Where Subjects were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776

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ABSTRACT

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This thesis examines the role of the colonial American jury, particularly the petit jury, during the quarter century leading up to the American Revolution. The thesis argues that the colonial jury at the inferior and superior court levels was central to a “law court culture” that provided colonists with the education, language and experience to assume the responsibilities of participatory, autonomous citizenship, as opposed to a passive subjecthood that deferred to social and political authority. Within their law court culture, colonial American jurors acted as powerful, independent decision makers, representatives of their communities judging matters of law as well as fact. Jurors sometimes even acted as arbiters in highly charged political disputes, to challenge the power of governors and of the empire itself. When outside British forces threatened this colonial American law court culture and the independence of those citizen jurors, Americans began to perceive themselves as a people apart from the English, uniting to preserve and protect their institutions, particularly their law court culture.
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dissertation would not have been conceived but for the stimulation of Edmund S. Morgan’s *Inventing the People: The Rise of Popular Sovereignty in England and America*, which, with several of his other works, prodded my thinking in various ways and directions. Along with Benedict Anderson’s *Imagined Communities* and Eugen Weber’s *Peasants Into Frenchmen: The Modernization of Rural France, 1870-1914*, these scholars have left me asking more questions than I have yet been able to answer. I have still to work through the idea that nations are “invented” or are as recent an imagination as all that. At any rate, these scholars, in person or through their writings, have ignited my interest in who, exactly, were “the people” before the creation of an American nation—the original, organic colonial societies that would become that nation.

Finally, I wish to thank two colleagues: Vincent Napolitano, for his encouragement and counsel at several points during my study at Columbia, and Judith Anne Wink, for her long friendship and for her keen editorial eye as I prepared this thesis for deposit.

Beyond all others, I am grateful to my wife, Meredith Lisagor Savage, whose love and support throughout has meant more than words can say.
DEDICATION

In Memory of my father,
Robert Moore Savage,

and with Gratitude to my mother,
Bettie J. Savage

and to my wife,
Meredith Lisagor Savage
Introduction:

Voices of “the people”

The jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.

—Alexis de Tocqueville

In his celebrated analysis of the early political culture of the United States, *Democracy in America*, Alexis de Tocqueville sketched an image of something almost invisible to most citizens at the time—a vast source of power that even government could not control. Indeed, according to Tocqueville, America’s governments were inherently weak, beginning at the national level, where the central government’s “sovereign commands” required the aid of “[m]unicipal bodies and county administrations” to be executed. Without the compliance of local governments, the nation’s “representative, the central government,” could do precious little. But even local governments had their limits in the face of a seemingly invisible and irresistible higher power. As he considered American political life in the Jacksonian era, what concerned Tocqueville was not the force of the national state, nor even that of lower political organs. What worried Tocqueville, rather, was the highly coercive power of the society itself. He expounded on these fears in his well-known warnings against the “tyranny of the majority.” In nearly every aspect of social and political life in the young republic, a tidal wave of majority opinion or belief threatened to inundate any contrary interest, dictating everything from artistic taste to

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morality to who should hold virtually every office of power in most levels of government.²

After elaborating on his fears about the “omnipotence of the majority” in a democratic—meaning, for Tocqueville, a socio-economically egalitarian—society, the French observer of American political culture devoted several fascinating pages to the question of “what tempers the tyranny of the majority in the United States.”³ Happily for American liberty, in Tocqueville’s view, the absence of administrative centralization in the United States meant that republican despotism would be hard to achieve, or it would lie in wait, perhaps, on some distant horizon.⁴ Moreover, he saw in the bench and bar, and in the legal profession generally, a sort of American aristocracy that might be a counterweight against what he called “democratic tyranny.”⁵ Legal professionals formed “a body” with mutual proclivities, naturally inclining their sympathies toward the elite, even if “their interest [just] as naturally pulls them toward the people.” Tocqueville thought that the common law, with its case method based upon precedent, attracts or molds a personality that respects “what is old with a liking for regularity” and orderliness. While American democracy depended upon “the political power of lawyers” and of judges, Tocqueville believed that their dispositions and habits of mind simultaneously put these lawyers and judges in a curious tension with the “instincts of

² Tocqueville’s discussion of a “great democratic revolution” as the inevitably expanding “equality of conditions” appears in the author’s introduction, Ibid., 9-20; his emphasis upon the social fabric supporting democratic political institutions can be seen in I, Part i, chaps. 3-4 (50-60); and his fears of society’s majoritarian omnipotence appear in I, Part ii, chap. 7 (246-61). Tocqueville discusses the majority’s influence on religion and the arts in II, Part i, 433-58, 465-74, and II, Part ii, 528-30. Forces acting to temper the majority’s tyranny in America are discussed in I, Part i, chap. 8 (262-76).
³ Note 2 above, and Tocqueville, I, chap. 8.
⁴ Tocqueville writes hauntingly and perhaps presciently of the twentieth century: “If ever a democratic republic similar to that of the United States came to be established in a country in which earlier a single man’s power had introduced administrative centralization and had made it something accepted by custom and by law, I have no hesitation in saying that in such a republic despotism would become more intolerable than in any of the absolute monarchies of Europe.” Ibid., 263.
⁵ Tocqueville, xiv.
democracy” and with the fickleness of that all-powerful public opinion. Tocqueville came to consider the American jury.

Tocqueville believed the American jury to be an emphatically political institution that both exemplified and restrained the omnipotence of popular majorities. If he was correct in observing that “[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one,” then clearly lawyers and judges played a crucial, political role in American life. So, too, did juries.

While Tocqueville had his doubts about the effectiveness of the jury (and particularly the civil jury) in the modern administration of justice, he harbored no doubt about the political importance of criminal and civil juries to American democratic culture. The French author suggested that, while the English had long extolled the jury as a “judicial institution,” the Americans had elevated the jury to a higher, “political” plane. Defining the *jury* as “a certain number of citizens selected by chance and temporarily invested with the right to judge,” Tocqueville argued that such a short-term official body may be either

an aristocratic or a democratic institution, according to the class from which the jurors are selected; but there is always a *republican character* in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into those of the rulers.

Of course, one might ask just how much “real control” over government power juries placed into the “hands of the ruled,” compared to the control of “the rulers.”

Tocqueville himself admitted that “the jury, though seeming to diminish the magistrate’s

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6 Tocqueville, 263-70.
7 Ibid., 270.
rights, in reality enlarges his sway….”  As he explained, “in no other country are judges so powerful as in those where the people have a share in their privileges.”9 Yet at the same time, the American jury system had long conveyed upon ordinary American men, along with judges, a genuine form of governing power over the lives, liberty and property of their neighbors.

For Americans since at least the mid-eighteenth century, jurors had been the embodiment of “the people” in the government; they literally presented the voice of the society within the state’s administrative apparatus. Even if the American Revolution had wrought a society more highly egalitarian than that of any other nation-state at that time, American society in the early republic still contained elements considering themselves “rich and well-born” as well as elements “plain and middling”—elements “aristocratic” as well as “democratic.” Still, as Tocqueville reported, Americans believed their juries to possess, inherently, a republican character. Juries continued to embody the voices of “the people,” broadly speaking, within the machinery of the state. This republican character of the American jury held such attraction that, by the 1830s, the power of the jury had already become enshrined in national memory as both a political weapon and as a means of community coherence, as well as a potent symbol of liberty itself. American political “scripture”—that body of founding documents including the Declaration of Independence and the Bill of Rights—proclaimed the jury as a vital symbol of American liberty.10

9 Tocqueville, 276.
10 Equally valid here might be the phrase national myth, in the sense of “myth” as used by Warren Susman, Culture as History: The Transformation of American Society in the Twentieth Century (New York: Pantheon, 1984), especially chaps. 1-3 (pp. 3-49). Also note in this context Pauline Maier’s discussion of the image of the American Declaration of Independence, enshrined in American memory, in American Scripture: Making the Declaration of Independence (New York: Vintage, 1997, 1998). As discussed below, the Declaration of Independence features the king’s attacks on the colonial jury as important
Ironically, even as Tocqueville marveled at how Americans had embodied popular power within an institution that simultaneously could confine and thus constrain it, the power of the American jury had already been curtailed. Its image in popular memory, however, would not be. This study hopes to shed light on why, from colonial times, the idea of the citizen jury holds such power in American memory. But first, it is essential to say a word about some of the underlying assumptions about the American jury system—about what juries represented to the early Republic. Here, again, much can be learned from that French observer of early American life.

The American jury as political power and as the school of republicanism

Alexis de Tocqueville insisted that the American jury was above all a “political institution” that gave citizens a share of governing power, and that provided them with a “school for citizenship.” Before considering his meaning here, however, it is important to notice one of Tocqueville’s central assumptions. Like Machiavelli before him, Tocqueville believed that, in politics, force and legitimacy were distinct and often competing concerns. As he succinctly put it, “Force is never more than a passing element in success; the idea of right follows immediately after it. Any government which could

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charges against the him, justifying the American Revolution. See also Pauline Maier, introd., The Declaration of Independence and the Constitution of the United States (New York: Bantam, 1998), 55-56, and see her introduction at p. 14. The Bill of Rights, adopted in 1791, provides express guarantees for grand jury indictment and for petit jury trial in criminal cases in the Fifth and Sixth Amendments, and for jury trial in common law civil suits involving more than twenty dollars in the Seventh Amendment, at pp. 79-80.

11 Abramson, We, the Jury, chap. 1, notes that popular perceptions of juries are not entirely positive, though no alternative to the jury system seems likely to replace it in the near future; and see Jonakait, The American Jury System, xxiv, 28-30.

12 Machiavelli surely was not the first to distinguish between power and legitimacy in government, but he clearly recognized the distinction, although he makes plain that “you cannot have good laws without good arms, and where there are good arms, good laws inevitably follow”—an argument that Tocqueville rejects, as seen below. See George Bull, ed., Niccolò Machiavelli: The Prince (London: Penguin, 1961, 1999), 40. Machiavelli further develops the distinction between power and legitimacy in his discussion of the “greatness” versus the “goodness” of the papacy and Church, “Ecclesiastical principalities,” pp. 37-39.
only reach its enemies on a battlefield would soon be destroyed.” Somehow, Tocqueville continued, the people must be brought to see the force of the laws as not merely force, but as rightful. In any state, under its laws, the penal codes offer the only “true sanction” for violating its “political laws.” But the problem for any state lies in this: “where that sanction [or punishment for breaking the law] is lacking, the law sooner or later loses its power.”

In other words, if a state can never be certain that every infraction of its laws will meet with sufficient sanction, then what compels people to obey laws, especially if state sanctions are weak or for some reason are unavailable? Besides a general fear of punishment, what makes society care about the state’s laws? More precisely, how can people be brought to see their own interest in the execution of the government’s proper orders or laws?

Tocqueville answered these questions by claiming that, in America, the people were in one crucial respect invested with state power. He declared:

[T]he man who is judge in criminal trial is the real master of society. Now, a jury puts the people themselves or at least one class of citizen on the judge’s bench. Therefore the jury as an institution really puts control of society into the hands of the people or of that class.

First, it should be noted that this, primarily, is the sense in which Tocqueville meant that juries put real power into the hands of the ruled. Some class of citizens is to join with the judge’s bench to exercise “control of society,” by sharing power over applying the criminal sanctions that give bite to the law. Tocqueville observed that, “In England jurors are taken from the aristocratic part of the nation. The aristocracy makes the laws, applies them, and judges breaches of them.” Thus in nineteenth-century England, the

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13 Tocqueville, 272.
14 Ibid., 272-73.
“class of citizen” that participated in applying criminal sanctions to individuals and, by implication, to the whole of society, was the class of propertied privilege.\textsuperscript{15}

“In the United States,” however, Tocqueville found that “the same system is applied to the whole people. Every American citizen can vote or be voted for and may be a juror.”\textsuperscript{16} Now, immediately the modern critic will object that, obviously, not every citizen had any such right or power in America during the 1830s, beginning with that half of the population barred by gender from political participation. But qualifying his language to refer to that white, male citizen class that may otherwise be considered as the political nation of Jacksonian democracy, Tocqueville insisted that, in America, real power was wielded by “the people,” on juries, quite differently than anywhere else:

The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail.\textsuperscript{17}

As most Americans then understood the term, “the people,” through their juries, exercised a real power over the daily workings of their government. This power did not merely allow the people “out of doors” to brood over the decisions made by others—representatives in government locally or nationally. Rather, the American jury system allowed the people themselves actually to handle power over the lives of individuals, over economic entities, and even over the decisions and actions of the administrators of government itself.\textsuperscript{18}

\textsuperscript{15} Tocqueville, 273.
\textsuperscript{16} Ibid., 273.
\textsuperscript{17} Ibid.
\textsuperscript{18} Gordon S. Wood suggests that the creators of the American republic envisaged the people as ever “out of doors,” watching guardedly as government did its work, and able to influence government primarily through the electoral process. Tocqueville believed “the people” did much more than this. See Wood, \textit{The Creation of the American Republic, 1776-1787} (Chapel Hill: U of North Carolina P, 1969, 1972), especially Part III, 257-389, and 593-615; Jonakait, \textit{The American Jury System}, 28-40. Regarding the jury as an essentially political and representative body, see also the article by and reaction to J. R. Pole,
“The people” was not some abstract concept when one was judged by one’s fellow citizens, particularly by a criminal trial jury. Surely then as now, both criminal defendant and fellow citizen-jurors could immediately feel the power inherent in the decision-making body. Furthermore, Tocqueville argued that the presence of “the people” on juries made the law not only powerful, but it went a long way toward making the power of law right, by speaking in the name of the people, the universally acknowledged source of all legitimacy. Because of the jury system, particularly in criminal trials, Americans had every interest in and reason for caring about the quality of their state and its laws. And the criminal trial jury was not a new reality in Jacksonian America; this particular power of “the people” had been exercised long before the Revolution.

Of course, the presence of jurors in civil and criminal trials did not guarantee “democratic” government, and even with effective juries, democracy had its dangers. While Tocqueville continued to express deep concern about the power of the majority in egalitarian society, he nonetheless felt it right that the jury “should be regarded as one form of the sovereignty of the people”—that the jury “is the part of the nation responsible for the execution of the laws, as the legislature assemblies [sic] are the part with the duty of making them; [and so] it is essential that the jury lists should expand or shrink with the lists of voters.” It is in this context that early Americans associated jurors with voters.


19 Ibid.; Tocqueville, I, Part ii, chap. 7.
20 See the discussion below and in the chapters that follow.
21 See note 19 above.
During the Jacksonian period, then, Americans had been observed drawing a close association between judging the application of the laws and the principle of electing representatives to make the laws. That is, Americans recognized a connection between judging the application of the laws—as jurors—and the republican principle. A fundamental question thus arises: To what degree did British subjects in America sense this connection before the Revolution? To what extent did service on juries promote a conception of what might be called citizenship in the colonial American subjects of His Britannic Majesty, as those subjects participated in judging the application of the laws as jurors? This question animates much of this study on the relation between the American jury and republicanism.

According to Tocqueville, the institution of the jury in America actually was a school of sorts, teaching Americans several things. Criminal trial juries taught citizens to respect the power of the law and the power of the jurors who applied that law. But while presumably few individuals are likely to confront a court as defendants in a serious criminal case, many individuals may sue or be sued in civil proceedings involving, for example, titles to land or business dealings. Here, civil litigants may “form the habit of using [juries and courts] in the ordinary business of life,” so that “the idea of justice becomes identified” with the civil jury itself. In this context, Tocqueville thought that civil juries, especially, “are bound to have a great influence on national character”:

Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

It spreads respect for the courts’ decisions and for the idea of right throughout all classes….

Juries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself. That is especially true of juries in civil
suits; hardly anyone is afraid that he will have to face a criminal trial, but anybody may have a lawsuit.

And most important, Tocqueville argued that

Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government. Juries are wonderfully effective in shaping a nation’s judgment and increasing its natural lights. That, in my view, is its greatest advantage. It should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate’s efforts, the judge’s advice, and also the very passions of the litigants bring within his mental grasp. I think that the main reason for the practical intelligence and the political good sense of the Americans is their long experience with juries in civil cases.22

Thus the American jury system educated and reinforced popular power within an egalitarian or “democratic” culture, while it also refined and reflected the political inclinations of that culture.

While Americans of the early republic believed that they had enjoyed a long experience with their jury system, more recently questions have been raised as to just how old and venerable is the tradition of the American jury.23 Professor John M. Murrin’s article, “Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England,” is frequently cited as doubting whether Americans actually had enjoyed such a “long experience” with juries. Murrin argues that in those

22 Tocqueville, 274-75.
colonies where Puritan magistrates were strong, they tried to limit or abolish jury use, except in capital criminal cases. “While the saints ruled, sinners paid for their crimes.” Juries were dispensed with to the extent that magistrates could avoid them—except in some ordinary civil lawsuits and, particularly, in capital, criminal trials, where apparently magistrates sought broader social responsibility for executions. Otherwise, “great saints” wanted convictions and magistrates wanted to rule by inquisitorial, biblical means, avoiding juries where possible—at least until 1660. The problem was that the “lesser saints” and, presumably, all the sinners wanted stronger protections, meaning juries, and they agitated for them whenever possible. In a somewhat similar vein, Bruce Mann argues that civil juries in Connecticut were relatively unimportant through the first half of the eighteenth century.24 One problem with both of these important studies is that they are concerned with the period before the mid-eighteenth century, that is, before the Anglicization of the American colonies, when British and American officials began to bring colonial legal institutions into greater conformity with those of England.25 Moreover, even Murrin acknowledges that seventeenth-century juries had played a crucial role, specifically in capital trials, and that colonists had continued to press for their juries in the period. Meanwhile, Mann’s study of early Connecticut may not


actually demonstrate a disuse of juries, but rather a disuse of juries only in certain courts.\footnote{Murrin, “Magistrates, Sinners, and a Precarious Liberty,” 157, 197-206. In particular, Nelson criticizes Mann for having focused on the Inferior, or County Courts in Connecticut, ignoring defendants’ use of amended pleadings to juries in the \textit{Superior} Court: Nelson, \textit{Americanization of the Common Law}, xii-xiii.}

This investigation hopes to shed light on this dispute. For the present, though, suffice it to say that most early-nineteenth-century Americans believed that they had enjoyed a long experience with juries, in civil and criminal cases, and that they highly valued this perceived experience.

\textbf{What the Revolution had wrought: From the nineteenth century, looking back}

Whatever else Americans may have thought about their experience with juries, by the 1830s, clearly the role of the American civil and criminal trial jury had changed. American jurors had been incredibly powerful in the years before and during the Revolution. This study will explore this power, particularly in the thought of John Adams and of other writers about juries and their duties and authority. But by the third decade of the nineteenth century, judges had risen in legal prominence while jurors’ roles had become tightly circumscribed. In short, American juries had come to be limited in their decision-making power. The judge, specially trained in and knowledgeable about the law, would reign supreme as never before in the American court—in this milieu of people and law. By the early nineteenth century, a judge in court was a powerful man armed with specialized knowledge. He knew things that jurors could not be expected to know, starting with a complex and lengthy (and now recorded) case law.\footnote{Morton J. Horwitz, \textit{The Transformation of American Law, 1780-1860} (Cambridge, MA; London: Harvard UP, 1977), chap. 1, especially pp. 16-30, and pp. 140-59, 226-30; Nelson, \textit{Americanization of the Common Law}, 1-10, 13-35, 69-79, 165-74.}
Meanwhile, in his discussion of American courts and their jurors, Tocqueville identified what was central to the workings of American democratic culture. For what was novel about American courts was that ordinary citizens participated in the law-applying process. But during the first decades of the nineteenth century, this citizen participation was being curtailed. By the Jacksonian era, that is, the authority of the people now was being used consciously, but more theoretically, to legitimate the force of law—certainly in matters of increasingly complex civil litigation. For by the 1830s, juries were being limited in their legal authority, as Morton J. Horwitz and William E. Nelson have well documented. Once the powerful deciders of the law as well as the facts of the case in the colonial period, by the age of Jackson, jurors’ powers were restricted only to questions of fact. The judge, as expert in law, now was gaining power to instruct and bind jurors as to what the law said and what it meant. How and why this happened is the story that Horwitz and Nelson, in their differing interpretations, have covered well.28

Less clearly understood is the nature and role of juries three-quarters of a century earlier, when they spoke with the force of the whole society and were central to a legal culture that knew no such clear boundary between fact and law. For here was a legal culture where all who brought business into court stood as equals on a middle ground of meeting, where powerful jurors, in some respects more than judges, held sway.

An hypothesis on juries and the emergence of a republican and national consciousness in late colonial America

American national feeling did not exist in the early colonial period, obviously. Neither was national sentiment fully formed at the very start of the Revolution, despite, for example, such references to “the people of America” in the Declaration and Resolves of

28 See Horwitz and Nelson, cited above.
the First Continental Congress in October of 1774, or to the “common liberties of America” in the New York Sons of Liberty Resolutions on Tea in November of 1773.29

On the subject of national consciousness, Benedict Anderson has written that “nationality, or, as one might prefer to put it in view of the word’s multiple significations, nation-ness, as well as nationalism, are cultural artifacts of a particular kind.”30 Now, surely such cultural artifacts must be created and advocated over time—developed and nurtured as with any set of cultural understandings—in order to have deep meaning to and resonance within a particular culture. The same applied to those cultural artifacts that were to provide the social foundation on which to support that political act known as the American Revolution. “Americans” seeking independence from British suzerainty required at least some sense of what was “American” as distinct from what was British. And if Americans were to cease being monarchists, they required at least some sense of what it could mean to be something else—to be republicans. The question, of course, is what helped them to imagine these new possibilities, to develop this new sense?

The purpose of this study is to explore the role of the petit jury, in particular, in the development of what would become an American republican polity or civic culture. A central aspect of this study will be the close analysis of the role and work of the jury in select, late colonial American court venues and cases, to explore the nature of colonial court life, or law court culture, in the development of what would lead Americans toward a new, republican polity—a new civic culture, a distinctively “American” nation. In examining cases from Massachusetts Inferior and Superior courts, particularly, this

investigation will illustrate how and when juries were used, in the years just prior to the
Revolution, requiring the subject to take an active role in politics—a role of power and
responsibility more akin to what we today would think of as that of citizen. This
investigation will also explore the origins and evolution of the language of popular
entitlement in this colonial court culture. Additionally, the wide pamphlet literature
discussing juries and court cases will be assessed. Judges’ charges and other writings,
such as those from the popular press, will broaden the focus of research. The central
postulate here is that a colonial American law court culture provided a nursery for the
development of an American (as opposed to a British) civic feeling. When gravely
threatened, this law court culture, with powerful, independent jurors at its heart, provided
an essential stimulus to and justification for revolution itself.

This investigation, then, seeks a better understanding of early court culture, using
as evidence select case studies, primarily from courts in various areas of Massachusetts.
While clearly all of colonial America was not like Massachusetts, nonetheless, as
William Nelson has observed, Massachusetts was a colony central to the course of the
American Revolution and influential over the subsequent legal development of the
American states, including the national state. In addition, after more than a half-century’s
Anglicization of the American colonies, the courts and jury system of colonial
Massachusetts were sufficiently “Anglicized”—like those of other colonies on the eve of
revolt—so that parallels may be drawn between the Massachusetts experience and that of
other colonies and, eventually, states.\footnote{In the sense in which Tocqueville described American courts and juries as “political,” above.}

\footnote{Nelson, \textit{Americanization of the Common Law}, 3-5, 30-35, xi-xvi; Murrin, “Anglicizing an American Colony,” 258-86.}
The central focus of this study is on the culture wherein court life and especially the action and decision-making power of the citizen-juror formed a distinct political arena. In the colonial court, American subjects within the British Empire possessed and used cultural, social and political power to negotiate the boundaries of rights and obligations between fellow subjects within the locality, between local communities and, occasionally, between the peripheries and the center of empire.33 In colonial courts, the petit jury also navigated the boundaries of authority between the jury itself and the magistrate-judiciary, and to some degree with magisterial power as well.34 This study seeks to illuminate how the evolution and long-term effects of court and jury culture led to the empowerment of colonial subjects, and to illustrate the significance of this culture in the creation of an American civic consciousness or national feeling.

A number of studies have described the development of American civic consciousness in the struggle for power and influence, particularly, in the more “political” arenas of American colonial life. For instance, historians have examined the signal role played here by colonial assemblies. Chief among these studies is Jack P. Greene’s The Quest For Power, which portrayed the emergence of the popular houses of the American colonial assemblies as they tried to become peripheral versions of the British House of Commons. They fought and gradually succeeded in limiting the power of royal governors and of the London government itself, providing the laboratory for American representative government and the nurturing soil for an American leadership.

34 Konig, ibid.
When challenged by King and Parliament, particularly during the Stamp Act crisis, these lower houses reacted, as might be expected, to maintain their power and privileges. Clearly, imperial action vivified popular support for legislative assemblies.\(^{35}\)

Moreover, works such as Jackson Turner Main’s *The Upper House in Revolutionary America, 1763-1788*, have placed the early American councils in their colonial and revolutionary perspective, showing how these evolved, as did the American republics themselves, toward more democratic aims, allowing space for political factions to fight out their differences, just as they would in the lower houses of the nascent American republics.\(^{36}\)

There is no need to doubt the importance of such studies in describing the rise of an American sense of legislative right and power, nor need anyone doubt that American national feeling was created and nurtured, in part, through the rise of indigenous legislative leaders and their growing authority. But even if one accepted the work of Robert Brown, for example, arguing for significant voter participation in colonial elections, still, the number of men who had actual legislative experience could only have been a fraction of that voting population from late-colonial times well into the early republican period.\(^{37}\) Given that the members of colonial American assemblies were a sliver of the general voting population—indeed, given that representatives generally came from the ranks of the elite—in what other ways were more ordinary early


Americans able to partake in political culture? If ordinary British-American colonists were to evolve into American republicans, whence came this impulse in popular thinking? Where could ordinary subjects of a king rehearse their roles to be citizens of a republic?

The juries of colonial courts offered American subjects a critical and at the same time routine opportunity to interact with the politically powerful of the colony, to defend basic personal and property rights. For example, Richard Bushman has described how humble colonial farmers in court, filing their papers and tending to their legal business, gained a sense of civic identity and virtue. Such identity and virtue had religious undertones, and central to court life, indeed, was the quasi-religious aspect of so much of what went on in these local tribunals. For ordinary farmers, the law court became the milieu mediating the appeal to higher authority, always characterized by arguments before justices on high and often before the juries who held a subject’s fate in their hands. By comparison, the church could not mediate disputes between non-members and, by 1750 even in New England, it had lost much of its earlier influence. But courts and juries regularly mediated disputes, with the power of the whole society and its political establishment backing their judgments. As time passed in New England, it became ever more clear that courts—and juries—could create and maintain social cohesion in a way that church meetings and some towns’ assemblies increasingly could not.38

38 Richard Lyman Bushman, “Farmers in Court: Orange County, North Carolina, 1750-1776,” in Christopher L. Tomlins and Bruce H. Mann, ed., The Many Legalities of Early America (Chapel Hill: U of North Carolina P, 2001), 388-413. Konig, 46-57, 104-5, 126-35. Whereas Konig credits the “relative simplicity” of the Massachusetts courts in “mak[ing] a powerful contribution to social stability” (115), I believe that the decision-making power of citizen-jurors, by the middle of the eighteenth century, exercised an influence over other potentially centrifugal forces in social opinion, partly in a manner described by Tocqueville, discussing the omnipotence of majoritarianism, specifically mentioning juries in this process; see above, and see Democracy in America, 252. Clearly, however, certain community disputes were
And while several important studies have explained the procedural role of courts and juries in colonial America (especially in Massachusetts), generally these have not elaborated on how colonists perceived the jury power and role; nor have they explained how juries came to advance the civic principle in making citizens out of subjects.

Shannon C. Stimson, for example, asserts that “jury duty represented one of the very few times ‘citizenship’ was exercised by the common order of men,” but she gives little or no explanation of how this occurred or what such a larger sense of duty meant to these “common” colonial men. Likewise, she asserts that “in the seventeenth century, discussions of the power of juries serve as an important precursor of popular attitudes about the possibility and character of self-rule,” without developing how this was achieved, or why. She declares, as if self-evident, that juries reflected, enforced, and created local “moral, religious, and political standards,” but she fails to paint a portrait of colonial law court life or culture—a portrait that might show how colonial jurors provided such a reflection of, or guidance to, their communities. (This is especially important since English juries did not come to wield such moral, religious or political power.) Stimson does not explore these areas because she is concerned primarily with other issues, especially with the evolution of the powers of judges and of judicial review probably beyond any colonial jury’s power to reconcile, particularly those involving fundamental conflict between elites—including political disputes between the periphery and the metropolis.

in a democratic culture.\textsuperscript{40} Unfortunately, much of that democratic culture remains in the shadows from such an institutional approach.

Likewise, dissertations such as Barbara Black’s, on “The Judicial Power and the General Court in Early Massachusetts,” have thrown light on issues relating to the current topic. Black’s dissertation, among others, has answered many of the questions about how judicial power developed in the colonies (or in a particular colony), yet such investigations have not focused on court and jury culture per se. Rather, they have emphasized the legal mechanics of the jury’s role. Again, such institutional studies, while important, do not deal with what this inquiry regards as “law court culture” and the popular power it embodied.\textsuperscript{41}

But just as revolutionary feeling among united colonial Americans did not spontaneously erupt, neither did the role of powerful juries as fact deciders, civic decision makers and, often, as the determiners of law itself. This study seeks a clearer understanding of how the role of juror evolved with the sense of community, especially by examining cases where community members came before juries and served on them. Here, as one example, the Town Records of Topsfield, Massachusetts prove vital, for they list the names of jurors chosen to serve each year, and at one point list the property

\textsuperscript{40} Stimson, ibid.

\textsuperscript{41} See Barbara Aronstein Black, “The Judicial Power and the General Court in Early Massachusetts, 1634-1686” (PhD diss., Yale University, 1975); and cf. Daniel David Blinka, “Trial by Jury in Revolutionary Virginia: Old-Style Trials in the New Republic” (PhD diss., University of Wisconsin-Madison, 2001). Blinka’s study is primarily concerned with how the jury developed from the Revolution—when juries exercised great power and leeway in deciding the law as well as the facts of the case—to the present day, when jury power over interpretation of law has been transferred entirely, in most or all jurisdictions, to the bench.
holdings of these men and all others in the town, providing some insight into what sorts of persons ordinary jurors tended to be in one New England locale.\textsuperscript{42}

In broader terms, then, what was the relationship between the community and jury that might help explain the expanding role and influence of jurors and their perceived power to enforce social order and stability? How did juries realize their broadening claims of legitimacy and power locally and, on occasion perhaps, even imperially?\textsuperscript{43} To what degree and in what ways did this court and jury culture help to create and nurture a new sense of civic consciousness in individuals?

A special relationship in colonial political culture between the community and the idea of the local jury of twelve, evolving over time, helps to explain the very personal attachment so many Americans have had to constitutionalism and courts, even to the point of “[Thomas] Paine’s vision of a constitutional cult”—a reverence well documented by Pauline Maier.\textsuperscript{44} Colonists prized this idea of the local jury, even while any particular defendant may have had cause to fear being hauled before the court.\textsuperscript{45} And clearly in colonial times, as today, jury service could be an onerous duty or disruption to one’s routine that one might wish to avoid.

\textsuperscript{43} Consider, for instance, the jury decision in the case of John Adams’s defense of the soldiers implicated in the Boston Massacre.
\textsuperscript{44} Willi Paul Adams, \textit{The First American Constitutions} (Lanham, MD: Rowman & Littlefield, 1973, 1980, 2001), 18-19; Pauline Maier, \textit{American Scripture}. As noted above, Maier deals with the making of the Declaration of Independence, as is clear from the book’s subtitle; but just as clearly, the US Constitution is a major piece of American “scripture”—writ that includes colonial charters, laws, and the like. All this is part of an American cult of constitutionalism.
\textsuperscript{45} Defendants often had cause to fear since, as the records of the Inferior Court of Massachusetts show, plaintiffs frequently won their cases especially before judges sitting without jury, an issue to be discussed below. As for criminal cases, juries would obviously be appreciated to the degree they were seen to have “regularly mitigated the severity of the laws,” and in localities where the chances of conviction approached only fifty-fifty. On the other hand, since defendants had to pay for their right to a jury trial, this might have limited the affections of many for this sort of procedure. Peter Charles Hoffer, \textit{Law and People in Colonial America}, rev. ed. (Baltimore; London: Johns Hopkins UP, 1992, 1998), 113, 119-20.
Beyond a reverence for “constitutionalism” and juries, however, colonial Americans did have other concerns about courts and, particularly, about judges. Richard D. Brown has portrayed an interesting tension in revolutionary Massachusetts between judges and courts, on the one hand, and “the people” on the other. While Massachusetts governors and their supporters might agree with the Popular party about the need for judicial impartiality, in theory, what did this mean in practice? Were courts and judges to be independent and, if so, of whom: of the administration? of the people? And how was any such independence in court culture supposed to apply to jurors? Governor Hutchinson certainly did not view Boston’s jurors as possessing the proper sort of “independence” in the years just before 1776. Meanwhile, opponents of Hutchinson viewed the proposal for Crown stipends for colonial judges as a grave threat to the “independence” of the courts. Many colonials feared judicial dependence upon administrative authority. Such fears were a primary reason for the closure of colonial courts and the refusal of some grand and petit jurors to serve, at the start of Revolution, even where judges tried to make the courts function. And as Robert E. Brown portrays it, American colonists, committed to their middle-class, democratic political culture, highly valued their “control over judges, justices, sheriffs, and jurors.” Mandamus Council members and Admiralty judges dependent upon royal appointment and salary were not the sort of officials Americans were fighting for; indeed, these sorts of officers, dependent on the political and economic power of the Crown and opposed to the people’s “rights,” clearly pointed toward the danger that courts could represent—if those courts were not properly constituted.  

The broader, more important lesson up till then, however, had been that of colonists coming to see how, in court, even the most ordinary subject—a farmer or a widow—could, as a plaintiff, defend his or her rights and seek satisfaction against neighbors powerful or plain. Easy access to courts and informal court procedure had made this possible. To what degree, then, did colonists view the court as an equalizer in their society, even when—and particularly when—class or other distinctions were so clearly displayed and impressed upon the minds of all present there? This study hopes to show that the jury of citizens was the key to creating a middle ground on which disputants could argue their claims with one another: individual subject and subject, the individual and the community, individuals in community and the colonial elite governing that community—and in some instances also the whole community and the center of Empire itself.  

Some of the studies of American colonial law (especially early colonial law) have focused on the variation of American common law from that practiced in the British Isles, or they have emphasized the regional variations and distinctions within the law of the thirteen colonies, until its Anglicization during the eighteenth century. William Nelson, in particular, has done important work on the evolution of the common law in the colonies, including his studies focusing on the technical aspects of juries and their

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47 Regarding the imperial point, see, for example, John Phillip Reid, *In a Defiant Stance*, 74, and chaps. 8, 11.

relation to town bodies and to social order more generally. The current study seeks to understand better how juries helped create community feeling, stability and order, particularly as tensions rose on the eve of Revolution.

**Where subjects were citizens**

A central hypothesis of this study is that American juries provided a middle ground on which colonial American political power (elite colonial office holders), attorneys, plaintiffs and defendants, tradesmen, farmers, widows, thieves, drunks, and even children (through their representatives) met to argue their causes before their fellow subjects. This middle ground was a unique culture—a law court culture—where common men exercised uncommon power, as jurors, over the lives of all in their communities. These jurors did not come mainly from the political elite (they were generally property holders), but they became uncommon subjects through the role they played as decision makers in an extremely wide variety of cases. And these jurors became uncommon subjects by wielding a power, if not that of a Burgess, clearly far beyond that available to any American jury today. How colonial American juries reflected their societies and molded them, represented their communities but without parliamentary pretensions, and how these juries sometimes provided community leadership—ultimately toward national feeling, by providing a platform for expression of revolutionary sentiment—these are the subjects of the pages that follow.

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Although this study is not a foray into the sociological or psychological “inner world” of the colonial subject, an intermediate hypothesis of the current investigation is that jury service did effect a significant change in individual political posture in those serving on juries and in those watching them act. If Anderson is correct that “nation-ness” is somehow a collection of cultural artifacts, then these artifacts in the culture must have resonance for ordinary folks such that the citizenry will respond to the exhortations of social and political leaders. Subjects must become citizens. They must become able to recognize, value and demand their own autonomy under law. To achieve this, individuals must first develop what Hendrik Hartog has called a “rights consciousness.”

This study will argue that going into court gave colonials this new consciousness.

A related, intermediate hypothesis is that something happened to His Majesty’s subjects, in America at least, in becoming part of a court culture, however briefly. The belief that the community is somehow represented by the jury that reconciles community divisions and disputes, and that binds up community wounds, in itself may not point the way to the creation of effective national sentiment. On the other hand, an overwhelming outside threat to such a community belief—a perceived, powerful attack upon the integrity and effectiveness of all communities’ juries—might spark a greater recognition that the “local” is “national,” a thesis developed by Michael Zuckerman. And while

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51 After painting an idyllic portrait of independent, largely isolated “peaceable kingdoms” for colonial New England towns, Michael Zuckerman concludes that, with “[t]he very core of their community life thus threatened [by Britain’s Intolerable Acts], the townsmen turned their attention outward for the first time in almost a century. In villages all over the province men who had barely ever bothered with anything but their immediate affairs took up with zeal the unaccustomed issues of Massachusetts and America and the empire itself.” While Zuckerman explicitly mentions the British elimination of the colonials’ “elective jury, an institution tied totally to the shared prejudices of peers and one which had proven itself a splendid
surely New England was not as “peaceable” as Zuckerman imagined, it is clear that American provincials came to believe that the British had designs on many of their local rights and institutions by the 1770s—particularly on their juries. Colonists believed in their jury courts; this too was a fundamental aspect of American colonial court culture. When threatened by an outside force, this belief in the right of jury trials would manifest itself as a significant part of an American political culture.

Moreover, an important part of this colonial court culture was a rising litigiousness (although one could argue that, in Massachusetts certainly, colonials had always been litigious).\(^{52}\) While a developing economy might help to explain early Americans’ apparent delight in litigation,\(^ {53}\) perhaps another factor also was at work. It will be suggested here that a new consciousness of rights or entitlement emerged from an increasing realization that juries were powerful, independent arbiters of law and fact before whom people felt increasingly empowered to assert their rights—to have their day in court. Whether a British soldier or a town loiterer; whether a governor or a newspaper owner; whether a debtor or a creditor—anyone might assert his rights in a court culture that in many ways leveled the playing field and forced opponents to defend their causes or to argue their entitlements. And this same court culture—and their journalistic and shelter for the townsmen from imperial regulations,” this concern appears as but one of many, and remains undeveloped. I propose that moving jury-community relations to the foreground better illustrates how the “local” became “national.” Further, before juries were providing legal “shelter” for revolutionaries, they were reinforcing local communities and creating and empowering a citizenry, as I develop below. Zuckerman, Peaceable Kingdoms: New England Towns in the Eighteenth Century (New York: Norton, 1970), 248-49.

\(^{52}\) Love of litigation can be seen in the seventeenth century, for example, in the volumes of the Records and Files of the Quarterly Courts of Essex County, Massachusetts, 8 vols. (Salem, MA: Essex Institute), as well as in the increase in number, complexity, and damage awards of civil suits, illustrated in chaps. 2 and 3 below.

\(^{53}\) Economic troubles provide another explanation for increased litigiousness during the latter part of the period, as evidenced by the tremendous amount of debt litigation seen in the Records of the Inferior Court of Common Pleas (Essex County Court House), from the 1740s to the Revolution, discussed in chaps. 2-3 of the current study.
political defense of this culture—would offer Americans, in some cases, certainly, the opportunity to argue their rights even against the king himself. Massachusetts offers a good test case for the argument of an “entitlement consciousness.” This study will suggest how, from 1765 on, external British threats to colonial court culture helped to transform a colonial “my rights” consciousness into an “our rights” consciousness. Nowhere would these threats be more resisted than in the increasingly serious British assault on colonial public forums such as the jury, as the Declaration of Independence makes emphatically clear.54

The plan of this study

The first chapter of this investigation posits and develops the idea of colonial law court culture and of the jury function at the heart of that culture. Linking the idea of a law court culture to the physical structure of colonial courts, the chapter illustrates how certain symbolic imagery and routines in court further created and reinforced that culture, binding officials within that court culture to each other and to the laity in the community beyond. Chapter 1 also emphasizes the significance of language—the spoken and written word—as key in the creation of this law court culture. The chapter argues that, while judges were a central authority in court, so, too, were jurors, a number of whom are identified and analyzed for what they can reveal about the range of men who served and

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54 Besides charging the king with dissolving “Representative Houses” and “suspending our own Legislature,” the Declaration attacks the king “For depriving us in many cases, of the benefits of Trial by Jury.” Commager, *Documents*, I, 101. With respect to broader examples of public forums as a means of self- and popular expression, David Waldstreicher makes a fascinating case that public festivals provided the early Republic, I would say, with a “political space” for public expression, which I think has some parallel to the spectacle of public trials, especially in creating social identity and cohesion, while also expanding the venues where ideas (or the symbols of ideas) of many varieties can be “displayed” and supported—or opposed. *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820* (Chapel Hill: U of North Carolina P, 1997).
about the social experience of those men and their families during the period leading up to and just beyond the Revolution.

Chapters 2 and 3 concentrate on the petit jury, primarily, in the inferior and superior courts of Massachusetts, focusing closely on the analysis over time of civil and criminal cases from the sessions of those courts. The reasons for focus on Massachusetts bear repeating: Massachusetts was a leading state in revolution and its legal methods and institutions had been and continued to be widely influential. Massachusetts provided an important legal model for Americans, constitutionally as well as judicially. These two chapters, then, consider the impact of the popular participation of jurors on the cases of civil litigants, and on those of criminal defendants who faced trials in the superior court, discussed in Chapter 3. These chapters ask, essentially, what difference did it make when colonial jurors heard and decided cases, as opposed to the judges?

Chapters 4 and 5 broaden the discussion into the larger social and political realm, focusing on the “political” trial. These chapters consider how this law court culture, with its independent jurors, enhanced the “entitlements consciousness” of New York or Massachusetts colonists, for example, just before Revolution. The Zenger trial, for instance, is an early and extremely important case, since it was in this most famous of trials that a jury, in 1735, struck an important blow for the right to dissent from official political opinion. In this celebrated case, the jury effectively nullified the administration’s use of the law of seditious libel as a New York judge had hoped to apply it, opening the political space for a broader social debate over essential rights and how these could be won, in courts, under law—law determined, that is, by a jury. These chapters consider how, from 1765 on, external British threats to colonial American law
court culture and to its juries helped the colonists and jurors transform a “my rights” consciousness into an “our rights” consciousness. And in broader terms, when particular, partisan political motives clashed with basic principles of justice, in the Boston Massacre trials, for example, how did jurors acquit themselves in such difficult, “political” decisions? How did jurors represent their societies, in political disputes, in court?

These final two chapters also consider several significant pamphlets published in England and America, part of a trans-Atlantic debate over such matters as the “right of appeal to juries” and the power and scope of jury trials in seditious libel cases. These were major issues of the eighteenth century, pitting administration (or government) power over the right of individual expression and the ability of jurors to defend and protect that expression. These chapters also analyze what some judges themselves said about what they thought of juries, in their charges to jurors at the end of trials. Judges’ writings and their charges to juries provide insight into competing attitudes toward the proper function and duty of jurors, as well as insight into what judges thought was not expected of those jurors.  

The American debate over writs of assistance and over the role and jurisdiction of the juryless vice-admiralty courts will be considered, offering further insight into where Americans thought their basic liberties were under threat and where their jury prerogatives required a strong defense.

In exploring these primary areas, this study hopes to demonstrate how American court and jury culture provided the stage for a new sort of political actor—an American citizen who challenged rather than deferred to authority, and who heeded the call, when it

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55 "Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772," ed. Josiah Quincy et al. (Boston: Little, Brown, 1865).
came, for a revolution in political mentality—precisely because the social revolution had been under way for some time, in colonial courts.

Broadly put, then, the pages that follow explore colonial American legal life, especially to develop an idea of what may be called a law court culture, a culture of transformational influence and power, situated in the actions and role particularly of the colonial petit jury. This study will illustrate how Americans came to see themselves as active participants—as jurors—in what often was essentially political activity. It is hoped that this study will throw a brighter light on how this jury and court life and action affected the community of which it was such an important part. This investigation seeks to illuminate how colonial litigants, jurors and many others observing their actions came to identify their interests with this court culture. This exploration tests a suspicion: that colonial law court culture provided a venue where American subjects of an English king could prepare themselves to become something more than subjects of an English king.
Chapter 1

Colonial Law Court Culture and the Jurors at its Heart

From south to north, throughout the American colonies in the several decades before Independence, court day in the vicinage was a major community event. In a southern colony such as Virginia, for example, farms and plantations, rather than towns and cities, provided the organization for daily routines, work and life. Community in the south was predominantly rural and widely dispersed. The community created by court day (or days) in a southern colony such as Virginia was especially important. For during those several days when the circuit court justices arrived and sat, a temporary sort of town came into being around the court, forming a close body of people in a society otherwise used to distance between neighbors. In the small towns of Massachusetts, on the other hand, closer contact between neighbors was the norm. Community was continuously on display through all kinds of social interaction in the small town of New England. But in the south as well as the north, court day witnessed a coming together of community around the pomp and ritual of the law court in its local visitation. While the sitting of a circuit court generated the gathering of community around the legal business at hand, the law court became itself a community with a culture all its own.  

More specifically, the colonial law court created around itself a “culture” of traditions, ritual and custom, and symbols rich in popular meanings—and that court culture transmitted those symbolic meanings to a wide audience in the broader

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community. In fact, that broader community was shaped and ordered, in large part, by colonial law court culture. And while judges on high sat at the center of the court and were responsible for the order and effective transmission of that court culture to the broader community, those judges did not sit alone. They were routinely joined by jurors who, if seated below the justices, were nonetheless also central in creating and shaping colonial law court culture. Indeed, in the most significant civil and criminal cases, jurors exercised enormous power and influence in the colonial law courts, as later chapters will show. What follows now is an examination of what colonial courts looked like, how they worked, and what sorts of people interacted there. Particular attention will be given to those men who represented the community within the court and who became its voice in deciding many of the community’s disputes. For jurors were central to colonial law court culture, and they could be as varied and distinctive—and, paradoxically, often as ordinary—as the community from which they were drawn. But within colonial law court culture, jurors became a powerful vox populi, even while individually they were simply subjects of His Britannic Majesty.

**Court day and the evolution of a colonial law court culture**

In both Virginia and in Massachusetts, to consider two colonial examples, court day was exciting. Colonial court day was a combination of fair, circus, and live theater, whose “performances”—trials at law—could range from dull to electrifying. Court day also presented an opportunity for ordinary farmers or townspeople to meet to conduct their business and to transact their economic affairs. Widows came, often fresh in their grief, with papers to file following the death of their husbands. Fears for the security of their estates may have added to their grief, when they came to court without the proper papers
because their husbands had died intestate. Alleged criminals came, if not usually under their own free will. And many ordinary folks appeared with complaints, especially about the failures of their neighbors to pay their debts.²

Court day in Virginia was not quite the same as court day in Massachusetts, thanks to the more rural landscape of the Old Dominion. Court day in a Virginia county saw a coming together, often from great distances, of families and neighbors—of community. The typical Virginia courthouse stood in a lonely field or wood, generally where two highways (dirt roads, that is) came together. With the monthly arrival of the circuit court justices and the coming of court day, however, the community of a Virginia county came literally into view. People appeared from miles around to attend to their legal business in court.³

Not too far from the county courthouse one would also find an ordinary or tavern, the local gaol or prison, and perhaps a general store. As the community assembled around the court and prepared for the legal business to commence, people could expect much entertainment in the festival atmosphere that unfolded. All subjects, from gentry to ordinary farmers, congregated at the tavern. (In fact, in many parts of colonial America during much of the seventeenth century, justices of the peace often had met in taverns,

³ Isaac, The Transformation of Virginia, 88-91; Sydnor, Gentlemen Freeholders, 74-80; and Roeber, “Authority, Law, and Custom,” 30-31, 34. Lounsbury insists—seemingly contradicting Isaac’s description of Virginia’s “isolated” courthouse—that the Virginia county courthouse “did not stand majestically aloof from its surroundings … [but] was an integral part of county life” (“The Structure of Justice,” 214). However, Lounsbury’s description of county and court life following this statement focuses on the court as the center of vibrant social activity, on court day(s), rather than on the court building’s position in the rural landscape (214). Virginia’s courts became bustling social centers on court day, becoming the hub of the rural community drawn together during that period. The courts created a sort of town around them, at least briefly, when the judges arrived and the court prepared for its busy session.
usually using upper rooms when these existed, to conduct law court business.\(^4\) At the tavern people could expect to find food and lodging and hear fiddle playing. If they cared to, they could join in the dancing and other merriments, including billiards and card games. Of course the ordinary also provided plenty of drink, including beer and spirits. Tavern keepers were vigilant to protect their monopoly license on this lucrative business. Unlicensed vendors often must have put up spirited competition on these days. Indeed, those imbibing too much during the sitting of court might well find themselves partaking personally in the judicial proceedings. More than a few frolickers were hauled before the judges to answer for their drunkenness. Worse, some inebriates were called to account for an off-color remark—even for crude comments, made outside of court, directed at the judges themselves. Occasionally, a raucous insult might even be shouted at the sitting justices, \textit{during} sessions of court!\(^5\)

If those suffering from too much merriment were smart, upon sobering up, they quickly humbled themselves before the justices. Generally they could hope for mercy—perhaps let off with only a fine. These gentlemen justices demanded deference, honor and respect within and without their court, and they insisted upon proper decorum in their courtrooms. But they also understood the necessity to temper their expectations for their


\(^5\) Lounsbury, “The Structure of Justice,” 215-17; Roeber, “Authority, Law, and Custom,” 30-31, 38-41; Roeber, \textit{Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810} (Chapel Hill: U of North Carolina P, 1981), 80-83. Roeber notes that more impudent challenges to the dignity of the judges would meet with harsher penalties, so that the punishment generally fit the crime, as it were. Consider the case of a drunken Richard Patterson, as quoted in Roeber, “Looking in at the Court and Speaking out a Loud ‘Come here You Dogs and Fight.’” The justices clearly were not amused. They not only fined Patterson but they confined him to the stocks for public torment (“Authority, Law, and Custom,” 39).
own dignity, court day festivities being what they were. Still, such festivities could not be permitted to overshadow the serious business at hand.

Thus the courthouse and its business formed the focus and hub—the nucleus—of this society coming into view. In particular, the Virginia courthouse, as a space, took on increasing importance during the eighteenth century. By the 1720s, the Tidewater’s traditional wooden frame courthouses were being replaced by grander, new brick structures, “the boasts of the shires,” as legal historian A. G. Roeber has described them. According to Roeber, before mid-century, these new courthouses were following the construction designs being conceived in the colonial capital at Williamsburg: “A Virginian riding up to [one of these new courthouses] beheld a public meeting place that was markedly superior to his own home dwelling.” Such courthouses would continue to impress the ordinary Virginian right up to the Revolution.

In his study of Virginia’s transformation during the course of the eighteenth century, Rhys Isaac portrays the newer style of courthouse becoming fashionable in that colony in the 1730s and 1740s as a dignified, perhaps two-story brick building, standing apart from any other. Such a building might feature tall and narrow arches running along its entrance side, creating a “loggia-style porch on the front,” the building capped by a plain yet stately, highly sloping roof. Only brick parish houses (churches) were likely to cost the citizens of their counties as much or more than did the construction of the courthouse in the Old Dominion of this period.

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6 See the sources in the previous note.
7 Roeber, *Faithful Magistrates*, 78-79.
8 Isaac, 88-89.
9 Lounsbury, “The Structure of Justice,” 217, especially n. 4. A typical Virginia courthouse might cost the community £500, while a parish church, also of brick, could cost £500 to £1200, possibly more. Presumably courthouses (and certainly church buildings) in poorer piedmont areas would have been constructed for lesser sums (219 ff.).
By the 1730s, then, Virginia’s courthouses had begun to improve in size and dignity of design, as well as in singularity of purpose. By 1740, a Virginia court building could not be mistaken for a church, an ordinary, or anything else. The arcade front of the new Tidewater courthouse, now often augmented by a second story featuring a large window atop of each arch in the arcade below, mimicked the grander style of English town (or market) houses. These English town houses had used heavy pillars to support the upper story of the building, so that the ground “floor” of the town house was open to the air. This ground floor was thus an open air market area where merchants could meet each other and their clients, walking to and fro underneath the town house, protected in any weather by the high ceiling forming the floor of the second story above. That second story of the English town house, an enclosed structure, contained rooms for town government and legal business, particularly the courts, a feature that would be copied in Massachusetts. This arcade structure in architecture made an early appearance in Virginia’s first capitol at Williamsburg, constructed between 1701 and 1705. But for Williamsburg’s capitol, the arcade was not a marketplace; rather, the arcade formed a protective covering that also joined the two houses of the colony’s legislature, the House of Burgesses and the General Court and Council. Likewise, by the 1730s and 1740s, the arcades of Old Dominion courthouses, possibly covered by a second story, were not providing space for merchants to meet, as with those English town houses or with Boston’s original town house and, later, its Faneuil Hall. Rather, the Virginia courthouse arcade had become “an open anteroom in which lawyers and clients could make final plans before their courtroom appearance.” It would be some time before attorneys had their own formal meeting spaces within the courthouse.10

10 Ibid., 219-20, quotation at 220. For English town houses and Faneuil Hall, see Martha J. McNamara,
By the second quarter of the eighteenth century, Virginia’s new courthouses were expanding to create not only space for a larger, more impressive courtroom itself, but also more space for specialized functions—particularly rooms for jury deliberation. Often two jury rooms were created to the left and right of the main hearing room, where jurors could retire to deliberate privately after a trial. Central in the main courtroom of Virginia’s new judicial buildings, against the far wall of the courtroom, was the large, cushioned armchair of the chief justice. This great chair, often with a tall back topped by a carved pediment or a canopy, was raised a foot or so above the seats of the other judges in attendance. Slightly below this imposing chair sat his fellow justices. These judges, lesser in seniority than the chief, often sat on backed benches radiating against the wall from right and left of the presiding justice’s chair; they also sat on “padded cloth cushions, ancient symbols of judicial authority,” according to Carl Lounsbury. Directly above the central focus of the courtroom, above the great chair of the chief magistrate, hung His Majesty’s coat of arms, the visual proclamation of the royal authority under which the courts operated. This royal crest visually projected His Majesty’s symbolic presence into the proceedings. Indeed, the king’s presence was immediately felt. Court opened with an official’s cry of “God Save the King!”

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Each justice was bathed in the authority coming from God and King. For each judge by order of seniority repeated a declaration of allegiance to the monarch by solemn oath at the commencement of every new commission. And all officials had to repeat and subscribe to “the Test,” which amounted to an explicit denunciation of the “papist” doctrine of transubstantiation—effectively affirming their Protestant loyalty along with their support for the monarchy of the Glorious Revolution’s settlement. Those gentry justices donned elegant waistcoats and jackets and wore great wigs crowned by tricorns, while all others in court, gentry and ordinary, remained bareheaded. To be sure, the gentlemen judges made an awe-inspiring virtual representation of His Majesty in court. Those magistrates, flanked by the other officials surrounding them within the bar, became the visual focus of the Virginia courtroom. But there was one other focus of public attention there.

Directly below the gentlemen justices, also seated when hearing a case, were the jurors. Their bench, if less ornate that that of the judges behind and above them, still was front and center in court. The jurors’ seated location and their immediate proximity to the judges helped ensure that they were treated “in the same deferential manner accorded the magistrates, confirming the notion that the jury was an important part of the judicial system.”

Seating—that is, who was seated and in what manner—was quite important in the Virginia court before mid-century. While the judges sat in the highest place of honor, with the jurors seated immediately below them, other court officials also were permitted to sit, on simple chairs or on benches. The county clerk, who swore witnesses, presented

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12 See the sources in the note above.
court papers and took minutes of the court’s proceedings, was seated at a table somewhere in front of the jurors, facing out into the courtroom. The sheriff and court crier also sat at tables on raised platforms near the front of the court. Attorneys and litigants sat at a lawyers’ bar, on backless benches, physically dividing the public’s viewing area from the interior court space occupied by the judges, jury and court officials. The king’s attorney sometimes may have enjoyed a special seat before the court, but otherwise attorneys, plaintiffs and defendants squeezed themselves together, in no particular order or arrangement, on benches at the lawyers’ bar facing the magistrates and the jury. Apparently the general public often must have stood during court proceedings; the few extant court diagrams show seating for court officials, but not for ordinary subjects watching the court’s activity. Witnesses may have stood while giving testimony. Attorneys rose to their feet while they addressed the seated judges and jury.

As Lounsbury has observed, however, the dignity accorded jurors in the typical Virginia courtroom suggests “that the jury system provided freeholders of the county with an important instrument for exercising some power in local affairs.” And since the gentry were often the jurors in colonial Virginia, it was inevitable that the jury system would be a powerful institution within the courts of the Old Dominion.

Creating a law court culture

14 Roeber, “Authority, Law, and Custom,” 37; Roeber, Faithful Magistrates, 77-80; Lounsbury, “The Structure of Justice,” 224. Elsewhere, Lounsbury has argued that Virginia courtrooms “were never intended for sizable audiences,” apparently based on the small size of the hearing rooms; but if he is correct that “[t]he public stood” in the back half of the courtrooms, numerous people could certainly have crowded together, as in taverns, to witness significant moments in court. See Lounsbury, “An Elegant and Commodious Building,” 233.

Before noting the similarities in court day and customs in Massachusetts, it may prove helpful to observe similar patterns of court day and ritual in part of another southern colony. In his portrayal of farmers in the court of Orange County, North Carolina during the third quarter of the eighteenth century, Richard Bushman has found many of the same court day traditions and routines south of the Old Dominion.\textsuperscript{16} In this Carolina county court, farmers regularly appeared, year in and out, registering their wills and deeds and tending to their other legal affairs and interests there. Why did farmers so trust in courts to protect their legal interests? In particular, why did these Carolina farmers place so much faith in the judges of their court to do what was right, especially when the stakes were high and the farmer might lose his legal battle for money or land?

In large part, it seems the Orange County court created a law court culture based essentially on a mythical belief about the nature of the justices themselves. In the court of this Carolina county, the justices of the peace became “vested with the mysterious authority of government,” being “transformed” by their commissions and their oaths from farmers and backwater merchants into \textit{His Majesty’s Judges}—just as “sacred words” had transformed the admittedly more “auspicious personages” of the Tidewater into His Majesty’s justices in Virginia. According to Bushman, these judges were miraculously changed from mere mortals to “‘worshipful’ justices,” coming into a nearly divine “power over life and property”—a mystical, almost religious transformation in the minds of the common folk of North Carolina. Key here was the willingness of Carolina farmers actually to believe in this transformative fiction, created by these commissions and oaths, whereby ordinary women and men coming into court “willingly suspended disbelief and

conformed to the illusion of this fabulous documentary fabrication.” Words on pieces of
documentary creation of these “virtuous” judges. Written and spoken words
transformed ordinary men into justices who, thereby, somehow stood above private
interest and became perfectly neutral—doing, according to their sacred oaths, “‘equall
Right and Justice to the Poor and to the rich … So Help You God.’”

These efforts to vest men with “virtuous” judicial authority represented, in fact,
the fabrication of the court’s legitimacy, without which it would be difficult for any court
(or government) to command positive action from subjects or citizens. Though their
rituals and their reliance on God-supported words and oaths, colonial courts created
within them a culture that lent legitimacy to their actions and thus obtained, generally, the
acquiescence of colonial subjects—but more than simple acquiescence. People believed
that courts not only exercised “power,” but that they possessed legitimating “authority.”
While most people may generally obey the commands of power, rulers have often sought
to legitimate the exercise of force—what Max Weber referred to as the “legitimations of
domination.” Such is precisely the role played by jurors in the exercise of court power to
this day (nowhere more importantly than in capital cases). Hence the need to create a law
court culture—to infuse something like a “religious aura to the courtly rituals”—that
would make court power appear legitimate in the minds of the governed.  

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17 Bushman, “Farmers in Court,” 402-5. Bushman adds that “Confidence in the court rested, not on
ideology, but on a belief in virtuous justices,” 405. Additionally, Bushman notes, at 403, that North
Carolina’s justices of the peace often sat without a jury; as seen in chapters below, juries were much more
prevalent in Massachusetts by the quarter century before Revolution, especially in the superior courts.
18 Bushman, “Farmers in Court,” 405. The classic analysis of the legitimization of power comes from Max
Weber, for which see From Max Weber: Essays in Sociology, trans., ed. H. H. Gerth and C. Wright Mills
(New York: Oxford UP, 1946, 1958), especially pp. 77-79, 82-95, and linking religion to the psychological
need for the appearance of legitimacy at 267-75; and see Max Weber: Economy and Society, An Outline of
Interpretative Sociology, ed. Guenther Roth and Claus Wittich, 2 vols. (Berkeley: U of California P. 1968,
By the term “culture,” nothing especially arcane is intended. Cultural historian and anthropologist Clifford Geertz, in particular, has been cited by historians in their efforts to analyze the distinctive atmosphere encountered by colonial Americans in court. For Geertz, “culture” is a term without any “unusual ambiguity.” Culture “denotes an historically transmitted pattern of meanings embodied in symbols.” Specifically, Geertz argues that culture involves a “system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.” In other words, “culture” refers to how human beings package or conceptualize what is important to their successful functioning in society, allowing others in that society to recognize them as members. And “culture” refers to how they pass these values, assumptions and beliefs down to their children. The “pattern of meanings” that culture transmits—knowledge about how to get on in society—is inherited by one generation from another, in the form of symbols. These symbols—concepts in shorthand—are important because they allow individuals to intuit social meanings without lengthy explanations, through social interaction. Symbols are the

1978), I, 31-37, 212 ff., II, 952-55, passim, for what Weber referred to as “legal authority.” Regarding capital cases today, in Ring v. Arizona, Associate Justice Ruth Bader Ginsburg wrote for a seven-member US Supreme Court majority that juries, not judges, must find the “aggravating circumstance necessary for the imposition of the death penalty,” 536 U.S. 584 (2002). Of course, Justice Ginsburg there grounds her opinion on “our Sixth Amendment jurisprudence,” not on considerations of legitimating domination. On “culture,” see Clifford Geertz, The Interpretation of Cultures: Selected Essays (New York: Basic Books, 1973), 89 ff. Works citing Geertz include Roeber, “Authority, Law, and Custom,” relying on Geertz’s analysis to understand the importance of face-to-face meeting and ritual action in the courts of Virginia’s largely oral society or culture (at 31); and see Roeber’s debt to Geertz in Faithful Magistrates, 73-75. See also the use of Geertz by McNamara, From Tavern to Courthouse, chap. 2.

