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GOVERNMENT BY JUDICIARY: THE GROWTH OF JUDICIAL POWER IN COLONIAL PENNSYLVANIA

*William E. Nelson**

LIKE Maryland and Plymouth before, Pennsylvania was founded as a refuge for a sect, in this instance the Quakers, that had been viciously persecuted in England.¹ But, unlike the Roman Catholic founders of Maryland and the Separatist founders of Plymouth, who lost control of their colonies within several decades of their establishment, the Quakers retained their hegemony in Pennsylvania throughout the colonial period.² Their success can be attributed, in large part, to their utilization of law.

William Penn, the colony's founder, was a strong believer in property rights,³ and within the first year of Pennsylvania's existence he conferred vast property holdings—some 875,000 acres—on his mostly Quaker followers.⁴ These holdings quickly became quite valuable. Even though the Quakers became a minority as people of other religions and of non-English ethnicity settled in Pennsylvania,⁵ the Quakers' land and wealth guaranteed that they would constitute much of Pennsylvania's leadership

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1. See HUGH BARBOUR & J. WILLIAM FROST, *THE QUAKERS* 28-32, 65-66, 74-79 (Greenwood Press 1988).

2. See *id.* at 90.

3. See EDWIN B. BRONNER, *WILLIAM PENN'S "HOLY EXPERIMENT": THE FOUNDING OF PENNSYLVANIA, 1681-1701* 10 (Temple University Press 1962).

4. See E. DIGBY BALTZELL, *PURITAN BOSTON & QUAKER PHILADELPHIA* 120 (Transaction Publishers 1996).

5. See SALLY SCHWARTZ, *"A MIXED MULTITUDE": THE STRUGGLE FOR TOLERATION IN COLONIAL PENNSYLVANIA* 1-3, 5-9 (New York University Press 1987).

as long as their land and wealth were secure.⁶ Here, of course, is where the law came in.

The founders of Pennsylvania turned to the common law and the rule of law to provide the needed security. Pennsylvania immediately established a complex court system, including a jurisdiction in chancery. Within a few years of settlement, a sophisticated legal profession existed, and that profession brought with it the full paraphernalia of common law pleading and procedure. The founders of Pennsylvania appear to have understood that legalizing government guaranteed social stability—that the rule of law protects those with wealth, power, and the ability to employ lawyers. It thereby insures that the families and groups who emerge at the top of a social order at one point in time are likely to remain at or near the top in future times. While the rule of law may not generate a hierarchical society, it surely does nothing to further egalitarian redistribution.

By empowering judges and disempowering local democratic institutions, Pennsylvania's Quaker elite not only insured social stability, but also created a government by judiciary. The basic units of settlement in Pennsylvania were scattered, isolated farms, not towns like those of New England; and, as a result, there were no democratic units of local self-governance.⁷ And, as this article will show, juries, the other institution drawn from localities, were systematically disempowered. As a result, eighteenth-century Pennsylvania judges, who were appointed to and, on occasion, removed from office by the colony's governor,⁸ enjoyed a strikingly broad political and social competence that makes the jurisdiction of twenty-first-century federal courts seem narrow in comparison.

In this article, I will trace first how Pennsylvania turned to the common law. Then, I will discuss how the colony used law to empower judges. Finally, I will examine how judges used their power to govern the king's subjects and, in effect, to create a judicial oligarchy, with the provincial assembly serving as the only check on oligarchical power.

But first, a brief aside. It is something of a paradox that Pennsylvania, whose government was perhaps the most autocratic and hierarchical in the thirteen colonies, was founded by Quakers, who believed in individual autonomy and equality. The most central Quaker belief was that every person is equally able to receive the light of God, without the intermediation of clergymen, sacraments, or sacred texts. All Friends believed themselves capable of approaching God directly and saw no need to defer

6. See BALTZELL, *supra* note 4, at 120.

7. See *id.* at 119-21.

8. See BRONNER, *supra* note 3, at 46; WILLIAM M. OFFUTT, JR. OF "GOOD LAWS" AND "GOOD MEN": LAW AND SOCIETY IN THE DELAWARE VALLEY 1680-170 43 (University of Illinois Press 1995). For instances of removal, see Revocation of Commission of Rowland Evans, Mar. 1761, in Philadelphia Court Papers, 1749-1821 (unpublished manuscript, on file with The Historical Society of Pennsylvania); John Wright, The Speech of John Wright, Esq., One of the Magistrates of Lancaster County (1741) [hereinafter WRIGHT].

to magistrates or ministers. While the Quakers did not expect that everyone would be equal in wealth or political power, all were equal in their right to search for truth and to understand truth as they individually saw fit.⁹

It may be, however, that Quaker beliefs in equality and individualism, along with Pennsylvania's demographic diversity and dispersed patterns of settlement, made autocracy and hierarchy inevitable. They certainly precluded tight communitarian rule of the sort practiced in colonial New England. In fact, colonial Pennsylvania's constitutional structure, as we shall see, was in important respects more like that of twenty-first-century America than eighteenth-century New England: individuals from diverse backgrounds were equally free within the minimal constraints set by law to pursue whatever economic and personal ends they set for themselves, while possessing little power to set or alter the substance of the laws that constrained them. Pennsylvanians thus experienced liberty differently than New Englanders. I hope to show that the law of Pennsylvania had less impact than New England law on the daily lives of its people beyond setting the structure of things under which its people lived. But in return for comparative freedom from daily legal control, Pennsylvanians gave up what colonial New Englanders possessed—the power to control the law and hence their communities' very nature.

I.

Before William Penn received his charter from Charles II in 1681, the territory in what is now Pennsylvania was part of the Duke of York's domain. One small town, Upland, on the site of what is now Chester, had been established by a mixture of Dutch, Swedish, and English settlers. By 1672, the Duke, in turn, had established a court at Upland, and that court's records are extant from 1676.¹⁰ In that year, the court had six justices, all of them Swedes.¹¹

The Upland court administered a sort of rough frontier justice with little attention to the niceties of the common law or to other sorts of formality. For example, in *Helm v. Oolsen*,¹² one of the first cases to be recorded, the plaintiff, one of the court's justices, accused the defendant of "beat[ing] & strik[ing]" him "in a most abusive and malicious manner," and, when the defendant failed to appear, the court warned him that "in case of further default, judgment . . . [would] pass against him according to law and merit."¹³ When Oolsen finally did appear, the sheriff asked that the court "not suffer that a justice of peace shall be so

9. See BALTZELL, *supra* note 4, at 95-96, 101-104; BARBOUR, *supra* note 1, at 43-44; SCHWARTZ, *supra* note 5, at 13-14.

10. See EDWARD ARMSTRONG, *Introduction to THE RECORD OF THE COURT AT UPLAND, IN PENNSYLVANIA, 1670-11*, 31 (Joseph Mitchell Co. 1959) [hereinafter RECORD OF UPLAND COURT].

11. See RECORD OF UPLAND COURT, *supra* note 10, at 35 n.1.

12. (Upland Ct., Mar. 1676/77), in RECORD OF UPLAND COURT, *supra* note 10, at 47.

13. *Id.*

abused," and the court, in response, fined Oolsen 210 guilders. But it remitted 150 guilders of the fine, "considering that the said Oole was a poor man with a great charge of children."¹⁴

In another case of fighting from the same term, the court postponed consideration and meanwhile "recommend[ed] the parties to compose the difference between them."¹⁵ Similarly, in a case of a defendant who had shot a plaintiff's boar, where the defendant argued that "the said boar was so cruel that no man could pass without danger of being hurt . . . and that their children were likewise in danger," the court "recommend[ed] the parties mutually to compose the business between themselves."¹⁶ Finally, when a plaintiff accused a defendant of being "troublesome to his son about a knife," the court, "finding the business and difference of no value, did order the parties to be friends and forgive one the other."¹⁷

By far the most common sort of case involved the collection of debts, and in these cases, the court did come to decisions, typically entering judgment against the debtor.¹⁸ In one case, however, the court examined the plaintiff's books, found his suit unjust and "vexatious," and ordered him nonsuited.¹⁹ In the Upland court's earliest years, litigants in the debt-collection cases made no effort to use common-law writs, and when they did begin to use them in later years, they more often than not used the wrong ones. One plaintiff, for example, brought an action of debt on an account,²⁰ and another, an action of debt on a lost bill.²¹ The wrong writ was also used in a case involving real property, where a plaintiff filed a writ of case for a trespass.²² None of these suits was dismissed because the wrong writ had been brought.

The common-law mode of trial—the jury—was rarely used, as questions of fact usually were decided by judges. In a case where a defendant was "not . . . able to prove what he had said or any part thereof," for example, the court not only found the facts against him, but also "ordered that . . . [he] openly shall declare himself a liar; & that he shall further

14. Helm v. Oelsen, (Upland Ct. June 1677), in RECORD OF UPLAND COURT, *supra* note 10, at 53-54.

15. Mortense v. Staecke, (Upland Ct. Mar. 1676/77), in RECORD OF UPLAND COURT, *supra* note 10, at 47.

16. Hendrics v. Bertels, (Upland Ct. June 1677), in RECORD OF UPLAND COURT, *supra* note 10, at 50-51.

17. Laersen v. Test, (Upland Ct. Nov. 1677), in RECORD OF UPLAND COURT, *supra* note 10, at 69-70.

18. See, e.g., Andries v. Ashman, (Upland Ct. June 1677), in RECORD OF UPLAND COURT, *supra* note 10, at 53.

19. Orian v. D'haes, (Upland Ct. Mar. 1678/79), in RECORD OF UPLAND COURT, *supra* note 10, at 127-28.

20. Shackerly v. Claassen, (Upland Ct. Mar. 1778/1779), in RECORD OF UPLAND COURT, *supra* note 10, at 133.

21. Darvall v. Nielsen, (Upland Ct. Nov. 1679), in RECORD OF UPLAND COURT, *supra* note 10, at 144.

22. Jegou v. Wright, (Upland Ct. Nov. 1679), in RECORD OF UPLAND COURT, *supra* note 10, at 140.

declare the plaintiff to be an honest man.”²³ In the first case in which a jury was empanelled, the court “suspend[ed]” the jury’s verdict for the plaintiff, entered judgment for the defendant, and also awarded the defendant costs.²⁴ Only in the final year of the Upland court’s existence were juries used on more than the rarest occasions.²⁵

The common law also was ignored when the county sheriff rather than a grand jury indicted a servant, Richard Duckett, for bastardy in keeping company with a mulatto woman and getting her pregnant. Duckett confessed the fact and said he had intended to marry the woman; when he promised to maintain the child, the court “remit[ted] . . . his offense upon his humiliation it being his master’s desire.”²⁶

The Upland court continued to function in its informal fashion through its final term, in June 1681. Then, in a letter dated July 21, 1681, authorities in New York thanked the justices “for your good services” and informed them that Pennsylvania thereafter was under the jurisdiction of William Penn,²⁷ to whom Charles II, with the consent of his brother and heir, the Duke of York, had just granted it.²⁸ Three months later, a new court for the “Province of Pennsylvania” met in what was soon renamed Chester. Only one of the old court’s justices, Otto Ernest Coch, sat on the new court, which in its first term contained eight new faces.²⁹ At the court’s second sitting, in November 1681, Penn’s new governor, William Markham, also joined the court and presided over it.³⁰

Even before the founding of Philadelphia or any other substantial town, these changes in personnel altered the court’s mode of transacting its business. In the new court’s first term, for example, juries were empanelled in nine cases.³¹ The court records also typically identify the writ under which plaintiffs sued: there was, for example, an action of trespass,³² an action of trespass on the case,³³ and an action of debt.³⁴ Plain-

23. *Cram v. Peterss*, (Upland Ct. Oct. 1680), in *RECORD OF UPLAND COURT*, *supra* note 10, at 175-176.

24. *Orian v. D’haes*, (Upland Ct. Nov. 1678), in *RECORD OF UPLAND COURT*, *supra* note 10, at 107; *Orian v. D’haes*, (Upland Ct. Mar. 1678/79), in *RECORD OF UPLAND COURT*, *supra* note 10, at 127-130.

25. See *Dalboo v. Lom*, (Upland Ct. June 1681), in *RECORD OF UPLAND COURT*, *supra* note 10, at 190; *Moensen v. Rambo*, (Upland Ct. Oct. 1680), in *RECORD OF UPLAND COURT*, *supra* note 10, 181-82.

26. *King v. Duckett*, (Upland Ct. June 1677), in *RECORD OF UPLAND COURT*, *supra* note 10, at 51.

27. Anthony Brockholls to the Several Justices, June 21, 1681, in *RECORD OF UPLAND COURT*, *supra* note 10, at 195-96.

28. See *BRONNER*, *supra* note 3, at 21-23.

29. See *RECORD OF THE COURTS OF CHESTER COUNTY, PENNSYLVANIA, 1681-1697 3* (Patterson & White Co. 1910) [hereinafter *RECORD OF THE COURTS OF CHESTER*].

30. See *id.* at 8.

31. See *id.* at 3-6.

32. See *Dalboe v. Eustason*, (Chester County Ct. Sept. 1671), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 4.

33. See *Erickson v. Mortinson*, (Chester County Ct. Sept. 1671), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 5.

34. See *Headings v. Taylor*, (Chester County Ct. Sept. 1671), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 6.

tiffs, of course, did not always use the correct writ: thus, there was an action on the case for weakening and disparaging title to land³⁵ and an action of debt for wages.³⁶ Nor did defendants always use proper defensive pleas, as in a slander suit where a defendant "answer[ed] . . . that the declaration [was] a pack of lies"³⁷ and an action on the case where a defendant responded that the plaintiff's "declaration" was "false, untrue, and vexatious."³⁸ Nonetheless, litigants were striving to follow common-law procedures; plaintiffs were filing writs and declarations³⁹ with common-law names, and defendants were pleading in response. Within a few years, common-law procedure also was in use in criminal prosecutions, with cases begun by grand jury indictment and tried by petit juries.⁴⁰

The legalism of the new Chester court emerged in one very early 1682 case,⁴¹ this time in a substantive rather than procedural fashion. The action was one for debt on a bill that the defendant admitted he owed. But the defendant claimed that the bill had been given "in consideration of land by the plaintiff sold to the defendant" but that he had not received proper "security" for the land. The evidence showed that the plaintiff had conveyed title, but apparently no record of the conveyance had been made. At this point, the Chester court, unlike the old one at Upland, did not direct the parties to resolve the matter and be friends. Instead, the jury returned a verdict for the plaintiff, and "an order was passed & recorded in the records of court formerly held under the other government" affirming the land's transfer. In the new province of Pennsylvania, the 't's had to be crossed and the 'i's dotted.

Comparable legalism emerged in the mid-1680s in another rural county, Bucks. Among the properly filed suits were an action of the case for slander,⁴² an action of the case for failing to pay for the rental of

35. See *Anderson v. Carolus*, (Chester County Ct. Jan. 1684/1685), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 46.

36. See *Bayly v. Wither*, (Chester County Ct. Sept. 1685), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 57.

37. *Devericks v. Prichett*, (Chester County Ct. Mar. 1693/1694), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 280.

38. *Jones v. Browne*, (Chester County Ct. June 1688), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 125-26.

39. See *Eyre v. Smith*, (Chester County Ct. June 1686), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 72-73.

40. The first reference to a grand jury in the Chester records occurred at the March 1685/1686 term. See *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 64. The first case in which a prisoner was indicted by a grand jury and tried by a petit jury occurred at the next term. See *King v. Hannum*, (Chester County Ct. June 1686), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 72.

41. *Saunderland v. Fforrest*, (Chester County Ct. June 1682), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 16.

42. See *Milcome v. Wheeler*, (Bucks County Ct. May 1684), in *RECORDS OF THE COURTS OF QUARTER SESSIONS AND COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA 1684-1700* 18 (Triane Publ'g County 1943) [hereinafter *RECORDS OF THE COURTS OF BUCK*].

horses,⁴³ and actions of debt on a bond⁴⁴ and on an arbitrators's award.⁴⁵ There also was an action of debt on a bill.⁴⁶ Unless the court's clerk was careless in his use of language and was using the word bill as a synonym for bond, this last action was improperly filed; case, not debt, was the proper writ to use in suing on a bill or other unsealed instrument. Nonetheless, in Bucks County as in Chester, judges and litigants were striving to follow common-law procedures even if they did not always follow them perfectly.

In the absence of direct evidence, we cannot know for certain why the courts in rural Pennsylvania counties took steps toward legalism and reception of the common law as soon as they were established. But we can guess. We know that William Penn had studied law in the Inns of Court⁴⁷ and that he agreed with the Whig ideal of the rule of law as a restraint both on the governed and on the governors.⁴⁸ As he wrote in a 1679 broadside in support of Algernon Sydney's campaign for a seat in the House of Commons, the only legitimate "power" of "government" is "a *legal power* . . . : that which is not legal, is a *tyranny*, and not properly a *government*." On a later occasion, he observed that "any government [was] free" only "where the laws rule[d]."⁴⁹ Aspects of the common law such as its protection of property and the right to trial by jury were central to Penn's political beliefs.⁵⁰ Perhaps Penn communicated these views informally to the earliest judges, or perhaps the judges he initially appointed intuited them. Or maybe Penn's convictions reflected a more widespread set of attitudes within a broader Quaker community.

Legalism and reception of the common law took a giant step forward with the 1682 founding of Philadelphia, where Penn himself arrived late in the year,⁵¹ as the province's political and commercial capital. During the mid-1680s, Philadelphia quickly became a center of commerce and commercial litigation.⁵² It also became a home and source of work for

43. See *Brock v. English*, (Bucks County Ct. Apr. 1684/85), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 13.

44. See *Blowers v. Wheeler*, (Bucks County Ct. Aug. 1685), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 23.

45. See *Boyden v. Collins*, (Bucks County Ct. Aug. 1685), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 22.

46. See *Moore v. Wheeler*, (Bucks County Ct. Nov. 1685), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 27.

47. See BRONNER, *supra* note 3, at 9.

48. See OFFUTT, JR., *supra* note 8, at 15.

49. Quoted in BRONNER, *supra* note 3, at 10-11.

50. See *id.* at 10.

51. See *id.* at 31.

52. See, e.g., *King v. Patrick*, in Samuel W. Pennypacker, *PENNYPACKER'S COLONIAL CASES* 105 (Rees Welsh & Company 1892) (Pa. Prov. Ct. 1686) [hereinafter *PENNYPACKER'S COLONIAL CASES*] (suit for breach of agreement to deliver lumber from Philadelphia to Barbados); *March v. Kilner*, in *PENNYPACKER'S COLONIAL CASES*, *supra*, at 29 (Pa. Ct. Admiralty 1683) (suit by passengers of transatlantic voyage); *Marsh v. Calendar*, (Philadelphia County Ct. Com. Pl. June 1732) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (suit for breach of contract in sale of slave); *Stanfield v. Smart*, (Philadelphia County Ct. Com. Pl. June 1695) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (suit for loss of tobacco shipped from Philadelphia

lawyers; the first English-trained lawyer to settle and practice permanently, David Lloyd, arrived in 1686.⁵³ Others, including James Logan, soon followed.⁵⁴ At least six lawyers practiced in Pennsylvania at one time or another prior to 1700,⁵⁵ and by the first decade of the eighteenth century four attorneys were practicing at the same time.⁵⁶

As early as the mid-1680s, only three years after Philadelphia had been founded, litigants were using common-law pleadings. Thus, there was an action of trover and conversion for pigs that were "lost by the plaintiff, came to the hands of & w[ere] converted to the defendant's use."⁵⁷ There was "an action of account"⁵⁸ and an action for a "balance of accounts,"⁵⁹ as well as an action of debt on a bond, to which the defendant properly pleaded that he was "not indebted."⁶⁰ The litigants did, however, make some errors, as when one plaintiff brought debt on a book account, which most likely had not been properly reduced to a sum certain. But the defendant gave a list of what he had received and agreed to pay for it, and the court gave judgment for the amount to which he had agreed.⁶¹

A decade later, under the guidance of trained attorneys, common-law pleading had become quite sophisticated. For example, in one "action upon the case" for money owed, filed by David Lloyd, the defendant interposed the proper defensive plea that "he did not assume in manner and form, etc."; the matter was referred to a jury, which returned a plaintiff's verdict.⁶² In another David Lloyd case, a plaintiff sued for £40 damages for breach of a provincial statute, in that the defendant "did

to England); *Ridley v. Smith*, (Philadelphia County Ct. Com. Pl. May 1695) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (suit for freight for goods shipped from Anitgua). Such litigation occasionally occurred in other counties as well. See *Brock v. Pickring*, (Bucks County Ct. Oct. 1685), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 36 (suit breach of contract to transport passenger from England).

