just its power) to determine the law and the facts in a criminal case. The historical evidence reviewed in this paper, however, shows that Howe was far closer to the truth when he acknowledged knowing very little about colonial criminal jury practice. The truth is that, for the most part, we just don't know whether, when, or where colonial criminal juries had the authority to judge the law. It seems reasonably clear that they had no such right in mid-eighteenth century Georgia, seventeenth and (at least) early eighteenth-century Maryland, and in Massachusetts on the eve of Independence. On the other hand, it appears equally obvious that criminal juries were acknowledged to have some form of law-finding right in Rhode Island throughout the colonial period. The rest (to varying degrees) is mystery.

The other grand division of power, is that of execution. And here the King is by the constitution, supreme executor of the laws, and is always present in person or by his judges, in his courts, distributing justice among the people. But the executive branch of the constitution, as far as respects the administration of justice, has in it a mixture of popular power too. The judges answer to questions of law: but no further. Were they to answer to questions of fact as well as law, being few they might be easily corrupted But by the British constitution, *ad questionem facti respondent juratores*, the jurors answer to the question of fact. In this manner the subject is guarded, in the execution of the laws. The people choose a grand jury to make inquiry and presentment of crimes. Twelve of these must agree in finding the Bill. And the petit jury must try the same fact over again, and find the person guilty before he can be punished. . . . So it is also in the trial of causes between party and party: No man's property or liberty can be taken from him, till twelve men in this Neighborhood, have said upon oath, that by laws of his own making it ought to be taken away, i.e., that the facts are such as to fall within such laws.

John Adams, *Clarendon to William Pym*, in 1 PAPERS OF JOHN ADAMS 168-69 (Robert J. Taylor, et al. eds., 1977). Moreover, in light of these comments, the gravamen of the jury-related grievance noted in the famed Instructions of the Town of Braintree, see John Adams, *Instructions to Braintree's Representative Concerning the Stamp Act*, in *id.*, at 138, 141, which Adams claimed to have written, see *Editorial Note*, in *id.*, at 129-32, would appear to have been that the Stamp Act's grant of authority to Admiralty judges to determine the facts as well as the law in enforcement actions violated this separation of powers doctrine. Of course, it is possible that Adams' views, or their political acceptability, may have changed between the mid-1760s and the appeal in *Gill and Mein*. But we must also consider the possibility that they hadn't.

Nonetheless, given the current debate about jury nullification, in which historical claims have so prominent a place,³⁹³ it is important to note another salient fact about the evidence examined in this article. Although that evidence includes statements by judges, lawyers, jurors, litigants, and others asserting that criminal juries had the right to determine what the law was, I have found no evidence that *anyone* claimed that these juries had the right to ignore what they deemed the applicable law. While it is possible that the latter right was recognized but that its recognition is completely hidden from our view by a universal conspiracy of silence,³⁹⁴ it seems much more likely that this silence betokens the absence of any sense that such a right existed. That would also explain the behavior of jurors in cases like the pirate Connor, Joseph Watson, John Elkins, John Baker, and alderman John Hutchins.³⁹⁵ It would also be consistent with the fact that, even in radical Rhode Island, criminal juries took an oath to decide cases "*according to Law and Evidence.*"³⁹⁶ And it would suggest that the prevailing wisdom to the contrary is wrong.

To the extent that the conventional wisdom about this, or any other form of jury lawfinding authority is unsupported by the evidence, so are constitutional and tradition-based arguments founded thereon. However, even if we knew that Massa-

³⁹³ See *supra* note 50 and accompanying text.

³⁹⁴ Cf. *United States v. Dougherty*, 473 F.2d 1113, 1117, 1130-37 (D.C. Cir. 1972) (affirming trial court's refusal to allow argument or give instruction on jury's prerogative to nullify law, in part because general knowledge of this prerogative makes its in-court acknowledgement unnecessary).

³⁹⁵ See *supra* text accompanying note 116; notes 118-27 and accompanying text; notes 148-60 and accompanying text; text accompanying notes 197-99; note 268.

³⁹⁶ See *supra* note 315 (emphasis added). Similarly, in Pennsylvania, where criminal juries were still given the traditional English oath, see *supra* text accompanying note 391, it was said that the law was part of the evidence in accordance with which juries were to decide a criminal case. See *Untitled Manuscript* (Historical Society of Pennsylvania, Yeates Collection, Misc. Legal Papers 1773-1776, folder 3) ("Law as Part of the Evidence to Jury"). Also see *King v. Morrison* (1778) (Historical Society of Pennsylvania, Yeates Collection, Misc. Legal Papers 1773-1776, folder 2) (notes including remark of trial counsel that "Consequences of Conviction out of the Question with Respect to the Jury—They are on Oath & must follow the Dictates of the Law"), and 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 537 & n.11 (1808) (oath for petit jurors in criminal cases, first embodied in statute in 1672 and retained in the Code, to decide cases "according to your evidence, and the law of this State.").

chusetts and Rhode Island were the only colonies that had any real law or practice on the jury's lawfinding prerogative on the eve of the Revolution and that they had (respectively) rejected and recognized some such right, the question of origins would not be moot: the same consequences would ensue if a lawfinding right had become an accepted part of American law before the adoption of the Sixth Amendment in 1791.³⁹⁷ Naturally, the conventional wisdom posits that such a right was generally accepted during that period as well. But is its rejection of this aspect of Howe's agnosticism more justified than its position on the jury's authority in colonial times? If so, which prerogatives did this lawfinding right entail?³⁹⁸ For now, these important questions must remain unanswered.³⁹⁹

³⁹⁷ Rhode Island didn't send delegates to the Philadelphia Convention, *see* MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 11-12 (1962), or the First Congress, *see* *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* xvi (Helen E. Veit, et al. eds., 1991), so it would have been in no position directly to influence the drafting of Article III or the Sixth Amendment.

³⁹⁸ *See supra* text accompanying note 12; note 49.

³⁹⁹ *See supra* note 47.