Geertz recognizes the difficulty, and need for explication, of such terms as “meaning” and “symbol,” and he develops these concepts in the pages that follow (89-125 ff.). For the purposes of the present analysis, however, only symbols of an obvious nature, and their meanings as applied to colonial courts, will be considered, since the broader sociological conceptions of symbol and meaning lie beyond the scope of this study.
shorthand “language” allowing people to understand and accept what they experience, without recourse to further justifications or explanations.\(^\text{20}\)

God and King were such symbols, central to colonial American law court culture and potent in legitimating the power of colonial courts in the broader society. Oaths sworn in the name of God explicitly called upon the Almighty for help in executing those oaths. Although judges did not preach the word of God, of course, judges and lawyers did teach the community about another “word”—that of law, becoming increasingly prominent in the form of texts that were beginning to take on their own religious-like aura. Courts found many ways to “give a religious aura to the courtly rituals” because religion, ritual, and word help to cohere any culture.\(^\text{21}\) Through invocations of God and the reverential use of texts (commissions, laws) and the spoken word (oaths), colonial law court culture employed ritual and symbol for the fabrication of its authority, beyond mere force. Rituals and images brought His Majesty into court, legitimating judicial power there, by his coat of arms on the court wall above the chief justice and his colleagues. Every court was held and all writs ran in the name of the Sovereign whom the crier shouted, at each opening of court, for God to save.\(^\text{22}\)

\(^{20}\) See Geertz’s discussion of symbol (and meaning) in relation to the “social-structural and psychological processes” within individuals and society through religion (as a “Cultural System,” chap. 4), and through his provocative discussion on the Balinese cockfight and its significance for the men and male society of Bali (chap. 15). McNamara uses Geertz’s “Notes on the Balinese Cockfight,” in The Interpretation of Cultures, as a paradigm for discovering how “religious and secular rituals” may create “a sense of cultural unity and support for social hierarchy,” in From Tavern to Courthouse, 37. The thesis in the current study is that the religious-inflected rituals of colonial law courts created a law court culture that helped to bind people in court to the legal system and that helped to bind the broader community to that law court culture. \(^{21}\) Bushman, “Farmers in Court,” 405; Geertz, especially chaps. 4, 15. \(^{22}\) Cf. “routinization,” in Weber, From Max Weber, Gerth and Mills, ed., 261-64, 296-301. Roeber, Faithful Magistrates, 73-79. Pauline Maier has described a metaphorical “gathering at the shrine” by which Americans venerate their “sacred” texts in American Scripture: Making the Declaration of Independence (New York: Knopf; Vintage, 1997, 1998), introd., chap. 4; and regarding texts, words and the judges, see Bushman, “Farmers in Court,” on the significance of and various types of legal texts, 389-91, 393-402, and their connections to judges, 403-6. Bushman does find significant skepticism among North Carolina farmers—a lack of willing suspension of disbelief—in the virtue of certain court officers, but not in courts
Court architecture made possible and enhanced court ritual. The court’s layout and symbology unambiguously announced the authority of the king and demarcated people’s places (seated or standing) within the hierarchy of court culture and of the society entering into that culture. Martha J. McNamara has vividly portrayed how court architecture, ritual, and “the ‘old pomp & parade of court week’” created and recreated spaces that legitimated court power and made ordinary people feel a part of the parade. According to McNamara, it was critical to the professionalization of the lawyers and of the colonial courts that court business be removed from the taverns (in which the courts had once met, for much of the seventeenth century), and from the town houses (in Massachusetts, during the early eighteenth century). Legitimating the courts, especially in status-conscious Virginia, had once required only the arrival of the finely dressed gentlemen justices, in grand processions, sometimes announced by the din of drums or trumpets. Once in court, the crier’s archaic shout of “‘Oyez, Oyez, Oyez, silence is commanded in court while his Majesties Justices are sitting,’” reminded all of the dignity of these aristocratic planters or great merchants, sitting as judges. In the seventeenth century, these great men’s social prestige gave legitimacy to the Virginia county court. But by the eighteenth century, the judges and the attorneys in court had to become more learned and professional students and practitioners of the law. The texts—the words—of this law now required long and careful study. Something more than society’s “great institutions, during the Regulator crisis of the 1760s to 1770s, a time of great economic hardship. Significantly, despite their frustrations with and doubts about particular court officials, farmers kept coming into court to settle their disputes, register their deeds and wills, and to participate in court culture, pp. 390-93, 408-13. The explanation Bushman offers is that “Property gave the court its reason for being.” Property holders needed courts to maintain their property rights and thus their social position, 410-12. One might add that vital rituals within a shared culture have a power to bind individuals and community as well. Such rituals always were central to the power of colonial American law court culture. As A. G. Roeber has written, “[t]his on-going ritual of suing and being sued kept planters and farmers coming to court every month to see who was recovering against whom and what their own roles might be at any given moment” (Faithful Magistrates, 85).
men” would be required to lend legitimacy to the courts. By the eighteenth century, courts required better-educated practitioners—on bench and bar—to ensure their legitimacy. And courts required a space of their own.\footnote{McNamara, From Tavern to Courthouse, 1-4, chap. 2. Bushman also traces the movement of court business, in North Carolina, from private dwellings to actual courthouses, spacious enough to lend appropriate dignity to court proceedings, beginning by the 1720s; see “Farmers in Court,” 405-6. Neal W. Allen, Jr. describes the transformation of “John Woodbridge’s tavern parlor into a courtroom for His Majesty’s justices” in York County, Maine (Massachusetts) in 1725, before the construction of formal courtrooms there; see “Law and Authority to the Eastward: Maine Courts, Magistrates, and Lawyers, 1690-1730,” in Law in Colonial Massachusetts, 1630-1800, Daniel R. Coquillette, ed. (Boston: Colonial Society of Massachusetts, 1984), 290-92. See also his discussion of court day there, 290-301.}

But transferring the work of courts from taverns to courthouses had implications beyond even the professionalization of bench and bar, important as these considerations are. Beyond the “sacred words,” the commissions, oaths and images of the king’s arms,\footnote{Indeed, apparently the king was sometimes referred to as “his sacred majesty”; see Edward M. Riley, “The Colonial Courthouses of York County, Virginia,” William and Mary Quarterly, 2nd Ser., 22:4 (October 1942): 400.} the construction of function-specific courthouses was the major factor in the evolution of a real culture that made law a lived experience for ever more people in the eighteenth century. And for colonial Americans on the eve of Revolution, the increasing importance of the role of juries was reflected by—and necessitated—the central, honored spaces for jurors created in those courthouses.\footnote{McNamara, From Tavern to Courthouse, 12-13, 37-38, 58-59. See also Isaac, Transformation of Virginia, 90-91; Roeber, “Authority, Law, and Custom,” 30-35, 38-41; Lounsbury, discussing the reliance by the earlier “amateur members of the bench” on their court clerks, in “The Structure of Justice,” at 224. Compare the new necessity of expert legal knowledge for eighteenth century judges in Peter Edmund Russell, “His Majesty’s Judges: The Superior Court of Massachusetts, 1750-1774” (PhD diss., University of Michigan, 1980), chaps. 1-2. John Adams famously campaigned against “pettyfoggers,” essentially quack attorneys, demanding the professionalization of bench and especially bar: see John Adams, Diary and Autobiography of John Adams, L. H. Butterfield, et al., ed., 4 vols. (Cambridge, MA: Harvard UP, 1961), I, 71-72, 133-38, 159, 205-6; and see L. Kinvin Wroth and Hiller B. Zobel, ed., Legal Papers of John Adams, 3 vols. (Cambridge, MA: Harvard UP, 1965), I, lvii-lviii.}

\section*{Court houses, court culture and juries in the eighteenth century}

As in colonial Virginia and elsewhere before the Revolution, court day in Massachusetts was all about the establishment of a law court culture: to clothe judges, juries and
attorneys in appropriate dignity, to legitimate court decisions, and to acculturate lay society at least somewhat into the growing intricacies of that culture. Perhaps more than anything else, his Majesty’s subjects had to be taught about “the very nature and forms of government.” Moreover, legitimating the court and its work meant that the community had to bear witness to the decisions made in court. This legitimating function of the court by the community was especially important in places like Virginia, where literacy rates were low. People who could not read could only be reached and moved by the spoken word, and here the law court could provide a popular theatre for the oral transmission of a legal culture. But whether in the largely oral society of Virginia or in more literate Massachusetts, the law court played a crucial educational role. Regardless of whether schools or textbooks on government were prevalent in the locale, as Rhys Isaac has observed, “the primary mode of comprehending the organization of authority was through participation in courthouse proceedings. The oaths and rituals were so many formulas, diagrams, or models, declaring the nature of government and its laws.”

Colonial law court culture was about teaching colonists how to participate in the construction, legitimization and use of power. The lessons learned in that “school”—in that law court culture—could transform the people involved. In particular, colonial court culture offered an opportunity for subjects to act as citizens.

The pomp and pageantry of court day in Massachusetts often was quite grand—sometimes a bit too much so for John Adams. Circuit-riding superior court justices arrived on their horses, often “escorted into town by an honor guard of the local gentry.”

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27 For the court as a “school,” see the Introduction above. See also Roeber, “Authority, Law, and Custom,” 29-31, who views the “key that unlocks the meaning of court day” as action, rather than cultural education—though education certainly was involved; and see Roeber, *Faithful Magistrates*, 73-86.
to hold court on these festive, “even raucous” occasions. Courtrooms often were packed. And why not? Where people were looking for entertainment in an era of few public spectacles, occasional drama in court provided it. Certainly lots of people were milling about the courthouse on court days. Undoubtedly, many were waiting to see if something startling or salacious might break out in a trial. While few trials offered the excitement of, say, the Boston Massacre cases, court day in Massachusetts as elsewhere offered impressive sights. In the Bay Colony, five justices paraded into town and appeared together on the bench in their “‘new, fresh, rich robes of scarlet English broadcloth; in their large cambric bands, and immense judicial wigs,’” as Adams described the scene. Though Adams did not particularly admire every justice of the Bay Colony’s superior court, still, he found the robes and the setting something to behold. And in the courtroom, greater-than-full-length portraits of past English kings reminded all present of the solemnity of the place.\(^\text{28}\) Of course, royal portraits in the courtroom were yet another reminder of His Majesty’s symbolic presence there, past and current.

When sitting in Boston, the superior court of Massachusetts had met in the Council Chamber of the city’s town house until 1769, moving in that year to the new brick courthouse not far away. As in the Virginia courts, the judges’ bench in the earlier town house chamber had stretched along the courtroom’s far wall, with the king’s coat of arms hanging above. The jury sat on benches along the walls to the left and right of the judges, and in the middle sat counsel and plaintiffs. In her study of the transformation of court space in Boston, Martha McNamara has published “a rare view of the layout of an

eighteenth century New England courtroom.” This sketch, made in 1763, illustrates the elevated bench for the judges of either the superior or inferior court, centered along the far court wall. The county justices of the peace, when present, sat against the right and left walls perpendicular to the judges’ bench, so as to create a U-shaped judicial space in court. Jurors were seated just below them, on the right and left sides of the courtroom, having a direct and close view of a seat in the center of this arrangement. Witnesses probably testified from this seat. A bar ran across the middle of the room, separating the inner courtroom space from the large open area reserved for the general public. This Boston U-shaped plan for the inner judicial space seems to have changed little from the early eighteenth century to 1763.²⁹ However, the new Boston courthouse did introduce a few changes to courthouse design.

Built between the spring of 1768 and March of 1769, the new Boston courthouse was the town’s first building dedicated solely to legal affairs. As in colonial Virginia, Massachusetts judges and attorneys were physically separating the courthouse (and thus the legal profession) from the taverns or market centers where the courts used to meet. From what little is known about the appearance of the new courthouse, it was a handsome, three-story brick structure. The courthouse was topped with an octagonal cupola, visible in Paul Revere’s otherwise fanciful engraving of the Boston Massacre. The first floor apparently consisted of a walkway and of rooms for certain officers of the court. A second floor, supported by pillars (reminiscent of the traditional town house style), provided space for the main courtroom and for rooms where grand and petit jurors met to deliberate. More rooms for jurors apparently existed on the third floor as well. McNamara notices that these jury rooms “not only saved the county the expense of

²⁹ Russell, “His Majesty’s Judges,” 6; McNamara, “In the face of the court,” 132-34.
paying for space in taverns,” where previously jurors sometimes retired to deliberate, but these spaces “also consolidated the disparate parts of the trial process within one building, giving justices and court officers a tighter control over the jury’s interaction with people outside the courtroom.”

What scholars may not have sufficiently appreciated, however, is the larger implications of these new, special spaces for jurors within function-specific court buildings. McNamara suggests that confining jurors to specific rooms for their deliberation allowed judges to better protect the integrity of jury decision making and, thus, to safeguard the appearance of judicial fairness—indeed, to protect the integrity of the court itself. More to the point, though, the protection of the jury decision-making process had to become a greater concern as jurors increasingly dealt with weightier civil and criminal cases.

Further, the requirement for designated spaces for juror deliberation also suggests the increasing complexity of legal cases heard by jurors. The special spaces now being set aside for jury discussion provide physical evidence that the days of very quick, simple jury deliberation were waning. Back in the seventeenth century, given the number and quality of the cases appearing in the Massachusetts Quarterly Court records, the impression left on the reader is that, with the resting of arguments in trials, jurors often simply stepped aside to a corner of the hearing room; jurors huddled for a few minutes, returning immediately to their benches to announce their verdict.

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30 McNamara, From Tavern to Courthouse, 51-52. McNamara also notes that in the new Boston courthouse, rather than sitting on a great bench, the chief justice sat upon a “‘great chair’ that was probably flanked by other chairs” for the associate justices, who nonetheless still maintained the place of prominence in the room (52). Thus the Boston courtroom took on a greater similarity to that becoming common in Virginia.

31 See discussion of the jury’s role in the more weighty civil and criminal cases after the 1740s in the chapters below.

32 See Records and Files of the Quarterly Courts of Essex County, Massachusetts, George Francis Dow, et al., ed., 8 vols. (Salem, MA: Essex Institute, 1911-1921), this tendency especially apparent throughout
By the mid-eighteenth century, however, court cases were becoming more complex, requiring more time for argument and, occasionally, for more lengthy jury deliberation. Jury sequestration, though rare, required tavern space for food and lodging. In addition, sequestration required the close supervision of jurors, when out of court, by court-appointed officials. More typically, though, jurors simply required some extended time to deliberate, and this extended deliberation now made jury rooms a practical necessity. The appearance of these spaces in the construction of eighteenth-century courtrooms strongly indicates that the role of jurors was changing. The increasing complexity presented in ever more jury cases was making necessary a room of the jury’s own. Juries now required spaces for private discussion and argument—away from the incessant bustle and crosstalk in court buildings. In several ways, then, privileged spaces in the court buildings point to the enhanced role of juries in the eighteenth century—in their seating directly beneath the judges, in their close proximity to witnesses, and in the demarcated spaces reserved for their own private deliberations.

Besides new trends in courtroom architecture, other traditions helped to enhance the dignity of the Massachusetts courts. Processions had been common in colonial
America, as in Massachusetts. Formal processions to the court on court day were another sort of ritual, helping to establish government authority and to reinforce popular deference to that authority. But the elaborate procession to court of justices, in wigs and robes, along with constables, sheriffs, clerks, and attorneys, actually was a rather new “custom” in later-eighteenth-century Massachusetts. In Suffolk County’s procession, the five justices of the Supreme Judicial Court marched in the middle of the procession, decked out in their fine scarlet robes. At the head of the procession, making way for the honorable justices, marched the constables, followed by the high sheriff, and then by the black-gowned clerks of the court. The justices marched at the middle of the procession, thereby being further marked and dignified as central in court authority. Following the justices, in gowns like those of the clerks, walked the attorneys who had been admitted to practice at the bar. They, too, were important officers of the court, sworn to serve the court and to act always with honesty and integrity before it.34

Significantly, however, jurors did not walk in these court day processions new to late-eighteenth-century Massachusetts. Those who would be grand and petit jurors stood with the rest of the people, outside of the official company of court and bar, watching the procession pass by on its way to the courthouse. For jurors were representatives of the community, brought into court to legitimate the court’s most difficult decisions—especially in criminal cases. Jurors remained “the people out-of-doors”35 in one important sense: as individuals, jurors were not legal professionals; they did not enjoy a

35 Gordon S. Wood discusses the evolution of the concept of “the People Out-Of-Doors” in Part Three of *The Creation of the American Republic, 1776-1787* (Chapel Hill: U of North Carolina Press, 1969, 1972), 319-28. Wood views this concept as a new, Federalist understanding of popular sovereignty from 1787, whereby the people, ever outside of government, kept a wary watch on the actions of that government—now the agent of popular power. The argument here is that this concept of “people out-of-doors” applied much earlier to the role of the subject as juror-in-court. The role was temporary, but official, as powerful as it was central to legitimating law court culture.
permanent position before the bar. In their role as jurors they served the court, but unlike the lawyers, they were not servants of it.

In arguing that jurors served, yet were not servants of, the court, however, it would be too much to claim, to paraphrase an ideal of earlier Bay colonists, that jurors were “in” a law court culture but not “of” it. In their role as critical decision makers, jurors were at the heart of colonial law court culture, and they were critical participants in that culture, as will be seen in the chapters to follow. Colonial Americans officially represented, served and spoke for their fellow subjects in a colonial law court culture—but for the moment only, not by vocation.\(^ \text{36} \) When called upon by parties in their cases, jurors became the vox populi serving at the heart of colonial law court culture, their role sanctioned by the following oath:

\[
\text{You Swear by the Living God, that in the Cause or Causes now legally to be committed to you by this Court; You will true Tryal make, and just Verdict give therein, according to the Evidence given you, and the Laws of this Jurisdiction: So help you God….} \tag{37}
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All members of this court culture, including the judges and attorneys, had to swear similar oaths, time and again. For jurors, such oaths would bind and legitimate them, as did the oaths of all court officials, into this culture. For the period of their immediate trial or trials, jurors were solemnly bound by God and King to a higher purpose, that of just

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\(^{36}\) “Vocation” is used here in the sense of Weber, “Politics as a Vocation” or “Science as a Vocation,” From Max Weber, Gerth and Mills, ed., 77-128, 129-156. For Weber, “organized domination” requires a “continuous administration” (80), along with “routinization” or the professionalization of political power, among other things. Judges and attorneys-at-law would share those attributes in ways that jurors in American courts never have.

\(^{37}\) See the oath as cited in Joseph H. Smith, ed., introd., The Pynchon Court Record: An Original Judges’ Diary of the Administration of Justice in the Springfield Courts in the Massachusetts Bay Colony: Colonial Justice in Western Massachusetts 1639-1702 (Cambridge, MA: Harvard UP, 1961), 181. See also John Adams’s comment on the broad power of juries to decide “both the Fact and the Law” of a case under the general verdict, as per that oath, in Wroth and Zobel, ed., Legal Papers of John Adams, I, 228-30.
judgment. These juror-judges were standing in for their fellow subjects throughout the broader community, for this time-limited though central purpose.

The method of selecting jurors provides explicit evidence that they stood as representatives of their communities in a Massachusetts court, as did other colonies’ jurors likewise. In Massachusetts (and generally throughout the colonies), jurors were white male freeholders, and additionally, in the Bay Colony, they were non-dissenting protestants. Earlier in the eighteenth century, jurors had simply been elected directly at town meetings, as shown in Topsfield’s Town Records through the 1740s. By mid-century, however, concerns for juror impartiality toward litigants had led the Massachusetts General Court to direct that the towns select jurors from lists, by lot. Thus Topsfield, for example, in order to create such a lottery for juror selection, provided for a special jury box to hold the names of potential jurors for the inferior and superior courts, names that would be drawn at random, in public, at a town meeting for the purpose. Towns like Topsfield later created a second box so as to keep separate each court’s juror pool. The clerks of the superior and inferior courts annually issued writs of venire facias to towns such as Topsfield. These writs were court orders that the town should hold a meeting to choose the requisite number of potential jurors to serve—the number varying, depending on the size of the town.38

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Prior to those town meetings to choose potential jurors for the year, the towns’ Selectmen had drawn up lists of eligible freeholders and had transcribed their names onto individual pieces of paper, each containing one freeholder’s name. These individual pieces of paper had been deposited into those boxes just described, kept under lock and key. The Charter of Massachusetts-Bay, granted by King William and Queen Mary on October 7, 1691 and inaugurated in Boston on May 14, 1692, would seem to have set a property requirement for freeholder participation in elections and in other governmental affairs like jury service. This property requirement could be met via one of two options: either by the freeholder’s possession of land yielding an annual rental value of forty shillings, or by the freeholder’s owning an estate whose total value was £40 sterling. (A property requirement for freeholder status was formally sustained until the Revolution.)

Good reasons exist to doubt how rigidly a property requirement for jury service ever was applied in practice, however, starting with confusion over exactly what estate value the charter had meant to set as an option for freeholder status and for the exercise of political rights such as jury service. While the text of the original charter offered the option of an estate valued at £40 to establish participatory political rights, a higher value of estate, that of £50, had been intended by crown officials. This conflict in the estate value option for freeholder rights created uncertainty for decades to come. Over the course of many years, one or the other figure appeared in the enabling statutes and in several published versions of the charter. For present purposes, suffice it to say that the property requirements for service on any Massachusetts jury—to the degree such requirements were observed—varied in practice from time to time and place to place.

Given dispute over the intentions behind the words of the William and Mary charter—

39 See the sources and discussion in the following note.
indeed, given this dispute over which numbers ought to be binding—it seems unlikely at best that property requirements for jury duty in the Bay Colony were applied with any sort of legal or monetary consistency in the quarter-century before revolution.  

By mid-century in Massachusetts, then, during town meetings for the purpose, the required number of names of freeholders who might serve as jurors of the inferior and superior courts for the coming year was drawn out of the two respective boxes holding those names. If any of these potential jurors selected were found to be ailing or otherwise incapable of service, a replacement name would be drawn, with the further proviso that no person was eligible to serve as juror more than once in any three years. These names were then transmitted to the superior and inferior courts. On court day, each court divided the names of its prospective jurors now in attendance into jury panels of twelve to hear civil suits. In the superior court, following the civil trials, the membership of jury panels was reshuffled for the hearing of criminal cases—any potential juror being subject, of course, to elimination from a jury by an attorney’s pre-trial peremptory challenge. Thus in Massachusetts and variously elsewhere, jurors truly did embody the

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40 The legislative enablement of the charter’s general requirements for freeholder status and jury service for those “liable by law and qualified to serve,” as one act phrased it, was renewed repeatedly, e.g., in 1736-37, 1749, 1760, 1770, and in 1775. The property requirement was uncertain even in law, however, as one of the charter’s options for freeholder status, possessing an estate valued at £40—clearly stated in the charter’s text—apparently was supposed to have read “Fifty pounds Sterl.” While the total estate option for freeholder privileges seems to have vacillated between £40 and £50 by the various enactments from 1692-93 through the 1720s, after 1726, the lower £40 requirement appeared in printed versions of the charter used by the colony. Regardless, it is extremely doubtful that the property qualification for jury duty generally was in any way rigidly applied. See the sources in note 38 above, see the text below, and see “The Charter of the Province of the Massachusetts-Bay” of 1691, in Acts and Resolves, I (Boston: Wright and Potter, 1869), 1-20, at pp. 11, 363, note for Chap. 4, and “Province Laws” of 1692-93, Chapter 9, at p. 37, where all jurors were to be chosen “according to former custome, by and of the freeholders and other inhabitants, qualified as is directed in their majesties’ royal charter” (act of June 28, emphasis added). See also Chapter 11 of the Acts of 1692-93, Art. 6, providing that “All trials shall be by the verdict of twelve men, peers or equals, and of the neighbourhood and in the county or shire where the fact shall arise or grow,” and Art. 7, that in all capital cases “there shall be a grand inquest,” that is, a grand jury investigation, followed by a trial by “twelve men of the neighbourhood,” at p. 40. See relevant enactments discussed here in Acts and Resolves, I, 37, 40, 74-79, 315-16, 363; Acts and Resolves, II (Boston: Wright and Potter, 1874), 828-29; III, 474-76, 995-96, 1009-10; IV, 318-20, 367-68, 920; V, 86; Wroth and Zobel, ed., Legal Papers of John Adams, III, 17-18.
community within the courts, because those jurors were selected from the community—albeit by lot—for that specific purpose.41

The appointment of jurors differed somewhat in colonies such as New York and Virginia. In those colonies, sheriffs—men generally recommended by the court and commissioned by the governor—played a more central role in the preliminary round of juror selection. The sheriffs registered the names of those freeholders eligible to serve as potential jurors, drawing names generally but perhaps not always randomly out of these juror pools and notifying those selected as potential petit jurors. While this method of appointment did not guarantee a selection by lottery during public meetings, as in Massachusetts, it did provide for a rotating selection of jurors from the wider freeholder population. On court day, especially in rural areas of Virginia but even in New York City, sheriffs also might have to round up any number of bystanders to be pressed into service. This use of bystanders as jurors occurred frequently, especially when attorneys’ pre-trial peremptory challenges of potential jurors exhausted those lists of the freeholders summoned to serve. As in Massachusetts, New York and Virginia had enacted various property requirements for freeholder status with participatory political rights. A New York statute of 1701 provided freeholder status to any adult, white man owning an estate of £40, or in possession of a leasehold qualifying as a freehold, of which there were more in the colony of New York than in any other colony except Virginia, according to Michael Kammen. In Virginia, freeholder status after 1736 was satisfied by the

41 William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Athens, GA; London: U of Georgia P, 1975, 1994), 20-21. See the following chapter for more information on the makeup of and changes over time to the court structure of Massachusetts. Note that unlike jurors drawn from the freeholding populace and Selectmen elected annually by the towns, the governor and lieutenant or deputy governor were appointed by the crown, while judges, sheriffs and justices of the peace were appointed by the governor with the advice and consent of the council, Acts and Resolves, I, 10, 12.
possession of a twenty-five acre estate with a domicile (a simple cabin would do), or by owning a house in a town, or by possession of one hundred acres of undeveloped land which, according to Charles Sydnor, was relatively inexpensive in many parts of mid-century Virginia. Thornton Miller described Virginia’s local petit or trial jurors, during and just after the revolutionary period, as “average citizens of the community,” ordinary freeholder farmers—though grand jurors in Virginia more often came from the gentry or planter class, or from the class of wealthier freeholders in New York colony. Overall, however, colonial American petit or trial jurors tended to be freeholders of moderate means, living in the vicinage of the civil or criminal disputes they were to try, representing their fellow subjects in the adjudication of those disputes.42

In his study of Plymouth County, Massachusetts, William Nelson found that between 1748 and 1774 “approximately 28 percent of all adult males in the county served on juries,” suggesting that “[d]espite town control over the jury-selection process, juries appear to have represented a fair cross section of the voting population of the county.” Nelson further found that the only voters who apparently were “systematically excluded from jury service were religious dissenters who did not attend services of the Congregational church,” amounting to some 3 percent of the voting population.43

Since jury duty then as now presented a disruption to one’s daily life and routine, towns apparently had little reason to narrow the jury pool. Rather, towns such as


43 Nelson, Dispute and Conflict Resolution in Plymouth County, 25, 160, n. 70. The jury laws of 1760 and 1767, governing the selection of jurors, expired on July 1, 1770, leading some loyalists to fear town (or mob) control over jury selection. The Boston Massacre juries suggest that perhaps such fears could be exaggerated. See the last chapter of the current study, and see Wroth and Zobel, ed., Legal Papers of John Adams, III, 17-18; Acts and Resolves, IV, 318, 920.
Topsfield were under popular pressure to expand as much as possible the number of eligible jurors, reducing an individual’s chance of more frequent service, precisely because the duty could prove onerous. But while the task might be burdensome, jurors played a crucial role within colonial American courts.

Perhaps the most important role for the jury in colonial America’s law court culture was its pedagogical function. In arguing that the jury in early nineteenth-century America was the embodiment of “the people” in the machinery of government, Alexis de Tocqueville emphasized the American use of the institution of jury as a “free school” for education in democratic culture and in government generally. Tocqueville distinguished between the purely judicial aspect of the American jury and its political aspect. As a “political institution” above all else, Tocqueville believed that the jury was “one of the most effective means of popular education at society’s disposal.” Through serving on juries and by watching their work, Americans learned about their rights. They came “into daily contact with the best-educated and most-enlightened members of the upper classes,” and they learned much about the law, the “passions of the litigants,” and about practical politics. In Tocqueville’s view, the jury’s main pedagogical function was to “instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”

In essence, here was the foundation of citizenship, laid by late-colonial American law court culture and its jurors—in the civic education of

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45 Alexis de Tocqueville, Democracy in America, ed. J. P. Mayer; trans. George Lawrence (New York: Harper, 1966, 1969), 270-76, quotation at 274. Regarding the pedagogical function of colonial juries, see the Introduction to the current work, and see also Isaac, The Transformation of Virginia, 92-93: that the courts “served not only to make the community a witness to important decisions and transactions but also to teach men the very nature and forms of government” (92).
early Americans. That education, essentially, involved teaching the subjects of a king to be citizens, judging cases and judging the law itself, by their own best lights.46

Colonial American jurors in Massachusetts

Identifying and portraying an “ordinary” juror in pre-revolutionary America is no easy task, for a number of reasons. Obtaining names from court records is not the problem. Jurors’ names—particularly petit or trial jurors—are listed occasionally in court record books. The problem is telling one “John Williams,” or “Hopestill Foster,” even, from another man of the same name. Fathers and sons often shared identical names in the colonial period, certainly in Massachusetts, and other men of no relation in the same locale could share the same name as well. So identifying with certainty obscure individuals named in court records presents great challenges and must always be pursued with caution.

Nonetheless, it is possible, perhaps, to separate out of the lists of jurors named in court records particular individuals about whom one may be cautiously hopeful of likely identification. The method used here has been to select unusual or rare names of jurors—names (checking for variant spellings) that appear uniquely in probate and tax lists, or in local church or vital records, as well as in the extensive Massachusetts Tax Valuation List of 1771. Further, it is possible to use birth and death dates to separate the likely active period of life for a father and son sharing the same given and surnames to determine which was the likely juror in the court record. In the case of the father and son named

Hopestill Foster, records indicate that the juror of that name served in Suffolk County in August, 1777. Since the father died in December 1772, not he, but his son Hopestill, surviving until 1802, must have been the Suffolk juror, no other jurors by that name being listed in the local Suffolk tax or probate records of that time. In addition, sometimes the distinction between “senior” and “junior,” with date references, can provide further clues to separate and identify individuals. Occasionally other titles, such as “Capt.” or “Deacon,” may similarly provide help in isolating a particular person.

From there, probate records, wills and other documents can provide a glimpse of the status of the man (and juror) at his death. Of course, it would not be wise to assume that a man was at his economic height at death, since indebtedness and even bankruptcy feature so prominently in the probate records for this period. Many estates of this time were troubled by debts, causing additional grief to executors, as illustrated below. Besides, a man may have earlier given lands or money to sons, or as dowries to marrying daughters, so that in his later years and at his death, he appeared poorer than he would have seemed at an earlier time, while his children were young. Thus the juror at an earlier age might not be perceived accurately by an examination, years later, of his will or of the inventory of his estate.

Still, with these caveats in mind, the documentary evidence does allow a peek into the lives of a few colonial jurors. What follows is in no way intended to be biographical

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47 “Suffolk County Probate Court Record Books,” vol. 72, First Ser., 1636-1894, Box 60, case 15286, and vol. 100, case 21604, in Massachusetts Archives legal collection, Boston; cited hereafter as “Suffolk Probate Records.” Other “Hopestill Fosters” are recorded in the Massachusetts Archives collection index, but they died at earlier dates in the seventeenth century, making them ineligible to be the eighteenth century juror here, and a “Hopestill Foster jun’r” was son of the juror, for which see below. See also record of the “Superior Court of Judicature” for Suffolk County, held at Boston beginning August 26, 1777, 151-52, Reel 16, “Superior Court of Judicature, 1771-1778,” Massachusetts Archives legal collection, Boston; cited hereafter as “Superior Court of Judicature.”

48 For example, see the cases of the younger Hopestill Foster and Peter Roe Dalton below.
sketches of these one-time jurors, but it is simply to note a common thread in the experience and service of these men. For the evidence suggests that most ordinary colonial American jurors were just that: ordinary subjects of His Majesty—though there were notable exceptions. Wealthy men also served on juries, meaning that juries were not always homogenous groups. More important, the evidence suggests that jury service frequently was a steppingstone to further social and political responsibility, beginning in the early public lives of these men. Above all, however, whether for the ordinary middling townsman or for a wealthy member of elite society, jury service made those men a temporary but powerful body of twelve peers, whose unanimous decisions brought the voice of the broader community into the halls of government power. Jury service perforce gave such men a keen awareness of the desperation of some of their neighbors, especially poor criminals or those in financial trouble. And more than a few jurors had reason to share the concerns of some of their debt-troubled neighbors in their trials. For whether rich or middling, more than a few such jurors would experience themselves the fears of crippling debt and financial ruin.

Topsfield, Massachusetts provides a laboratory by which to trace the steps of some of the king’s subjects from early levels of responsibility, including as citizen-jurors, to later periods of mature leadership. This Essex County town was recognized as such by the General Court of Massachusetts in 1650. Along with other inland towns, Topsfield had been experiencing in-migration from coastal towns since at least 1754. Its population had risen from some 719 souls in 1765 to perhaps 773 persons by 1776. By the year of Independence, increasing numbers of out-of-town people were settling in Topsfield. Town records show that, at Independence, “fifty white people and one negro were living
here who belonged to other towns.” The native colonial population of Topsfield included, besides the greater white population, some twenty-five “negroes and ‘mollattoes.’” Topsfield’s men were farmers and landowners, predominantly, but traders and craftsmen of many sorts were represented as well.49

Many of Topsfield’s political and social leaders from the late 1740s to the end of the 1770s learned early civic responsibility through jury service in the inferior and superior courts of Massachusetts. Deacon George Bixby, for example, played a major role in the town’s political and religious affairs. Owner of a modest lot in the sixth division of Topsfield’s property allocations list from 1754, Bixby was a frequent moderator of town meetings, an honored and important office in the town’s civic life.50 He was chosen by his fellow townsmen to preside over at least nine village meetings that occurred quarterly (and, often, more than quarterly), between 1751 and 1765. Bixby was elected to serve on a select committee to treat with the Rev. Emerson, the town’s minister, in delicate negotiations over the preacher’s salary in 1752. Apparently the minister wanted to be paid better than the town felt it could afford. Bixby served on another committee to supervise the building of a new meeting house in January, 1759,

49 George Francis Dow, comp., Vital Records of Topsfield, Massachusetts To the End of the Year 1849 (Topsfield, MA: Topsfield Historical Society, 1903), I, 4, which records the 1776 population at 773. Dow uses a figure of 733 whites for the period in his introd., Town Records of Topsfield Massachusetts, II, 1739-1778 (Topsfield, MA: Topsfield Historical Society, 1920), vii, perhaps subtracting most of those residents from out of town. See also Dow, comp., Town Records of Topsfield Massachusetts, I, 1659-1739 (Topsfield, MA: Topsfield Historical Society, 1917), vii. Hereafter these are cited as Vital Records of Topsfield and as Town Records of Topsfield, with vol. number, respectively.

50 Additional sources for Topsfield history and comment on the role of New England town moderator can be found in Richard Lyman Bushman, Joseph Smith: Rough Stone Rolling (New York: Knopf/Random House, 2005, 2007), 14, and at n. 21, p. 14: Smith’s ancestors hailed from Topsfield, including Capt. Samuel Smith, mentioned below. Town Records of Topsfield, II, 118.
and two years before that he was empowered, with another prominent townsman, to go to court to answer for the town’s failure to provide adequately for a school.\textsuperscript{51}

From the 1730s through the 1760s, Bixby was also a frequent juror. He had served as a petit or trial juror at least as early as 1736, in the Inferior Court of Common Pleas at Newbury, though he likely had been a juror before then, having been born in 1691/2. What is clear from the record is that in the 1730s, as Bixby was serving his community as a juror, he also was beginning his rise as a town notable. During the decade he served several annual terms as Selectman and was on the town’s committee to provide for a schoolmaster, among other responsibilities. Later town records continue to list Bixby as a petit juror, for example, at the Superior Court in Salem, three times during the 1750s and 1760s. He further served as a grand juror for the year in 1755. In short, Bixby was often called upon to serve his community—and an important part of his public service began as a juror in his colony’s courts.\textsuperscript{52}

Probably no men played a more prominent role in Topsfield politics, from the 1740s to the Revolution, than Elijah Porter and Capt. Samuel Smith. Elijah Porter served as Topsfield’s Town Clerk during tumultuous years, from 1766 until his death in December, 1775. Frequently he was elected Town Treasurer as well. George Francis Dow, citing a contemporary press notice, observed that Porter “died suddenly one Sunday evening while in office: ‘a person of good endowments, natural and acquired.’”\textsuperscript{53} Indeed, Porter served his community in many ways, often elected to offices of responsibility, in addition to frequent service as a juror in his county.

\textsuperscript{53} Dow, comp., Town Records of Topsfield, II, viii; and see Vital Records of Topsfield, 88, 246; New England Chronicle, 8 February 1776.
Elijah Porter often served as one of Topsfield’s Selectmen during the 1750s, and at least once in the early 1770s.\textsuperscript{54} He was regularly called upon to moderate his town’s legal meetings in the 1750s and 1760s.\textsuperscript{55} Porter was elected several times to represent his town at the General Court in Boston.\textsuperscript{56} He also was involved in higher church responsibilities, on that committee negotiating with the Rev. Emerson over his salary in 1752, and on other committees to rebuild the meeting house and to seat people in that building.\textsuperscript{57} When the time came to replace Rev. Emerson, Porter was involved in the search committee, as well as in the effort to find an interim minister for the community.\textsuperscript{58}

Apparently, Topsfield was lax in providing for a school during the 1750s and 1760s, and Porter frequently was involved in efforts to recruit a teacher as well as to provide for an adequate schoolhouse. These efforts required Porter to represent his town in the superior court, with Deacon George Bixby, where he pleaded the town’s cause and probably begged for more time to set things right. In the meantime, he argued that the court might rescind the fine for his village’s pedagogical failings.\textsuperscript{59}

During this busy and difficult period, when Elijah Porter was not in court on town business, he was often in court as a juror. As was usually the case with Massachusetts jurors, Porter began his jury service as a trial or petit juror, serving in the Inferior Court at Newbury in 1746 and again in 1751. Four years later he was in the Superior Court at Salem, this time as a grand juror. He would serve as grand juror three more times in the

\textsuperscript{54} Town Records of Topsfield, II, viii, 81, 86, 94, 106, 120, 130, 151, 184, 297.
\textsuperscript{55} Ibid., 127-58, 174-94, 202-25, 234-38.
\textsuperscript{56} Ibid., elected representative in 1753, 1754, 1756, and in 1762, pp. 110, 123, 143, 212.
\textsuperscript{57} Ibid., 101, 180, 191-94.
\textsuperscript{58} Ibid., this in the fall and winter of 1774, pp. 329, 337-38. Shortly thereafter, in January of 1775, Porter was elected to a committee to organize the town’s Minute Men, 340.
\textsuperscript{59} Ibid., viii, 158, 163, 220, 225, 230. Porter also was his town’s representative in the Court of General Sessions of the Peace to argue Topsfield’s opposition to a jury decision regarding the placement of the Wenham line road, in June of 1756 (p. 144), and to that court again to answer for the town’s later failure to mend that road (in 1760, p. 196).
late 1750s and early 1760s, returning as a petit juror in the Salem superior court in 1766. 60 Besides work on the town’s school committee in 1745-1746, Porter’s earliest recorded service to his community, at the same time, was as petit juror—service he continued to render into the last decade of his life. 61 By the early 1750s, Porter would rise to be a frequently-elected Selectman, and he was representing his town at the General Court in Boston by the mid-1750s. Porter’s political career would continue from there. 62

Capt. Samuel Smith, Topsfield’s other leading figure of the period, shared a similar history of jury service. Like Porter, Samuel Smith owned a modest piece of land in the first division of the town’s property list. 63 And like Porter, Smith participated actively in town politics. Following Porter’s sudden death, Smith was Town Clerk from 1776 to 1778. Smith clearly had the trust of his fellow townsmen, who voted that he should “take Recognizence of Debts &c as the Law Directs,” during the wartime crisis of debt and high taxation. 64 He played a leading role in the town’s efforts in the Revolution, 65 and he was a frequent juror. Like Porter, Smith began his law court duty as a petit juror, serving three times, and later as a grand juror, once, from the 1740s through the 1760s. 66 By the 1760s, Smith frequently was chosen to moderate Topsfield town meetings, especially during the difficult early revolutionary period, and he was active in the Stamp Act crisis and with the town’s committee of correspondence. Smith also was a

60 Ibid., 53, 92, 133, 181, 201, 226, 249.
61 Porter served on the school committee in 1745-1746, and he saw first recorded jury service in 1746, Town Records of Topsfield, II, 42, 51-52, 53. His last jury service was as petit juror in 1766 (p. 249).
62 Ibid., 81, 94, 106, 110, 120, 123, 143.
63 Ibid., 116; Samuel Smith owned the first lot in the first division of Topsfield property while Porter owned the twelfth in that division, though Porter’s was the larger lot of land. The Vital Records of Topsfield shows Capt. Samuel Smith dying in 1785 at about 72 years of age (p. 250, birth in 1714, at p. 96). See also Bushman, Joseph Smith, 14, and references / sources in n. 21 at 566.
64 Town Records of Topsfield, II, viii, 349, 352, 387.
65 Ibid., viii.
66 Ibid., 68, 111, 184, 226.
member of a committee rejecting Parliament’s policy (and its tax) on imported East India tea. He was chosen a delegate to the “Provincial Congress” in 1774, and he often was the town’s delegate to the General Court in Boston. Smith also served as juror at the new American Court of Admiralty on the eve of Independence, as the early republic strove to bring popular participation into these formerly juryless courts. Frequently chosen a Selectman, Smith also represented Topsfield in a suit at the Court of General Sessions and he served on the committee that led the town to reject the first proposed constitution for the Bay State.

In considering the political development of town leaders like Bixby, Porter or Smith, none of this discussion is to suggest that such men became preeminent or politically prominent due to their service on juries. But the records of Topsfield do suggest that jury duty was a steppingstone toward a future of public responsibility and civic service. Of some eighty-six Topsfield jurors studied between 1748 and 1778, including some sixty-eight who were landowners enumerated in the Topsfield property allocations list of 1754, nearly all of them appear to have entered into law court culture at

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67 Smith served very often as Moderator of town meetings from the 1760s through the 1770s (many references in Town Records of Topsfield, II, pp. 161-394), including the town meetings refusing to indemnify Governor Hutchinson and others for their losses in the Stamp Act riots (245-51). Committee of Correspondence work is at pp. 318-20, 334. See also vi, 233, 238, 245-46, 261, 268, 279, 289, 300, 309, 323 (re: tea), and 335-36, 367-78.

68 Ibid., 358. See also “Maritime Records 1779-1788,” Middle District, 1-102, in Reel 17, Massachusetts Archives, legal collection, Boston. Americans’ efforts to have juries serve on admiralty courts would ultimately fail, however. For English fears of and struggles with the juryless admiralty courts, see Henry J. Bourguignon, Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828 (Cambridge, UK: Cambridge UP, 1987, 2004), 4-13, 15-23, with American fears raised at 202-4; and see especially Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution (Chapel Hill: U of North Carolina P, 1960), on the ultimately unsuccessful attempt to incorporate jurors into vice-admiralty courts in America, to stem popular fears of this maritime jurisdiction: vii-viii, 6-7, 15-19, 55-56, 60-65, 78-90, 111-27, 130-46, 188-201. Ubbelohde writes that American efforts to remedy “the most hated feature of the old provincial vice-admiralty courts—trial without jury”—was an “experiment [that] soon proved unworkable” (199-201).

69 Smith was elected a Selectman during most of the 1770s, Town Records of Topsfield, II, 297, 304-5, 314-15, 326, 342, 352, 374; and see 196, 231 for his Court of General Sessions service, and pp. 366-94 for the first, unsuccessful Massachusetts constitution.
an early stage in their civic lives, as jurors.\textsuperscript{70} For men such as Porter and Smith, jury service formed a part of their preparation for future appearances and dealings in court, particularly in the service of their town. Jury duty nearly always preceded other, later important political responsibilities in the lives of these men. And nearly all these men began their public service as petit jurors, often in inferior court, later serving as petit or grand jurors in the superior court.

Luke Averill, for example, born in 1699, saw first recorded jury service at the “Jury of Tryalls” in the Inferior Court of Newbury in 1728, and he was elected a constable for the year after that. His next recorded court service, again as petit juror, appears to have been in the Inferior Court at Ipswich in 1734/5. A year later, he rose to be elected a Selectman. Averill also later served on the Topsfield school committee and on a committee to represent the town’s interests in the Court of General Sessions of the Peace (dealing with conflicts over the Wenham highway), and he was often seen dealing with other town problems. Until his death in 1776, Averill continued to serve three more times as a petit juror and once as a grand juror.\textsuperscript{71} Capt. Thomas Baker, another influential town leader during the early revolutionary period, served as petit juror twice in the late 1740s and 1750s before serving as Selectman and as a frequent moderator for the town’s meetings. During the 1760s and 1770s, Baker continued to serve twice as petit juror, once as a grand juror, and he also was a juror on that new American Court of

\textsuperscript{70} See \textit{Town Records of Topsfield}, II, 116-19, and see the text below.
\textsuperscript{71} \textit{Town Records of Topsfield}, I, 302, 319, 368, 373; II, 21, 58, 95, 113, 147, 150, 152, 199, 220. Lieut. Luke Averell / Auvel / Averel / or Averill appears in the \textit{Town Records of Topsfield}, II, 118, as “Luke Averell,” with a modest town lot in the fourth division. Confidence that this man is one-in-the-same comes from there being a unique date-plausible reference to “Lieut. Luke Averill” in the \textit{Vital Records of Topsfield}, death at 77 years of age in 1776, p. 203, and a single date-plausible reference to this man’s birth appears in 1699, at p. 11.
Admiralty in Salem in the fall of 1776. Baker presided over the Topsfield town meeting that voted to support a declaration of American independence from “the Kingdom of great Britain,” should the Continental Congress “think fit.”

Thomas Symonds and Benjamin Towne likewise knew early jury experience before advancing to other public or political work. Owner of a moderately sized plot in the fourth division of Topsfield’s property distributions, Symonds served as petit juror at least four times from the late 1740s to the early 1770s, and he was a grand juror for the year 1767. He also was elected a surveyor of highways in 1750. He was on a committee to repair the old meeting house and another to supervise the building of a new one, and he served on still another committee to seat inhabitants in that new building. He was elected a constable in 1757 and was chosen one of a committee to “take Care & provoid a School for the Town” in 1765. Capt. Benjamin Towne presents a similar picture. The owner of one of the larger lots in Topsfield (the second lot in the first division of village lands), Towne was an experienced juror. Towne seems to have begun his jury service as a petit juror, serving at least twice, in the early 1720s and in 1730. As “Capt. Benjamin Towne,” he was selected as grand juror at least twice in the 1750s. At mid-century, Towne was regularly elected moderator of the Topsfield’s meetings until the eve of

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72 Exclusive reference to a “Capt. Thomas Baker” appears in the Topsfield town records, but this reference must be used with caution, since there were earlier “Thomas Bakers” (in addition to a Thomas Baker, Jr.). To guard against confusing Bakers, only references to the later “Capt. Thomas Baker” in the *Town Records* II have been considered here: *Town Records of Topsfield*, II, 77, 133, 139, 141, 149, 191-99, 210, 226, 249, 367. The *Vital Records of Topsfield* death lists contain three Capt. Thomas Bakers, but only one date-plausible candidate for this man, a “Capt. Thomas Baker,” who died in 1777, at age 67 (p. 204). This is likely the “Capt. Thomas Baker” holding the first lot of land in the fourth division of the 1754 Topsfield property list, *Town Records of Topsfield*, II, 117, since the other “Capt. Thomas Bakers” had died in 1717/18 and in 1725, respectively, and since “Thomas Baker Jur,” clearly another man, is listed separately in the Topsfield property listings (Vital Records of Topsfield, 204; *Town Records of Topsfield*, II, 117).

73 At the meeting of June 14, 1776, *Town Records of Topsfield*, II, 358.

74 The *Vital Records of Topsfield* gives one reference for a Thomas Symonds who died at 80 years of age, on January 10, 1791 (p. 251). See also *Town Records of Topsfield*, II, 117, 60, 86, 95, 101, 168, 181, 256, 300, 302, 151, 236.
revolution, when he died at eighty years of age. Meanwhile, from the later 1720s to 1760, Towne had been a frequent Selectman and at least once, in 1752, he was Topsfield’s Treasurer. He represented his town at the Court of General Sessions of the Peace in a dispute over a proposed road. But he, too, appears to have moved from early jury service to other public callings in his later years—though jury duty generally continued periodically throughout the life of a man like Towne.75

What village leaders such as these had in common was an early (and, usually, a continuing) experience in court, as jurors—typically beginning as trial jurors in inferior court. Charles Sydnor has noted an analogous trend in Virginia on the eve of America’s revolution. In describing the “pathway to power” for the scions of the Old Dominion’s planter elite, Sydnor found that, “[i]n most cases, the first upward step in a political career was admission to the office of justice of the peace and thus to a seat on the bench of the county court.” He observed that Washington, Jefferson, Madison and others—including signers of the Declaration of Independence, members of the US Constitutional Convention, and early congressmen—had gotten their start this way. From there, future gentry leaders were seasoned by county court experience, preparing them for service in the House of Burgesses and beyond.76

Yet in Virginia as in Massachusetts, jury service was also a typical preparation for higher public service.77 Jury duty introduced the king’s subjects to great responsibility

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75 Vital Records of Topsfield death lists show one reference to a “Capt. Benjamin Towne,” who died on February 11, 1772, at 80 years and 9 months of age (p. 252). Also see Town Records of Topsfield, II, 116, 112, 139, 91-137, 145-94, 215, 270-71. References to “Benjamin Towne” in the 1740s as a petit juror, then grand juror, and then as Selectman, probably the same man before becoming captain, appear at Town Records II, 33, 61, 81, 86. Earliest references to Benjamin Towne appear in Town Records I, showing him selected as petit juror at the Inferior Court at Ipswich in 1722/23, and again as petit juror at the Inferior Court at Newbury in 1730 (pp. 236, 328-29); he often served as a Selectman beginning in the later 1720s.
76 Sydnor, Gentlemen Freeholders, 100-6, 60-65.
77 Ibid.; Greene, Negotiated Authorities, 262-63, 268-69, 276-79.
and gave them sometimes enormous decision-making authority, as will be described in the chapters to come. Jury service often was the first step toward larger social and political responsibility, giving men immediate authority over the lives and property of others, within the colonial law court culture. And there is every reason to suspect that colonial Americans were willing to trust the courts precisely because they were willing to trust fellow citizen-jurors—their neighbors in the local community—who would be hearing their cause. Ordinary freeholders in Topsfield in their town meetings regularly promoted such jurors to higher positions of town responsibility. But such public trust began with jury service, where young townsmen experienced their first exercise of real authority over their communities, in court.

**Interlude: When subjects in trouble faced privileged peers**

Before considering a few of the more humble men who served their communities as jurors, it may be informative to contrast the more ordinary, middling juror—including some of those jurors above, as younger men, who later rose to prominent leadership positions in their communities—with a few wealthy men who served as jurors in Massachusetts. Although not financially typical of their fellow subjects, they, too, played important roles in their communities and, in at least one important case, became historically significant through their jury service. Moreover, at least two of these jurors illustrate that wealth built during the colonial era could prove fleeting in the tumult of revolution. And these few jurors provide interesting examples of privileged colonials confronting neighbors in desperate straits. Did the economically privileged juror vote

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78 This is to extend on the argument of Bushman, “Farmers in Court,” 402-5, 390-413. While this article deals (in part) with the mystical attributes of courts and their judges, juries also legitimated colonial American law court culture and its judgments, as argued in this chapter and in the chapters that follow.
differently from his more ordinary, freeholder peers in the course of his jury duty, in criminal cases, say? How about where property cases were concerned? Were juries frequently hung in challenging cases by one or more wealthy men refusing to go along with the judgments of their more humble peers?

Hopestill Foster (the younger) was a well-to-do Suffolk juror who sat on a panel that decided a brutal murder case in the summer of 1777. In the Government and People v. Robert Pasco, this resident of Boston and “Laborer” was accused of having grabbed by the hair a woman, Margaret Welch, throwing her to the ground, striking her and repeatedly stomping on her just beneath her left shoulder. The wounds proved mortal; Margaret died a few days later. Pasco pleaded not guilty and asked for a jury to hear his case. For reasons the record does not explain, Pasco was found not guilty. Presumably Foster and his fellow jurors simply did not believe that the right man had been found and indicted. Meanwhile, the court report offers no indication of any difficulties between Foster and his fellow freeholder jurors in swiftly coming to their unanimous verdict. There was no hung jury or delay in a verdict that would suggest a struggle among Pasco’s jurors that he should be held harmless in this horrible crime.79

Apparently before this Pasco case, Foster had just sat with the same foreman, Caleb Blanchard,80 on another jury hearing a very different sort of case—a highly political one. In Government and People v. Thomas Williams, this laborer of Boston stood indicted as

an evil minded person … contriving & devising to discourage divers of the People of this State from supporting the declaration of the Independency of the United

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79 “Superior Court of Judicature,” Suffolk County, August 1777, Reel 16, 151-52.
80 This Caleb Blanchard, likely the man listed in Boston’s tax records and apparently a tanner, owned a small shop in Boston, according to The Massachusetts Tax Valuation List of 1771, ed. Bettye Hobbs Pruitt (Camden, ME: Picton P, 1978, 1998), 32-33.
States of america made by their Congress & with a design to Justify the measures taken by the King & Parliament of Great Britain against the American States and to prevent the Continental Army being raised & the Continental Navy from being manned on the fourth day of May [1777]….

Moreover, the indictment charged that Williams did

in the presence & hearing of divers of the good People of this State drink a health to King George meaning & explaining himself to mean George the Third of Great Britain, and that the said Thomas Williams then and there, having with him a number of armed men, in the presence & hearing of divers of the Good People of this State published & pronounced the following offensive & unlawful words viz. I am inlisting Men for the King meaning George the Third King of Great Britain, in Six Weeks time this Town will be overcome and will be in the hands of the King’s troops, … [and] the time will come that the Streets of Boston will run down with blood.

The indictment further charged that, apparently at the time of his arrest, Williams had intended to be “bound to Providence, & from thence to Hallifax … contrary to the laws of this State [and providing] an evil example to others in like case offending & against the peace & dignity of the said Government & People” of Massachusetts. (Now gone were the days when indictments accused alleged evildoers of acts against the “peace & dignity” of His Majesty the King.) The jury found Williams guilty as charged, fining him £4, “to the use of the Town of Boston,” and binding him “by recognizance” for £100 “for his keeping the peace & being of good behaviour for the term of two Years towards all the good People of this State,” and to pay the costs of prosecution.  

Perhaps these jurors, as shown in chapters to follow, simply acted with typical mercy toward the accused in both these cases. After all, Pasco and Williams might have hanged for these charges.

More to the point, though, the trials of Pasco and Williams provide examples of the well-to-do colonist performing his duty for his community alongside fellow jurors

81 “Superior Court of Judicature,” Suffolk County, August 1777, Reel 16, 147.
less financially endowed. Of course, it often might be a mixture of subjects who together sat in judgment of their neighbors. Indeed, the jury box was the one place in colonial society where wealthy men and ordinary freeholders had to sit side-by-side. Otherwise, wealthier men in Topsfield, for instance, usually sat apart from poorer subjects, even in church. This is not to argue that colonial jury service provided some dynamic kind of social leveling. Hierarchy always was on display in court, visible particularly in the privileged position of the judges, above all others in the courtroom, as has been shown. Class distinction was a reality of life in colonial Massachusetts, as elsewhere throughout the colonies. Still, among the jurors themselves, no social hierarchy or distinction was apparent in the manner in which those twelve men sat, on their bench on either side of the justices. But whatever social or economic differences existed between jurors in such cases, those differences almost never prevented jurors from arriving at unanimous decisions—even in troubling cases such as the murder trial above, as well as in cases involving property rights, considered just below and in the chapters to follow. And regarding those socially mixed juries, the elite of Massachusetts certainly did not believe that the middling jurors of that colony were any sort of pushover, ready to acquiesce to the wishes of their socio-economic “betters,” once they retired to the deliberation room. But if socio-economic differences did pervade colonial society, the jury box was the one place where wealthy men and ordinary freeholders had to sit side-by-side.

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82 Ibid., from the trial record and comparison of the juror list with identifications from the Massachusetts Tax Valuation List of 1771, referenced above.
83 It was not only in socially hierarchical Virginia where the gentry exercised their “pride of rank,” entering church only after the “humbler men” were present, taking their privileged places in reserved pews at the front, and departing worship before all others. Privilege of place existed in the Topsfield meetinghouse, too. The town records provide one illustration of social rank in Topsfield, by those who had purchased their places of honor by pew number, beginning with the first, in the meetinghouse. See Isaac, The Transformation of Virginia, 61-65; Town Records of Topsfield, II, 192-93.
society, how did a “privileged” juror compare to a more ordinary peer? Just how
privileged were some of the more privileged Massachusetts jurors?

Based on a fairly random selection of a few elite Massachusetts jurors, Hopestill
Foster surely was better off than most citizens of the nascent state of Massachusetts. This
Hopestill Foster was the son of a Capt. Hopestill Foster who, at his death in late 1772,
had left an impressive estate, to his son Hopestill and to his three daughters and a
granddaughter, of just over £2000. Among the house and lands valued at more than
£660, the furniture, bedding, household items and “Sundry Books,” was “a Negro Boy,”
appraised at £53, six shillings and eight pence. What happened to this child is unknown
from court records, but those records do reveal that at least some of the family’s property
was “lost by British Troops.” It is possible that this boy was lost to British troops as
well; Hopestill’s son, the juror, left no slave in his estate.

When the juror Hopestill Foster died by early 1802, he, too, left an impressive
estate, much more impressive than those left by most jurors of Massachusetts. As his
father did before him, in his will, the son Hopestill declared himself to be “Gentleman” of
Boston. The inventory of son Hopestill’s estate seems to have included the “Eight Day
Clock,” desk, and many other household items that he had inherited from his father.
Tables and other furniture, pewter, tin ware, fireplace utensils, brass kettles, candlesticks,
several looking glasses, along with one Bible—such were among Foster’s possessions
received by his wife. His estate apparently also included a set of silver plate, not

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86 The tally came in at some £2012 and 14 shillings. Will and inventory of estate of Capt. Hopestill Foster,
“Suffolk Probate Records,” in vol. 72, 311-15; inventory of July 16, 1773, in vol. 73, 4-7 (case
15,286).
87 “Suffolk Probate Records,” vol. 73, 4-7.
88 “Suffolk Probate Records,” vol. 73, 4-7; vol. 83, Box 66, 125-36.
generally found in the estates of lower-middling men. At just over $4300, this was no mean estate in 1802, but not nearly as great as some. (By comparison, another Suffolk juror of the period, Francis Wright, left an estate of over $10,000 in 1812, though that estate still faced debts of nearly $5000 in 1819.) What was not discovered in the estate of the younger Hopestill Foster was the African American servant for life who had once lived with the family.\(^89\) Clearly, at some point just prior to or in the years following Independence, this Foster family in Boston had ceased to be slaveholders. What is likewise clear is that Foster, like his more middling fellow jurors, faced neighbors on trial who had come from less privileged circumstances. Jury duty for such men would guarantee that they could not stand untouched by or unaware of the poverty or unhappy circumstances of those around them.

Two other men provide examples of the privileged juror—men of great wealth and significant estates—offering insight into colonial American society and its juries. The first, Suffolk gentleman Peter Roe Dalton, left a substantial estate upon his death, initially valued at nearly $41,000 in 1811.\(^90\) Earlier in life, however, economic and social privilege could not completely shield Dalton from an awareness of the desperation of some. For Dalton had served as a juror in two pre-revolution criminal cases in His Majesty’s Superior Court of Judicature in Suffolk County, in the summer of 1772. In the first case, Rex v. Lucy Little, “a free negro singlewoman” of Boston, defendant Little stood accused of breaking and entering the dwelling house of a Boston widow and of

\(^89\) “Suffolk Probate Records,” the will and initial court records for Hopestill Foster (the younger) at vol. 100, 37-39, 49, with inventory at vol. 100, 151-52, case 21604; and Francis Wright will at vol. 110, 381-82, inventory at vol. 110, 438-39; and debt records at vol. 117, 297-98, 421-22, case 23979. By 1819, Wright’s executrix, his widow Mary, was in court asking to sell real estate from her inheritance to pay the sum of $4925 beyond the cash which the estate could raise, “for the payment of his just debts and incidental charges” still owed Wright’s creditors. See “Suffolk Probate Records,” vol. 345, 14.

\(^90\) The extensive inventory and valuation of the estate of Dalton is in “Suffolk Probate Records,” vol. 109, 519-21, with additional items enumerated at vol. 110, 246-47; vol. 115, 441.
stealing some clothing, shoes, and a few other small items. She had pleaded not guilty and had asked a jury to hear her cause. Dalton and his fellow jurors found her guilty, and the court sentenced Little to be branded on the forehead with the letter “B.” In addition, Little had to pay the widow £3 and six shillings, “being with the goods restored treble the value of the goods and chattels she stole,” and to pay the costs of prosecution, a fairly typical penalty for the period.\textsuperscript{91}

Dalton’s other case, The King v. John Daley, involved another alleged housebreaking and theft. Daley, a laborer of Boston, was accused of stealing a number of items from a gentleman’s house totaling nearly £20, a not insubstantial theft for the time. Daley pleaded not guilty, asked for a trial by jury, and was held guilty by his peers. He, too, was ordered branded by the court, upon the forehead, with the letter “B.” And like Lucy Little, he was ordered to pay his victim treble damages, amounting to nearly £60. Unlike Little, apparently, Daley had nowhere near that kind of money. Thus the court ordered him bound into involuntary servitude for five years.\textsuperscript{92}

While colonial American juries were likely to show every possible mercy to debtors and others in trouble, a theme to be developed below, in cases like Little’s and Daley’s, Dalton and his fellow jurors generally showed no inclination to coddle burglars. The Massachusetts court records strongly suggest that most colonials—whether plain freeholders or wealthy men like Dalton—valued the right of personal property and defended that right as jurors in court.\textsuperscript{93}

At his death, former juror Peter Roe Dalton left his household goods and a third of his estate to his wife for the rest of her life, an arrangement frequently seen in the court

\textsuperscript{91} “Superior Court of Judicature,” August 1772, Reel 16, 123.
\textsuperscript{92} Ibid.
\textsuperscript{93} See Chapters 2 and 3 below.
records of this period. The remainder of his apparently considerable holdings he divided between his children. When Judge Thomas Dawes of the Suffolk County Probate Court accepted the will, on September 16, 1811, had did so without an executor yet named to represent the estate.94 The estate would continue for some years to have difficulties in finding a appropriate executor, in no small part because, while Dalton had certainly enjoyed the benefits of wealth while alive, he had also run his estate into tremendous debt.95 In fact, while Dalton had left what had appeared to be an estate of great worth at his demise, the estate was plagued by existing and mounting debts, totaling nearly $14,000 in 1817.96 Although Dalton’s family still possessed significant assets, they soon became aware that they were inundated by heavy and growing liabilities.

On the other hand, the Dalton family was not so unusual here in one respect. For indebtedness was a problem this family shared with others in the early republic—including the third president of the United States, who ended his days at Monticello mired in debt, in the decade following Dalton’s decease. Herbert Sloan has analyzed the fears and struggles of Thomas Jefferson, from the 1780s until his death, against the effects of debt on individuals (particularly on Jefferson himself), as well as on the republic as a whole. Sloan has shown how “the problem of debt” played a significant role in the creation of the nation’s early republican ideology, through the personal struggles of the founder of the first Republican party. And this problem of debt affected

94 “Suffolk Probate Records,” vol. 109, 497-98, case 23845.
95 Ibid., vol. 109, 519-21, with more (cash) inventory at vol. 110, 246; vol. 115, 411. Dalton is also listed in the Massachusetts Tax Valuation List of 1771, 42-43, showing, however, only one of several later houses at that earlier date. “Suffolk Probate Records,” vol. 110, 246-47, 480-81; vol. 112, 654-56; vol. 115, 420-22.
96 Ibid., 422.
the nation beyond, as well.\textsuperscript{97} Indebtedness and even bankruptcy would afflict the lives and estates of more than a few Massachusetts jurors and their families, and not just the seemingly rich, such as the Daltons.\textsuperscript{98}

One final juror of means who, additionally, became significant in the history of the American Revolution, was “plump” Gilbert Deblois, as historian Hiller Zobel has characterized him.\textsuperscript{99} At his financial height, this Boston Massacre trial juror, a merchant in fineries, silks and ribbons, was worth of fortune. Pro-administration and loyalist in the early revolutionary period, abandoning his country and his estate in 1779, Deblois was everything the Boston whigs despised.\textsuperscript{100} More will come about Deblois and the Boston Massacre trial in the last chapter of this study. For present purposes, however, Deblois presents an historically significant case of a very wealthy juror who, along with his fellow jurors, redeemed his city and fellow citizens in the eyes of John Adams.

At the time of Deblois’s death in 1792, the inventory of the estate of this one-time Boston juror is eye-popping. Deblois possessed a veritable department store of merchandise, including furniture and all sorts of cloths, lace, “Spangles,” buttons, “String & Beads.” His merchandise included “Ladies Bosom Freinds,” gloves and combs, hats,

\textsuperscript{97} By no means were Peter Roe Dalton and his family alone in the snare of debt. Thomas Jefferson shared with his peers and with this period the often unhappy embrace with debt, a theme developed in Herbert E. Sloan, \textit{Principle and Interest: Thomas Jefferson and the Problem of Debt} (New York: Oxford UP, 1995, 2001), especially pp. 3-5, 9-12, chaps. 3, 4, 6. Jefferson himself, as Sloan points out, “died a bankrupt” (11). Obviously, Jefferson was not alone in his time—as Sloan explains—and would not be the last American to live in ways and with expectations that led to ruin and to deep pessimism for the future (218-37, especially 233)—which should be a poignant theme for Americans of the early twenty-first century.

\textsuperscript{98} Estates varied widely in worth in Massachusetts by period of the early republic. The largest estate inventory in this survey of 1812 Suffolk was for just over $40,000, similar to the early valuation of Dalton’s, while the poorest inventory was for $50.06. The next highest estates after that were appraised at $65.18 and at $83.25, respectively. Of the 27 estates studied for this year in Suffolk, only 6 were valued greater than $5000. Most inventories were valued at much less than $5000. One estate, however, that of Andrew Roberts with assets of $83.25, was deceptively low; the estate was owed some $333 in notes. “Suffolk Probate Records,” vol. 110, 484-632. Obviously, estates could be creditors as well as debtors, though as the Massachusetts court records illustrate, debt was the more prevalent condition.

\textsuperscript{99} Zobel, \textit{Boston Massacre}, 245, 227.

\textsuperscript{100} Ibid., 245-46, “Suffolk Probate Records,” vol. 82, 1-2, 25-26; vol. 83, 567-69, case 19898.
writing paper and coffin handles—this merchant had wares to tempt any consumer. Yet despite this huge stockpile of goods, even Gilbert Deblois’s case presents an estate that eventually found itself in ruins. After the merchant’s death, his executors finally reported to Probate Court Judge George Minot that the estate was insolvent. After the “subduction of necessary charges and disbursements, there remains in the hands of the … Executors a balance” of some £3460 remaining in the estate and over £4800 in old lawful money owed by the estate to its creditors. The court ordered the executors to do what they could. Creditors were thus forced to accept, as per an act of the Massachusetts General Court, 14 shillings and 4 pence on the pound, slightly more than a twenty-five percent loss.  

Thus one more formerly wealthy British-American subject ended up with an estate ensnared in debt. In Deblois’s case, his bankruptcy had much to do with his abandoning citizenship in the new republic. Before fleeing his native land, however, Deblois had served his country, with results that John Adams would have expected of his fellow citizens, in their role as jurors—and with results that Adams applauded, in the first of the Boston Massacre trials. Deblois was no American hero, and Adams did not consider him such. Still, at a most painful moment in the history of Boston’s civic life, jurors rich and ordinary had performed their civic duty. They delivered saving justice to defendants on trial for their lives, even if some of them later, like Deblois, could not embrace the new America coming into being.