53. See *BRONNER*, *supra* note 3, at 47.

54. See *id.*

55. See "Lawyers Whose Cases Appear," in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at unpaginated preface.

56. See *Heather ex dem. Sprogel v. Frankfort County*, (Pa. Provincial Ct. 1708) (dictum), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 142, 166.

57. See *Op den Graeff v. Cocks*, (Pa. Provincial Ct. 1685), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 84-85; accord *Graves v. Cooke*, (Philadelphia County Ct. Feb. 1685/86) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

58. *Croft v. Burholz*, (Philadelphia County Ct. 1685) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

59. *Reynolds v. Simpson*, (Philadelphia County Ct. Sept. 1685) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

60. *Claypoole v. Goffe*, (Philadelphia County Ct. May 1686) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

61. *Markham v. Grubb*, (Philadelphia County Ct. Apr. 1686) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

62. *Spikman v. Robeson*, (Philadelphia County Ct. Com. Pl. Mar. 1694/95), quoted in *Edwin B. Bronner, Philadelphia County Court of Quarter Sessions and Common Pleas, 1695*, in *77 Pennsylvania Magazine of History and Biography*, 457, 464 (1953) [hereinafter *BRONNER II*]. For a classic writ of assumpsit less than a decade later, see *Sanders v. Sanders*, (Philadelphia County Ct. Com. Pl. Dec. 1703), in *Attachments for Debt, 1702-1741* (unpublished manuscript, on file with The Historical Society of Pennsylvania); cf. *Mathews v. Whitpain*, (Philadelphia County Ct. Com. Pl. Mar. 1694/95) (unpublished manuscript, on

dispossess the said [plaintiff] of his goods without the lawful judgment of his twelve equals or any other due course or process of the laws of this province” by taking away eight quarters of mutton; the jury returned a verdict for the plaintiff for 5s. damages.⁶³ And, in a third case from the same year, a plaintiff sued pursuant to a 1576 act of Parliament that made an informer whose suit was dismissed liable for the damages of the person against whom he had informed; accordingly, the plaintiff sued the crown’s collector of customs, who had sued him unsuccessfully for customs duties. But the court, apparently concluding that the Elizabethan statute had sought to protect subjects from harassment and that a tax collector’s suit for taxes could not be deemed harassment, dismissed the plaintiff’s writ.⁶⁴

Pleading practices in Philadelphia quickly spread to the two rural counties. In Bucks County, for instance, there was a well-pleaded 1697 “action upon the case” on a “bill” given by a defendant “under his hand”;⁶⁵ there also was an *assumpsit* action explicitly alleging, along with other formulaic language associated with the writ, that the defendant “did assume and faithfully promise to pay.”⁶⁶ In both Bucks and Chester, there were actions of debt on bonds containing appropriate formulaic language,⁶⁷ while Chester County saw a writ of *assumpsit* alleging that the defendant “did assume.”⁶⁸ Chester also had a writ of case to recover on bills of exchange.⁶⁹ Of course, lawyers and judges occasionally made mistakes, as in one Philadelphia case where a plaintiff brought a writ of *assumpsit* on an account and the court accepted the defendant’s plea of “owes nothing,” rather than the proper plea of “never promised.”⁷⁰ But, on the whole, it seems clear that Pennsylvania lawyers by the 1690s knew how to plead and were expected to plead their cases under the common law’s rules.

If they did not, they might find their cases thrown out of court. Thus, suits were dismissed when a “declaration was not legal nor substantial nor

file with The Historical Society of Pennsylvania) (writ of debt on bond; plea of not the defendant’s act and deed; jury verdict for plaintiff).

63. *Smith v. Harris*, (Philadelphia County Ct. Com. Pl. Mar. 1694/95) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

64. *Trout v. Randolph*, (Philadelphia County Ct. Com. Pl. May 1695) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

65. *Wheeler v. Heefler*, (Bucks County Ct. Oct. 1697), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 334-35.

66. *Merriot v. Jerrome*, (Bucks County Ct. June 1697), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 317; *accord* *Boar v. Holme*, (Bucks County Ct. June 1704) (unpublished manuscript, on file with Bucks County Historical Society).

67. *See Wheeler v. Brindley*, (Bucks County Ct. Oct. 1688), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 96; *Cadman v. Clayton*, (Chester County Ct. Aug. 1689), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 161-62.

68. *Phillips v. Stamfield*, (Chester County Ct. Aug. 1689), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 164-66.

69. *Turner v. Pusey*, (Chester County Ct. Mar. 1689/90), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 188-90.

70. *Chisolim v. Poros*, (Philadelphia County Ct. Com. Pl. Mar. 1694/95) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

sufficient in law to be answered"⁷¹ or when the court concluded that a case did not fit on its facts within the writ served,⁷² as, for example, when a plaintiff brought a writ of debt on a writing not under seal.⁷³ Other cases were dismissed for procedural defects, as when process was not served within the time required by law,⁷⁴ when the plaintiff served a summons without a declaration⁷⁵ or a declaration without a summons,⁷⁶ or when a declaration was "uncertain as to the day, month, & year" of the matters alleged⁷⁷ or otherwise "too general,"⁷⁸ which could result in "the most innocent . . . be[ing] accused by sly informers."⁷⁹ There were also pleas in abatement⁸⁰ and cases of special pleading.⁸¹ One of the earliest cases requiring procedural regularity was *Noble v. Man*,⁸² which dismissed an appeal that "lies not legally nor regularly before us" because the court below lacked jurisdiction; the *Noble* case undoubtedly gave a signal that Pennsylvania's Quaker elite would insist that courts abide by the law.

71. See *Ewer v. Governor*, (Chester County Ct. Mar. 1691/92), in RECORDS OF THE COURTS OF CHESTER, *supra* note 29, at 254. For another case of a demurrer, see *Wright v. Daglon*, (Philadelphia County Ct. Com. Pl. Mar. 1712/13) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

72. See *Clayton v. Collitt*, (Chester County Ct. Oct. 1691), in RECORDS OF THE COURTS OF CHESTER, *supra* note 29, at 242; *accord Edgcomb v. Richardson*, (Philadelphia County Ct. Com. Pl. June 1717) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

73. See *Pumphrey v. Boom*, (Bucks County Ct. Sept. 1705) (unpublished manuscript, on file with Bucks County Historical Society).

74. See *Empson v. Collitt*, (Chester County Ct. June 1691), in RECORD OF THE COURTS OF CHESTER, *supra* note 29, at 237.

75. *Wheeler v. Test*, (Pa. Provincial Ct. 1685), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 73-74.

76. See *Lloyd v. Sandilands*, (Chester County Ct. Oct. 1691), in RECORD OF THE COURTS OF CHESTER, *supra* note 52, at 242-43.

77. *Ewre v. Simcock*, (Chester County Ct. Mar. 1692/93), in RECORD OF THE COURTS OF CHESTER, *supra* note 29, at 279.

78. *Claypoole v. Guest*, (Pa. Provincial Ct. 1686), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 100-01; *cf. England v. Shute*, (Pa. Ct. Ch. 1724/25), reprinted in THE REGISTRAR'S BOOK OF GOVERNOR KEITH'S COURT OF CHANCERY OF PENNSYLVANIA 1720-1735 22 (Pennsylvania Bar Association 1941) [hereinafter THE REGISTRAR'S BOOK] (motion "overruled for too much generality contained in the said notice of motion").

79. *Claypoole v. Guest*, (1686), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 100-01.

80. See *Mifflin v. Jones*, (Philadelphia County Ct. Com. Pl. Mar. 1712/13) (unpublished manuscript, on file with The Historical Society of Pennsylvania); *Barker v. Jones*, (Philadelphia County Com. Pl. June 1712) (unpublished manuscript, on file with The Historical Society of Pennsylvania); *cf. Allin v. Ashbourn*, (Bucks County Com. Pl. Dec. 1730) (appearance docket, on file with Bucks County Historical Society) (defendant files "exception," which plaintiff answers "by justifying the writ").

81. See *Sober v. Poole*, (Philadelphia County Ct. Com. Pl. Sept. 1717) (appearance docket, on file with The Historical Society of Pennsylvania); *Barker v. Jones*, (Philadelphia County Com. Pl. June 1712) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

82. (Pa. Provincial Council 1683), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 27-28; *cf. Worrall v. Justices of Chester County*, (Chester County Quarter Sessions Nov. 1722 (microformed on Chester County Archives) (action quashed "for several imperfections and insufficiencies in the same").

Legislation also contributed to Pennsylvania's commitment to formalism and the rule of law. William Penn and his Quaker followers were heirs to the law-reform efforts that had surfaced during England's Civil War, when the reformers, among other things, had demanded that all laws be clearly codified in English so that the people could readily understand them. Pennsylvania's legislature followed through on this demand when in early sessions it adopted and published forms for writs of arrest and summons—forms that it declared "legal and authentic."⁸³ These forms were important not only because they constituted commands that courts meeting in Philadelphia were required to follow, but also because they served as written and readily available mechanisms for transmitting legal knowledge from the capital to the outlying counties. In the absence of legislated forms, the courts in Bucks and Chester might not have known what courts and lawyers in the metropolis were doing. The published forms made transmission of legal knowledge easy and readily insured legal uniformity throughout the province.

Judges also contributed legislatively to formalism by their adoption of court rules. One court rule, for example, provided as follows:

That plaintiffs, defendants, & all other persons speak directly to the point in question, & that they put their pleas in writing, (this being a court of record) & that they forbear reflections & recriminations either on the court, juries, or on one another under penalty of a fine.⁸⁴

By requiring pleas in writings directly addressed to the point in question, the rule required lawyers to think, to research, and to draft carefully. It also minimized risks that judges and court clerks would misinterpret the claims litigants were advancing.

Once Pennsylvania had moved in the late seventeenth century toward common-law formalism and adherence to the rule of law, it was easy to continue in that direction, and Pennsylvania did so for the remainder of the colonial period. Thus, litigants continued to use the common-law forms of action⁸⁵ and common-law defensive pleas⁸⁶ and to engage in

83. THE LAWS OF THE PROVINCE OF PENNSYLVANIA 25 (Philadelphia, Bradford 1714), reprinted in, THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713 29 (John D. Cushing ed., Michael Glazier, Inc. 1978). See generally OFFUTT, JR., *supra* note 8, at 16-19.

84. Rules of Court, (Pa. Provincial Ct. 1686), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 98-99.

85. See, e.g., Rowland v. Hull, (Chester County Ct. Com. Pl. Nov. 1755) (unpublished manuscript, on file with Chester County Archives) (covenant); Kitton v. Silver, (Cumberland County Ct. Com. Pl. Mar. 1750) (unpublished manuscript, on file with Cumberland County Historical Society) (trespass on the case); Lessee of Lukens v. Stiles, (Northumberland County Ct. Com. Pl. Aug. 1773) (unpublished manuscript, on file with Northumberland County Clerk's Office); Ashton v. Goad, (Philadelphia County Ct. Com. Pl. Dec. 1760) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (entry sur disseisin en le post); Miller v. Berlinger, (York County Ct. Com. Pl.) (unpublished manuscript, on file with York County Archives) (debt on bond).

86. See, e.g., Phipps v. Phipps, (Chester County Ct. Com. Pl. Nov. 1756) (plea of "non detinet" to writ of detinue) (unpublished manuscript, on file with Chester County Archives); Robinson v. Moore, (Chester County Ct. Com. Pl. Nov. 1749) (plea of "non cul") (unpublished manuscript, on file with Chester County Archives); Jones v. Ellis, (Chester County Ct. Com. Pl. Nov. 1717) (plea of non assumpsit) (unpublished manuscript,

special pleading.⁸⁷ Common recoveries began to be suffered,⁸⁸ and property owners began to use other common-law tools, such as the executory devise, to pass property to their heirs.⁸⁹ Writs continued to be quashed if they were not legal in form,⁹⁰ and actions were dismissed for want of a proper declaration.⁹¹ Demurrers and pleas in abatement continued to be offered, sometimes successfully, to challenge the substance of cases.⁹²

Dismissals also occurred on procedural grounds. When an attorney received a summons in a suit for a debt, for instance, he pleaded privilege, and the court allowed his plea. It held

that no precept ought to be issued by any justice against any attorney of this court for any debt whatsoever, but that every attorney of the said court ought to be sued by Bill of Privilege in this court, according to the ancient custom of the Court of Common Pleas.⁹³

In another case, a writ was abated on the ground that the defendant, who was a freeholder, had been arrested; arrest was the wrong form of process in suits against freeholders.⁹⁴ Similarly suits against wives and servants were dismissed because wives and servants were immune from suit,⁹⁵ and

on file with Chester County Archives); *Bryan v. Dunlap*, (Philadelphia County Ct. Com. Pl. Mar. 1766) (plea of non assumpsit) (unpublished manuscript, on file with The Historical Society of Pennsylvania). For a case where a court refused to accept an incorrect plea, see *Owen v. Ashton*, (Chester County Ct. Com. Pl. Nov. 1732) (plea of "in debet") (unpublished manuscript, on file with Chester County Archives).

87. See, e.g., *Blasthford v. Kennedy*, (Pa. Sup. Ct. Apr. 1771) (microformed on Pennsylvania State Archives); *Morgan v. Bickby*, (Pa. Sup. Ct. Apr. 1770) (microformed on Pennsylvania State Archives); *Reed v. Boyer*, (Pa. Sup. Ct. Nisi Prius Sept. 1765) (microformed on Pennsylvania State Archives); *Lownes v. Price*, (Pa. Sup. Ct. Apr. 1742) (microformed on Pennsylvania State Archives).

88. See *Shewell v. Bickley*, (Pa. Sup. Ct. Apr. 1754) (microformed on Pennsylvania State Archives); *Miller v. Posthothwaite*, (Lancaster County Ct. Com. Pl. Nov. 1750) (continuance docket, on file with Lancaster County Historical Society); *Allen v. Clymer*, (Philadelphia County Ct. Com. Pl. Sept. 1775) (unpublished manuscript, on file with Philadelphia City Archives).

89. See *Lessee of Ashton v. Ashton*, 1 U.S. (1 Dallas) 4 (Pa. Sup. Ct. 1760).

90. See *Munday v. Sandelands*, (Chester County Ct. Com. Pl. Nov. 1718) (unpublished manuscript, on file with Chester County Archives).

91. See *Newlin v. Newlin*, (Chester County Ct. Com. Pl. May 1773) (unpublished manuscript, on file with Chester County Archives); *Willis v. Prior*, (Chester County Ct. Com. Pl. May 1722) (unpublished manuscript, on file with Chester County Archives); *Boidlör v. Hubon*, (Lancaster County Ct. Com. Pl. Nov. 1751) (continuance docket, on file with Lancaster County Historical Society).

92. See *Chilo v. Robinson*, (Pa. Sup. Ct. Sept. 1757) (microformed on Pennsylvania State Archives); *Taylor v. Cloud*, (Chester County Ct. Com. Pl. May 1747) (unpublished manuscript, on file with Chester County Archives); *Haskins v. Young*, (Chester County Ct. Com. Pl. Feb. 1736/37) (unpublished manuscript, on file with Chester County Archives); *Jefferies v. Sutton*, (Chester County Ct. Com. Pl. Aug. 1725) (unpublished manuscript, on file with Chester County Archives).

93. *Thompson v. Rose*, (Lancaster County Ct. Com. Pl. Mar. 1757) (continuance docket, on file with Lancaster County Historical Society).

94. *Myer v. Bullman*, (Lancaster County Ct. Com. Pl. May 1763) (continuance docket, on file with Lancaster County Historical Society); accord *Macy v. Stuart*, (Bucks County Ct. Com. Pl. June 1766) (continuance docket, on file with Bucks County Historical Society); *Norris v. Talley*, (Philadelphia County Ct. Com. Pl. June 1771) (unpublished manuscript, on file with Historical Society of Pennsylvania).

95. See *Marlin v. Wildman*, (Bucks County Ct. Com. Pl. Sept. 1761 and Mar. 1762) (continuance docket, on file with Bucks County Historical Society); *Taylor v. Taylor*,

many writs were abated by the death of a plaintiff⁹⁶ or defendant.⁹⁷ Judgments also were set aside because a court lacked subject-matter jurisdiction,⁹⁸ because a summons had not been “legally served,”⁹⁹ because of a failure to name a co-executor as a party,¹⁰⁰ or because of other “insufficienc[ies] in form.”¹⁰¹

Even procedures not known to the common law were assimilated to it. In an effort to reduce litigation and its expenses, the legislature in 1683 established “peacemakers” for each county, who would hear cases under simplified procedures and render decisions that would have the status of court judgments.¹⁰² Over the next ninety years, while thousands of cases continued to be referred to what became known as arbitrators or referees,¹⁰³ the reference process became legalized. By the middle of the eighteenth century, reports of referees were being set aside and issues retried by juries,¹⁰⁴ or, as another court wrote, it was “upon argument . . . of opinion that an action . . . lies for the plaintiff in this case and that the

(Chester County Ct. Com. Pl. Nov. 1757 and Feb. 1758) (unpublished manuscript, on file with Chesster County Archives) (wife); *Chandler v. Thomas*, (Chester County Ct. Com. Pl. Aug. 1734) (unpublished manuscript, on file with Chester County Archives) (servant).

96. See, e.g., *Jones v. Hall*, (Bucks County Ct. Com. Pl. June 1751) (appearance docket, on file with Bucks County Historical Society); *Thompson v. McIlherry*, (Chester County Ct. Com. Pl. May 1745) (unpublished manuscript, on file with Chester County Archives). *But see* *Logan v. Mather*, (Pa. Sup. Ct. Sept. 1747) (microformed on Pennsylvania State Archives) (co-plaintiff allowed to proceed when his attorney informs court of death of one of the other plaintiffs).

97. See, e.g., *Bard v. McKee*, (Chester County Ct. Com. Pl. Feb. 1756) (unpublished manuscript, on file with Chester County Archives); *Carmichael v. Thompson*, (York County Ct. Com. Pl. Apr. 1758) (unpublished manuscript, on file with York County Archives).

98. See *Lloyd v. Parry*, (Pa. Sup. Ct. Sept. 1746) (microformed on Pennsylvania State Archives); *Growden v. Stevenson*, (Bucks County Ct. Com. Pl. Dec. 1750) (continuance docket, on file with Bucks County Historical Society).

99. *Lawrey v. Smallman*, (Lancaster County Ct. Com. Pl. Feb. 1764) (continuance docket, on file with Lancaster County Historical Society); *cf.* *Hess v. Angst*, (Lancaster County Ct. Com. Pl. Feb. 1770) (continuance docket, on file with Lancaster County Historical Society), where a defendant who had never been arrested but had been granted bail without his consent was discharged for want of proper service.

100. See *Meade v. Thomas*, (Philadelphia County Ct. Com. Pl. Mar. 1768) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

101. *Overseers of Montgomery v. Overseers of Gwyneth*, (Philadelphia County Quarter Sessions Sept. 1765) (unpublished manuscript, on file with Philadelphia City Archives); *accord* *Appeal of Overseers of Poor of Lower Merion*, (Chester County Quarter Sessions Nov. 1760) (microformed on Chester County Archives); *Overseers of Abington v. Overseers of Manor of Moreland*, (Philadelphia County Ct. Quarter Sessions Sept. 1765) (unpublished manuscript, on file with Philadelphia City Archives); *see also* *Appeal of Overseers of Poor of Darby*, (Chester County Quarter Sessions Feb. 1745/46) (microformed on Chester County Archives) (order quashed for failing to provide for support of wife and child of pauper).

102. See *OFFUTT, JR.*, *supra* note 8, at 18, 66. For an early example of the procedure’s use, *see* *Crosby v. Andrews*, (Chester County Ct. Dec. 1683 and Aug. 1684), *in* *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 34, 39.

103. See, e.g., *Starrett v. Chambers*, (Pa. Sup. Ct. Apr. 1768) (microformed on Pennsylvania State Archives); *Firrell v. Fehl*, (Lancaster County Ct. Com. Pl. Nov. 1755) (continuance docket, on file with Lancaster County Historical Society).

104. See *Meade v. Farrell*, (Philadelphia County Ct. Com. Pl. Sept. 1746) (unpublished manuscript, on file with Historical Society of Pennsylvania).

present action is properly brought and therefore" it gave "judgment according to the report."¹⁰⁵

Procedural formalism also crept into the criminal process, where one indictment was dismissed because it was "without form & insufficient in law"¹⁰⁶ and where a convict was pardoned after filing a motion in arrest of judgment alleging that his indictment was defective because it did not contain the words "forge & counterfeit" as "the form of the act of Assembly" required.¹⁰⁷ But the Pennsylvania Supreme Court was not inclined to allow procedural motions, such as one claiming that an alleged crime occurred within the jurisdiction of Connecticut rather than Pennsylvania,¹⁰⁸ or to impede the criminal process "without some appearance of oppression,"¹⁰⁹ even if that meant sending a man to his execution by hanging.¹¹⁰

How can we account for this rapid spread of the common law throughout Pennsylvania within a few short years of its settlement? Part of the explanation, as we have seen, was the ideological commitment of William Penn and his followers to the rule of law. Surely the fact that lawyers and court officials like sheriffs made money from the law also assisted in its triumph. But the on-the-ground, paper instrumentalities of the legal system, such as the judiciary's concern for safekeeping of its records,¹¹¹ were of utmost importance.

We have already seen how the common law spread immediately from Pennsylvania's central authorities to outlying counties like Bucks and Chester. That rapid spread continued as new counties were founded during the course of the eighteenth century. In 1752, for instance, during the first session of the court of Common Pleas in Northampton County, located in the upper Delaware Valley, an attorney filed a technically perfect writ of debt;¹¹² twenty-one years later, at the first session of the same court in Bedford County, located in an Appalachian Valley some 200 miles due west of Philadelphia, a young lawyer and future justice of the United States Supreme Court named James Wilson, filed a proper writ of assumpsit.¹¹³ They were undoubtedly helped by the fact, already noted,

105. *Tasin v. Sweet*, (Pa. Sup. Ct. Sept. 1771) (microformed on Pennsylvania State Archives).

106. *Queen v. Canley*, (Bucks County Quarter Sessions Sept. 1713) (unpublished manuscript, on file with Bucks County Historical Society).

107. *King v. Rippy*, (Pa. Sup. Ct. Oyer & Terminer Cumberland County May 1772) (microformed on Pennsylvania State Archives).

108. *See King v. Speedy*, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County 1771) (microformed on Pennsylvania State Archives).

109. *King v. Haas*, 1 U.S. (1 Dallas) 9, 10 (Pa. Sup. Ct. 1764).

110. *See King v. Bullock*, (Pa. Sup. Ct. 1742) (microformed on Pennsylvania State Archives).

111. *See Petition of Parker*, (Chester County Quarter Sessions Dec. 1724) (microformed on Chester County Archives) (ordering the building of a room in the new courthouse for the keeping of records).

112. *Henrick v. Jockie*, (Northampton County Ct. Com. Pl. Oct. 1752) (unpublished manuscript, on file with Northampton Archives).

113. *Jones v. Spear*, (Bedford County Ct. Com. Pl. Jan 1773) (unpublished manuscript, on file with Bedford County Clerk's Office).

that the legislature had prescribed the forms of writs by statute, which forms were easily accessible to the bar. But these were not the only forms that lawyers possessed. The 1752 lawyer in Northampton arrived in town with a prewritten form for an action of debt, with blanks to be filled in with names, date, and amounts. The heading on the form read, "Philadelphia County Court June Term 1752." The lawyer simply crossed out "Philadelphia" and "June" and substituted "Northampton" and "September" and filled in the blanks. Two decades later in Bedford, Wilson had a preprinted form and simply filled in the blanks. No wonder they both got it right.

The use of rewritten forms was not novel in 1752, nor printed forms, in 1773. Thus, the Chester Court of Common Pleas in 1730 ordered a plaintiff's lawyer to "fill up the blanks in the declaration" by a stated date,¹¹⁴ while there is a printed form for a power of attorney in the papers of a mid-eighteenth-century lawyer, John Ross.¹¹⁵ From its early years, in short, the common law provided a highly portable system of books and papers for maintaining order and resolving disputes. It thereby offered the leaders of Pennsylvania a means of insuring their colony's stability and growth.

II.

As we have seen, William Penn and his fellow Quaker founders of Pennsylvania accepted the Whig ideal of the rule of law as a restraint both on the governed and on the governors. Adherence to the rule of law caused them to receive the common law immediately after the colony's founding and induced their successors to apply it throughout the ninety-plus years of the colony's existence. Of necessity, fidelity to the rule of law also required judges to enforce many of the common law's substantive rules and procedural formalities.

Adherence to the rule of law required powerful judges, but creating a strong judiciary was at odds with another Quaker value—the right to trial by jury. Penn himself had been beneficiary of that right in *Bushell's Case*.¹¹⁶ The case arose out of a criminal prosecution of Penn for sedition in which the jury, contrary to its instructions from the court, refused to find Penn guilty. After the crown had imprisoned the foreman of the jury, Bushell, for contempt, he sought a writ of habeas corpus from the Court of Common Pleas. Chief Justice Vaughan granted the writ and ordered Bushell released. He held that a juror could not be held in contempt or otherwise prosecuted for voting in accordance with his conscience, even if that vote was contrary to the court's instructions on the law. For the next century, *Bushell's Case* stood for the proposition

114. *Powell v. Kroft*, (Chester County Ct. Com. Pl. Aug. 1730) (unpublished manuscript, on file with Chester County Archives).

115. Loose Paper Dated September 26, 1750, in *Docket of John Ross, 1745-1750* (unpublished manuscript, on file with The Historical Society of Pennsylvania).

116. 124 Eng. Rep. 1006 (Ct. Com. Pl. 1670).

that juries had the right to determine both law and fact in the cases they heard, even in opposition to judicial instructions.

A number of early Pennsylvania Quakers defended that right. One was James Keith, a renowned preacher who arrived in Philadelphia in 1689, where he quickly became embroiled in contentions with some of the province's leading figures. He soon was indicted for accusing Samuel Jennings, one of the province's judges, "of being too high and imperious in worldly courts" and "an ignorant, presumptuous, and insolent man." Keith demurred to the charge on the ground that he had spoken of Jennings as an individual and fellow Quaker and not as a magistrate, and hence that he had committed no public offense but at most a private defamation for which Jennings might sue. When his demurrer was overruled, Keith refused to plead and accordingly was found guilty by the court.¹¹⁷

Keith had also written a pamphlet about another event involving pirates who had stolen a vessel from a wharf and began an escape. Three Quaker magistrates immediately issued a warrant for the pirates' capture, a prominent Quaker merchant offered a reward of £100, and a party of men acting under the warrant forcibly overtook and seized the pirates and received the reward. Keith questioned whether "hir[ing] men to fight, (and giving them a commision to do so, signed by three Justices of the Peace called Quakers)," was consistent with Quaker principles of pacifism. The pamphlet was published by the only printer in Philadelphia, William Bradford.

Bradford was indicted for publishing a seditious attack on the magistrates. The main issue in the case was who would determine whether the publication was seditious. The prosecution's position was that the jury should find only whether Bradford had printed the pamphlet, while the court should determine whether it was seditious. Bradford, in contrast, argued that the jury should have broad power "to find also whether this be a seditious paper or not and whether it . . . tend[s] to the weakening of the hands of the magistrate." Some jurors also "believe[d] in their consciences they were obliged to try whether th[e] paper was seditious," and Samuel Jennings for the court so instructed them. Two days later, the jury was dismissed after being unable to agree on a verdict.¹¹⁸

No other judge in colonial Pennsylvania ever conceded such broad power to juries. But other Pennsylvanians thought juries should possess it. In 1686, for example, the Pennsylvania assembly seemingly objected to county courts serving as "judges of equity as well as law . . . to mitigate, alter, or reverse" the verdict of a jury,¹¹⁹ while a Philadelphia grand jury indicted a justice of the peace "for menacing and abusing the jurors in the trial" of a named individual, "which was an infringement of the rights and

117. *Proprietor v. Keith*, (Philadelphia County Quarter Sessions 1692), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 117, 126-29.

118. *Id.* at 130-40.

119. *Quoted in THE REGISTRAR'S BOOK*, *supra* note 78, at 75.

properties of the people.”¹²⁰

The Pennsylvania assembly similarly impeached Chief Justice Nicholas Moore when he refused to accept a plaintiff’s verdict in the amount of £8 when the declaration had sought £500. Moore told the jury to “go out and find according to evidence or else you are all perjured persons,” and the jury did so and brought in a verdict for the defendant. In the assembly’s view, Moore had “refuse[d] a verdict brought in by a lawful jury and by diverse threats & menaces and threatening the jury with the crime of perjury and (confiscation) of their estates forced the said jury to go out so often until they had brought a direct contrary verdict to the first.” The council, however, refused to convict Moore, who therefore retained his position as well as William Penn’s confidence.¹²¹

The council’s decision not to convict Moore apparently reflected a policy judgment on the part of Penn and the Quaker elite governing his province about how to resolve the conflict between judicial authority and the power of local communities represented on juries. In subsequent years, judges used a changing variety of techniques to keep juries under control.

In one case, for example, in which jurors were having difficulty reaching a verdict and agreed to resolve the case by casting lots, the court held the verdict defective and required the jurors to “give[] satisfaction both to the plaintiff and defendant and parties concerned” so that “they were no way hurt or damnified by the said verdict”; in addition, the jurors and the constable who aided them were collectively fined some £50.¹²² In two other cases, the Court of Common Pleas for Philadelphia County granted a motion in arrest of judgment¹²³ and set aside a judgment.¹²⁴ Similarly, in both Chester and Lancaster counties, verdicts were set aside and new trials ordered.¹²⁵ In all but one of these cases, the grounds for the court’s action were unspecified and might have been either substantive or procedural in nature; in the one, the ground was substantive—that the verdict was “uncertain” because a product of compromise.¹²⁶ Of course, in many

120. Presentment of the Grand Jury, (Philadelphia County Quarter Sessions 1686), in *PENNYPACKER’S COLONIAL CASES*, *supra* note 52, at 116-17.

121. Proprietor v. Moore, (Pa. Leg. 1685), in *PENNYPACKER’S COLONIAL CASES*, *supra* note 52, at 39, 41, 46, 48.

122. See *White v. Altman*, (Bucks County Quarter Sessions Dec. 1698), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 358-60.

123. *Lowdon v. Hubbard*, (Philadelphia County Ct. Com. Pl. Dec. 1712) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

124. *Burrows v. Hough*, (Philadelphia County Ct. Com. Pl. June 1717) (unpublished manuscript, on file with the Historical Society of Pennsylvania).

125. See *Story v. Bryan*, (Chester County Ct. Com. Pl. May 1728) (unpublished manuscript, on file with Chester County Archives); *Garner v. Moor*, (Lancaster County Ct. Com. Pl. May 1737) (continuance docket, on file with Lancaster County Historical Society); *Eastland v. Reinock*, (Lancaster County Ct. Com. Pl. Feb. 1733/34) (continuance docket, on file with Lancaster County Historical Society).

126. *Garner v. Moor*, (Lancaster County Ct. Com. Pl. May 1737) (continuance docket, on file with Lancaster County Historical Society). The uncertainty was a product of the verdict’s holding the defendant the owner of the horse sued for, but requiring the defendant to pay £4 damages. There was no legal theory to justify why the defendant should pay

cases motions were denied. In one case, for example, a motion to set aside a verdict on the ground the defendant had been misnamed in the original writ was denied,¹²⁷ as was a motion grounded on a juror's illness, which prevented him from being in court when the verdict that he had signed was returned.¹²⁸

What apparently became the favored mode of jury control in the late seventeenth and early eighteenth century was recourse to equity. We have already seen the Pennsylvania assembly's concern that equity courts could "mitigate, alter, or reverse" jury verdicts.¹²⁹ Two examples occurred in Chester County in 1686, when losing litigants each "preferred a bill" seeking "a remedy against the verdict of jury" that had been obtained only one or two days earlier.¹³⁰ In both cases, some relief was granted, though on unspecified grounds. A third appeal to equity occurred in 1693, with a comparable result.¹³¹

A bit more is known about a fourth appeal from a jury verdict. In a suit for breach of a contract to survey lands, for which the plaintiff had made partial payment, the jury returned a verdict for the defendant even though the evidence showed he had not completed the survey work. The plaintiff wanted the verdict set aside "because of the severity of the common law allowing him no consideration for the money paid, which he doubts not but equity will allow."¹³² Unfortunately, the appeal's outcome has not been preserved. In a series of other cases, however, it is possible to determine that defendants did turn successfully to equity to reduce the penalties juries had awarded in suits for breach of penal bonds.¹³³

damages if he owned the horse, although there was an obvious explanation—that the jurors had reached a compromise.

127. See *Bonnam v. Wiley*, (Chester County Ct. Com. Pl. Aug. 1737) (unpublished manuscript, on file with Chester County Archives).

128. See *Roberts v. Eglesime*, (Chester County Ct. Com. Pl. Aug. 1717) (unpublished manuscript, on file with Chester County Archives). However, a verdict would be set aside if the jury was separated before reaching agreement. See *Loveacre v. Ellmaker*, (Pa. Sup. Ct. Apr. 1753) (microformed on Pennsylvania State Archives); *King v. Marshall*, (Pa. Sup. Ct. Apr. 1751) (microformed on Pennsylvania State Archives); *Kleine v. Yeriger*, (Berks County Ct. Com. Pl. Nov. 1768) (unpublished manuscript, on file with Berks County Prothonotary's Office).

129. *Quoted in THE REGISTRAR'S BOOK*, *supra* note 78, at 75.

130. *Collett v. Renolds*, (Chester County Eq. Ct. Dec. 1686), *in RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 87; *Yarnall v. Hastings*, (Chester County Eq. Ct. Dec. 1686), *in RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 87.

131. *Yarnall v. Musgrove*, (Chester County Ct. June 1693), *in RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 289-91; *Musgrove v. Yarnall*, (Chester County Eq. Ct. June 1693), *in RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 293.

132. *Jones v. Ascom*, (Pa. Provincial Ct. 1686), *in PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 111.

133. See *Ffarington v. Tatham*, (Bucks County Ct. Mar. 1690/91), *in RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 136; *Jones v. Thomas*, (Philadelphia County Ct. Com. Pl. June 1695) (unpublished manuscript, on file with The Historical Society of Pennsylvania); *cf. Wheeler v. Brindley*, (Bucks County Ct. Dec. 1688), *in RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 96 (plaintiff remits penalty due on bond and requests only actual damages); *Beals v. Richards*, (Chester County Ct. Com. Pl. Oct. 1694), *in RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 332-33 (plaintiff waives damages

Pennsylvania's separate court of equity ceased to function, however, after 1735,¹³⁴ as a result of a dispute between the governor and the provincial assembly over who had power to establish it. The governor claimed power to create a court by prerogative and accordingly refused to act on bills passed by the assembly to create one. Meanwhile, the assembly declared that the governor lacked "sufficient authority to raise a court of equity, which we judge can only be done by a law in this province." The assembly, it should be noted, also expressed its concern that while "a court of law . . . must judge, according to one ordinary rule of the common law," equity "proceedings [were] extraordinary without any certain rule."¹³⁵ In any event, the end of a separate chancery court put an end to the use of appeals to equity as a mechanism for jury control. But a new device quickly came into use—the demurrer to the evidence.

Kuhn v. Hart,¹³⁶ a 1752 case from Lancaster County, with its ethnically mixed population of English and German settlers, is characteristic. The town of Lancaster had set up a lottery to raise money for purchasing a fire engine and had appointed Adam Kuhn and John Hart as the lottery's managers. After the drawing, the winners went to Hart to collect their winnings, but he refused to pay; they then presented their winning tickets to Kuhn, who did pay and who then brought an action on the case against Hart for reimbursement. At the close of the plaintiff's case, in which Kuhn had presented evidence to this effect, the defendant demurred. Hart's counsel, in language important enough to be quoted at length, pleaded

that the evidence and allegations aforesaid alleged were not sufficient in law to maintain the issue joined for the plaintiff, to which the defendant need not nor by the law of the land is bound to give any answer. Wherefore for want of sufficient evidence in this behalf, the defendant demands judgment, that the jurors aforesaid of giving their verdict be discharged, & that the plaintiff be barred from having a verdict &c.¹³⁷

In response to this attempt to override the jury's power, the plaintiff declared "that he had given sufficient matter in evidence, to which the defendant has given no answer."¹³⁸ However, before the court could

in fence dispute case when defendant agrees to move fence and "live lovingly together for the future").

134. See THE REGISTRAR'S BOOK, *supra* note 78, at 76-77. The court had been created in 1720. See *id.* The best discussion of the history of the court is in Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY 255, 266-271 (Donald Fleming & Bernard Bailyn eds., Charles Warren Center for Studies in American History 1971).

135. An Answer from the House of Representatives to the Governor's Message of the Eighteenth Instant, Signed by Andrew Hamilton, Speaker, (Feb. 20, 1735/36) (unpublished manuscript, on file with Historical Society of Pennsylvania).

136. (Lancaster County Ct. Com. Pl. Nov. 1752) (continuance docket, on file with Lancaster County Historical Society).

137. *Id.* (file papers, on file with Lancaster County Historical Society).

138. *Id.*

resolve the demurrer, the parties settled the case.¹³⁹

Demurrers to the evidence raising legal issues occurred with some frequency thereafter.¹⁴⁰ On one demurrer, the Pennsylvania Supreme Court "on argument adjudge[d] the evidence support[ed] the action and that the law [was] with the plaintiff and therefore adjudge[d] for the plaintiff." The issue was of sufficient import for the defendant to appeal to the Privy Council, which affirmed the Supreme Court's holding.¹⁴¹ In another case a decade later, the Supreme Court on argument again ruled "that the law [was] with the plaintiff and [gave] judgment accordingly," and the defendant appealed to the Privy Council.¹⁴²

At the same time as the demurrer to the evidence was blossoming, other lawyers, perhaps with less sophistication, were striving to develop analogous procedures. Over time, some of these emerged as full-fledged mechanisms for controlling jury discretion and hence reigning in the power of local communities. Indeed, by the mid-1770s demurrers were coming to be "disused"¹⁴³ and replaced by these other mechanisms.

Just as the Pennsylvania Court of Equity was closing down, a jury in Lancaster County returned a plaintiff's verdict. The defendant's lawyer moved in arrest of judgment, perhaps on procedural or perhaps on substantive grounds. The court's decision suggests, however, that the grounds were substantive. It noted that

the reasons filed in arrest of judgment being argued and the authorities quoted in behalf of the plaintiff appearing stronger than those produced for the defendant, the reasons are overruled by the court and judgment for the plaintiff.¹⁴⁴

Eight years later, ambiguous motions challenged jury verdicts in two separate actions in Chester County. In the one, after a verdict had been set aside on unspecified grounds, a second jury found a new verdict; the losing party moved for yet another new trial, but the court denied the motion.¹⁴⁵ In the other, a defendant filed reasons to stay a judgment based on a verdict for plaintiff.¹⁴⁶ Nine years after that, just as the Lan-

139. *Id.* (continuance docket, on file with Lancaster County Historical Society).

140. *See, e.g.,* Lessee of Proprietary v. Ralston, 1 U.S. (1 Dallas) 18 (Pa. Sup. Ct. 1773); Hurst v. Dippe, (Pa. Sup. Ct. Sept. 1774) (microformed on Pennsylvania State Archives); Brown v. McMurtrie, (Pa. Sup. Ct. Apr. 1763) (unpublished manuscript, on file with Pennsylvania State Archives, Miscellaneous Papers, 1704-1899, Carton 1, Folder 8); Lessee of Hyam v. Edwards, (Pa. Sup. Ct. Apr. 1759) (microformed on Pennsylvania State Archives); Lessee of Thatcher v. Richardson, (Pa. Sup. Ct. Apr. 1755) (microformed on Pennsylvania State Archives).