101 “Suffolk Probate Records,” will of 1789 at vol. 91, 147-49; inventories of March 1792 at vol. 91, 179-80, 481-521; estate’s creditors and debts at vol. 91, 639, and vol. 93, 158-60, 442-44.
103 See the last chapter of this study for a discussion of the significance of the Boston Massacre trials and of their several juries. Zobel, Boston Massacre, 302; Diary and Autobiography of John Adams, II, 79, where Adams writes, the jury’s “Judgment of Death against those Soldiers would have been as foul a Stain upon
The voice of the broader community

In the end, however, the fact remains that most Massachusetts jurors had nothing like the wealth or the level of debt that eventually engulfed the estate of Gilbert Deblois. More than a few jurors’ heirs, though, did know the grief of debt and financial ruin.

William Frobisher did not end his days in ruin. But in his occupation, home wares and net worth at death, he presents a picture much closer to the ordinary Boston shopkeeper from late colonial to early republican times. Foreman of the first of the Boston Massacre trials, soap maker Frobisher left an estate of around $3300, which included the value of his workshop and land (minus a mortgage and other expenses against the estate tallied in 1808). Frobisher left a will dividing his estate among his survivors, and the inventory of his estate portrays a modest home containing the usual collection of andirons, an “Old desk and book Case,” pewter and iron ware, candlesticks and kettles. Although the estate faced significant debts and expenses, Frobisher left his heirs a respectable if modest inheritance.104

Charles Coffin, another Suffolk juror, left his widow Abigail and his children and grandchildren a much smaller estate, valued at $74.55 in 1814. Coffin’s household included very ordinary tin and brassware, bedding, and household furniture. Included in the estate were two looking glasses, two tea chests, and two coffee mills, along with some “Old Crockery.” Coffin also owned one pewter dish and twelve plates. His most valuable possessions were two beds and bedding valued at a total of $20. Price comparisons at this late date are very difficult, however; court records for the valuations

__104 Zobel, Boston Massacre, 245; “Suffolk Probate Records,” will at vol. 105, 170-72, inventory at 183-84, with debts and expenses at vol. 106, 260-61.__
of household items show a collapse in prices by 1814, in comparison with those of just a few years earlier in Boston.\textsuperscript{105} Prices aside, the estate inventory of his worldly goods portrays a former juror of very humble means at his death. But even as a younger man, Coffin appears to have led a modest existence.\textsuperscript{106}

Juror Richard Leach, a yeoman of Essex County, left a will at his death, and a personal estate with an inventory value of $212.83 in April, 1801, in addition to farm lands and salt marsh worth some $1400. By 1805, however, his estate continued in court proceedings to face more than $800 in expenses and debts. His heirs would have to go to court to sell lands to pay various expenses and compensate creditors. Meanwhile, Leach’s household goods were those of a lower middling farmer, mostly ironware and “old” furniture. His most valuable possession was his bed, worth some $25. His plough was valued at $3. This Beverly juror likely shared much in common with the lives of his fellow Essex farmers.\textsuperscript{107}

Capt. John Farnam, another one-time juror of Essex, died intestate in late 1786, leaving an estate that, like Leach’s, faced debts to creditors. While Farnam’s estate was greater than Leach’s, so too were its debts. The lengthy inventory of Farnam’s estate lists numerous household and personal items, including one “great Coat,” silver shoe buckles, his razor and strap, penknife, and a good deal of furniture, dining ware, and kitchen utensils. Farnam also owned several head of livestock and a number of books, including \textit{Bailey’s Dictionary}, \textit{Salmons Geography}, and a Bible. In all, Farnam’s estate was

\textsuperscript{105} Clearly the War of 1812 was devastating to the Massachusetts economy. It ravaged the valuation of many estates, as can be seen by a perusal of the probate records such as Coffin’s from this period.
\textsuperscript{106} “Suffolk Probate Records,” vol. 112, 61-62, case 24388. Coffin appears to have been a lodger with William Frobisher in 1771; \textit{Massachusetts Tax Valuation List of 1771}, 24-25.
\textsuperscript{107} The Richard Leach records appear in “Essex County Probate,” Court Record Books, Old Ser., with will at vol. 368, 238-39, in Massachusetts Archives legal collection, Boston, cited hereafter as “Essex Probate Records.” The Leach inventory appears at 334, and expenses and debts are listed at vol. 372, 312-13.
appraised at some £624 as enumerated in December of 1786. As with the estate of farmer Richard Leach, however, Farnam owed significant debts that his survivors would have to repay—mounting to nearly £603 by the accounting of April, 1790. Ultimately, the moneys owed by Farnam’s estate to its creditors amounted “to more than the whole of his Estate (after deducting one third Part of the real Estate for his widows Dower),” leaving the estate insolvent, according to Farnam’s son, the estate’s administrator.

Interestingly, court records show that Farnam had been both a significant debtor and also a creditor for small amounts to some of his neighbors. The life of this juror illustrates, then, that on the eve of Revolution, the distinction between debtor and creditor was not always clear cut.

Still, recalling Herbert Sloan’s analysis of the plight that “bankrupt,” Thomas Jefferson, it was debt that dominated the lives and ends of many of the one-time jurors of Massachusetts. This tale could be elaborated almost endlessly. And if debts did not sink the estates of former jurors, family disputes over inheritance could. The estates of former Suffolk juror Isaac Phillips and Middlesex jurors Abijah Learned and Noah Hide followed well-worn patterns.

Isaac Phillips had been the foreman in the Suffolk jury that had included Peter Roe Dalton, convicting Lucy Little and John Daley. Phillips died intestate in 1786, leaving his widow Priscilla what should have been a comfortable inheritance of home and furnishings. Unfortunately for Phillips’s widow, however, his £883 estate was saddled

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108 John Farnam’s estate records and inventory are at “Essex Probate Records,” vol. 358, 506-8, with the estate’s debts and expenses at vol. 359, 232-36, statement of insolvency at 236; addendum to inventory, debts and amounts owed the estate at vol. 360, 382, 439-43. Richard Leach had served on a jury that found an Essex man guilty of sexual assault in 1771, while that same year Farnam had joined his peers in convicting John Austin, 3rd, for having shot a young man in the face, causing his death. Pleading benefit of clergy, Austin was ordered branded on the hand for his crime, though this penalty was later respited, for reasons unclear. See “Superior Court of Judicature,” reel 16, 206, 195.
with heavy debts. To pay the £1500 owned, the probate judge ordered a committee of three to do their best to figure out how to resolve the estate’s troubles. They did so, but widow Priscilla had to bear the brunt of it. She lost most of her home. Priscilla was awarded the right to living quarters in a few of the rooms of her former house, including use of the front door, kitchen and part of the barn, yard and some other land, as well as rights to use the water pump and the privy house. The rest of the house, grounds and lands were put up for sale.¹⁰⁹

Middlesex yeoman Abijah Learned died intestate, leaving an estate valued at nearly £370 in 1783, which included farm animals, plows and other agricultural tools, the homestead and several farm and marsh lands in and around Cambridge. Learned’s wife Sarah had died before him, leaving several children as his heirs. Learned’s son Isaac, a Cambridge husbandman, was the original administrator of his father’s estate, but perhaps in a sign of troubles brewing, elder brother Samuel Smith Learned, a Cambridge yeoman, wrote a letter to Probate Judge Oliver Prescott, asking to be added as an administrator. Judge Prescott granted Samuel’s request that April. Meanwhile, by May, Judge Prescott reported that “disputes have arisen between the administrators & the claimants.” There may have been some conflict between Isaac and Samuel over some of the lands in their respective inheritance, but the larger problem appears to have been that the sons were claiming that daughters Sarah Learned Heath and Abigail Learned Perry already had received their inheritance from their late father at the time of their weddings. In fact, it turned out that money had also gone to a third daughter, Mary Learned Boyes, now deceased, whose son William had become her beneficiary. The brothers were unhappy

that their shares of inheritance would be reduced by the sisters’ receiving additional moneys now. By the following month, however, Learned’s sons and daughters had settled their dispute, avoiding a full jury trial, likely in part because they hoped to avoid seeing the estate eaten in court and legal fees and in the other estate expenses that would follow from drawn out proceedings.\textsuperscript{110}

Noah Hide left his “well beloved wife” Ruth use of “the easterly End of my dwelling house from Top to bottom and one third part of the barn,” along with a cow, some “good salt-pork,” fourteen bushels of Indian corn, and most of the household furniture. For caring for him in sickness, he gave daughters Ruth and Lucy the other end of his house as their dwelling place and a small sum of money. To his eldest son William, his executor, Hide left a few acres of land and farming tools, and to his younger son Noah he left nearly £28, on the condition that the younger Noah repay a note to another man for nearly that amount, a debt which the father had co-signed. Hide provided for two other daughters with small sums of money. An inventory of Hide’s estate estimated its worth at £249 in 1787. By 1789, however, the court had found the estate insolvent, forcing the family back into court to sell lands and effects, breaking up the homestead, to satisfy the demands of Hide’s creditors.\textsuperscript{111}

Conclusion

Whether simple irony or cases of history repeating itself, former jurors—from rich merchants to plain farmers, men who so often had served on cases where debtors were

\textsuperscript{110} Abijah Learned’s third son, Nathaniel, also became an heir, almost as an afterthought in the interlining of his name in the judge’s settlement of June [8?], 1786. “Middlesex County Probate Court, File Papers (First Series),” case 13834, frames/pp. 23 ff. (includes unnumbered frames), in Massachusetts Archives legal collection, Boston.

\textsuperscript{111} “Middlesex County Probate Court,” case 11275, frames/pp. 11 ff. (includes unnumbered frames), Massachusetts Archives legal collection, Boston.
hauled into court by creditors—ended up creating still more court business when their
own estates wound up in debt and in court. Perhaps ultimately the common thread in the
life of so many colonial jurors was indeed “the problem of debt,” a cycle linking debtor
defendants to jurors who themselves were so often debtors. In the chapters that follow, it
will be argued that jurors had sympathy for neighbors in trouble—especially for
neighbors in debt—because those jurors themselves could well imagine what a creditor’s
demands could mean. For many jurors, as surveyed in the court records for this study,
the worries of debt were not just imagined. They were a fact of life.

But such was the life of many ordinary men toward the end of the colonial period
and in the first decades of the new republic. Men served their communities, beginning
with their duties as jurors, and they did their best to make a living and to hand something
down to their widows, children and grandchildren. But when their days were done, if
debts remained or if family quarrels broke out, their survivors were forced back to court,
providing more business for judges, attorneys and, in many a contentious case, for jurors.

As will be seen in the pages that follow, debt was a major reason why courts and
juries would seldom want for business from the middle of the eighteenth century to the
Revolution. In cases of debt, and in many other desperate situations, colonial Americans
in court would turn to jurors for help. For many in trouble, a jury of their peers would
offer hope and, frequently, legal salvation. Law court culture could be frightening in its
power over property, limb, and even life. But ordinary jurors often would throw a lifeline
to debtors and other desperate defendants on trial. From before mid-century, jurors were
important representatives of their communities in court. They were neighbors protecting
neighbors. Anglo-American subjects, when sitting as jurors, were prominent citizens indeed.
Chapter 2
The Jury in the Inferior Courts of Massachusetts

Edward was born free and is the Son of the said Violet a freewoman and ought not to be subjugated to slavery more than any other of the King’s Subjects,…

—Edward Lewis, otherwise known as Ned of Topsfield, indirectly quoted, suing for his freedom before a jury in the Superior Court of Judicature, meeting in Essex County, Massachusetts, November 1769

Of all the cases that a colonial American jury could hear, surely none was more compelling or more clearly demonstrated the role and power of the twelve peers than that case involving the life and liberty of the subject. Just such a cause was presented by one Edward Lewis, “otherwise called Ned of Topsfield,” who brought suit in the Superior Court of Massachusetts in Essex county—in a trial challenging that subject’s status of servitude. In the fall of 1769, Ned, a minor and “labourer,” sued a yeoman of Topsfield named Solomon Dodge, accusing Dodge of trespass against his rights—that is, of illegally enslaving him. Ned charged Dodge with “maliciously contriving and intending to deprive the [plaintiff] of his liberty,” for a full year, “without any right to do so [along with] many other injuries….,” Since he was a minor, Ned sued Dodge through his mother, Violet Cudjo of Ipswich, “a freewoman” whose status presumably ought to have descended to Ned as well. Ned had appealed his case after a typical procedural plea or demurrer by the defendant in the Essex Inferior Court. There, Ned had claimed that “said Solomon was and is well knowing” that Ned was a freeman. Nonetheless, Solomon had “with force and arms [made] an assault upon the body of the said Edward” and had

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1 Record of “His Majesty’s Superior Court of Judicature, court of Assize and general goal delivery,” held in Essex County, Massachusetts, beginning November 7, 1769, 209-10; in Reel 15, “Superior Court of Judicature, 1769-1771,” Massachusetts Archives legal collection, Boston; cited hereafter as “Superior Court of Judicature.”
“detained & held him as a slave” for the previous year. The record may be read to suggest that Ned already had wrested his freedom from Dodge as a practical matter, and now, in addition to seeking legal recognition of his freedom, Ned was appealing his case to obtain monetary damages from Solomon Dodge.²

Now in the Superior Court of Massachusetts, Dodge proceeded as most defendants did in such a serious case: he asked for a jury trial. Unfortunately for Dodge, the superior court jury found him “guilty of trespass [against Edward Lewis as] alleged in the writ,” awarding Lewis £5 in damages, as well as his costs of court (which Dodge would also have to pay). Now, Ned Lewis had demanded damages of £50 in the inferior court. As will be seen, plaintiffs often received less from juries—sometimes far less—than they had asked for in damage suits. Still, the court costs that Dodge would have to pay in this case, at more than £7, amounted to even more than Dodge had to pay Lewis in damages.³ It is not explained in the record why the superior court jury so drastically reduced Ned’s damage award from the amount he had demanded in the inferior and superior courts. But it is possible to speculate.

Edward Lewis’s race is not noted in the record. Generally, when a party in a civil or criminal case was of African ancestry, Massachusetts court records identified the individual as “negro.” Lewis was not so characterized in this suit. Yet the record strongly supports suspicions that Lewis was at least partly of African ancestry. The atypical phrasing of his name—Lewis’s nickname, “of Topsfield”—in the court record, and the reference to his mother Violet, as a freewoman, point to Lewis’s African descent,

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² Ibid.
³ Ibid. The costs of court in this case amounted to £7:6:8, neither a trifling nor a substantial sum, as considered below.
probably adding this case to one of those early blows against slavery in Massachusetts.\(^4\)

What is beyond dispute, however, is that this case represents one subject’s successful fight against his unlawful imprisonment by another subject of His Britannic Majesty in colonial America. As will be seen, cases of unlawful imprisonment were not rare in the Bay Colony, on this periphery of the British Empire.

One other fact is clear from the court report in Lewis’s case. Twelve Massachusetts men had to decide whether a young plaintiff-appellant would be upheld in his demand for his liberty (and perhaps compensated for his temporary loss of it), or whether a defendant-appellee would be sustained in his claim of property (or at least in his claim of innocence against another man’s grave accusations). Here, the superior court jury decided for liberty. Did colonial Massachusetts jurors often have to resolve dilemmas such as those between property and liberty? And what did it mean for colonial communities when jurors did decide such conflicts?

This chapter seeks a better understanding of the role of the colonial American jury in the development of what could be called a “law court culture.” The courts of colonial Massachusetts offer a laboratory for the examination of this law court culture and the setting to explore its development. Massachusetts played a vital and leading role in the evolution of the law and the judicial systems of the American states, and of those of the future national government, as well. Jurors were at the heart of the law court culture of the American colonies, as Chapter 1 has explained. So what was the role of those jurors, then, in Massachusetts jurisprudence? How were jurors’ judgments different from the

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decisions of judges in civil cases, for example? What difference did it make when juries, rather than the judges, decided civil cases in the Massachusetts inferior courts?

This chapter hopes illuminate the pervasive influence of the demos—the ordinary male citizenry—as jurors, in the decision-making processes of the Massachusetts inferior courts. Jurors had a central and democratizing influence in the inferior courts, in their role as decision makers in the weightier conflicts heard in those courts. In order to illustrate this democratizing influence and the power of juries in the civil courts of Massachusetts, more specific questions will be considered, highlighting the role of jurors in protecting their neighbors—particularly debtors—time and again, by mitigating their losses in court. How often, then, did juries decide serious civil actions? Did the civil suits heard by jurors vary monetarily from non-jury cases, or did the claims heard by jurors versus those heard without juries merely random in magnitude. That is, did Massachusetts jurors generally hear cases involving the weightier damage claims? How often did jurors side with defendant-debtors or with plaintiff-creditors? In what sorts of cases were juries typically called, and by which party? Did the presence of an attorney for one or the other party make a difference in whether a jury was called upon to decide a case?

These are central questions posed and discussed in this chapter. Perhaps it is impossible to know what the psychological impact would have been upon court observers (or upon jurors themselves) as colonial juries made decisions in cases pitting such core “American” values as liberty and property against each another. Still, a systematic study of the court records provides evidence suggesting how colonial Americans perceived and why they valued the powers of their juries over the most important aspects of their lives.
Above all, as jurors, neighbors could protect neighbors, especially in times of financial distress. And from their experience in the use of this protective power, colonial Americans developed a sense of citizenship that could support a revolution, transforming subjects into citizens. An examination of when and why juries were called upon, and how they were utilized, then, is where an understanding of colonial law court culture—as lived experience—must proceed.

The Massachusetts courts and their juries

In the analysis of cases to be considered here, several conclusions become clear from a close study of the court records. Studying those records as they develop, over time, in the various inferior courts allows the scholar to notice an evolution in the functioning of the Massachusetts courts—inferior and superior—over the decades before independence. In particular, one can observe the evolution in the methods of pleading, and in jury use, in the courts. By the early 1750s, the methods of pleading in the inferior courts of Massachusetts began to change, leading to a greater reliance on the superior courts to hear significant cases and, indeed, even to hear original trials. In other words, over time, trials of civil cases with significant sums at stake—trials that routinely had been heard

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5 This is the suggestion of William E. Nelson, arguing that the superior court in Massachusetts was more important than the inferior court, given the way defendants used amended pleadings to appeal their cases to—and thus to have their real trials in—the superior courts. Nelson posits and this study confirms the enhanced use of juries in those superior courts. See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, 2nd ed. (Athens, GA; London: U of Georgia P, 1975, 1994), xi-xvi, 15 ff., 72-73 ff., dealing with pleading; and cf. the work Nelson criticizes for failure to consider this transition, Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill; London: U of North Carolina P, 1987). In addition, John M. Murrin has argued that, after the mid-seventeenth century, colonial American trial practices were becoming increasingly anglicized, changing greatly from their original Puritan ways in New England, for example. See Murrin, “Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England,” in David D. Hall, et al., eds., *Saints and Revolutionaries: Essays on Early American History* (New York; London: Norton, 1984), 152-206, at 179, 198-206; and see Murrin, “Anglicizing an American Colony: The Transformation of Provincial Massachusetts” (PhD diss., Yale University, 1966), 53-60, chaps. 4-5.
previously in the inferior courts—began increasingly to be heard in the superior courts.

In effect, the parties and their lawyers in the Massachusetts courts were pushing changes in the operation, if not in the structure, of the Massachusetts judicial system. Trials would continue in the inferior courts, obviously. But over the course of a generation, through numerous court sessions, gradually the weightier civil cases were being fought out before juries, increasingly in *original* trials, being held in the superior courts. In order to get a better handle on just what was changing in the workings of the Massachusetts courts after the 1740s, a word of explanation about the structure of Massachusetts courts may prove helpful.

When the Bay Colony’s first charter was revoked in 1684, among the consequences was a reorganizing of the three-tiered court structure of the colony. Effectively, the colonial courts began to be anglicized, that is, brought into closer harmony with English law court practice. In 1692, following England’s political reformation by the Glorious Revolution, Massachusetts received news of its new royal charter and got a new court organization, though still in three tiers. The old county courts were replaced by the Inferior Courts of Common Pleas. These inferior courts were constituted as the tribunals of original jurisdiction for most civil cases. They heard civil suits involving damage claims for more than forty shillings, or £2 (usually in Massachusetts money, which varied in value but was less than its nominal equivalent in British pounds sterling). In practice, however, as the records consulted for the present study demonstrate, the inferior courts also considered cases involving claims for far less than £2. The inferior courts met quarterly in each county, where four justices presided, any three of whom constituted a quorum. Although the Inferior Courts of Common Pleas

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6 See Murrin, “Anglicizing an American Colony,” chaps. 4-5.
were intended to be the court of original jurisdiction (or the main trial court) in Massachusetts, serving as such until 1859, many colonial-era trials in fact effectively began at a higher court—at the superior court level.\textsuperscript{7}

The superior court was another creation brought about from the judicial reorganization of 1692. This was the year the judicial function of the Court of Assistants, the legislative upper house, gave way to the new Superior Court of Judicature. This superior court was a circuit court that saw justices riding from county to county to hear appeals from the inferior courts within those counties. The superior court comprised a chief justice serving with four associate justices, any three of whom sitting constituted a quorum. Besides hearing civil appeals from the inferior courts, the superior court had original jurisdiction over serious criminal cases—those of “Rex” or “The King” (or “Regina” during the reign of Queen Anne) against some criminal defendant—and over certain land and probate cases. The Superior Court of Judicature also heard appeals from the Court of General Sessions of the Peace, a body of justices of the peace sitting together and meeting in each county, generally handling administrative and more minor, non-capital criminal issues. For example, an innkeeper unhappy at the loss of his liquor license; a man fighting accusations of having fathered a bastard child; or some town in a dispute over maintenance of its roads—in each of these cases, the losing party could appeal its case from the Court of General Sessions of the Peace to the Superior Court of

Judicature. In practice, however, as may be observed in the chapter that follows, the Superior Court of Judicature heard a wide variety of civil appeals from inferior tribunals, with no particular consideration given to the damage amounts claimed in the suit. Superior courts routinely heard civil suits for damage claims ranging from the enormous to the trivial. And as will be seen, the parties in court—especially the defendants—were frequently represented by counsel, particularly in jury cases. In many ways, then, the close of the seventeenth century marked the beginning of a period of enormous change for the courts of Massachusetts, as well as for their lawyers.

Lawyers (who once had been optional in many typical court proceedings) were now becoming an ever more integral part of this newly reformed Massachusetts court system. The changes within the courts were bound to affect the lawyers practicing within that system, while the lawyers in turn also were pressing for change. John Murrin has described this period of change as one of increasing Anglicization and professionalization for both the colonial bench and bar. Murrin has shown that, during the first decades of the eighteenth century, the governors’ judicial appointees were more likely to be Harvard graduates, and more superior court appointees were beginning to arrive with years of experience on lower courts. And for the Bay Colony’s legal practitioners, a “standard of apprenticeship was slowly emerging.” After 1750, both a college education and formal apprenticeship would generally be essential to success in a legal career. Between 1760 and 1775, Murrin portrays the legal profession—judges and attorneys—as “consciously structur[ing]” themselves toward English norms. Like their English counterparts, Massachusetts lawyers divided themselves into “barristers” and “attorneys,” though without the rigid and life-long distinctions typical in English courts: “the presumption of

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mobility still distinguished the province from Great Britain.” Moreover, America lacked England’s Inns of Court to train these lawyers. A more professionalized bar association, and later, after the Revolution, the rise of professional law schools would formalize the education of American lawyers.9

In the meantime, late colonial Massachusetts courts were striving to act more like their English counterparts, by raising the standards for the education and training of judges and lawyers. But such efforts toward professionalization of bench and bar did not automatically elevate the lawyers in popular colonial esteem. Aside from some of its terminology, legal knowledge was not so opaque or bewildering that many colonial subjects stood in awe of its practitioners.10 Perhaps this fact accounts for the relatively low legal fees at the time.11 Still, during the eighteenth century and until the Revolution, efforts by county bar associations, three to seven years’ apprenticeships, and eventually law schools would strengthen the Massachusetts bar, permitting lawyers to wipe out that class of unqualified legal interlopers known as pettifoggers. Before the Revolution, attorneys like John Adams were striving to tighten and raise the standards of their profession, though the respect lawyers enjoyed from clients and from their fellow

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9 Murrin, “Anglicizing an American Colony,” 207-9, 236-46. This concern for the professionalization of the bar can be seen in the pre-Revolution career of John Adams, especially in his campaign against those he called “pettifoggers.” These pettifoggers were unqualified law practitioners—legal quacks—who, besides threatening the reputations of professional lawyers, also threatened their business by attracting away potential clients. See L. Kinvin Wroth and Hiller B. Zobel, ed., Legal Papers of John Adams, 3 vols. (Cambridge, MA: Harvard UP, 1965), I, lvii-lxxiv, lxxvii-lxxix, including discussion of Adams’s legal practice and his financial and business concerns; and see Charles R. McKirdy, “Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession,” in Daniel R. Coquillette, ed., Law in Colonial Massachusetts, 1630-1800: A conference held 6 and 7 November 1981 by The Colonial Society of Massachusetts (Boston: Colonial Society of Massachusetts, 1984), 313-58.

10 Steven Wilf has argued recently that “[p]opular law talk was at the heart of revolutionary law-making and at the heart of the American Revolution itself,” as ordinary people debated the law in “America’s coffee houses and cobblestone streets,” from 1756 through the 1790s. Late colonial law, as he portrays it, was very much a “public sphere.” See Wilf, Law’s Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America (Cambridge: Cambridge UP, 2010), Introd., 193-96, quotations at p. 1.

subjects still depended largely on their personal character. In short, then, those lawyers and judges were striving to appear more like their brethren in England, while they strove to make the function and structure of their courts more “English,” as well.

Thus on paper, as it were, the court structure of Massachusetts would appear to have become eminently logical and straightforward, and more like its mother country model. Minor civil disputes and less serious criminal matters were decided by justices of the peace in courts of general sessions. More serious civil trials, involving somewhat more substantial claims, were handled in the inferior courts. And more serious civil matters might be reviewed on appeal in the superior courts, while all major criminal trials occurred in these higher courts as well. Unfortunately for the sake of logic and orderliness, however, the parties battling each other in court often conspired against such a tidy organizational scheme. After the late 1740s, and clearly by 1752, litigants and their attorneys increasingly found ways to defeat whatever efficiency might have been possible in the legal hierarchy just described—by effectively dissolving that hierarchy. Litigants found two ways to defeat the division of labor implicit in this hierarchy of law courts.

One such way of scrambling the system can be seen when a party, dissatisfied with the outcome of its case in the Inferior Court of Common Pleas, for example, appealed its case. That appeal went, of course, to the Superior Court of Judicature. But now in superior court, the parties could demand a trial de novo—a brand new hearing of their entire case—on appeal. This could even involve a whole new trial, by jury. Trial de novo in the superior court was not an entirely new development in the 1750s; this practice had gone on in Massachusetts for some time. But as more parties began to retry their

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entire cases in superior court, this increasing repetition, especially of jury trials between the inferior and superior courts, was beginning to call into question the whole point of jury trials in inferior courts by the early 1750s. Worse yet, trial *de novo* could occur *twice* in the superior court: the party losing his or her trial in the superior court could ask for yet another trial there, so long as that party had not also lost in the inferior court. All of which is to say that, conceivably, a case could actually be heard three times, by three different juries—meaning three separate trials—in two different courts. The records examined in the current study provide ample evidence that such proceedings were not at all unusual.\(^{13}\) At times, Massachusetts litigation bears some resemblance to a sporting match where one opponent is up, then down, now up again—a seemingly never-ending back and forth. Such multiple trials *de novo* on appeal could only lead to less efficient use of judges, juries, attorneys and the like, as well as to an explosion of litigation as the number of trials in any single suit doubled or even trebled. To say the least, parties were finding it harder in some cases to get anything like a final resolution of their dispute. And that final resolution was only going to take longer, given this possibility of multiple trials of a single dispute.

But there was another, more important way that parties could rob this Massachusetts judicial hierarchy of its rationale and efficiency. After mid-century, litigants increasingly sought to avoid a complete hearing of their disputes in the inferior court and maneuvered, instead, to push their original trials into the superior court. Litigants—often the defendants—pushed their original trials into the superior court by three methods. By one stratagem, the defendant could demur to the plaintiff’s accusations in the lower court, a legal way of asking “so what?” Court judgment for

\(^{13}\) See below and also Hindus, “A Guide to the Court Records,” 522-23.
either the plaintiff or defendant would set the stage for an appeal to, and a full trial in, the superior court. By another method, defendants could engage in a contrived or sham pleading, saying in essence, “he never asked me to pay him that much” or “in that form.” Such pleading was designed to compel the plaintiff to reply, typically, that the defendant’s “answer to his [the plaintiff’s] Declaration aforesaid was “an insufficient answer.” In other words, such pleading, usually by the defendant, forced the plaintiff to come back declaring that the defendant’s plea failed to answer the accusation or was just no good as a legal response to the facts or the law of the case.\textsuperscript{14} Again, the parties would be off to the superior court for an original trial.

In yet a third pleading method, seen commonly in the records by 1770, plaintiffs would consent to allowing defendants to enter a plea at the inferior court that those defendants could later amend in their trials at superior court. Such pleas were a temporary, diversionary argument, not serious pleas intended to be pursued at a later trial. By use of such amended pleading, both plaintiffs and defendants could avoid discussion of actual issues in the inferior court, saving these arguments and rebuttals for their real, original trials in superior court. The inferior court language to achieve this result was formulaic and straightforward: “upon the Plt’s [plaintiff’s] Agreeing that at the Trawl at the Super Court, the [defendants] may Tender any other Issue” as a defense in their trial,

\textsuperscript{14} An example of this newer format in pleading can be seen in \textit{Timothy Burbank v. Nathanael Cunningham}, a case pitting an Essex County trader against a Middlesex County merchant and administrator of his father’s estate. In this case the plaintiff sued for damages of £15; upon the judge’s decision that the defendant’s plea was insufficient, the judge awarded the plaintiff £9:18:11, and costs of court. The defendant immediately lodged his appeal to the superior court where, presumably, he had always expected to fight his case. See the Records of the Ipswich March Court, 1752, in “Inferior Court of Common Pleas, Vol. I, 1742-1754,” 323-24. Genealogical Society of Salt Lake City (Utah) microfilm. (All cases from the inferior courts are from GSU microfilm unless otherwise noted.)
defendants would then proceed to offer a sham pleading designed, again, to push the real trial into the superior court.15

These three forms of pleading led often (but not always) to the inferior court’s judgment in favor of the plaintiff. Irrespective of whether such pleading resulted in a judgment for the plaintiff or for the defendant, once the court’s judgment was rendered, the appeal was set. The real trial followed, most frequently before a jury, in the superior court. Of course, the entire purpose of there being an inferior court at all was called into question by these increasingly common tactics. But such was becoming ever more the reality of judicial life, after the mid-eighteenth century, in the Massachusetts courts.

A systematic, chronological study of earlier versus later inferior court sessions, then, makes possible the observation of these changes in litigants’ practice over time. After mid-century, litigants and their attorneys regularly can be seen trying to push their original trials out of the inferior and into the superior courts. This behavior was especially common in debt cases where the stakes were higher—that is, where monetary damages were more substantial. Indeed, as the records here studied indicate, the use of juries generally was more frequent (in civil cases at both court levels), where monetary damage claims were higher. Before about 1750, however—before changes in pleading began pushing the more significant cases into the superior court for original trial—the weightier inferior court trials typically had been by jury. As demonstrated here,

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15 See for example the Records of the Ipswich March Court, 1770, in Inferior Court of Common Pleas, Vol. IV, 1766-1770, GSU, 522.
however, after mid-century, court practice and jury use would change, due to the behavior of litigants and attorneys in court.\textsuperscript{16}

Over time, then, as the records described and analyzed by court session here reveal, contested trials by jury in the inferior courts declined in Massachusetts.\textsuperscript{17} The trend can be seen from as early as the late 1740s and lasted through the mid-1770s. Jury trials at the inferior court level fell from a high of 60.9\% of contested cases being handled by jury, in the Salem December Court (Essex County Inferior Court) of 1749, to a percentage typically ranging between 23\% and 36\% by the early 1770s.\textsuperscript{18} The major reason for this decline in jury trials, at the inferior court level, was the expanded use of amended pleadings, by which defendants clearly were seeking to have their original trials heard at a higher level, avoiding the additional costs of a second jury trial. Further, defendants were seeking to avoid the strategic difficulties that could arise from exposing one’s defense case to the plaintiff in advance of yet another—likely the final, and therefore the “real”—trial at superior court.

Specifically, then, how was judicial routine changing in the inferior courts of Massachusetts from mid-century to the Revolution? What did these changes mean for the inferior courts—and especially for inferior court juries—in the years leading up to Independence? What follows is an analysis of all the cases of twelve complete sessions.

\textsuperscript{16} This evolution in litigant behavior explains why Bruce Mann could find a decline in jury use in Connecticut’s inferior courts: parties were pushing real trials—by jury—into the superior courts. Cf. Nelson, \textit{Americanization of the Common Law}, xii-xiii; Mann, \textit{Neighbors and Strangers}, 67-100.

\textsuperscript{17} See the previous note.

\textsuperscript{18} “Contested” cases, as the term is used here, refer to those actions where plaintiff and defendant appear for trial, make their arguments and demand judgment, when in civil actions, and where “the king” or government prosecutes and the defendant maintains his or her innocence, asking either the judge or jury for a verdict, in a criminal case. Since juries could never hear cases that were not live contests (for example, where the plaintiff is nonsuit or the defendant defaults, or where a criminal defendant simply pleads guilty), this study has compared the frequency of jury use to the total number of contested cases in each session of court cases per term rather than to the total number of all causes that may have been considered in court that session.
of the inferior court of Essex County, Massachusetts, from March of 1749 through September of 1771, as well as several additional inferior court case sessions, from Essex and Worcester counties, from 1775 through September of 1778. Each court session in this and the following chapter has been selected largely at random, so as to observe changes in court practice over several decades—though selected also with the aim of ensuring coverage of the earlier as well as the later periods under study. The chapter following this one takes the story to the superior court level, where all the cases of eighteen sessions will be analyzed, to evaluate jury use in the superior courts of eleven Massachusetts counties from 1769 to 1777. In the process, the popular proclivities of jurors, to come to the defense of ordinary neighbors in trouble—especially to help debtors—can be seen prominently in the foreground of this story.

The purpose of this analysis is to achieve some sense of how often juries were called upon in the colony (and, later, the state) of Massachusetts, and how defendants and plaintiffs fared in causes tried by jury—as opposed to those where judges alone (or perhaps where judges, ratifying the judgments of referees), decided such conflicts. Using Massachusetts as our laboratory, this analysis also hopes to provide some insight into the role of attorneys in courts, where jury action is concerned, as well as to suggest how significant were the cases handled by juries, as opposed to those decided by judges without juries. A major point in the broader analysis of this chapter and the next will be

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19 These records of the Massachusetts inferior and superior court sessions have been chosen largely at random, allowing a comparison of hundreds of cases from court sessions of ca. 1749-1752 with those of ca. 1769-1778. Some court sessions were excluded from consideration here based, for example, on the simple illegibility of or extensive damage to the records, or based on the lack of extensive court business conducted during that particular session. A reading of superior court sessions prior to 1769 verifies the subsequent increase in original trial business conducted in the superior courts, as discussed above; see also Nelson, *Americanization of the Common Law*, ix-xviii, 15-35.

20 See below for a discussion of referees, judicial decision-makers appointed by the parties and the court, whose decisions were routinely accepted by the court as final.
to note how jury use in the inferior courts differed from that at the superior court level, where jury action became ever more significant in the decades leading to Independence. In considering the use of juries in the inferior courts of Massachusetts, then, the key question is this: what difference did it make when juries, rather than judges, decided cases?

**Jury use in the Inferior Courts of Massachusetts—An analysis of Massachusetts Inferior Court sessions: when and why juries were called**

Based only on a consideration of the business done in the inferior courts of Essex County, Massachusetts roughly from 1749 to 1776, one might conclude that jury use in the courts of that region was on the wane. Such an impression would be false, however. Jury use in the *inferior* courts of Essex did decline overall from mid-century to the 1770s. But this decline in inferior court jury use occurred primarily because an increasing number of original trials were being moved into the *superior* courts, where juries were ubiquitous, as the next chapter demonstrates. At the inferior court level in Essex, the story is complicated, but the central point may be reduced to this: even while civil litigation was being pursued more actively in the superior courts, in *any* court, when the economic stakes were high, debtors and other defendants at risk asked jurors to hear their cases. When defendants faced huge damage claims presented by plaintiffs, they sought a jury trial—either in the inferior courts or, increasingly over time, in superior court, avoiding a hearing in inferior court altogether when possible. What all this meant for the inferior  

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21 In his study of Connecticut, Bruce H. Mann argues that civil juries there were relatively unimportant in the first half of the eighteenth century. But as noted in the Introduction of the present study and discussed immediately above, Mann focused on the use of juries in the inferior, or county courts of Connecticut, ignoring the more expansive use of juries in superior courts, a trend only accelerating after mid-century. Mann, *Neighbors and Strangers*, cited above, and see the criticism of Mann offered by Nelson, *Americanization of the Common Law*, xii-xiii.
courts of Essex, then, was instability and an uneasy period of transition from a trial court of original jurisdiction to a future quite unclear in 1776.

An examination of the cases from twelve complete sessions of the Essex County Inferior Court paints a portrait of a jury system in the throes of profound change, largely because the inferior court itself was undergoing an evolution that would not be complete until the early years of the nineteenth century. Considered here are four inferior court sessions of cases from 1749: those of the Ipswich March Court, the Salem July Court, the Newbury September Court, and the Salem December Court. Again, these quarterly courts handed civil cases generally, while the superior courts handled civil appeals as well as most of those cases that today would be classified as “criminal,” at least as that concept was then applied. Four sessions from the same inferior courts are considered for 1752. The analysis then moves forward toward the eve of Revolution, with an evaluation of the inferior court cases from the sessions at Ipswich in March and at Salem in July of 1770, concluding with the full sessions of cases for the Salem July and Newbury-Port September Courts of 1771. By 1773 to 1774, serious disruptions in court business begin to show in the record. Massachusetts inferior court records reveal a dramatic break in the processing of cases between July of 1775 and July of 1776. With the resumption of court business—by no means normal—in July, 1776, courts ceased to be styled as “his Majesty’s Inferiour Court of Common Pleas” (held at Salem beginning July 11, 1775, for example). By 1776, writs ran and courts were held in the name of the government and

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22 Similarly as William E. Nelson in *Americanization of the Common Law*, above, Morton J. Horwitz has traced the transformation of the role of the jury into the early nineteenth century. Horwitz showed how jury functions and power were curtailed, specifically, “[i]n order to protect insurance companies from merchant-oriented juries.” Although Horwitz describes a different evolution from that examined here, the two examples of jury change may not be unrelated. See Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA; London: Harvard UP, 1977), 28-29, 140 ff., 228.
people, and court business was conducted, for example, “At an Inferiour Court [of] common Pleas begun & held at Salem.”

By 1775-1776, jury use at the inferior court level had now become highly infrequent, as the number of plaintiff nonsuits (judgments against the plaintiff for failing to appear to prosecute his or her case), and the number of defendant defaults (similar judgments against the defendant for failing to appear to defend), predominate in the record.

Back in 1749, however, court life was different and, in significant ways, simpler. The Essex County Inferior Court meeting at Ipswich in March that year sat with four justices presiding: Timothy Lindall, Thomas Berry, Benjamin Marston and John Choat. The four Justices heard 68 cases that session, 35 of which were live or “contested” conflicts with issues in dispute and litigants asking for judgment. Virtually all of these cases involved debt. Of the four quarterly sessions in 1749, this March quarter saw the smallest percentage of jury cases to arise out of all contests during these four sessions. Only twelve out of thirty-five, or 34.3% of all contested cases were heard by jury that March. The rate of jury use in the three later quarterly sessions that year would be more like 60% in each one of those three quarterly courts. As in those later three Inferior Court sessions for 1749, however, the cases that juries did hear that March were monetarily significant. Debtor-defendants did very well before juries—better than before the judges alone, though such defendants’ success is anything but obvious by a simple glance at Table 2.1 below.

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23 These later cases are found in Reel/Box 13, “Essex County court of Common Pleas, Court records 1766-1780,” vols. 4-6 (Massachusetts Archives legal collection, Boston), vol. 6: 365.
It might appear, at a first glance at the data presented in Table 2.1, that *plaintiffs*, rather than defendants, had had the greatest success by juries that March.\(^{24}\) Whereas the judgment amounts that plaintiffs won in all contested cases averaged approximately £71 in the spring of 1749, plaintiffs were awarded an average £209 when juries decided their cases.\(^{25}\) Were the analysis to stop here, one might conclude that most plaintiffs were winning much greater amounts from juries than from judges deciding their cases—that juries were good for civil plaintiffs (or creditors). What these numbers actually reflect, however, is that jurors were deciding the more significant monetary issues. No case heard by jury that March involved a damage claim for less than £20, while the judges heard at least five cases involving such smaller amounts this term. The judges’ smallest plaintiff claim appears to have been for £2, the next largest was for £3, and the next after that was for £5. On the other hand, half of all plaintiff damage claims heard by juries were for sums between £100 and £999 in Massachusetts money. And while the judges


\(^{25}\) Average judgments for victorious plaintiffs in all contested cases are compared to jury judgments in such cases, in the tables of this and the following chapter. This broader comparison mitigates problems that arise in comparisons of just the judge-decided cases. For example, the justices decided a number (sometimes a majority) of cases that were not live, contested suits, during any court session. But in analyzing court judgments, it is essential to work only with live contests, where both parties appeared and engaged actively in their respective pleas. Otherwise, in defendant defaults, judges routinely ruled for plaintiffs, awarding them precisely what they had demanded, while in plaintiff nonsuits, judges dismissed plaintiff claims altogether and awarded the defendants their court costs. As the court records studied here show, appeals by the “losing” parties frequently followed such decisions by judges, rendering these judgments irrelevant: *real* trials and judgments would occur in superior court. Beyond the issue of appeals of non-contests, however, including such statistics as these in judge-made decisions would provide meaningless data to compare with jury verdicts; therefore, such data have been excluded from tabulations. Moreover, too often in judge-decided cases, data comparable with that generally explicit in jury-decided cases are lacking in the record, especially when such cases were heard by continuance or after some delay, by a rehearing, in pleas of trespass or ejectment, or as a result of sham pleading—all of which occurred frequently. Because the judges decided the bulk of inferior court suits (compared to those decided by jurors), the average judgment for plaintiffs in all contested cases represents a figure not significantly different from that of actual judicial awards, were it possible to generate equally valid statistics in judge-decided cases for plaintiff judgments compared to claims. Plaintiff claims before judges are sometimes missing or unclear in the records, offering another reason for the cautious use of statistical evidence from court records (see the following note). Hence, tables here compare judgments in all contests, including the justices’ judgments in live cases and in referred contests, with those of juries. See the text and/or notes for comparisons of plaintiff claims in judge-decided contests (given the caveats in this and the following note) with those in jury-decided suits.
alone heard several weighty damage claims without jury this session, plaintiff claims in these judge-decided contests averaged some £51, while the jury-decided plaintiff claims averaged much higher than that (at £198, broken down by category in Table 2.1).\textsuperscript{26} If jurors rewarded plaintiffs more handsomely in their judgments, it was because the cases they decided involved larger average claims than were seen in the typical contested lawsuit heard without jury. Moreover, much more than judges, the jurors were reining in plaintiff awards, in comparison to their demands.

\begin{table}
\centering
\begin{tabular}{lrr}
\hline
Plaintiff Claims & Raw Number & Percent \\
\hline
Less than £20: & 0 & 0 \\
£20 to £49: & 2 & 20 \\
£50 to £99: & 3 & 30 \\
£100 to £199: & 2 & 20 \\
£200 to £999: & 3 & 30 \\
£1000 or more: & 0 & 0 \\
\hline
\end{tabular}
\caption{Plaintiff damage claims sought and awards (judgments) actually made, Ipswich Inferior Court, March 1749 session.}
\end{table}

[From the ten jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Defendants in serious jeopardy in Essex that March were asking for jury trials.

There was no requirement in law or otherwise that juries had to hear damage cases of a

\textsuperscript{26} Unfortunately, not all plaintiff claims are enumerated in the record, so that in this session, for example, both the judge-decided awards (composing the bulk of judgments for plaintiffs in all contested cases) and the jury-decided judgments appear higher than the average of plaintiff claims in their respective suits. (Generating valid claim numbers can be problematic particularly in the judge-decided contests; see the previous note). For various reasons, then, here and in the sessions that follow, data generated from such court records must be interpreted as illustrative of the broader argument, not as supporting some “scientific,” hard statistical analysis.
certain amount. As will be seen below and in the following chapter, sometimes, for whatever reasons, defendants preferred judges to hear their cases. But this was not typical defendant behavior in court when the stakes were high—that is, when defendants were exposed to great potential losses at court. Moreover, during this March court, in ten out of the twelve contested cases decided by jury—or in approximately 83% of jury trials—the defendant brought along an attorney27 who demanded a trial by jury.

Behind the apparently big wins by some plaintiffs, however, lies a more salient fact. Defendants clearly had a reason to ask for jury trials in cases involving large liability: in fact, in such cases defendants had fared quite well by jurors that March. In all contested cases during this Ipswich session, plaintiffs enjoyed victory nearly 72% of the time, with defendants winning just ten out of thirty-five disputes. The situation was quite different when juries heard such disputes, however. For when jurors heard their cases, defendants won just over 58% of the time. Indeed, never in the Inferior Courts of Essex County in 1749 did defendants win less than fifty percent of their jury-tried cases.

In the next quarterly session, that of the Salem July Court for 1749, defendant victories hit a low mark, where juries hearing sixteen cases that summer split their verdicts equally between plaintiffs and defendants that quarterly session.28 This fifty percent success rate for civil defendants appears to have been an anomaly, however, with much higher success rates for defendants in the Newbury September Court, where defendants won 58.3 percent of their causes, and in the Salem December Court, where at

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27 For more on the education, bar admission and practice of attorneys, see above, and see Wroth and Zobel, ed., Legal Papers of John Adams, I, lii-lxxxiii; McKirdy, “Massachusetts Lawyers on the Eve of the American Revolution,” 313-28, which includes a list of and short biographical notes on attorneys practicing in Massachusetts in 1775, 339-58; and see Gerard W. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840 (Westport, CT; London: Greenwood P, 1979).
the close of the year 1749 defendants won twelve out of fourteen civil contests, a victory rate of 85.7%. Generally, jurors would prove sympathetic to defendants, especially to debtors facing exposure to dire financial risk at trial.

The broader story of these later court sessions of 1749 is similar to that of the Ipswich March Court for that year, where debtor defendants in serious financial jeopardy had good reason to prefer jury trials. In the Essex County Inferior Court meeting in Salem that July, sixty-four cases were heard, of which twenty-seven were live, contested conflicts. While the judges decided nearly sixty percent of all issues brought before the court that summer, a significant number of cases was heard by jury; sixteen out of twenty-seven contested cases, or 59.3% of such conflicts, saw jury judgment. Most defendants who asked for a jury trial that session were represented by attorneys; in fourteen cases (representing 87.5% of jury trials), it was counsel for the defendant who requested trial by jury. Again it appears that, in addition to the significance of the causes, the fact that the defendant had representation in court was an important factor in determining whether a jury would be called to hear a defendant’s case.

As illustrated by Table 2.2, the money amount of plaintiffs’ successes narrowed greatly in jury trials that July, as measured by average money winnings at trial, versus that earlier session in March. For while plaintiffs recovered an average of approximately £32 in all contests, they won a mean of £43 by jury that July—a difference, certainly, but not one of such great magnitude as before.30

The real picture, however, appears in the damages being sought by plaintiffs in Salem that summer. Once again, where the stakes were high—or, put another way,

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TABLE 2.2
Plaintiff damage claims sought and awards (judgments) actually made, Salem Inferior Court, July 1749 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>4</td>
<td>30.8</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>2</td>
<td>15.4</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>1</td>
<td>7.7</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>3</td>
<td>23.1</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>2</td>
<td>15.4</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>1</td>
<td>7.7</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £32
Average judgment for plaintiffs— by jury: £43

[From the 13 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]

where defendants had a lot to lose—defendants, usually by their legal counsel, asked a jury to hear their cause. Although thirty percent of cases heard by jury in July involved plaintiff claims of less than £20, nearly forty percent of jury trials involved damage claims of £100 to £999. Indeed, nearly half of the jury cases involved plaintiff claims of £100 or more. Overall, creditor demands in jury cases averaged some £290. The creditor demands in judge-decided contests averaged far less than that, at approximately £57.\(^{31}\)

And how did debtors fare in their jury trials that summer in Essex County? Debtor defendants did better when their cases were heard by jury. Plaintiffs won seventeen of twenty-seven contests overall, a victory rate of about 63%. When jurors heard these civil complaints, however, defendants did much better—they broke dead even. Plaintiffs’ chances of victory fell from 63% to 50%, as they won eight out of

\(^{31}\) Ibid.
sixteen contests in front of their peers in Salem that July. Whether civil defendants sensed that their odds might be increased to those of coin toss when jurors heard their cases cannot be known, but such were the odds for defendants before juries this session. And winning that coin toss meant, of course, that the defendant owed nothing. Hence, what debtor would not gamble on a jury trial under these circumstances?

Debt suits, along with several alleged cattle theft cases, dominate the inferior court record of the early cases in Salem that July. These cattle theft cases allowed plaintiffs a significant number of their victories before juries this term. In the first jury case that session, James Eveleth sued Ipswich cooper Josiah Burnam for stealing two of his cows. Defendant Burnam came into court with this defense: that he was merely making a legitimate collection on a debt by taking Eveleth’s livestock. The jury disagreed, siding with plaintiff Eveleth and awarding him one pound, in addition to his costs of court. In the next case, Solomon Andrews, a blacksmith of Ipswich, also sued Josiah Burnam. Andrews was coming forward with a plea of trespass, claiming that Burnam had violently seized and detained him without legal right, demanding £200 in damages for the assault. The jury found defendant Burnam guilty again, but awarded the plaintiff vastly less than he had sought, merely £3 and costs of court. Josiah Burnam was sued yet a third time, by Ipswich yeoman Francis Choat, who claimed that Burnam had stolen five of his cows. Choat was seeking £2 for his losses. Once more, jurors found Burnam guilty of bovine theft, but they awarded the plaintiff less than he had demanded—a quarter of a pound less. In that last case, Burnam was represented by counsel, attorney Daniel Farnam. And in that last case, the record adds an important factual detail, one not explicit in the fact presentations in the previous trials: that Burnam

32 Ibid.
was acting as debt collector of his parish. Thus Burnam was not merely some cattle rustler. Even if a debt collector were acting in an official capacity to recover debts owed the parish or others in the community, juries were not encouraging the efforts of this particular debt collector in any of these suits.\textsuperscript{33} Juries tended to support debtors when they could. Indeed, jurors were often supported by the greater part of local communities—before, during and after revolution—in their attempts to defend debtors, especially against the collectors of taxes or personal debts. From mid-century well into the 1780s, popular resistance—including by jurors—to officials trying to recover public and private debts became intertwined with the politics of rebellion.\textsuperscript{34} Such politicization of debt and its attendant forms of resistance, by colonists and their juries, would only increase with the coming of revolution and in its aftermath.\textsuperscript{35} As these cases illustrate, then, jurors could turn a cold shoulder to defendants who, as debt collectors, pursued their official responsibilities with excessive zeal.

Generally speaking, jurors appeared quite sympathetic to the plight of debtors, as defendants, in the March Court at Ipswich and the July Court at Salem in 1749. In March, as shown above, Ipswich jurors had sided with defendants just over 58\% of the time. It seems clear, however, that jurors were never going to side with a defendant such as that heavy-handed Ipswich debt collector, Josiah Burnam. Before Burnam lost his three cases in the July Court in Salem, he had lost yet another case that previous March, when an Ipswich jury had awarded Nathaniel Low £15 for what had amounted to an

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{33} Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, Salem July Court 1749, 33-37. Choat received thirty-five shillings for his losses as well as costs of court, ranging generally between two and six pounds. \\
\textsuperscript{34} Terry Bouton, \textit{Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution} (Oxford: Oxford UP, 2007), 145-51. Bouton also believes that jurors after mid-century were “acquitting debtors or taxpayers” as part of broader forms of economic resistance, though he finds this “difficult” to prove, 154-57. Such juror resistance to debt and tax collectors seems clear in the record here, however. \\
\textsuperscript{35} Ibid., 146-47.
\end{tabular}
\end{footnotesize}
assault and battery by Burnam. However, Low had demanded £200 recompense for the physical harm he had suffered at Burnam’s hands. In addition, Low had claimed that Burnam extorted £4 from him before Burnam would release him from his unlawful captivity. If Burnam was a debt collector who tended to rely on brute force in his work, juries were having no part of it. On the other hand, neither were Ipswich jurors going to reward plaintiff Low anything like £200 for his alleged suffering.\textsuperscript{36}

In one case involving a huge debt in the Ipswich March Court, a jury awarded the plaintiff just over £774 in relief. The defendant, a Boston merchant, appealed, no doubt to have his case heard again before another jury in the superior court. More typical, however, were the majority of cases where jurors found for debtor defendants. But when jurors did find for plaintiffs in high-stakes cases, the awards, like that one for £774, were likely to be substantial indeed—precisely because the original damages sought were so much greater than in cases decided without juries, by the judge alone.\textsuperscript{37}

Disputes involving huge sums were more likely to be decided by jury. In that Salem July Court of 1749, suits where greater damage amounts were at stake generally went to jury trial. Sometimes a plaintiff could win by jury. For example, Henry Pain, a shipwright of Marblehead, brought into court Nicolas Edgcomb, a shoreman, along with others, for nonpayment for work Pain had done on their boat. The damage claim was substantial. The plaintiff was suing for some £241 in lawful money from the defendants. Edgcomb et al. asked for a jury trial through their attorney, John Chipman. Surprisingly, given typical jury behavior in such cases, the defendants were disappointed and the jury

\textsuperscript{36} Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, Ipswich March Court, 16-17.
\textsuperscript{37} Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 23, 16-28. The actual amount of the award in this high-stakes debt case was £774:16:3, with court costs of £3:10:6. The damages alleged in the suit amounted to vastly more than £774, however, totaling some £3099:5:0. Again, plaintiff demands heard by judges averaged more like £57 this session.
awarded what the plaintiff had sought. Not surprisingly, the defendants appealed. More
typical jury action can be seen in the case of another shipwright, Charles Hodge of
Newbury, suing Boston merchant Jonathan Binney over debts of more than £3000.
Defendant Binney, again represented by attorney Chipman, asked a jury to decide the
matter. The debt was enormous. So was the jury’s capacity for mercy, apparently. This
time, the jurors more characteristically sided with the defendant, who was absolved of the
entire debt and awarded his costs of court. Also characteristically, once again, the losing
plaintiff appealed. 38

These last two cases highlight an important fact about the life and work of
colonial juries. Just because jurors were asked to hear and decide cases involving large
claims did not mean that their decisions rendered were final. Finality in decision-making
in courts of original jurisdiction was only possible in cases where both parties had agreed
to have a hearing referred. When cases were referred, they were sent to a panel of three
men, or referees, one appointed by each party and a third by the court. The decision of
any two of the referees was to be final, as per agreement by the parties beforehand.
Juries played no part in this process. 39 Thus, justice rendered by referees could be
relatively swift and judgment final. But that finality of judgment might not be considered
an unmixed blessing to many a defendant or plaintiff. After all, for the loser, an appeal
offered the hope of a better outcome tomorrow. Such appeals were foreclosed by
referring decisions. Furthermore, the mercy that a defendant would hope for from a jury

was in “bills of the old tenor,” inflated by something like eight times the value of the “Lawfull money”
commonly in use by 1749 but still a significant amount; see the equation of monies offered in Pain v.
Edgcomb, for example, cited above, GSU at 47-48, where £120 “Lawfull money” is equated to £966:10:1
in bills of credit of “Old ten.;” and see the appendix in Toby L. Ditz, Property and Kinship: Inheritance in
39 See, for example, Nelson’s discussion of referees and the changes later made to their authority, in
might not appear from referees, only one of whom—out of the three who would decide the defendant’s fate—would be chosen by the defendant. A jury of twelve neighbors might open any number of possibilities in the complex process of decision-making, possibilities that might redound to the defendant’s favor. Neighbors might hope for leniency or mercy from their fellows serving as jurors. Those neighbors, as jurors, might harbor feelings of “there but for the grace of God….” Were referees or gentlemen judges as likely to share such sentiments? Considerations such as these probably ensured that referees would decide very few cases during any particular session in the inferior courts of Essex.40

Perhaps equally appealing to defendants was the fact that, if the verdict went against them, those jury judgments could be appealed, as frequently they were. For example, jurors had their decisions appealed in no fewer than 81% of cases in the quarterly sessions of 1749; indeed, every one of their judgments was appealed in the Salem December Court of that year. Overwhelmingly in appeals of jury cases, however, it was the plaintiff who appealed his loss to the defendant by jury.41 Just because a jury decided a case at the inferior court level, then, did not mean the end of the dispute—only that the dispute would be continued at a higher level, and probably before a jury there as well, where the hope for the comfort of neighbors could spring again.

Hopes for mercy from neighbor jurors continued during the Essex Inferior County Court session of September 1749, held at Newbury, which bore some resemblance to that

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40 For example, only one case out of 68 contests was arbitrated in the March Court at Ipswich in 1749. In the July Court at Salem in 1749, four cases of 64 were referred, while in the Newbury Court of September that same year, no more than two cases out of 86 were referred. Generally speaking, in any inferior court session from the late 1740s into the 1770s, only a few cases were referred out of the increasing numbers of contests decided. See Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 1-118, 308-422; Vol. IV, 1766-1770, GSU, 516-60; Vol. V, 1770-1773, GSU, 1-187.

41 See discussion of the Salem December Court of 1749 below.
of the inferior court at Salem during the previous July. Sixty percent of contested cases at Newbury were settled by jury, now with an attorney representing the defendant and requesting a jury trial in each instance. Again, the split between plaintiffs’ winnings in the two types of cases was close: plaintiffs won an average of £71 in contests overall, while plaintiffs recovered slightly less, £68, in those contests decided by jury (illustrated in Table 2.3).

It would appear from the record that juries, in effect, were beginning to put the brakes on plaintiff awards. And defendants did much better, on the whole, before juries

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>2</td>
<td>16.7</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>2</td>
<td>16.7</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>2</td>
<td>16.7</td>
</tr>
</tbody>
</table>

**Average judgment for plaintiffs—all contested cases:** £71  
**Average judgment for plaintiffs—by jury:** £68

[From the 12 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]

this session. One-third of jury cases saw the defendant in jeopardy for £200 or more; in about seventeen percent of cases, defendants were at risk for £1000 or more. Half of all plaintiff claims were for more than £50. In other words, the money damage amounts
claimed by plaintiffs in the cases handled by jury were significant indeed. While judge-decided cases saw plaintiff demands averaging about £191, this figure is significantly skewed by two atypically large claims; without these two cases, non-jury plaintiff claims amounted to some £55, roughly the same as the plaintiff demands in jury cases this term, excluding their own two largest plaintiff claims. Otherwise, while judges were hearing plaintiff demands averaging some £191 overall, juries were deciding average plaintiff claims for £203.

In the broader view, plaintiffs did well in those cases where defendants chose not to have a jury hear their defense, winning 55% of their causes (eleven out of twenty contested disputes). When juries heard the case, however, defendants escaped just over 58% of the time.42 Defendants did even better during the final inferior court session that year, held in Salem in December. At the end of 1749, defendants won nearly 86% of the time in trial by jury, compared to 60.9% of the time in all contests, by jury or by judges alone.43

Of the twenty-three contested cases brought to the inferior court at Salem in the December, 1749 session, defendants were represented by counsel in every one of the fourteen jury trials. When an attorney was present for the defense, this attorney presence for the accused weighed decisively in favor of jury trial. The court records point to the reason why attorneys would favor jury trials for their defendant clients. Attorneys understood where jurors’ sympathies tended to lie: with the debtor defendant. Nearly sixty-one percent of all contested cases in the Salem December Inferior Court were heard by jury. Defendants and their attorneys had good reason to prefer jury hearings. As long

as jurors could be seen to offer leniency to defendants—as long as jurors’ decisions proved so miserly toward plaintiffs trying to collect debts or press injury claims—defendants and their attorneys would continue to seek jury trials.

It is hard to escape the conclusion that jurors felt sympathy for their peers in financial straits. As Table 2.4 shows, fully two-thirds of plaintiffs’ demands for compensation that winter ranged between £20 and £99. Such liability was considerable for the typical colonial subject-as-defendant whose annual return on real estate may have been worth that much, or less.\textsuperscript{44} Another quarter of plaintiff damage claims averaged substantially more than that: between £100 and £1000. Non-jury contests (decided by the justices) saw plaintiff demands for far less than that. Plaintiff claims in judge-decided

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
Plaintiff Claims & Raw Number & Percent \\
\hline
Less than £20: & 1 & 8.3 \\
£20 to £49: & 4 & 33.3 \\
£50 to £99: & 4 & 33.3 \\
£100 to £199: & 1 & 8.3 \\
£200 to £999: & 2 & 16.7 \\
£1000 or more: & 0 & 0 \\
\hline
\end{tabular}
\caption{Plaintiff damage claims sought and awards (judgments) actually made, Salem Inferior Court, December 1749 session.}
\end{table}

Average judgment for plaintiffs—all contested cases: £39

Average judgment for plaintiffs—by jury: £5

\[\text{[From the 12 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]}\]

\textsuperscript{44} The annual rental value of most people’s real estate in the Bay Colony was enumerated at less than £30, as late as 1771, based on a perusal of Bettye Hobbs Pruitt, ed., \textit{The Massachusetts Tax Valuation List of 1771} (Camden, ME: Picton P, 1978, 1998).
cases averaged about £93, while jurors decided plaintiff claims averaging £90, nearly the same amount. Yet, though plaintiffs won an average of approximately £39 pounds for their efforts in all contested cases, juries slashed their winnings to merely £5. Moreover, while plaintiffs lost nearly 61% of all contested cases that December, they lost nearly 86% of their cases when juries made the decision. Plaintiffs had a tough time recovering their debts from defendants in that Salem session, but they had a rougher time still when defendants asked jurors to settle things.

Finally, while nineteen defendants appealed in a total of twenty-two judge-decided cases (where appeals were seen), only one defendant appealed his case from a jury decision, compared to thirteen plaintiffs who remained discontented with the jury’s verdict.45 It was the plaintiffs, overwhelmingly, who ensured that every single jury verdict would be appealed that December. Plaintiffs were leaving the inferior courts unhappy. Defendants, on the other hand, were benefiting handsomely from panels of their peers in Essex County at the end of 1749. Jurors had shown strong sympathy for those in debt before mid-century. Debtors and their attorneys must have known this, watching juries in action. The visible sympathy of jurors toward many in financial distress explains why defendants continued to rely consistently on juries, especially when the economic stakes were high.

The Essex Inferior Courts in transition

In the Essex County inferior courts, the year 1752 marks a significant transition in the lower courts of this part of Massachusetts. For by 1752, a casual survey of the record would appear to show civil defendants experiencing unfamiliar trouble with jurors, who

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formerly had been so sympathetic to debtor-defendants in their cases, within the quarterly courts of Essex. In reality, however, litigant behavior was forcing changes upon these Massachusetts courts, changes that would escape detection except by a systematic study of litigant behavior, over time, in the quarterly sessions of these inferior courts.

In a dramatic change of the norm from the proceedings seen in prior inferior court sessions, civil defendants actually began to fare worse before juries than before the justices alone in some of the court sessions of 1752. Defendants’ unhappiness with their altered rate of success was demonstrated by the high number of defendant appeals of their cases that year. (Such a high rate of appeal by defendants in 1752 brings to mind the high rate of appeal by losing plaintiffs in the court sessions of the 1740s, as just seen.) On the other hand, during some of the court sessions of 1752, defendants actually did see success against plaintiffs in certain crucial respects. What then explains this seemingly contradictory behavior of jurors toward civil defendants? Were juror sympathies really beginning to change, foreshadowing darker prospects for civil defendants in the future? Or could something else explain a surprising decline generally in judgments for defendants by Essex jurors, just after mid-century?

In short, the inferior courts of Essex were in a difficult state of transition, a situation that would begin to resolve itself only in the 1770s. In the meantime, real jury verdicts were becoming less common in the inferior courts—including judgments for debtor-defendants—as real civil trials were being pursued elsewhere. Defendants more often now lost cases procedurally in the lower courts, precisely to move their real trials into the superior courts. Otherwise, even when jurors gave plaintiffs a win in real contests, they rewarded creditors with far less than they had demanded in their civil suits.
This transition in Massachusetts court practice is visible by the Ipswich March Court of 1752, where in the nearly half of all contested cases (overwhelmingly involving debt), heard by jury, plaintiffs won an astonishing twelve out of thirteen jury decisions. As would be expected, all but one of those defendants appealed the jury’s verdict. While twelve of those thirteen civil defendants were represented by counsel that spring, the old magic of defense counsel was appearing to fade, where victory by jury was concerned.

Importantly, however, as one aspect of this transition in jury voting, although plaintiffs were the overwhelming winners in their debt disputes, jurors were letting off debtor defendants for amounts far less than the plaintiffs were demanding. More than half of the jury contests that March exposed the defendant to damage claims of more than £50 in Massachusetts money; nearly a quarter of all plaintiff damage claims were for sums of £100 to £1000.\(^46\) At the same time, whether winning a mean of £33 in all contests or an average of £36 by jury trial (in Table 2.5), plaintiffs were recovering a fraction of what they had demanded—particularly by jury.