141. Nixon v. Long, (Pa. Sup. Ct. Sept. 1764 and Apr. 1765) (microformed on Pennsylvania State Archives).

142. Smith v. Reed, (Pa. Sup. Ct. Apr. 1772) (microformed on Pennsylvania State Archives).

143. Hurst v. Dippe, 1 U.S. (1 Dallas) 20-21 (Pa. Sup. Ct. 1774).

144. McCoan v. Morrrough, (Lancaster County Ct. Com. Pl. Feb. 1734/35) (continuance docket, on file with Lancaster County Historical Society).

145. *See* Pennell v. Brogden, (Chester County Ct. Com. Pl. Aug. 1743 and Nov. 1743) (unpublished manuscript, on file with Chester County Archives).

146. *See* James v. Griffith, (Chester County Ct. Com. Pl. Aug. 1743) (unpublished manuscript, on file with Chester County Archives).

caster Court of Common Pleas was deciding *Kuhn v. Hart*, another defense attorney in Lancaster moved for a new trial and a repleader following a jury verdict for the plaintiff. No record remains of the motion's grounds, but the fact that the lawyer requested a repleader along with a new trial suggests that substance was at issue.¹⁴⁷

It is also likely that substance was at issue in a 1763 Bucks County appeal from a judgment from a justice of the peace. An issue in the case, which at the very least impacted on damages, was whether a bill of costs taxed by a justice of the peace should be given in evidence. After the issue had been "fully debated" by counsel, the court admitted the document in evidence.¹⁴⁸

Substance was clearly at issue in the 1763 Supreme Court case of *Lessee of Fothergill v. Stover*,¹⁴⁹ a suit over title to land. At trial, the court accepted the defendant's offer of an informal letter from the secretary of the land office as proof of his title, and the jury returned a defendant's verdict. The plaintiff, contending that the letter did not suffice to confer title, thereupon filed a bill of exceptions to the court's evidentiary ruling and took an appeal to the Privy Council, which accordingly was forced to rule on the substantive issue whether the informal land-grant procedures adopted in Pennsylvania following William Penn's death sufficed to grant valid title.¹⁵⁰

The procedure of a bill of exceptions, followed in local Pennsylvania practice by a writ of error (rather than an appeal) to bring a case before a higher court, was soon used in *Lessee of Lash v. Kurtz*.¹⁵¹ There the plaintiff at a nisi prius trial sought to introduce a writing that the defendant claimed was fraudulent. When the trial judge admitted the document, the defendant filed his bill of exceptions along with a writ of error to bring the case before the full Supreme Court.

The procedure of exceptions and error was clearly used to reign in a jury in *Hoofnagle v. Weitzel*.¹⁵² At issue was an item of costs added to an award of arbitrators after the award had been finalized. The defendant argued that the addition constituted unlawful tampering; the plaintiff, on the other hand, maintained that granting costs followed automatically

147. *Harris v. Potts*, (Lancaster County Ct. Com. Pl. Aug. 1752) (continuance docket, on file with Lancaster County Historical Society).

148. See *Strickland v. Growdon*, (Bucks County Ct. Com. Pl. June 1763) (continuance docket, on file with Bucks County Historical Society); cf. *Tredyffrin v. Charlestown*, (Chester County Quarter Sessions Aug. 1762) (microformed on Chester County Archives), a poor law case that raised the issue whether residents of the towns in litigation could be compelled to testify. After a witness was offered, opposing counsel "objected and after argument & solemn debate the court" gave its "opinion."

149. 1 U.S. (1 Dallas) 6, 7 (Pa. Sup. Ct. 1763).

150. The procedural context and the substantive issues are laid out in *The Respondent's Case on Appeal to the Privy Council, July 1766*, in *Miscellaneous Legal Papers* (unpublished manuscript, on file with Historical Society of Pennsylvania).

151. (Pa. Supp. Ct. cc. May 1773) (unpublished manuscript, on file with Pennsylvania State Archives, Nisi Prius Records, 1764-1775. Box 1, Folder: Berks County Part 2).

152. (Pa. Sup. Ct. 1774) (unpublished manuscript, on file with Pennsylvania State Archives, Certiorari and Habeas Corpus Papers, 1774, folder 2).

from the arbitration award and hence that it was appropriate to add them. The court agreed with the plaintiff as a matter of law and refused to allow evidence of tampering to be presented to the jury.

A third writ of error in the 1770s claimed that a judgment below was contrary to "the Laws of . . . England and of this Province of Pennsylvania,"¹⁵³ while a fourth rested on an exception to a trial court's admission of seemingly dispositive evidence—sufficiently so that its admission warranted an appeal to the Privy Council.¹⁵⁴ A fifth sought to impeach a judgment below on procedural grounds, in that it had been entered when no judges were present on the bench.¹⁵⁵ Finally, a number of cases in the 1760s and 1770s involved motions in arrest of judgment on unspecified grounds, perhaps substantive but perhaps procedural.¹⁵⁶

Whatever the ambiguities, it seems clear that by the 1770s Pennsylvania's lawyers and judges had developed a number of mechanisms—the demurrer to the evidence, the writ of error and the bill of exceptions, and perhaps, the motion in arrest of judgment—to deny lawfinding power to juries and place it in the bench's hands. They also had one other device—the special verdict—which functioned, however, in a different fashion.

Special verdicts were an old form of procedure, in which a jury merely found facts without reaching any judgment about the case's outcome. Their use in Pennsylvania dated back to the early eighteenth century¹⁵⁷ and occurred continually thereafter.¹⁵⁸ But they appear to have been used only when both parties not only agreed to have the court apply the law to the facts but also were willing to stipulate the facts that the jury would find.¹⁵⁹ Thus, the special verdict appears to have been little more

153. *New v. Haffnet*, (Pa. Sup. Ct. 1771) (unpublished manuscript, on file with Pennsylvania State Archives, Certioraries & Habeas Corpus, 1679-1772, Carton 2, Folder 10: 1771).

154. *Sniepers v. Logan*, (Pa. Sup. Ct. Apr. 1773) (microformed on Pennsylvania State Archives).

155. *Betz v. Graffe*, (Pa. Sup. Ct.) (unpublished manuscript, on file with Pennsylvania State Archives, Certioraries & Habeas Corpus From 1753-1768, Folder 1: 1753-1761); *see also* *House v. Taggart*, (Pa. Sup. Ct. Sept. 1775) (microformed on Pennsylvania State Archives) (after hearing counsel court rules no error exists).

156. *See* *Starrett v. Chambers*, (Pa. Sup. Ct. Apr. 1760) (microformed on Pennsylvania State Archives); *Harmony v. Marks*, (Berks County Ct. Com. Pl. May 1769) (microformed on Berks County Historical Society); *Peaceable v. Gerhardt*, (Berks County Ct. Com. Pl. May 1769) (microformed on Berks County Historical Society); *Glinick v. Derr*, (Bucks County Ct. Com. Pl. June 1775) (continuance docket, on file with Bucks County Historical Society).

157. For one old case, *see* *Legaw v. Applegarth*, (Philadelphia County Ct. Com. Pl. Mar. 1716/1717) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

158. *See, e.g.,* *Lessee of Leech v. Armitage*, (Pa. Sup. Ct. Apr. 1775) (unpublished manuscript, on file with Pennsylvania State Archives, Special Verdicts, Carton 10, Folder: Special & Privy Verdicts 1775); *Leech v. Armitage*, (Pa. Sup. Ct. Sept. 1755) (microformed on Pennsylvania State Archives); *Stevenson v. Pemberton*, (Pa. Sup. Ct.) (unpublished manuscript, on file with Pennsylvania State Archives, Certioraries & Habeas Corpus From 1753-1768, Folder 1: 1753-1761).

159. *See* *Legaw v. Applegarth*, (Philadelphia County Ct. Com. Pl. Mar. 1717) (unpublished manuscript, on file with The Historical Society of Pennsylvania), where the court

than a means for parties to present an agreed statement of facts on which they wanted the court to determine the law.¹⁶⁰

III.

Unlike judges in other colonial jurisdictions, most notably Massachusetts, who had ceded lawfinding power to juries, the judges of Pennsylvania reserved that power to themselves and restricted juries only to finding facts. The decision to empower judges was an early one, apparently taken by William Penn himself and a close group of councillors who refused to convict Chief Justice Nicholas Moore on the assembly's charge that he had improperly dictated law to a jury. Once this decision was made in the 1680s, the courts never looked back on it and never reversed it. As Chief Justice Benjamin Chew announced less than two years before Americans declared their independence in Philadelphia, "the law [was] not uncertain": it was "a settled rule, that courts of law determine law; a jury facts. Upon which maxim," he added, "every security depends in an English country."¹⁶¹ As long as counsel took the necessary steps to make it so, "the opinion of the court" on points of law was "conclusive to the jury."¹⁶²

The assumption of lawfinding power by judges made sense in light of the function of courts in William Penn's province. Quakers in early Pennsylvania were expected to resolve disputes among themselves in their yearly, quarterly, and monthly meetings. But Quakers were not the province's only settlers. Courts were needed to resolve disputes involving non-Quakers, to impose the norms of right-thinking people on those non-Quakers, and to maintain social stability as the percentage of the population that did not belong to the Society of Friends grew.¹⁶³ Judges appointed by the proprietor or his governor could more reliably control non-Quakers than juries that, although often packed with Quakers, might sometimes consist of many non-Quakers.¹⁶⁴

ordered counsel for one party to deliver his notes for a special verdict to counsel for the other party so that the latter could agree. Note might also be taken here of the use of struck juries, especially struck juries of merchants. *See, e.g.,* Shewell v. Nusum, (Philadelphia County Ct. Com. Pl. Mar. 1768) (unpublished manuscript, on file with The Historical Society of Pennsylvania); Ehlors v. Hull, (Philadelphia County Ct. Com. Pl. Mar. 1757) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

160. *Cf.* Hill v. Thompson, (Bucks County Ct. Com. Pl. Mar. 1769) (continuance docket, on file with Bucks County Historical Society) (parties agree to have court decide case on basis of facts stated in declaration).

161. Hurst v. Dippo, 1 U.S. (1 Dallas) 20-21 (Pa. Sup. Ct. 1774).

162. Anonymous, 1 U.S. (1 Dallas) 20 (Pa. Sup. Ct. 1773).

163. *See* OFFUTT, JR., *supra* note 8, at 2-3, 9, 23-24, 146-47.

164. *See id.* at 42-60, for a statistical analysis of Quaker control of the bench and of how the Quaker elite used that control to pack juries "with an aplomb that English sheriffs would have envied." *Id.* at 60. Nonetheless, the occasional jury that could not be packed might have needed to be controlled by some other means. On the Quaker elite's continued dominance throughout the colonial period both of the Pennsylvania economy and of Pennsylvania politics, *see* FREDERICK B. TOLLES, MEETING HOUSE AND COUNTING HOUSE: THE QUAKER MERCHANTS OF COLONIAL PHILADELPHIA, 1682-1763 49, 116-122 (University of North Carolina Press 1948).

Indeed, it is not surprising that, after the abolition of Pennsylvania's Court of Equity, many of the earliest cases developing new forms of jury control arose in Lancaster County, a then recently settled, ethnically diverse locale with a large number of German settlers. It also is not surprising that one of the early cases, *Kuhn v. Hart*, arose out of a lottery—a practice of which Quakers were suspicious¹⁶⁵ but which others in Lancaster accepted. The *Kuhn* case is a classic example of where reliable judges probably were needed to control potentially unreliable jurors.

Having empowered themselves to determine the law's substance, Pennsylvania's judges used that law as they needed it—to control the province and maintain its stability. Seizure of lawfinding power from juries necessarily meant that judges would have to make law; making law necessarily meant that judges would decide issues of social policy; and deciding questions of policy necessarily meant the assumption of broad powers of governance, especially in a colony where legislative and executive authorities were weak and administrative bureaucracies, nonexistent. Of course, the judges, many of whom were members of the Quaker elite, used their powers to maintain the status quo (i.e., to maintain social stability) and otherwise advance elite interests.

A.

A necessary step in preserving social order and stability was maintaining judicial authority, and the judges acted forcefully to do so. They did small things, such as fining men who failed to serve on grand juries¹⁶⁶ or petit juries,¹⁶⁷ who failed to appear when summoned as witnesses,¹⁶⁸ who assaulted court officials,¹⁶⁹ or who refused to serve as such officials¹⁷⁰ or neglected to perform their duties.¹⁷¹ They punished a supervisor of the

165. See "From our Yearly Meeting held at Philadelphia . . . To the several Quarterly and Monthly Meetings thereunto belonging," (1719), at 31 (unpublished manuscript on file with Friends Library, [hereinafter YEARLY MEETING AT PHILADELPHIA]).

166. See, e.g., *Queen v. Harding*, (Bucks County Quarter Sessions Sept. 1704) (unpublished manuscript, on file with Bucks County Historical Society); *King v. Deterick*, (Lancaster County Quarter Sessions Aug. 1771) (unpublished manuscript, on file with Lancaster County Historical Society).

167. See, e.g., *King v. Guthry*, (Cumberland County Quarter Sessions Apr. 1761) (unpublished manuscript, on file with Cumberland County Historical Society); *King v. Ogden*, (Philadelphia Mayor's Ct. July 1769) (unpublished manuscript, on file with Historical Society of Pennsylvania). For examples of requests to be excused from attending court, see *George Geary to the Honorable the Judges*, Apr. 6, 1771 (microformed on Pennsylvania State Archives, Pennsylvania Supreme Court Oyer and Terminer Records, File for Philadelphia 1771) (wife about to give birth); *E. Clarkson to Judah Fould*, Apr. 8, 1771 (microformed on Pennsylvania State Archives, Pennsylvania Supreme Court Oyer and Terminer Records, File for Philadelphia 1771) (illness).

168. Cf. *Moore v. Mourer*, (Philadelphia County Ct. Com. Pl. Sept. 1775) (unpublished manuscript, on file with Philadelphia City Archives) (witnesses held in contempt).

169. See *King v. Lee*, (Philadelphia Mayor's Ct. May 1760) (unpublished manuscript, on file with Philadelphia City Archives).

170. See *King v. Cassell*, (Philadelphia County Ct. General Sessions June 1758) (unpublished manuscript, on file with Philadelphia City Archives).

171. See *King v. McClelland*, (Lancaster County Quarter Sessions Aug. 1755) (unpublished manuscript, on file with Lancaster County Historical Society); *King v. Brown*, (Phil-

highways for showing contempt by throwing a court order on the ground¹⁷² and another man for speaking “words” tending “to slight authority,”¹⁷³ while a third was held in contempt for refusing, because of “scruples of conscience,” to testify either upon affirmation or upon “oath in the usual form.”¹⁷⁴ Even a sheriff was fined for being late to court and making the court “wait for him.”¹⁷⁵ Perjury and subornation of perjury were punished more severely, with whippings or time in the pillory,¹⁷⁶ sometimes at the behest of the judges before whom the perjury had occurred.¹⁷⁷ And efforts were made to discourage perjury by allowing only disinterested individuals to be sworn as witnesses.¹⁷⁸

Riot and sedition could be more serious offenses. Nonetheless, many rioters were punished only with small fines,¹⁷⁹ as was a Lancaster County man found guilty of interdenominational vandalism.¹⁸⁰ Two men accused of sedition for “persuading people (contrary to an order of court) not to pay the public levies of this county” likewise got off easily with payment

Philadelphia County Quarter Sessions Sept. 1757) (unpublished manuscript, on file with Philadelphia City Archives); *see also* Motion of Smith, (Cumberland County Quarter Sessions July 1766) (unpublished manuscript, on file with Cumberland County Historical Society) (motion to hold constable in contempt for selling property “under color of an execution” when “he had no such execution or any order”); *cf.* King v. Wilson, (Philadelphia County Quarter Sessions Sept. 1760) (unpublished manuscript, on file with Philadelphia City Archives) (fined for refusing to assist constable).

172. *In re* Moland, (Chester County Quarter Sessions May 1757) (microformed on Chester County Archives); *accord* Motion of Attorney General, (Chester County Quarter Sessions Aug. 1756) (microformed on Chester County Archives) (speaking contemptuous words about justice of the peace); Confession of Thomas, (Chester County Quarter Sessions May 1718) (microformed on Chester County Archives).

173. Confession of Thomas, (Chester County Quarter Sessions May 1718) (microformed on Chester County Archives); *accord* Confession of Moore, (Chester County Quarter Sessions May 1718) (microformed on Chester County Archives) (speaking “lightly of Joseph Jones’s evidence”).

174. King v. Grimes, (Bucks County Quarter Sessions Dec. 1758) (unpublished manuscript, on file with Bucks County Historical Society) (defendant stated “his objections and scruples of conscience against kissing the Book”); *cf.* Revel v. Thacher, (Bucks County Ct. Sept. 1689 and Mar. 1689/90), *in* RECORDS OF THE COURTS OF BUCKS, *supra* note 42, at 110, 211 (fine for “abus[ing] the jury” by calling them “sworn rogues”).

175. King v. Sheriff, (Philadelphia County Ct. Sept. 1685) (unpublished manuscript, on file with the Historical Society of Pennsylvania).

176. *See* King v. Douglass, (Philadelphia County Quarter Sessions May 1737), *in* Philadelphia Court Papers, 1697-1821 (unpublished manuscript, on file with The Historical Society of Pennsylvania); King v. Norris, (Philadelphia Mayor’s Ct. Apr. 1762) (unpublished manuscript, on file with Philadelphia City Archives).

177. *See* King v. Kelly, (Pa. Sup. Ct. Oyer & Terminer Lancaster County 1771) (microformed on Pennsylvania State Archives) (judicial order for arrest of crown witness against Kelly).

178. *See* Wallace v. Stiles, (Pa. Sup. Ct. Apr. 1763), *in* John Dickinson, *Laws and Opinions of Cases*, vol. 2 (unpublished manuscript, on file with Historical Society of Pennsylvania).

179. *See, e.g.*, King v. Noland, (Bedford County Quarter Sessions Oct. 1775) (unpublished manuscript, on file with Bedford County Clerk’s Office); King v. Armstrong, (Cumberland County Quarter Sessions Jan. 1768) (unpublished manuscript, on file with Cumberland County Historical Society); King v. Eaton, (Philadelphia County Quarter Sessions Mar. 1756) (unpublished manuscript, on file with Philadelphia City Archives).

180. *See* King v. Stone, (Lancaster County Quarter Sessions May 1754) (unpublished manuscript, on file with Lancaster County Historical Society) (fined for destroying the door of Dutch Lutheran Church).

only of fees upon their "submission" and request for "mercy,"¹⁸¹ as did a man who was indicted "for spreading false news" who agreed to "do[] so no more."¹⁸² On the other hand, a rioter who attacked a sheriff received a fine of £50,¹⁸³ while another, who was part of a mob of 300 people, was fined £70.¹⁸⁴ Similarly, a man found guilty by a jury of sedition was sentenced to an hour in the pillory and fifteen lashes.¹⁸⁵ And a lawyer who wrote and published a "false, scandalous, libellous, and infamous manuscript" "reflecting on several magistrates . . . & tending to promote party rage and discord" was suspended from practice.¹⁸⁶

Judges also played dominant roles in connection with taxation and elections. In an ideal world, grand juries proposed taxes and the Court of Quarter Sessions approved them and issued warrants for their collection,¹⁸⁷ or, as another entry put it, "this Court with the approbation of the grand jury have thought good to order that a tax be raised."¹⁸⁸ But often the world was not ideal. Grand juries could become resistant and demand, as one did, an accounting of how tax monies were spent.¹⁸⁹ Or the county assessors might refuse to act after a grand jury and the justices had agreed and thereby delay collecting a tax for several months until a special tax collector was appointed.¹⁹⁰

In the end the judges usually won. Thus, when one grand jury refused to agree to a tax, it was dismissed and told to return a month later "in

181. *King v. White*, (Chester County Ct. Dec. 1689), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 184.

182. *King v. Keach*, (Chester County Ct. Sept. 1687), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 104.

183. *See King v. Weimer*, (Lancaster County Quarter Sessions Nov. 1736), in *LANCASTER COUNTY PENNSYLVANIA QUARTER SESSIONS ABSTRACTS (1729-1742)* 55 (Gary T. Hawbaker ed. privately published 1986) [hereinafter *LANCASTER COUNTY QUARTER SESSIONS*].

184. *See King v. Crever*, (Lancaster County Quarter Sessions Nov. 1736), in *LANCASTER COUNTY QUARTER SESSIONS*, *supra* note 183, at 55-56.

185. *See King v. Cally*, (Lancaster County Quarter Sessions. May 1757) (unpublished manuscript, on file with Lancaster County Historical Society). *See also King v. Hay*, (Bedford County Quarter Sessions Apr. 1774) (unpublished manuscript, on file with Bedford County Clerk's Office) (fine of £10 on conviction for libel).

186. *Suspension of Henderson*, (Lancaster County Ct. Com. Pl. May 1764) (continuance docket, on file with Lancaster County Historical Society).

187. *See Presentment of Grand Jury*, (Bucks County Quarter Sessions Mar. 1703/04) (unpublished manuscript, on file with Bucks County Historical Society); *Order re Arrears of Tax*, (Bucks County Ct. Oct. 1690), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 130.

188. *Order re Taxation*, (Bucks County Ct. Jan. 1689/90), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 121; *cf. Order re Public Notice*, (Bucks County Ct. Jan. 1693/94), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 282 (desiring "all persons that are concerned in the county" to come to the courthouse and agree to a tax); *Appeal of Fawkes*, (Chester County Quarter Sessions May 1776) (unpublished manuscript, on file with Chester County Archives) (appeal from settlement of town supervisor's accounts). The judiciary also had jurisdiction over challenges to the validity of taxes. *See Gray v. Bittinger*, (York County Quarter Sessions Jan. 1770) (unpublished manuscript, on file with York County Archives).

189. *See Presentment of Grand Jury*, (Chester County Ct. Dec. 1689), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 193-94.

190. *See Presentment of Grand Jury*, (Bucks County Quarter Sessions Dec. 1708 and Mar. 1708/09) (unpublished manuscript, on file with Bucks County Historical Society).

order to agree about the remainder of the county tax.”¹⁹¹ Another Sessions court had to deal with a messy situation arising when owners and lessees of a tract of marshland could not agree on how to apportion a tax between them, but the court ultimately appointed auditors who returned a report resolving the situation, which the court confirmed six months later.¹⁹²

In the end, though, courts striving to raise taxes had to confront the poverty of the tax base, as, for example, when a small rural town proclaimed itself “so extremely poor as not to be able to support & maintain” one of its paupers. There was no easy answer and no law to help. But Northampton County’s justices had power to craft social policy, and that is exactly what they did, when they imposed a tax on the neighboring, wealthier towns of Allentown and Bethlehem to pay one-third each for the pauper’s support.¹⁹³ In doing so, the justices created law, and another town that had supported a pauper for fourteen years¹⁹⁴ claimed in reliance on the precedent that it also was too poor to continue supporting her. Bound by its recent precedent, the court ordered a neighboring town to contribute.¹⁹⁵

Judges exercised even greater power in dealing with disputed election returns. In the ordinary course of events, one of the duties of judges was to certify election results.¹⁹⁶ But, at times they assumed far greater powers. When a sheriff reported, for example, that the “tumultuous behavior of sundrie persons at the last election” of county commissioners and assessors resulted in ballots “not having been delivered to the inspectors on three several pieces of paper” as directed by law and thus prevented him from making a proper return, the court simply directed the incumbent commissioners and assessors to serve another term.¹⁹⁷ Similarly, when an election official reported that his ill health prevented him from returning Jonathan Jones as “duly chosen supervisor of the public roads,” the court appointed Jones;¹⁹⁸ and when elected highway surveyors refused and ap-

191. Order re Grand Jury, (Philadelphia County Quarter Sessions Sept. 1695), in BRONNER II, *supra* note 62, at 480.

192. See Petition of Morton, (Chester County Ct. Com. Pl. Feb. 1770 and Aug. 1770) (unpublished manuscript, on file with Chester County Archives).

193. Petition of Township of Moore, (Northampton County Quarter Sessions Dec. 1766) (unpublished manuscript, on file with Northampton County Archives).

194. See Petition of Winck, (Northampton County Quarter Sessions Mar. 1753) (unpublished manuscript, on file with Northampton County Archives), which ordered the Overseers of the Poor of Low Hill to support Winck’s daughter.

195. See Petition of the Overseers of the Poor of Low Hill, (Northampton County Quarter Sessions Mar. 1767) (unpublished manuscript, on file with Northampton County Clerk’s Archives).

196. See, e.g., Indenture of Sheriff, (Bedford County Quarter Sessions Oct. 1772) (unpublished manuscript, on file with Bedford County Clerk’s Office); Motion of Pyle, (Chester County Quarter Sessions Nov. 1722) (microformed on Chester County Archives).

197. Remonstrance of Hamilton, (York County Quarter Sessions Oct. 1750) (unpublished manuscript, on file with York County Archives); cf. Bush v. Gore, 531 U.S. 1046 (2000), where the presence of ballots in improper form induced a 5-4 majority of the Supreme Court to put a new group of officials in power.

198. Suggestion of Jones, (Berks County Quarter Sessions May 1774) (microformed on Berks County Historical Society).

peared unable to assume their offices, the court appointed others in their stead.¹⁹⁹

The most extreme assertion of judicial power to ignore the electoral process occurred in Philadelphia. Charles Brockden was the duly chosen recorder of deeds for Philadelphia, but William Parr, who wanted his job, accused him of being too old and infirm to perform the job properly. The court appointed a committee to seek Brockden's response to Parr's charge and to inspect his records. Brockden sent his deputy to answer, but the court apparently refused to hear him because he had not taken any oath or given any security for his performance of Brockden's job. The court also inspected Brockden's records. It found they were "kept in an irregular and disorderly manner" and that Brockden no longer possessed "the capacity and ability . . . to execute the said office." It accordingly removed him and replaced him with William Parr.²⁰⁰

Pennsylvania judges, on occasion, acted with excessive assertiveness in a miscellaneous variety of other settings. In one case, for instance, the province's chief justice was said to have impeached a county court judgment not properly before him in "a most ambitious, insulting, & arbitrary way,"²⁰¹ while a county court ordered a justice of the peace whose judgment was on appeal to "assign his reasons to the court to support his judgment."²⁰² In a third case, judges acted without any basis in law on a complaint from the neighbors of Owen McDaniels that he "had arms which they were afraid of"; the court confiscated the weapons and prohibited McDaniels from entertaining strangers or letting them abide in his house.²⁰³

B.

It was rare, however, for Pennsylvania courts to aggrandize their power by acting without a basis in law. The real power of the courts lay in their capacity to make and enforce law—to determine issues of public policy in a way that would obligate the people of the province to obey. Pennsylvania's judges asserted their lawmaking power emphatically against all competing sources of power; they successfully laid claim to the final word. In the process, they created a body of doctrine that maintained socioeconomic stability and advanced the interests of the Quaker elite from which they were so heavily drawn.

Perhaps the most impressive move of Pennsylvania's judges was to take on Great Britain. Thus, they held that the Statute of Frauds, enacted by

199. Order re Lancaster Elections, (Lancaster County Quarter Sessions May 1763) (unpublished manuscript, on file with Lancaster County Historical Society).

200. Petition of Parr, (Philadelphia County Quarter Sessions Sept. 1767) (unpublished manuscript, on file with Philadelphia City Archives).

201. Proprietor v. Moore, (Pa. Legislature 1685), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 39, 42.

202. Brown v. Cooper, (Bucks County Ct. Com. Pl. Dec. 1742) (continuance docket, on file with Bucks County Historical Society).

203. Complaint of Heyes, (Chester County Ct. Sept. 1796), in RECORDS OF THE COURTS OF CHESTER, *supra* note 29, at 393.

Parliament in 1677, did not extend to Pennsylvania. The basic rule about the overseas applicability of Parliamentary legislation was that statutes enacted before the settlement of a colony applied to that colony, whereas statutes adopted after settlement did not.²⁰⁴ The Pennsylvania Supreme Court interpreted that rule to mean that, although the Statute of Frauds predated Charles II's 1681 charter to William Penn, it still was not applicable because it was enacted after the Duke of York had assumed jurisdiction over what later became Pennsylvania.²⁰⁵ This was a plausible but by no means compelling interpretation of the basic rule, and it was one that might have antagonized officials of the crown in London if they had cared about the Statute of Frauds.

They probably did not care. But the crown had to have been concerned whether the overseas colonies would comply with an act of Parliament prohibiting the arrest of military personnel in civil actions—an act designed to leave soldiers and sailors “at liberty to perform [their] duty in his Majesty’s service.” The Pennsylvania Supreme Court accordingly held that the act did “extend to this province.” But it also held that the plaintiff’s “cause of action [was] just & [could] not be determined in th[e] summary way” that would be required if the defendant could not be kept in jail while the plaintiff prepared his case. It therefore “ordered, that the defendant be committed to the custody of the sheriff of the city & county of Philadelphia.”²⁰⁶

The British military also had to be concerned about colonial interference with its efforts to enlist men into military service. One case from Philadelphia, for instance, kept the military from enlisting a prisoner in the city’s jail for two key years during the French and Indian War, from 1757 to 1759.²⁰⁷ To the extent that crown officials in London paid attention to such individual cases, they could not have been pleased.

The Supreme Court also rejected the crown’s position on the issue whether “a general warrant of assistance” should be granted to “customs-house officers.” Upon “considering the several acts of Parliament relating to this subject,” the judges

were unanimously of opinion that such a general warrant could not legally be granted, but that the custom house officers should apply for warrants of assistance from time to time as special occasions should call for them.²⁰⁸

The Pennsylvania court thereby made it significantly more difficult to enforce the Navigation Acts and whatever tax laws Parliament might

204. *See Boehm v. Engle*, 1 U.S. (1 Dallas) 15-16 (Pa. Sup. Ct. 1767).

205. *Anonymous*, 1 U.S. (1 Dallas) 1 (Pa. Sup. Ct. 1754).

206. *Lownes v. Price*, (Pa. Sup. Ct. Apr. 1742) (microformed on Pennsylvania State Archives).

207. *See Cochrane v. Sheriff of Philadelphia*, (Pa. Sup. Ct. 1757-1759) (microformed on Pennsylvania State Archives).

208. *Motion of Attorney General*, (Pa. Sup. Ct. Apr. 1769) (microformed on Pennsylvania State Archives).

choose to enact.²⁰⁹

*Lessee of Albertson v. Robeson*²¹⁰ raised an issue about the effect of the Privy Council's disallowance of an act of the Pennsylvania assembly. The province's Supreme Court held first that the colonial act was valid and of lawful effect until it was disallowed. But that ruling only raised the next question—what counted as the date of disallowance? Was the relevant date that of the Privy Council's action, or the date on which news of that action reached Philadelphia? The court, applying Pennsylvania law expansively and minimizing the impact of the crown's actions in London, held that Pennsylvania's laws remained in effect until news of their disallowance reached Philadelphia. One suspects, again, that crown officials may not have been pleased, although subsequent professional opinion in England accepted Pennsylvania's approach as legitimate.²¹¹

Pennsylvania judges also were ready to reject English common-law rules whenever those rules thwarted their sense of justice. Thus, when a defendant offered to prove a want of consideration as a defense in a suit of debt on a bond, the plaintiff responded that, at common law, "the consideration of a bond is not enquirable into, the passing the bond being a gift in law." He cited four English cases in support of his position.

To this it was answered, and so ruled by the court, that there being no Court of Chancery in this province, there is a necessity, in order to prevent a failure of justice, to let the defendants in under the plea of payment to prove mistake or want of consideration: And this the Chief Justice said he had known to be the constant practice of the courts of justice in this province for thirty nine years past.²¹²

Four years later a lower court agreed.²¹³

The Pennsylvania Supreme Court dealt with the statutory output of its own legislature in the same unfettered fashion that it dealt with the law of England. In fact, the colonial court in many respects adopted a free-wheeling approach similar to that of modern courts. Thus, in one case the court rejected a claim advanced by a criminal defendant that it should adopt a plain-meaning rule in interpreting statutes. Instead, it turned to the standard method of construing documents—authorial intention,²¹⁴

209. *But see* *Lessee of Lewis v. Stammers*, 1 U.S. (1 Dallas) 2 (Pa. Sup. Ct. 1759); *Lessee of Hyam v. Edwards*, 1 U.S. (1 Dallas) 2 (Pa. Sup. Ct. 1759); *Lessee of Hyam v. Edwards*, 1 U.S. (1 Dallas) 1 (Pa. Sup. Ct. 1759) (allowing into evidence copies of wills, death records, and deeds that had been properly authenticated in England). These recognitions of English law facilitated transactions between people in England and people in Pennsylvania and thereby furthered British imperial policy.

210. 1 U.S. (1 Dallas) 9 (Pa. Sup. Ct. 1764).

211. *See* JOSEPH H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 524 (Columbia University Press, 1950).

212. *Swift v. Hawkins*, 1 U.S. (1 Dallas) 17 (Pa. Sup. Ct. 1768); *accord* Advice of Benjamin Chew on case of *Grubb v. James*, in "Chief Justices of the Supreme Court of Pennsylvania" (unpublished manuscript, on file with The Historical Society of Pennsylvania).

213. *Bavington v. Bavington*, (Bucks County Ct. Com. Pl. June 1772) (continuance docket, on file with Bucks County Historical Society).

214. *See* Advice of Benjamin Chew on case of *Grubb v. James*, in "Chief Justices of the Supreme Court of Pennsylvania" (unpublished manuscript, on file with the Historical Soci-

reasoning that the colonial assembly “could never [have] intend[ed]” that “such a construction ought to be put on the act as that public justice may . . . be eluded” or that “offenders of the highest nature would escape being brought to justice.”²¹⁵ On the other hand, when an attorney seven years later urged the court to construe an act on the basis of “the intention of the legislature, considering the whole of the act of Assembly together,” the court refused because “the words of the act of Assembly were plain and express.”²¹⁶ In yet another case, the judges avoided the plain meaning of an act, which did not provide for appeals in a certain category of case, because “review[s], though not taken notice of in the act of Assembly, had always been granted” and thus had “become a matter of right.”²¹⁷ The legal realists were not the first to appreciate how the maxims of statutory construction can be manipulated to lead a judge to whatever result she wants; the Pennsylvania Supreme Court manipulated them nearly two centuries earlier.

Judges also were prepared to fill in gaps that the legislature either consciously or unconsciously had left open. Thus, they fined a widow 10s. “for keeping and harboring dogs that worrie[d] and kill[ed] her neighbor’s hogs”; it did not help her cause that she placed the dogs in the care of an “Indian boy” who was her servant.²¹⁸ Nor did it trouble the court that its treatment of the widow was unprecedented as long as it led to a result the court wanted to reach.

C.

The results that Pennsylvania judges typically wanted to reach were those that advanced the interests of existing property holders and thereby maintained the province’s socioeconomic stability. One of their basic principles was that “it would be very mischievous now to overturn” practices that had “generally prevailed in this province, from its first settlement, and undergone from time to time the notice of the courts of justice.”²¹⁹ Thus, they held that a property owner whose land was taken for a road was entitled to just compensation.²²⁰ They also held that a *feme covert’s* joining in a conveyance, but without an acknowledgment or private examination before a justice of the peace, sufficed to convey her

ety of Pennsylvania) (declaring that a will should be read in accordance with “the testator’s intention” as revealed by “the plain & natural interpretation of the whole will”).

215. *King v. Lukens*, 1 U.S. (1 Dallas) 5 (Pa. Sup. Ct. 1762).

216. *Petition for Sale of Hasell’s Real Estate*, (Pa. Sup. Ct. Apr. 1769) (microformed on Pennsylvania State Archives). Another case with similarly formalistic language was *Petition of Donaldson*, (Pa. Sup. Ct. Apr. 1755) (microformed on Pennsylvania State Archives), where the court ruled that “spending money on the new building mentioned in the accounts” of auditors was “contrary to law.”

217. *Confirmation of King’s Road*, 1 U.S. (1 Dallas) 11 (Pa. Sup. Ct. 1764).

218. *King v. Neales*, (Chester County Ct. Dec. 1787), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 115.

219. *Davey v. Turner*, 1 U.S. (1 Dallas) 11, 13-14 (Pa. Sup. Ct. 1764).

220. *See Application of Noonan*, (Pa. Sup. Ct. Sept. 1765) (microformed on Pennsylvania State Archives).

interest in land she brought to a marriage;²²¹ they observed

that it had been the constant usage of the province formerly for *femes covert* to convey their estates in this manner, without an acknowledgment or separate examination; and that there were a great number of valuable estates held under such titles, which it would be dangerous to impeach at this time of day.²²²

Similarly, the Pennsylvania courts held that an informal letter from the secretary of the land office sufficed to convey title to land; as the court noted, "a great part of the province had been settled" on the basis of grants arising out of such letters, and "the general conveniency" required that the letters continue to be given effect.²²³ In another case, the Supreme Court upheld a title based on twenty years of possession plus hearsay testimony that the land had been conveyed to the party in possession.²²⁴ Finally, it held that an ancient deed authenticated only by a witness who claimed to recognize the grantor's handwriting constituted sufficient evidence of title.²²⁵

Another example of the courts favoring established interests was *England v. Mullinax*,²²⁶ a case brought by a plaintiff who had been licensed to keep a ferry over the Schuylkill River against a defendant who had set up a competing ferry. Most people in two districts and some in a third wanted to hire the defendant in preference to the plaintiff, and the defendant stated that "he knew no reason why he might not work for his living as well as others." But the court knew otherwise. It sought to establish a harmonious and stable society rather than an efficient and competitive one, and it accordingly directed the sheriff to seize the defendant's boat and obtain security from him not to operate any ferry.²²⁷ Courts also took it upon themselves to set the rates that ferrymen could charge.²²⁸ Not wanting to upset expectations arising out of past efforts to develop the province, the Pennsylvania Council similarly required landowners who recovered land from trespassers to compensate them for any improvements they had made on the land.²²⁹

The Supreme Court took the same approach in commercial cases. An important issue was whether "the strict rules of law with regard to evi-

221. See *Davey v. Turner*, 1 U.S. (1 Dallas) 11 (Pa. Sup. Ct. 1764).

222. *Lessee of Lloyd v. Taylor*, 1 U.S. (1 Dallas) 17 (Pa. Sup. Ct. 1768).

223. *Lessee of Fothergill v. Stover*, 1 U.S. (1 Dallas) 6-7 (Pa. Sup. Ct. 1763); *accord Lessee of Flecher v. McDowell*, (Pa. Sup. Ct. Apr. 1762), in John Dickinson, *Laws and Opinions of Cases*, vol. 2 (unpublished manuscript, on file with The Historical Society of Pennsylvania).

224. See *Lessee of Richardson v. Campbell*, Pa. Sup. Ct. Apr. 1763, in John Dickinson, *Laws and Opinions of Cases*, vol. 2 (unpublished manuscript, on file with The Historical Society of Pennsylvania).

225. *Lessee of Thomas v. Horlocker*, 1 U.S. (1 Dallas) 14 (Pa. Sup. Ct. 1766).

226. (Pa. Council 1693/94), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 56.

227. *Id.* at 57.

228. See *Petition of Chadds*, (Chester County Quarter Sessions Aug. 1737) (microformed on Chester County Archives).

229. See *Bellamy v. Watson*, (Pa. Council 1683), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 28.

dence ought . . . to be extended to mercantile transactions.” The argument was “that this being a mercantile transaction, such evidence as merchants usually admit . . . should be received.” The court agreed.²³⁰ Not only did it want to affirm the existing expectations of merchants about how they could do business; it also wanted to establish rules of law that would help entrepreneurs bring business to Pennsylvania and thereby develop its economy and bring wealth to its inhabitants. As the judges had known throughout Pennsylvania’s history, they could not establish rules if “merchants would be discouraged” by those rules “from coming here with their vessels etc.”²³¹

The significance that the courts attached to assisting people in earning a living emerged in a case where a minister was indicted for marrying a man to a woman who had another husband living. The attorney general demanded an immediate trial, but the defendant sought a postponement to obtain a material witness. Although such delays normally were not permitted in criminal cases, it was “granted by the court, the defendant being a clergyman, and his living depending on his acquittal.” But the court, much like a modern one with which many readers will be familiar,²³² carefully “declared” its decision “not to be a precedent.”²³³

The most important step, however, that courts took to promote Pennsylvania’s economic development was to propound clear, fixed rules to facilitate the collection of debts. One rule, for example, permitted a sheriff who attached perishable goods to sell them immediately for the benefit of the creditor, even prior to judgment.²³⁴ Real property also was subject to sale to pay debts,²³⁵ as, of course, were farm animals.²³⁶ Money and goods of a debtor in the hands of another could be garnished by a creditor, unless the goods had been transferred to the other in payment of a preexisting debt.²³⁷ Debtors could be barred from leaving the province

230. *Riche v. Broadfield*, 1 U.S. (1 Dallas) 16-17 (Pa. Sup. Ct. 1768).