In reality, then, the results of their victories turned out to be mediocre for plaintiffs. Given the magnitude of many of their cases, it appears that Ipswich jurors were greatly restricting the losses for defendants, even if they were allowing plaintiffs to succeed more frequently in their suits. In truth, Ipswich jurors in March of 1752 were still showing partiality toward civil defendants, even if jurors were finding for creditor plaintiffs more frequently that session.

\(^{46}\) By contrast, non-jury-decided cases saw plaintiff demands averaging £56. The largest of these cases saw a plaintiff claim of £200, with the next largest at £100. Otherwise, the average plaintiff claim to be settled by the judges alone was for nearly £25. Average plaintiff claims in jury-decided cases that March were just above £78.
Still, in that zero-sum game that is a court trial, defendants were more often now taking the loss. What other factors, then, help to explain this rise in jury judgments for the plaintiff, instead of the defendant, in early 1752?

One crucial factor goes a long way toward explaining the apparent changes in jury behavior after mid-century. Colonial American law court culture itself was changing

**TABLE 2.5**
Plaintiff damage claims sought and awards (judgments) actually made, Ipswich Inferior Court, March 1752 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>6</td>
<td>46.2</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>4</td>
<td>30.7</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>7.7</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>2</td>
<td>15.4</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

*Average judgment for plaintiffs—all contested cases:* £33

*Average judgment for plaintiffs—by jury:* £36

[From the 13 jury-decided cases where information is available. Average judgments are approximate due to rounding.]

because of alterations in methods of pleading by parties and their attorneys in their cases. For pleading in the inferior courts of Massachusetts evolved after 1750 in significant ways. Increasingly, with the rise of new pleading forms observable by this time, cases that formerly would have been heard by jury, in the inferior courts, now were being deferred, to be heard in the superior courts, by means of the changes in pleading previously discussed (such as in Burbank v. Cunningham, cited above). The use of this
new pleading form increased greatly from the 1750s to the Revolution. For example, in the Salem December Court of 1752, in the case of William Tanner v. Thaddeas Ridden, plaintiff and defendant maneuvered to avoid an inferior court trial. Using new pleading strategies, they managed to have their real trial, likely by jury, heard in the superior court instead. Previously, in the traditional pleading form (which continued to be employed, of course), the defendant would ask for a trial by jury—as, for example, Marblehead fisherman John Clone had done, by his attorney John Chipman, that same December. According to the court record, the defendant denied he had made certain promises to plaintiff Jacob Fowle, Esq., also of Marblehead, “& thereof puts himself on the Country whereupon Issue being Joined the Cause After a full hearing was committed to a Jury Sworn According to the law to try the Same who Returned their Verdict therein upon oath,” whereby they found for the plaintiff, Jacob Fowle, for £1:14:9.47

Now, however, in the new form of pleading, seen in the Tanner case just mentioned, William Tanner, a Marblehead joiner, sued yeoman Thaddeas Ridden, of Lynn, for repayment of a loan made at the start of that same month of December. Tanner sought to recover from Ridden £3:16:8—and then some. Now, creditor Tanner was seeking £10 for his trouble.

So into the Salem December Court of 1752 came the plaintiff, joined by the defendant, who was represented by Nathan Bowen, his attorney:

47 Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 409, 404-5. Interestingly, the costs of this latter case that now had to be borne by the defendant, at £3:5:2, were not far from twice the damages he owed. Perhaps the relatively minor damage judgment helps to explain defendant Clone’s refusal to appeal his loss in this case. Regarding the older and newer forms of pleading, see Nelson, Americanization of the Common Law, 16, 20-23, 32, 72-88; George Lee Haskins, Law and Authority in Early Massachusetts: A Study in Tradition and Design (New York: Macmillan, 1960, 1968), 179-88; William E. Nelson, “Court Records as Sources for Historical Writing,” in Coquillette, ed., Law in Colonial Massachusetts, 502-16; and see “John Adams’ Pleadings Book,” with discussion on and examples of pleading forms, in Wroth and Zobel, ed., Legal Papers of John Adams, I, 26-43 ff.
& upon the Plt\textsuperscript{5} Agreeing that upon the Appeal he [the defendant] may Give any Other Answer to the Plt\textsuperscript{4} declaration afores\textsuperscript{d} [the defendant] Says he was never Requested [to pay the plaintiff the debt owed, as the plaintiff had alleged] … and the Said William Consenting thereto Says the afores\textsuperscript{d} Plea of the Said Thaddeas is Bad & that he need not Reply to it & this he is ready to Verify & therefore Prays Judg\textsuperscript{i} for his Damages & Costs— and the Said Thaddeas Says that his Plea afores\textsuperscript{d} is good & for Want of the Plts Answer thereto prays Judg\textsuperscript{i} for his Costs.\textsuperscript{48}

As common in this newer pleading format, the justices ruled summarily for the plaintiff, William Tanner, declaring the defendant’s plea “insufficient” and awarding Tanner the £3:16:8 that had originally been in dispute. Defendant Ridden immediately appealed, meaning that the real trial would follow in the superior court, in all probability, by jury. This newer form of pleading continued into the 1770s when, for instance, in Sawyer v. Ayers, the defendant’s plea was declared “not sufficient” by the judges, leading to the defendant’s appeal. Of course, the judges could find the defendant’s plea “good,” leading to an appeal by the plaintiff. This result occurred in Ropes v. Giddinge, during that same court session. More typically, though, judges ruled for the plaintiff in such cases, followed by the defendant’s appeal.\textsuperscript{49}

Hence, at mid-century in Essex County, trial practice appeared to be evolving as defendants and plaintiffs, often through their attorneys, sought to minimize their trial exposure as well as their costs. After all, what plaintiff or defendant would want to tip his hand before the opposing party, if another jury were going to hear the case again regardless? It may be speculated that counsel for defendants were pushing court practice in this direction, given the predominance of counsel for the defense in jury trials. But if

\textsuperscript{48} Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 409. Within the defendant’s declaration here was the traditional language that he “puts himself on the Country,” language representing the call for a jury trial. But as usual in cases of this new pleading form, there is no further reference to any jury activity in the case, and it appears that no jury trial in fact occurred. The record merely reflects that the court proceeded to judgment for the plaintiff, followed by the defendant’s declaration of an appeal to the superior court. Cf. Nelson, Americanization of the Common Law, 15-18, 72-73.

\textsuperscript{49} Inferior Court of Common Pleas, Vol. IV, 1766-1770, GSU, 521-22, 543-44. The last two examples are from the Ipswich March Court of 1770, cited below.
juries were to become less important at the inferior court level, they would continue to
play a crucial role in the superior courts, as will be seen.

Meanwhile in inferior court, in March of 1752, although plaintiffs won 85.2% of
contested cases, they won an even higher percentage of their trials when jurors decided
their cases that spring. For Ipswich juries gave plaintiffs the victory in 92.3% of their
cases that session. But most of these verdicts were not intended to stand, as any court
observer could see. Typically, now, real trials were being pushed into the superior court,
through special pleading. In other words, defendants were losing in the inferior courts
more often now, frequently through the technique of the sham pleading described above,
sometimes with the help of a perfunctory jury hearing. Such “losses” merely paved the
way for a real trial in the court above. Still, if one simply takes the inferior court record
of plaintiff victories at face value, life was getting tougher for civil defendants in the
lower county courts. Even in those real trials still conducted at inferior court, defendants
were losing jury verdicts—though they also losing less money than previously.\textsuperscript{50}

In the Essex Inferior Court held at Salem, in July 1752, 42.1% of contested cases
were handled by jury, while the Newbury September Court saw 57.1% of contested
causes tried by jury. Fully three-quarters of jury-decided cases in the Salem July Court
saw a defendant represented by counsel (though this was the lowest rate of attorney
representation in jury cases in all quarterly sessions studied). Plaintiffs did well in all
contested cases that July, winning an average of 73.7% of all civil contests. Plaintiffs did
not fare quite as well by jury, however, winning 62.5% of their cases before their peers.

What the record continues to demonstrate in this change of trial jury behavior
toward defendants and plaintiffs is that, if jurors felt compelled to acknowledge

plaintiffs’ demands more frequently now in trials, jurors would reward them less generously. While plaintiffs won a mean of £33 in all contested cases in July, they won only £30 on average by jury decision (see Table 2.6). Although the justices alone handled plaintiff demands somewhat greater than those seen by juries this session, this anomaly occurred because of two plaintiff demands quite beyond the norm, for £200 and for £104, pushing up the judges’ plaintiff claims average to almost £53. Otherwise, creditors’ claims in judge-decided cases amounted to some £24, more in line with the £31 claimed by plaintiffs in the six jury-decided suits where information is available. While one jury suit was for £100 this session, all other contests heard this term were for far less than that. Whether before judges alone or before juries, about three-quarters of plaintiff claims were for less than £46.51

The fact remains, however, that juries were tough on defendants in the summer of 1752. While defendants won but 26% of all contested cases, juries rewarded them 37.5% of the time—better by jury, certainly, but not like back in 1749, when defendants in each session had always won at least half the time, and when in December of that year defendants had won nearly 86% of their causes. Regardless, unhappy defendants could always appeal, and appeal they did. Four of eight defendants sought another trial in superior court when the inferior court jury did not see things their way.52 Unfortunately for civil defendants, in some respects, things would not look up for them in Newbury, that following September.

51 Ibid.
52 Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 340-69, and 370-403 for this and the preceding two paragraphs. Only one plaintiff appealed a jury decision from the Salem July Court of 1752. On the other hand, judges found 21 defendants appealing their judgments, out of 58 cases that included contested as well as non-contested causes. Comparisons between appeals from judges and those from juries are hard to make, however, since judges handled so many issues that did not always involve live contest between opposing parties. Appeals might be rare, for example, in plaintiff nonsuits or in defendant default cases.
TABLE 2.6
Plaintiff damage claims sought and awards (judgments) actually made, Salem Inferior Court, July 1752 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>2</td>
<td>33.3</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>3</td>
<td>50</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £33

Average judgment for plaintiffs—by jury: £30

[From the six jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Plaintiff damage claims sought and awards (judgments) actually made, Newbury Inferior Court, September 1752 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>5</td>
<td>41.7</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>8.3</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>2</td>
<td>16.7</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>8.3</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £42

Average judgment for plaintiffs—by jury: £46

[From the 12 jury-decided cases where information is available. Average judgments are approximate due to rounding.]
In the Essex County Inferior Court sitting at Newbury in September of 1752, the vast majority of civil defendants asking for trial by jury did so through their attorney: eleven of twelve jury trials (out of 21 contested cases) were called for by counsel. It would appear at first blush that Newbury’s jurors were harder than ever on civil defendants, ruling against them seventy-five percent of the time that fall. That jurors seemed in a harsh mood toward defendants is strongly suggested by the fact that defendants were better off, in one sense, without them: plaintiffs were only winning sixty-five percent of their contests by judges or referees.\(^{53}\)

Why were juries seemingly being so tough on civil defendants at mid-century? Perhaps jurors were getting the harder, uglier or higher-stakes cases—which used to be the norm in inferior court—so that defendants out of desperation were tossing the dice, as it were, toward a jury trial, while jurors were not buying. Of course, some very recent court sessions ought to have warned civil defendants and their attorneys against such a strategy of casting their lot with a jury trial. If juries had previously been seen as a chance for a pass in a really tough case, the past few court sessions should have caused defendants to think again. The court record, however, offers little support to the notion that juries were harder on the accused now because the jurors were hearing more vicious disputes or seeing especially desperate defendants.

The first jury case in Newbury that September was the second issue coming before the court that session. Although the record is not completely clear in details, apparently a jury decided this particular issue, pitting mariner Benjamin Manning of Salem against Newbury felt maker Ezekial Mighill. The record shows plaintiff Manning

asking for £7 in damages—nowhere near the upper end of damage claims for that session, but very ordinary, in fact. Defendant Mighill put himself “on the Country,” as the standard request for jury trial had it. The plaintiff prevailed, recovering £5:6:8 for his efforts. Defendant Mighill promptly appealed.  

In this and the following two jury cases, however, the newer pleading form—involving an agreement between plaintiff and defendant to postpone their real argument until trial in the superior court—appears to have been in play. The court record is not explicit on how juries were actually used in those two following cases, Proctor v. Wormstead and Hobbs v. Berry, though the plaintiffs’ claims for damages are clearly reported, at £100 in the Proctor case (the plaintiff winning £70), and in the Hobbs case, where plaintiff Hobbs essentially had claimed assault or false imprisonment (and won £150 from defendant Thomas Berry). Both defendants appealed. In short, these cases do not seem terribly unusual in substance or content from what jurors normally would have expected in Newbury in the fall of 1752, or previously. 

The next two cases were undeniably heard by jury, expressly confirmed as such in the record. The first pitted Newbury tailor John Gerrish against neighbor and wig maker Moses Todd. Apparently plaintiff Gerrish was upset that his son, Moses Gerrish, having been apprenticed to Moses Todd to learn his trade, had spent the past two and a half years with little to show for it. The elder Gerrish’s suit claiming damages of £20 was nothing extraordinary for the time. The jury in the case awarded plaintiff Gerrish a mere ten shillings for his efforts, which the plaintiff must have been taken as an insult. Here again, the jury was handing the plaintiff his victory, but underneath this victory was a none-too-
subtle rebuke. Astonishingly, the defendant appealed this minor loss. Perhaps Todd had his reputation, as worthy master to apprentices, to consider.⁵６

The next case, the sixteenth that session, also was by jury, as expressly confirmed in the record. John Pearson of Newbury sued neighbor Johnson Lunt, a coaster, for £5 damages, arising from an unpaid debt. The original debt had been for £4:3. The jury in the case found again for the plaintiff, but once again the plaintiff must have been disappointed: Pearson won some £3:3 for his trouble, a full pound less than the original debt that had been owed. True to form, Lunt, apparently one more cranky defendant, appealed.⁵⁷

Pearson v. Lunt, like those other cases just mentioned, does not present an issue so vicious or thorny, or a defendant so desperate, that the defendant would be turning to a jury as a last-ditch hope of salvation.⁵⁸ Whatever the cause for jurors’ increasing preference for plaintiffs over defendants, the reason does not appear to lie in the facts of the cases. And once more, even if juries increasingly were offering plaintiffs relief with one hand, they were cutting the losses for defendants with the other. Whether civil defendants could appreciate such mercy was an altogether different matter, as Lunt’s appeal suggests. The overarching fact remains that jurors’ behavior was changing.

Later jury cases that September, 1752, continue to demonstrate this evolution in jurors’ behavior toward plaintiffs and defendants. Again, jurors were not getting terribly difficult or unusual cases from defendants of dying hopes. In many ways, jury business in 1752 continued to be run-of-the-mill, leaving some other cause for why defendants,

⁵⁶ Ibid., 377.
⁵⁷ Ibid., 378.
⁵⁸ It may be noted that, while half of the jury-decided cases involved damage claims of more than £50 that September, judges and referees were hearing claims averaging much less than that, at £35. Defendants in higher-stakes cases were continuing to turn to juries for help.
whose outcomes had been so favored before, now were failing to get their way—to receive a not-guilty verdict. Of course, pro-defense juries could still be seen on occasion that September. For example, the nineteenth case that term, John Greenwood v. John Clark, pitted the Boston portrait painter against a gentleman of Salem, involving damages of £6 of debt unpaid. More than £32 had been paid on an order of seven pictures, totaling just over £38. This was not an extraordinary case, except perhaps that the jury found for the defendant, whose argument had been merely that he didn’t owe. Without surprise, the plaintiff appealed.\(^5^9\) In the twenty-eighth issue that session, Stephen Emmerson v. Abner Harris, an Ipswich yeoman sued a shipwright from the same town over a problem with a boat—shoddy repair work, it seems. The damage claimed, at £20, was nothing especially unusual in many of these sorts of disputes, which often involved more significant values. The jury’s verdict, however, was becoming increasingly the norm: plaintiff Emmerson was given his victory in court, but he received half of what he had asked for, some £11. Despite having his potential loss sliced nearly in half by his jury, the defendant appealed.\(^6^0\)

And so the jury trials went that fall, with defendants winning two of the last four jury cases. When plaintiffs saw success, as with James Jeffry Jr., a Salem shopkeeper, it was muted: Jeffry won less than £21 by jury, having claimed damages of £200. And Marblehead merchant Ebeneser Stacey won less than £26, after having documented damage in the amount of £50. In both cases, however, celebrated Boston attorney

\(^{60}\) Ibid., 383.
Edmund Trowbridge represented the defendants. Trowbridge also ensured that his clients appealed their losses.\(^{61}\)

What, then, do the court reports suggest? What can be said about why juries were rewarding plaintiffs more frequently (if less generously) than before? Moreover, why did trial by jury seem to be declining after mid-century in the inferior courts of Essex?

The court record of the proceedings in Newbury that September does not support a thesis that jurors were hearing now only the angrier or more complicated causes, that defendants were employing juries now only as some sort of last gasp, or that jurors now were hearing cases involving substantially higher damage claims than they had considered previously. Jurors regularly had been called upon to decide the more significant cases involving very substantial claims, but occasionally they had heard the petty disputes for paltry sums as well. These facts of jury life remained.

What does appear to have changed, however, is that inferior court jurors were hearing fewer contested cases than before, as defendants and their attorneys more frequently moved an original court hearing, by jury, into the superior courts. More than half of all contested causes in the Essex County inferior courts had been heard by jury in 1749 (53.6%). The percentage of live contests decided by jury had fallen to 45% by 1752, and by 1770 the percentage would drop still further, where the two court sessions analyzed below showed just 33.9% of actual contested issues being tried by jury. In the inferior court sessions’ cases analyzed for 1771, the rate of trial by jury continued its decline, to below 12% of contested cases.\(^{62}\) As will be seen in the chapter to follow, jury use was constant and critical at the superior court level throughout this period, rising to

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\(^{61}\) Ibid., 392, 393.

\(^{62}\) Tabulations from cases in Inferior Court of Common Pleas, Vol. IV, 1766-1770; Vol. V, 1770-1773, GSU.
one hundred percent of the few contested cases heard during several sessions in the
difficult years of 1776 and 1777.

By 1752, however, plaintiffs more frequently appeared to be gaining the
advantage, particularly when defendants demurred or pleaded procedurally, losing their
cases, precisely because they wanted their real trial—typically by jury—to occur at a
higher level. And when inferior court juries did give a real—not merely procedural—win
to the plaintiff, more often than not that victory was becoming pyrrhic. Ever more
litigants and their attorneys apparently were coming to understand that the real contest, or
contests where the stakes were highest, were not to be fought originally at the inferior
court level. Indeed, the Essex records suggest that juries were punishing defendants (and
any of their attorneys) who were not getting that message: that there was a new game in
defense pleading and in the use of appeals that might save notoriously time-conscious
New Englanders hours in court and, more to the point, some money. Perhaps many a
defendant also hoped for some advantage in changing the venue of his trial, moving from
such a familiar, local jurisdiction to a broader one, where their attorneys might find a
more sophisticated arena in which to display their expertise in the finer points of contract
law.63

The broader effect of the actions here of jurors and parties in the inferior court is
clear, however. A costly loophole had opened in the structure of the Massachusetts
courts, allowing for repeated trials of the identical issue. Long before the Massachusetts
legislature would solve this problem, jurors and the parties in inferior courts, by their
decisions and by their actions in litigation, were striving to close this loophole.

63 Wroth and Zobel, ed., Legal Papers of John Adams, I, xl-xlii. I thank Richard Bushman for the
suggestion of this last point.
Eventually, during the years 1804 and 1805, Massachusetts would reform this overlapping system of trials in its appellate courts, ending the “wasteful system of a de novo trial before the full bench” of the superior court, as William Nelson has written, vesting the jurisdiction to hear original cases solely in the inferior courts and their juries. The nineteenth-century reforms of the Massachusetts judicial system also eliminated the tradition of plural justices sitting on the lower bench. Until then, however, and throughout the colonial period, several justices presided over both the inferior and superior courts—gentlemen who often were non-lawyers, lacking expert knowledge of the law. Their seriatim charges to the jury allowed jurors to pick and choose among these justices’ varying “opinions” about the relevant law in the case. Jurors thus could choose those legal opinions they preferred, meaning that jurors had enormous power over lawmaking in cases. But the critical problem during the colonial period continued to be repeated trials in multiple courts.

The evidence from the court records of Essex analyzed here strongly suggests that jurors were supporting parties’ efforts to transfer their original hearings or trials into the superior courts when possible. Increasingly after mid-century, jurors can be seen punishing civil defendants (or the occasional plaintiff) who insisted on trying cases unnecessarily in the inferior courts. Therefore, in their decisions in these cases, jurors can be seen as powerful actors in court, helping the courts to adjust to or repair defects in their organization and function. Essentially, by their decisions, jurors were instructing attorneys and the parties at trial on how the courts should be used. Jurors were not merely observers in colonial courts. Along with the civil parties, jurors were playing a critical role in molding the form and directing the function of Essex county courts. In

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Essex, ordinary colonial subjects were having a significant impact on how the courts did business.

The changing scene for jury use in the Massachusetts Inferior Courts

At the end of the year 1752, in the Inferior Court held at Salem that December, the use of juries in contested cases fell further, to precisely one-third of contested suits, as five of fifteen such issues were heard by jury during that month’s session. What sort of mood did jurors express toward defendants and plaintiffs that winter?

From one vantage point, plaintiffs had a field day when juries heard their causes, winning jury verdicts fully 80% of the time. On the other hand, plaintiffs were doing better still without juries, winning 93% of contests decided by judges or by arbitration confirmed by the justices. Put the other way, defendants went from a mere 7% victory rate in all contests generally, to that of 20%, when juries heard their causes. While such statistics may still sound bleak for civil defendants, the fact remains that the one single defendant who won his contest in the Salem December Court that year, won by jury. That particular case otherwise was uninteresting: a Newbury “physitian” sued a Boxford husbandman involving a debt from July 4, 1749, for £32 current lawful money of Massachusetts. True to form, after the jury awarded the defendant his judgment of not guilty in the claim and his costs of court, the plaintiff appealed to the next session of the superior court. Otherwise, plaintiffs seemed to be riding high when defendants asked for trial by jury—except for the fact that plaintiffs were winning half the money damages before jury that they had won in all contests generally. Sixty percent of these cases saw damage claims for less than £20, while in the remaining forty percent, plaintiffs were suing for closer to £50. In all contested cases where plaintiffs won, they raked in £10 on
average; plaintiffs won but £5 when juries heard the dispute (see Table 2.7 below).

Plaintiffs must have been depressed when jurors could see fit to give them, on average, only half of what they might have won from a judge’s decision.65

And perhaps this is what continued to give some civil defendants in the Essex inferior courts their hope, in having their trials heard by jury there. Defendants might lose, but they might not lose much—and still there was always the possibility that they

TABLE 2.7
 Plaintiff damage claims sought and awards (judgments) actually made, Salem Inferior Court, December 1752 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>3</td>
<td>60</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £10

Average judgment for plaintiffs—by jury: £5

[From the five jury-decided cases where information is available. Average judgments are approximate due to rounding.]

might win outright by the help of their peers. The central point is that, even if defendants lost their cases, which they often did in Salem that winter in 1752, they stood to lose a

65 Inferior Court of Common Pleas, Vol. I, 1742-1754, GSU, 404-22. Mean plaintiff demands in non-jury contests that winter, at £81, were greatly inflated by two unusually large claims, one for £600 and the other for £100—these demands themselves doubtless inflated, as judges awarded £44 and £12 in each case, respectively. Without these two huge claims, plaintiff demands averaged a more ordinary amount of £14 in non-jury contests that December, nearly the £15 average in run-of-the-mill jury suits. It is unclear why the defendants in those two huge civil cases did not behave as most defendants did—requesting a jury trial.
fraction of what the plaintiffs had hoped to gain. Defendants seem to have been aware that juries were whacking back the claims of plaintiffs, when they won, making things a bit easier for defendants after all. Again, Essex jurors in fact were showing debtors what mercy they could, when creditors made legitimate claims that jurors could not simply ignore.

These plaintiff judgment awards strongly suggest, then, that jurors were shielding those in debt. As economic times turned harder in the years leading up to Revolution, creditor-plaintiffs were facing a rise in delinquent defendants—increasing financial pains that jurors in these cases seemed little able to palliate. Analyzing the financial stresses in the years leading to Independence, Terry Bouton has recently argued that the British were monetarily squeezing colonial debtors, who were increasingly being forced into the courts to defend themselves and were losing the struggle—a major factor helping to explain the American Revolution. Of course, the problem of debt had always existed in Massachusetts, and historians since Charles Beard have argued that debt played a formative role in the Revolution and influenced the politics of the early Republic. Whether exogenous forces (such as British efforts to contract the colonial money supply) or more endogenous factors (such as local lenders who simply wanted their debts repaid)—or indeed a combination of both—were the primary igniters of revolution, is a question beyond the scope of this study. In any case, the inferior court records for this

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66 Bouton, Taming Democracy, 3-10, 30, chaps. 1-3, passim.
part of Massachusetts at mid-century make clear that debt repayment was a serious problem that frequently found its way into the courts. The great preponderance of the cases in the records surveyed here involve creditors seeking repayment from debtors, a problem increasing in severity as time marches closer to Revolution. 68

What is equally clear from the court evidence is that there is little to support a thesis that jurors were becoming unsympathetic to the plight of debtors. If jurors were awarding more victories to plaintiffs, by December 1752 they were also cutting plaintiffs’ winnings—generally by a lot. Moreover, by the 1770s, defendants appeared in many ways to be doing far better by juries in the Essex Inferior Courts, although the newer forms of amended pleading, in particular, would continue to push the more significant causes, cases that so often previously had been handled by juries, into the superior courts, as shortly will be seen.

**Inferior Court Jury use on the eve of Revolution**

By the spring of 1770, civil defendants were enjoying a stunning comeback in their success rates before juries, as opposed to their success rates in civil trials without their peers. In each of the first two complete sessions of cases studied here from the Essex County inferior courts, one held at Ipswich in March of 1770, and the other at Salem in July that same year, defendants improved their odds of success when juries heard their cases and they cut significantly their financial losses when neighbors decided their liabilities to creditors. 69 (See the breakdowns for the two sessions in Table 2.8 below.) Although jury use in the Essex inferior courts continued its decline from mid-century,

68 See the following citation, and see Bouton, *Taming Democracy*, especially introd., part 1.
69 Inferior Court of Common Pleas, Vol. IV, 1766-1770, GSU, 516-60; Vol. V, 1770-1773, GSU, 1-29. There were thirty-one live or contested cases in each session, that of March and that of July, 1770.
when defendants did ask for trial by peers, juries appeared to profoundly improve their odds of success in civil cases by the early seventies. Attorneys for the defense continued consistently to request a hearing by jury for their defense clients, on those occasions when they did press for full trial at the inferior court level. In March 1770, nine of ten defendants had attorney representation requesting jury trial; all eleven defendants had attorneys making the request for a jury hearing in every jury case that July.\(^70\)

The Inferior Court meeting at Ipswich in March of 1770 was led by Justices Nathan Ropes, Caleb Cushing, Andrew Oliver and William Bourn, beginning its session on the last Tuesday of the month, March 27. Of the 131 issues brought before the justices that term, thirty-one were live, contested causes, ten of which were settled by jury trial. While plaintiffs won 65.5% of all contested litigations in Ipswich that spring, defendants managed to break even when their cases were heard by a panel of twelve. More significant, jurors were continuing their habit since mid-century of whacking back plaintiff winnings at court. In all contests, by jury or by justices alone, winning plaintiffs took a mean of £45 from the losing side. When juries heard the cases, however, plaintiffs’ winnings were greatly reduced—to £19 on average in a winning case. This is important because, while eighty percent of plaintiff claims (in all those cases where data exist) were for £99 or less, twenty percent of plaintiff claims were for very great amounts—£200 or more. For example, in the case of Stephen Kent v. Joseph Kent, both yeomen of Newbury in a suit involving a plea of ejectment, the damage claimed was £2000 for loss of land and its income. In this case, Kent the defendant won his costs,

\(^{70}\) Ibid.
while Kent the plaintiff licked his wounds by asking the superior court to reconsider things.  

So how had things changed for civil defendants in Essex by 1770? Were jurors redoubling their efforts as the defenders of debtors—of those in economic trouble? Certainly the odds for defendants’ victory by jury were looking up, and this brighter circumstance for defendant-debtors continued into the Salem inferior court session that July. Every one of the eleven cases heard by jury during the July session witnessed an attorney for the defense requesting trial by jury. And defendants that summer seemed to be back on top, as they had been a generation earlier.

Fully sixty-four percent of civil defendants won their cases when heard by jury that July, compared to thirty-two percent in all contested issues. When plaintiffs won in contested conflicts generally, they took in an average of £39 (as shown in Table 2.8). But when plaintiffs had to argue their causes before twelve peers, their mean winnings in victorious cases dropped substantially, to £20.

As was typical of the Essex inferior courts, jurors continued often to deal with more substantial cases, generally speaking. During this session, for example, two jury cases involved a plaintiff’s demand for £40 in each case: one for notes of hand due to the plaintiff and the other for the unauthorized cutting of the plaintiff’s trees. A third jury case involved a plaintiff’s demand for £400, owed from a debt dating back to 1769. Two other jury cases involved amounts of £50 each at risk, and still another jury case for £80.

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71 Inferior Court of Common Pleas, Vol. IV, 1766-1770, GSU, 516-60; the Kent case was complex without clear fact situation or explicit description of nature of case in record, at 555-56. Both juries and judges alone decided several very high-stakes cases this term. While the justices heard cases involving plaintiff claims averaging some £134, without several of their high-profile civil suits, judge-decided cases differed little quantitatively from most of the cases decided by jury, minus their own two very high-stakes disputes—one of which, Kent v. Kent above, at £2000, was the highest defendant liability contest heard this session.
TABLE 2.8
Plaintiff damage claims sought and awards (judgments) actually made, Ipswich Inferior Court, March 1770 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>3</td>
<td>30</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>1</td>
<td>10</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £45
Average judgment for plaintiffs—by jury: £19

[From the ten jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Plaintiff damage claims sought and awards (judgments) actually made, Salem Inferior Court, July 1770 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>2</td>
<td>22.2</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>3</td>
<td>33.3</td>
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<td>3</td>
<td>33.3</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>11.1</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £39
Average judgment for plaintiffs—by jury: £20

[From the nine jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]
This was pretty ordinary stuff in the Essex inferior courts during the period—except that the damage amounts involved were fairly high, compared to most of the cases the judges alone were hearing. Amounts at risk by defendants in such judge-decided cases most often were for £10 or less during this session; rarely were plaintiff demands substantial in judge-decided cases this term. There were exceptions to this rule. For whatever reason, defendants sometimes went to trial without jury, relying on the judges alone to determine the defendant’s innocence or guilt and, if the judges found the defendant guilty, to determine the damage award. One wonders why several defendants during this session did not ask for jury trial when they were in jeopardy for £400, £250, or £70, just to take the three such larger amounts to be decided by judges alone, during the first thirty-three trials that session. In that first case where the plaintiff was demanding £400, the judges awarded the plaintiff more than £200. (Compare a similar suit, that third jury case for £400 mentioned just above: the jury had sided with the defendant, who paid nothing and received his costs of court.) In that suit for £250, the judges again ruled for the plaintiff, awarding him £220. And in that suit for £70, the judges sided with the plaintiff once more, awarding him more than £58. Generally, however, the jurors were handing the larger claims and, more important, jurors tended to show greater mercy to the defendants—sometimes letting them off entirely—especially when the stakes were high.  

The evidence suggests that plaintiffs were beginning to face tough times as jurors were showing increasing sympathy for debtors—particularly debtors facing great loss:

72 Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 1-29. Plaintiff demands in judge-decided contests averaged almost £58 this session. With mean plaintiff demands in jury-decided cases at over £78, the difference between judgments in all contests versus jury contests, again, is significant: juries were hearing more substantial cases and were showing greater leniency toward debtors than was shown generally by judges.
while more than half (55.5%) of plaintiff jury cases in July involved £49 or less, another third of such cases that session saw plaintiffs seeking £50 to £99. And one jury case mentioned just above was for damages involving far more. In that jury judgment, involving Boston merchant William Griffin’s debt of some £400 lawful money to Benjamin Pickman of Salem, Griffin’s attorney put his client “on the country” and got his client acquitted, only to see plaintiff Pickman appeal.73

Still, only something above a third of inferior court cases were being heard by juries in Salem that summer of 1770.74 The reason for this lower rate of jury-heard cases involved the trend that had been established and that accelerated in the Essex inferior courts after mid-century. This trend in the inferior courts of Essex saw defendants increasingly defaulting in their of cases, or else demurring or pleading the new form—in order to have their cases heard in a higher court, usually by jury, as will be see in the chapter to follow. But when defendants did choose to submit their cases to a jury, they were now enjoying greater success than they had known some years before. The broader results of jury judgments—favoring defendants—would not alter substantially in the period ahead. Trends in inferior court jury use, however, were undergoing profound change.

Strikingly, of the 101 issues heard by the inferior court sitting at Salem in July of 1771, not one of the fifteen live or contested cases was heard by jury at the inferior level.75 Meanwhile, fully seven of these contests that might have been heard by jury, were handled by arbitration, or by referees, instead.76 If examination of the evidence

73 Ibid., case at 4.
74 The total was 35.5%.
76 See above regarding the use of referees in inferior court.
stopped here, one might conclude that more plaintiffs and defendants were looking for
greater finality in a court decision—at least in a lower court decision—and therefore the
parties more often now were agreeing beforehand to abide by what arbiters or referees
decided was best. Without more careful consideration of the court record, one might
conclude that litigants now were looking for swifter, irremediable justice. Such
speculations cannot be dismissed out of hand.

Several factors, however, militate against the conclusion that referees were
replacing jurors as the preferred decision makers for litigants seeking faster, final justice.
First, referees had been used in the Massachusetts inferior courts over many decades, as
the records analyzed for this study bear witness. Jurors, meanwhile, had always operated
alongside the occasional calling of referees or arbiters in hearing trials and deciding
disputes. Given the love that the Bay Colony’s subjects had long displayed for a good
legal fight,77 it is hard to imagine that they would resort to arbiters or referees too often.
The records here studied show but one case handed to arbiters in March of 1749, four
cases referred in the Salem July Court of 1749, one or two cases by arbiters in September
1749, two more referred in December 1749, three cases referred in March of 1752, and so
on. Generally the records show that in only a few cases each term did the parties ask for
arbiter or referees to settle their disputes, and in some court sessions, such as that sitting
in Salem, December 1752, the litigants utilized none. The inferior court records are
replete with cases of litigants fighting it out, before judges and often before juries, over
even paltry sums. So it seems unlikely that litigants now were just giving up a good fight

before their peers. In fact, juries would reappear in the inferior courts later that September in 1771.

More to the point, however, juries never did similarly vanish from the normal operation of the superior courts. While jury use was in apparent decline in the inferior courts into the early 1770s, jury use only increased in the superior courts, making the panels of twelve ever more significant in the law court culture of the higher tribunals, as the following chapter will explain. Again, litigants were increasingly trying to avoid the more serious trials—especially those by jury—in the inferior courts, pursuing these disputes more often now in the superior tribunals. Here, then, is the chief explanation for the apparent decline in the inferior court jury in Essex during the period.

If the use of referees was increasing by the early 1770s, so too was the number of decisions made by judges alone—significantly more than the number of referred cases. Part of the reason for this preference for judges over referees would seem to have been that, while referred decisions ensured finality in the matter, as noted above, referees could be dangerous for defendants. For example, the referees in the Salem Court of July, 1771, gave defendants a very hard time of it, ruling in favor of plaintiffs five times, and for the defendant only once. (In one additional case, the decision of the panel of three is unclear from the record, perhaps because the parties had finally resolved the issues themselves; at any rate, the parties did not appear at the proceeding and the case at least temporarily was dropped.) Thus, the justices were handing more of the case load—80.2% of all cases (contested or not) that summer—and appeals from the judges’ decisions were heartily employed by both sides, especially by defendants. If plaintiffs won 60% of the contested

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78 Based on tabulations from the Inferior Court of Common Pleas, GSU, records cited above.
causes before judges that July, the litigants who appealed that term helped to ensure that nearly 78% of the justices’ decisions would be reexamined in a higher court. Whatever else might be said of Essex subjects for the present, they continued to love litigating their appeals.

Meanwhile, in the inferior court sitting at Newbury-Port in September, 1771, the normal demand for jury trial in Essex returned, as nearly a quarter of all contested issues were heard and settled by panel of twelve that autumn. As per the earlier norm, the defendant always asked for the peers to hear his case, with seven of eight civil defendants asking for the privilege through their counsel. While it was not unprecedented in the past that a plaintiff would add his voice to the request for a jury trial, more common perhaps at the superior court level to be discussed later, apparently no plaintiff did so in the inferior court this term.

At first blush, the results appear disastrous for defendants that September (portrayed in Table 2.9 below). In considering the settlement of plaintiffs’ contests generally, when plaintiffs succeeded, their total winnings averaged some £68. But for the cases heard by jury that fall, the average plaintiff awards jumped dramatically—to £220! (Such numbers might tempt one to wonder what on earth defendants were thinking when they asked a jury to consider their cases.) Certainly, such an enormous disparity in award amounts in favor of the plaintiff was not the norm that had been evolving up to now. One must look back to the spring of 1749 to see such a disparity, in

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80 From tabulations of Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 115-40. The total of justices’ decisions appealed that July was seven out of nine. Most of these judge-decided cases saw plaintiff demands ranging from several shillings to £60.
81 Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 141-69. The actual percentage of contested cases heard by jury was 22.9%.
favor of the plaintiff, in juries’ civil awards. Was the situation now, as before mid-century, that inferior court juries were hearing cases involving much higher damage amounts than in some of the later sessions that have here been considered? Were inferior court juries once again handling more substantial cases than they had seen in the recent past—bigger cases, monetarily, that more often these days had been kicked up to the superior courts?

Based on tabulations of the records here sampled, it does appear that Essex inferior courts had witnessed a decline in the magnitude of plaintiff claims after mid-century, a decline that now looked to be in reverse. In March 1749, half of the civil plaintiffs were suing for damages of £100 to £999, enormous sums then in Massachusetts. In the July session for 1749, over forty-six percent of plaintiff claims had

TABLE 2.9
Plaintiff damage claims sought and awards (judgments) actually made, Newbury-Port Inferior Court, September 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>2</td>
<td>28.5</td>
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<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>14.3</td>
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<tr>
<td>£100 to £199:</td>
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<td>0</td>
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<tr>
<td>£200 to £999:</td>
<td>3</td>
<td>42.9</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**Average judgment for plaintiffs—**all contested cases:  £68

**Average judgment for plaintiffs—by jury:**  £220

[From the seven jury-decided cases where information is available. Average judgments are approximate due to rounding.]
been for sums from £100 to more than £1000. Such sums amounted to a great deal more than the annual rental value of most people’s estates in Massachusetts tax records and in many of the jurors’ wills from the period.\textsuperscript{83} In the Newbury Court for September, 1749, just over a third of plaintiffs’ claims averaged from between £200 to £1000 or more. A plaintiff claim for damages of £1000 or more would not be seen again, in the inferior court records here studied, until March of 1770. And while no claim that high was brought to the Newbury-Port session in the fall of 1771 (shown in Table 2.9), three cases, nearly 43\% of the total number of the contested cases where plaintiffs’ claims could be determined, saw plaintiffs demanding between £200 and £999 from the defending party. Judges generally were handling plaintiff claims for far less than those amounts—typically for a few dozen pounds, and only rarely for £100 or more.\textsuperscript{84}

The Essex records demonstrate that, if juries now in the early 1770s were rewarding plaintiffs more handsomely than in non-jury contests, they did so because, as in the period just before mid-century, juries were now handling far bigger claims in the inferior courts—at least for the moment. The continuing value of the juries of Essex to the people of that part of Massachusetts, and by implication beyond, was demonstrated once more in the September of 1771 when, at Newbury-Port, juries again met to hear and settle the most serious plaintiff claims brought against civil defendants that session. As shown in Table 2.9, those Newbury-Port jurors rewarded plaintiffs with enormous

\textsuperscript{83} Estimated from Pruitt, ed., Massachusetts Tax Valuation List of 1771, where the annual rental worth of most people’s entire real estate was valued at less than £30 in 1771. Jurors’ wills and estates are considered in Chapter 1.

\textsuperscript{84} From tabulations of the records of Inferior Court of Common Pleas, GSU, cited above. As best the author can determine, the justices settled three contested claims, each for £100 this session, and one additional claim of £400. No other claims handled only by the justices were for such sums. Partly from the defendants’ use of the new pleading form, the plaintiffs won two of those three suits involving £100, as well as the suit for £400; the losing party appealed in each instance, where almost certainly a jury would hear the case de novo, in the superior courts discussed in the next chapter.
judgments, £220 by simple mean. But if jurors rewarded victorious plaintiffs more handsomely than did the judges, it was because jurors were handling much greater plaintiff demands, averaging £157, compared to the justices’ cases, where plaintiff demands averaged £52. Once again, jurors were deciding much weightier civil suits, leading to weightier jury awards as well.

Such huge average awards were only one part of the story, however. For perhaps what Massachusetts defendants and their attorneys continued to love about juries was their ever hoped-for capacity to mix things up. That fall in Newbury-Port, the jurors did mix things up, rewarding defendants in nearly 63% of the cases they heard. Considering the plaintiff’s 71% victory rate in all contested causes generally, for most defendants most of the time, a jury trial was looking more like a winning prospect than ever. Those plaintiffs who were able to win damage awards from juries did well indeed. The only thing was, in front of juries, plaintiffs most often lost.\(^5\)

Time and again, jurors came to the aid of defendants, especially the debtors. Even when jurors sided with plaintiffs or creditors, they typically slashed the judgment awards that plaintiffs had demanded. As the Revolution loomed, the institution of the jury would only look better and better to many colonials under siege.

Jurors continued to demonstrate sympathy toward debtors and other defendants in trouble, as can be seen clearly in their work in that Newbury-Port September Court of 1771. In one case that fall, where the jurors found for the plaintiff, they awarded £270. But the damage demand had been for £400. In another big jury award to a plaintiff that session, the jurors had likewise cut another demand for £400 down to £364. In the last

\(^{5}\) Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 141-69.
heavy damage case where the jury sided with the plaintiff, the victor recovered £25. Unfortunately for that plaintiff, he had been seeking damages of £200.\(^{86}\)

That last plaintiff to win his case—yet win far less from the defendant than he had hoped—was “Caesar a Negro man, of Andover.” This leather dresser had sued Samuel Taylor, a cordwainer of Reading, in Middlesex, on a plea of trespass. Caesar charged that Taylor had forcibly “imprisoned & detained & kept [him] in Slavery,” treating him cruelly for more than three months during the summer of 1770. Facing an enormous damage liability, Taylor had obtained counsel, who had requested a jury trial for his client. The Essex jurors sided with the African American plaintiff, but they awarded him an amount far less than the £200 he had demanded for his confinement and suffering. Unhappy that he had to pay anything, however, defendant Taylor appealed.\(^{87}\)

Generally, Essex juries continued to demonstrate a partiality toward defendants, especially debtors. They did this by repeatedly slashing the damage awards to plaintiffs when they did not (or could not) simply find the civil defendant not guilty. The great majority of the defendants (and many plaintiffs) appear to have been, by their titles in court cases, quite ordinary farmers and craftsmen, including an occasional Caesar. Cordwainers and shoremen, fishermen and blacksmiths, yeomen, bricklayers, coopers and widows of husbandmen—commoners such as these march through the trial records as they attended to their business in court.\(^{88}\) It seems reasonable to conclude that jurors had sympathy for the ordinary defendant in trouble—for the underdog—because, as

\(^{86}\) Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 149, 154, 158.

\(^{87}\) Ibid., 158. Caesar’s actual award was £25:13:8, as well as court costs. For a comparison of this case and issues of slavery in Massachusetts with those of the south, see Emily Blanck, “The Legal Emancipations of Leander and Caesar: Manumission and the Law in Revolutionary South Carolina and Massachusetts,” Slavery and Abolition, 28:2 (August, 2007): 235-54. See also Chapter 3 of the current study to follow the appeal of Caesar v. Taylor in the superior court.

Chapter 1 argues, jurors typically were neighbors and commoners such as these. And as economic troubles spread during the 1770s, many a juror must have shuddered at the thought of how he would cope, were he in the defendant’s place—as financial underdog.

Before finishing the story of litigants’ struggles before juries in the early 1770s, however, it may be helpful to step back, to take a broader view of what was happening in the Essex inferior courts.

**Interlude: Elements of a colonial American law court culture**

A systematic reading of Massachusetts inferior court records over time illustrates the broad and consistent desire of civil defendants in serious financial trouble to ask jurors to hear their plight, in effect seeking the comfort of neighbors. Those neighbors, as jurors, generally did what they could to help out their neighbors in distress, either by simply rejecting altogether the plaintiff’s claim or, when that was impossible, by curtailing the plaintiff’s winnings, sometimes drastically. Before mid-century, such jury cases routinely had been heard in the inferior courts, where jurors tended to decide the weightier damage cases, though inferior court jurors had always heard quite ordinary damage suits as well. Moreover, study of the inferior court record over time illustrates the increasing tendency of litigants after mid-century to avoid more significant contests in the inferior courts and to push such cases into the superior court, for jury trial there.  

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In Massachusetts, litigants found a space, a level playing field or middle ground, in which to argue their causes. This judicial space\textsuperscript{91} was created because of a law court culture\textsuperscript{92} where such disputes, especially between lenders and debtors, were played out time and again. Beyond anything else, a systematic and chronological reading of Massachusetts court records makes clear that the love of litigation was nothing new to the denizens of Massachusetts. Fighting out every conceivable dispute in court went back to the formative years of the colony, as is illustrated in the records of the Quarterly Courts of Massachusetts from the colony’s early years.\textsuperscript{93} The inhabitants of the Bay Colony had always loved suing each other, it would seem, from the myriad times they did so, going back to the beginning, and, frequently, over what can seem today as the most mundane of issues.

But as the court cases under current discussion are examined, in one case after another, debt turns out to be the favorite cause of litigation. The records of the inferior courts of Massachusetts overflow with such disputes from mid-century to the Revolution. Reading through the records, dreary as they can often be, one almost gets the feeling that debt litigation was the closest Massachusetts colonials could come to blood sport, they indulged in it so. At the same time, however, serious issues were involved and, as has been seen already, serious money also could often be at stake. Regularly, juries heard these sorts of cases. And while litigants were more than willing to appeal a jury decision that went against them, from the evidence developed here, court adversaries generally

\textsuperscript{91} Stimson expands on her term “judicial space” at pp. 100-36, though her use of the term is unique and not necessarily that of the current study; and she considers the jury as the voice of the people at 69-89, though without elaborating on how that voice operated within a court system or culture.

\textsuperscript{92} See Chapter 1 of the current study.

\textsuperscript{93} See the Introduction to the current study, and see George Francis Dow, ed., \textit{Records and Files of the Quarterly Courts of Essex County, Massachusetts}, 8 vols. (Salem, MA: Essex Institute, 1911-1921), dealing with the founding period and following decades.
wanted juries to hear their disputes—certainly the more important ones, those involving higher financial stakes. Moreover, as will be seen in the superior court record, when criminal defendants were in danger of life or limb, or of having a hot-fired iron sear the flesh of their hands, or foreheads, or the lash applied to their naked backs—such defendants regularly demanded trial by their peers.

As colonial legal issues became more “political,” as colonial subjects found themselves increasingly threatened in their entitlements or their various “rights”—for example, in their right to a robust press or to a jury trial, issues to be considered shortly—colonials already had a judicial space, a law court culture, where antagonists could argue their causes, be represented by counsel, defend their interests and entitlements (perceived or real), and in the more important matters, compel at least twelve of their fellows to take a direct interest in their problems. Often these problems were not merely personal, but affected the community as a whole: for example, in the case of neighbors’ debts to neighbors. These community disputes were thrashed out in a colonial law court culture, where often the jury was on full public display, hearing concerns involving the community’s members and their promises to each other, particularly financial promises. As today, juries in the colonial period did not hear and resolve every case presented to the courts; far from it, as the figures here presented have shown. Juries, presumably always, have been an unpredictable and perhaps expensive means of settling disputes, thus leading some litigants to avoid them. But as resolvers of various types of community conflict, juries had their value.

From a broader perspective, however, it must be acknowledged that the value of jury trial in America was always Janus-faced. By way of analogy, one may consider how
David D. Hall has portrayed an earlier brand of New Englanders, some of them struggling Puritans, hanging out in the “horse shed” during the Lord’s Supper, longing for the salvific grace of the meeting house and its holiest sacrament but concerned about the power of that sacrament. For many feared the consequences of unworthiness, the failure to be spiritually clean enough to participate in this rite. To differentiate themselves from the Anglican “‘mixt multitude,’” Puritan reformers had made self-examination even more important as a prelude to the sacrament, since “the Lord’s Table [represented] a zone of danger.” As Hall explains, Puritans had understood that “[t]he Devil lay in waiting for the unclean…. So some ministers had emphasized “the frightful consequences of coming to communion without being ready for it.” Essential as the Lord’s Supper was to salvation, then, it presented mortal risks to the insufficiently prepared. The very power that saved the saint could also damn the unworthy.  

Juries, too, could save or damn. Perhaps many Americans today would share with those later colonials of the Bay region studied here, and undoubtedly others beyond, a similar ambivalence toward the judges, attorneys, and the culture of power represented and embodied in the court. The jury of one’s peers, too, must always have been an intimidating or daunting prospect for any litigant to face. But unlike the colonial gentlemen judges on high or the attorneys of special and arcane learning and language—and unlike those earlier Puritan ministers of intimidating sacramental mysteries—jurors were fellows in a more intimate, down-to-earth sense. Jurors were peers; they were neighbors. In the years following 1771, outside forces would remind colonials of the value of their juries as potential defenders of the

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individual in trouble. For jurors wielded great power in colonial American law court culture. Jurors even held sway over the law itself.\(^95\)

**The crisis of the Inferior Courts in Revolution, and the triumph of the Superior Courts in Colonial Massachusetts**

At Salem in December, 1771, the Essex Inferior Court sat once again to hear the quarrels, especially between lenders and debtors. These cases often followed the pattern that had evolved in the 1750s, of agreed-upon pleading forms to push real trials into the superior court. In addition, the inferior court that winter waded through a large number of simple defaults by defendants as well as nonsuits by plaintiffs. The disputes featured pretty ordinary stuff. The second case of the term, for example, involving an estate issue, was settled by reference. The referees came down in favor of the plaintiff, for some £23, apparently what he had demanded. The fourth case also had been referred, but a report was not presented, for reasons unclear, and the justices took no further action at the time. The ninth case had been referred as well, and the referees now awarded the plaintiff just over £8, apparently again what the plaintiff had wanted. Plaintiffs typically did well by referee judgments, as demonstrated by cases such as these. The eleventh case involved a slightly more serious claim. Plaintiff John Keezer, a Newbury-Port shipwright, was suing Ebenezer Norwood, a Gloucester trader, to recover £70 owed for his labors repairing the hull of a sloop. Attorney Daniel Farnham represented defendant Norwood and asked a jury to hear the dispute. Unfortunately for Norwood, the jury sided with the plaintiff, but for something less than what Keezer had demanded. The jury awarded the

\(^95\) The power of ordinary jurors to decide the law as well as the facts of a case was discussed in the Introduction and is developed further in the current study. In this context, see for example Horwitz, *Transformation of American Law*, chap. 1, and pp. 140-59, 226-30; and see Nelson, *Americanization of the Common Law*, 1-10, 13-35, 69-79, 165-74.
plaintiff some £66. Apparently Norwood was dissatisfied with his nearly £4 break, however, and so he appealed. The next jury case involved the alleged nonpayment for a cow. Daniel Killam, a Wenham yeoman, sued one Jacob Dodge for £6 in damages for failing to pay for the animal. Through his attorney, Dodge asked for a jury to decide the quarrel. The jury found Dodge guilty of the non-payment, but awarded the plaintiff what apparently was the original estimate of the animal’s worth, £4. The jury was not going to allow this plaintiff to inflate his estimate of damages. Still, as occurred so often, the defendant appealed. No doubt this case would be tried again in the superior court, probably by jury.

Thus the more impressive cases of just that previous September seemed to be settling down now into a more quiet, tedious monotony. In case after case, plaintiffs were haling defendants into court, typically for non-payment of their debts. Such tedium, however, was merely the calm before the storm. For war was on the near horizon.

Routine cases would continue, to some degree, in the sessions of “his Majesty’s Inferior Court of Common Pleas begun and held at Salem” starting July 11, 1775. After a number of cases (many of these non-contests), however, the record literally goes blank for a page, until the next, styled: “At an Inferior Court of common Pleas begun & held at Salem” sitting July 9, 1776. Missing were Justices Andrew Oliver and Peter Frye, but the court continued to be led by Justice Caleb Cushing and now included Benjamin Greenleaf, Timothy Pickering, Jr., and Samuel Holten. For two days the inferior court heard plaintiffs’ causes, overwhelmingly without a defendant’s response. Those

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96 Inferior Court of Common Pleas, Vol. V, 1770-1773, GSU, 170-77. Keezer’s actual jury award was £66:2:0.
plaintiffs met an astonishing default rate against defendants—in virtually every case. Nowhere before in the court records does such a string of defendant defaults occur. Thus the justices were left with little choice but to hold for the plaintiffs and give them what they had asked. And as the crisis continued into 1777, plaintiffs, too, were failing to appear in court to prosecute their cases. The failure of ever more plaintiffs to appear meant that judges simply had to dismiss these cases as nonsuits. For example, at least thirteen out of thirty-two cases were dismissed nonsuits at the Newbury Port court of September, 1777. Juries were nearly absent now from inferior courts, as court activity suffered serious wartime disruption.98

The inferior courts of Essex were pressing on as best they could, but clearly the Revolution was causing enormous difficulty in carrying out the simplest of court business. Since juries had largely disappeared from the inferior courts during this period, judges were left to handle the bulk of case loads—trying the occasional case when plaintiffs and defendants were able to attend. But even during these difficult early war years, juries sometimes did hear cases.

One rare jury case occurred in the Salem December Court of 1776. The issue involved a debt, where the defendant by his attorney “says that he does not want to pay”! With apparently little choice, the jury found for the plaintiff, awarding him the debt of £2:14:0 and court costs of £1:6:8.99

At that Newbury Port Inferior Court of Common Pleas of September 1777, mentioned just above, along with the many nonsuits and defaults, apparently six cases, at

98 Massachusetts Archives Coll. Inferior Courts, Vol. 6: Defaults flow by the dozens, in the Inferior Courts of Salem, July 1776, 365-69; of Newbury Port, September 1776, 369-75; and of Salem, December 1776, 376-386. Plaintiff nonsuits also shot up, at the September Newbury Port Court of 1777, for example, 428-51, ff.
least, were handled by panels of three referees. The referees gave victories to the parties in these six cases with a perfectly even hand, plaintiffs winning as often as defendants.

One uninteresting jury trial occurred, wherein the parties’ procedural pleading prevented, as intended, any real trial from occurring there at all. In this instance, the jury “found” for the defendant, thus providing the plaintiff with his grounds for an immediate appeal.

This case was not going to be tried in earnest in the inferior court. But as has been shown, such procedural pleading was nothing new in the Essex inferior courts after mid-century. In fact, such pleading—to get the real trial heard in the superior court (generally by jury, as will be seen)—was finally now the norm in the courts of common pleas. The practice appears to have occurred in at least six of about twelve live contests this session.100

From the mid-seventies and for some time to come, then, litigants in the inferior court increasingly were showing little interest in a full trial there, to be followed by another full trial on appeal, in superior court. Rather, by their pleadings in the inferior court, litigants were working to minimize their exposure to multiple trials in various courts. By the mid-1770s, most of the proceedings in the inferior courts of Essex had become thoroughly uninteresting. If most of these proceedings were uninteresting, however, one case was arresting.

The Court of Common Pleas, sitting at Newbury Port that fall in 1777, heard a case wherein one “Timon a Negro man of Andover … Labourer” sued merchant Peter Osgood Jr., also of Andover, in a plea of trespass. Timon claimed that he had been assaulted, falsely imprisoned, and “restrained … of his liberty & held … in servitude …

100 Massachusetts Archives Coll. Inferior Courts, Vol. 6, 428-51.
against the law of the land & against the will of him the said Timon”—demanding damages of ten pounds. Both Timon and Osgood had attorneys in this case.\textsuperscript{101}

Intriguingly, the trial did not go to jury, for reasons that may be surmised. The defendant Peter argued that Timon’s action against him:

ought not to have [proceeded] & [should not] Maintain because he says that said Timon is the proper Negro slave of the said Peter & that on[e] Thomas Chadwick at Andover aforesaid on the fourth day of June AD 1776 was possessed of said Timon as of his own proper Negro slave & being so thereof possessed the said Thomas then & there for the consideration of sixty Pounds bargained sold & delivered to the said Peter the said Timon (by the name of a negro man servant of about thirty two years of age named Timon) to hold to, the said Peter forever as his property where by the said Peter became possessed of said Timon as of his own proper negro slave & by virtue of the sale & delivery aforesaid hath ever since held & will hold … Timon as his own proper negro slave all which [Peter] is ready to verify wherefore he prays Judgment [against Timon, as] said Peter ought to have & maintain [his property].\textsuperscript{102}

Timon appears to have offered two responses: the first, a standard plea these days, claiming that Peter’s argument “in manner & form above pleaded is no sufficient answer in law to his said Timons [sic] declaration,” and secondly, more typical of a defendant’s response in pleading, “that he the said Timon hath no need nor is he bound by the law of the land to answer [to the defendant] thereto…. ” As was explained in the Introduction and will be further developed below, colonials such as Timon (or his attorney) well understood that American juries were fully empowered to make sweeping judgments on “the law of the land,” another reason why American colonials so loved the institution of the jury, as cases such as the Zenger trial would illustrate.\textsuperscript{103}

\textsuperscript{101} Ibid., case at pp. 447-48.
\textsuperscript{102} Ibid.
But in arguing that he was not bound by the law of the land to answer the substance of the defendant’s declaration, perhaps Timon (or his counsel) also sensed that he had risked overplaying his hand. Moreover, it is possible that Timon feared that some of his neighbors may have known whether, in fact, he had been the property of Thomas Chadwick and had now become the possession of Peter Osgood. After all, a circuit justice of the Essex courts may not have had the same depth of such local knowledge as Timon’s peers. Probably, counsel urged Timon not to take a gamble on the knowledge of ordinary members of the community in such a case, avoiding a jury, instead arguing “the law of the land” to judges who, in this era, were not necessarily legal experts anyway.\textsuperscript{104} What may clearly be inferred from the record is that Timon’s attorney struck a deal with Peter Osgood, so that Osgood was “acquitted & forever discharged” of damages, as well as of costs, in the case—unusual language in the records, to say the least.\textsuperscript{105}

Meanwhile, the Essex lower courts struggled until about 1780. Wartime left their caseloads much lower than what the county’s inferior courts had previously known. Those parties who did make it into the inferior court sought, whenever possible, to avoid full-blown trials there. Rather, parties worked to appeal their causes for a first-time hearing—in the superior courts. Precisely this same phenomenon may be observed by the 1770s in Worcester County, for instance.

\footnotesize{
\textsuperscript{104} Horwitz, \textit{The Transformation of American Law}, 1-30, 140-59; Nelson, \textit{Americanization of the Common Law}, chaps. 1-2.  \\textsuperscript{105} Massachusetts Archives Coll. Inferior Courts, Vol. 6, at 448.}

As in Essex, litigants in Worcester County also appear to have struggled with the eccentricities of the Massachusetts court system on the eve of Revolution. The inhabitants of Worcester also wanted to avoid having repeated jury trials at various levels of courts. Juries were not settling significant cases in the inferior court of Worcester in September of 1776. Indeed, Justices Artemas Ward, Moses Gill, and Samuel Baker presided over no jury trials that term, but neither was there much other court work done that September, thanks largely to the war. Of seventy-one cases in total recorded that fall, forty-eight were continued over to the next session. All but seven of the cases not continued into future sessions were default judgments, where juries could not have been used in any event.

In the Worcester County Inferior Court of Common Pleas meeting in September of 1778, the docket of forty-six causes shows fifteen of these continued or just dismissed. Juries did hear five trials, and referees settled another three. Nine cases saw the defendants default. In those trials that Worcester juries did hear, the highest award was for £100, the next was for £5, and another was for £4. One plaintiff recovered forty shillings, or £2, and yet another recovered the unspecified value of possession of lands. Most of these cases—except certainly for that one resulting in the award of £100—involved trifling sums. For the most part, the inferior court juries of Worcester, like those in Essex, were no longer hearing substantial lawsuits.

108 Ibid., 571-93.
But before the war, inferior court jurors regularly had heard the most significant suits. And if jurors sometimes had rewarded plaintiffs more handsomely than had the judges, it was because plaintiff claims tended to be higher in jury cases: averaging £119 for those cases decided by jury, across all the cases studied for this chapter, compared to less than £73 in those cases argued before the judges. Table 2.10 presents the totals for all cases presented here.

### TABLE 2.10
Summary tabulation of all inferior court plaintiff damage claims sought and awards (judgments) actually made in all tables presented in this chapter.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>32</td>
<td>29.4</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>22</td>
<td>20.2</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>23</td>
<td>21.1</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>11</td>
<td>10.1</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>17</td>
<td>15.6</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>4</td>
<td>3.7</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £44
Average judgment for plaintiffs—by jury: £64

[From the 109 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]

**Conclusion**

By the 1770s, then, a broader trend was becoming clear. In serious civil disputes, litigants and their attorneys now were working regularly and systematically to have their trials—usually by jury—heard essentially on original jurisdiction in the superior courts of Massachusetts. By any measure, the stakes were higher still for civil parties in

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Justice, since he was the sole justice to take a crown salary, allegedly rendering him dependent on royal authority, 146-47; and see Wood, *Creation of the American Republic*, 65-71.
superior court, where decisions usually were final. And for criminal defendants who found themselves in superior court, facing humiliation, branding, physical mutilation, or worse, the need for jury protection, as will be seen in the chapter to follow, would be paramount. Here, in the higher courts, juries always had been essential to the preservation of their neighbors’ money, life and limb. And just as citizen jurors had so often tried to shield those in economic straits in the inferior courts of the past, so superior court jurors would show a marked tendency to favor desperate defendants in civil as well as in many criminal cases.

But long before the revolutionary era, citizen jurors at both levels had became accustomed to the experience of the independent exercise of real power over the lives and fortunes of their neighbors. This experience is what Alexis de Tocqueville had in mind when he declared that American juries instill in citizens the habits of citizenship—that jury service was a “free school” of democracy, “establishing the people’s rule” and providing “the most efficient way of teaching them how to rule.” 110 When jurors ruled, they protected their neighbors, so that debtors, servants, and underdogs generally found in their peers a powerful shield against those who would make them submit.

Meanwhile, from mid-century straight to Revolution, litigants in more serious cases were increasingly showing preference for the superior courts and their juries to adjudicate their disputes. The superior courts of Massachusetts, then, are the venue to which this study must now turn.

110 Alexis de Tocqueville, Democracy in America, ed. J. P. Mayer; trans. George Lawrence (New York: Harper, 1966, 1969), 274-76. As developed elsewhere in the current study, the concept of citizen juror has parallels with what Peter M. Shane refers to as “autonomous citizenship,” derived, he argues, from the establishment of “democratic legitimacy,” in Madison’s Nightmare: How Executive Power Threatens American Democracy (Chicago; London: U of Chicago P, 2009), 7-8. Alternatively, the Introduction and last two chapters of this study argue that the reality and practice of autonomous citizenship, as exercised by jurors, provided an environment for the evolution of democratic society and for notions of its legitimacy.
During the night of May 18-19, 1770, one Owen Richards, yeoman of Boston, suffered greatly at the hands of some of his neighbors. Allegedly, Richards that night had endured an “assault on the body”; he later reported in court, according to the record, that certain attackers did “violently beat wound bruise and evilly intreat so that his life was thereby put in great danger.” What Owen Richards’s attackers had done to him was terrifying indeed. Richards, now in Suffolk County Superior Court in late August, 1772, recounted his ordeal. He alleged that Boston wig maker Joseph Heakley, among others, had imprisoned him “for a long time to wit for the space of six hours,” stripping him “naked to the skin,” stealing “his hat, wig, coat, waistcoat, and shirt, and also a gold sleeve button, two handkercheifs [sic] his pocketbook with sundry papers therein of value … [including] an original note of hand for seven pounds ten shillings and sundry original receipts for moneys paid and other papers of value also one peice [sic] of gold money called a Johannes and two spanish mill’d dollars in silver being all of the value of thirty pounds lawfull money.” Richards claimed that none of these valuables had been returned to him. His attackers then forced him into an open cart. What came next, as Richards alleged, was horrific:

[T]he said Joseph did then and there also cover and besmear the said Owen’s head and face and naked body with Tar and cover him over with Feathers upon said Tar and cruelly & inhumanly set fire to said feathers and then and there dragged said Owen in said cart thro’ divers streets of said town of Boston and from one end of said Town to the other for the space of six hours … and fixed a Label to his the said Owen’s breast with a writing thereon imparting that the said Owen was a common Informer and in that condition exposed him … to the contempt and resentment of his Majesty’s leige Subjects [sic] and as a publikc spectacle
thro’ said town[,] and other outrages and enormities on him [were committed by Joseph Heakley and unnamed or unknown others].

Clearly, Owen Richards had endured a most unpleasant night. He was not going to take a tar-and-feathering—or the theft of his personal property—lying down. Richards demanded his right to justice. If Richards had his way, Heakley would pay dearly for those and other “outrages and enormities,” as the superior court language conventionally put it. Richards was demanding a thousand pounds for his injuries and suffering.

Unfortunately for Richards, the Inferior Court of Common Pleas meeting in Boston that past April had found for the defendant, Joseph Heakley, awarding him his costs of court. Obviously unwilling to swallow this further humiliation, Richards had asked the superior court to review things.

Defendant Heakley had asked for a jury trial, originally, at the Boston inferior court held in the spring of 1772, through his attorney, John Adams. Even while this jury sat, the parties appear to have been making use of the now-typical, newer forms of procedural pleading, discussed in the previous chapter, to move a real contest into the superior court, saving the time and costs of full-blown, duplicate trials. These parties would have had another reason to prefer a substantive hearing in the superior, rather than

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2 Superior Court of Judicature, 116. See also Legal Papers of John Adams, I, 39-40: Adams represented two other defendants in related cases, Joseph Doble and Benjamin Jones. Adams won for Doble a jury acquittal in inferior court, while Richards discontinued his suit on appeal in the superior court. Adams won a jury acquittal for Jones in inferior court, the appeal eventually being dropped.
in the inferior, court. Pushing their original, substantive trials into the superior court would avoid tipping their hand in a first trial, at the inferior court, when a second trial in superior court was likely to follow anyway—an especially important concern in criminal trials. In this civil suit, Adams’s report and the court record suggest that the proceedings at the inferior court level were mainly intended to move the contest to a higher jurisdiction. The proceedings at the inferior court level were mainly intended to move the contest to a higher jurisdiction. It seems reasonable to conclude that, after a perfunctory jury hearing in the inferior court, the parties had appealed to the superior court at Boston, to conduct their real battle there.

Now in the superior court at Boston in August of 1772, Adams again asked for a jury to hear Heakley’s case. This jury’s judgment—what might be considered as something of a split decision—followed an increasingly common pattern in the Massachusetts superior court by the early 1770s. The jury found defendant Heakley guilty, restoring to the plaintiff some of his pride, perhaps. But Richards’s pride commanded a very disappointing cash value. While Richards had demanded a thousand pounds in damages, the jury now saw fit to give him but twenty—less, indeed, than the value of the objects stolen from him on the night of his attack. If Richards had lost £30 in personal effects on the night of his assault and had suffered terrible degradation, and was now to be awarded with just £20, one must wonder: had the superior court jury actually meant to insult Owen Richards? What must Richards have made of such a “victory” by his peers in superior court?

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3 See Legal Papers of John Adams, I, ed. n. 33, pp. 39-40, and see sources listed there, as well as Adams at 39-41, II, 173-75 ff.; Superior Court of Judicature, 116, and see Reel 16, passim; Zobel, Boston Massacre, 352, sources at n. 49.
4 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16. The superior court record makes clear that a jury settled this case, at p. 116.
5 Ibid., at right side p. 116.
A clue to the jury’s parsimonious judgment may be found in the “label” or placard Richards was forced to wear during the night of his ordeal. He had been branded by the organizers of his torment as a “common Informer” and subjected to “the contempt and resentment of his Majesty’s leige Subjects and as a publick spectacle.” Such were common tactics of colonial American protestors even before the Revolution.\(^6\) In fact, Richards had developed something of a reputation in Boston as a snitch, an “informer,” or a loyalist—take one’s pick. He seemed always trying to help the Massachusetts royal administration, against the John Hancock and Sam Adams crowd. For example, the spring of 1768 had seen the administration trying to bring Hancock under heel. As the government attempted to crack down on smuggling, inspectors moved to condemn Hancock’s brigantine, the *Lydia*, whose crew was suspected of illegal trade. Senior tidesman Owen Richards, a low-ranking customs official, had been overzealous in his efforts to ferret out contraband below deck on the *Lydia*, sneaking below without warrant—in violation of Massachusetts law at the time—to gather his evidence. Hancock and his men had discovered Richards and released him, but only after a frightening going-over. Now, in the spring of 1770, Richards had been at it again, informing on the alleged smuggling of another owner of another boat. Richards appears to have been working hard to court radical violence against himself.\(^7\) As Pauline Maier has described, colonial Americans in the run-up to revolution subjected tax collectors, informers and

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other opponents of “American liberty” to organized, sometimes harsh physical violence. What happened, then, when the victims of such violence brought their alleged attackers into court?

This chapter explores some of the ways by which the courts and their juries provided an important venue for the playing out of social and, sometimes, political conflict during the late colonial period. The superior court record offers the case of Owen Richards as an example of such social and political conflict, brought into the courts for resolution. In Richards’s case, the superior court jury did its duty to oppose terrible violence against one of his Majesty’s “leige Subjects.” But it is equally clear that these jurors were half-hearted in the effort. Their monetary judgment was embarrassingly minimal for what could have resulted as a murder; such a paltry award must have stung. On the other hand, since these jurors apparently believed that Richards was a tax violations informer (that is, a political opponent of “the people”), they seemed determined to deliver a potent political message. Considering his trauma, Richards’s tiny monetary award thus stood as eloquent testimony to the power of a jury to shield perceived defenders of “the people.” Richards’s case illustrates how a colonial popular jury enforced a sort of rough justice in an increasingly divided civil society. As will be seen in this study of the period leading to Revolution, juries frequently rose to the defense of neighbors’ entitlements in such highly-charged, politicized cases—as in this case, where jurors effectively punished an alleged tax informer. And as Americans came to see jurors as powerful defenders of their entitlements, their commitment to trial by jury would only be enhanced. Indeed, the ideal of the people’s panel would become enshrined

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8 See the citation above, Maier, From Resistance to Revolution.
in popular memory, above and beyond whatever actual services jurors had provided to the “cause of liberty.”\textsuperscript{10}

This chapter continues the analysis of the previous chapter, seeking a better understanding of the role of the jury in the development of a colonial American law court culture, using Massachusetts as a laboratory for this study. For Massachusetts played an extremely important and influential role in the evolution of the jurisprudence of the other American states as well as of the national government itself. What difference did it make in Massachusetts jurisprudence, then, when juries, rather than judges, decided cases? As the previous chapter explained, after the mid-eighteenth century, the more financially serious civil suits were more often heard in the superior court than in the inferior courts of the Bay Colony. These superior court cases, that is, often involved substantially greater plaintiff damage claims (in colonial money) than was generally the case in the inferior courts. Moreover, criminal issues involving life and limb were also heard in the superior court, where juries regularly determined the administration of colonial justice. What was the effect of this democratic insinuation of popular juries into the daily workings of judicial administration by royal justices? What were the broader effects of incorporating the demos into an otherwise elite law court culture, populated by gentlemen justices and by an increasingly professionalized and wealthy bar?\textsuperscript{11}

\textsuperscript{10} For the colonial and early republican attitude toward juries as bulwark of liberty, see, for example, Jeffrey Abramson, \textit{We, the Jury: The Jury System and the Ideal of Democracy}, rev. ed. (Cambridge, MA; London: Harvard UP, 1994, 2000), 22-45.

\textsuperscript{11} The first chapter of the present study considered the nature of the ordinary juror in the “law court culture” of late colonial America, specifically of Massachusetts. Morton J. Horwitz emphasizes the connection between the professionalization of the bar and the rise of commercial lawyers, made wealthy by their connections with and service to the commercial elite of early nineteenth-century America, in \textit{The Transformation of American Law, 1780-1860} (Cambridge, MA; London: Harvard UP, 1977), 140-59, 226-37, 253-66. While this study is concerned with the period preceding the early nineteenth century, the professionalization of the bar and its corresponding concern for substantial economic success can be seen in the pre-Revolution career of John Adams, nowhere more than in his campaign against those he called
The purpose of this chapter, then, is to achieve a better sense of the importance of jurors and their democratizing influence on the superior courts of the colony (and, later, the state) of Massachusetts. Given their varying use at the inferior court level, how frequently were juries called upon in the superior court, and why were they called? (The previous chapter argued that, where the stakes were higher—where defendants saw greater exposure to higher monetary damages—the more likely an inferior court jury generally was to hear the dispute). Furthermore, at the superior court level, how often did jurors side with defendants or with plaintiffs? In what sorts of cases were juries most often called, and by which party? Did the presence of attorneys for one or the other side have an impact on the likelihood of a jury to hear a trial? Such are central questions for this chapter. And as in the previous chapter, the key question remains: what difference did it make when juries, rather than judges, decided cases? It is hoped that the answers to these questions will help establish when and how juries were used in important venues in the Massachusetts superior court, to better understand the workings of Massachusetts courts and their juries. In better understanding the role of the men who served on Massachusetts juries, this study hopes to provide insight into the law court culture developing in Massachusetts on the eve of Revolution, to show how jurors, as neighbors, supported other neighbors in trouble. From their experience in the use of this protective jury power came a sense of citizenship that could support a revolution, by transforming subjects into citizens.

Jury use in the Superior Courts of Massachusetts—An analysis of sessions: when and why juries were called

Several findings are clear from the examination of a number of superior court sessions considered in this chapter. In particular, from the superior court reports analyzed here, it is striking that at no point did jury use in the superior courts here evaluated ever fall below fifty percent of live or “contested” civil cases—those actual trials where opposing litigants brought into court live issues and requested judgment. From the late 1760s through the 1770s, jury use in the superior courts hovered generally between 70% to well above 80% of cases, falling to just over 57% in May 1772, and then to precisely 50% in June 1772. But from August, 1772 to 1776 and beyond, jury use rebounded and remained at its typically high level in the superior courts. In fact, in several of the later sessions of superior court cases considered here, the use of jurors to hear and decide cases actually reached 100% of the causes that the Massachusetts superior courts managed to try during the early, tumultuous years of revolutionary war.

Generally, as will be seen, civil defendants enjoyed high success rates against plaintiffs in jury trials. On the other hand, on those occasions when plaintiffs’ success rates were higher before panels of twelve, those superior court jurors—like their inferior court counterparts discussed in the previous chapter—were likely to curtail the civil damage claims of plaintiffs. Indeed, sometimes superior court jurors dramatically diminished the magnitude of plaintiffs’ demands in their winnings. The court records

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12 See Chapter 2 for further discussion of the use here of “live” or “contested” cases, for explanation of how cases were selected in this study, and for comment on the methods and limits of comparison between judge-decided contests and those suits decided by juries. See also comment there on the use in tables of comparisons between judgments in all contests, including the justices’ judgments in live cases and in referred contests, with those of juries. See the text and/or notes for comparisons in this chapter of plaintiff claims in judge-decided contests (given the limits explained in Chapter 2) with those in jury-decided cases.
often show jurors shielding defendants, even when jurors had to enter a judgment against a defendant. In some superior court sessions, such as that of Suffolk County in February, 1772, juries frequently not only protected defendants in civil cases, but they severely slashed plaintiffs’ damage requests, offering significant protection to debtors from exposure to economic loss to creditors. Throughout the pre-Revolution years, then, jurors frequently stood as a potent shield for those in economic distress.

Moreover, even in that low point for jury use, in the Superior Court for Essex County meeting in June, 1772, mentioned just above, where juries were called upon to settle only fifty percent of the contested cases heard that session—even then, jurors decisively mitigated plaintiffs’ claims, as they had in past years. Essex superior court jurors may have given plaintiffs their victories in court that June, as will be seen. But as also will be seen, those jurors were stingy in their awards to winning plaintiffs. Generally, superior court juries tended to reward debtor-defendants in their judgments and to make it tough on plaintiffs to collect anything close to what they had demanded.

Again, where the financial stakes were high, or where serious damage claims were being alleged by plaintiffs, civil defendants would seek to have a jury hear their cause in the superior courts. The presence of legal counsel often coincided with the defendant’s request for a jury trial. The records suggest that legal counsel well understood the value of a jury to a defendant’s chance of success—or at least to cutting his financial losses in court.

Finally, the superior courts also heard criminal cases, where liberty or life itself could be at risk. Here, too, criminal defendants most often would seek a jury trial, particularly if the potential punishment were severe. Frequently, criminal defendants
would do well by their peers—in several court sessions winning against the king by a ratio of two-to-one or more. An important caveat must follow, however. Jurors often, like judges, could be tough on crime, as the saying goes today. Usually jurors had little sympathy for counterfeiters, for example, as will be seen in a number of trials. However, more than a few alleged perpetrators of ghastly offenses managed, by jury, to escape the gallows. The people’s voice by a jury verdict, then, did not guarantee mercy in heinous crimes, although more than a few defendants were spared the harshest penalties, even in murder trials, by judgment of their peers.

This study of eighteen full case sessions of the Superior Court of Judicature from eleven Massachusetts counties, from August of 1769 through February of 1777, seeks to understand how superior court business and its use of jurors evolved—as did their inferior court counterparts—during this period. For as explained in the previous chapter, after mid-century, civil parties and their attorneys were pushing serious court business from the inferior into the superior courts, with the help of inferior court juries. As with the inferior courts, a systematic study of superior court records, over time, allows the scholar to observe changes in the superior courts, as jurors confronted increasing numbers of highly politicized cases as well as increasingly serious debt suits. In some of these cases, considered in the final two chapters, juries acted to defend individuals’ entitlements—to defend what patriots would call the “people’s rights.” What becomes clear is that juries were central to the culture of these courts. Moreover, those panels of twelve were a bulwark for defending the entitlements and claims of many colonial American defendants—particularly of debtors and of those in great distress in criminal

\[13\] See Chapter 2 for explanation of how case sessions were selected—largely at random, but also with an eye toward differences in and evolution of court and jury practice from the earlier to the later years of the period under study.
cases. If juries were employed frequently at the inferior court level, as related in the previous chapter of this study, they would be used consistently and reliably in the superior courts. Routinely by the 1770s, as shown by a systematic reading of the court record, defendants had shifted to the newer pleading forms, described in Chapter 2, to push more significant trials into the superior courts of Massachusetts, where jurors, generally, decided these cases. What sorts of trials did jurors hear in the superior courts of Massachusetts, then, and what were the consequences when jurors, rather than judges, decided these civil and criminal disputes?

**Juries in the civil and criminal proceedings of the Superior Courts of Massachusetts**

While it may have appeared as though jury use was waning in the inferior courts from the late 1740s to the Revolution, jury use never waned in the superior courts, until the Revolution just about closed those courts, based on the records considered here. Jury use in the inferior courts did decline when parties sought to move their disputes into the superior court, to have an essentially original trial heard there, avoiding repeated trials by jury in the inferior as well as superior courts. But jury use remained consistent in the superior courts of the Bay Colony and later Bay State, whenever the courts were open and available to parties, well into the crisis of colonial rebellion and war. The analysis here of eighteen full sessions from the Superior Court of Judicature, from eleven Massachusetts counties, demonstrates the high regard American subjects of His Britannic Majesty maintained for that celebrated English entitlement of trial by one’s peers—particularly in the superior court of Massachusetts.

Love of litigation before jurors is clearly evident, for example, in the August 1769 Superior Court of Judicature session held in Suffolk County, at Boston. This session
witnessed more than seventy-five significant cases presented before the court, with twenty-five issues actually in dispute between two parties attending and demanding judgment. Of these twenty-five live or contested issues, twenty-one were heard by jury.\textsuperscript{14} In other words, these twenty-one contests heard by juries in Suffolk that August—fourteen civil and seven criminal cases—constituted fully 84\% of the contested cases that session. When litigants brought their cases before the superior court, as illustrated in Suffolk County that August, they overwhelmingly demanded that juries hear and settle their disputes.

Although the records are spotty on the point, presumably all of the civil defendants (and clearly all the criminal defendants) were responsible for their trials being heard by jury. It is unclear whether any civil plaintiff this term joined the defendant, as sometimes could occur, in making the request that the trial be heard by jury.\textsuperscript{15} Also unclear is what role attorneys may have played this session in determining whether a jury was to hear a civil case. At least one case this session saw attorneys representing the plaintiff’s side of the civil dispute, but the record is silent on the role of the plaintiff’s representative regarding jury use. Likewise, at least one civil defendant was represented by counsel this session. Presumably this attorney recommended that his client have a jury hear the case, but such cannot be known with certainty.\textsuperscript{16}

How serious were the civil issues heard by the Suffolk Superior Court in Boston that August? Table 3.1 below illustrates the plaintiff damage awards sought by jury as opposed to what amounts actually were received. Of the plaintiffs’ claims that can be

\textsuperscript{14} See Chap. 2 for discussion of live or contested cases.
\textsuperscript{15} See below, for example, in the discussion of the Superior Court for Suffolk County of February 1771, where apparently plaintiffs in five cases requested trial by jury, joining with the defendants’ requests in those trials.
\textsuperscript{16} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 221-55.
determined from the court records, one-quarter of plaintiff damage claims were relatively minor, for less than £20. No claim was reported for an amount between £20 and £49. Just over eight percent (8.3%) of plaintiffs’ claims were for damages of £50 to £99. Significantly, however, fully two-thirds of plaintiff claims were for damages between £100 and £1000.\textsuperscript{17} The vast bulk of the civil cases heard by jury in the superior court in Boston late that summer were for very large amounts of money indeed.\textsuperscript{18}

How did plaintiffs and defendants fare in their struggles before their peers in this superior court session? Defendants seem to have met a most friendly reception by the jurors hearing their cases that August, winning their causes 64.3% of the time. In all civil trials combined, on the other hand, defendants’ chances narrowed quite a bit, to a success rate against the plaintiff of 53%. Juries appeared significantly more sympathetic to defendants than judges overall.

At first glance, when defendants did lose before Suffolk Superior Court juries, their monetary losses appear not significantly different from what occurred in all contests decided by justices alone and by jury. As Table 3.1 shows, in all civil contests, victorious plaintiffs took in a mean of approximately £24, versus £25 when jurors heard and decided their causes. Given that two-thirds of these plaintiffs had asked jurors and judges for damages amounting to something far greater, the typical winning plaintiff leaving court might have been forgiven for feeling quite disappointed. But while it might appear that superior court juries that August rendered judgment awards to plaintiffs not significantly different from those rendered by judges, such an appearance would be misleading. In

\textsuperscript{17} Ibid.
\textsuperscript{18} A perusal of the \textit{Massachusetts Tax Valuation List of 1771} will demonstrate that these sums were substantial in comparison to how real estate was valued overall. See the printed work, ed. Bettye Hobbs Pruitt (Camden, ME: Picton P, 1978, 1998).
TABLE 3.1
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Suffolk County, August 1769 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>1</td>
<td>8.3</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>3</td>
<td>25</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>5</td>
<td>41.7</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £24
Average judgment for plaintiffs— by jury: £25

[From the 12 jury-decided cases where information is available. Average judgments are approximate due to rounding.]

fact, the difference between jury justice and judgments rendered by judges (including those cases referred) was substantial. For despite similar average awards to victorious plaintiffs by justices as well as by juries, plaintiff demands in judge-decided contests averaged £23. Meanwhile, jurors were deciding much more serious civil suits, where plaintiffs’ demands averaged £181.19

It must further be remembered that in the majority of civil cases this term, where juries found for the defendants, those defendants ended up owing nothing to their creditors (or to plaintiffs claiming some other type of harm). Indeed, those defendants had court costs paid by surely disappointed plaintiffs. For example, when George

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19 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 221-48. As explained in the previous chapter, data on plaintiff demands are sometimes lacking especially in judicial cases, so that overall average judgments can sometimes appear higher than demands, which was not the case here. As in the previous chapter, then, for a variety of reasons, data generated from court records must be interpreted as illustrative of the larger argument, not as supporting a “scientific” or hard statistical analysis.
Wilmot of Boston lost his case against his debtor, mariner Nathaniel Porter of Wenham, the superior court jury verdict meant that Wilmot was out not just the £120 damages he demanded over the debt. On top of that, he owed the expenses of court. Even when plaintiffs won their cases, superior court juries tended to whittle down their winnings, often dramatically. During the same superior court session that August, a jury awarded plaintiff John Gill £75 (and £12 in court costs) against defendant John Main, stemming from a charge of battery. But Gill originally had sued Main in inferior court for £200, where he had been awarded £130, for the serious injuries and suffering he had sustained. No wonder, then, that defendants sought new trials before superior court juries, where their losses could be so significantly reduced. More often this session, however, juries sided outright with defendants, slashing their liability to zero. Such was the case where William Torrey sued Joseph Torrey, in an apparent family dispute involving a debt of £508. Since some time had passed and the plaintiff had suffered additional costs over the debt, William was now asking for slightly more in damages, £520 from Joseph, in the superior court. The defendant had demurred in the inferior court, pushing the real trial into the Suffolk Superior Court for adjudication. There, the jury granted the plaintiff nothing—besides which the plaintiff was ordered to pay all court costs.\(^{20}\) Civil defendants were doing quite well by juries, then, in superior court in the summer of 1769.

Criminal defendants in the superior court dock that August, however, did not make out as well by judgment of their peers. In the criminal cases heard this session, five defendants arguing their innocence lost their trials while three others won not-guilty

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\(^{20}\) Superior Court of Judicature, Massachusetts Archives, Coll., Reel 15, 234, 235, 248.
verdicts, a success rate for criminal defendants of 37.5%.\footnote{Again, as with civil cases discussed in this and the previous chapter, only “contested” criminal cases are considered here, since juries could never hear a non-contested criminal case, that is, where the defendant merely pleaded guilty, hoping perhaps for the justices’ mercy. Of the eleven criminal issues brought before the Superior Court of Suffolk this session, seven contested trials saw eight defendants arguing their cases, counted here, then, as eight defendants’ causes. In one case involving a riotous, unlawful assembly, several other defendants stood with the named defendant, creating a mixture of defendants in a confusing record. In all these cases this session, three defendants (but possibly a fourth) were found not guilty by jury, while at least five (but perhaps another three) defendants were convicted. The current study focuses as consistently as possible on the cases where judgments are plainly or clearly discernable from the record. In this Suffolk session, four other defendants apparently pleaded guilty, suffering their punishments and making trial by jury impossible. Of the remaining eight defendants named or whose cases are relatively unambiguous in the record, note that several of these guilty verdicts for those five convicted were for lesser charges, discussed in the text below.} One of these cases saw a mixed verdict by the jurors where, in the same case, some defendants were convicted while others were acquitted. Moreover, in three instances, jurors saw fit to find the defendants guilty, but for lesser charges. For example, jurors found Boston laborer James Smith not guilty of breaking and entering a dwelling house, but they found him guilty nonetheless of a theft of various articles of clothing, sparing him a harsher punishment.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 251.} Another laborer, George Fitzgerald, was indicted for breaking and entering a dwelling house, along with the theft of sundry items of personal property. He pleaded not guilty and was acquitted of the burglary; however, the jury found him guilty of breaking and entering. Fitzgerald’s punishment was severe enough. He was ordered to be whipped twenty stripes on his naked back and fined just over £9. Unable to pay this fine, he lost his freedom by being ordered into three years’ servitude to repay his debt.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 249.} At least Smith and Fitzgerald had avoided a branding on the forehead, as happened to another criminal defendant later in the session.\footnote{See the case of John Jones below.}

It is difficult to say with certainty why some criminal defendants declared their innocence and demanded a jury trial while others pleaded guilty and took their lumps.
Doubtless the gravity of the charge had something to do with the decision. Accused murders and rapists, for example, did not plead guilty in the Suffolk Superior Court that August.

Consider the case of Hephzibah Blackman, a single woman of Boston, who stood accused of bearing a “live female child, bastard” and drowning that baby in a privy or necessary. A grand jury had indicted her for murder.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 248.} Now in late August or early September 1769, she pleaded not guilty and was acquitted by the jury. As will be seen, this jury acquittal of a single woman accused of murdering her bastard child was not uncommon. Another criminal defendant had less success before his jury. Charles Johnson, a mariner, was indicted for assaulting “an Infant of the Age of ten years & eight Months,” a girl named Deborah Wheeler. Johnson was accused of having tried to “ravish & Carnally know her,” wounding her in his attempts so that her life was “greatly endangered.” He pleaded not guilty. His peers found him otherwise, however. His punishment was to sit in the pillory for an hour and, after that public humiliation, he was whipped thirty stripes on his naked back.\footnote{Ibid., 251.} The record does not indicate whether he survived the ordeal. A punishment of thirty lashes was just about unprecedented.\footnote{The records consulted in the present study suggest that twenty lashings were rather severe punishment, while thirty were exceedingly rare.}

Alexander Ross, a gentleman, was indicted along with several laborers in a riotous, unlawful assembly in Boston, with intent to disturb the peace. Disturb they did, “with swords & Bayonets” assaulting one Peter Barber, a town constable, and stealing from Barber’s custody a man named Peter Riley, being held in another matter. All involved pleaded not guilty. Nonetheless, the jury found Ross and three accomplices
guilty, while one or two others were found not guilty. Each guilty man had to pay a £7 fine in addition to other sureties for his future good behavior.\textsuperscript{28}

As with civil cases, then, when the criminal charges were serious and the potential penalties severe (whippings, branding, or execution, for example), criminal defendants sought a jury trial during this superior court session. Those Suffolk jurors this session had shown sympathy toward one female accused murderer. Perhaps they felt sorrow or even horror at the plight of this unwed mother. (Jurors’ attitudes toward women in such circumstances will be explored further below.)

Otherwise jurors tended to mete out tough justice. Yet this tough justice was often tempered by mercy. By contrast, one could consider the fates of those four criminal defendants who simply pleaded guilty during this session. One thief was ordered to pay a fine, another was condemned to be whipped fifteen stripes and to pay a fine, and an accused house burner was ordered to pay surety. And then there was the case of John Jones.

Jones, a Boston mariner, was indicted for breaking and entering a shop and for stealing various items, primarily yards of cloth and some clothing. Apparently escaping from captivity, he was recaptured, and upon being brought into superior court, he pleaded guilty to the charges. That is, Jones declined his right to a jury hearing. So the justices heard his case and handed down a hard sentence. Jones was ordered to be branded on the forehead with the letter B, and to pay treble damages of more than £19, as well as the costs of his own prosecution. Unable to come up with such money, he was handed over for seven years of bound servitude.\textsuperscript{29} It is not clear from the record whether Jones had an

\textsuperscript{28} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 253-54.

\textsuperscript{29} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 254.
attorney representing him in superior court that day, but one strongly suspects he did not. The record makes no mention of an attorney in his case, where otherwise attorneys seem generally to have been noted. Jones apparently was poor. This, too, might have made representation unlikely—although other apparently poor individuals this session seem to have arranged for counsel in court. Perhaps he simply believed his case was hopeless.

What the record does suggest, however, is that Jones might have been treated more leniently had a jury decided his fate. Juries tended to offer hope and help to many criminal defendants. Several individuals, accused of roughly similar types of crimes this session, did ask for trial by jury. At the very least, those individuals obtained a chance to escape any penalty, which was never possible when one pleaded guilty. (As the preceding case of John Jones illustrates, throwing oneself on the mercy of the court, if that was what he intended, would guarantee no leniency.) Even if the defendant were convicted by jury, the person was fined and possibly whipped for his offenses, but no person this session found guilty by jury trial was permanently disfigured by the conspicuous facial branding that Jones suffered. Those convicted by jury and unable to pay their fines also received shorter terms of servitude—most often three years—compared to Jones’s seven years, imposed by justices deciding the case alone. One exception was that of Boston laborer Stephen Holmes. He was indicted for breaking and entering a house and for theft of some items therein. Holmes pleaded not guilty and asked for a jury trial. He was convicted nonetheless—but not of the burglary. The jury mitigated his conviction, finding him guilty instead of the theft of certain unspecified items. He was ordered to be whipped twenty times (a high number of stripes for such an offense this term), and he had to pay £2 as a fine. Unfortunately, Holmes did not have
that much money. Thus Holmes was ordered to six years of service to such of the King’s
subjects as would take him. In every other jury trial for similar offenses this session, the
term of service, if imposed, was half what Holmes had received.\textsuperscript{30} When juries heard
criminal cases, convicted defendants tended to receive penalties that were at least
somewhat more lenient than those typically imposed by the summary judgment of the
justices.

Moreover, while this session saw a rapist convicted by jury, the other person
accused of a heinous crime, that of murder, was acquitted by jury.\textsuperscript{31} The record suggests
that, while juries could be tough on crime, criminal defendants still might prefer a jury
trial for softening the blow in case of conviction, and for evening somewhat the odds of
conviction itself. Such trends would continue, by and large, in the Middlesex County
Superior Court later that October.

Juries continued to prove helpful to civil defendants and, though to a lesser
degree, to criminal defendants, in the Massachusetts Superior Court for Middlesex
County, meeting at the end of October in 1769. Of the thirty-eight civil and criminal
issues heard by the Superior Court that October, eleven were actively contested. Of these
mixed contested cases, seven (63.6\%) were heard by jury. These jury cases comprised
half of the civil contests (that is, four out of eight civil cases), as well as all three criminal
cases where defendants pleaded not guilty this session.

As Table 3.2 illustrates, plaintiff civil damage claims that October were
significant: fully three of the four plaintiff damage demands were for amounts between
one hundred and a thousand pounds. On first blush, during this October session in

\textsuperscript{30} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 249.
\textsuperscript{31} The person accused of murder was Hephzibah Blackman; her case is considered just above.
Middlesex, plaintiffs who won their suits appear to have done better by jury than they did in all contests considered together. For in all contests, superior court plaintiffs who won received judgments averaging £71, while civil juries awarded winning plaintiffs an average of £91.32

Again, however, initial statistical observations of superior court work can deceive. For civil plaintiffs were claiming an average of £89 in damages before the justices alone, while jurors that October were holding plaintiffs to £91, on average demands for £336. One may add that this superior court session was not typical of jury behavior toward plaintiffs and defendants. Indeed, of the eighteen full case sessions from various Massachusetts counties analyzed in this study, only a third of these sessions saw plaintiffs receive higher average monetary judgments by jury than by justices presiding without jury—again, despite the fact that juries were hearing substantially greater damage claims.


table 3.2

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £71

Average judgment for plaintiffs—by jury: £91

[From the four jury-decided cases where information is available. Average judgments are approximate due to rounding.]

32 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 194-205.
generally. Even those six sessions where plaintiff awards were higher in jury judgments than by judges’ decisions, several of those sessions saw only a narrow advantage for the plaintiff, such as in that August 1769 Superior Court session in Suffolk considered just above.\footnote{As noted in Table 3.1 above, in the Suffolk Superior Court session of August 1769, victorious plaintiffs did better in jury decisions than in all contested cases by merely £1.}

Moreover, while juries tended to hear the more significant damage claims, as just observed, they greatly mitigated awards in those claims where the plaintiff did win, when not dismissing the plaintiff’s claims altogether. Superior court juries decided four active civil contests in Middlesex that October, effectively making a split decision between plaintiffs and defendants that fall. Even though two of these four civil suits saw the win for the plaintiff, however, when it came to damage awards, jurors slashed plaintiffs’ claims. In one case where a plaintiff had demanded £700 in damages from numerous annual promises that remained as yet unpaid, the jury awarded just over £57. The other plaintiff victory that fall saw the superior court jury award £125—a significant sum for the period—to the plaintiff, which may have equaled the original plea of trespass over that debt. The first plaintiff “victory” clearly illustrates the power of jurors to minimize the extent of a plaintiff’s winnings. Typically, however, defendant awards that October suggest that the real power of jurors was to come to the aid of defendants in economic or legal trouble.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 196, 199.}

For instance, take the case of Jonas Cutler, a shopkeeper, who sued Nathan Jones over a debt originally of some £1550, along with some other debts in addition to this one. Cutler accused Jones of “not paying the said condition” and of continuing to neglect his

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Name & Amount & Description \\
\hline
Jonas Cutler & £1550 & Debt on account of annual promises \\
Nathan Jones & £125 & Plaintiff victory \\
\hline
\end{tabular}
\caption{Examples of jury decisions in Middlesex October 1769.}
\end{table}
obligations. Cutler now came into superior court demanding £500 in current damages (as apparently much of the original debt had been repaid). Both parties apparently asked for a jury to hear the dispute. Unfortunately for creditor Cutler, the jury sided with Jones, awarding him costs of court.35 Defendant and debtor Jones thus owed not another penny.

A similar story was presented when Middlesex inn holder John Felch sued gentleman Jonathan Richardson for twenty days’ lodging, the bill remaining unpaid. Felch now demanded £20 in damages from Richardson, much less than the demand in the previous case but still not an insubstantial sum. After demurring their pleas in the inferior court, they both now were asking for jury trial in the Middlesex Superior Court. Once more the jury came down on the side of the defendant, allowing Richardson his costs of court.36 And although referees heard two cases this term for amounts in the hundred-pound range, these were rarities. Usually, from the 1760s into the early 1770s, referees and judges decided cases involving far less than Cutler’s demand for £500—typically for less than £30.37

Generally speaking, then, juries in the Middlesex County Superior Court session of October, 1769 proved sympathetic to defendants in debt. For while defendants won but a quarter of their cases in all contests, when juries decided civil cases, they favored defendant debtors precisely half the time. In other words, Middlesex juries that October were turning civil contests from a seventy-five percent certainty for the plaintiff, overall, into a coin toss, when juries decided the case. Debtors had good reason to turn to their

35 Ibid., 197.
36 Ibid., 198.
37 See Superior Court of Judicature, Massachusetts Archives Coll., examples of civil cases in Reel 15, 194-98, 206-17, 234-48; Reel 15, next vol. (unnumbered), 1-24, 117-133, 140-45, 150-57, 161-67, 180-84.
neighbors for relief in Middlesex that fall. Neighbors, as peers on panels of twelve, appeared highly sympathetic to neighbors in financial trouble.

One plaintiff victory by jury in the Middlesex Superior Court that October was a most interesting case indeed. James, “a negro man of Cambridge,” in Middlesex, listed in the court record as a “labourer,” appeared as a plaintiff appellant against Richard Lechmere, also of Cambridge.\(^{38}\) Appellant James was suing Lechmere on a plea of trespass. James claimed that Richard had assaulted, “imprisoned and restrained [James] of his liberty and held [him] in servitude” from April 11, 1758, to May 2, 1769, “against the law of the land and against the will of the said James.” It seems that James had somehow gotten free from Lechmere and was now suing him for £100 in damages in superior court. Prior to this, Lechmere seems to have defaulted in the inferior court. For unstated reasons, the inferior court had ruled for defendant Lechmere, awarding him his costs of court. Thus James was appealing his inferior court loss.

Now in the Middlesex Superior Court, Lechmere did appear, and he asked for a jury to hear his case. Lechmere lost. Even here, however, the Middlesex civil jury showed sympathy toward the defendant. The report indicates that plaintiff James, although victorious in his cause, nonetheless “consented to take Judgment for two pounds money damage and costs.” The costs, at £4:16:8, amounted to more than twice James’s damage award of £2. Now, James had asked for £100 in damages. What explains such disparities here?

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The court record provides little explicit guidance in this case. Perhaps James had been a slave purchased by Richard who, years later, could not produce valid documentation of his property right. Or perhaps James had been brutally assaulted, threatened and terrorized into servitude, only working up his courage after many years to demand his entitlement to liberty. The record does state that James “consented to take Judgment for two pounds money damage,”39 as well as court costs, strongly suggesting that the parties worked out a behind-the-scenes agreement to settle the dispute. Whatever the jury’s other intentions were in this case, one fact stands out. A Middlesex laborer named James, of African ancestry, won recognition of his right to freedom by Massachusetts superior court jurors. If the monetary award for his unlawful enslavement disappointed him, the legal recognition of his freedom, surely, did not.

Such was the power of the panel of twelve peers in a colonial American world—a world not famous for its pro-African or anti-slavery proclivities. Civil jurors wielded an enormous power that could bind or liberate, bankrupt or enrich. This power was wielded regularly in colonial Massachusetts.

By comparison, one might examine the three cases settled by referees during this Middlesex Superior Court session in October, 1769. The referees, acting without jurors and whose decisions were ratified by the superior court justices, rewarded the plaintiff in every instance. Moreover, in the decisions of the three referees in each case, plaintiffs got pretty much what they had asked for in damages. In the first such referred case that session, spinster Jemima Blanchard sued widow Sarah Blanchard, perhaps a sister-in-law, in an estate debt. Plaintiff Jemima had asked for £26:17:5, and was awarded £27:7:9, and court costs, by the referees. In the second referred case that session, plaintiff appellee

39 Author’s italics; see citation above.
Richard Smith asked on appeal for £100 in damages against James Mellen, winning precisely that, plus costs. And in the final case decided by referees that term, Isiah Tufts, a yeoman of Charleston, sued Abraham Watson of Cambridge and widow Mary Tufts involving an estate, presumably that of Isiah’s father. Again the plaintiff won. Isiah collected £117 of the £130 he had demanded. The odds alone suggest that the defendants in these cases would have fared better in jury trials.

While civil defendants were breaking even in their cases before jurors in Middlesex Superior Court that October, criminal defendants were not doing quite as well, winning their trials before jurors in but one case out of three that session. William Quirk was the lucky defendant that term, pleading not guilty to the charge of assault and asking for a jury trial. He was acquitted. Another defendant, Thomas Powell, found himself in much deeper trouble, however.

Middlesex laborer Thomas Powell, accused of several thefts, was indicted and tried in two prosecutions, and he was implicated in yet a third criminal issue this term. In his first theft trial that October session, Powell was indicted for breaking and entering a dwelling, and for stealing a number of items therein. Powell pleaded guilty. In all likelihood, Powell came to see that this plea was a mistake. The superior court justices summarily ordered Powell to be branded on the forehead with the letter B and to pay the owner of the dwelling the rather substantial sum of £13:12:0, “being with the value of the goods & chattels restored, treble the value of the goods & chattels he stole & costs.”

40 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 194-95. Isiah Tufts had actually sued for £130:17:4 and received £117:10:0, with court costs coming close to making up the difference. See the discussion in Chapter 2 of referred cases, that is, judgments by referees, whose decisions, by two votes out of three, were to be final and binding on the parties and the court.

41 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 202.
Unable to pay that amount, the justices empowered Josiah Dennison, the victim in this case, to dispose of Powell as an involuntary servant for four years.\textsuperscript{42}

But this was not the end of Powell’s problems. For he had been indicted in a second case, now accused of the theft of numerous items from one Daniel Child. Presumably Powell had learned a lesson from his earlier pleading. This time, Powell pleaded not guilty and asked for a jury to hear his case. Unfortunately for Powell, the jury found him guilty and he was sentenced to be whipped 15 stripes and to pay Child £2:6:8, again, being with the items he stole, treble damages. As in the earlier case, since Powell was unable to pay that amount, the court held that Daniel Child could dispose of the convict to service for a year. At least Powell was not hanged, nor had he been ordered branded by the jury’s judgment, which may suggest why criminal defendants appealed to juries for their defense. Jurors might hand down mercy that justices withheld.\textsuperscript{43} Unfortunately for Powell, he was involved in a third criminal case this session, though not directly as a defendant. It appears that Stephen Bodge, “a molatto Servant” belonging to a denizen of Boston, had tried to help Thomas Powell and another prisoner escape from the gaol. Bodge had tried to slip the prisoners various tools, including a “Smith’s hammer, and One Saw,” by which they might effect their getaway. Apparently, Bodge was caught red-handed. Indicted, Bodge simply pleaded guilty. The court ordered him whipped 15 stripes and to pay costs of his prosecution. Such was a pretty light punishment for those who, for whatever reason, chose not to roll the dice for jury trial in a serious criminal case. Of course, Bodge had been caught in his attempt,

\textsuperscript{42} The current and following cases are from Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 202 ff.
\textsuperscript{43} While whip scars on the back might heal, and otherwise would not ordinarily be visible in daily life, the same could not be said for an iron branding on the forehead. Judges seemed more partial to forehead branding than jurors in the records studied here.
which had failed. At any rate, it would seem that in those earlier trials of Thomas Powell, the laborer learned from his first pleading mistake, though too late to avoid an excruciating and disfiguring penalty.

The last criminal prosecution by jury in superior court that October saw Middlesex laborer James Digo indicted for an assault and attempted murder, allegedly committed three years earlier. He had also assaulted a town constable, Abel Perry. The jury found Digo guilty. Astonishingly given the charges, the jury merely committed Digo to one month’s imprisonment and the costs of his prosecution. Laborers who pleaded guilty and took justice from the judges usually received far harsher punishments this term—brandings, or whippings at least. As in civil cases, criminal juries in Middlesex Superior Court generally proved helpful to those with much at stake. The end of the year 1769 would see more of the same in Essex County.

The Superior Court of Judicature sitting at Essex in early November of 1769 saw fifty-nine cases or legal issues presented, only nine of which were actually contested trials. Of these nine contests, seven were trials by jury, six civil and one criminal. Civil defendants in Essex did not do well by the justices, winning only 37.5% of contests overall that session. When juries heard their disputes, however, civil defendants broke dead even in court. Debtors did well by their peers in Essex. Criminal defendants did, too.

Of the three criminal cases tried that November, two criminal defendants simply pleaded guilty. Samuel Blasdell of Amesbury provides a typical example of such a defendant, basically throwing himself on the mercy of the court. He confessed to the theft of three yards of broadcloth, some £5-worth of velvet, and some other cloths,

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44 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 202-5.
presumably from some shop. No mercy from the justices was delivered here. Blasdell
was ordered whipped fifteen times and to pay back more than £33 in damages. Unable to
pay that sort of money, Blasdell lost seven years of his life to unfree servitude.⁴⁵

Although Blasdell’s status was not listed in the record, it is likely that Blasdell was a
laborer or otherwise a poor resident of Essex. Possibly this had some influence on his
decision to plead guilty. The case of Elizabeth Eams would suggest that putting oneself
on the mercy of God and country—asking for a jury trial, that is—could be a much
smarter way to go.

The case of Elizabeth Eams presents a striking counterpoint to the example of
Samuel Blasdell. Elizabeth, wife of one Jonathan Eams of Boxford, was indicted for the
murder of Ruth Eams, likely her sister- or mother-in-law. Elizabeth allegedly had
dispatched Ruth by mixing white arsenic into Ruth’s food, causing her illness and then
death. Facing a hanging charge, Elizabeth pleaded not guilty and asked for jury trial.
The jury found Elizabeth not guilty of the crime, so she was released.⁴⁶ While the record
gives no explanation of why the jurors found for Elizabeth as they did, the fact remains
that criminal defendants in serious jeopardy usually acted, as did Elizabeth and her
husband in this case, to obtain legal counsel and, especially, to ask for a jury trial. So,
too, would their civil counterparts.

Civil defendants did far better during this November 1769 session of superior
court when jurors heard and decided their cases, compared to non-jury proceedings. The

⁴⁵ Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 219-20.
⁴⁶ Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 220. Interestingly, John Adams
was attorney to Jonathan and Elizabeth Eams in this case (though the case is not referenced in Legal Papers
of John Adams). The record shows that Adams moved in court for their release after her acquittal;
apparently both husband and wife were being held in the town gaol. The record shows that the court
ordered their discharge, the King’s Attorney not objecting.
single case decided by referees—three men appointed to settle such matters with their
decisions routinely ratified by the justices—went against the defendant. Most of the
civil defendants in live contests asked for juries to settle their disputes. As Table 3.3
illustrates, the stakes were high for the civil litigants that fall in superior court in Essex.
Two-thirds of the debtors defending in jury trials during this session were at risk for sums
between £50 and £1000. In all contested cases, however, judgments were a fraction of
the amount demanded, averaging £23. When juries decided these civil conflicts,
judgments were less than a third of even that amount. Juries kept plaintiff awards down
to an average of just £7—a far cry from the enormous damages that several plaintiffs
were seeking. And since referees and judges alone tended to decide cases involving
smaller sums, the difference juries made this term was striking.

Moreover, while plaintiffs did very well in all contests considered together this
session, winning not far from two-thirds of the time, civil juries exactly evened the odds
for defendants in those cases where debtors or others called upon jurors for relief. One
plaintiff who did win this session was Edward Lewis, otherwise known as “Ned of
Topsfield.” His story is related at the beginning of Chapter 2 and will not be repeated
here, except to note that Ned won recognition of his freedom from slavery by a jury of his
peers, during this term of the Essex Superior Court. However, Ned’s case does offer a
cautionary note for plaintiffs in superior court. Ned had sued Solomon Dodge, a yeoman

47 See the discussion of referred cases, or judgments by referees, in Chap. 2.
48 Referees decided one contested issue this term involving £24, finding for the plaintiff, while the judges
decided the other contest, again finding for the plaintiff, awarding him some £69 from a claim of a £130
debt. While some of the jury cases dealt with lesser amounts, half of the jury cases this session involved
claims of more than £100—juries slashing these claims to £7 on average award (Table 3.3). Again, when
the liability was high, debtors turned to jurors for relief.
49 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 209-10.
of Topsfield, for unlawfully enslaving him, and he had won that point. But additionally, Ned had asked the civil jury for £50 in damages from defendant Dodge. For whatever reason, this jury awarded Ned just £5, and his costs of court.\(^{50}\) Ned’s jury had delivered him his legal victory but, typically, these jurors proved to be tightfisted in awarding money damages to a victorious plaintiff.

**TABLE 3.3**

Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Essex County, November 1769 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>2</td>
<td>33.3</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>2</td>
<td>33.3</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

*Average judgment for plaintiffs—all contested cases:* £23

*Average judgment for plaintiffs—by jury:* £7

[From the six jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Thus in the Essex Superior Court that November, defendants won their civil cases fully half the time, better odds than in judgment by referees or by the court alone. But even when defendants lost, victorious plaintiffs took a fraction of the damages for which they had sued. For example, Jesse Saville successfully sued Joseph Foster and a number of other defendants for breaking and entering his house and for the damage they had

\(^{50}\) Ibid. It may be recalled from the previous chapter that the costs of court in this case, at £7:6:8, to be borne by the defendant, amounted to more than Ned’s jury award.
caused. Saville demanded £200 from the defendants who had “utterly despoiled and
destroyed” his home. The jury saw fit to award him something like £25 from the vandals,
however. Moreover, the jury acquitted two other defendants altogether. Generally
speaking, jurors found ways to side with defendants even when rewarding plaintiffs—
especially if the plaintiff was a Tory sympathizer, as was the case here. 51 This jury
tendency to side with defendants would continue into the year 1771.

Seven superior court sessions from the year 1771 continue to show juries as
sympathetic toward civil defendants, particularly debtors, and often to criminal
defendants as well. As Table 3.4 suggests, the first two sessions of Superior Court in
1771, that for Suffolk County in February and that for Cumberland and Lincoln Counties
in July saw a significant number of civil lawsuits threatening defendants with potentially
catastrophic losses.

For the first time in the superior court records here evaluated (and rarely seen at
the inferior court level before this time as well), the superior courts now confronted
lawsuits for one thousand pounds or more. 52 Civil lawsuits for more than a thousand
pounds would continue to be rare in the superior courts to the early years of Revolution.

51 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 210-11. This provides an example
of a civil case of the eighteenth century that today almost certainly would be handled as a criminal matter.
Then, however, such cases were often handled civilly, with victims bringing perpetrators into civil court by
writ of trespass, as was the case here. See Zobel, *Boston Massacre*, for facts related to this case, at 215.
Further details and contemporary press references are provided in Joseph E. Garland, *The Fish and the
Falcon* (Charleston, SC: History P, 2006,) 51-56. Saville (thus spelled in the court record, but also seen as
Savil) was a tidesman and frequent Tory suspect among the radicals, from whom he suffered several
assaults. See also Maier, *Resistance to Revolution*, 8; Benjamin H. Irvin, “Tar, Feathers, and the Enemies

52 In the previous chapter, the twelve inferior court sessions examined case-by-case, from 1749 to 1771
(and several sessions studied beyond to Revolution), showed only four clear examples of civil suits for
sums exceeding £1000 in those inferior courts. Three of these four cases were from the late 1740s, when
inferior court juries still generally heard significant plaintiff claims, before parties routinely began using
new pleading strategies to move such suits into the superior courts and to their juries (see Chapter 2).
TABLE 3.4
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Suffolk County, February 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>6.25</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>6</td>
<td>37.5</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>2</td>
<td>12.5</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>5</td>
<td>31.25</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>6.25</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>1</td>
<td>6.25</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £33

Average judgment for plaintiffs—by jury: £28

[From the 16 jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Cumberland and Lincoln Counties, July 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>4</td>
<td>22.2</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>3</td>
<td>16.7</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>1</td>
<td>5.6</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>5.6</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>8</td>
<td>44.4</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>1</td>
<td>5.6</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £76

Average judgment for plaintiffs—by jury: £74

[From the 18 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]
While inflation clearly affected colonial economies in the period, still, suits for these sums remained the exception. But it must be observed that larger damage claims were becoming an increasingly common part of civil court business after the 1760s.

Referees and judges again this February session continued to hear contests over smaller amounts than did juries. In the first two civil contests decided by referees this term, the amounts at stake were unclear since the cases were carried over from previous terms by continuance, and since the referees now sided (uncharacteristically) with the debtor defendants, awarding them their costs. In the later referred cases this session, referees sided with the defendant once more and with the plaintiffs five times, awarding amounts averaging approximately £42, about what the plaintiffs had demanded. The justices, then, ratified these referee decisions, and the judges ordered plaintiffs to be paid in default cases this term. Meanwhile, in live civil contests, the justices adjudicated plaintiff demands averaging £72, while jurors were hearing plaintiff damage requests for some £131. Once more, in February, 1771, civil and criminal juries heard far more contested cases than did the justices acting alone, and they heard higher-stakes cases as well. Thereby jurors also played the predominant role in court decision making. For example, in that February session of the Suffolk Superior Court, of the thirty civil and criminal contests decided, twenty-two of these (73.3%) were heard by jury. And juries heard eighteen of the twenty-three contested civil cases (78.3%) that July. As Table 3.4 shows, an increasing number of jury cases now involved disputes well over £100, representing amounts beyond what referees or judges alone typically would hear.
Generally, then, where parties were in conflict in superior court, and where the financial stakes were greatest, juries were deciding the disputes.\(^{53}\)

In the three criminal cases decided by the justices without jury that February, the defendants had pleaded guilty, obviously resulting in no actual contest. The justices merely handed down their judgments. In these cases, William Marshall, a husbandman of Suffolk County, was sentenced to the pillory and had to pay costs of prosecution for passing counterfeit coin (a charge increasingly frequent in the records by 1771). Elizabeth Smith, a single woman, paid more dearly for her confession: the justices ordered her whipped twenty stripes and to pay three times the value of the gowns she had stolen. And when Boston laborer William Benjamin pleaded guilty to theft, he too was summarily sentenced to twenty lashes on his naked back and ordered to pay treble the value of the goods he stole, as well as the costs of his own prosecution.\(^{54}\) Most criminal and civil defendants did not walk into court and plead guilty, however. Rather, most criminal and civil defendants wished to contest the charges against them and asked for a trial by jury. Of those five criminal defendants who asked for jury trial this term, four were acquitted.\(^{55}\)

The increasing exposure that many civil defendants faced to potentially huge plaintiff damages claims continued as a concern in the Superior Court for Cumberland and Lincoln Counties in July of 1771. Indeed, as shown in Table 3.4, half of all plaintiff damage claims that session were for sums from £200 to more than £1000—to £1800 in

\(^{53}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, second vol., pp. 1-25.

\(^{54}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, pp. 16, 41-42.

\(^{55}\) The one defendant convicted this term by Suffolk jury was Charles Bourgatte, a French servant boy, found guilty of perjury related to the Boston Massacre case, discussed in the last chapter of the current study. See also Zobel, *Boston Massacre*, 211-12, 216-19, 295-99. Charles got off relatively lightly by his jury, for a perjury charge—sentenced to stand for an hour in the pillory and to endure twenty-five lashes. Even then, the Boston mob apparently intervened to mitigate the whipping, Zobel, 298.
fact. Once again, jurors cut these damage awards far short of what plaintiffs had
demanded. By comparison, the largest referred case in superior court that summer saw
the plaintiff win £142 on a damage claim for £376. The other referred cases saw one
plaintiff win £42 on a claim for £52, while another took £4:12:8 on an inferior court
winning of £17:13:8. One referee judgment was for the defendant in an unspecified
claim. In an inheritance case, the justices without jury granted the plaintiff £148, or
possession of lands, as well as costs. But jurors handled far more civil cases and
significantly reduced the exposure of defendants and debtors to loss. Specifically, while
the justices heard four plaintiff demands averaging £148, civil superior court juries heard
eighteen such suits averaging £291, awarding an average of £74 on these claims. The
judges deciding cases alone awarded more than that, £84, on cases for plaintiff demands
averaging half what jurors were hearing.  

For instance, in that civil suit for £1800, the defendant, a Falmouth widow and
executrix of her husband’s estate, faced the appeal of several men, plaintiffs from Lincoln
County who had lost their case in the inferior court. The plaintiffs sought £1800 from an
alleged breach of contract for delivery of various types of trees. While the inferior court
had held for the plaintiffs, the amount they were awarded must have insulted them, at a
mere £23:6:8, along with costs of court. So the plaintiffs had appealed. Now, in the July
Superior Court for Cumberland and Lincoln, the jury gave another win to plaintiffs. But
the superior court jury was even more miserly than the inferior court had been. This time
the plaintiffs recovered only £22:13:4. Even more stinging, the jurors also issued an
uncharacteristic order regarding costs in the case. Apparently by jury discretion, the
court held that the costs to be borne by the defendant should be only those originally

56 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 117-20, 139.
taxed by the inferior court, some £4! The plaintiffs must have viewed such victory as a humiliation.

Occasionally court records note a distinction between the plaintiff’s actual losses suffered and an inflated damage claim now brought into superior court. Although extreme occurrences are not frequent in the records, a certain inflating of plaintiffs’ damage claims sometimes can be observed. In most instances, when jurors sided with such plaintiffs, they awarded the lower, un-inflated amount. Two instances of this behavior can be seen, for example, during the superior court session in February, 1771 at Suffolk. In one such case, Boston merchant Edward Blanchard sued yeoman Benjamin Leonard Jr. and others of Hampshire County, on plea of trespass involving an unpaid debt of some £25. Now on appeal in the superior court, the plaintiff told the jury he should by rights have £35 in damages. The jury basically gave him his original £25. In a similar case, Worcester innkeeper Benjamin Furnace was a defendant against Boston gentleman Thomas Payson. Furnace owed Payson some £21 from several smaller debts. Payson had demanded £30 in inferior court and had gotten some £21. Apparently, the defendant was unsatisfied that his losses were not cut further and appealed. Both parties’ attorneys asked for a superior court jury to review the matter. These jurors let the non-inflated inferior court judgment stand.

Debt cases like those of Joseph and David Reed, presumably related, are typical in the record. Joseph Reed, a Lincoln County coaster, took his creditor, Boston merchant Joseph Henshaw, into superior court. Joseph Reed apparently hoped to cut back his

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57 Ibid., 130-31. The actual costs were £4:0:10.
58 The actual award was £25:11:11, and one-half pence, along with costs. Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, at p. 14.
59 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, pp. 14-15. The judgment was for £21:17:0, the original debt.
losses still further from a judgment in the inferior court. Reed had borrowed from Henshaw just over £32 “with Interest,” and £32 was precisely the amount Henshaw now demanded back. The inferior court had awarded Henshaw £14:7:6. Unfortunately for creditor Henshaw, the superior court jury was not going to do him much better. Henshaw recovered £14:12:1 from his appeals jury. Thus a jury allowed Joseph Reed to repay Henshaw less than half of what he had borrowed, never mind the interest. In another such case, David Reed, gentleman of Lincoln, also was debtor to Joseph Henshaw. Henshaw had loaned David some £32 with “Lawfull Interest.” Now, padding his losses (and perhaps learning from his previous court experience), Henshaw was demanding £40 returned. This time the courts were more sympathetic to the creditor. The inferior court had awarded Henshaw some £33 and, in recognition of interest and inflation, the superior court jury now raised the award for plaintiff Henshaw to £35. No jury, however, was going to raise it to forty.\(^\text{60}\) It would be interesting to know if the same superior court jury heard both of these cases and, regardless, if the jurors in these cases simply believed that “gentleman” David Reed was better able to pay his debt than was “coaster” Joseph Reed. Still, the record does confirm that creditors were struggling before juries to recover every shilling they could. Frequently, juries disappointed those creditors.

In case after case, jurors sided with debtors when their creditors demanded they pay up. But even when plaintiffs won before juries, they routinely had to settle for far less than the original debt amount or, if they were fortunate, for something just approaching that amount. Juries appear to have been suspicious of plaintiffs who might be wrangling more than they deserved from defendants.

\(^\text{60}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 23-24.
Most important, the records repeatedly show that jurors were actively protecting debtors. In that July Superior Court for Cumberland and Lincoln Counties, a jury cut a £500 debt to £300, and in another case slashed a £900 inferior court judgment to £450. Such actions are typical in the records. In an extreme case that session, the jury reduced a £9 damage claim, for the theft of trees, to six shillings.\(^{61}\) Falmouth merchant Ebenezer Prout’s debt to Cumberland gentleman Richard King was reduced from some £11 to £9. (King had asked for damages of £20.) Thomas Pearson documented £41 in losses due to Joseph Lawrence’s theft of a number of his animals. Pearson asked for £40 to be returned. The superior court jury awarded Pearson £20, less than half his documented loss.\(^ {62}\)

Sometimes jury awards to plaintiffs simply must have been intended to wound the winning side. Jonathan Andrews allegedly had stolen plaintiff Nicholas Dennet’s year-old colt in May of 1770, riding it nearly to its death. The horse had been valued at £6 and now was appraised as nearly ruined. Nicholas took Jonathan to court to recover his £6 investment. The inferior court had found the defendant guilty for the injury, but awarded Nicholas just £1:15:0, less than a third the healthy colt’s worth. Jonathan must have suspected he could cut even this amount by appeal. He did. The superior court jury cut that judgment to twenty shillings—that is, to £1.\(^{63}\) A similar example was presented when widow Joanna Frost and her family sued one John Starbird for cutting and carting away hundreds of trees from their land. The plaintiffs asked for £500 in damages.

\(^{62}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 124.
\(^{63}\) Ibid., 126-27. Although meaningful calculations of such things are difficult, horses would appear to have been more valuable than £1 in Cumberland and Lincoln counties at the time, based on estate valuations from Bettye Hobbs Pruitt, ed., \textit{Massachusetts Tax Valuation List of 1771}. The point here simply is that the superior court jury had substantially reduced the inferior court judgment, which itself had been significantly less than the original valuation of the healthy colt.
According to the record, this amount was pretty close to the actual, enumerated value of the trees cut and stolen. The superior court jury gave the plaintiffs the win, but rewarded them with merely five shillings in damages.\textsuperscript{64} Jury victories such as these could only have felt pyrrhic to winning plaintiffs. It seems clear, however, that superior court jurors were doing all they could to comfort civil defendants and especially to shelter debtors from more serious harm whenever possible. Jurors were creating a law court culture that was suspicious of the claims of lenders and plaintiffs, regularly curtailing their claims. The next few superior court sessions would continue to demonstrate these tendencies.

The superior courts sitting for Hampshire and Berkshire Counties in September 1771, and that for Worcester County meeting in the same month, had comparatively little civil and criminal business to do. On the other hand, what cases these courts did hear were overwhelmingly decided by jury. Eight of eleven contested civil cases were decided by jury in the Hampshire-Berkshire session (nearly 73\%, that is). There were no criminal cases heard in that Hampshire-Berkshire session. And in the Worcester session that September juries decided six of the nine civil and criminal causes argued.

The civil cases in the Hampshire-Berkshire session were generally routine. No plaintiff that session was demanding more than a hundred pounds from a defendant in a jury case, although four of the eight claims heard by juries were for amounts of £50 to £99. Another three claims were for less than £20. One claim was for £25. Interestingly, superior court jurors this session were a bit more generous to plaintiffs than referees had been, which rarely was the case. In all contested cases this term, victorious plaintiffs took an average of about £26, while juries were rewarding plaintiffs with more like £35. Still, jurors could hardly be accused of excessively favoring plaintiffs, since plaintiffs’

\textsuperscript{64} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15,127-28.
documented claims before juries had been for precisely that—£35. In addition, jurors were handling more cases than were referees and judges. Judges heard a single case involving a plaintiff claim for damages of £30, essentially dismissing the suit, perhaps for procedural reasons.\(^65\) Referees decided two cases this session. One case involved a plaintiff award from the inferior court for £300, which the referees in superior court now drastically (and uncharacteristically) reduced to £10, for reasons unknown. The other referred case involved a plaintiff claim for £26, resolved in favor of the plaintiff for £18 (again, demonstrating unusual mercy toward a civil defendant on the part of referees).

More to the point, however, as was typical of these superior court sessions, defendants’ overall chances of success were better before their peers. While defendants won 54.5% of all contests generally, they won 62.5% of these cases by Hampshire-Berkshire juries. And in the Worcester session, while defendants were winning half of all contests generally, they succeeded in two cases out of three, by jury.\(^66\) Again, juries here were protecting civil defendants as frequently as possible.

The more interesting cases of the period come from the criminal docket during the Worcester session of 1771. No criminal defendant merely confessed judgment in that September court. All five criminal defendants who pleaded not guilty to their charges asked for trial by jury. Three of those five defendants were declared not guilty by their peers. In one of those cases, Nathaniel Wyman had been indicted for the theft of eighteen pounds (weight) of sheep’s wool. Having been convicted by jury in the inferior court, he had appealed, and was now acquitted by another jury in the superior court. While such proceedings could prove advantageous for criminal defendants like Wyman, multiple...

\(^65\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 156. The language in the dismissal, that the plaintiffs “take nothing by this suit,” is unusual in the records.

\(^66\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 150-57, 140-50.
trials of the same issue would continue to erode the efficiency and rationale of the Massachusetts court system until its reform and restructuring in the early nineteenth century. In another case, a man and woman were found not guilty of suspected unlawful cohabitation. Once a serious offense in the Bay Colony, jurors now seemed less interested in enforcing such mores. Then there was the case of the King against Ezekiel Forkett, a Worcester County trader, and husbandman John Bound Moulton, also of Worcester.

Forkett and Moulton were indicted for counterfeiting coin, “Spanish mill’d pieces of Eight.” The records show that counterfeiting was becoming an increasingly common and serious problem in Massachusetts, apparently requiring ever stronger response from courts and juries by the early 1770s. Such a case was mentioned above, where in February, 1771, husbandman William Marshall had been sent to the pillory for passing counterfeit coin. This time, the Worcester superior court jury found Forkett and Moulton guilty, but their punishment was more severe than in that earlier instance. Both were sent to the pillory for an hour’s humiliation, but in addition each suffered the loss an ear, as well as £25 in fines to the King. More broadly, then, a systematic study over time of Massachusetts court records demonstrates that, from the seventeenth through the eighteenth centuries, the colony’s jurors were becoming less enthusiastic than they once had been about protecting the community from people’s irregular living arrangements and certain other private behaviors. But the sympathy toward defendants that juries so

67 See the previous chapter for discussion of the inefficiencies and structural problems of the Massachusetts courts, including their resolution.
68 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 142-50. The records provide much evidence of the increasingly common problem of counterfeiting, with jurors generally showing little tolerance for the crime.
often were extending these days did not apply those endangering the economic security
of the colony—certainly not in the case of counterfeiting.69

Criminal trials in Bristol County in October of 1771 illustrate the continued
leniency on the part of juries toward alleged wrongdoers, though, again, not where
counterfeiting was the issue. Superior court juries in Bristol that fall let off two of the
three criminal defendants that term. Bristol County laborer William Hill was judged not
guilty by his peers, although he had faced a most serious charge of arson. One James
Mason was indicted for failure to pay two promissory notes and for perjury on top of that.
His jury allowed him to escape both charges. Mayberry Ellis, a Worcester laborer, was
yet another man indicted in the increasing number of counterfeiting schemes now
plaguing Massachusetts. Court records here show that Spanish milled pieces of eight
were a favorite coin to fake, and such allegedly had been Ellis’s choice. The punishment
for counterfeiting likewise was increasing, so Ellis had no intention of pleading guilty.
Yet his jury found him guilty nonetheless. Ellis suffered not only the hour’s torment in
the pillory and the loss of an ear. In addition to that, he was ordered whipped twenty
times, and (as usual) he had to pay the costs of his own prosecution.70 Juries and justices
seemed united in sending a message that this particular crime would not pay. And they
were sending a harsher message now against counterfeiting. It is notable that so many
defendants would continue to be haled into court for this offense in the coming years.

69 Cf. Superior Court of Judicature, Massachusetts Archives Coll., cases considered in the current study,
with the more pronounced concerns over sexual deviation (fornication, adultery, bestiality, and the like)
raised in those earlier cases from the seventeenth-century Records and Files of the Quarterly Courts of
Essex County, Massachusetts, George Francis Dow, ed., 8 vols. (Salem, MA: Essex Institute, 1911-1921).
See also William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on
S. Lindemann, “‘To Ravish and Carnally Know’: Rape in Eighteenth-Century Massachusetts,” Signs:
70 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 175-78.
Probably simple desperation was the cause. The court records strongly illustrate that economic distress was spreading in the 1770s.

Such economic distress would suggest why jurors appear to have felt increasing pressure to get tougher on civil defendants, as illustrated in Table 3.5: creditors were presenting more cases of serious loss that they demanded be addressed. Although criminal defendants enjoyed a two-to-one victory rate before juries that October, Bristol juries just before Revolution were coming down harder on civil defendants, giving them only a 50% success rate in cases tried before them. This trend would continue through the rest of 1771. Yet even still, juries were proving to be sympathetic to debtors facing hard times.