231. *Proprietor v. Keith*, (Philadelphia County Quarter Sessions 1692), in *PENNYPACKER’S COLONIAL CASES*, *supra* note 52, at 117, 134 (testimony of witness). For another commercial case, see *Wharton v. Strettle*, (Pa. Sup. Ct. Apr. 1763), in John Dickinson, *Laws and Opinions of Cases*, vol. 2 (unpublished manuscript, on file with The Historical Society of Pennsylvania) (holding that owner of vessel who purchased it at a salvage auction following loss could recover only amount of actual loss, not the face value of insurance that had been purchased before voyage).

232. See *Bush v. Gore*, 531 U.S. 1046 (2000).

233. *King v. Rapp*, 1 U.S. (1 Dallas) 9 (Pa. Sup. Ct. 1764).

234. See, e.g., *Carson v. McMahon*, (Chester County Ct. Com. Pl. May 1735) (continuance docket, on file with Chester County Archives); *Mylon v. Paterson*, (Lancaster County Ct. Com. Pl. Nov. 1732) (continuance docket, on file with Lancaster County Historical Society).

235. See, e.g., *Pidgeon v. Gould*, (Bucks County Ct. Com. Pl. Dec. 1730) (appearance docket, on file with Bucks County Historical Society).

236. See, e.g., *Moore v. Jones*, (Chester County Ct. Com. Pl. Aug. 1716) (unpublished manuscript, on file with Chester County Archives).

237. See *Stevenson v. Pemberton*, 1 U.S. (1 Dallas) 3-4 (Pa. Sup. Ct. 1760); *accord*, *Fridley v. Shank*, (Lancaster County Ct. Com. Pl. Nov. 1753) (continuance docket, on file with Lancaster County Historical Society).

before they had paid their debts.²³⁸ But a debtor could not be served with process while attending court under summons in another case.²³⁹

A particularly useful procedure in the hands of creditors was known as debt "sans breve"²⁴⁰—debt without writ. The procedure was used when a borrower, at the time he took his loan, appointed an attorney chosen by and under the control of the lender and authorized that attorney to confess judgment on his behalf if he did not repay on time. When the debtor failed to pay, the creditor simply had to file a suit, without having to use any writ, and a judgment by confession automatically followed. The procedure was used thousands of times in the eighteenth century.

Often, however, debtors were insolvent, and creditors then had to turn to other remedies. A group of creditors could jointly petition a court to appoint auditors to collect a debtor's assets and "settle the . . . shares" of the creditors "proportion[ally]."²⁴¹ In dividing a debtor's assets, auditors were bound to follow the law; if they did not, their report would be set aside as "not legal" by the court that had appointed them.²⁴²

A creditor also could attempt to keep an insolvent debtor in jail. A debtor then had two options. The first was to be sold into servitude either to the creditor or to some third party who would pay enough to square the debt. Typically such servitude lasted for several years.²⁴³ One

238. See THE REGISTRAR'S BOOK, *supra* note 78, at 69. A procedure for deposing of witnesses about to leave the jurisdiction also was frequently employed. See, e.g., *Richardson v. Donaldson*, (Lancaster County Ct. Com. Pl. Aug. 1766) (continuance docket, on file with Lancaster County Historical Society); *Baynton v. Bartholomew*, (Philadelphia County Ct. Com. Pl. Mar. 1766) (unpublished manuscript, on file with The Historical Society of Pennsylvania). *But cf.* *Petition of Proctor*, (Philadelphia County Ct. Com. Pl. Dec. 1746), in *Philadelphia Court Papers, 1744-1749* (unpublished manuscript, on file with The Historical Society of Pennsylvania) (granting petition for immediate trial by debtor who wished to leave the province).

239. See *Application of Otlay*, (Chester County Quarter Sessions Aug. 1765) (microformed on Chester County Archives).

240. See, e.g., *Kline v. Shcuman*, (Berks County Ct. Com. Pl. Nov. 1770) (unpublished manuscript, on file with Berks County Prothonotary's Office); *Canby v. McFarland*, (Bucks County Ct. Com. Pl. Sept. 1743) (appearance docket, on file with Bucks County Historical Society); *Bachman v. Lewis*, (Northampton County Ct. Com. Pl. Mar. 1755) (unpublished manuscript, on file with Northampton County Archives); *Lynn v. Lukens*, (Northumberland County Clerk's Office); *Stevenson v. Glenn*, (York County Ct. Com. Pl. July 1757) (unpublished manuscript, on file with York County Archives).

241. *Smith v. Willson*, (York County Ct. Com. Pl. Jan. 1758) (unpublished manuscript, on file with York County Archives); *accord Biles v. Stevenson*, (Bucks County Ct. Com. Pl. Mar. 1744) (continuance docket, on file with Bucks County Historical Society); *Pearsoll v. Willcockson*, (Chester County Ct. Com. Pl. Nov. 1754) (unpublished manuscript, on file with Chester County Archives).

242. *Williams v. Pennell*, (Chester County Ct. Com. Pl. May 1758) (unpublished manuscript, on file with Chester County Archives); see also *Caldwell v. Allen*, (Chester County Ct. Com. Pl. Nov. 1756) (unpublished manuscript, on file with Chester County Archives) (report of auditors set aside).

243. See *Petition of Harley*, (Bucks County Ct. Com. Pl. Jan 1753) (appearance docket, on file with Bucks County Historical Society) (debtor sold for twenty-one months); *Neild v. Roberts*, (Chester County Ct. Com. Pl. May 1718) (unpublished manuscript, on file with Chester County Archives) (debtor sold for three years to pay £9 debt plus court costs); *Ruddolf v. Smith*, (Lancaster County Ct. Com. Pl. Nov. 1735) (continuance docket, on file with Lancaster County Historical Society) (debtor sold for three years and six months);

man was even sold to ten creditors, to work for them consecutively, to square a series of small debts.²⁴⁴ The second option was to assign all of one's property to creditors and, if no one objected, to seek to be discharged from prison.²⁴⁵ If a creditor objected, however, the debtor would not be discharged, at least as long as the creditor was willing to support the debtor²⁴⁶ and his family.²⁴⁷ A debtor also would not be discharged if he had not resided in Pennsylvania for two years²⁴⁸ or if otherwise he did "not satisfy[] th[e] court that he was entitled" to be.²⁴⁹ Thus, a man with a wife and three children who had compounded with all but two of his creditors but could not pay a fine for shooting a dog was denied release from jail.²⁵⁰ A court also could impose conditions on discharge, such as requiring a debtor to indemnify the town where his illegitimate child had been born.²⁵¹

Consistent with Quaker beliefs that people should "keep . . . their words, promises, [and] engagements in their dealings" and "satisfy their just debts,"²⁵² colonial Pennsylvania courts spent far more time on debt collection cases than anything else. But debts often remained unsatisfied for long periods of time. The vast majority of entries in the surviving docket books deal with postponing cases from term to term, and the sense one obtains from the records is that debt collection often was a process of bargaining rather than a creditor's standing effectively on her legal rights. Obtaining a judgment did not automatically result in immediate payment; often a creditor might get more money by postponing collection or accepting less than the full amount. Hence one finds cases that end, for example, not with a judgment or decision of law, but with an

Hughs v. Griffith, (Philadelphia County Ct. Com. Pl. Dec. 1717) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (debtor to serve creditor for four years).

244. Petition of McQuaid, (Chester County Ct. Com. Pl. May 1754) (unpublished manuscript, on file with Chester County Archives).

245. See, e.g., Petition of Andrews, (Chester County Ct. Com. Pl. Nov. 1737) (unpublished manuscript, on file with Chester County Archives); Murray v. Bryan, (Philadelphia County Com. Pl. Sept. 1746) (unpublished manuscript, on file with The Historical Society of Pennsylvania); Petition of Zimmerman, (York County Ct. Com. Pl. Jan 1772) (unpublished manuscript, on file with York County Archives).

246. See, e.g., Petition of Thomson, (Chester County Ct. Com. Pl. Aug. 1768) (unpublished manuscript, on file with Chester County Archives); Petition of Seip, (Lancaster County Ct. Com. Pl. Nov. 1772) (unpublished manuscript, on file with Lancaster County Historical Society).

247. See, e.g., Motion of Beard, (Berks County Ct. Com. Pl. Dec. 1774) (unpublished manuscript, on file with Berks County Prothonotary's Office); Petition of DeSpitzer, (Bucks County Ct. Com. Pl. June 1750) (appearance docket, on file with Bucks County Historical Society).

248. See Petition of Weidman, (Northampton County Ct. Com. Pl. Dec. 1775) (unpublished manuscript, on file with Northampton County Archives).

249. Petition of Prichard, (Chester County Ct. Com. Pl. Nov. 1753) (unpublished manuscript, on file with Chester County Archives).

250. See Petition of Wells, (Bucks County Quarter Sessions Sept. 1750) (unpublished manuscript, on file with Bucks County Historical Society).

251. See Petition of Pinkerton, (Lancaster County Ct. Com. Pl. Nov. 1773) (continuance docket, on file with Lancaster County Historical Society).

252. YEARLY MEETING AT PHILADELPHIA, *supra* note 165, at 10.

agreement by the debtor "to pay the debt in four years without interest."²⁵³

William Penn and the leaders who followed him enjoyed remarkable success. Unlike New York, which had Leisler's Rebellion; Virginia, Bacon's Rebellion; and North Carolina, the Regulator Movement; colonial Pennsylvania suffered no major civil strife. Its legal system produced remarkable social stability. The law also promoted economic growth and insured the wealth and continued success of its leading entrepreneurs. Pennsylvania quickly became perhaps the most prosperous colony in America and Philadelphia, the continent's leading city. In their legal attainments and sophistication, Boston and New York were distant seconds to Philadelphia as American independence approached.

As Andrew Hamilton, perhaps the leading Pennsylvania lawyer of the colonial period, told the Pennsylvania Assembly, it was "not to the fertility of our soil and the commodiousness of our rivers" that the province "chiefly" owed its success. Rather that success was "principally and almost wholly owing to the excellency of our constitution."²⁵⁴ Pennsylvania's success, as another commentator similarly noted, was a consequence of its "laws and institutions . . . whose pacific principles and commercial spirit . . . blessed it with tranquility and opulence."²⁵⁵

D.

Nothing is imposed more coercively on the people of a polity than criminal law. Tort and contract law that prefers existing wealth holders to their competitors can pass beneath the attention of most people, who believe that existing economic hierarchies are in the nature of things rather than creations of law. But the criminal law intrudes itself visibly into a community and displays the power of the governing classes with a clarity no one can miss. In some respects, the body of criminal law that Pennsylvania judges applied intruded on the daily lives of the colonists and displayed the power of the judiciary starkly. Pennsylvania courts prosecuted all the standard crimes of the eighteenth century—murder,²⁵⁶ man-

253. *Heckendorn v. Rodermal*, (York County Ct. Com. Pl. July 1757) (unpublished manuscript, on file with York County Archives); *see also Miller v. Berlinger*, (York County Ct. Com. Pl. July 1758) (unpublished manuscript, on file with York County Archives), where the parties engaged in an extended pleading process that delayed a judgment over many court terms.

254. Address of Andrew Hamilton to the Pennsylvania Assembly (1738), in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 23.

255. Dr. Mosheim, in *PENNYPACKER'S COLONIAL CASES*, *supra* note 52, at 24.

256. *See, e.g., King v. Roach*, (Pa. Sup. Ct. Oyer & Terminer Berks County 1776) (microformed on Pennsylvania State Archives); *King v. Dowdle*, (Pa. Sup. Ct. Oyer & Terminer Chester County 1768) (microformed on Pennsylvania State Archives). For a case in which the judges who had presided over the trial of a man convicted of murder petitioned the governor for clemency on the ground that the defendant "was not active" in the homicide "but unhappily fell into ye company of those that committed it," *see Recommendation of Mercy from David Lloyd, Richard Hill, and Jeremiah Langhorne to Patrick Gordon*. (June 21, 1728) (unpublished manuscript, on file with The Historical Society of Pennsylvania).

slaughter,²⁵⁷ arson,²⁵⁸ rape,²⁵⁹ burglary,²⁶⁰ larceny,²⁶¹ assault,²⁶² forcible entry and detainer,²⁶³ counterfeiting,²⁶⁴ and nuisance.²⁶⁵ They also prosecuted morals offenses.

The Quakers who settled Pennsylvania were in many respects the ideological heirs of mid-seventeenth-century English Puritans.²⁶⁶ When their movement split off from the movement of their forebears, the Quakers

257. See, e.g., *King v. Woods*, (Pa. Sup. Ct. Oyer & Terminer Chester County 1768) (microformed on Pennsylvania State Archives); *King v. Ord*, (Pa. Sup. Ct. Oyer & Terminer York County 1768) (microformed on Pennsylvania State Archives).

258. See, e.g., *King v. Goodwin*, (Pa. Sup. Ct. Oyer & Terminer Chester County 1768) (microformed on Pennsylvania State Archives); *King v. Kelly*, (Pa. Sup. Ct. Oyer & Terminer Lancaster County 1771) (microformed on Pennsylvania State Archives).

259. See, e.g., *King v. Dewar*, (Pa. Sup. Ct. Oyer & Terminer Chester County 1772) (microformed on Pennsylvania State Archives); *King v. Carr*, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County 1773) (microformed on Pennsylvania State Archives); see also *Coverdale v. Conway*, (Bucks County Ct. Apr. 1687), in *RECORD OF THE COURTS OF BUCKS*, *supra* note, at 75-77, where Coverdale testified that

Conway about 3 months ago came to her bedside & did say he had sworn he would fuck her either by night or by day & about a month after that he came to the house & said he had sworn about 4 years he would fuck her & she said she was so afraid lest he should lay violent hands on her that she was forced to call back a youth that was newly gone out of the house to stay until Conway was gone.

Conway was fined 25s. for these threats. When, in addition, he “behaved himself contemptuously toward the court,” he was fined an additional £5; cf. *King v. Church*, (Chester County Quarter Sessions Aug. 1723) (microformed on Chester County Archives) (assault with intent to rape); *King v. Ryan*, (York County Quarter Sessions Apr. 1752) (unpublished manuscript, on file with York County Archives) (assault with intent to rape); *King and Queen v. Mack Daniel*, (Chester County Ct. Sept. 1694), in *RECORD OF THE COURTS OF CHESTER*, *supra* note, at 328 (attempted rape).

260. See, e.g., *King v. Wright*, (Pa. Sup. Ct. Oyer & Terminer Chester County 1774) (microformed on Pennsylvania State Archives); *King v. German*, (Pa. Sup. Ct. Oyer & Terminer Cumberland County 1768) (microformed on Pennsylvania State Archives).

261. See, e.g., *Rex v. Quam*, (Bucks County Quarter Sessions Sept. 1741 (unpublished manuscript, on file with Bucks County Historical Society); *King v. Davis*, (Philadelphia Mayor’s Ct. July 1759) (unpublished manuscript, on file with Philadelphia City Archives).

262. See, e.g., *King v. M’Cune*, (Cumberland County Ct. General Sessions Oct. 1772) (unpublished manuscript, on file with Cumberland County Historical Society); *King v. Hogan*, Philadelphia County Quarter Sessions Dec. 1754 (unpublished manuscript, on file with Philadelphia City Archives).

263. See, e.g., *King v. Spear*, (Bedford County Quarter Sessions July 1771 and Jan. 1772) (unpublished manuscript, on file with Bedford County Clerk’s Office); *King v. Smiley*, Lancaster County Quarter Sessions Aug. 1771 (unpublished manuscript, on file with Lancaster County Historical Society).

264. See, e.g., *Rex v. Rippy*, (Pa. Sup. Ct. Oyer & Terminer Cumberland County 1772) (microformed on Pennsylvania State Archives); *King v. Litt*, (York County Quarter Sessions Oct. 1770) (unpublished manuscript, on file with York County Archives); see also *King v. Pettit*, (Northumberland County Quarter Sessions May 1776) (manuscript in Northumberland County Clerk’s Office) (altering currency); *King v. Lynch*, (York County Quarter Sessions July 1754) (unpublished manuscript, on file with York County Archives) (uttering counterfeit).

265. See, e.g., *King v. Schler*, (Berks County Quarter Sessions May 1774) (microformed on Berks County Historical Society); *King v. Miley*, (Lancaster County Quarter Sessions Feb. 1771) (unpublished manuscript, on file with Lancaster County Historical Society); *King v. Biddle*, (Philadelphia County Quarter Sessions Sept. 1732), in *Philadelphia Court Papers, 1697-1821* (unpublished manuscript, on file with The Historical Society of Pennsylvania).

266. See *BALTZELL*, *supra* note 4, at 79-106; *TOLLES*, *supra* note 162, at 52-53.

retained nearly all of Puritanism's older moral values. Throughout Pennsylvania's history, we accordingly see its courts imposing most of the same moral norms on its inhabitants that the courts of New England imposed on those who resided there.²⁶⁷ But there were two important exceptions, which ultimately reflect a sort of Lockean libertarianism that made Pennsylvania a far more tolerant and less-coercive place than seventeenth-century New England.

One sinful behavior that Pennsylvanians regarded as a serious crime and punished with great frequency was fornication. It was prosecuted from the colony's very beginning. In one of the earliest cases, the testimony was that the defendant, John Rambo, entered a room where three sisters, who were acquainted with him, were sleeping together in one bed. As they testified,

He said he would lie in the bed. We said no. So he jumped in the bed. And so there was not room. So my sister and I went out of the bed and left Bridgett there, and I & sister lay on the floor a little way from the bed till daybreak. The deponent heard him ask Bridgett (about an hour after the deponent and sister left them) if she would have him. She answered no at first and then asking her again she said yes, and the deponent heard him say the devil take him if he would not marry her.

A jury found Rambo guilty of getting Bridgett with child, and the court "enjoin[ed]" him to marry her "before she be delivered." If he failed to marry her in time, he was to be fined £10, as was Bridgett, and ordered to keep and support the child.²⁶⁸

Another early case instituted what became a routine procedure. Martha Wilkins, who was indicted by a grand jury for being pregnant but unmarried, pleaded guilty. The attorney general, in response, argued that her plea did not convict her because "every criminal must be found guilty by two juries at least" and therefore moved for a trial by a petit jury. The court, however, rejected his motion and accepted her plea as conclusive of the case.²⁶⁹ Thereafter, nearly all women charged with fornication pleaded guilty,²⁷⁰ although in the case of one woman who had "commit-

267. See OFFUTT, JR., *supra* note 8, at 192-94.

268. *Cock v. Rambo*, (Philadelphia County Ct. 1685), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 79, 82-83. In a subsequent suit, Bridgett sued Rambo for failing to maintain their child. He responded that he was willing to keep and care for the child, but that she refused to give him the child. She replied that he never made a proper legal request for the child. The jury returned a verdict in her favor. See *Cock v. Rambo*, (Philadelphia County Ct. 1686), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 112; *cf.* *King and Queen v. Bore*, (Philadelphia County Quarter Sessions June 1695), in BRONNER II, *supra* note 62, at 475 (proceedings ended since couple married); *King v. Pringle*, (York County Quarter Sessions Jan. 1762) (unpublished manuscript, on file with York County Archives) (proceedings ended since couple married).

269. *Proprietor v. Wilkins*, (Philadelphia County Quarter Sessions 1685/86), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 88, 89.