Fifty percent of civil defendants were being found guilty this term, both by referees (who decided two cases), and by juries (who decided six). Yet the much larger awards that jurors were granting to plaintiffs, shown in Table 3.5, is a deceiving statistic. The fact is that juries were hearing cases involving substantially greater liability than were referees (or judges) this session. The first case decided by referees involved a judgment for eighteen shillings, though the original demands in the case are unclear. In this dispute, however, the plaintiff received less than £1 for his efforts. The other case decided by referees saw the defendant in a plea of trespass at risk for £2:7. Here, however, the referees decided in favor of the defendant. Thus the plaintiff recovered nothing.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 162-63.} The referees in these cases simply were not making significant judgments involving great sums or threatening defendants with crippling losses if the decision went against them.
Jurors were handing cases involving much more substantial sums that October in Bristol. As Table 3.5 makes clear, plaintiff claims in jury-heard cases were substantial: a third of these cases involved plaintiff demands between £100 and £1000, and half saw

**Table 3.5**

Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Bristol County, October 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>3</td>
<td>50</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—**all contested cases**: £85

Average judgment for plaintiffs—by jury: £113

[From the six jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]

claims averaging close to £50. While referred and judge-decided contests saw plaintiff claims averaging but a couple of pounds each this term, jurors adjudicated civil disputes averaging £101. This last number is dramatically inflated by a single enormous case involving a plaintiff demand for £400, settled for (and reduced by jury to) £321. Even without this weighty civil suit, however, jury cases saw average plaintiff demands far beyond those in non-jury disputes, averaging £41. And setting aside that one weighty civil case, average jury awards to those remaining successful plaintiffs—who were demanding, again, £41 on average—came to less than £9.72 And, of course, it must be

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72 The actual number is £8.5, for the jury judgments in the two lesser civil disputes.
remembered that in half the civil disputes heard by jury this term, the defendants walked out of court owing nothing at all. Again, when defendants faced serious liability—and even on occasion when they faced relatively small plaintiff claims—defendants asked for trial by jury in the superior court. Those superior court jurors offered defendants significant protection—from creditors, particularly.\(^{73}\)

Moreover, as one studies the court records systematically, past the mid-1770s, it becomes increasingly apparent that a great bulk of judge-decided cases involved defendants in default, meaning that the judges were simply granting plaintiffs whatever they were demanding. Economic hardship likely was a factor here. Civil defendants in real, contested disputes were demanding jury trials, however. By the 1770s, superior court jurors generally were hearing the cases involving significant plaintiff claims and, for that reason, as in Bristol in October 1771, juries may be seen handing down larger average awards to victorious plaintiffs.\(^{74}\)

Even when juries are seen awarding substantial sums to some plaintiffs, the larger point is that jurors found for defendants as often as they decided against them this session. Defendants in jeopardy of losing large amounts in money judgments still were enjoying precisely even odds before panels of twelve. Such odds must have continued to appeal to debtors, in particular, since referees so often favored plaintiffs in their demands. And for those like John White, the Boston baker at risk in that £400 claim that fall, the superior court jury’s curtailing that amount to £321 must have come as some relief at

\(^{73}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, by review of cases from pp. 161-75 this session.

\(^{74}\) This is apparent from a study of cases across-the-board from Superior Court of Judicature, Massachusetts Archives Coll., Reels 15-16, especially as cases move past the mid-1770s, Reel 16, second vol., 3-158.
least. Again, juries were doing what they could to shield those facing large liabilities, though apparently their task was becoming harder. Inflation, coupled with a credit crunch and increasing economic dislocation (and soon, war) were putting colonials in a vise. Surely jurors, as neighbors, well understood the financial stresses of their peers in hard times.

**Hard times for British Subjects in Massachusetts, and for Jurors**

Meanwhile, the last months’ records of the Massachusetts superior courts of 1771 offer ample evidence that many in the colony were in tough financial straits. Debts small and large dominate the records. Jurors appear overwhelmed, trying to provide some relief, where they could, to defendant-debtors in the civil courts. Jurors were finding this increasingly difficult to do. Two-thirds of superior court defendants in November (Essex) and more than seven in ten defendants in October (Middlesex) had asked jurors to decide their cases. Court evidence suggests that juries were sympathetic to debtors in distress whenever possible. Even when these juries could not see the way to allow escape to those in debt, they did what they could to cut their losses to plaintiffs. Table 3.6 suggests this as the clear pattern in Middlesex County that October. The story is more complex, however, in Essex that November.

Eighty percent of the civil cases litigated in the Middlesex County Superior Court in October, 1771, were for amounts involving liability for less than £100. Some of these cases involved demands for possession of lands with unspecified monetary amounts.

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75 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 165-66.
making further calculation impossible. (When the plaintiff won “possession,” the record does not offer further information, except that the plaintiff received the land he had sought.) But debt cases, large and small, dominated the court’s attention. Examples of such debt cases are plentiful, to say the least.

Middlesex jurors gave a sort of victory to plaintiff Zachariah Robbins, a husbandman and executor of the estate of the late Benjamin Robbins. It seems that Joseph Robbins, likely Zachariah’s brother or an uncle, had signed a couple of promissory notes to borrow money from the late Benjamin as far back as 1765, and had never repaid those debts. On behalf of the estate, Zachariah was now asking that £70, apparently the debt including interest, be paid. Joseph brought his attorney to speak for him in superior court and, characteristically, the attorney asked for a jury trial of the matter. The jurors came back with a Solomonic judgment. They held that Joseph had not made the promise to pay in the first count (regarding the first note), but that he had made the promise in the second count, and therefore owed £24:14:6, just over a third of the damages that the plaintiff demanded. So the plaintiff won, sort of. The defendant was spared the worst of it by the jurors’ split verdict.

A Middlesex jury was even more lenient toward defendant John Richardson, a Worcester tailor, who was accused of nothing less than assaulting and unlawfully imprisoning housewright Samuel Hall for four days, attempting to extort from Hall £4:18:4 for his release. Hall sued Richardson for these and other “Injuries, Outrages, & Enormities,” as per the legalese of the age. Hall demanded £50 for his injuries and loss of his time. As juries did so often these days, this superior court panel found Richardson guilty of trespass but granted merely £4:18:0 in damages to plaintiff Samuel Hall. Hall

77 Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 181.
TABLE 3.6
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Middlesex County, October 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £32

Average judgment for plaintiffs—by jury: £14

[From the five jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Essex County, November 1771 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £58

Average judgment for plaintiffs—by jury: £94

[From the four jury-decided cases where information is available. Average judgments are approximate due to rounding.]
was not even to recover the full amount extorted from him for his release! As things turned out, Hall should have quit while he was ahead, back in the inferior court. There, he at least had received £25 for his pains. Now, however, in superior court, Hall’s jury awarded him damages of less than £5. The costs of the case in superior court were more than £10.\textsuperscript{78} Who could blame Hall if he felt dismay in his appeals court “victory”? It certainly appears as though superior court jurors were sending a signal to plaintiffs, who had won in the lower court, not to be greedy.

As Table 3.6 shows, superior court juries effectively sent another message to plaintiffs during that October Middlesex session. Civil juries were cutting back overall contest judgments from £32 to just £14. But generally speaking, it appears that too many debts that session just could not be overlooked or split by the difference. Four out of five plaintiffs won their cases by jury in Middlesex that fall. But those successful plaintiffs won far less than what they had asked for. In the referred case this session, the plaintiff recovered £69:10:2, probably on a par with his demands, while jurors rewarded plaintiffs with £14 on average plaintiff claims of £93. In a number of cases, such as those of plaintiffs Zachariah Robbins and Samuel Hall above, the victor may well have felt to some extent a loser. In probing beneath the numbers, then, it does appear that jurors still sought to help out defendants whenever they could.

It also appears that by the end of the year’s superior court sessions, jurors were having a harder time shielding debtors, particularly. The Essex County Superior Court session of November, 1771, points to the difficulties for jurors here. As can be seen from Table 3.6, those Essex jurors saw a small and scattered group of civil suits, most of these

\textsuperscript{78} Superior Court of Judicature, Massachusetts Archives Coll., Reel 15, 183-84. The court costs came to £10:14:0.
involving claims of less than £50. But one case involved a damage claim for £400, explaining why the mean damage claims and awards were for more than £50. Indeed, in all contested cases where plaintiffs won, Table 3.6 shows that they took an average of £58, while by jury plaintiffs received an average of £94. As usual, however, this disparity reflects the fact that jurors were handing cases where more money was a stake.79 Illustrating this point was that just-mentioned damage claim for £400. The facts of this case were straightforward.

Several yeomen from Danvers, led by Aaron Putnam, had been contracted by the Inhabitants of the Town of Danvers, defendants, to survey and repair the highways of the town earlier in 1771. The town had promised to pay something like £270 for the work. This work involved the “labour & service done by them,” Putnam and his crew, “in the Necessary Repairs of the highways & rebuilding the bridge” in Danvers, “for which repairs & rebuilding the said Inhabitants are Chargeable by Law to pay according to the Account annexed.” The bills for labor and materials purchased and used in the work had been duly submitted to the court as evidence. The town owed Putnam and friends £260 for work done and materials used, as well as another £100 that had been “dispursed” on another project. Adding these various claims together, the plaintiffs were now seeking £400 in damages owed by the residents of Danvers. Two months earlier, the Newburyport Inferior Court had granted Putnam et al. just over £270. Presumably the inferior court had been willing to reward the repair crew with the labor and material costs originally agreed to, but not the additional outlays of another hundred pounds. In any event, the Inhabitants of Danvers appealed their loss, even though they had gotten

79 While referees and judges decided two suits involving average damage demands of nearly £6, jurors awarded three plaintiff victories averaging £94, on claims averaging £145. Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 193-205.
something of a break in the inferior court. After all, £270 was a far sight less than £400. But the town of Danvers seemed to hope that a superior court jury would reduce even that amount. Such hopes were not without reason. Juries repeatedly had rewarded civil defendants throughout the superior court sessions seen here.

Now in the Essex Superior Court, a jury heard the dispute and again rewarded the plaintiff appellees. Putnam and fellows received precisely the same £270:9:10 and one-half pence judgment that the inferior court had granted back in September. The superior court jury was not going to cut the plaintiff’s award further. On the other hand, the plaintiffs’ award already had been significantly reduced from what the plaintiffs originally had demanded.80

The other civil cases for the November session show jurors similarly trying to keep plaintiffs’ awards down, even if they had to find for those plaintiffs in three out of four cases. A defendant asked for a jury to hear his case involving his alleged theft, by digging up and carting away, of £6 worth of sod, along with 30 shillings’ worth of gravel. The plaintiff sought damages to the tune of £9 in lost property and labor to replace it. The superior court jury found the defendant guilty, but jurors ordered that he pay only £5 restitution. The sod alone had been valued in court at £6. This jury sided with the plaintiff, probably because the evidence of the theft was overwhelming. But jurors were holding the line on this defendant’s losses. Another defendant that term was in jeopardy for £25 in damages for failure to pay for salt hay that had been delivered way back in 1763. Again the superior court jury hearing the case voted with the plaintiff. But that £25 claim was slashed to £8. The superior court costs were that much. Meanwhile, the

80 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 197.
inferior court had previously awarded the plaintiff nearly £20.\textsuperscript{81} No wonder defendants like the one in this hay delivery case appealed. Not only had they little to lose if they had already lost at the inferior court level (except, of course, a little more money owed in court costs), but they might actually win their case, owe nothing, and make the plaintiff pay the costs. And if the defendant lost the appeal, then there was always hope—well documented here—that appeals court juries would whittle down that inferior court judgment for the plaintiff, easing the burden on debtors or those in trouble in contract disputes. What is amazing is that plaintiffs who had won in inferior court were still sometimes appealing their judgments. Perhaps the jury trial presented to all parties an irresistible betting opportunity. Even a cursory reading of the records makes this hypothesis seem plausible.

In too many cases, however, losing the bet on a cause in civil court could be catastrophic for defendants, given some of the damage amounts at stake, as the tables in the present chapter highlight. A systematic reading of the superior court cases in session after session offers little evidence that the participants considered their litigation as any sort of game. In some of these cases, loss for the defendant could amount to insolvency, bankruptcy, or to the loss of lands and estate for defendants, even for heirs of estates that had been involved in litigation long before.\textsuperscript{82} Civil defendants often needed jurors’ help, to whatever degree possible, to get them out of their legal straits, or to mitigate their losses if such could not be avoided. Jurors can be seen here, time and again, as providing a firewall between creditors and their debtors, or between more belligerent parties and the vulnerable in contractual disputes. Neighbors protected their own in communities

\textsuperscript{81} Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 194, 198-99.
\textsuperscript{82} Superior Court of Judicature, Massachusetts Archives Coll., Reels 15 and 16, passim, and suggested in at least one of the juror portraits considered in the first chapter of this study.
where so many were in debt, as these court records demonstrate. For criminal
defendants, the stakes could be even higher.

The most striking criminal case in the Superior Court of Judicature in Essex that
November, 1771, was that of The King against Bryan Sheehan, a laborer of Essex
County, indicted for rape that session. He was charged with an assault on Abiel
Hallowell, wife of Benjamin Hallowell. The grand jury alleged that Sheehan “did
feloniously ravish & carnally … force & against the will of said Abiel” rape this woman.
Sheehan pleaded not guilty. He asked twelve peers to judge his case. They found him
guilty of rape. The court record continues:

The Attorney General “then moved the Court that Sentence of Death may be
pronounced against him.” The court then “demanded of the said Bryan Sheehan
if he hath or knoweth anything to say Wherefore the said Justices here ought not
upon the promises [of Sheehan, at trial, to prove his innocence] & Verdict
aforesaid to proceed to Judgment & Execution against him, who nothing further
saith unless [besides] as he before had said…”

As was the custom of the day, Sheehan had promised a legal defense but,
inexplicably, he apparently had had nothing more to add to his case except a general
denial. For whatever reason, there would be “nothing further saith.” Damningly, he also
had refused the benefit of clergy that might have spared him the ultimate sentence.

83 The sad story of Bryan Sheehan, originally of Ireland, including relevant sources, is related in Margaret
Human Tradition in Colonial America (Wilmington, DE: SR Books, 1999), 273-90. See also Daniel
Williams, “The Gratification of That Corrupt and Lawless Passion: Character Types and Themes in Early
New England Rape Narratives,” in Frank Shuffelton, ed., A Mixed Race: Ethnicity in Early America (New
York: Oxford UP, 1993), 194-221; and Essex Institute Historical Collections, XXXIII (Salem, MA: Essex
Institute, 1898), 124-26. A reference to this case also may be found in Lindemann, ““To Ravish and
Carnally Know,”” 76. Case at Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 206-7.
84 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 206-7.
85 From English legal tradition, eventually extended to New England, the benefit of clergy allowed those
convicted of certain heinous crimes to escape capital punishment. Those who had just been convicted in
court could request to recite a portion of Psalm 51, asking for mercy, and they were then spared the
ultimate penalty, often by being branded instead. For background here see Bradley Chapin, Criminal
Justice in Colonial America, 1606-1660 (Athens, GA: U of Georgia P, 1983), 48-51; George Lee Haskins,
With the jury’s verdict against him and without benefit of clergy, the justices sentenced Bryan Sheehan back to the gaol, and “from thence to the place of Execution,” on December 19, to “be hanged by the Neck untill he be Dead.”

Thus ended superior court sessions of Massachusetts in 1771.

Bryan Sheehan’s silence is intriguing. Had he actually raped Abiel Hallowell? Or was he maintaining some heroic silence hoping to save her life or honor at the expense of his own? The court record gives no help here; Abiel’s testimony is not recorded. What is known is that she did testify against him, claiming that he had violently forced himself upon her, though some locals apparently came to doubt how strongly she had resisted his overtures. Clearly, Sheehan’s refusal to speak sealed his doom. Still, he refused to plead guilty. Indeed, he insisted on his innocence straight to the gallows. This insistence on his innocence delayed his execution at least twice, as apparently the court waited in vain hope for a confession. Far from confessing, however, Sheehan stood steadfast, asserting his innocence. And he had demanded his right to a jury trial. Thus one suspects that, despite his continued silence (beyond his general claim of innocence), he did hope to live—perhaps because he was innocent or, perhaps, because he was monster. Whatever the case, some of Sheehan’s neighbors, his jurors, relieved him of his life.

Some speculation may be warranted about how jurors must have felt in exercising their sometimes awesome decision making power, such as in the rape trial of Bryan Sheehan. Even if Sheehan’s jurors believed that they had voted to exterminate a monster,

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86 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 206-7.

those twelve men in Massachusetts Bay understood full well what power they were exercising. This power came with formidable responsibility. Surely most people, then and now, would feel keenly the heavy weight of that responsibility. All present in court that day, and those gossiping later about the trial and its outcome—everyone in that community would have understood the responsibility borne by those jurors. The records of more than eighteen superior court sessions consulted for this study make clear that ordinary subjects of the King rarely exercised the power, in the King’s name, to end a neighbor’s life. On that rare occasion when subjects did exercise this power, all in the community must have found it electrifying. What political spillover might be expected from the exertions of such popular power over life and death itself?

In the Introduction to this study, Alexis de Tocqueville was quoted as claiming that “[t]he jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.” Evidence has been presented here that the superior court jurors of Massachusetts had much experience in providing the ground rules and decreeing the safeguards and penalties for the conduct of economic relations in the colony in the years leading up to Revolution. In the inferior as well as in the superior courts of Massachusetts Bay, jurors have been seen here frequently siding with debtors and with the vulnerable or weak in contract relations, finding for them when possible and, when not possible, by cutting the liability to which defendants were exposed. In criminal cases, too, jurors often have been seen to side with the weak or

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88 Indeed, Sheehan’s sentence is unique in the records studied here. Frequently, as can be seen in the pages above, juror discretion reduced the charge, and thus the penalty, for serious offenses. See Superior Court of Judicature, Suffolk County, August 1769, for example, and see the convictions on lesser charges in the Boston Massacre trials, discussed in the last chapter of this study.

vulnerable. Jurors have been shown here effectively shielding a desperate mother and the occasional laborer who foolishly ran afoul of the law.

Jurors, as tribunes of the people, had the power to relieve debt or to bind, to show mercy or to condemn. They did so by a vote. And as Chapter 1 showed, these voters were drawn from the ranks of the many, male freeholders, usually, who were neither the lowest nor the greatest of society. But as representatives of their community, jurors voted. Their votes had enormous consequence in the governance of communities. And as will be seen in the last chapters of this study, these jurors’ votes sometimes conveyed enormous political power as well.

Meanwhile, one day in the autumn of 1771, twelve men voted to extinguish the life of one of their neighbors—a man who died resolute in his innocence. One wonders how often those twelve men reflected on that decision in their remaining years. Apparently, as time passed, some folks in the community felt uneasy with it all.90 Surely, for the rest of her life, Abiel Hallowell pondered the meaning of at least one jury’s vote.

**The Superior Court of Massachusetts on the eve of Revolution**

As Revolution approached, colonial juries in the superior courts of Massachusetts appear to have become even more determined to show mercy to debtors and the vulnerable in civil cases. The jury sitting in Suffolk County in February 1772 offers a case in point. Seventy-six percent of the contested cases that session were heard by jury. As shown in Table 3.7, the bulk of damage claims this term was for huge amounts. Over half of those jury-decided cases for which damage demands can be determined ranged from £200 to £1000 and more.

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The sixteen civil cases decided by superior court jury that February saw the largest yet proportion of trials threatening enormous losses, potentially, to defendants. Yet jurors were extremely tightfisted with those plaintiffs winning their cases. As Table 3.7 shows, in all contests, victorious plaintiffs took £308 as an average judgment. Defendants did far better by jurors, who held their losses to just £53—this despite the fact that juries continued to hear and decide most of the cases involving higher risk to those defendants. This term judges (or referees) were handling civil cases for claims ranging from £5 to £50, with one enormous claim (an atypical exception), discussed just below. The average plaintiff demand in jury-decided cases, by contrast, was for £908. Even without their own four enormous, atypical claims, juries still heard plaintiff demands far greater than those heard by judges and referees, averaging £144. Again, juries were slashing even that average demand in their judgments, awarding an average of £53 to

TABLE 3.7
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Suffolk County, February 1772 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>7.7</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>2</td>
<td>15.4</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>2</td>
<td>15.4</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>1</td>
<td>7.7</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>3</td>
<td>23.1</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>4</td>
<td>30.8</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £308
Average judgment for plaintiffs—by jury: £53

[From the 13 jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]
successful plaintiffs (Table 3.7). More striking still is the success rate for defendants in jury trials. While defendants won just over half of all contests cases considered together (54.5%), defendants won almost 70% of their cases when jurors made the judgment.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, pp. 1-14: the actual percentage of defendant victories by jury that session was 68.75%}

This February session saw several defendants in jeopardy for some enormous damage claims. In the string of cases beginning the session, the first seven jury decisions all went for the defendant. One of those cases, involving an estate, threatened the defendant with the loss of £1500. Another case had the defendant in jeopardy for £2000. The jury held both defendants completely harmless. A case decided by referees, whose decision was confirmed by the justices, held the defendant guilty. At stake had been £5 damages for the cutting and theft of trees, the court rewarding the plaintiff with two pounds and a shilling.\footnote{Ibid.} Then followed a most unusual case.

William Taylor, a Suffolk gentleman, appealed a loss in the inferior court to plaintiffs Thomas Lane and Benjamin Booth, who were London merchants. This case involved a plea of debt. The merchants had loaned Taylor £3843:2:8 by a bond, apparently none of which had been repaid, and so they were now demanding judgment for £4000. The judges at the inferior court at Boston had awarded the plaintiffs £2286:11:7, but this did not satisfy the London money men. In the superior court now, incredibly, Taylor did not ask for a jury to hear his case, allowing the justices to make the judgment themselves. It is quite strange that Taylor did not ask jurors to hear his case. Usually defendants at risk for such sums did ask for jury trial. In this case, the justices granted the plaintiffs a bit more in damages, raising the award to £2414:15 by chancery, essentially a mercy judgment. So Taylor got off paying a great deal less than the £4000
originally demanded.\textsuperscript{93} But the court records strongly suggest that jurors would have been even more merciful.

Generally, jurors heard cases of greatest financial import, and not infrequently they allowed the debtor to walk out of court owing nothing. For example, several suits this term, involving £1500 to £2000, saw repossession of lands and other estate issues at stake in the various pleas. Both parties in these three cases joined in asking for a jury trial. The juries found the defendants harmless every time. In another battle between two Boston merchants, £5000 was at stake. The defendant had won in the lower court, and the plaintiff now pursued the defendant into the Suffolk Superior Court. As was typical in cases involving such serious liability, the defendant asked for a jury trial. That turned out to be a smart move. The jurors ruled that the defendant, at risk for £5000, owed not a penny.\textsuperscript{94}

Jurors most often heard those cases involving the highest stakes and most important issue of all: the rightful ownership of human beings. “Sall” was an example of such human property. Two single women originally had owned Sall, Elizabeth Tompkins and Amelia, presumably Elizabeth’s sister, who later became the wife of Francis Dalton, a Boston surgeon. Now Elizabeth, Amelia and her husband all became plaintiffs in a dispute over Sall with one Benjamin Cudworth. Back in 1766, the record says that Elizabeth and Amelia “were possessed of a Negro Woman Called Sall as of their own Slave or Servant for her the said Sall’s life time & her Service,” having purchased Sall for £40. Within a year, however, Elizabeth and Amelia had “lost her.” It seems that Sall had come “unto the hands & possession of him the said Benjamin Cudworth who well

\textsuperscript{93} Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, p. 14.
\textsuperscript{94} Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, at pp. 5, 10-12, 18-20.
knew that the same negro woman of Right did belong to the said Elizabeth & Amelia….”

The record suggests a sexual relationship between Benjamin and Sall, but whether Sall had been forcibly taken and raped or otherwise used by Benjamin, or whether the two were together willingly, is unclear.95 What the record says is that Cudworth, a Boston gentleman and a Deputy Sheriff of the town, by June 1768 had moved “to defraud the Plaintiffs [by having] Converted the said Negro Slave to his the said Benjamin’s own use.” The three plaintiffs were now demanding £70 in damages for the loss of their property and of four years of her labor.96

Now in the superior court, the defendant asked for a jury trial. Unfortunately for Cudworth, his jury found him guilty of trespass and awarded damages to the plaintiffs. The plaintiffs seem to have won their title to Sall. But the jurors set damages at £13:5:0, much less than the £70 that the plaintiffs had sought.

Sall’s ultimate fate is unrecorded in the court reports. The records document, in a side note of April, 1772, that Benjamin Cudworth had paid the full amount of the judgment. What the court record clearly denotes, however, is that where human life and its money value were at stake, jurors were typically called upon to settle things.

Jurors decided any number of cases involving human life and labor and their worth. Charles Thompson, of Boston, found himself in court for allegedly assaulting and imprisoning Richard Orchard, the apprentice and servant of Simeon Freeman, a mariner of Boston. It seems that Thompson had, “without any lawfull warrant or Authority or any reasonable Cause … imprisoned & detained [Orchard] on board the Ship called the Mermaid & still detains him there,” from the previous June. Plaintiff Freeman worried

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95 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 23.
96 Ibid.
not only that he had “wholly lost the Service of his Servant,” but that he was “likely to lose it forever hereafterward[,] the said Charles … intending to carry away the said Richard beyond [the] sea…..” So Freeman sought £50 in damages from Thompson.97

Now in superior court, Thompson pleaded not guilty to these charges of false imprisonment, and he asked for a panel of his peers to settle the argument. Once again a jury smiled on a defendant, finding Thompson not guilty. If this had been a typical imperial impressment case, one suspects that a New England jury would have been highly unsympathetic toward a defendant accused of imprisoning and forcing a fellow subject into naval service. Rather, the record here refers to Orchard as the plaintiff’s “apprentice & Servant”: presumably Orchard had been an indentured servant or even an African-American slave seeking his freedom, which Thompson may have been offering. Regardless, what is clear from the record is that Thompson’s jury, once again, came to the aid of the defendant. It seems likely also that the jury here had smiled on an unhappy servant escaping his master.

Superior Court juries were not so likely to come to the aid of defendants in matters too far outside the realm of established standards of behavior, however. An illustration of jury unwillingness to support defendants beyond the realm of decency came in The King against John Sennett. Boston laborer John Sennett had been indicted for making “an assault upon a Certain Mare … to have a Veneral [sic] Affair with her & Carnally to know the said Mare … to Commit & perpetrate that Sodomitical Horrible & destible [sic] Crime of Buggery (not to be named among Christians) to the Great Displeasure of Almighty God [and] to the scandal of all human kind.” The indictment

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97 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 25. This was yet another case where parties were employing the new pleading methods—here, by demurrer—to avoid a real trial in inferior court, for a first and full hearing in the superior court instead.
concluded, in formulaic language, that such acts went “against the Peace of the said Lord the King.” Apparently no fool, given the gravity of the charge against him, Sennett pleaded not guilty and asked a jury to hear his case. The jury took its stand in defense of the law of Almighty God and against scandal to humankind. More to the point, the jury acted to delineate acceptable mores within the community. Sennett’s jury did so with firmness, but also with a certain degree of mercy. Sennett might have been ordered to hang for his offense. Instead, Sennett was sent out to “be sett on the Gallows for the space of One hour with a Rope about his neck … and the other end Cast over the Gallows for the space of one hour … [and to] be whipped thirty stripes” on his naked back under the gallows. The jury declared neither branding nor mutilation nor death. But the extent of Sennett’s punishment—thirty stripes—made clear that the community would not permit its members to cross certain boundaries. Possibly the anxiety over these boundaries can be seen in the nervous hand of the court clerk who took notes on this case.

Juries found three defendants in all guilty that February, 1772 term. One defendant was acquitted. This was George Wilmot, who allegedly had aided and abetted Ebenezer Richardson in the fatal shooting of a minor, Christopher Sider. Otherwise, jurors did not show much sympathy toward alleged murderers and thieves that session in Suffolk Superior Court, convicting the rest.

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98 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 39.
99 Ibid. The misspellings in the description of the facts of the case, unusual even for the period, combined with a bizarrely mangled record of the judgment (with several phrases obviously repeated unnecessarily), cause the reader to infer that the court clerk, Samuel Winthrop, either was disturbed by the nature of the case, or else was suffering some other distraction, turning his record into an uncharacteristic jumble.
100 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 15-16. This killing was instrumental in the heightening of tensions in Boston, leading to the Boston Massacre. See Zobel, *Boston Massacre*, chap. 15, especially pp. 174-79. The boy’s name, “Sider” in the court record, is also variously given as Seider and Snider. See also Wroth and Zobel, *Legal Papers of John Adams*, II, 399-400, 404-10, 417-24; III, 3.
The Middlesex County Superior Court session of April 1772 seems a peculiar aberration in the tendency of juror sympathy toward civil defendants. Jurors heard six of eight civil cases that term, but no criminal case. The one criminal defendant that session pleaded guilty to theft and the justices ordered him branded on the forehead with the letter B. When he could not pay the treble damages owed in addition to the branding, he was ordered into servitude for seven years. It is curious that he did not try his luck by jury trial. His punishment could hardly have been worse.\textsuperscript{101}

In the six civil contests that were heard by Middlesex jurors that April, their judgments went in favor of the plaintiff in five of those trials. Again, however, jurors were hearing the more substantial contests and they were proving beneficial even to the defendants who lost. One referred case involved a minor child, allowing the child to remain in his current domicile until coming of age, while in the other referred case this term, the plaintiff prevailed, taking apparently what he had hoped, some £36. But even though jurors sided with plaintiffs this session, they slashed the awards on plaintiff demands averaging £234—to £67.\textsuperscript{102}

In three later superior court sessions of 1772, even when jurors could not vote to let civil defendants off the hook entirely, they regularly shielded them, to ameliorate their liability to plaintiffs. Time and again, jurors can be seen effectively aiding their neighbors in debt. Table 3.8 presents those three Massachusetts superior court sessions of that year, that of Plymouth in May, of Essex that June, and that of Suffolk in August. During each of these three sessions, superior court juries dramatically reduced the liability of defendants to plaintiffs who had won their civil suits. Even in the May and

\textsuperscript{101} Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, at p. 53.
\textsuperscript{102} Ibid., 40-53.
June sessions, where plaintiffs saw great success in the percentage of their victories over defendants, still those plaintiffs lost by winning. Plaintiffs’ jury awards were a fraction of what they had won by trial without juries.103

Moreover, plaintiffs’ jury awards most often were an even smaller fraction of what they were seeking as damages in court. As Table 3.8 shows, one of the two damage claims in the Essex Superior Court session of June was for an amount from £200 to almost £1000. The Essex jury sliced the mean awards in these cases from £26 in all judgments to just £3. One of the seven August session’s plaintiff claims was for precisely £1000. In this case, the jury did give the win to the plaintiff, but awarded him only £20—a pittance compared to his original demand.104 The mean Suffolk jury award in the claims this session was just £52, reduced from £146 in all contested cases.105 Some plaintiffs must have left superior court in disgust. Most debtors, however, were surely relieved at what juror discretion had handed them. In most sessions, it seems that jurors generally were helping neighbors in trouble to the degree that their consciences could allow, and not only in cases of debt.

Consider Caesar’s lawsuit against Samuel Taylor. “Caesar a Negro man of Andover,” a leather dresser, had sued Middlesex cordwainer Samuel Taylor in inferior court on a plea of trespass. Caesar had accused Taylor of having “assaulted the sd Caesar & him imprison’d detained & kept in Slavery from the said first day of June to the 9th of Sept. instant & [of committing against him] other Enormities.” Caesar, making claim to

103 These three sessions were anomalous for seeing slightly higher plaintiff demands in non-jury contests, at an average of £127, the three sessions taken together, compared to plaintiff claims in jury-decided cases, at £108 in these three sessions. Still, juries slashed plaintiff demands far below what judges and referees would consider (see text and Table 3.8).
104 This was the Owen Richards case with which this chapter began.
105 Plaintiff demands had averaged £271 before the justices, versus £206 before jurors. Again, it was unusual that judges were hearing the costlier civil suits. Still, jurors were cutting plaintiff awards much more dramatically than were judges.
TABLE 3.8
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Plymouth County, May 1772 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>3</td>
<td>75</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £32

Average judgment for plaintiffs—by jury: £4

[From the four jury-decided cases where information is available. Average judgments are approximate due to rounding.]

Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Essex County, June 1772 session.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>£20 to £49:</td>
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<td>0</td>
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<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs—all contested cases: £26

Average judgment for plaintiffs—by jury: £3

[From the two jury-decided cases where information is available. Average judgments are approximate due to rounding.]
TABLE 3.8, cont’d.
Plaintiff damage claims sought and awards (judgments) actually made, Superior Court of Judicature, Suffolk County, August 1772 session.

<table>
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<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
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<td>42.9</td>
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<tr>
<td>£20 to £49:</td>
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<td>0</td>
</tr>
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<td>£50 to £99:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>3</td>
<td>42.9</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>1</td>
<td>14.3</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £146

Average judgment for plaintiffs— by jury: £52

[From the seven jury-decided cases where information is available. Average judgments are approximate due to rounding. Percentages may not equal 100 due to rounding.]

his freedom, had demanded £200 in damages from Taylor. An inferior court judgment in favor of Caesar, for £25:13:8 and costs, had proved too much for Taylor. He appealed to the Superior Court meeting at Essex that June, asking for a jury to reconsider the case. The superior court jurors again found Taylor guilty of the civil charges, but they came to Taylor’s aid financially. Caesar’s civil award was reduced to £5:13:4, though Taylor also would have to bear the court costs of some £25. Caesar must have been disappointed with the decrease in his money judgment, but at least this jury had legally recognized his freedom.106 In that respect, Caesar’s jury victory must have seemed priceless.

106 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 91. See the reference to this case in Blanck, “Seventeen Eighty-Three: The Turning Point in the Law of Slavery,” 27; and see Blanck, “The Legal Emancipations of Leander and Caesar: Manumission and the Law in Revolutionary South Carolina and Massachusetts,” Slavery and Abolition, 28:2 (August, 2007): 235-54. See also Chapter 2 of the current study for the inferior court proceedings of this case.
Two cases in superior court that June were distressing and must have been wrenching for the jurors called upon to decide them. Two women were indicted for violence to their newborn babies. Susannah Jennings, an Essex spinster, was accused of having attempted to murder her “female bastard Child with Intent to destroy kill & murder her same female bastard Child,” by wrapping the girl in a woolen carpet and hiding the carpet between two feather beds. Apparently she had hoped to silence the baby who she expected eventually would die. The child lived, however, after somehow having been discovered. Jennings pleaded not guilty and asked for a jury to hear her case. Her jury found her guilty and ordered that she stand under the gallows with a rope around her neck for one hour. Jennings was then released.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 98.}

The other woman succeeded in her attempt at infanticide. Sarah Goldthwait, a spinster of Lynn, was indicted for having brought forth “alive of her body a Certain male Child, which same male Child was by law a Bastard,” whom she then bound with two large stones, dropping the baby into a local pond. The child drowned. Presumably its body had been recovered. Now Goldthwait faced charges of murder in superior court. She asked for a jury trial. The record does not report what she said to her jurors—whether she begged them to know that she was simply innocent of the charge, or whether her misery was just too apparent. The jury of twelve men found her not guilty and ordered her released.\footnote{Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 99.} Did these men believe her innocence or were they simply unwilling to add to her miseries? In effect, did these twelve jurors allow a woman to get away with murder? Jurors did have that power, after all.
Still, men of conscience must have dreaded cases such as these. Unwanted pregnancies and distressed defendants must have tried the souls of the community, and of the jurors whose votes represented the conscience of that community. Such cases of human freedom, of life and death, forced jurors into an unusual role and responsibility to themselves, to the courts and to the law, to the name of God on whom they swore their oaths, and to their society. Yet even in resolving disputes over trifling debts, ordinary subjects of the King in Massachusetts took on a power and responsibility for how their community should be governed. These jurors’ responsibility, whether mundane or wrenching, was on display for all to see. Jurors’ decisions touched lives immediately and often profoundly.

**American law courts and juries in crisis and as a cause of Revolution**

By 1776 and 1777 the Superior Courts of Massachusetts were in crisis. Very few cases could be tried as parties were increasingly absent or in default. With the meeting of the Superior Court for Essex County, beginning on June 18, 1776 in Ipswich, His Majesty’s name for the first time was dropped from the superior court record. Massachusetts Bay was still being referred to as a “Colony,” however.\(^\text{109}\) The membership of the court had also been altered. Tory Chief Justice Peter Oliver, who had served in the previous court sitting at Boston, was now replaced by William Cushing, the only justice who had presided previously along with his colleagues. Cushing was now joined by Jedediah Foster and James Sullivan on the bench. The superior court that June heard a large number of litigant “complaints.” These complaints were appeals to the justices that plaintiffs or defendants had failed to appear to prosecute their superior court appeals,

\(^\text{109}\) Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, second book, left side of p. 3.
leaving the justices no choice but to declare the court’s judgment for the complaining party that did show up. Juries were never involved in these non-contested issues. All of the four significant cases heard in Essex Superior Court, in the month before the Declaration of Independence, were criminal.

Of these four criminal cases, two were contested by the defendants, who asked for juries to uphold their innocence. In both cases, the appellate court juries failed to do so. Superior court jurors that session convicted John Pickett Bancroft of Middleton for stealing from another man “certain Bills of credit of the value of six pounds against the peace & . . — .” This is a poignant moment in the court record. The court recorder seemed not to know what else to write, since the normal phrase would have been “against the peace of the said Lord the King his Crown & Dignity.” Such language had now become impossible in colonial American law court culture and its records. Justices, jurors, litigants and audience all must have felt awkward in the uncertainty of how to proceed. Very shortly, Massachusetts Bay would no longer style itself as a “Colony.”

But Massachusetts Bay, as an independent state, would continue to seat jurors to hear criminal cases. And this June, in the final days of Massachusetts as a “colony” of whomever, jurors continued to play their powerful roles as arbiters of life and limb. For Bancroft, the jurors’ guilty verdict meant he was to be whipped twenty stripes and, since he could not pay the customary treble damages of his theft, he was ordered into unfree labor for a year, to pay his debts.

In the “Gov & People vs. Michael Dun” of Salem, another change appears in court language, also seen just above in “Gov & People vs. Bancroft.” Subjects of a king

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110 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, next vol. in ms. at p. 21; cf. Reel 16, previous vol. p. 207.
111 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 21.
were becoming something else, assuming a mantle that jurors, in their responsibility, powers and action, had worn all along. “Government” was to replace “King,” and “People” were acknowledged for the first time in the language of court proceedings, along with “government,” as somehow actors in their own right. It may be argued that such alterations in language were merely cosmetic, that these were simply political evasions, since revolution meant that writs and courts could no longer function in the name of a king. This argument would miss something important, however. For such alterations in court language seem to have reflected a profound change in how “the People” viewed itself, now that subjects had become citizens, subject to no king.112

American law court culture now explicitly represented “People” as well as states. Of course, the “People” effectively had always been active and vital participants in colonial law court culture—as jurors. Now, however, and for as long as indictments and court proceedings ran in the name of the “Government and People” of the commonwealth, the ideals and reality of political power might be in closer harmony, and not just in rhetoric. As will be argued, the Revolution was pushing real power into local hands—more ordinary hands—especially those of jurors.113 For now, it is significant that the language of the courts was catching up to the reality of the power that jurors had long wielded within that court culture. This was a signal political moment. Explicitly in court, people were saying so.


113 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 21-22. Such is the argument of historians like Bouton, Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution (cited above). Horwitz, in The Transformation of American Law, suggests that the de-centering of jurors in the nineteenth century, in favor of judicial authority, transformed the courts, making them institutions not of people but of states/governments, thus causing them to defend very different interests: 141 ff., 228 ff.
Meanwhile, Michael Dun was also convicted by his peers that June. Dun was ordered to suffer one month’s imprisonment and to pay the costs of his prosecution for breaking, entering and theft. Under the old regime, illustrated by the court records considered here, the judges might have ordered this common mariner branded, or worse. Instead, here was merely one more instance where American jurors exercised their power to be lenient, as they had done for so many defendants on so many occasions before. Now, however, Dun’s jurors were foregoing the whippings and casting into servitude so often seen as punishments in years past.

In later 1776 and early 1777, juries continued to act to aid debtors to the extent possible and to side with criminal defendants more often than not. The chaos of revolution and war made normal jury trials impossible in the Superior Court for York County, at the Court for Cumberland and Lincoln Counties and at that for Suffolk from later June through September, 1776. A Superior Court was able to sit at Worcester County that September, hearing at least one civil and one criminal case. A superior court civil jury there held the plaintiff’s winnings to just over £30, whereas £60 had been demanded and won in the inferior court judgment, presumably without jury. The one Worcester superior court criminal case heard by jury, uncharacteristically, saw jurors fail to convict an alleged forger and counterfeiter. Perhaps jurors were coming to believe that all was fair in war, after all. More likely, economic crisis and, particularly, money shortages had pushed everyone to the brink. Jurors now were taking law and economic justice into their own hands as people struggled to survive however they could.

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114 Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 22.
115 See the Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 24-30.
116 This is an argument developed by William E. Nelson, Americanization of the Common Law, chaps. 1, 3-4. Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 32-36.
In September and October of 1776, Superior Courts convened for Hampshire and Berkshire Counties, and for Bristol County, respectively, but apparently no jurors could be seated and it proved next to impossible to conduct real trials during these sessions.

In February of 1777, in Middlesex County, superior court juries were empanelled to hear three contested criminal cases and one civil case. Defendants were riding high during this brief and limited session. The civil court jury awarded the British vessel *Anna Maria* to one set of American privateers, setting the stage for maritime cases to follow for a number of years. Meanwhile, two out of three criminal defendants won their cases before the Middlesex Superior Court juries that term. The “Government and People” of Massachusetts Bay accused yet another single woman of having “delivered a live female Bastard Child” and murdering the infant. Her jury acquitted her. In the other criminal case that session, two stood accused. Laborer John Potamy and Moll Thayer, “otherwise call’d Molly Oliver[, a] Molotto Woman,” both of Stoneham in Middlesex, were indicted for breaking and entering a house and for stealing “Sundry goods” worth over £26. Each pleaded not guilty. The jury convicted Potamy but spared Moll. Potamy’s fate was to be determined later.\(^{117}\)

The court records suggest that jurors maintained their partiality for defendants in general, and for debtors in particular, for many months to come.\(^{118}\) Jurors continued to be their own agents, acting capably and independently to dispense justice as they saw fit. Jurors settled economic disputes with an eye toward leniency for those in real trouble. If William Nelson is correct that the laws (statutes) of colonial Massachusetts gave “broad remedies” to creditors, so that “[d]ebtors in general were almost powerless” under the

\(^{117}\) See Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 50-57.

\(^{118}\) See Superior Court of Judicature, Massachusetts Archives Coll., Reel 16, 58-159; Reel 17, 161-216.
law, the fact was, shown so often by systematic study of court records here, that jurors were the law in colonial Massachusetts. As Nelson himself observes, “the legal system of the province was structured so as to delegate effective law-making power to local communities”—ultimately meaning, to jurors. Contrary to Nelson’s assertion that, even near Revolution, Massachusetts colonials “shared [a] moral or religious belief that debtors ought to make full repayment of all they had received,” the study over time of the larger court record demonstrates something else. By the 1770s, Massachusetts jurors no longer held a “puritanical antipathy toward enjoyment of earthly pleasures” that might anathematize debtors as spendthrifts, who should be compelled to pay up all they owed, as Nelson believes. Rather, the court record convincingly portrays neighbors as shielding neighbors in trouble, precisely because those peers in court knew the economic pain that had recently fallen so heavily on their communities. And as the 1770s continued, revolutionary war would do nothing to lessen the economic misery of so many in colonial Massachusetts and beyond.

**Conclusion**

If nothing else is clear from these court records, it is that jurors always had acted as citizens rather than subjects. Jurors were never passive servants rubber-stamping the commands of judges. Far from it. Jurors showed their own preferences, quite different from those of referees and judges where economic mercy, particularly, was concerned. Jurors continued to demonstrate leniency toward debtors and, often, toward criminal defendants, far more than did the referees or the justices. If citizenship is defined so as to

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121 Ibid., 45.
122 Ibid.
include, in part, a sense of rights or entitlements as *personal* possessions, and to include a sense of strong individual will and responsibility in its exercise, then the jurors shown in decision making here were exercising these qualities—citizenship—in abundance.

Undoubtedly this is what Alexis de Tocqueville had in mind when he wrote that the jury was “both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.”\textsuperscript{123} The rule of jurors, in court cases such as those here discussed, was not the same as that of the justices-on-high or of eminent men appointed to referee disputes. Jurors brought the “people’s rule,” in a real sense, into the culture of judges and lawyers, into the law courts, and into the heart of law itself\textsuperscript{124}—as well as into law’s influence on politics colony-wide, as will be explored below. Jury work forced ordinary men to make difficult decisions in sometimes heartbreaking cases. Jury service forced colonials to think about their rights in and obligations to their communities, propelling them into citizenship in the ways Tocqueville later observed. How jury service compelled subjects to act as citizens in a larger, *political* sense is the subject of the last two chapters that follow.

So far, this study has portrayed colonial jurors as the mediators of disputes between private individuals (in debt cases, say), or between private individuals and the broader society and state (in criminal trials, typically). All the while, however, jurors actually had been autonomous decision makers in a deeper sense. For in the cases discussed in this and the preceding chapter, jurors had played a central role in the creating of an evolving sense of *social justice*. Indeed, the jurors here described often were the principal actors in the restoration—or recreation—of community trust when the bonds of

\textsuperscript{123} Tocqueville, *Democracy in America*, 276.

\textsuperscript{124} The rise and fall of this jury power and influence in American legal culture is a central theme of Horwitz, *Americanization of the Common Law*, cited above.
social justice had been broken. At some level, the breach of any trust relationship represents a moral violation, a breaking of the good faith that founds any relationship. In civil debt cases, this trust relationship involves, obviously, the repayment of the obligation according to the terms of the contract. One might say that a debtor has a moral obligation to uphold his promise to his creditor, as an earlier generation of New England Puritans clearly had believed. Of course that formulation can be reversed: a creditor, likewise, might be said to owe mercy or leniency to his debtor, especially in times of personal hardship or general financial crisis, as a moral obligation. Moral obligations in trust relationships involving debt might run both ways, after all.

Criminal cases, meanwhile, can involve the most horrific violations of social trust, where those accused face charges of trampling on the rights of others in the community, of stripping from their victims their property, their sense of physical well-being—perhaps their very lives. Even the less serious criminal cases may involve an attack by the accused on the dignity of another individual, on her or his feeling of security or safety within that community.

At the heart of the jurors’ work described here always had lain an obligation and hope to mend the damage done to community when trust was broken—when promises were not kept, or when individuals had become, in some sense, predators on the community in which they had appeared to be neighbors. When moral obligation or trust is broken, people’s belief in stable and reliable social bonds must be restored. The bonds of social justice must be reestablished. In the decades before Revolution, ordinary

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125 The earlier, Puritan belief that debt represented a moral or even religious obligation has been discussed just above. While William Nelson may overestimate the power of this belief in Massachusetts society during the upheavals of the 1770s and 1780s, Nelson’s argument that indebtedness at some point had constituted a moral obligation cannot be denied. See Nelson, Americanization of the Common Law, 41-45.
subjects, as jurors, regularly took on the critical task of binding up the community’s wounds, civil and criminal—of restoring a sense of justice to individuals and within society-at-large. This work in the restoration of justice was essential to allowing individuals to feel continued confidence in their being protected, for example, in their economic transactions. The court records studied here illustrate that, in the years before Independence, many colonists had reason to seek the financial protection of jurors—protection especially from economic ruin or from those who, sometimes markedly, had possessed the economic power to become financial superiors in the relationship of debt-obligation. And this work of jurors to restore social justice likewise was essential in criminal cases—allowing people to continue to imagine their society as a safe and peaceable community, free of wolves, or at least prepared to identify and constrain them.126

The establishment of social justice—the rectifying of moral breaches within community—thus had always been the overarching function of jurors in colonial society. This and the previous chapter have illustrated how jurors sought to establish social justice within the limited sphere of domestic relations, civil and criminal, in Massachusetts. But as the following two chapters will argue, jurors also played a crucial role in the establishment of social justice on a higher, political plane. On that plane, jurors would be called upon to rectify instances of political injustice (or resolve political conflicts).

126 The concept of justice emphasizing the rectifying of broken relations, which informs the argument here, received early treatment by Aristotle, for example, in Nicomachean Ethics, Bk. V, chaps. 2-11. See Richard McKeon, ed., Introduction to Aristotle (New York: Random House, 1947), 400-23. A related concept of social justice in the mediation of disputes at the town level was elaborated by Michael Zuckerman in Peaceable Kingdoms: New England Towns in the Eighteenth Century (New York: Norton, 1970), chaps. 1-4. I thank Richard Bushman and Christopher L. Brown for the suggestion that, at base, jurors were the repairers of broken trust in debt relations in civil lawsuits—a rupture in trust that presumably always must be felt as a moral issue, that is, as a breach of justice, with an analog in criminal cases.
between individuals and the state and even between the colonies and their imperial masters across the Atlantic. For as colonial Americans gradually moved toward the rejection of British subjecthood, the perquisites of “citizenship” and the establishment of justice by jurors in highly-charged political disputes became increasingly entwined in the revolutionary struggle. In other words, the colonial individual’s consciousness of personal entitlements could be transformed into a collective consciousness of broader social and political rights—including the right to criticize governors or even kings. ¹²⁷

This overtly political struggle, seen in several significant jury trials in the years leading to Independence, represented a colonial grasping for greater individual and collective “liberty” for themselves and their fellows—for a higher form of social justice. This political struggle by jurors both reflected and accelerated the broader drive for enhanced civil and political rights for individual colonists and for colonial society within the British empire. This political struggle, by jurors, for an acknowledgement of colonial rights—as a moral matter, a matter of social justice—is the story that follows. A well-worn colonial struggle for “my rights” became a revolutionary demand for “our rights” against what Americans came to view as an unjust imperial administration. In this struggle, a matter of transcendent justice, ¹²⁸ colonial American subjects, as jurors, would insist that even the king acknowledge the “rights consciousness” of those subjects who were demanding to be recognized as citizens.


¹²⁸ It is in this sense of transcendent justice, of moral rectitude, even, that colonial Americans, in their Declaration of Independence, complained to their “British Brethren” that those brethren had been “deaf to the Voice of Justice,” thus requiring Americans to appeal to a higher court, to the “Opinions of Mankind,” to judge their cause. See Pauline Maier, introd., The Declaration of Independence and the Constitution of the United States (New York: Bantam, 1998), 57, 53.
APPENDIX TABLE 3.9
Summary tabulation of all superior court plaintiff damage claims sought and awards (judgments) actually made in all tables presented in this chapter.

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>Raw Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than £20:</td>
<td>21</td>
<td>21.7</td>
</tr>
<tr>
<td>£20 to £49:</td>
<td>19</td>
<td>19.6</td>
</tr>
<tr>
<td>£50 to £99:</td>
<td>9</td>
<td>9.3</td>
</tr>
<tr>
<td>£100 to £199:</td>
<td>17</td>
<td>17.5</td>
</tr>
<tr>
<td>£200 to £999:</td>
<td>24</td>
<td>24.7</td>
</tr>
<tr>
<td>£1000 or more:</td>
<td>7</td>
<td>7.2</td>
</tr>
</tbody>
</table>

Average judgment for plaintiffs— all contested cases: £76

Average judgment for plaintiffs—by jury: £47

[From the 97 jury-decided cases where information is available. Average judgments are approximate due to rounding.\(^\text{129}\)]

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\(^{129}\) Average plaintiff claims in judge-decided contests (where information is available) were for £67 across all cases presented in the tables above, while plaintiff claims in the jury cases averaged just over £173. Average non-jury judgments for successful plaintiffs generally ranged above the non-jury claims, since claims in some of these judge-decided contests—in pleas of trespass or ejectment, or in cases on file before judges, for example—are not always presented as reliably as are corresponding data in the jury cases (as explained in the previous chapter).
Chapter 4

The Political Role of Jurors on the Eve of Revolution, Part I

[In England, corrupt, Tory] Lawyers aim at stripping their Country, that is to say, our Juries, of all real Power, and Ingrossing the whole to themselves; and from … their Behaviour in time past, we may judge of it in time to come, were they once possessed of the whole Power of trying and condemning their Fellow Citizens: I say condemning, for should we ever have such Judges upon the Bench, as we had [in time past], I fear, they would rarely acquit, where the Crown or the Minister was the Prosecutor. Should this ever come to be the unhappy Condition of the People of this Country, I should rather live in Turkey than here; because were I to die, I should chuse to die by the Bowstring, at the arbitrary Command of a Sultan, or Sultana, than be plagued with going thro’ all the affected Forms of Justice. But I hope, our Juries will take Care, not to allow themselves to be made meer Cyphers in the Trial of their Countrymen….¹

If the typical colonial Massachusetts juror came from a socio-economic class of middling men rather than from membership in a political or economic elite, as discussed in Chapter 1, it would be wrong to conclude that jurors were without significant political power and influence. Ordinary jurors did not enjoy the high profile of the politician, delivering orations in the colonial assembly. But ordinary colonial American jurors did play a fundamentally political role in one important sense: in the struggle against arbitrary rule.

In a number of critical “political” trials leading up to the Revolution, ordinary jurors played a leading role in the effort to curtail administrative power. In several highly publicized and politicized court cases, colonial jurors pushed the envelope of what Americans thought should be the “rights of Englishmen” or, by the 1770s, the rights of “Americans.” Indeed, on several occasions, ordinary jurors took the leading role in

¹ James Erskine, Lord Grange, in opposition to those English Tory or “court” party lawyers who were dependent upon the ministry and who were attacking the jury’s “Right,” particularly to decide the question in seditious libel cases, in The Doctrine of Libels and the Duty of Juries Fairly Stated ... (London, 1752 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]), 21.
defending colonial political entitlements against the claims of power and authority by the colonial administration and even by the imperial government. In important ways, colonial American juries were instrumental in the creation of an “American” political consciousness—in the evolution of an American national identity.

Since at least the early 1750s, colonial jurors often had acted in civil cases to mitigate heavy plaintiff damage claims and to show what mercy seemed warranted to criminal defendants—especially to women in distress. Not infrequently, jurors wiped out all or significant portions of the debts of those in economic hardship. Where the defendant clearly owed a debt to a plaintiff—a debt that jurors simply could not ignore—jurors nonetheless did what they could, more often than not, to reduce the plaintiff’s damage claim and show mercy to those defendant debtors. At the same time, as the foregoing chapters have argued, jurors could be tough on certain criminals. Acts of excessive violence often met harsh retribution from criminal trial juries.

But on numerous occasions, jurors seem to have been determined to mitigate the harshest penalties of criminal law, to deliver mercy to a criminal defendant. In cases where defendants were accused of murder, say, juries not infrequently would acquit the defendant on the charge of murder, which mandated a death penalty, and find the accused guilty of the lesser charge of manslaughter. The condemned thereby had the opportunity to ask for the benefit of clergy and suffer a nasty branding of the hand or thumb. But at least the convicted defendant would escape a far worse fate. The final chapter of this study concludes with such an example in one of the most sensational political trials in American history. Moreover, throughout the several decades preceding the Revolution, jurors seemed particularly willing to spare distraught women who were accused of killing
their newborn, unwanted children. In more than one such criminal case, it was as though the male jurors could not bring themselves to heap punishment upon despair. Juries tended to dispense mercy to debtors and sympathy to many criminals, except the vicious or depraved. Jurors, then, have been seen often acting as autonomous agents for their communities, bound by their community’s trust and by their own conscience. But jurors did more than this in the years leading to Revolution.

In several partisan trials that would gain lasting fame in national memory, instigated by administrations seeking political advantage, colonial American jurors proved themselves to be independent political agents in their own right. Colonial jurors more than once proved themselves to be the protectors of defendants under political attack. In the Province of New York during the 1730s, printer John Peter Zenger was saved by a jury protecting him from the wrath of a governor and his partisan judiciary. That jury ignored the instructions of the judge and took the facts and the law into its own hands, to strike at a hated colonial administration. By the time of the Revolution, the popular and frequently reprinted account of Zenger’s trial offered up this case as a prominent example of the power of the colonial American jury to curb the authority of royal governor and judges alike. The political and legal repercussions of this trial spread throughout the colonies and were and felt in imperial London itself. Grand and petit jurors played key roles in attacking British regulatory and tax policies, during the Writs of Assistance cases and the Stamp Act crisis. And while at least one New York set of juries gained infamy for derogating the rights of a feared minority of African-American

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2 See the discussion below, and see Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Cambridge, MA; London: Harvard UP, 1994, 2000), 73-75.
slaves, more typical were the two Massachusetts juries that spared the lives of a widely despised group, the soldier-defendants in the Boston Massacre on the eve of Revolution.

With the significant exception of the case of the alleged conspirators in the so-called “Negro Plot” in New York City in 1741, jurors in politicized cases tended to side with defendants. Jury sympathy for defendants is especially evident in highly politicized state trials where the accused were Anglo-American subjects who found themselves pitted against royal authority, in defense of their “liberties,” as they conceived them. When imperial power threatened those liberties, Americans responded with angry protest, violence, and ultimately, with revolution. But they responded first, on several critical occasions, in their courts. In those colonial courts, in an American law court culture, jurors at the heart of that culture spoke out in defense of American entitlements in a significant way—before the more famous speeches made by members of colonial assemblies and of continental congresses.³

As this and the final chapter will show, colonials reacted with particular venom to British threats to the right of jury trial itself. Colonial Americans were especially dismayed by British efforts to curtail their right to jury trial by means of the juryless courts of vice-admiralty. They feared British efforts to drag Americans charged in criminal cases away from their own “peers,” to be tried by foreigners in Nova Scotia or in England. Indeed, Americans would list in their Declaration of Independence the British threats to their right to trial by one’s peers as a primary cause of the revolt. The British attack on the colonials’ right to jury trial was a major reason why the American “People [had] to dissolve the Political Bands” that had connected them with the British “People.”

Perhaps as much as anything else, the right of trial by jury would be decisive in creating an American sense of citizenship—a sense of being a “People” distinct and apart from their “British Brethren.” As will be argued here, such an American sense of nationality arose, in part, through the possession of “certain unalienable Rights,” according to the declaration published “in the Name, and by Authority of the good People of these Colonies.”

In the end, London denied that Americans possessed any entitlements that the British were bound to respect. Employing terms similar to the Irish Declaratory Act of 1720, Britain’s Declaratory Act of 1766 made clear that the King and Parliament “hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever.” The very words of the Declaratory Act strongly support the supposition that British government policy makers assumed that British subjects in America were a “people” to be distinguished from the people of “Great Britain.” Of course, the British people and their interests had always been separable from colonial Americans and their interests. That fact had been the premise of mercantilism, after all. But now the imperial government’s Declaratory Act made it

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4 Pauline Maier, introd., *The Declaration of Independence and the Constitution of the United States* (New York: Bantam, 1998), 53, 57-58. Elements of the Declaration dealing with the abrogation of jury trials are discussed below. While undoubtedly there were numerous “causes” of the American Revolution, the current study focuses on the political and “citizenship rights” aspects of Revolution, since whatever else the movement was about, it emphasized Americans’ collective and individual rights or entitlements. Such an emphasis on rights, especially that of trial by jury, gave a strongly civic or legal expression to the struggle for American independence. This study argues that an American national sentiment—distinguishing the Americans from the British through their differing policies and attitudes toward certain political and legal entitlements—emerged in part from the civic struggle at the heart of the independence movement. The focus of this study is upon the entitlement to trial by jury as central to the development of an American national feeling or sentiment.

emphatically clear that entitlements or political or personal rights of any sort—even to trial by a jury of one’s peers—were at best a conditional gift, subject to revocation at any time, in Britain’s American colonies. Neither the privilege of trial by jury, nor any other entitlement, was excepted in the explicit terms of this short but sweeping statement.\(^6\)

Events after 1763 would bring Americans to a heightened consciousness of the fragility of their colonial political entitlements, rights that the British now denied as adhering inherently to Americans. The clear and sustained threat to the political and legal entitlements of colonial Americans started the evolution of an American sense of citizenship, or national feeling. If the British conceived of their American “Brethren” as subjects under an omnipotent king and Parliament, then an evolving sense of citizenship—emphasizing certain political protections—would “impel” Americans to “the Separation.” A growing, fierce sense of “rights consciousness” was central to the movement for Independence. Repeated British assaults on their sense of “rights” helped an American people to become aware of their differences from a British people. For the Americans, the entitlement to jury trial was a fundamental right lying at the heart of that sense, or “rights consciousness.”\(^7\) Indeed, the privilege of trial by jury would become both a cause and a means of an American sense of political, national identity.

\textit{A Prologue: The rise of American national feeling through the experience of citizenship “rights” in a law court culture}

\(^6\) See below for more on the act and its precursor, the Irish Declaratory Act.

As suggested in the Introduction to this study, the right to trial by jury was part of a broader conception of a “rights consciousness” that, when threatened by an outside power, profoundly altered the way colonial Americans thought of themselves. Colonial Americans’ recognition of a body of rights as theirs—and under threat—helped to create a heightened American awareness of their entitlements and of their need to defend them. Indeed, British threats to American entitlements, particularly to trial by one’s peers, helped mold a new national identity, a national feeling based on a shared consciousness of these collectively shared yet endangered rights.

National consciousness or feeling may be promoted in any number of ways, by various groups or parties, animated by various concerns or interests. American purveyors (or propagandists) of national sentiment have promoted their nationalistic visions through various modes and numerous media, from the cultural to the aesthetic, and through the economic as well as the political spheres of social interaction. Even before the end of the eighteenth century (and throughout the nineteenth and beyond), propagandists for an American national identity were writing literary works celebrating the greatness of the nation’s brief past. Authors formulated national myths or, more precisely, they wrote works that helped to create a “national” or “collective” memory that might filter down into the “popular memory” of “ordinary folks.”

Public spectacles, parades, orations, paintings, poems and other literary-historical works celebrating the people (and its leaders) are further examples of efforts to promote and sustain the binding symbols of

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8 Warren Susman sees the American people as unified through a difficult cultural transition—despite tensions created by the enormous ideological and technological changes during his period of study—through the work and especially the promotion of cultural “heroes,” while Michael Kammen has developed the theme of and psychological “need” for myth (or “memory”) on the national level, to help individuals understand (and sometimes to forget) their relations to the broader culture. See Warren I. Susman, Culture as History: The Transformation of American Society in the Twentieth Century (New York: Pantheon, 1984), especially Parts 3, 4; cf. Michael Kammen, Mystic Chords of Memory: The Transformation of Tradition in American Culture (New York: Knopf, 1991, 1993), especially Parts 3, 4.
American national memory or myth. Those promoting American national feeling, in particular, have trumpeted the speeches or acts of politicians. Tales of George Washington’s honesty or later fables of Abe Lincoln’s humility and assiduousness are examples of such efforts to bind individuals to a culture of shared political and personal values. Proponents of national sentiment have even tried to build a sense of cultural and political community through triumphs of law. Such legal triumphalism has celebrated court cases creating or protecting some right of national citizenship, or promoting the glories of the national-state itself. The trial of New York printer John Peter Zenger would become even more important in national memory or myth than it originally was in law, pointing American colonists toward a heightened sense of their political power, their individual entitlements, and the value of their institutions: their law court culture. Zenger’s trial—and his jury’s action in it—would also become a cause célèbre for those Americans who perceived dangers in the policies of their British “Brethren” abroad. So American legal culture, despite its British origins, would become another source of American national identity, as will be seen.

9 Kammen, Mystic Chords of Memory: his conceptions of “collective memory” vs. “popular memory” are introduced at p. 10. David Waldstreicher argues that rather than ideology, it was popular culture—the practice of common people through parades, spectatorship, and politics, creating sites of national identity, through mass political action and celebratory activities—that gave rise to the American nationalism of the early Republic. See David Waldstreicher, In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820 (Chapel Hill; London: U of North Carolina P, 1997).

10 For example, note the work of Mason Weems as America’s “first fabulist,” promoting the politico-cultural myth of George Washington, in Kammen, Mystic Chords, 27-28, 203; and the work of George Bancroft in promoting the national ideal of the United States and that of the Constitution in his History of the United States, From the Discovery of the American Continent, 10 vols. (Boston: Little, Brown, 1854-1874), as well as his History of the Formation of the Constitution of the United States of America, 2 vols. (New York: D. Appleton, 1882, 1885).

Searching for specific sources of national sentiment in western countries, Benedict Anderson has described how the “sacred languages” of classical cultures evolved into the literary-historical, artistic and statist constructs of our modern sense of “nation.” According to Anderson, the modern “nation” is “an imagined political community … both inherently limited [to “our” nation, as opposed to “their” nation], and sovereign,” that is, standing in legal equality to all other such nations. The state becomes the emblem of the modern nation. But the nation itself remains, according to Anderson, as a sort of voluntary, communal illusion—to too vast, and far too populous to permit any real or intimate fraternity among the bulk of a modern nation’s members. People “imagine” or believe in the “nationhood” of fellow nationals they can never know or even meet. As historian Max Savelle once asked,

[W]hat is a nation? No one has ever seen a nation; no one has ever touched one. The nation has no existence in the physical world. Its existence, therefore, while nonetheless real, is entirely metaphysical, or mental; the nation exists only as a concept held in common by [its citizens].

So the idea of membership in a nation remains, ultimately, a fairly abstract mental construct. Furthermore, according to Anderson, the modern nation must be “imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.” In

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12 Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism, Rev. Ed. (London; New York: Verso, 1983, 1991), xii-xiv; 1-14, chaps. 3, 6; quotations at pp. 6-7; Max Savelle, “Nationalism and Other Loyalties in the American Revolution,” The American Historical Review, 67:4 (July 1962): 901-2. “[S]trictly speaking,” Savelle is probably correct that “The Declaration of Independence did not create an American nation,” nor was the nation fully “created” by the Revolutionary War (at 914). However, a too-limited focus on the strictures of the Articles of Confederation could cause one to miss important steps toward national feeling clearly evident in the text of the Declaration as well as in the experience of many soldiers, including Alexander Hamilton, during that war. Savelle threatens to fall under such a limited focus (914-16), but later he broadens his view to claim that “Americans were becoming conscious of their own heroic past and their own culture” through their revolutionary experience (918). Savelle is undoubtedly correct that “Many forces were at work … to create an American national image, to disseminate it among the people of the states, and gradually to arouse a universal loyalty to it” (918). It is the thesis of the current study that one of the prime forces at work here was the common experience of jury service and the effects of that service colony- and, ultimately, nation-wide.
other words, the full experience of actual “fraternity” within the modern nation may have its limits. Social discrimination or other societal fractures may shut certain individuals or groups out of full participation in the experience of national feeling. For the majority, however, generally speaking, the members of a nation believe that they create a single, unique “community.” Again, such feeling of “community” will not be the actual lived experience of every person in that nation—in the minds of individuals of a particular minority group, for example, particularly if they feel persecuted. Nonetheless, cultural and political national feeling continue to be expressed in the broad-based, popular imagination, in literature and the arts. National sentiment, that is, tends to be—and perhaps must be—promoted in many forms of political expression.

Moreover, for the idea of nation to gain mental traction, most individuals living in that national “community” must share experiences that vivify that community for those individuals. In the eighteenth century, community was more than some ideal or theory. Community was experienced every day. What social or political experience did colonial Americans have in common? What shared events in colonial life provided them with cultural-political nexus points—socio-political links—that might bond them in crisis? What shared experiences might colonial Americans have drawn upon for aid in turmoil?

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13 Anderson, 7.
14 The author is grateful for an e-mail communication with Professor Mark von Hagen, who suggested that he had become less concerned with theories of nationalism (which must probably remain of elusive practicality), but rather that he had become more interested in how national development actually happens. This study is concerned primarily with the practice of national development, via the role and work of juries, rather than with theoretical speculations on national sentiment. It must be acknowledged that the theory of nation and national development is voluminous. Several studies have been helpful here, besides Anderson, including Omar Dahbour and Micheline R. Ishay, ed., *The Nationalism Reader* (Atlantic Highlands, NJ: Humanities P International, 1995), providing critical primary source readings on national thought; Anthony D. Smith, *Nationalism: Theory, Ideology, History* (Cambridge, UK: Polity Press, 2001); Smith, *The Ethnic Origins of Nations* (Oxford: Blackwell, 1986, 1988); Geoff Eley and Ronald Grigor Suny, ed., *Becoming National: A Reader* (New York; Oxford: Oxford UP, 1996); and John A. Hall, ed., *The State of the Nation: Ernest Gellner and the Theory of Nationalism* (Cambridge: Cambridge UP, 1998). Again, however, the current study remains more concerned with the practice of, rather than with the theoretical speculations on, national development.
More specifically, what common practice or institution, revered and (often directly) experienced by ordinary colonials, united Americans throughout the colonies in so many aspects of their daily life? And what common practice or institution was likely to provoke a rallying cry if threatened from the outside?

The experience of jury service was shared by many ordinary men in the American colonies in the decades before Independence. Colonial American women and men together likewise shared the ideal of a defendant’s right to a trial by jury—an ideal that provided a safeguard to many ordinary women and men in colonial times, a safeguard even to their lives. Occasionally American colonists watched jury proceedings in rapt attention, especially in some of the highly “political” trials to be considered shortly. But whether the trials were sensational or mundane, this experience and this commitment to a common law heritage—this legal entitlement to jury trial—bound individual Americans with their communities. And this common commitment and heritage associated colonials’ localities with other communities sharing those rituals, rights and obligations. At the heart of a common law court culture, central among those rituals, rights and obligations, was that “ancient privilege” of trial by one’s peers. Powerfully commanding a central place in British popular memory, the Britons in America were especially jealous of what they believed was a right of ancient and thus venerable origins.15

15 According to maritime legal historian Steven Snell, as “[a] legacy of Saxon times reinforced in Article 39 of Magna Carta, the jury was the cornerstone of common-law procedure” in England. While foreign merchants and seamen had little interest in justice from English jurors, preferring the swifter jurisprudence available in admiralty courts (where there were no juries, and which were more familiar to continentals, as they were more like continental merchant courts), most Englishmen remained deeply concerned about juryless justice in England. Thus the admiralty courts in England “became a convenient target” for English subjects at home, fearing the spread of admiralty jurisdiction “as a potential threat to civil liberties and, perhaps more importantly, [as] ‘non-English.’” Meanwhile, Snell finds “no end to the [English] panegyrics composed in honor of the English common-law jury.” See Steven L. Snell, Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction (Durham, NC: Carolina Academic P, 2007), 83-123 (quotations at 88), and for the American context, 128-36 ff. See also William
Long before Independence, before any conscious sense of American nationhood or national feeling, colonial Americans had participated in shared ritual and rite in their law court culture. By the eighteenth century, this law court culture, however varied from one colony to another, featured at its heart panels of twelve as powerful arbiters of fact and of law. Ordinary subjects sat, along with judges, as wielders of power widely observed and keenly felt.

But just because colonial Americans daily shared the rituals and witnessed jury decision making power in their law court culture did not mean that they understood such venues as any sort of common ground unifying one colony with the next. So what if people in New York, Massachusetts and elsewhere routinely called upon juries to settle their disputes and protect their rights? Something had to break through to individuals


living in disparate colonies to force them to recognize that they had institutions, rights and civic practices in common with those of other colonies. Something had to happen to make colonials recognize that a common practice and revered institution might be commonly endangered. Something had to shock colonial Americans into the realization that the political and legal entitlements they held dear were fragile and could be lost. Until that point, colonists might share many aspects of a common law court culture—they might cleave to many shared characteristics in political or legal life—without recognizing any larger significance in those binding ties. Nations cannot exist unless their members first recognize the ties that make them such.

Many wartime events would focus colonial American minds on their common crisis, making them aware of their common ties and shared identity. Britain’s attacks on Massachusetts and its key port city and British assaults on the personal and collective liberties of its subjects throughout the thirteen North American colonies would help unite Americans to confront such an outside danger. Certainly Britain’s war upon the continent, to defeat colonial rebellion, was sufficient to wake up even the sunshine patriots. All these would stir colonial Americans to a strong intercolonial unity and to an American national feeling. Yet American national sentiment was in formation even before these crisis events, even before America’s War for Independence.

Paul A. Varg has shown how colonists’ language, describing how they saw themselves, changed decisively between 1758 and 1776. Long before the British landed troops in North America to begin their campaign of military conquest over the civilian population, colonial Americans’ sense of self was being transformed. Prior to the

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17 This certainly was the American view of the situation, which colonials compared to what Ireland had experienced in its brutal subjugation by the English, and which Americans feared was in store for them.
1750s, colonial Americans had developed a strong sense of pride in being “British colonists in America,” as they had preferred to call themselves into the middle of the eighteenth century. Paradoxically, perhaps, the colonial Americans’ first, nascent national feeling had begun as a sense of British pride. Americans’ confidence from their victory over French, Roman Catholic absolutism, in the French and Indian War, had expressed itself as a British national-like sentiment among the colonists. And what, specifically, had made the Anglo-Americans so proud of their place in a British empire? At the heart of this patriotic spirit among the Anglo-Americans was a political theory of consent in government: a theory of consent that saw French absolutism (including popery) as foreign and repugnant. In other words, at the core of a British proto-national sentiment in colonial America was the faith that the British constitution “offered firm guarantees of personal liberties.” What made these personal liberties possible was the genius of that constitution’s balance of power between “King, Lords, and Commons.”¹⁸

Eventually, the American colonists would discover that they were mistaken in their faith that “a common political theory” guaranteed their liberty: “that the authorities in London meant to apply it to the British plantations.” From the time of the Stamp Act of 1765 on, Americans would begin to understand “that colonies were not in the category of equals, that government by consent and agreement was to be limited to minor local matters,” and that the Americans had no genuine “equality within the empire.”

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the defeat of those papist, absolutist French in North America in 1763, Britain’s attention had been turned to more dire matters—namely, to intercontinental war with the French. So Britain had indulged the American colonists in a policy of salutary neglect. But with the end of Britain’s salutary neglect of its American possessions, following the defeat of French North America, Anglo-Americans were forced to create a new sense of identity. This new identity was not a British national pride, but an American national consciousness. American “[n]ationalism as a self-conscious phenomenon was stimulated,” then, “by the British challenge of the colonists’ illusion of equal status and their confidence in their future role” within a British empire.¹⁹

But there were other influences pushing the development of American national sentiment. In several key political trials in the years leading to Revolution, Britain’s imperial government and its local representatives in the colonial administrations would compel the Anglo-Americans to recognize what bound them together as a people. That binding tie was found in their most basic political entitlements and within their law court culture, including, especially, their right to trial by jury.

One last comment must be offered on the subject of national feeling. Benedict Anderson insists that, even if this modern sense of nation is “imagined,” nonetheless, it does exist in a very real sense—so real, in fact, that millions of members of modern nations have been willing “not so much to kill, as willingly to die for such limited imaginings.”²⁰ What could cause such deep feeling in the members of modern nations is far beyond the scope of the present study.²¹ But what is of interest here is how such national identity evolved, specifically, with respect to the thirteen disparate British

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¹⁹ Ibid.
²⁰ Anderson, 7.
²¹ See the comments in notes 9, 10, 12 and 14 above.
colonies in North America. In the American case, a sense of unified colonial identity seems to have been forged through a shared political culture that emphasized the entitlements and responsibilities of the middling sorts of citizens considered in the previous chapters.

The theory of this study is that a colonial American political identity evolved, at least in part, in an experience of many ordinary subjects in the political life of their colony—and beyond—within a law court culture. Experience in colonial law court culture gave many ordinary subjects the opportunity to exercise legal and political power and, in the process, turned those “subjects” into “citizens.” This experience in the exercise of legal and political power helped to mold a nation of ordinary subjects into autonomous citizens who could see themselves in vital ways as political actors—as empowered and independent, rather than as mere subjects owing deference to a higher authority. The shared experience of colonial Americans in their courts, in service on grand juries and particularly in their work on trial or petit juries, helped to forge a common American political identity. Most important, the news of what American juries could do, especially in a few sensational, partisan trials, got people talking about their rights, and about relations between colonies on the American continent and with others beyond. These partisan trials and their political repercussions are the subject of the pages that follow in these last two chapters. The key question is this: how did these partisan trials, often featuring administration attacks on individuals’ entitlements, help to transform colonial American subjects into citizens ready to support the formation of a new nation?

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22 The trials studied here often but not always featured purely partisan efforts by a local administration to silence critics. The Boston Massacre trials considered at the end of the final chapter presented their jurors with a very different set of “political” issues, requiring very different responses from those citizen-jurors.
Of Subjects and Citizens

What did it mean, before the American Revolution, to be a “subject” of His Britannic Majesty, and how did American colonial subjects evolve toward imagining themselves as “citizens” of a nation of their own? How did the colonial American jury empower ordinary subjects to use extraordinary authority to decide important “political” issues? What were the effects of such “political” jury trials on colonial Americans?

Historian James H. Kettner has described how the idea of American citizenship evolved during the revolutionary era. Kettner has argued that, prior to the Revolution, colonial Americans had been “subjects” of a sovereign monarch to whom lifelong and nearly total allegiance and deference were owed. Arising out of medieval, feudal theory, and formulated and modified particularly in the writings of Sir Edward Coke, British social theory held subjects to be just that: in subjugation, under law and custom, to their “sovereign lord the king.” The king, as superior, owed his subjects his protection. The king’s subjects, as inferiors in the neo-feudal relation, owed the sovereign their allegiance, obedience, and loyalty. Such social theory had its roots in the writings of Aristotle, who had analogized the relationship between monarch and subject with that between father and son. In Coke’s legal view, British sons never outgrew an almost absolute allegiance to their social and political “father.” As Kettner has shown, Coke held that “Subjection in law must therefore share the attributes of natural subordination [of son to father, that is. Furthermore, the subordination of subject to sovereign] must be deemed perpetual and immutable.”

Certainly, “inferior subjects” had no right to speak

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or write critically “against their masters,” as a leading scholar of press freedom has put it.\textsuperscript{24} Only by the late seventeenth century would such ideas of permanent obligation and subordination of English subject to sovereign begin to be substantially revised.

By the 1690s, “John Locke and others began to explain the structure of society and government in terms of a primal social compact in which free individuals voluntarily joined together to form communities, relinquishing part of their natural autonomy in order to protect their most essential liberties.”\textsuperscript{25} According to Kettner, it would take an American Revolution and many decades in its aftermath for American citizens to work out what citizenship meant, legally, in the new republic. Britain, too, would require several decades to accept the new reality of legally separated and independent American citizens. Numerous legal cases in America and in Britain would be fought to resolve what exactly was the status of British subjects living in America in, say, 1780. Was a Loyalist in New York in that year a faithful British subject or a traitorous citizen of a new American nation or state? Judges and courts would spend the next several decades hashing out the answers to such questions. How the British and Americans ultimately resolved the nature of American citizenship in international law (and in British and American courts) is a topic beyond the subject at hand. For the present, let it simply be noted that while Americans came to embrace the Lockean, volitional idea of citizenship through their revolutionary experience, the British after 1783 accepted American independence as a political and legal fait accompli. But the British establishment “resisted the doctrines of individual choice and consent that developed such force across


\textsuperscript{25} Kettner, “Subjects or Citizens,” 948.
the Atlantic, and they remained much more reluctant than their American counterparts” to recognize the political “rights” of citizenship, such as that of the general franchise, even in England.\(^{26}\)

In Britain for decades to come, many in the governing class continued to view English subjects as precisely that: “in subjection,” subordinate, and politically bound to defer to the authorities above them. In many ways and for a long time after America’s War for Independence, the British sovereign and Tory parliamentarians and ministers denied English (and Irish) subjects what Americans had come to think of as the basic entitlements of citizenship.\(^{27}\)

Indeed, legal historian John Phillip Reid has argued that mob power over—and as—“law enforcement” gave American commoners and their radical or whig political leaders in Boston, for instance, a significant check on the power of the colony’s administration. This was a popular check on government power unlike anything typical in Britain. British “imperial law” and English judges held sway in English courtrooms in

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\(^{26}\) Kettner, “Subjects or Citizens,” 952-67, quotation at 967. In both articles cited here, Kettner emphasizes Britain’s unwillingness to recognize American citizens as such, insisting for years that Americans remained British subjects liable, particularly, to impressment on British naval vessels.

ways that imperial law and the local colonial administration in America simply could not, according to Reid.  

Regardless of such differences, however, many American whigs saw dark portents in the rising parallels between political events in America from 1765 on, and in Britain, particularly in the government assaults on freedom that they thought had been occurring in British isles for some decades. As endangered as American whigs thought liberty seemed to be in England, it was Ireland that presented the starkest contrast for colonials. The British Parliament’s Irish Declaratory Act of 1720 reinforced the disenfranchisement of the majority of Catholic Irishmen while it stripped the Irish Parliament of any significant autonomy over Irish affairs. (In fact, the initial impetus of the 1720 act was to strike at the assertions of prerogative that had just been made by the Irish Lords.) This declaratory act is generally recognized as the model for that later act asserting Parliament’s “full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America … in all cases whatsoever,” passed in 1766. The parallel language of the 1720 act, directed at the Irish, had “caused outrage in Ireland,” according to Sean J. Connolly in his recent history of the island. If most Americans evinced little initial reaction to Parliament’s act of 1766, they came to reject its philosophy of an absolute parliamentary sovereignty. And fairly or not, they would note with trepidation the Irish example as illuminating what the British intended for Americans. 

Specifically, in Ireland “foreign” (English) officials dominated Irish courts. Those judges served at “the king’s pleasure” rather than with commissions for life (or

29 Ibid., and see S. J. Connolly, Divided Kingdom: Ireland, 1630-1800 (Oxford: Oxford UP, 2008), 215-29, 197-207, 235-36, 308-9, quotation at 221. See also the note and sources immediately below.
“good behavior”), a privilege of judges in England since the Bill of Rights of 1689. This lack of judicial independence from crown or administrative authority was a second parallel American whigs saw between the Irish and American political experience. (The British denial to Americans of a properly constituted judiciary, one inappropriately dependent on royal favor, would appear as a charge against the king in the Declaration of Independence.) Unlike in American courts, however, judges in Ireland had been successful at completely dominating Irish courts and their jurors—jurors chosen by the “tory government party,” according to Reid. This difference between the powers of judges in Ireland (or in England, for that matter) and in America, was possible because “[i]n Ireland, the law was governed by men. In North America men were governed by law.” Reid attributes this distinction to differing attitudes among the rulers. Thomas Hutchinson in Massachusetts, for example, held different assumptions about the use of power from those of John Fitzgibbon, lord chancellor of Ireland, and they had different views regarding the “mutability of the law. The difference … may not be in the substance of the law but how much those who govern respect the rule of law.” Surely an additional factor was at work, however. The English and the “conquered” Irish, living at the center of imperial power, would have found it much more difficult to resist the force of that authority directly atop them, than did those on the periphery of empire.30

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Far away from the center of imperial power, on the other side of the Atlantic, American colonists had enjoyed much greater autonomy, particularly in the practice of certain rights of “citizenship.” Specifically, when acting as jurors, colonial Americans regularly had felt the experience of significant decision-making responsibility. The exercise of those rights and that power—of citizenship—came through the eighteenth-century colonial experience of their law court culture. Central to this law court culture was the jury, whose audience could extend far beyond one particular courtroom. As several trials of great political import would demonstrate, the audience of a sensational partisan trial could be widespread, and the results of such trials could have a deep and lasting impact on a local administration’s power in America. In several highly publicized, often partisan trials, jury power and responsibility could and did check those hoping to wield a political axe. If American subjects were ever so politically bound or deferential to their superiors, such deference was not on display in several key political trials to be considered now.

**The political background and a precedent to the Zenger Case in the Colony of New York: The politics of colonial American law court culture and the political use and power of juries**

Of all the trials and jury decisions in American popular memory, the New York trial of John Peter Zenger for seditious libel against the colonial administration in 1735 enjoys one of the highest places of prominence. Legal historians have questioned whether the Zenger case actually changed much in the law of the Colony of New York, in its immediate aftermath, in the eighteenth century. Some have expressed doubt about

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whether the case did much at all to expand political rights, namely freedom of the press, anywhere in the colonies in the years immediately following the decision. These arguments over the immediate judicial impact of the Zenger case continue, though at least one most prominent legal historian, who once had cast doubt on the broader, practical effect of Zenger as a significant moment in the historical struggle for press freedom, seems now to have come around, defending the legal significance of the case. Most historians agree that Zenger was a sensational partisan trial that eventually had a great impact on American political and legal thought. All agree that the case became a symbol of enormous importance politically and in American national memory.31

More specifically, the case caused a sensation throughout New York and the other American colonies at the time. The political impact and public discussion of this case would continue throughout the remainder of the eighteenth century. Indeed, James Alexander’s A Brief Narrative of the Case and Trial of John Peter Zenger, first published in 1736 and widely distributed throughout the American colonies (and later states), was “reprinted fifteen times before the end of the century.” According to the modern editor of

31 While Leonard W. Levy and Stanley N. Katz have argued strongly that the jury decision in the Zenger trial did not fundamentally change American law or politics in the eighteenth century, Levy seems to have revised his position by 1999, holding that the Zenger trial was indeed “a victory for freedom of the press and the jury’s power to make truth a defense against a charge of libel,” a position he had previously criticized. And Katz has held that, although Zenger was not a law-changing precedent in New York for many decades after, the case nonetheless was important politically, representing “an early appreciation of the emerging popular basis of American politics” that “would ultimately lead to reforms both of politics and law.” All commentators seem to agree that the Zenger trial was highly significant in various respects, certainly as one of America’s first, sensational political trials. See Leonard W. Levy, “Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York,” William and Mary Quarterly, 3rd Ser., 17:1 (January 1960): 35-50; and cf. Levy, The Palladium of Justice, 81; and see Stanley Nider Katz, ed., A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of The New York Weekly Journal, By James Alexander, 2nd ed. (Cambridge, MA: Harvard UP, 1972), 29-35; and note Katz’s dismissal of grand notions of the Zenger case as the “‘germ of American freedom’” in John Peter Zenger: His Press, His Trial, Livingston Rutherfurd, introd. Stanley N. Katz (New York: Dodd, Mead [1904], rpt. 1981), xviii-xix. See also Patricia U. Bonomi, A Factious People: Politics and Society in Colonial New York (New York; London: Columbia UP, 1971), 117-20; Kammen, Colonial New York, 207; and Paul Finkelman, “The Zenger Case: Prototype of a Political Trial,” in Michal R. Belknap, ed., American Political Trials (Westport, CT; London: Greenwood P, 1981), 21-42.
Alexander’s *Narrative*, this report of Zenger’s trial was the best known publication in the colonies until John Dickinson’s *Letters from a Farmer in Pennsylvania* in 1768. The report of Zenger’s seditious libel trial became a focus of discussion, for instance, in the unsuccessful prosecution of Alexander McDougall, in 1770, for seditious libel against the New York Assembly. Jeffersonians in Boston would use yet another republication of the Zenger trial narrative as a vehicle to attack President John Adams and the Federalist Sedition Act, passed during his administration.  

The account of Zenger’s trial had repercussions in England, as well. The account went through four editions in its first year of publication and was reprinted repeatedly in London after 1738. Zenger’s trial account was cited frequently in the pamphlet wars later in the eighteenth century. The account was discussed during the seditious libel trial in London of bookseller William Owen in 1752, for example. In Owen’s case, in a rare display of independence in flouting their judge’s instructions in his charge to the jury, the London trial jurors acquitted the bookseller. Reportedly those English jurors consciously followed the model set by Zenger’s trial jury, a model they had come to know through the often reprinted reports of Zenger’s trial.  

English jurors repeated the performance in the 1763 prosecution of John Wilkes for his allegedly seditious libel of the government of George III, in his No. 45 of *The North Briton*. In Wilkes v. Wood, radical reformers saw to it that the jurors received various pamphlets arguing for greater press freedom and for jury powers to protect it.  

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32 See the note and sources of the following citation.
Among the pamphlets was yet another reprint of the account of Zenger’s trial. In both the Wilkes trial and in a companion case involving press freedom and jury power, Entick v. Carrington, the juries acquitted the defendants along the lines laid down in Zenger. A “Letter to be read by all Jurymen,” a political tract by “Britannicus” arguing for greater jury power to protect press liberty, followed the defense arguments in the Zenger trial.34 If Zenger’s trial did not immediately change judicial case law or alter the statutes of American colonial assemblies or of the British Parliament, the trial had a profound, immediate and lasting impact on public opinion in the colonies as well as in England, on what ought to be the boundaries on the right of subjects to criticize the governing administration.

In referring to the Zenger case—or any other, for that matter—as a sensational partisan trial, nothing arcane or legalistic is intended by that term. In common usage, the term partisan or “political” trial often is also used to mean “show trial.” Of course, not every highly politicized trial is a Stalin-like show trial. For instance, the Boston Massacre trials discussed at the end of this study were highly politicized or “political” trials, but they were not state show trials or partisan trials. In this immediate context, partisan or show trials usually have sensational news value tending to make them famous (or notorious), because the state conducts these trials for broader political purposes. Partisan trials, as the term is used here, typically involve an attack on an individual or on groups, by means of the courts, by the ruling administration or government, in an

apparent desire by the state to gain advantage over political opponents or by seeking the
destruction of that opposition’s party, power or influence. Such partisan, state trials
occasionally have the effect, at the time or later, of changing the political order or altering
the governing power—not necessarily in the ruler’s favor. The viciousness or manifest
injustice of the state, employing “courts of justice” to attack dissenters politically, is what
gives such trials their notoriety. The term “partisan” or “show trial” may call to mind the
madness of Stalin’s purge trials during the 1930s, climaxing in “‘confessions of guilt’ by
most of the victims,” usually to bogus charges, followed by their quick execution. Few if
any eras in the history of the partisan, state trial have been so insanely bloody as that of
Stalin’s show trials. Most examples of such state trials have been far less spectacular,
though still appalling, which suggests a second sense of “partisan” trial, as contemplated
here.

In a broader sense, partisan or state show trials are considered here to be those
that attracted a large audience at the time—an audience recognizing political issues at
stake and caring deeply about those issues. That audience need not have been present in
the courtroom, of course, but may have been attending to the trial through newspapers,
pamphlets, oral reports, or some other source. As time passed, other people reading or
hearing about such a trial also may have been moved to see that trial as having been
important in the development of their relation to the state, or significant in some other,
broader political sense. A trial may be considered as a state or partisan trial, then, when

35 The essays in Belknap, ed., American Political Trials, have been of help to the analysis here. These
essays do not specifically define “political trials.” Rather, the collection seeks to exemplify the
phenomenon of political attack, through the courts, on individuals or parties for overtly political
reasons. 36 Stalin’s purges and show trials are outlined in Basil Dmytryshyn, USSR: A Concise History, 4th
ed. (New
York: Scribner, 1965, 1984), 180-85; and their effects and the efforts of later Soviet leaders to deal with
the “judicial” residue are discussed in Seweryn Bailé, The Soviet Paradox: External Expansion, Internal
members of the broader public see themselves as individually concerned with the trial and its outcome and believe that the trial involved the vital interests of the community and its governance.

In several such trials during the eighteenth century, colonial Americans believed that their liberty was at stake. In these trials, the jurors, called upon to decide the issues in the case, could be seen as acting in the most highly “political” sense, opposing the interests or policy of their rulers. The jurors, in these key politicized cases in the late colonial period, acted to uphold what Americas were coming to see as their entitlements against illegitimate “authority,” and eventually against British power. The entitlements of colonial Americans were in fact challenged in several court trials decided by jury. These trials raised basic legal issues, but these issues went far beyond mundane law points debated by a few adversaries in court. Some ordinary colonial American subjects decided some extraordinary cases as jurors in court. In one sense, John Peter Zenger’s case was merely one more libel trial of a printer who published something the government considered offensive. But Zenger’s would be anything but an ordinary case.

As will be seen, the court experience of John Peter Zenger fits any description of a partisan trial, where the ruler wanted to destroy a political opponent and where a jury and a large part of the populace then (and later) took a heightened interest in the case—feeling their own political interests at stake. But to better understand the context of Zenger and his legal problems, it may prove helpful to step back for a moment, to understand the broader political scene of New York. For New York society and politics were still quite unsettled following a period of partisan battle at the start of the century. In 1702, in fact, the colony was still reeling from the effects of England’s Glorious
Revolution and Leisler’s rebellion. In the course of the partisan strife, the New York administration would take one of its political opponents to court, where a New York jury would struggle, but ultimately fail, to fully protect a victim from state harassment. It was a famous trial that would teach New Yorkers, however, about the potential power of jurors to defend those whom the administration wanted to crush. The lessons of the trial of Nicholas Bayard would not be lost by the time the state came to shut down Zenger’s press.

**Internecine party warfare and an administration’s attempt to use the courts to subjugate a political opponent in New York: A rehearsal for Zenger’s trial**

In many ways, New York was unusual among Britain’s colonies in North America. New York’s religious pluralism had helped this once-Dutch colony avoid the high-pitched doctrinal struggles and the weight of ministerial authority characterizing life in New England’s Puritan, congregational towns. Meanwhile, like the southern colonies, New York knew powerful landowning families in the early eighteenth century (particularly the Morrices and the Livingstons). But the tensions between those landowning clans and the colony’s powerful mercantile interests made New York political life more volatile than that of the gentry-ruled colonies of the south. 37 New York was well acquainted with factional struggle in the seventeenth and eighteenth centuries. Political infighting spilled into the courts of New York more than once during the century, as colonial rulers sought to punish their political opponents there.

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In fact, the Zenger trial was not the first highly politicized prosecution in New York. There had been one other—very prominent, and very nasty. The details are complicated and have been well developed elsewhere, so it is hoped that a short summary here will lay the scene for the judicial politics the ensnared Zenger in the 1730s. In short, from the early eighteenth century, New York’s politics had been thoroughly entwined with its social divisions. Socially and politically, New York in the early eighteenth century was a society torn by competing nationalisms. The political fallout of these competing nationalisms would be felt in the colony right up to the Revolution.

Originally, of course, it was the Dutch who had governed New Amsterdam until the English took possession of Manhattan in bloodless conquest in 1664. The upriver Dutch areas had capitulated shortly thereafter. Although the English became the majority of the European population in New York City by 1698, the Dutch would continue to exercise great influence in the city, while they dominated, socially and politically, the lands along the Hudson to the north. Thus many English felt themselves “to be an embattled minority” in the colony during the early eighteenth century. According to Nicholas Bayard, leader of the “English party” at the time, “‘those of the English nation’ in New York were still ‘opprest’ by the governor’s Dutch appointees,” men who had been appointed to placate Dutch sensitivities but whose positions, as key colonial officers, clearly offended English national sentiment. Indeed, English sympathizers such as Bayard apparently chafed under lingering Dutch political influence in the colony. And as one might expect, many Dutch returned little love toward English partisans such as Bayard.38

38 Bonomi, A Factious People, 22; Kammen, Colonial New York, 74-87, 91, 120-27; Adrian Howe, “The Bayard Treason Trial: Dramatizing Anglo-Dutch Politics in Early Eighteenth-Century New York City,”
Recent political events in England had not calmed the waters in New York. The Glorious Revolution of 1688 that ended Stuart rule had brought a Dutchman and his English wife to the throne. With Protestant William III and Mary now in power in London, a predominantly Dutch group of rebels led by Jacob Leisler had grabbed power in New York in May of 1689. Ironically, the numerical and political stronghold of the Dutch in New York, at Albany, resisted Leisler’s claims to New York’s governorship, partly out of fear that the Iroquois might take advantage of chaos in New York by launching an attack. Fears of the Iroquois, then, stiffened Dutch resistance against Leisler’s insurrection and strengthened their support for English—not Leislerian—authority in the colony. Eventually Leisler and his ringleaders surrendered to the new English governor, Colonel Henry Sloughter, in March 1691, who promptly delivered rough justice to the defeated Leislerian leadership. Leisler and another leader of the rebellion were hanged, and others also were sentenced to die. The Dutch partisans, meanwhile, resented Sloughter’s harsh treatment of Leisler and his followers. Leisler’s inglorious end thus rekindled the lingering Dutch resentment against English rule and created a new “party” in New York, known as the Leislerians. Dutch and English social tensions came to a boil shortly after Sloughter’s eradication of the Dutch “rebellion,” when Leislerian sympathizers saw a chance to attack an English opponent—in court, on charges of treason, no less.  

_Colonial America: Essays in Politics and Social Development, 4th ed.,_ Stanley N. Katz, John M. Murrin, et al., ed. (New York: McGraw-Hill, 1993), 330-38, Bayard quoted by Howe at p. 335. In an irony of New York politics, Bayard was Dutch-born but apparently had evolved into an adamant Anglophile by the time of Leisler’s Rebellion, and he remained at least as partisan to his new national identity—and perhaps more so—afterward. See the discussion below and see Howe, 345-49, 362-64.  

39 See the previous note and see Bonomi, _A Factious People_, 25.
The treason trial of Nicholas Bayard in 1702 became possible because of the continuing twists and turns of New York’s political leadership, where a new governor, following Sloughter, sought to placate Dutch Leislerian anger over the recent hostilities. Governor Richard Coote, the Earl of Bellomont, wanted both to pacify the Dutch population of New York and to bring a stable New York society more securely into the British imperial order. Bellomont’s plan was to elevate the Dutch political profile in New York, to assuage Dutch animosity and try to balance the rival social forces that had ravaged New York politics. Unfortunately, Bellomont’s well-intentioned efforts to place Dutchmen in important positions in his administration led to backlash among the English. “English party” leaders such as Nicholas Bayard were now feeling themselves “opprest” by a “foreign” interest. But at least for a moment, New York’s political war enjoyed something of a truce. The temporary lull in the political struggle ended, however, when Bellomont died in 1701.40

Now, with Bellomont’s death, the Leislerians’ opportunity for score settling was at hand. Lieutenant-Governor John Nanfan presided over the colony until the next English governor could arrive. Nanfan and all five members of the Council—all of whom were Bellomont’s appointees and highly sympathetic to the Leislerian cause—now took advantage of the power Bellomont had given them. They indicted their political archrival, anti-Leislerian Nicholas Bayard, on grounds of high treason. The charges were politically inspired, and this trial was to be a thoroughly partisan charade. Bayard was accused of having spread “Scandalous Libells” against the king’s government in New York, charges that would echo three decades later in the Zenger case. According to the scholar of the Bayard trial, Adrian Howe, “if the conspicuous issue was loyalty to the

40 Bonomi, A Factious People, 76-78; Howe, “Bayard Treason Trial,” 333-38.
crown, the reality to the townsfolk was that the treason trial of Nicholas Bayard was a political trial, and no attempt was made to disguise the fact.” Allegedly, Bayard and his son Samuel had urged certain subjects of the king, including soldiers stationed at Fort William Henry, to sign petitions to the king and House of Commons complaining of “oppressive government in New York.” No such petitions were ever produced at trial, so Nicholas and Samuel Bayard were implicated only by the testimony of some of those soldiers. Meanwhile, the judges—also sharing pro-Dutch sympathies—were gunning for Nicholas Bayard. The attorney general, perhaps because he was a man of conscience, refused to proceed against Bayard. His refusal forced the Leislerians to invent the “specially created post of solicitor general” to argue the government’s political case. The grand jury was overwhelmingly of Dutch descent. Almost all of the grand jurors were members of the Dutch Reformed Church. While not all were Leislerian faction supporters, probably half of them were, according to Howe’s research. Incredibly, given the makeup of the grand jury, the required number of grand jurors refused to vote a true bill against Nicholas Bayard. In an indication of just what sort of trial this was to be, Chief Justice William Atwood ordered the case to proceed regardless.41

The high-handed behavior of the chief justice in Bayard’s treason trial also would echo three decades later in the overt partisanship of the bench in the political trial of John Peter Zenger. In both cases, an administration and its judicial appointees, bent on breaking their political enemies, pursued a criminal trial of dissidents regardless of the failure of the grand jury to vote out an indictment in the normal, customary form.

Bayard’s case immediately proceeded to jury trial. The trial jurors, apparently all Dutch, included five identified Leislerians. After what could only be considered a show

41 Howe, “Bayard Treason Trial,” 338-41, 349-54.
trial, the Chief Justice charged the jury, instructing them—in the way *English* justices so often did, in the jury’s duty in deliberating—“to ‘bring in the prisoner guilty.’” After some confusion and following requests for additional information about what exactly was the English law of treason, the trial jury eventually, and reluctantly, complied with the judge’s instructions. By such proceedings, Bayard was found guilty. Shortly thereafter, he “apologized for his offense to the satisfaction of the Council,” and was reprieved by Lt. Gov. John Nanfan on the very day set for his execution.42

The treason trial of Nicholas Bayard was not the ideal Anglo-American jury trial. While Bayard’s grand jury illustrated that generosity toward defendants that would characterize so many later Massachusetts juries as well as the jurors in Zenger’s case, Bayard’s trial jury did not. Unlike so many later petit juries in Massachusetts in the quarter century leading up to revolution, Bayard’s trial jury did not come to his rescue. Nor did Bayard’s trial jury show the determination to mitigate the harshness of the law (or a vengeful prosecution), as would more than a few Massachusetts juries in criminal trials in the decades before Independence. Bayard’s jury found him guilty of trumped-up, politicized charges that lacked necessary evidence, in court proceedings missing any noticeable sense of justice.

But for reasons that probably cannot now be known, according to the student of the case, Bayard’s trial jury struggled against finding him guilty. At length, Bayard’s jurors did find him guilty, but “‘with much regret and trouble of mind,’” as Howe quotes two of the jurors. Indeed, it is possible that some of the jurors voted to convict Bayard in the same spirit in which two of the judges eventually acquiesced in sentencing him to death—only upon the understanding that the lieutenant-governor would grant Bayard a

reprieve if he confessed his bad intentions toward the government.\(^{43}\) (Bayard did finally make such a confession. It would appear he did so only to save his life, and in so doing, he succeeded.) But it bears repeating that the grand jury had not indicted Bayard; the grand jury never had achieved the number of votes needed to allow the prosecution to proceed. Such a trial ordinarily never would have occurred in an English colonial court in the period. No matter; this entire proceeding was thoroughly in the nature of a political vendetta. Such a “judicial” proceeding would not be the last occasion at law when procedural safeguards would be dispensed with for reasons of state—or, more to the point, because the state wished to humble a dissident, finding its means in the courts, before partisan judges, in a show trial.

The Bayard treason trial was a grotesque aberration of the normal proceedings of justice in colonial America in the decades before independence. What was signal about the Bayard trial was that it featured a colonial administration persecuting a political opponent, albeit in a crude, even ridiculous way. The victim, that opponent and focus of the government’s—and Dutch party’s—ire in this case was a curious enemy, however. For in actuality, Anglo-partisan Nicholas Bayard was of Dutch ancestry, the “Holland-born nephew of Peter Stuyvesant, the last Dutch governor of New Netherland.” Though he had been an elder in the Dutch Reformed Church, by 1702, Bayard was in the process of converting to the Church of England. He was by then attending services at the Anglican Trinity Church, though he also was “still, apparently, receiving communion in the Dutch church at the time of his arrest,” for treason. Professor Howe suggests that Bayard’s real treason, besides his having been the archenemy of Jacob Leisler and his followers, was that he was a traitor to his own nation in his effort to “become English,

\(^{43}\) Ibid., 356-57, 344-46.
and aggressively English at that.” Thus the Dutch-Leisler “party” of New York seems to have wanted to punish Bayard for his “national” treason. Howe argues that the predominantly Dutch grand jurors, being Dutch—a people presumably of cautious and mild-mannered temperament—balked at indicting Bayard. The Dutch petit jurors only convicted out of timidity and with manifest regret. Indeed, Howe suggests that, in all likelihood, the Dutch-Leisler party magistrates, rushing to finish the job before the arrival of a new English governor, never really intended to execute Bayard anyway. (Apparently Bayard knew nothing of any intention to spare him in the end, however.) Howe concludes that the Bayard treason trial is best “interpreted as a drama,” highlighting the complexities of New York’s social system and suggesting reasons for New York’s lasting reticence to embrace any future political revolt, right down to 1776.  

From their turbulent colonial experience, New Yorkers knew that rebellions can have very unhappy endings and unforeseen consequences to government and society, lasting for decades. Speculations on identity politics and the Dutch national character aside, perhaps better than interpreting the Bayard treason trial as some sort of inter-cultural “drama” would be interpreting it as a political “show trial,” minus the Stalinist execution-despite-confession at the end. Bayard had been well served by his grand jury, but his trial jury

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44 Kammen, Colonial New York, 211, 124; Howe, “Bayard Treason Trial,” 360-61, 346-47, 361-64, 331-33. As late as the end of June, 1776, John Adams found New Yorkers maddeningly slow to get on board the cause of Independence, writing that “New York was ‘likely to have the Honour of being the very last of all in imbibing the genuine Principles and the true system of American Policy,’” Howe at 331; and see also John Adams’s exasperation noted in Bonomi, A Factious People, 17. It is significant that Adams appears here to conceive of an “American” national policy, a national sentiment and agenda toward which New Yorkers’ sentiment was “‘rather retrograde,’” Howe, 331. As pointed out above, national sentiment is unlikely to be experienced uniformly throughout any nation. In New York’s case, it seems equally likely that the colony’s merchant community found breaking ties with their English counterparts in 1776 profoundly wrenching, another factor explaining New York’s tardiness to imbibe the revolutionary spirit.  

45 Indeed, Howe states that “the treason trial of Nicholas Bayard was a political trial,” featuring a “partisan” bench but a clearly mixed, not fully partisan grand jury and traverse jury. “Bayard Treason Trial,” at 340-41, 349-57. It was the non-fully-partisan behavior of the grand and petit jurors that made Bayard’s trial more complex than the vulgar, Stalinist sort of show trial. The necessary number of grand jurors did not
caved. It must be emphasized, however, that if Bayard’s trial jurors capitulated to the government’s wishes, they did so only after much struggle and with reluctance. Bayard’s trial jury, contrary to his own real fears and deluded assertions, was not fixed. His jurors acted as political arbiters in a highly politicized case. They stood as best they could and only gave in when, apparently, they came to believe that a political deal had been struck to save Bayard’s life. Still, Bayard’s trial jury did not demonstrate the mercy toward defendants typical of so many later Massachusetts jurors, portrayed in the previous chapters of this study. And the example set by Bayard’s petit jury was not followed by the jurors in the Zenger case. But it does appear that Bayard’s starkly partisan trial raised the consciousness of many New Yorkers, so that the next generation of New York jurors would be much more receptive to arguments, from attorneys of a more professionalized bar, asking jurors to think for themselves and not allow an administration to use the courts to silence the state’s political opponents.

In many respects, then, the Bayard treason trial was a rehearsal for Zenger’s trial. The next time a New York grand jury would be asked by the colonial administration to indict a political dissident in a major politicized case, the grand jury—two, actually—would adamantly refuse with a singular, strong voice. There would be no close division among the grand jurors in the Zenger case. And Zenger’s trial jury would simply reject the judge’s instructions on the law as well as his call for a guilty verdict. That jury would want to indict; the petit jury did convict, but only reluctantly. Later grand juries in politicized cases such as Zenger’s would play the same defiant role. Zenger’s trial jury, however, would positively refuse instruction from the politicized bench. Zenger’s jury would defy the colonial administration as Bayard’s jury, for whatever reasons, could not. Perhaps in the end, Bayard’s jury simply did not see Bayard as “one of them.” This raises an interesting question and paradox: what is to be made of the conflict between a jury’s duty to “do justice” impartially, without respect to parties, and yet also to represent, somehow, “the people” and do their will. This is a paradox raised by Abramson, *We, the Jury*, 1-13, 17-36 ff. Kammen, *Colonial New York*, concludes that the “adroit handling of the Zenger case in 1735 as compared with the cruder Bayard trial in 1702 demonstrates the rapid professionalization of the colonial bar within a generation,” 211.
make a “political statement” of its own—one that would shout far beyond the borders of New York and serve as a beacon for individual entitlement against authoritarian rule. The colonial subjects on Zenger’s jury would, in effect, declare themselves to be citizens, powerful lawmakers in their own right. Zenger’s jurors, in their law case, would be widely seen as effectively annulling bad law—striking a blow against an oppressive and, in some sense, a “foreign” administration. The Zenger case would become a heralded trial in American national memory precisely because it illustrated that power of ordinary subjects to defend their interests against rulers determined to hold them subordinate under their power—determined to rule them as subjects rather than govern them as citizens.47

The Zenger trial and its political significance: The rise of Citizen Jurors as a political force

By the generation following the highly politicized Bayard treason trial, the New York political landscape had changed in several ways. By the 1730s, New York governors had been shorn of important elements of their power. Although still a potent force in the colony’s political life, the governor had seen his influence in the upper house of the colonial legislature significantly curtailed. Crown legal advisors had determined that the governor of New York “should no longer participate in deliberations of the legislative council.” Thus the chief executive in New York saw his influence over legislation truncated in the colony. Moreover, at about the time of the Zenger trial, by 1738, the sovereign home government in London would decide to split what had until then been the single position of governor of New York and New Jersey. After 1738, one executive would govern each colony, where the two had previously been ruled by the office of the royal representative in New York. And the 1730s saw a victory for the New York

47 See pp. 263-66 above.
colonial assembly over the governor in payment of his salary. The traditional, large and long-term payments to New York’s executive were now cut, reduced to limited, annual payments for salary, and only for salary, by the legislature. The New York legislature had come to see the danger in broadly budgeted sums, including amounts above and beyond that line item intended for the executive’s salary, moneys that could be used at the governor’s sole discretion. So, perquisites were curtailed to a single emolument, not to be laid out over some number of years but to be paid only annually. Often these sums would amount to less than what was recommended by the governor’s instructions from London.48 In a related development, the 1730s had seen the waning of the pro- and anti-Leislerian politics of the previous generation. By 1735, New York politics had evolved into a struggle between two rival factions. On one side stood a “court party” supporting the new governor, William Cosby and his Philipse family allies, along with a judge of the New York Supreme Court, James DeLancey, among others. And on the other side stood a “country party” led by Supreme Court Chief Justice Lewis Morris and political leader Rip Van Dam, among others, including prominent attorneys James Alexander and William Smith.49

At the time of William Cosby’s arrival in New York to assume his duties as the newly appointed governor, in August of 1732, “party” differences in the colony seem to have settled down. Unfortunately, under Cosby, party differences quickly reignited, in large measure due to Cosby’s arrogance, incompetence or, most likely, both. As the

historian of the Zenger trial, Stanley N. Katz had described him, Governor Cosby was “a ‘rogue governor’ to many New Yorkers from the moment he stepped ashore. He was quick-tempered, haughty, unlettered, jealous, and above all greedy: it was his greed that brought him the greatest difficulty.”

Immediately upon his arrival in New York, Cosby kicked up a dispute with Rip Van Dam. Van Dam was a merchant of Dutch descent who, as senior member of the Council, had served as acting governor of the colony after the previous governor’s death, until Cosby could arrive. Once in New York, Cosby asked Van Dam to hand over the remainder of the year’s gubernatorial salary, all of which had already been paid to Van Dam. Cosby simply assumed that, as the new governor, he was entitled to any remainder of the annual salary, and he wanted every penny. While handing over a portion of the year’s salary to the next governor apparently was customary, it was not obligatory that Van Dam comply. So Van Dam refused. His reason: Cosby had refused to give him the same proportion of those “perquisites of the governorship which had devolved upon [Cosby] in England before his departure for America.” Since Cosby had earned much more in England in gubernatorial perquisites than Van Dam had earned in New York, by Van Dam’s calculations, it came as no shock when Cosby refused the deal. Even so, Cosby continued to demand that half of the colony’s annual salary for governor for that year be turned over to him. Indeed, Cosby threatened to press his claims against Van Dam in New York’s colonial courts. Just one problem presented itself. Could Cosby, a “strange and already unsympathetic governor”—a political and cultural outsider in a case

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presenting overtones of avarice—win before a jury of ordinary colonial subjects in New York? Could Cosby win such a suit heard by “twelve of Van Dam’s countrymen”\(^\text{51}\)?

Actually, Cosby had a choice of courts to which he could turn to recoup what he considered his lost governor’s pay. He could have brought his case at common law before the Superior Court of New York. Here, however, he would have given his opponent, defendant Van Dam, the right to a jury trial. Apparently Cosby was reluctant to go this route. Most ordinary subjects in New York were wary of the so-called “court faction” (the name inspired by English royal politics\(^\text{52}\)), and its latest holder of executive power, Governor Cosby. But the governor did have an alternative. He could have asked the New York Superior Court to hear his case as a court of equity. As an equity court or, at law, as an “Exchequer Court,” the justices of the New York Superior Court could hear Cosby’s case without a jury. Of course, that fact alone would inflame public opinion in New York, where most ordinary subjects opposed equity proceedings precisely because they were an alternative to common law proceedings. In common law trials, juries were the rule and the right of the accused—or of the defendant. Since equity cases proceeded without the defendant’s right to a jury decision, such trials were widely considered to be less “responsive to public feeling than were the rulings of the common law courts.”\(^\text{53}\) As the preceding chapters of this study explain, defendants and their attorneys preferred jury trials in important civil and criminal cases.

\(^{51}\) Ibid.
Characteristically, Governor Cosby pressed for an equity trial on his salary claim against Van Dam in New York’s supreme court. Colonial New Yorkers would note well his decision: the governor did not trust jurors any more, it appeared, than he trusted New Yorkers generally. He preferred that the New York superior court judges alone decide his case against former governor Van Dam. Unfortunately for Cosby, he found an opponent in one of those judges. For that court’s chief justice was none other than Lewis Morris, a leader of New York’s opposition, “country faction.” Complicating matters, Morris also had served as a New Jersey Council leader. Indeed, Morris additionally had served as an acting governor for New Jersey before Cosby had arrived. Now, it may be recalled that crown officials were soon to split the governorship of the two colonies. In the meantime, however, since Morris had recently finished service as New Jersey’s acting governor, it was conceivable that Cosby might also demand back salary from Morris as he had from Van Dam. “Morris in a sense was being asked to render a judgment contrary to his own interests.”\footnote{Bonomi, \textit{A Factious People}, 106-8, quotation at 108.} This Morris was unwilling to do.

New York’s premier attorneys James Alexander and William Smith appeared in Superior Court to argue for Van Dam in his salary dispute with Governor Cosby. They argued the law of the case: that the case could not be heard at equity, without a jury, unless the legislature endorsed such a proceeding. Legislative endorsement meant that the Assembly would have to concur, which, politically, was not going to happen. New York’s lower house was not about to side with such a governor on such an issue. Assembly members were not disposed to saddle up with an executive whose power they had been trying to curtail, or to vote against the interest of a fellow New Yorker, opposition leader and one of their own. Chief Justice Morris’s position on the matter
came as no surprise. Without legislative authority, Morris held, the governor could not
take his salary case into the New York Superior Court as a matter of equity. When his
fellow justices James DeLancey and Frederick Philipse opposed his ruling, Morris
censured them. As the political skies darkened over Governor Cosby, he grew reluctant
to pursue his legal suit against Van Dam any further. But Cosby could still get revenge
against his latest enemy. And so Governor Cosby fired Chief Justice Morris.\textsuperscript{55}

The stage was now set for all-out war between the Cosbyites and the Morrisites—
between the court and the country factions of New York. If the argument between the
two sides could be brought into the law courts of the colony, as a jury trial, the “country”
or more popular faction could well expect the advantage before a jury of colonial peers.
Presumably, no jury of ordinary New Yorkers would now happily favor a royal governor
who had displayed such distrust of popular juries—who had displayed, indeed, such
venality and contempt. Unfortunately for those country faction leaders spoiling for a
fight, the governor threw in the towel on his salary dispute. But other issues arose from
Cosby’s quarrel with Van Dam and his dismissal of Morris. And Cosby’s anger was not
yet assuaged. His government stood ready and eager to bring suit against anyone who
would dare to politically attack his leadership.

The politics were eventful, to say the least, in the Province of New York in 1733.
Attorneys Alexander and Smith, who had gone to bat for Van Dam, were now eager to
support the dismissed Chief Justice, Lewis Morris, and his popular cause. So the
Morrisites took their political case to the populace of New York. Morris himself sought
to challenge Cosby and his court faction by trying to vanquish that party in the
Westchester County election of October of that year. Despite various political

\textsuperscript{55} Ibid., 110-11.
shenanigans pulled by the court side, Morris won handily to become an assemblyman for New York. 56 Morris had been aided in his endeavor by an upstart newspaper and its young editor, soon to become immortalized in American popular memory.

From its founding in 1725 until 1733, only one newspaper had circulated in New York, the New York Gazette, owned by William Bradford. Bradford also happened to be the government’s official printer. As such, on salary to the government for a substantial £50 per year, Bradford was unwilling to print anything that could be considered hostile to his employer’s interests. Quite to the contrary, Bradford printed whatever the governor pleased, including polemical attacks on the Morrisite faction. Former Chief Justice Morris and his allies, attorneys Alexander and Smith, saw an obvious political need for a countervailing voice. So they arranged for the creation of a rival newspaper, the New-York Weekly Journal under printer John Peter Zenger. In November of 1733, the new Weekly Journal regaled its readers with the news of Morris’s victory over the governor’s forces in the Westchester Assembly race. The stage was now set for a direct political challenge to the Cosby government. 57

Zenger printed a number of pungent articles in his Weekly Journal, most written by Alexander and Smith—anonymously—attacking Governor Cosby and his henchmen. Most of these articles were pretty tame by current political standards—and certainly tame compared with the editorial high jinks prevalent in much of the nineteenth century. But Governor Cosby was infuriated by what Zenger’s Weekly Journal had printed and was

56 Ibid., 112-13; Katz, Brief Narrative, 4-5. Katz argues that Morris was “a most unlikely character to have led a popular political party,” for as a contemporary commented, Morris “was not by temper ‘fitted to gain popularity.’” Regardless, the “stagnation of the province and the Governor’s unpopularity enabled Morris to mold New York’s strongest opposition party since the revolutionary days of Jacob Leisler.” Katz, at p. 5.
57 Bonomi, A Factious People, 114-15; Katz, Brief Narrative, 6-7.
bent on revenge against his political opponents. When two separate grand juries refused to indict Zenger for malicious statements against the governor and his administration, Cosby turned to the New York Assembly. He demanded that the Assembly condemn what he considered a libelous rag. The irate governor wanted offending pieces in various issues of Zenger’s paper to be publicly burned. The Assembly, including newly elected member Lewis Morris, proved unwilling to oblige Cosby. Only the governor’s Council went along with the public burning, further estranging the new governor from any general popular support. And since New York grand jurors had twice denied Cosby his indictment of Zenger, the governor turned again to the Council, this time to order Zenger’s arrest, which occurred on Sunday, November 17, 1734. The Attorney General charged Zenger by means of an “Information,” since no grand jury would indict. The use of an Information was a legal but unpopular prosecutorial end-run around grand jury indictment. On rare occasions, a colonial administration would resort to use of an Information to bring a case to trial when grand jurors refused to indict. Since grand jury indictment was seen as a venerable, democratic safeguard against unjust prosecution by state authority, Cosby’s government thus sank still lower in the popular esteem.58

The worst of what Zenger’s newspaper had published against the administration of New York included statements such as these, included in the attorney general’s Information against Zenger:

“They (the People of the City and Province of New-York meaning) think as Matters now stand, that their LIBERTIES and PROPERTIES are precarious, and that SLAVERY is like to be intailed on them and their Posterity, if some past Things be not amended, and this they collect from many past Proceedings.”

(Meaning many of the past Proceedings of His Excellency the said Governour,

and of the Ministers and Officers of our said Lord the King, of and for the said Province.)

Zenger was further accused of having printed the following libel against the governor and his “Tools”:

“One of our Neighbours (one of the Inhabitants of New-Jersey meaning) being in Company, observing the Strangers (some of the Inhabitants of New-York meaning) full of Complaints, endeavoured to persuade them to remove into Jersey; to which it was replied, that would be leaping out of the Frying Pan into the Fire; for, says he, we both are under the same Governor (His Excellency the said Governor meaning) and your Assembly have shewn with a Witness what is to be expected from them; one that was then moving to Pensilvania, (meaning one that was then removing from New-York, with intent to reside [at] Pensilvania) to which Place it is reported several considerable Men are removing (from New-York meaning) expressed in Terms very moving, much Concern for the Circumstances of New-York (the bad Circumstances of the Province and People of New-York meaning) seemed to think them very much owing to the Influence that some Men (whom he called Tools) had in the Administration (meaning the Administration of Government of the said Province of New-York) said he was now going from them, and was not to be hurt by any Measures they should take, but could not help having some Concern for the Welfare of his Country-Men, and should be glad to hear that the Assembly (meaning the General Assembly of the Province of New-York) would exert themselves as became them, by shewing that they have the Interest of their Country more at Heart, than the Gratification of any private View of any of their Members, or being at all affected, by the Smiles or Frowns of a Governour … both which ought equally to be despised, when the Interest of their Country is at stake.”

It is important to notice that this attack on Governor Cosby and the “Tools” or political lackeys within his administration—all corrupting the governmental life of the colony—was not the only concern of this anonymous critic of New York’s political scene. For this critique included an assault on unnamed members of the Assembly who held “private View[s],” rather than holding the “Interest of their Country more at Heart.” These unidentified Assemblymen stood here accused of being influenced “by the Smiles or Frowns of a Governour,” charges that sound much like those made by the “Real,”

59 These charges in the Information against Zenger can be found in the “Literal Reprint of the First Edition of the Case and Trial,” Katz, John Peter Zenger, His Press, His Trial, 195-97.
“True,” or “Old” Whigs of England against crown ministers. These English
“Commonwealthmen,” by yet another name, were political writers and leaders who had clung to the ideals flowing out of England’s Glorious Revolution. As decades passed, however, those Old Whig ideals would linger into a new era that would find them increasingly irrelevant in England. For the ideological heirs of those Old Whigs became the defenders of an idealized, imagined settlement of the Glorious Revolution. That settlement was to have provided for a balance of power between the three English estates of monarchy, peers and commons, a balance that became ever more illusory by the time of George II. This second generation of Commonwealthmen, faithful followers of old whig ideals, decried the increasingly corruptive influence of agents of the monarchy.
These agents, bad ministers of the king, were thought to extend their corruptive influence throughout government and into every area of life. These ministers practiced various forms of bribery to amass personal power. They created dependent pensioners, peerages and placemen—all ready to do the bidding of their political masters. A third generation of English Commonwealthmen, contemporaries of the American revolutionaries, shared with their colonial brethren an innate fear of political corruption. Like their English counterparts, American whigs feared the power and influence of the “Smiles or Frowns” of any current administration. Like the independent-minded colonial American jurors portrayed here, English Commonwealthmen and their ideological cousins in America were determined to guard against governmental encroachments on their “rights.”

particular, they saw unchecked executive power as a potential threat to liberty. It was this whig ideology of early eighteenth-century England that Zenger’s newspaper was bringing to his readers in New York. And this fear of excessive executive power was precisely the political issue that would be laid before Zenger’s jurors at trial.

Governor Cosby must have noticed that Zenger’s anonymous writer here was accusing him of more than trying to reduce the people into “slavery” by attacking their liberties and property. In addition, he stood accused of trying to corrupt the people’s representatives. Apparently he never considered trying to turn the debate into one against unscrupulous Assemblymen. Doubtless, such a deflection of the charges against him would never have succeeded anyway. For Zenger’s press was pointing directly to the governor as the source of all of New York’s political trouble. If the two groups of grand jurors who had refused to hand down indictments of Zenger were any indication, the people of New York by now were not in the governor’s camp. Rather, the people’s fears of the corruptive power of the executive over New York’s social and political life would be front and center at any prosecution of this young, middling printer.

At the climax of the Information came this final charge against John Peter Zenger. He had published in his newspaper the following words, declaring that certain New Yorkers had come to believe that “the Law it self is at an End,” and that all “the People of the Province of New-York” could

“SEE MEN’S DEEDS DESTROYED, JUDGES ARBITRARILY DISPLACED, NEW COURTS ERECTED WITHOUT CONSENT OF THE LEGISLATURE

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63 Kammen, *Colonial New York*, 206-7; Katz, *Brief Narrative*, 8-9. Katz reports that “Cosby was quickly convinced that the Journal was becoming influential among the citizens of New York and that it posed a real threat to the maintenance of public order and to the permanence of his administration,” p. 11.
Within the Province of New-York meaning) by which it seems to me, trials by juries are taken away when a governour pleased (his excellency the said governour meaning) men of known estates denied their votes, contrary to the received practice, the best expositor of any law: who is then in that Province ... that call (can call meaning) any thing his own, or enjoy any liberty (liberty meaning) longer than those in the administration ... will condescend to let them do it, for which reason I have left it, (the province of New-York meaning) as I believe more will.”

The governor of New York was attacking the courts of the colony. Specifically, he was attacking a supposedly independent judiciary and striking at the subjects’ right to jury trials. Cosby was threatening the law court culture of New York by such actions, even to the point of moving trials into irregular courts, those not provided for by the legislature.

The governor clearly had wanted to push his case against Van Dam into the juryless equity courts. Such executive arrogance would later show itself in the British push for the trial of Americans in the juryless vice-admiralty courts, to be discussed below, another great fear of colonial Americans on the eve of Revolution. As the final blow against the governor, Zenger’s press had alleged that the governor had assailed the right of men of “KNOWN ESTATES” to vote, the same men who served as grand and petit jurors and who were the “BEST EXPOSITOR OF ANY LAW.” No wonder Zenger’s unnamed critic of the governor thought that law itself was at an end in New York.

These “libels” against the governor and his administration—clearly declaring that the governor and his henchmen had turned New York into a despotic regime—could not be tolerated. If the authors of such inflammatory words could not be identified, Zenger, the publisher of those words, would stand trial for these libels himself.

It has already been noted that, for all its fame in the American national memory of the struggle for liberty, especially for freedom of the press, some historians have doubted

64 Katz, John Peter Zenger, His Press, His Trial, 197.
that Zenger’s trial actually set any legal precedent at the time. As has been seen, however, the Zenger trial became widely known throughout the colonies and in England as a symbol of a jury’s potential power. As one scholar of the jury system has put it, a celebrated case such as Zenger cannot change statute law or overthrow all case law, where it represents merely one trial. But the Zenger trial did “demonstrate the way jury trials gave local residents, in moments of crisis, the last say on what the law was in their community.” For in the American colonies, the local jury, for all intents and purposes, was the law. The trial illustrated the power of a colonial American jury to return a “general verdict” (simply of guilty or not guilty) in a libel case. In other words, trials such as Zenger demonstrated that a colonial jury had the power simply to say that a publisher is not guilty of the accusation of libel against the government, thereby acquitting the accused of any and all aspects of the charge in a partisan legal attack.65

It is true that Zenger did not at the time alter New York’s (or any other colony’s) law of seditious libel and, furthermore, critics have contended that the case did not confer on any jury, as a matter of law, the right to acquit by general verdict those who the judges thought were guilty of libel. Until the early nineteenth century, judges in America occasionally attempted to compel juries—as judges of the King’s Bench in England routinely did—to deliver a “special verdict” in libel cases. In special verdicts, juries were merely to answer the particular question in its narrowest form, as in Zenger’s case: Did the defendant publish a particular piece in a particular edition of his newspaper on a particular date? If the jury found as a “matter of fact” that such a piece had been

65 Abramson, We, the Jury, 24-25; and see John Adams’s comment on this power of local juries, in “Adams’ Diary Notes of the Right of Juries,” in L. Kinvin Wroth and Hiller B. Zobel, ed., Legal Papers of John Adams, 3 vols. (Cambridge, MA: Harvard UP, 1965), I, 228-30, and introd., xlix.
whether the matter was “libelous” as a “question of law.” Such use in court of the special verdict limited the power of the jury substantially.66

Use of the special verdict also made it easy work for judges to punish those who wrote nasty things about an administration, whether in England or in a colony such as New York. After all, as Leonard Levy has pointed out, this was “‘a time when judges were dependent instruments of the crown,’” a time when only “‘a jury of one’s peers and neighbors seemed to be a promising bulwark against the tyrannous enforcement of the law of seditious libel by the administration and its judges.’” What else offered an ordinary subject in England or colonial America protection from the wrath of an executive bent on curbing the expression of popular resentment? As Harold M. Hyman and Catherine Tarrant have argued, “The jury, a popular institution, could sometimes protect political critics of the royal administration.” These scholars have also warned that, “[i]ronically, juries which adopted libertarian positions in famous instances, were as susceptible as judges to prejudice against litigants who expressed opinions that were unpopular in the community.”67

Such an instance would appear virulently in New York some years later, when African Americans were accused of plotting against the white population of the province. Unfortunately for enslaved blacks in New York, white jurors would not tolerate basic judicial rights for that minority in 1741. This “Negro Plot” to murder New York City’s white men, rape white women and burn the city, was undoubtedly a hoax concocted by a

sixteen-year-old indentured servant. But New York’s jurors saw no need for mercy, or for much factual investigation, apparently. For more than a year, jurors convicted black men, hanging eighteen slaves and burning thirteen at the stake. More than 150 African Americans were rounded up in the hysteria. Whites were also accused in the slave conspiracy. Four white men were hanged for complicity and 25 others were jailed. The hysteria only subsided when the young indentured servant began accusing respected white New Yorkers of involvement in the slave plot. Her credibility diminished, New York juries wrapped up their work.68

Otherwise, however, repeatedly during the course of the eighteenth century, colonial juries had tended to do well by defendants. Colonists evidenced a “deep affection … for their jury arrangements … in their resistance to the increasingly determined efforts of Crown officers to dominate those arrangements.”69 In Zenger’s proceedings, both grand and petit juries would protect freedom of expression in the broadest and strongest possible terms. Generally speaking, colonial juries not only protected subjects from royal administrations bent on trespass against their entitlements. Juries also could shield defendants from hostile judges as well.

In John Peter Zenger’s case, the jury was being asked to decide whether Zenger had published certain articles. If so, the judges were ready to take care of the rest of the matter. If the judges could direct the jury to find that Zenger had printed certain newspaper pieces, the only task remaining would be for the judges to declare his work “libelous” of the government. Once the jury decided by special verdict the mere fact of

68 The “Negro Plot” is described by Levy in Palladium of Justice, 81. This case presents obvious parallels with the witchcraft “trials” in Massachusetts half a century earlier (except that witches were hanged in New England).
publication, the judges decided the real question of the case, as a matter of “law.” In Zenger as in other such cases, the judges argued that “libel” was a legal determination for the judges alone to make. If the jurors accepted such an argument from the bench, then Zenger’s case ought to have been quick work for the judges. All that was essential was that the jury find, by special verdict, the Zenger had put certain words into print in his newspaper.70

As it turned out, Zenger’s jurors took the facts of the case—and the law of the case—into their own hands. They refused to play the administration’s game. Zenger’s jurors rejected the rules laid down by the judges. In the process, the Zenger jurors took a defiant step toward a “right to criticize authority.” This right, if not settled law in New York or elsewhere in 1735, eventually would become settled, in part because citizen jurors spoke decisively for colonial subjects in New York in that year. Their clear statement eventually would help create a new attitude toward political discussion, leading to a new understanding of libel and press freedom, and to a new political relation between citizens and their administration that would evolve over the next century.71

While Stanley Nider Katz has expressed doubts about Zenger’s immediate impact on colonial American (or later Federal) libel law, even he has declared that the arguments and jury decision in Zenger represented “an early appreciation of the emerging popular basis of American politics, full recognition of which would ultimately lead to reforms both of politics and law.” Katz has held that the Zenger case “has always served as a useful symbol of the development of political freedom in America,” precisely because of its influence, from then till now, on “the hearts and minds of the people.” Katz argues

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70 Katz, Brief Narrative, introd., 30; Bonomi, A Factions People, 118-20.
71 Levy, Palladium of Justice, 65, 80-82; Bonomi, 118-20.
that Zenger represented “not the conclusion but the origins and sources of change”
driving “the transformation of both politics and the law.”\textsuperscript{72} If the Zenger verdict did not
immediately change the colonial law of seditious libel, the jury verdict was powerful
precisely because the jurors spoke as empowered citizens for their fellow subjects, who
strongly applauded their decision. As Leonard Levy has written, the Zenger jury
judgment “made people exult both in liberty and the relationship of liberty of the press to
liberty itself…. It invigorated their understanding that citizens—and Zenger’s attorney
spoke of ‘citizens,’ not just subjects—should distrust an unjust government that sought to
overawe them. It fortified their conviction that in a season of tyranny, citizens must be
forthright in their censure” of leaders who sought their subordination to unchecked
power.\textsuperscript{73} Most important, the Zenger jurors demonstrated that “in practice they could not
be coerced.”\textsuperscript{74}

And so, the jury system that had become the focus of the political dispute over
Governor Cosby’s Exchequer proceedings against former Governor Van Dam, now
became central again in the Zenger proceedings. Zenger’s \textit{Weekly Journal} had called for
a greater role for the jury in libel prosecutions, after all, so that jurors could submit a
general rather than a special verdict—deciding not just the mere fact of publication, but
deciding whether a piece was or was not libelous against government. Subjects of the
king in New York—as citizen jurors—were about to hand their rulers a stinging rebuke.