270. See, e.g., *King v. Willard*, (Chester County Ct. Dec. 1688 and Mar. 1688/89) (woman "beguiled . . . under a promise of marriage"); *King v. Luntz*, (Philadelphia County Quarter Sessions Dec. 1773) (unpublished manuscript, on file with Philadelphia City

ted fornication . . . in a boat upon the river," the court appointed a jury of matrons who could "not find she is with child neither be they sure she is not."²⁷¹ Two months later, she declared she was not pregnant and submitted herself to the crown's mercy.²⁷² Penalties for women who pleaded guilty to fornication were severe—most frequently twenty-one lashes²⁷³ or a fine of £10.²⁷⁴

Men accused of fornication often pleaded guilty,²⁷⁵ but many of them demanded a trial by a jury. Some were acquitted,²⁷⁶ sometimes on technical grounds;²⁷⁷ others convicted.²⁷⁸ Those who pleaded or suffered a conviction received the same penalty as their partners—twenty-one lashes²⁷⁹ or a fine of £10²⁸⁰—and in addition were required to pay for the support of their child.²⁸¹ These were not light penalties. Mordecai Bevan, for example, was found guilty of fornication by a jury and sentenced to pay a fine of £10 and to provide security for the support of his child.²⁸² Together with court costs, he owed in excess of £18. "[H]aving

Archives). *But see* King v. Bowen, (York County Quarter Sessions Oct. 1763) (unpublished manuscript, on file with York County Archives) (woman found guilty by jury).

271. King and Queen v. Turberfield, (Chester County Ct. Aug. 1689), in RECORD OF THE COURTS OF CHESTER, *supra* note 29, at 166. The case is also reported as *In re* ———, (Chester County Quarter Sessions 1689), in PENNYPACKER'S COLONIAL CASES, *supra* note 52, at 53.

272. King and Queen v. Turberfield, (Chester County Ct. Oct. 1689), in RECORDS OF THE COURTS OF CHESTER, *supra* note 29, at 173.

273. *See, e.g.*, Queen v. Cowper, (Bucks County Quarter Sessions June 1704) (unpublished manuscript, on file with Bucks County Historical Society); King and Queen v. Hopkins, (Philadelphia County Quarter Sessions Mar. 1694/95), in BRONNER, *supra* note 62, at 468-69.

274. *See, e.g.*, King v. James, (York County Quarter Sessions Apr. 1757) (unpublished manuscript, on file with York County Archives).

275. *See, e.g.*, King v. Fathimore, (Philadelphia County Quarter Sessions Dec. 1754) (unpublished manuscript, on file with Philadelphia City Archives).

276. *See, e.g.*, King v. White, (York County Quarter Sessions Apr. 1765) (unpublished manuscript, on file with York County Archives).

277. *See* Petition of Battle, (Philadelphia Mayor's Ct. July 1739), in Philadelphia Court Papers, 1697-1821 (unpublished manuscript, on file with The Historical Society of Pennsylvania) (petition by bail of defendant seeking exoneration on ground that alleged father could not be extradited from New Jersey jail and on further ground that mother of illegitimate child was a convict whose testimony was inadmissible in court and who had also accused another man of being the child's father).

278. *See, e.g.*, King v. Hains, (Lancaster County Quarter Sessions Feb. 1764) (unpublished manuscript, on file with Lancaster County Historical Society).

279. *See, e.g.*, King v. Richard, (Bucks County Quarter Sessions Oct. 1702) (unpublished manuscript, on file with Bucks County Historical Society); King v. McCormack, (Chester County Quarter Sessions May 1723) (microformed on Chester County Archives).

280. *See, e.g.*, King v. Dunn, (Philadelphia County Quarter Sessions June 1756) (unpublished manuscript, on file with Philadelphia City Archives); King v. Simmons, (York County Quarter Sessions Apr. 1751) (unpublished manuscript, on file with York County Archives).

281. *See, e.g.*, King v. Madeira, (Philadelphia County Ct. Com. Pl. Dec. 1773) (unpublished manuscript, on file with Philadelphia City Archives). If fathers failed to pay, they were held in contempt of court. *See* Petition of Grubb, (Chester County Quarter Sessions Feb. 1750/51 and Nov. 1752) (microformed on Chester County Archives). Courts were unwilling to set aside child support orders on technical grounds. *See* Appeal of Mathers, (Chester County Quarter Sessions May 1725) (microformed on Chester County Archives).

282. King v. Bevan, (Chester County Quarter Sessions Feb. 1636/37) (microformed on Chester County Archives).

nothing wherewith to satisfy the charges” and wanting desperately “to avoid the corporal punishment” of twenty-one lashes that would have been imposed if he did not pay, he agreed to be sold into servitude for a period not exceeding four years²⁸³—a rather lengthy time for an evening of pleasure.

Fornication was not punished only because it produced illegitimate children that might require public support if their fathers could not be forced to pay for them.²⁸⁴ It also had an impact on marriage—a process that Quakers regulated tightly. Quakers strove to prevent each other from “marry[ing] out of the unity of Friends”²⁸⁵ and required couples contemplating marriage to obtain parental consent and the consent of two consecutive monthly meetings, at which the proponents’ love for each other would be closely examined. Only after the community had been so assured that it was wise for a couple to marry could a modest wedding ceremony be scheduled.²⁸⁶ Of course, betrothed couples were directed to “not dwell together in the same house or family . . . until their marriage [was] consumated,”²⁸⁷ lest they end up in a commitment before the community was satisfied that the commitment was appropriate.

Thus, the court records contain cases like the one where Elizabeth Woodyard declared that Philip Yarnell, her betrothed, came to her house and

asked whether she was a woman and she answered she was all one as other women she thought and he said he would feel and she said he should not and he said how should he know whether she was all on as other women if he did not feel, since she was she that was to be his wife. And then he took her hand being stronger than she and put into his codpise and would have her to feel his members how they went limber or stiffer.

On another night, they lay down in bed together and

she fell asleep and thought she might sleep near an hour or thereabouts and as she was sleeping she thought she felt her clothes to go up and her feet to move and she awakening . . . did happen with her arm to strike him and with her hand unawares she felt his members which did affright her very much.

Philip, in turn, confessed that “he had been foolish insomuch that something scattered from him which was his seed.” Philip was not punished criminally for his weakness, but the outcome of the defamation suit he brought, probably for being accused of attempted rape, suggests that peo-

283. Petition of Bevan, (Chester County Ct. Com. Pl. May 1737) (unpublished manuscript, on file with Chester County Archives).

284. On the potential liability of towns, see Petition of Grant, (Bucks County Quarter Sessions Dec. 1743) (unpublished manuscript, on file with Bucks County Historical Society); Petition of Baldwin, (Chester County Quarter Sessions Feb. 1716/17) (microformed on Chester County Archives).

285. YEARLY MEETING AT PHILADELPHIA, *supra* note 165, at 9.

286. See *id.* at 22-25.

287. *Id.* at 25.

ple looked at him askance.²⁸⁸ And Elizabeth announced that she “would never have anything [more] to do with him.”²⁸⁹ Another couple similarly was prosecuted “for being too familiar with each other,” although no child was born and they may not even have had intercourse.²⁹⁰

Adultery was another crime “to the high dishonor of God”²⁹¹ for which people were prosecuted with some frequency.²⁹² Here the penalties were more severe—twenty-one lashes plus a fine of £50 or one year in prison in one case,²⁹³ ten lashes and one year in prison in another,²⁹⁴ forfeiture of one half of the defendant’s estate or one year in prison in a third,²⁹⁵ and a fine of £50 or twenty-one lashes in a fourth, later case.²⁹⁶ Infanticide also was prosecuted with frequency, although there were few convictions,²⁹⁷ perhaps because the penalty for the few who were convicted was death by hanging.²⁹⁸ There were also occasional prosecutions for buggery²⁹⁹ and bigamy.³⁰⁰ And, of course, there were innumerable prosecutions for misuse or unlawful sale of alcoholic beverages.³⁰¹

288. See *Yarnall v. Musgrove*, (Chester County Ct. June 1693), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, 289-91 (jury verdict in his favor for costs and 2d. damages). Shortly thereafter, the court set aside the verdict and imposed most of the costs on Yarnall. See *Musgrove v. Yarnall*, (Chester County Eq. Ct. June 1693), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 293.

289. *Yarnall v. Musgrove*, (Chester County Ct. June 1693), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 289-90.

290. *King & Queen v. Taylor & Williamson*, (Chester County Quarter Sessions Mar. 1694/95), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 339.

291. *King & Queen v. Willard*, (Chester County Ct. June 1690), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 202-03.

292. See, e.g., *King v. Maclean*, (Pa. Sup. Ct. Apr. 1758) (microformed on Pennsylvania State Archives); *King v. Pencre*, (Lancaster County Quarter Sessions Feb. 1746/47) (unpublished manuscript, on file with Lancaster County Historical Society).

293. *King v. Sullivan*, (York County Quarter Sessions Jan. 1754) (unpublished manuscript, on file with York County Archives).

294. *King v. Buffington*, (Chester County Ct. June 1689), in *RECORD OF THE COURTS OF CHESTER*, *supra* note 29, at 157-58.

295. *King and Queen v. Willard*, (Chester County Ct. June 1690), in *RECORDS OF THE COURTS OF CHESTER*, *supra* note 29, at 202-03.

296. *King v. Steele*, (Philadelphia County Quarter Sessions Sept. 1773) (unpublished manuscript, on file with Philadelphia City Archives).

297. See, e.g., *King v. Harden*, (Pa. Sup. Ct. Oyer & Terminer Cumberland County 1774) (microformed on Pennsylvania State Archives); *King v. Young*, (Pa. Sup. Ct. Oyer & Terminer Berks County 1772) (microformed on Pennsylvania State Archives).

298. *King v. Mulattoe Elizabeth*, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County 1774) (microformed on Pennsylvania State Archives). For an instance in which trial judges petitioned the governor for clemency on behalf of a man and woman convicted of infanticide, on ground “the child might have been born dead,” see Andrew Hamilton and Thomas Graeme to Patrick Gordon, May 10, 1732 (manuscript in The Historical Society of Pennsylvania).

299. See *King v. Brandon*, (Pa. Sup. Ct. Oyer & Terminer Cumberland County 1772) (microformed on Pennsylvania State Archives); *King v. Roughton*, (Pa. Sup. Ct. Oyer & Terminer York County 1768) (microformed on Pennsylvania State Archives).

300. See *King v. Walder*, (York Quarter Session July 1765) (unpublished manuscript, on file with York County Archives).

301. See *OFFUTT, JR.*, *supra* note 8, at 192. For later cases of liquor-law violations, see, e.g., *Rex v. Proby*, (York County Quarter Sessions Oct. 1749) (unpublished manuscript, on file with York County Archives); *King v. Douglas*, (Philadelphia Mayor’s Ct. Jan. 1764) (unpublished manuscript, on file with Philadelphia City Archives).

As noted above, there were two subjects on which Pennsylvania, unlike New England, witnessed no prosecutions. First, there were quite a few prosecutions in New England for sodomy and other forms of same sex intimacy, but none appear in the extant colonial Pennsylvania court records.³⁰² It also seems that few people were disciplined by Quaker meetings for homosexual activities.³⁰³ The disciplinary advice of the Philadelphia Yearly Meetings offers a clue to the attitudes of Pennsylvania's Quaker leaders. The 1719 meeting, for example, did not specifically mention sodomy or other same-sex intimacies; it prohibited only "unseemly keeping company with women or other scandalous practices" and "disorderly and indecent practices as shall give or occasion public scandal."³⁰⁴ Nearly a century later little had changed, as the 1806 *Rules of Discipline of the Yearly Meeting of Friends* sanctioned only "men and women . . . unseemly keeping company with each other, or any other scandalous practice . . . or such other disorderly or indecent practices as shall occasion public scandal."³⁰⁵ At the same time, discipline was recommended for those "guilty of tattling, talebearing, reproaching, backbiting, or speaking evil of their brethren or neighbors or busily meddling where not concerned with the affairs of other folks." "[B]ackbiting, whispering, and reporting anything to the injury of another" was "to be discountenanced, prevented, and utterly disused among us."³⁰⁶

In short, Pennsylvania's Quaker leaders worried about sexual misconduct that led to public scandal but did not wish to publicize private sins, because publicity only had a "tendency . . . to raise up strife and discord or cause disesteem among brethren and neighbors."³⁰⁷ Thus, they punished fornication severely when it might lead to public consequences, such as an illegitimate birth or an impulsive marriage that could plague the couple and the community for decades to come. In contrast, they treated the sin mildly when it occurred in private and was discovered only by happenstance. When Robert Browne, for example, committed an "act of uncleanness" in "lying with a young woman and having the carnal knowledge of her," the court "show[ed] him mercy" and fined him only 40s, because the woman had disappeared and might not have become pregnant and he had "promis[ed] for the future to be careful & do so no

302. My findings are consistent with those of Clare A. Lyons, *Mapping an Atlantic Sexual Culture: Homoeroticism in Eighteenth-Century Philadelphia*, 60 WILLIAM AND MARY QUARTERLY (3d Series) 119 (2003).

303. See Jack D. Marietta, *Records of Quaker Discipline in Pennsylvania, 1682-1776* (computer printout, on file with Friends Library, Swarthmore College), which categorizes nearly 5,000 disciplinary cases over the period in question. Although Marietta has categories for such offenses as "marriage," "fornication," "fornication with finace(e)," "adultery," and "incest," he has none for sodomy or any other form of homosexual behavior. If any such disciplinary cases occurred, he would have coded them under his categories of "loose conversation," general bad conduct" or "miscellaneous."

304. YEARLY MEETING AT PHILADELPHIA, *supra* note 165, at 8, 18.

305. RULES OF DISCIPLINE OF THE YEARLY MEETING OF FRIENDS, HELD IN PHILADELPHIA 22 (Philadelphia, Kimber, Conrad, & Co. 1806).

306. YEARLY MEETING AT PHILADELPHIA, *supra* note 165, at 11, 21.

307. *Id.* at 11.

more.”³⁰⁸ Likewise, a woman who led a “loose and idle life,” upon her promise to move to Maryland, was merely censured.³⁰⁹ Homosexual conduct appears to have been treated similarly: as long as individuals behaved privately and discretely, the law paid them no heed.

As noted, there was a second difference between Puritan and Quaker morals prosecutions. There was an anticapitalist strand in morals prosecutions in New England: cases were brought, for example, against merchants who charged excessive prices for their goods and common folk who dressed too elegantly. This strand never emerged in Pennsylvania,³¹⁰ which quickly embraced capitalism and the profit making and acquisitiveness we associate with it. “True Godliness,” according to William Penn himself, did not turn people away from the world, “but enable[d] them to live better in it.”³¹¹ Thus, the 1734 Philadelphia Yearly Meeting found the “pursuit of worldly riches, . . . within due bounds, for the comfortable subsistence of ourselves and families, . . . commendable,”³¹² and Quaker merchants were advised it was acceptable to buy goods cheaply and sell them at market prices, without telling anyone about the large profit they were making.³¹³ Indeed, nothing better illustrates the capitalist values of Pennsylvania’s Quakers than Christ’s advice to his disciples when they, and probably most other people around them, had no meat. As reported by a Philadelphia merchant, Christ bid his disciples to “*cast their nets into the sea, and they drew to land a net full of great fishes*; and fishing being their trade, no doubt but they sold them, for it was not likely they could eat ’em all.”³¹⁴ One only wonders how much profit the disciples obtained.

There is a remarkably postmodern libertarian vein in these Quaker attitudes toward sexuality and the market. Like us, colonial Pennsylvanians drew a line between private behavior not subject to government regulation and conduct that impacted the public and thus should be subject to state control. Of course, they placed the line in a different location than we do; they understood the public-private distinction differently than we. But like us, they drew the line and the distinction at a time when colonial New Englanders, among others, did not.

308. King & Queen v. Browne, (Chester County Ct. June 1692), in RECORD OF THE COURTS OF CHESTER, *supra* note 29, at 260.

309. King Queen v. Rowland, (Philadelphia County Quarter Sessions Mar. 1694/1695), in BRONNER II, *supra* note 62, at 471.

310. See OFFUTT, JR., *supra* note 8, at 199, who also finds no such cases except in regard to ferrymen and court officers. Both, of course, were public officials, and, as such, their fees were set by the courts. See Order re Fees, (Bucks County Ct. Com. Pl. June 1743) (appearance docket, on file with Bucks County Historical Society) (court officers); Petition of Chadds, (Chester County Quarter Sessions Aug. 1737) (microformed on Chester County Archives) (ferryman).

311. Quoted in TOLLES, *supra* note 164, at 53.

312. EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 148 (Philadelphia, T. Ellwood Zell 1860).

313. See *id.* at 60.

314. TOLLES, *supra* note 164, at 56 (quoting Thomas Chalkley).

One matter on the public side of the line for colonial Pennsylvanians was the treatment of underclasses. Like the Puritans, Quakers sought to protect servants, women, and even children from the tyranny of those holding power over them. In particular, the Friends sought to end sexual exploitation of the weak by the strong.³¹⁵ The Quakers also took early steps to ameliorate the condition of African-American slaves; in 1719, for example, the Philadelphia Yearly Meeting urged "that none among us be concerned in the fetching or importing of negro slaves" and "that all Friends who have any of them do treat them with humanity and in a Christian manner."³¹⁶

Others have written extensively about the development of a strong antislavery movement among Pennsylvania Quakers as the colonial era was coming to an end.³¹⁷ American antislavery had its start among Pennsylvania Quakers, and masters manumitted a significant number of slaves before the War of Independence. But, just as benevolence toward servants was balanced with strict discipline, so too freedom for slaves was balanced with protection for the community. Anyone who manumitted a slave was required to give a bond to the town of the slave's residence protecting the town against any expenses caused "by sickness or otherwise."³¹⁸ Moreover, even after they were freed, blacks were not equal citizens. One "free Negro," for example, who "unfortunately [had] married a bad woman," went to jail for "express[ing] some harsh words against her" and was freed only on the undertaking of a white man that the black would not be "further troublesome" to the community.³¹⁹ White men who beat their wives would, in contrast, be required only to give peace bonds and guarantees of support for their wives; no one ever required them not to be troublesome to the community, because they were the community. Blacks were not.

A like pattern can be observed in Pennsylvania's treatment of other underclasses. Although the province was no more successful than other colonies in obtaining convictions of those who had killed their servants, a number of such prosecutions were brought.³²⁰ There also were prosecu-

315. See DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 499 (New York, Oxford University Press 1989).

316. YEARLY MEETING AT PHILADELPHIA, *supra* note 165, at 12.

317. Recent work includes BARBOUR, *supra* note 1, at 119-23, and JACK D. MARIETTA, *THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783* 111-27 (University of Pennsylvania Press 1984). Classic work includes DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* 213-54 (Cornell University Press 1975) and THOMAS DRAKE, *QUAKERS AND SLAVERY IN AMERICA* (Yale University Press 1950).

318. See, e.g., Bond of Lownes, (Chester County Quarter Sessions May 1771) (microformed on Chester County Archives).

319. Petition of Meredith, (Bucks County Quarter Sessions June 1762) (unpublished manuscript, on file with Bucks County Historical Society).

320. They all resulted in jury verdicts of acquittal. See, e.g., King v. Bishop, (Pa. Sup. Ct. Oyer & Terminer Berks County 1772) (microformed on Pennsylvania State Archives); King v. Meredith, (Pa. Sup. Ct. Oyer & Terminer Bucks County 1774) (microformed on Pennsylvania State Archives); see also King v. Meredith, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County 1770) (microformed on Pennsylvania State Archives) (servant charged with petit treason for killing master; found guilty only of manslaughter); cf. King v.

tions against masters who beat servants “unreasonably”³²¹ or “in a very cruel manner.”³²² In at least one case a master was fined,³²³ while in others servants were freed.³²⁴

Husbands, in turn, were prosecuted for beating their wives,³²⁵ as was a grandfather, for “beating and intolerably abusing his grandchild.”³²⁶ But criminal penalties were a blunt tool for remedying family violence, and thus the courts typically had recourse to peace bonds rather than corporal punishment in criminal cases.³²⁷ A more effective remedy for most wives was to seek separation and support from a violent husband. Hannah Pyle, for example, left her husband because he “beat and abuse[d]” her; he was now living with “an idle strumpet” in their marital home and threatening to “squander” the estate Hannah had brought to the marriage. The court ordered him to pay her 3s. per week.³²⁸ Similarly, when a town had begun supporting an indigent wife after she had left an abusive home, the courts would order her husband to reimburse the town.³²⁹

But wives did not always win. One woman who asked not for her husband’s support but for an appointment as administratrix of her husband’s estate found her petition dismissed because it was “not cognizable before” the court in which she sued.³³⁰ Another wife who sought whatever relief the court deemed appropriate also had her case dismissed.³³¹ A third was ordered to return home, although her husband

Wilson, (Pa. Sup. Ct. Oyer & Terminer Lancaster County 1771) (microformed on Pennsylvania State Archives) (grand jury return of ignoramus).

321. *King v. Clawson*, (Bucks County Ct. Apr. 1685), in *RECORD OF THE COURTS OF BUCKS*, *supra* note 42, at 20.

322. Complaint against Meyer, (Philadelphia County Quarter Sessions June 1762) (unpublished manuscript, on file with Philadelphia City Archives).

323. See *King v. Francis*, (Philadelphia Mayor’s Court Apr. 1761) (unpublished manuscript, on file with Philadelphia City Archives).

324. See Complaint against Meyer, (Philadelphia County Quarter Sessions June 1762) (unpublished manuscript, on file with Philadelphia City Archives); Petition of Galhon, (Philadelphia Mayor’s Ct. Oct. 1732), in *Philadelphia Court Papers, 1732-1744* (unpublished manuscript, on file with The Historical Society of Pennsylvania).

325. See, e.g., *King and Queen v. Smalwood*, (Bucks County Quarter Sessions Oct. 1698), in *RECORD OF THE COURTS OF BUCKS*, *supra* note 42, at 362; *Rex v. Boucher*, (Chester County Quarter Sessions May 1737) (microformed on Chester County Archives).

326. See *King & Queen v. Randol*, (Bucks County Quarter Sessions Oct. 1698), in *RECORDS OF THE COURTS OF BUCKS*, *supra* note 42, at 362. People had duties not only to their children and grandchildren, but also to their parents, whom they were obliged to support if they were unable to support themselves. See Order against M’Quead, (Chester County Quarter Sessions Feb. 1761) (microformed on Chester County Archives).

327. See *Rex v. Boucher*, (Chester County Quarter Sessions May 1737) (microformed on Chester County Archives).

328. Petition of Pyle, (Chester County Quarter Sessions Feb. 1758) (microformed on Chester County Archives); accord Petition of Baldwin, (Chester County Quarter Sessions Feb. 1771) (microformed on Chester County Archives); Petition of Beyser, (Philadelphia Mayor’s Court, Jan. 1761) (unpublished manuscript, on file with Philadelphia City Archives).

329. Complaint of Duncan, (York County Quarter Sessions Jan. 1753) (unpublished manuscript, on file with York County Archives).

330. Petition of Scott, (Bucks County Quarter Sessions Dec. 1762) (unpublished manuscript, on file with Bucks County Historical Society).

331. Petition of Biddle, (Philadelphia County Quarter Sessions Sept. 1768) (unpublished manuscript, on file with Philadelphia City Archives).

was required to post a £100 good-behavior bond.³³² Finally, a wife who sought a divorce on grounds of her husband's impotency failed when physicians appointed by the court reported that the husband was "capable of consummating his marriage."³³³

What the cases show is that wives who framed their petitions properly and accumulated evidence to support their claims typically gained freedom from their abusive husbands. The same was true for servants who brought suits against abusive masters. Thus, a servant who claimed that his master treated him "with great cruelty & inhumanity by frequently beating & wounding" him³³⁴ and another who claimed she was in danger of losing her eyesight and the use of her limbs from her master's ill usage³³⁵ both obtained their freedom.³³⁶ So too did a servant who was sold to an Indian and "forced back into the woods where he also suffered very great hardships"³³⁷ as did one who was bound to the mistress of a disorderly house and would "of course be brought up and educated in all kinds of vices."³³⁸ Another, convicted of an assault, was sold to a new master when his existing mistress refused to pay the fines and court fees to obtain his release from jail.³³⁹ The courts likewise freed servants who had completed their terms,³⁴⁰ who were held under indentures that had been obtained unlawfully,³⁴¹ or whose masters had abscon-

332. Petition of Johnson, (Philadelphia County Quarter Sessions Dec. 1773) (unpublished manuscript, on file with Philadelphia City Archives).

333. *Bohm v. Miller*, (Pa. Eq. Ct. 1728/29), in *THE REGISTRAR'S BOOK*, *supra* note 78, at 41.

334. Petition of Vanleuvenigh, (Philadelphia Mayor's Ct. Nov. 1763) (unpublished manuscript, on file with Philadelphia City Archives).

335. Complaint of Bell, (Bucks County Quarter Sessions June 1732) (unpublished manuscript, on file with Bucks County Historical Society).

336. *Accord, e.g.*, Petition of Weaver, (Philadelphia County Quarter Sessions Sept. 1768) (unpublished manuscript, on file with Philadelphia City Archives); Complaint of Laurence, (York County Quarter Sessions Jan. 1754) (unpublished manuscript, on file with York County Archives). *But see* Complaint of Shuster, (York County Quarter Sessions Apr. 1750) (unpublished manuscript, on file with York County Archives).

337. Petition of Hawkings, (Chester County Ct. General Sessions Dec. 1724) (microformed on Chester County Archives); *cf.* Petition of Cossott, (Philadelphia County Ct. Sept. 1785) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (granting petition by servant not to be sold out of province).

338. Petition of Aduell, (Philadelphia County Quarter Sessions June 1768) (unpublished manuscript, on file with Philadelphia City Archives).

339. Petition of Clark, (Philadelphia Mayor's Ct. Nov. 1732), in *Philadelphia Court Papers, 1697-1821* (unpublished manuscript, on file with The Historical Society of Pennsylvania).

340. *See, e.g.*, Petition of Jenkins, (Bucks County Quarter Sessions Dec. 1723) (unpublished manuscript, on file with Bucks County Historical Society). *But see* Petition of Reab, (Chester County Quarter Sessions Nov. 1775) (microformed on Chester County Archives).

341. *See* Motion of Ross, (Lancaster County Quarter Sessions Feb. 1758) (unpublished manuscript, on file with Lancaster County Historical Society); Petition of Bell, (Lancaster County Quarter Sessions Aug. 1757) (unpublished manuscript, on file with Lancaster County Historical Society); Complaint of Duncan, (York County Quarter Sessions Jan. 1754) (unpublished manuscript, on file with York County Archives). *But see* Motion of Allen, (Bucks County Quarter Sessions Mar. 1775) (unpublished manuscript, on file with Bucks County Historical Society) (apprentice who had destroyed indenture required to remain in service); *see also* Petition of Gaynor, (Philadelphia Mayor's Ct. 1740), in *Philadelphia Court Papers, 1732-1744* (unpublished manuscript, on file with The Historical Soci-

ded.³⁴² Suits for freedom such as these could be brought by relatives of servants as well as by the servants themselves.³⁴³

However, an apprentice would not be freed from service because his master was not teaching him a specified trade, although the master would be ordered to teach that trade.³⁴⁴ Similarly, judges would not free an apprentice who suffered a disabling injury that would make it difficult but not impossible to learn his trade.³⁴⁵ Other rules helpful to servants were those requiring that masters pay “freedom dues” upon completion of a servant’s term³⁴⁶ and that new servants be brought before a court for a judicial determination of their age.³⁴⁷

Despite these helpful rules, servants were subject to strict discipline. Servants who ran away upon recapture were required to serve extra time to compensate their masters for their losses³⁴⁸—often a considerable amount of time, like six months, for only a brief absence, like eleven days.³⁴⁹ Extra time was also required of servants who were imprisoned,³⁵⁰ who married without their master’s consent,³⁵¹ or who gave birth

ety of Pennsylvania), where the petitioner alleged that his master “persuaded him being in drink to bind himself for a servant.” The case’s outcome is unknown.

342. See Petition of Hyat, (Philadelphia Mayor’s Ct. July 1763) (unpublished manuscript, on file with Philadelphia City Archives). *But compare* Petition of Tracy, (Philadelphia Mayor’s Ct. July 1769) (unpublished manuscript, on file with The Historical Society of Pennsylvania) (apprentice not freed when master imprisoned for debt and deprived of all assets by creditors), *with* Petition of Biddle, (Philadelphia County Quarter Sessions Sept. 1768) (unpublished manuscript, on file with Philadelphia City Archives).

343. See Motion of Ches, (Bucks County Quarter Sessions June 1765) (unpublished manuscript, on file with Bucks County Historical Society); Petition of Buffington, (Chester County Quarter Sessions Nov. 1768) (microformed on Chester County Archives); Petition of Lambert, (Chester County Quarter Sessions Aug. 1737) (microformed on Chester County Archives). A master who was ordered to release a servant and refused would be committed to jail for contempt. See Complaint of Worstell, (Philadelphia County Quarter Sessions Mar. 1774) (unpublished manuscript, on file with Philadelphia City Archives).

344. See, e.g., Petition of Lancaster, (Bucks County Quarter Sessions Sept. 1753) (unpublished manuscript, on file with Bucks County Historical Society); Petition of Laub, (Philadelphia Mayor’s Ct. July 1762) (unpublished manuscript, on file with Philadelphia City Archives).

345. See Petition of Smith, (Philadelphia Mayor’s Ct. Apr. 1770) (unpublished manuscript, on file The Historical Society of Pennsylvania).

346. See, e.g., Petition of Duffey, (Chester County Ct. Com. Pl. Feb. 1737/38) (unpublished manuscript, on file with Chester County Archives); Petition of Middleton, (Chester County Quarter Sessions Nov. 1732) (microformed on Chester County Archives).

347. See, e.g., Petition of Duncan, (Bucks County Quarter Sessions July 1697), *in* RECORD OF THE COURTS OF BUCKS, *supra* at 325; Petition of Trent, (Chester County Ct. Com. Pl. Oct. 1693), *in* RECORD OF THE COURTS OF CHESTER, *supra* note 29, at 300.

348. See, e.g., Petition of Hart, (Bucks County Quarter Sessions Dec. 1726) (unpublished manuscript, on file with Bucks County Historical Society); Petition of Davis, (Philadelphia County Quarter Sessions Dec. 1754) (unpublished manuscript, on file with Philadelphia City Archives). *But see* Petition of Tolbert, (Bucks County Quarter Sessions Mar. 1762) (unpublished manuscript, on file with Bucks County Historical Society) (master’s claim for additional service denied “as improper for the notice of the court”).

349. See Petition of Maise, (Philadelphia County Quarter Sessions Mar. 1774) (unpublished manuscript, on file with Philadelphia City Archives).

350. See Complaint of Carney, (York County Quarter Sessions April 1752) (unpublished manuscript, on file with York County Archives).

351. See Petition of Harvy, (Chester County Quarter Sessions Feb. 1733/34) (microformed on Chester County Archives).

to an illegitimate child.³⁵² A person who employed a runaway servant was required to compensate the servant's master.³⁵³ And, if a master proved unable to discipline a servant, she could have him committed to the "workhouse, for one week, to be kept at hard labor on bread and water, and for two weeks longer, unless the clerk of this court shall think he is sufficiently humbled."³⁵⁴

In Pennsylvania's treatment of its underclasses, we can discern a subtle transformation of New England's Puritan egalitarianism into Quaker humanitarianism. Puritans treated women and servants relatively well because they understood them to be equal members of Christ's church, however much they might occupy different places in God's creation or be under temporary legal restraints. Quakers, in contrast, did not treat white servants or African-Americans as equals, although unlike some Southerners they did treat blacks as human and white servants with restraint. There also was a slight difference in how New England and Pennsylvania treated husbands who abused their wives. New England courts, sensing that women were equal human beings who could care for themselves in their husbands' absence, imposed criminal penalties on the abusers; Pennsylvania judges, worried, in contrast, that women needed the help of men, put abusive husbands under bond to treat their wives well. The judges thereby showed humanitarian concern, however misplaced, for a human problem, but not a belief in equality.

In their rejection of notions of just price and consequent acceptance of the free market, Pennsylvania judges also slipped away from guaranteeing equality. In early New England, Puritan leaders accepted responsibility for the economic well-being of the poor who lived among them: they had to share their corn, for example, at a price related to its cost with those who had none. Quakers, in contrast, were encouraged to turn a profit, even if profitmaking resulted from exploitation. Quakers, of course, were charitable.³⁵⁵ But charity, like humanitarianism, tends to affirm the superiority of those who choose to give rather than imposing a legal duty on the rich and powerful to treat their fellow humans as equal possessors of entitlements.

IV.

Pennsylvania judges were powerful indeed. They preserved and institutionalized their power. They made law and thereby determined major issues of socioeconomic policy. They imposed taxes and decided elections. They implemented moral policies by enforcing the criminal law, by

352. See Petition of Lownes, (Chester County Quarter Sessions Aug. 1737) (microformed on Chester County Archives); Petition of McCulloch, (York County Quarter Sessions Apr. 1755) (unpublished manuscript, on file with York County Archives).

353. See Complaint of Edwards, (York County Quarter Sessions July 1751) (unpublished manuscript, on file with York County Archives).

354. Motion of Jones, (Chester County Quarter Sessions Nov. 1773) (microformed on Chester County Archives).

355. See BALTZELL, *supra* note 4, at 77-78.

extending humanitarian protections to underclasses, such as women, servants, and even African-American slaves, but by leaving elites, including themselves, free to exploit their power and hence their wealth.

The judges also acted in what we would call an administrative and police capacity as well as a judicial capacity. The practice of subjecting criminal suspects to examination before justices of the peace, which was commonplace in eighteenth-century America, was one way in which judges assumed policing roles. In one case, for example, Elizabeth Orr confessed that she had borne “a dead child,” allegedly to William Storey, whom she asked to bury it. At first, he refused, saying “if the child would be found he would be hanged for it,” but then he relented and urged Elizabeth “to keep it quiet and not speak of it to anybody.” When Storey was examined, he denied any knowledge of the child and proclaimed his innocence in connection with both its birth and death, “but expected to suffer for it as many an innocent person before him had suffered.”³⁵⁶

In another case, a justice examined a man named Hitinger, suspected of theft, and his wife and sister-in-law. Hitinger denied stealing and accused his wife’s sister, but “he would not say any further.” His wife and sister-in-law also denied stealing, and his wife said she had “begged” the money found in their possession. All three were committed to jail.³⁵⁷

Another important part of the criminal process—coroner’s inquests into suspicious deaths—was so routinized by the mid-eighteenth century that the jurors who conducted the inquests under the coroner’s guidance reported their findings on printed forms.³⁵⁸ But routinization was only superficial. Investigations into suspicious deaths were actually under the central judiciary’s control, as a series of letters to the province’s chief justice in one potentially controversial case show.³⁵⁹ Judges also communicated with law-enforcement officials in other jurisdictions, such as the mayor of New York City,³⁶⁰ and extradited vagrants to other colonies where they were wanted on criminal charges.³⁶¹

A striking illustration of the judiciary’s vast power occurred in *Petition of M’Cann*,³⁶² a case involving welfare not to the poor, which judges also

356. Confession of Orr, (Pa. Sup. Ct. Oyer & Terminer Cumberland County May 1773) (microformed on Pennsylvania State Archives).

357. Examination of Hitinger, (Northampton County Quarter Sessions 1758) (unpublished manuscript, on file with Northampton County Archives); see also, e.g., Examination of Harden, (Pa. Sup. Ct. Oyer & Terminer Cumberland County June 1774) (microformed on Pennsylvania State Archives); Examination of Arnot, (Northampton County Quarter Sessions 1772) (unpublished manuscript, on file with Northampton County Archives).

358. See Inquest into Death of Female Infant, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County Sept. 1768) (microformed on Pennsylvania State Archives).

359. See David Jameson to William Allen, March 26, 1768, and Samuel Johnston to William Allen, March 27, 1768, in King v. Ord, (Pa. Sup. Ct. Oyer & Terminer York County Sept. 1768) (microformed on Pennsylvania State Archives).

360. Whitehead Hicks to Thomas Willing, July 18, 1768, (Pa. Sup. Ct. Oyer & Terminer Philadelphia County Sept. 1768) (microformed on Pennsylvania State Archives).

361. See Extradition of Thomas Johnson, (Chester County Quarter Sessions Aug. 1734) (microformed on Chester County Archives).

362. (York County Quarter Sessions Oct. 1756) (unpublished manuscript, on file with York County Archives).

administered,³⁶³ but to the middle class. M'Cann reported that fire had consumed his house and all his real estate, and he asked the court for relief. Apparently willing to grant relief, the court appointed three men to estimate the value of what had been destroyed.

Not until the New Deal would agencies of government again be willing to perform the insurance welfare function performed by the judiciary in *M'Cann*. Never again would judges perform that function. And, never again would judges in America perform all the functions that Pennsylvania's colonial judges performed.

Of course, the colonial judiciary's vast, undemocratic power met with opposition. The province's chancery court, for example, was brought down in the mid-1730s because people in the counties feared a central court under the governor's control applying uncertain law.³⁶⁴ They complained that a chancery court was "contrary to . . . [Pennsylvania's] charter of privileges," which provided that no one should "be obliged to answer any complaint relating to property before the governor and council, or in any other place, but in the ordinary course of justice."³⁶⁵

In a similar vein, a justice of the peace in Lancaster County, who identified himself as formerly "a friend to power," which he "'compared to a great river . . . [that], while kept within due bounds, is both beautiful and useful,'" offered some "observations on power and government." In a speech published by Benjamin Franklin, the justice, who had been removed from office on account of his joining in "opposition given by the House of Representatives," urged his fellow subjects to "be on . . . guard" against "the ill effects of lawless power" that he feared judges might exert once he no longer was one of them. In particular, he urged fellow subjects to keep up "the banks of liberty and common right, the only bulwark" against power, which can turn into a river that "overflows its banks," becomes "'too impetuous to be stemmed,'" and then "'brings destruction and desolation wherever it comes.'"³⁶⁶

As mid-eighteenth century judges were making "encroachments . . . upon the *rights* of juries"³⁶⁷ through devices like the bill of exceptions and the demurrer to the evidence, the press likewise urged jurors to stand fast. One essay, for example, flatly rejected the argument that juries should "only judge of naked *matter of fact*, and are not at all to take upon them to *meddle with* . . . *matter of law*, but leave it wholly to the court." It

363. Pennsylvania courts confronted a great deal of litigation over the obligations of towns, under the poor law, to support paupers. See, e.g., Appeal of Overseers of the Poor of Mill Creek, (Chester County Quarter Sessions Feb. 1767) (microformed on Chester County Archives); Overseers of Poor of Twon of Marungie v. Overseers of Poor of Town of Brecknock, (Northampton County Quarter Sessions 1769) (unpublished manuscript, on file with Northampton County Archives).

364. See KATZ, *supra* note 134, at 255, 268.

365. Petition of Chester County and Resolve of Pennsylvania Assembly, 1736, quoted in KATZ, *supra* note 134, at 252, 268.

366. WRIGHT, *supra* note 8.

367. *The Englishman's Right: A Dialogue between a Barrister at Law and a Juryman*, THE PENNSYLVANIA CHRONICLE, Jan. 20, 1772, at 1.

declared that “if a jury will take upon them the knowledge of the law . . . , they may.” In this essayist’s view, juries had “ever been vested with such power,” and to “disseise them of the same were utterly to defeat the end of their institution,” which was to serve as “guardian of our legal liberties against arbitrary injustice” and to protect against “judges,” who were “more likely to be under an influence which is injurious to the rights of the people.” The judiciary’s efforts to deny the jury its rightful power to find law, in the words of this article, were turning the institution into “a *snare*, or engine of oppression.”³⁶⁸

Despite such criticism, Pennsylvania judges were able to maintain normal appearances as judicial power was dissolving elsewhere in America in the mid-1770s. They kept their courts functioning into the late spring of 1776. But when independence finally came in July, the floodgates opened. Pennsylvania immediately adopted America’s most democratic state constitution, and for the next half century democracy was an unusually potent force in the commonwealth: the state was a constant battleground between conservatives seeking to foster judicial power and democrats seeking to curb it.³⁶⁹ It was not until the mid-nineteenth century that the Pennsylvania judiciary fully reentered the mainstream of American legal development.

368. *The Englishman’s Right: A Dialogue between a Barrister at Law and a Juryman*, THE PENNSYLVANIA CHRONICLE, Feb. 3, 1772, at 5. The essay was continued on February 10 and February 17.

369. John Phillip Reid, *Legislating the Courts: Judicial Dependence During the Era of the Early Republic* (on file with the SMU Law Review).