\textbf{The Acquittal of John Peter Zenger}

\textsuperscript{72} Katz, \textit{Brief Narrative}, introd., 34-35, 2. Cf. Abramson, \textit{We, the Jury}, who shows the Zenger trial and
outcome to be “the defining moment for the American jury in the colonies, as Penn’s trial had been for the
English jury…. Ever since, the Zenger case has stood as a proud reminder of the contribution jury
nullification can make to reconciling law and justice” (73, 75).
\textsuperscript{73} Levy, \textit{Emergence of a Free Press}, 37-38.
\textsuperscript{74} Stimson, \textit{The American Revolution in the Law}, 59-60.
Zenger’s jurors were keenly aware of the previous case that Governor Cosby had tried to bring against former acting Governor Van Dam. Zenger’s own Weekly Journal had spread knowledge of this case far and wide in the colony. They knew that Cosby had feared taking his case before a trial jury, hoping instead to have the supreme court, as a court of exchequer, decide his case. People had witnessed Cosby’s “aristocratic proclivities” that suggested his distrust of the people of New York and of their juries. Such disdain for popular sentiment, for jury trials in the courts established by the people’s legislators, was bound to be reciprocated by the jury that would hear Zenger’s case. Indeed, Governor Cosby’s evasion of grand jury indictment of Zenger, whereby ordinary subjects in a regular inquest might have reviewed the accusations of a prosecutor, only heightened popular resentment against the governor. As already noted, for New Yorkers, “the use of an information smacked of corruption.” In fact, Attorney General Richard Bradley had come under censure of the Assembly for excessive use of such tactics to bring charges against defendants in the colony. That the home government had disallowed a 1727 Assembly act banning the use of an information to bring charges, without grand jury approval, in criminal cases, would not have made Zenger’s jurors any more comfortable with the government’s tactics now.  

75 Quoting Finkelman, “The Zenger Case,” in Belknap, 24-28. By 1765, Chief Justice Thomas Hutchinson of Massachusetts was expressing concern about the use of informations in his charge to grand jurors during the August term of the Superior Court. “Sometimes Informations are filed by the Attorney General, and in certain Cases admitted,” he said, “though we are very tender how these are indulged, as ’tis a Hardship on the Subject; and I think there is no Case in which a Man shall be tried for Life on an Information. The Life of a Man shall not be endangered, unless twelve Men of the Grand Jury shall say, he shall be put on Trial, and twelve more of his Peers shall all agree that he is guilty, before he shall lose his Life. This is a Privilege of which the Court is as tender as any of the Subjects, and therefore do not allow Informations, only in particular Cases, and those very seldom.” “The Charge by the Chief Justice given on the Adjournment,” Superior Court, August Term 5 Geo. 3 (1765), in Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, Josiah Quincy, Junior (Boston: Little, Brown, 1865), 178. See also the discussion on informations above.
Moreover, that Zenger’s prosecution was politically motivated would have been obvious to most New Yorkers at the time, and certainly to Zenger’s jurors. It is for good reason that Zenger’s case has been described as one of America’s foremost “political” trials. It was patently clear then as now that the purpose of the prosecution was nothing less than to shut down Zenger’s press.  

Along with other scholars of the Zenger case, Paul Finkelman has asked why Zenger was brought to trial, rather than attorney James Alexander, for example, the author of numerous pieces in the *New-York Weekly Journal*. Finkelman concludes that the government was determined to pursue Zenger not only because this poor immigrant printer would make an easy target for an administration bent on humbling its political enemies. Obviously, a man such as Zenger, new to the country, young and struggling to start his business, was more vulnerable to legal harassment than a powerful lawyer such as Alexander or his *Weekly Journal* colleague in libel, attorney William Smith.  

But there was a far greater reason for the government to go after Zenger rather than to attack prominent New York attorneys, even if they were the suspected authors of the political muckraking in question. The entire point of the prosecution was to close off a popular voice of criticism of the administration and of the judges of the superior court. Convicting Zenger of publishing criminal libels against the governor and his administration would surely terminate his press business and end at least this venue for public complaint. And destroying Zenger’s press would simultaneously silence those annoying critics Alexander and Smith. Meanwhile, James Alexander and William Smith, the authors of so many of those anonymous, alleged libels in Zenger’s newspaper, also

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were Zenger’s original attorneys in his trial. One could argue that Alexander and Smith were using Zenger as a pawn in a larger political game—a fight against a governor they despised. But they immediately determined that, if this were to be a partisan trial, then they too could use this trial for their own public purposes. After all, Zenger made a sympathetic victim to a populace already primed to view their governor as a greedy, petty tyrant—just the sort of executive that the Old Whigs had always feared. More to the point, Zenger’s attorneys could portray the printer as a sympathetic defendant before the jurors who would be trying the case. Alexander and Smith could use Zenger’s case as a vehicle for indicting, in the court of public opinion, Governor Cosby and his villainous placemen, Chief Justice DeLancey and Justice Frederick Philipse. Indeed, these two judges were openly and thoroughly biased against the defendant right from the start. The key question, from the start, was how New York jurors were going to react to the politics inherent in such a political trial.78

From the first moments of their defense of Zenger, then, his attorneys tried to pitch this case into the broader court of public opinion. Perhaps they could even turn Zenger’s jurors into representatives for the people’s opposition.79 Perhaps Zenger’s jurors could be asked to speak truth to power by having the truth of Zenger’s newspaper articles debated in open court. Unfortunately for Alexander and Smith, their opening

78 Finkelman, “The Zenger Case,” 23-24, 30-31; Katz, John Peter Zenger, His Press, His Trial, xvi-xvii; Bonomi, A Factious People, 112-16.
79 James Alexander’s Brief Narrative of Zenger’s trial states that the defendant’s bail request had been argued “in presence of some hundreds of the inhabitants,” making it clear that this entire affair was of enormous popular interest—that it was a larger popular audience whom Zenger’s attorneys also would address. The selection of jurors in the case, discussed just below, raises the question of the popular nature of the jury that would decide Zenger’s trial, making it clear that Zenger’s would be a “popular” jury of his peers. As discussed below, Andrew Hamilton’s defense of Zenger was pitched entirely in terms of what “everybody knows,” as Alexander’s Narrative records, making clear that Hamilton was playing to the gallery, as it were, as much as to Zenger’s jurors—and certainly playing more to the jurors and wider public (“the neighborhood”) than to the judges: Katz, ed., Brief Narrative, 24-25, 48, 56-58, 69, 74-75 (italics in the original), 79-80, 89-91, 101.
sally was also to be their closing argument. Both were about to be summarily thrown out of court.

Zenger’s defense attorneys had gotten off on the wrong foot with Chief Justice DeLancey before the trial had even begun. They had first approached him with a request to reduce the exorbitant bail the judge had imposed on Zenger. The defense team pointed out that Zenger, charged with only a misdemeanor, was worth less than £40, yet he was being held on bail of £400, in addition to another £200 for each of two bonds for surety. DeLancey would not be swayed. So Zenger spent the next eight months in prison, until the day after he was acquitted. Alexander and Smith further annoyed the judge by “taking exception to the council’s arrest warrant,” an irregular warrant, they argued, necessitated by the fact that no grand jury would indict Zenger. Doubtless, DeLancey winced at being reminded that two sets of grand jurors had refused to indict in this case. And since DeLancey himself had signed the warrant, it was unlikely he could be swayed by argument of counsel that the warrant was invalid. 80

When Zenger’s lawyers next argued, in open court, that judges DeLancey and Philipse themselves could not preside over the trial because their judicial commissions were invalid, such a tactic—a direct insult—proved too much for an outraged DeLancey. To justify the insult, Alexander and Smith offered four arguments as to why the judges were unfit to hear Zenger’s case or, for that matter, any other. According to Alexander’s own Brief Narrative of the Case of Trial of John Peter Zenger, his and Smith’s argument to DeLancey included the primary charge that their judicial commissions ran contrary to the standard form of commissions for the judges of the King’s Bench in England.

80 Katz, Brief Narrative, 18-19.
been appointed to serve “during pleasure,” meaning during the pleasure of Governor Cosby. As the two lawyers had it: “For that the Authority of a Judge of the King’s Bench, in that Part of Great Britain called England, by which the Cognizance of this Cause is claimed, is by the said Commission granted to the Honourable James DeLancey, Esq … only during Pleasure; whereas that Authority (by a Statute in that Case made and provided,) ought to be granted during good Behaviour.”

By these words, Zenger’s attorneys struck at Cosby’s judges and at Cosby himself. Their attack was potentially deadly. Alexander and Smith were suggesting that Cosby had worked illegally to create a dependent judiciary, whose judges were subject to a governor who could revoke their commissions at any time he ceased to be pleased with their performance. Indeed, Zenger’s entire defense case was to turn on the question of Cosby’s behavior as governor of the colony and the Weekly Journal’s reporting of that behavior. In fact, former Justice Lewis Morris had been fired by Cosby for asserting his independence of the governor, whereby DeLancey had been raised in his place. The nature of DeLancey’s commission plainly suggested the opposite of an impartial, independent judiciary. The whole business smelled of corruption, of Cosby’s attempt at “tyrannically flouting the laws of England and New York [by] setting up personal henchmen with unlawful powers to control the judicial system of New York.”

Alexander and Smith were plainly attempting to indict Cosby and his crony “henchmen” judges in the court of New York public opinion.

DeLancey and Philipse, obviously resenting the implication of their being the illegitimate “personal henchmen” of the governor, brought the axe down on both of

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81 Katz, ed., John Peter Zenger, His Press, His Trial, Ts. of the “Brief Narrative,” 185.
82 Quoting Katz, Brief Narrative, introd., 20; see also Bonomi, A Factious People, 117.
Zenger’s lawyers. Alexander and Smith were disbarred then and there, by order of DeLancey with the concurrence of Philipse.\(^{83}\) Defendant Zenger was now in the unhappy position of being in court, on trial, without an attorney. The printer’s next move was to pray that the very judges who had just been attacked by and had sacked his former attorneys would appoint him a new one. Zenger’s plight was resolved, but the resolution must have left him very uneasy. The court did appoint a new attorney to represent Zenger—one with close ties to the justices and to the governor himself. The Chief Justice named John Chambers to represent Zenger, “a competent lawyer but [the] Governor’s man,” in the words of the preeminent scholar of the Zenger trial. So Chambers now proceeded to plead Zenger not guilty and to ask for a jury trial.\(^{84}\)

All evidence suggests that John Chambers began in good faith to effectively represent his client. The first problem to arise in Zenger’s actual trial involved the jury list that the court clerk had produced. The clerk was required under New York law to select forty-eight names from a list of the colony’s freeholders. The prosecution and the defense would each then have the opportunity to challenge up to twelve of those considered unacceptable. In his account of the proceedings, former attorney James Alexander records Zenger himself as claiming that “a great Number of these Persons were not Freeholders, that others were Persons holding Commissions and Offices at the Governour’s Pleasure, that others were of the late displaced Magistrates of this City, who must be supposed to have Resentment against me, for what I have printed concerning them; that others were the Governour’s Baker, Taylor, Shoemaker, Candlemaker, Joiner, &c….” It does seem obvious that magistrates who had recently been defeated in

\(^{83}\) Katz, *John Peter Zenger, His Press, His Trial*, 189.
provincial elections, in part by the opposition of Zenger’s press, were unlikely to be
dispassionate jurors in Zenger’s case. Likewise for employees of the governor.

Chambers recognized the plot and quickly moved in court for the creation of a proper
jury list. The court, perhaps fearing to show too flaming a bias against Zenger, ordered
the clerk to comply. The prosecution and defense thus cooperated to produce a panel of
twelve, acceptable to both sides. Now, at least six of those jurors finally selected have
been shown to be members of Morris’s “popular” faction, including the foreman, Thomas
Hunt.\footnote{Katz, \textit{John Peter Zenger, His Press, His Trial}, Ts. of the “Brief Narrative,” 191-93; Katz, \textit{Brief
Narrative}, introd., 21.} What did it mean for colonial American law court culture—for “justice” in that
culture—that jurors selected for cases might harbor sympathies for the defendant, which
may well have been true for half of Zenger’s jury?

Such maneuvering to obtain a jury sympathetic to the defendant would be seen
decades later in the first of the two Boston Massacre trials. In that first trial, and in
American colonists’ law court culture in general, an “impartial” jury—and judiciary—did
not mean a completely disinterested or absolutely “objective” panel and bench. Rather,
for the colonials, an impartial jury generally meant one not partial to or dependent upon
the government’s side.\footnote{The Introduction to the current study noted that Governor Hutchinson of Massachusetts, for instance, did
not see his colony’s elected jurors as properly “independent” in the years leading up to Independence. He
thought jurors were too representative of the popular party. Hutchinson’s political adversaries, meanwhile,
thought that “independent” jurors meant those properly imbued with Whig principles. They were
concerned lest too great a dependence of judges on executive authority should threaten the “independence”
of the courts. See Richard D. Brown, \textit{Revolutionary Politics in Massachusetts: The Boston Committee of
Correspondence and the Towns, 1772-1774} (Cambridge: Harvard UP, 1970), 49-57, 73-86 (where Brown
also considers jury independence from the bad charges of judges), 99-111, 151-52. See also Robert E.
Brown, \textit{Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780} (New York: Harper,
1955, 1969), 276-79, 330-46, 379-80. In the Boston Massacre trials, as discussed in the final chapter, the
government was in the delicate and difficult position of having to prosecute British soldiers who were
supposed to be executing the government’s policy, but who stood accused of murder.} Americans had learned enough of old whig theory to understand
the natural and inevitable tension between the interests of government, or dominion, and
the needs of liberty. 87 In colonial America, governors and their dependent judges made no pretense of deferring to the immediate interests or opinions of their subjects. Cosby and his cronies on the bench demanded their subjects’ deference and obedience. 88 Jurors, on the other hand, represented an entirely different set of interests. They brought the vox populi directly into the heart of colonial law court culture. The increasingly powerful voice of popular opinion was present alongside justices and counsel in court. That power of the public’s voice in colonial law court culture represented a growing popular or democratic force in American court life that would thrive into the start of the nineteenth century. In colonial American courts, unlike anywhere else in the world, ordinary subjects became a counterweight to administrative authority. “The people,” or ordinary freeholders, became a voice for political power—for government—in their own right as jurors. In many respects, one could argue that the jury, as a democratic political force, was born in Zenger’s trial. And the jury as popular political force would not end there. 89

At this moment in his trial, defendant Zenger received a great gift that probably saved him and immortalized his trial. For Zenger’s former defense team, Alexander and Smith, had secretly arranged for Andrew Hamilton, perhaps the greatest lawyer of his day in colonial America, to represent Zenger for the remainder of his trial. Hamilton had been prominent in the political and legal affairs of Philadelphia since 1717 and had

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87 See the colonial fears of dominion and its corruptive influence on courts and juries and its danger to liberty in Bailyn, Pamphlets of the American Revolution, 48-59, 66-69, including Otis’s comments on the necessity of independent juries, “Rights of the British Colonies Asserted and Proved,” 426-35; passim. See also Bailyn, The Ideological Origins of the American Revolution, especially chap. 3; Wood, Creation of the American Republic, Parts 1-2.

88 Implications drawn from argument in Kammen, Colonial New York, 191, 202-7; Bonomi, A Factious People, 106-12 ff.

represented his constituents and clients against his own governor in Pennsylvania. Now he had traveled to New York to continue his greater cause of resistance to arbitrary or unpopular power. As would shortly become clear, Hamilton knew well his audience in New York.

According to the “Literal Reprint of the First Edition of the Case and Trial” published by Zenger, Andrew Hamilton dramatically rose at the start of the proceedings in early August 1735, to announce that he had been retained in Zenger’s defense and that he was prepared to proceed to trial. Perhaps caught off guard by the suddenness or unexpectedness of Hamilton’s appearance, the chief justice simply agreed to let Hamilton, not of New York, proceed with the case for the defense. Further putting the prosecution and court off balance, Hamilton declared that he and his client were prepared to confess the fact of publication but would argue, contrary to the legal understanding of the time, that the articles in question from Zenger’s press could not be libelous because they were true.

Specifically, Hamilton insisted that the prosecutor had to follow the literal words of the Information: that Zenger’s published words must have been “false, scandalous, and seditious or else we are not guilty.” Hamilton was demanding that Zenger’s pieces be proved “false,” if Zenger was to be convicted. What was more, Hamilton was quite willing and ready, he claimed, to prove those pieces factual and true. Hamilton was ready to tell New Yorkers what presumably they already knew: that the governor and his henchmen were greedy and corrupt—that they were placemen of the worst sort decried by the Whigs of old. Unfortunately for Zenger and his attorney, Chief Justice DeLancey

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90 Katz, Brief Narrative, introd., 21-23.
swiftly overruled Hamilton’s entire defense strategy, declaring that “You cannot be admitted, Mr. Hamilton, to give the Truth of a Libel in Evidence. A Libel is not to be justified; for it is nevertheless a Libel that it is true.” This was indeed the law of England at the time, as declared by such legal luminaries as Sir Edward Coke (in Star Chamber) and, later, William Blackstone.92

Hamilton was thereby denied even the chance to develop his argument on whether he should be allowed to make his case for truth as a defense against libel. He was likewise forbidden to make his case that Zenger’s pieces were indeed truthful accusations against the governor and his regime. So Hamilton turned to the jurors and said:

Then Gentlemen of the Jury, it is to you we must now appeal, for Witnesses to the Truth of the Facts we have offered [to prove, that Zenger had printed articles truthfully impugning the governor and his administration], and are denied the Liberty to prove; and let it not seem strange, that I apply myself to you in this Manner, [for] I am warranted so to do both by Law and Reason. The Law supposes you to be summoned, out of the Neighbourhood where the Fact is alleged to be committed; and the Reason of your being taken out of the Neighbourhood is, because you are supposed to have the best Knowledge of the Fact that is to be tried. And were you to find a Verdict against my Client, you must take upon you to say, the Papers referred to in the Information, and which we acknowledge we printed and published, are false, scandalous and seditious; but of this I can have no Apprehension. You are Citizens of New York; you are really what the Law supposes you to be, honest and lawful Men; and, according to my Brief, the Facts which we offered to prove were not committed in a Corner; they are notoriously known to be true; and therefore in your Justice lies our Safety. And as we are denied the Liberty of giving Evidence, to prove the Truth of what we have published, I will beg Leave to lay it down as a standing Rule in

92 Ibid., 207-35, italics in original. Sir Edward Coke had ruled in Star Chamber that a person could libel another, either a private or public figure, dead or alive, regardless of whether the statement was false or true, and that “It is not material whether the Libel be true…. .” “The Case de Libellis Famosis,” 1605 Easter Term, 3 James I at pp. 125 a—126 a, in Sheppard, ed., The Selected Writings and Speeches of Sir Edward Coke, I (Indianapolis: Liberty Fund, 2003), 145-48, and see Coke’s explanation of how judges were to be deciders of law while jurors were deciders of fact, in Section 366, Conditional Estates, part 41, at pp. 226 a—228 a, in Sheppard, ed., Selected Writings and Speeches of Sir Edward Coke, II, 724-30. Note William Blackstone’s later concurrence that in criminal or “political” libel suits, truth is no defense, in Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, IV (Chicago; London: U of Chicago P, 1979), 150-53. Blackstone emphasized that “it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally;” at 150.
such Cases, *That the suppressing of Evidence ought always to be taken for the strongest Evidence*; and I hope it will have that Weight with you.\(^{93}\)

Hamilton’s “standing Rule” did carry weight with the jurors, those “Citizens of New York.” Taking the law into their own hands, Zenger’s jurors effectively overruled English law and precedent, even the opinion of the great Sir Edward Coke, in this particular case.\(^{94}\) In and for this trial, Zenger’s jurors acquitted him by essentially ignoring the standing law, the criminal charge, and the judge’s instructions to the jurors. If these jurors had not actually “made” new law for America that autumn in 1735, they certainly had unmade some law in a New York court. Eventually, the law of New York and of the United States—indeed, of England itself—would catch up with this jury’s belief that if truth was not a defense against a charge of libel, it should be.\(^{95}\)

Most important, front and center in Zenger’s trial was the issue of press freedom and, specifically, the right of ordinary subjects to criticize their government. When Hamilton turned to Zenger’s jurors and asked them to “use their best judgment as ‘citizens of New York,’” he was calling upon those jurors to act in a role quite different from that of medieval subordination. Hamilton was exhorting those jurors to rise to the position of active, empowered decision makers. He was asking the jurors to take upon themselves the authority “to decide the entire case—both the facts and the law—before them.” And Zenger’s jurors did more than that. They took the additional step of accepting the argument that “the truth of a statement would prevent it from being a libel.” It would take many more years for British and American legislators and judges to alter

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their respective opinions on seditious libel, eventually providing that truth was a defense against the charge of speaking critically about society’s government. But if Zenger’s jurors did not immediately alter the statutes of New York or elsewhere, they did decide the law in Zenger’s case. They created an often-hailed model for how jurors might act in a political trial, with implications for American and even British politics and law.96 Colonial American jurors in Zenger illustrated a new capability and willingness on the part of the colonial subject to defy administrative and judicial authority and power. Indeed, as Paul Finkelman has argued, the defiance shown by Zenger’s jurors may help explain the limited number of seditious libel trials against administrations following this case.97

This tug-of-war in courts between judges and jurors over their respective powers was becoming a significant judicial and political issue by the time of Zenger’s trial. Zenger’s attorney made reference to such judge-jury conflict in his defense argument. Specifically, Hamilton had sparred with Chief Justice DeLancey over whether juries, rather than judges, might decide the law of the case in a trial for seditious libel.98

Indeed, by mid-century, prosecutions of seditious libel—any writings, generally, against the administration or government—were rising, in America, but especially in England. Before mid-century, English judges, particularly in cases of seditious libel, had been

96 See pp. 263-66 in the current chapter above.
97 Finkelman, in Belknap, 24, 34-36; Stimson, The American Revolution in the Law, 4-9, chaps. 2-3; Nelson, Americanization of the Common Law, ix-xvi, 3-10, chap. 2; Levy, Emergence of a Free Press, 44. Cf. Murrin, “Magistrates, Sinners, and a Precarious Liberty,” 152-206, on relative disempowerment of juries in American courts in the earlier colonial period and the eventual rise of jury power, vis-à-vis that of the magistrates, with America’s Anglicization, after 1689.
determined to separate matters of “law” from matters of “fact,” a distinction American judges would be able to enforce only after the first quarter of the nineteenth century.  

English whig attorney and one-time counsel for radicals, Thomas Erskine was a prominent opponent of judicial limitations on jury powers and on free speech generally in England. Erskine strongly defended “the ‘right to discuss the government in a rational manner provided such discussion derives from a sincere belief in the necessity for change.’” He argued this position before Chief Justice Lord Mansfield in the case of the Dean of Saint Asaph. That English churchman had been found guilty of libel “for urging Parliamentary reform.” Erskine had lost his argument and his appeal of the libel conviction of the Dean. After this notorious trial and appeal, however, Parliament eventually passed Fox’s Libel Act of 1792, securing the power for English juries to decide the facts of the case as a general issue—amounting to deciding the law of the case—in criminal libel suits. That is, Parliament eventually allowed English jurors to vote on the general verdict rather than the more limited “fact” of publication in libel suits, as explained above. By 1792, then, English jurors could assert powers that Zenger’s jurors had exercised in 1735—in criminal libel cases. Still, judges in England as in America continued to preside over successful prosecutions of speech deemed unacceptable by government. In the end, then, what had Zenger really changed in American politics and law?

99 John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights (Madison: U of Wisconsin P, 1986), chap. 6; Reid, In a Defiant Stance, 27-64, 135-49; and see the sources in note 96 above.
101 Finkelman, in Belknap, 36-39, quoting Erskine at p. 38; Levy, Palladium of Justice, 82.
The Zenger trial and the struggle for the entitlements of citizenship

Legal historian John Phillip Reid has done important work on the threat Americans felt to their jury rights and power by English authorities trying to impose “imperial law” on unwilling American colonists, who resisted such incursions on local control by means of their own “whig law.” Colonial Americans, Reid has shown, sought to defend their entitlements by reliance on the earlier, Old Whig set of English constitutional principles. By the mid-eighteenth century, colonial American juries had begun seeking not only to protect their fellow subjects locally from “imperial prosecutions,” but they were punishing “royal officials ‘guilty’ of enforcing ‘unconstitutional’ imperial law[s].” On the other hand, England from mid-century had been witnessing a “resurgent toryism [among the] common-law judges.” King’s Bench Chief Justice Lord Mansfield “led the assault, ruling in the trial of Henry Sampson Woodfall, the publisher of Junius’s letters, that in prosecutions for seditious libel the jury was to determine only if the defendant had printed and sold the objectionable literature; whether the words were libelous was a question of law for the court.” Reid reports that from this trial, half a decade before the Declaration of Independence, and for some years to come, “the British press was filled with polemics attacking Mansfield and what were perceived as new definitions of law, government power, and personal security.”

The problem was that British prosecution of more seditious libel suits in the English courts only inspired more press polemics, which in turn led to still more seditious libel suits in the English courts. And as long as English judges held such strong “tory” objections to robust popular press debate in general and to jury autonomy in particular, English government and American popular attitudes toward seditious libel would evolve

in opposing directions. As long as English judges could restrain English jurors and curtail their scope of action, the practical effects of the casework in British courts would be quite different from that produced in the courts in colonial America.

For His Majesty’s subjects on the western side of the Atlantic, in the Zenger case, were pushing colonial American law court culture toward very different understandings on the law from what Lord Mansfield was achieving in London. The Zenger case effectively ended gubernatorial prosecutions of seditious libel against individuals in the colonial America. In the years after Zenger, when colonial and later state legislatures attempted to mount efforts to punish seditious libel, these attempts often fell flat and eventually came to be seen as an illegitimate use of legislative power. Even the formerly skeptical scholar of the Zenger case-as-precedent has now acknowledged that Zenger had its effects on later American statute law. The Federalist Sedition Act of 1798 expressly provided for juries to decide the law as well as the fact of a charge of libel. The Sedition Act also provided that truth should be good defense against any criminal, seditious libel charge. The act further declared that the intent of the writer and the tendency of that writing could be considered to refute the charge of criminality. Even with these “safeguards,” the Jeffersonians condemned the 1798 Sedition Act as an abomination against the rights of free citizens, and Sedition Act died with the Federalist control of the Congress that had enacted it. The belief that peacetime writing, to criticize leaders or disagree with government policy, could constitute “seditious libel” against a government, would die as well.  

Colonial American legal practice was being pushed and molded by citizen lawmakers—jurors—years before Parliament, colonial assemblies, state legislatures or a

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United States Congress would enact reforms providing for such jury powers or for provisions to protect political speech. While historians have argued since the early 1960s that Zenger did not “set a new legal precedent” but rather “set an important political precedent,” in fact Zenger did both. What had immediately prevailed in Zenger’s case was a political argument made to citizen jurors who determined the law in that particular case. Historians such as Stanley Katz and Leonard Levy have correctly argued that immediately, by itself, “the Zenger case did not lead to a ‘reformation of the law of libel.’” But no single colonial case could “make” or “transform” an entire body of law at that time. As British jurist and Chief Justice Lord Holt had declared for his legal era—the late seventeenth to early eighteenth centuries—“The law consists not in particular instances and precedents, but in the reason of the law….” In other words, in an age when lawyers believed that law was “found” or “discovered” rather than “made” in particular precedents, no single case was capable of establishing a new legal tradition. Yet Zenger’s jurors took a critical step toward expressing a new popular attitude toward seditious libel, and toward law itself, when they rejected Justice DeLancey’s charge to bring in a guilty verdict. For Zenger’s jurors also rejected the judge’s opinion on the law governing the case, inserting their own version of the law instead.

What Zenger’s jurors expressed—for which they were roundly applauded in the courtroom after announcing their verdict—was an evolution in colonial popular

104 See the argument and citations, especially for Levy and Katz, in Finkelman, “The Zenger Case,” in Belknap, American Political Trials, 22-36.
105 Ibid., 23.
107 “[T]here were three huzzas in the hall which was crowded with people” following Zenger’s acquittal, while defense attorney Hamilton was awarded banquets, gifts and honors of the city, according to Alexander’s Brief Narrative, in Katz, ed., A Brief Narrative of the Case and Trial, 101-5.
understanding of what the law of seditious libel ought to be. Zenger’s acquittal was a dramatic demonstration of what impact popular opinion could have on a case with high political overtones in a court of law. Zenger’s jurors were reflecting as well as pushing public opinion in the political arena which, in this instance, also was a courtroom. In taking the law into their own hands in this case, Zenger’s jurors acted as political agents in what very clearly was the political sphere, a realm where popular criticism of authority otherwise was not easily voiced, if indeed it could be voiced at all.

After Zenger’s acquittal, colonial governors grew reluctant to pursue prosecutions of seditious writings in the press for fear that grand and petit juries would refuse to indict and convict, just as they had refused in Zenger’s case—embarrassing the executive authority, just as New York’s governor had been humiliated. And over the next few decades, legislative prosecutions of seditious libel would be seen as increasingly inappropriate in American politics. Revolutionary state prosecutions of tory printers and efforts of the Federalist Congress to strike at its enemies in 1798 did occur. But these efforts would likewise be condemned, at the time and later, as illegitimate. In pushing broader public opinion and eventually the law and toward tolerance of dissident speech, Zenger’s trial established a new reality in the politics of New York, with implications far beyond. In revising his view on Zenger, the prominent scholar of the case—and former skeptic of its results and influence—Leonard Levy has concluded that “common-law prosecutions petered out after Zenger’s case.” Even if “the [statute] law remained the same as it had been in England and the colonies” after the Zenger jury verdict on the facts and the law in the case, “the record of the Zenger case kept aloft the standard of truth as a defense, despite the unchanging law.” And the point is, of course, as Levy has
recognized, that because of jury action and public opinion, eventually, the American law
did change.\textsuperscript{108}

While the Revolution and the origins of American party politics would sorely test
the routine applications of jury independence, the American commitment to trial by jury
would remain firm, reinforced by the impact of the Zenger jury’s action. As Shannon
Stimson has written, “Zenger’s case was of considerable heuristic and pedagogical
significance.”\textsuperscript{109} Americans were discovering how they might govern themselves, and
they were learning how to answer and resist those in power, even if “the law” forbade it.

Following Zenger, common law prosecutions for seditious libel often ran into
trouble before juries in colonial courts. For instance, the New York Assembly tried but
failed to humble critic Alexander McDougall in 1770-1771, mentioned earlier, in the
New York courts. McDougall did spend two-and-one-half months in jail, but by the
assembly’s decree, not by court order. McDougall’s political struggles would, like those
of Zenger, raise public awareness of the dangers of government attacks on press freedom,
from whatever source. Governor George Clinton failed in his attempt to silence printer
James Parker in 1747, in this instance because Parker enjoyed the support of the
Assembly. The point is that, after Zenger, American governors became fair game for
political opponents. Jurors in court tended to ensure that. Extending the principle of the
freedom to criticize American legislatures would take longer, however; though as

\textsuperscript{108} Finkelman, in Belknap, 36-39. While taking key supportive points from Finkelman, the author of the
current study argues against Finkelman that the Zenger case did indeed influence and shape the
development of American law and was not merely important as a “political precedent” (at 36). See also
Katz, \emph{Brief Narrative}, introdu., 29-35; Levy, \emph{Palladium of Justice}, 102-5, 80-87; Levy, \emph{Emergence of a Free
Press}, quotations at 44, and see pp. 42-88.

\textsuperscript{109} Levy, \emph{Emergence of a Free Press}, 37-44; Abramson, \emph{We, the Jury}, 73-75; Stimson, \emph{The American
Leonard Levy has argued, colonial prosecutions of seditious libel more often were pursued by an act of the legislature, rather than by a court trial by jury.\textsuperscript{110}

\textbf{Conclusion}

Legally as well as politically, American law court culture was diverging in several key respects from that of the home country, from the Zenger trial to the Revolution. At the same time, popular opinion in late colonial America was diverging from that of the judges in England as well as in America. Only after American independence and into the early nineteenth century would American and British attitudes toward press freedom, expressed in their libel statutes, begin in some ways to converge. Eventually genuine jury independence, within its judicial sphere in libel cases, would be secured by Parliamentary statute in England, as it was earlier asserted in New York by Zenger’s trial jury. In the meantime, the British would struggle to achieve by act of Parliament what the Zenger jurors had already exercised as their prerogative—the power to declare what was and what was not the law of libel in a criminal sedition case. Because American jurors in Zenger acted as autonomous citizens, they taught their fellow citizens how ordinary American citizen-jurors might push American courts toward accepting greater protections for civil liberties.

A great deal of this public debate on the right to criticize authority would also be carried on in the press in Great Britain and America. The final chapter of this study analyzes some of this press debate. But as will shortly be seen, American citizen jurors were capable of exercising, long before Independence, what British Whig theoreticians were arguing \textit{English} jurors \textit{should} be able to exercise, by right. Those English writers

would engage in a long and elaborate press debate to advance jury power in England, particularly in seditions libel suits. Zenger’s jurors, meanwhile, had shown early on how the ideal and practice of jury power could protect defendants in civil and criminal trials. And as will be seen, colonial Americans believed so deeply in their jury system that they would even permit that system to protect a despised minority in their midst—a minority that many colonists believed threatened their way of life. Colonial Americans would fight a war for independence, in part, over the value of that jury system. Indeed, the debate over jury power and right would frame a significant difference between the English of Britain and the English of colonial America—so much so that the English of colonial America would cease to think of themselves as “English,” but rather as “Americans.”

Perhaps ironically, in one important respect, American independence and the rise of an American sense of citizenship have their origins, not in a broad expanse called America, but in the neighborhood—specifically, in the local court. As Andrew Hamilton had told Zenger’s jurors, “[t]he law supposes you to be summoned out of the neighborhood where the fact is alleged to be committed; and the reason of your being taken out of the neighborhood is because you are supposed to have the best knowledge of the fact that is to be tried…. You are citizens of New York; you are really what the law supposes you to be, honest and lawful men…. In any “free government,” the “ruler of a people” cannot simply issue an order “to stop people’s mouths when they feel themselves oppressed.” People have a right to air their grievances, and as “the representatives of a free people,” jurors have the right and the duty to speak for those people, if they cannot speak for themselves anywhere else. Acting as the representatives of the people within
the courts of law, those jurors “were not obliged by any law to support a governor who
goes about to destroy a province or colony … which by His Majesty he was appointed,
and by the law he is bound to protect…. And [what] if a man must be taken up as a
libeler for telling his sufferings to his neighbor?” Then, Hamilton declared, if no
assembly or legislature can rescue that man, his neighbors must—as jurors in court.111

As representatives of their community temporarily embedded in the machinery of
the state, Zenger’s jurors did exactly that. The decision was electrifying and the news of
this jury’s action spread far and wide, then and in the years to come. People in England
and America were talking about what a jury in New York had done.112 How far the
consequences of this new popular thinking might spread was yet to be seen.
Chapter 5

The Political Role of Jurors on the Eve of Revolution, Part II

We think, in America, that it is necessary to introduce the people into every department of government, as far as they are capable of exercising it; and that this is the only way to insure a long-continued and honest administration of its powers.... [As for] trial by jury .... I consider that as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution.

—Thomas Jefferson

In the Administration of Justice too, the People have an important Share. Juries are taken by Lot or by Suffrage from the Mass of the People, and no Man can be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People.

As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controll, as decisive a Negative, in every Judgment of a Court of Judicature. No Wonder then that the same restless Ambition, of aspiring Minds, which is endeavouring to lessen or destroy the Power of the People in Legislation, should attempt to lessen or destroy it, in the Execution of Lawes.

—John Adams

Colonial Americans on the eve of Revolution valued their juries for many reasons, not the least of which being the jury’s pedagogical function, as a “free school” where the individual “learns his rights” and learns how to protect himself and his neighbor, as Alexis de Tocqueville later would explain. John Adams and Thomas Jefferson embraced this belief in the proper role of juries. By the late colonial era the jury effectively had

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become a school for citizenship, in Tocqueville’s words, “establishing the people’s rule” over law in the courts and simultaneously “teaching them how to rule.”

Juries had ruled in some highly politicized cases since the start of the eighteenth century. In several notorious attempts by the state to prosecute perceived enemies, colonial American jurors often tried to defend what they thought should be the “rights of Englishmen.” From the treason trial of Nicholas Bayard to Governor Cosby’s attempted court attack on Rip Van Dam; from the disgraceful trials of supposed “Negro Plotters” to the attempted prosecutions of John Peter Zenger, Alexander McDougall, James Parker and others—the state had tried to silence its enemies by jury when it could not avoid a jury trial altogether. Jurors had not always stood as the bulwark of individual freedom. But as revolution grew closer, juries seemed increasingly unwilling to abet the state in vengeful prosecutions, especially “political” or partisan ones. This was precisely why John Adams put such trust in “the Voice of the People” as it spoke through the juries of his day.

But by the early 1770s, Adams in particular was growing concerned about what he saw as British designs on the proper functioning and integrity of the colonial jury system. He was alarmed by recent developments that, to him, suggested a new trend in British attacks on the rights and powers of American juries. Until now, Adams wrote:

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4 See discussion of these cases in Chapter 4.

5 See Chapters 3 and 4 above.

The Rights of Juries and of Elections, were never attacked singly in all the
English History. The same Passions which have disliked one have detested the
other, and both have always been exploded, mutilated or undermined together.

The British Empire has been much allarmed, of late Years, with Doctrines
concerning Juries, their Powers and Duties, which have been said in Printed
Papers and Pamphlets to have been delivered from the highest Trybunals of
Justice. Whether these Accusations are just or not, it is certain that many Persons
are misguided and deluded by them, to such a degree, that we often hear in
Conversation Doctrines advanced for Law, which if true, would render Juries a
mere Ostentation and Pagentry and the Court absolute Judges of Law and fact. 7

Adams appears to have adopted the attitudes of those such as attorney Andrew
Hamilton who, in defending John Peter Zenger, had called upon the jurors to use their
best judgment as “citizens of New York.” Hamilton had asked the jurors in that trial to
decide the case as a whole, to judge both its facts and to determine the law. And so
Zenger’s jurors used their own judgment, ignoring the charge by the judge and freeing
Zenger, returning him to his press. Adams, as a young colonial whig attorney, approved
of juror power to decide the law as well as the facts in a trial, to protect individual
entitlements in cases such as this. 8 His belief that the jury spoke for the people, to defend
the people’s rights, was broadly shared in colonial America, beyond New York and
Massachusetts. Historian J. R. Pole has noted strong popular belief in jury rights and
power in Virginia, for instance. Unlike the judges of England, justices in Virginia did not
sum up cases at the end of trials, as “Virginia juries would have regarded this as an
intrusion on their privileges.” Pole sees “at least a hint here of a democratic influence on
the courts, akin to Andrew Hamilton’s argument ... in the Zenger trial in New York that
the popular element in colonial government enhanced the rights of juries at common

7 Wroth and Zobel, ed., Legal Papers of John Adams, I, 229.
8 Stanley Nider Katz, ed., A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New
law.”⁹ Of course, this insight can be reversed. As the previous chapter illustrates, Hamilton actually argued the opposite point: that if they chose to use it, ordinary jurors had the power to enhance the popular element within colonial government. If jurors chose to do so, they could turn the law to popular ends. Indeed, one might as well conclude that, where jurors could decide the law as well as the facts of a case, the jurors were the law. Obviously, the impact of such thinking on the administration of government could be profound.

Thus there were those who strongly believed that jurors should have no such power to decide the law of a case, especially where the case involved the state’s desire to quash “dangerous” opinions against it—seditious libel—regardless of whether such writings were true or false.¹⁰ English and American judges generally adhered to the English common law on the question of whether juries could decide the law of a seditious libel case, holding that jurors should be bound by the judges to consider only the mere fact of publication.¹¹ Indeed, Hamilton had tried to argue with Chief Justice DeLancey over whether the jurors, rather than the judges, should decide the law of the case in a trial for seditious libel. DeLancey, following the practice of English judges, refused to entertain any such arguments during the trial, but Hamilton drove the point home to the jurors in his closing speech anyway.¹² English, Irish, and American judges before mid-century had been determined in cases of seditious libel to separate matters of “law” from

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¹¹ Pole, “‘A Quest of Thoughts,’” 120-21, and see the previous chapter.

¹² See the discussion in the previous chapter, and see Stanley N. Katz, introd., *John Peter Zenger, His Press, His Trial, Livingston Rutherfurd* (New York: Dodd, Mead [1904], rpt. 1981), 70-88, ff.
matters of “fact,” requiring jurors merely to declare the “fact” that the defendant on trial had printed a particular piece, which the judges then could hold by “law” to be libelous and seditious, and thus impose potentially harsh sanctions. And although these judicial efforts to limit jury discretion in seditious libel cases had proved less successful in American than in England or Ireland in the years just before Independence, Americans like Adams were still anxious over where things might go.\textsuperscript{13}

British Chief Justice Lord Mansfield had been particularly keen, for some time, to limit jury powers in the courts. As James Oldham has written, in the eighteenth century “a storm of controversy developed about seditious libel, and Lord Mansfield was at the center of that storm. Mansfield was accused in the popular press of having created a restrictive seditious libel apparatus that imprisoned freedom of the press.”\textsuperscript{14} Even if that apparatus had in fact been built at the start of the century, the creation of an earlier chief justice, by the period just after mid-century Mansfield began working the machine hard.\textsuperscript{15}

John Phillip Reid has noted that, in the half-decade before Independence, “the British press was filled with polemics attacking Mansfield and what were perceived as new


\textsuperscript{14} While Lord Mansfield’s personal distaste for trial juries perhaps has been exaggerated, he feared the introduction of juries into new types of Scottish trials as “‘big with infinite mischief.’” Although apparently generally polite to jurors within his own courtroom, he looked unhappily upon the “inefficiencies and inconveniences of trial by jury,” according to James Oldham, \textit{English Common Law in the Age of Mansfield} (Chapel Hill, NC; London: U of North Carolina P, 2004), 16-17. “The main inconvenience identified by Mansfield was the problem of differentiating between law and fact,” especially in criminal libel cases (16). Apparently Mansfield’s sympathetic courtesy toward jurors did not extend far in seditious libel cases, however; see pp. 26, 34, 209-35. See Oldham also regarding revisionist interpretations of England’s law of seditious libel and its application by judges, and cf. Philip Hamburger, “The Development of the Law of Seditious Libel and the Control of the Press,” \textit{Stanford Law Review}, 37:3 (February 1985): 661-765.

definitions of law, government power, and personal security.”16 As Lord Mansfield and
his judicial followers attempted to circumscribe jury powers in seditious libel suits,
cloaking their new policy in fictitious antiquity,17 colonial American proponents of jury
power became increasingly worried about the implications for law, courts, press freedom
and, especially, for juries.

From these efforts by judges on both sides of the Atlantic to shield administration
from adverse public comment, a great press debate arose in England as well as in
America over just what kind of power juries should have, compared to the judges in the
courts. What were the claims in this press debate, for and against the powers of jurors to
be able to decide the law, as well as the facts, of a case? What were the arguments for
broad versus limited jury powers to decide the core issues in seditious libel cases? And
how did this argument over jury powers affect the thinking of Americans on the eve of
Revolution, particularly when many colonists were coming to view the government
itself—and specifically its army—as the source of sedition?

The problem of libel law and jury independence: A defining debate over the nature
and entitlements of citizenship

Just after the turn of the eighteenth century, in July of 1705, Nicholas Corsellis, Her
Majesty Queen Anne’s Justice of the Peace, proudly (though ostensibly reluctantly)
published his just-delivered charge to the grand jurors for the Essex (England) General
Quarter Session of the Peace. The charge was “Published at the Request of the Grand-
Jury, &c.” Apparently the Essex grand jurors wanted their fellow Englishmen to know,
through the charge of their JP, that “High-Treason” was afoot in England. In the few

17 Oldham, English Common Law, 209-10; Green, Verdict According to Conscience, 318-20.
preceding years, Queen Anne had made it clear in several addresses to Parliament that she had great concern for “‘Our Religion, for the Laws and Liberties of England, for the Maintaining the Succession to the Crown in the Protestant Line, and [for] the [proper] Government in Church and State.’” The Queen declared that her “‘Heart [was] Entirely English.’” Her Majesty had emphasized that “‘My own Principles must always Keep Me Entirely Firm to the Interests and Religion of the Church of England, and will Incline Me to Countenance [only] those who have the truest Zeal to Support it.’” Unfortunately, there allegedly were those in the realm who doubted the Queen’s sincerity. Worse, according to Corsellis, England was threatened by “‘Dissenters, that do but call themselves Protestants, in effect to set up a Religion of their own.’” Such traitors “ought to be presented by you,” Corsellis charged the grand jurors under his jurisdiction, to protect the church and state of England. No one should be permitted to use England’s gracious and tolerant laws to shield “the growing and dangerous Practises of Seditious Sectaries, and other disloyal Persons, who under pretence of tender Consciences have, or may at their Meetings contrive Insurrections” against the proper English order.

Justice of the Peace Corsellis clearly saw no need for toleration of such dangerous state enemies as Roman Catholic or Quaker zealots, for example. Quite the contrary. If dissenters attempted to hide behind the protections of English law, “so [that] their Preacher takes a Licence, signs [only] thirty five, and part of another, of the nine and thirty Articles of the Church of England,” then such actions demonstrated “Stubbornness, not Religion.” Grand jurors needed to present all such traitors for indictment. For this stubbornness was in fact “High-Treason” and needed to be dealt with as such. Speech or

writing against the doctrines of the church or the policies of the state were seditious and had to be punished.\textsuperscript{19}

Eventually, of course, such fears for the safety of the English Protestant establishment receded along with the diminishing Stuart threat to the legitimacy of the Orange succession. But anxieties were revived with the Hanoverian succession, following so soon after the expulsion of the Catholic Stuarts and the importation of a Dutch-English monarchy. Concern for the security of the new regime would increasingly harden the stance of tory judges to protect the dignity of the state, its Parliamentary supremacy, and its ministers.\textsuperscript{20} The intensifying hostility of those judges and their government allies to published criticism of any sort enflamed the fears of their political opponents, the heirs of the Old Whig tradition. These latter-day whigs now saw new and grave threats to the security of Liberty.

Thus began in England a long battle over whether written attacks on the state, its ministers or their policies should be vigorously prosecuted. English judges, led by Chief Justice Lord Mansfield, seemed determined to carry out the strongest possible defense of state “dignity”—or power—by any judicial means necessary. While the Zenger case had

\textsuperscript{19} Ibid., 5.
\textsuperscript{20} Hence Blackstone would later declare that “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it,” for “there is no court that has power to defeat the intent of the legislature,” or Parliament. Parliamentary supremacy was the new order. Moreover, the King-in-Parliament could not be attacked or be made subject to “libelous” criticism. The ministers of the government, as its creatures, however, might be criticized in place of the king or Parliament. Obviously, tories would quickly perceive that such criticism might actually be an indirect attack on the supreme authority of the state and thus, also, had to be opposed. Here the law of seditious libel could provide the state its primary weapon to maintain control over an expanding and unruly press. See Blackstone, \textit{Commentaries}, I, 91; IV, 150-52 (dealing with “malicious defamations of any person, and especially a magistrate,” intended to “expose him to public hatred, contempt, and ridicule”). See also Oldham, \textit{English Common Law in the Age of Mansfield}, 212-17 ff., with Mansfield’s tory allegiances at 217; and note the rise of bench control over jurors in England, Green, \textit{Verdict According to Conscience}, 278-79.
struck a significant blow against such prosecutions in the colonies, and while most colonial Americans had rejoiced at Zenger’s victory, the argument in England over seditious libel against the administration, and what to do about it, would be long and tortuous.

James Erskine, Lord Grange was one of the British pamphleteers attacking those tory “Lawyers” and ministers (usually unnamed) who sought to limit jury powers in criminal libel cases. Grange, a Scottish publisher, judge and member of Parliament active from the early eighteenth century to the late 1740s, led a checkered personal life and had a career of vacillating political loyalties. On the issue of press freedom and jury rights, however, Grange was a most effective voice for press owners such as he, as well as for the government’s opponents, when he chose to challenge the ministry. At mid-century, he succinctly summarized the tory argument to curtail jury power:

Juries, they say, are Judges of Fact only, not of Law, therefore if it be proved that the Defendant was the Author or Publisher, they ought to find him Guilty; because the Question, whether it be a Libel or no, is Matter of Law, of which they [the jurors] are not proper Judges; or at least, the Jury ought to bring in a Special Verdict, finding the Publication proved, and leaving it to the Court to decide whether what was so published was a Libel or no.

As explained earlier, the practical effect of such a procedure was to strip jurors of the real authority to decide what was or was not libelous. Jurors were left with merely the

21 Paul Finkelman suggests that the “limited number of prosecutions” for seditious libel in America, following Zenger, may well be “the legacy” of the Zenger case. See Finkelman, “The Zenger Case: Prototype of a Political Trial,” in Michal R. Belknap, ed., American Political Trials (Westport, CT; London: Greenwood P, 1981), 21-42, at 24, and see the previous chapter.
22 Katz, Brief Narrative, introd., pp. 29-31, and from the Narrative, at 101; Katz, John Peter Zenger, His Press, His Trial, 125-31.
question of whether a particular individual had written or printed a certain piece or book, as a simple fact to decide. With the simple fact of writing or publishing established, the judges could then condemn the work as libelous, as a matter of “law.” Now, Lord Grange was willing to accept this division, which would be canonized by Blackstone, between judges and jurors and their respective legal roles. “Juries, I shall grant, are proper Judges of Fact only,” Grange declared. But since only “an Act of the Mind makes the Crime,” elements such as malice, intention, or motive must be taken into consideration by jurors determining whether a particular writing constituted a criminal or seditious libel that might be punished with fines or jail time. Could a jury “in their Conscience find the Defendant guilty of writing or publishing, and leave it to the Court to determine whether it was a Libel or no”? This was indeed English law at midcentury and it had its defenders, to the very end of the eighteenth century.

One of these tory defenders, a Mansfield acolyte and barrister at law of the Inner Temple, was John Bowles. An intense Francophobe and anti-Jacobin, Bowles was a staunch proponent of strict religious and moral standards, extending to the realm of political speech as well. Bowles published his *Considerations on the Respective Rights of Judge and Jury* in 1791, in hopes of defeating Fox’s proposed Libel Act in Parliament, to secure to English jurors the power to decide what writings constituted seditious libel in England. Bowles sought to defend the regime in Britain against what he considered the ethical deterioration of modern times, including in political life. In this tract, Bowles hoped to promote the stability of law by defending judicial power and undermining jury

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rights, declaring: “In most countries the offices of declaring the law and investigating the fact are united in the same person.” In England, however, “It has been long and deservedly the boast of this country, that these offices are here separated,” so that the “TRIAL BY JURY” would provide “the best mode of trial for … the discovery of truth, that human ingenuity can devise.” Judges, meanwhile, possessed “very different qualifications.” For a proper understanding of the law “demands great talents, profound study, extensive knowledge, and a long professional pursuit of legal enquires”—qualities not possessed by ordinary English subjects. Indeed, it would be “alarming and dangerous” to vest law-deciding power in them. The reason for alarm was simple. The “education and modes of life of jurymen are not adapted to furnish them with legal knowledge; and, however they may vary in their qualifications, it is no disgrace to them to say, that they must in general be unqualified to decide questions of law.”28 It may be recalled that it was precisely this power to decide the law of the case that had been the key issue in Zenger’s trial back in 1735. There, Andrew Hamilton had insisted that New York jurors rightfully had and must exercise the power to judge the law as well as the facts in Zenger’s trial.

Tellingly, in the very way this barrister defined the word “trial,” Bowles sought to strip from jurors any power to decide issues of legality within English law court culture. As Bowles cited Blackstone, “the term Trial is defined [as] an ‘examination of the matter of fact in issue;’” as such, English jurors could play no role in the determination of “law.” For law, Bowles asserted, “is discovered by a reference to authorities and precedents, by deductions of analogy, and inferences of legal reasoning. It would absurd in the extreme

to talk of swearing a witness to prove what is law,” the normal method by which jurors
determined the facts of any case. Bowles believed it obvious that ordinary witnesses
were “neither required nor able to inform the jury what is law.” Only the judges, “whose
province it is to declare and dispense the law, are accordingly sworn ‘to decide according
to the laws of the land.”’ It naturally followed, then, that “if it is the duty of the judge to
declare the law to the jury, it must surely be the duty of the jury to receive the law as the
judge has declared it….”

Bowles did make an interesting and important observation about the dilemma that
would permeate any law court culture if jurors were to follow the advice of counselor
Hamilton in Zenger. For there was a potentially serious problem if jurors were to take
upon themselves the right to decide the law as well as the facts presented in any trial.

Bowles observed that

if the decision of the law were in the breast of the jury, this pernicious
consequence would follow, that the law would be decided *sub silentio*, without
being declared. The general verdict [that is, simply, of guilty or not guilty]
including both law and fact would leave it quite in the dark what principles of law
prevail in it, or whether it is founded upon ignorance, partiality, or caprice. A
party in a civil case would be entirely ignorant whether he failed from a
deficiency of evidence, or because his claim was not supported by law. In like
manner it would be impossible to say, whether a jury acquitted a prisoner because
they disbelieved the facts, or because they doubted the law upon those facts…. A
court of justice thus conducted would resemble an inquisition…. Thus would a
trial by jury (which, as it affords so public an opportunity of examining and
sifting witnesses, is the best possible criterion of truth) become the dark
repository and silent dispenser of the law….

Thus Bowles warned that, if law court culture—and law—were to be transparent,
coherent and consistent, the determination of what was “the law” could not be left in the
hands of ordinary, lay citizen jurors, as had been the result in Zenger’s trial. By the end

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29 Bowles, *Considerations*, 6, 8-10.
of the first quarter of the nineteenth century, most American judges would concur, making this the new reality of an American law applied in American courts.\textsuperscript{31} The law would remain opaque and uncertain or unpredictable until it could be “routinized” by a professional legal class—that is, by the judiciary.\textsuperscript{32}

More insightful still, Bowles warned of conflating a jury’s right with power. The jury might easily “determine” what was law in a general verdict, where—as in Zenger—the jury simply handed down a verdict of not guilty, ignoring the relevant statute or case law, a judge’s instructions, or anything else. Bowles wrote:

> It cannot however be denied, that as the form of a general verdict does not admit of any reference to the motives or considerations on which it is founded, the jury have the power to take upon themselves the decision of the law[.\ldots] But it is impossible from thence to infer the right so to do, unless power necessarily implies right; which I imagine will not be contended\ldots. They have the same power to indulge a bias of favour or resentment, to gratify their partialities or caprice, as to be governed by their own notions of law in opposition to the opinion of the judge; and they have the same opportunity of concealing such motives


\textsuperscript{32} “Routinized” is used here in the sense suggested by Max Weber, as developed in \textit{From Max Weber: Essays in Sociology}, trans., ed. H. H. Gerth and C. Wright Mills (New York: Oxford UP, 1946, 1958), especially pp. 261-64, 296-301. Weber describes the evolution of governmental orders from earlier “charismatic” forms of authority to more modern, bureaucratic means of governing society. For Weber, “charismatic” authority “rests upon a belief in the sanctity or the value of the extraordinary, and traditionalist (patriarchical) domination,” acting over yet within the “everyday routines” of local, familiar culture (297). While Weber was thinking of kings, prophets and war lords as exemplars of such charismatic authority, one could also see jurors—sworn (thus altered or elevated) by sacred oaths and sanctified by ancient and venerated tradition—as possessing charismatic power. Jurors decided guilt or innocence by special (local) knowledge and power said to be theirs, uniquely, by virtue of being peers from the vicinage (suggesting also a “sacred” power in the locality of place, or ritually-delineated local space). With the rise of a professional legal class and its “rules,” however, “routinizations” replace personal and intrinsic powers with official, legal, and learned (“rational”) administration, according to Weber. So the “modern state” is characterized by “bureaucratic rule,” whereby jurists (for example) apply “impersonal” and (later) “scientific” rules, to decide questions and to make more “rational” and coherent judgments (297-301). By the end of the first quarter of the nineteenth century, English and American jurors might retain much of their ritual or “charismatic” authority to declare who had done what to whom. But an increasingly “scientific” age, demanding predictability in outcomes, would also insist on greater predictability and transparency in the determination of what was “the law”—the rules governing everything. Like science, business management, and ever more areas of modern life, the law was no realm for amateurs. Further implications of Weber’s analysis can be followed in \textit{Max Weber: Economy and Society, An Outline of Interpretative Sociology}, ed. Guenther Roth and Claus Wittich, 2 vols. (Berkeley: U of California P, 1968, 1978).
under the cover of a general verdict. But the Constitution trusts that they will not abuse the confidence reposed in them.\textsuperscript{33}

One could argue—as Andrew Hamilton had in New York—that jurors were worthy representatives of the people, their spokesmen in the broadest sense within any court. Jurors could be trusted as the final arbiters of society’s laws. But Bowles did not trust his countrymen to judge the law competently or justly. One suspects that Bowles did not share that “confidence” in English jurors which he asserted was “reposed in them” by the British constitution.

What Bowles feared was that autonomous and independent juries were being promoted as a “system … aiming at the subversion of the authority and the usefulness of judges,” threatening to make “the judges merely cyphers, and all the pomp and solemnity with which the constitution has distinguished their office, only [to] serve to render their insignificance more visible.” Moreover, independent, autonomous jurors would just let off seditious libelers, those dangerous criminals who threatened the stability and peace of the established social order. After all, as Bowles pointed out:

The doctrine that the law is within the comprehension and the province of the jury, is extremely convenient to libellers, as it furnishes them with an opportunity, by means of popular harangues—by taking advantage of the prejudices of the times—and by an abuse of the most sacred terms relating to civil rights—to persuade juries to return a verdict of not guilty, or some other verdict that may equally frustrate the ends of justice.

Above all, Bowles feared sedition and wanted it punished. He was likewise afraid that jurors were easily duped. Thus critics of the government—criminals—would escape justice and rankle social tranquility. The solution to such threats was clear. Jurors must follow the dictates of wiser and more knowledgeable judges, accepting their determinations on what was the law in any case and rejecting “popular harangues” and

\textsuperscript{33} Bowles, \textit{Considerations}, 15-16, italics added.
those “passions [that can] agitate the mind.”  

In their treatment of defendants such as Zenger and attorneys such as Andrew Hamilton, it certainly appears that American judges could be strongly sympathetic to such views.

Presumably the judges did not suffer from agitating passions. Without doubt, a judge was an “authority” to whom subjects should submit in any matter where the judge, as superior, commanded their deference. The submission of inferiors to their superiors was the proper social and legal order, after all. It had been the colonial American legal order, too, until Zenger’s jurors, concurring with counsel for the defense, brusquely set that order aside in the printer’s trial. This social order commanding deference of inferiors to their superiors had prevailed at least as much in southern colonies such as Virginia.

There, in the Chesapeake region including Virginia, the social elite—such as governors Thomas Jefferson and Patrick Henry, along with the likes of Washington, Mason, and a younger generation of protégés such as John Marshall and James Madison—expected and received the deference of their inferiors. In the South, the gentry, as social leaders, were also the political leaders of the colony. This class of landed gentry was destined to rule—and to command the deference and obedience of the “vulgar herd.” White commoners of Virginia were likewise referred to by their betters as the “common herd” or the “ignorant Vulgar.”

Liberal Thomas Jefferson—the visionary for popular democracy in American national memory—proposed in his *Notes on the State of Virginia* an enlightened state program of free education for a limited number of poor

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34 Bowles, *Considerations*, 55-56.
white boys of genius who “will be raked from the rubbish annually.” That was human rubbish, of course. Now, Virginia’s elite doubtless would have rejected the term “aristocrat” to identify themselves, holding that term “in utmost abhorrence because of its pejorative connotations of rule by a small, legally privileged group for their own private ends,” as Jack Greene has observed. Still, Virginia’s planter elite clearly “shared the traditional disregard for the abilities and worth of the poorer segments of society.” Those “in the middle and lower ranks, who … lacked the talent, wisdom, training, time, or interest for politics” were expected, in the words of a governor of the 1730s, to “Submit … to every Law,” including, of course, to gentry rule. And gentry rule encompassed politics, the law, and the courts—where planters would serve as jurors in Virginia’s law court culture. But gentry service on juries would guarantee, at the least, that Virginia’s social and legal elite did not seek to denigrate grand or petit jurors in order to uphold “authority,” including the authority of judges. Jefferson, for example, would insist that “if the [legal] question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact” at the trial. Virginia’s jurors also were powerful arbiters of fact and of law in their

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38 Greene, Negotiated Authorities, 262-63, 268-69, 276-79.

39 Merrill D. Peterson, ed., Thomas Jefferson: Writings (New York: Library of America, 1984), 256, from Query XIV of Notes on the State of Virginia. It must be remembered that Jefferson was not one to flatter any specific center of “authority”—and here, certainly not judges. Before American independence was recognized by the British, Jefferson wrote of the abuses of his own state legislature, “An elective despotism was not the government we fought for.” in Koch and Peden, ed., Life and Selected Writings of Thomas Jefferson, 237. Jefferson did express here a profound trust in Virginia’s jurors, however.
legal cases, meekly submitting to no judge, to no “superior”—especially in cases of judicial corruption or in matters relating to “public liberty.”

Perhaps what most surprises the modern reader in the English tory defense of judicial authority (and in their criticism of the idea of powerful, autonomous, citizen jurors) is the undisguised arrogance running through so much of their argument. Men like Bowles often came close to maligning jurors in order to elevate the dignity of the judiciary. (Of course, whig writers were capable of doing something like the opposite—harboring suspicions of a powerful judicial elite to promote instead the rights of the ordinary citizen-as-juror.) Eighteenth century tory defenders of the traditional English social order simply assumed that socio-political superiors—such as judges—could and should demand the deference of their inferiors—in this case, ordinary subjects unable to understand the complexities of the common law. Men like John Bowles and Lord Mansfield believed that jurors lacked the “education and modes of life” necessary to a proper knowledge of the law. A high place in British society and position as barrister or judge did nothing to discourage a haughty attitude toward inferiors—especially the unlearned-at-law whom they typically would have met in court. But such attitudes as those expressed here toward the common English juror raise other issues regarding the elite’s expectations of deference in English law court culture.

Indeed, two issues arise from the English elite’s attitudes toward their inferiors, when those inferiors were jurors sitting on trials at court. First, most notably in libel cases but prevalent in other trials as well, Britain’s social and legal elite truly expected

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41 See, for example, Green, Verdict According to Conscience, 318-49.
42 Quotation from Bowles, Considerations, 4; see also Oldham, English Common Law in the Age of Mansfield, 3-17, chap. 10.
that lowly subject-jurors not think about any political questions that might arise in these trials. For example, Bowles had emphatically denied that jurors had the “right to exercise their own judgment upon matters of law.” If jurors exercised their own judgment on the law, this “would at once erect them into a self-moving court of appeal from the judges themselves.” This independent exercise of judgment on the law, of course, was inconsistent with the jurors’ role—according to the lights of Mansfield and Bowles—to defer to the authority of the judges in such matters. At least as important to men such as Mansfield and Bowles, this independent exercise of judgment in the political realm was inconsistent with their larger social role of deference to authority generally.  

But Bowles went farther still, striking at a jury’s responsibility even to consider the facts a case might present. Bowles argued that when jurors found a defendant guilty of the fact of having published a piece, they ought not worry themselves about any more facts, like that of the writer’s motive. Jurors actually should think as little as possible, since their proper role was so limited anyway. Certainly jurors need not concern themselves with matters such as criminal intent in libel cases. For “[i]f the defendant has published a libel, the law presumes that he published it with bad intent…. [T]he intent is presumed, as it ever must be, to accompany the crime. No direct proof is required, nor indeed can in general be given, of a malicious intention…. ”

In other words, libel cases did not require much intelligent reflection from jurors. They need not be bothered with such difficulties as the establishment of motive, malice or intent—in cases of seditious

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44 Bowles, Considerations, 31.
libel, involving inherently political questions.\textsuperscript{45} Jurors certainly were not to consider the words actually written and the arguments made by those words, according to Bowles. Jurors absolutely were not to consider the broader political context to which a libel allegedly referred. They absolutely were not to consider any political debate wherein the alleged libel may have struck a just blow against some person in government or against a government policy. These very constraints on independent thought or judgment were what Zenger’s judges had imposed on his jurors—shackles that Zenger’s jurors had dramatically cast aside.

Other writers such as Lord Grange would insist that in judging all crimes, including seditious libel, jurors had to \textit{think}. Jurors had to weigh issues such as the defendant’s state of mind—malice, motivation, or intention—which formed the very basis of the crime. It was the state of mind of the defendant, Grange pointed out, that made the difference between a conviction for murder, for instance, and one for the lesser act of homicide. Perhaps the defendant committed an accidental killing, which might be less punishable still. Killing in self defense, in fact, might be fully justifiable, incurring no guilt—being no crime—at law.\textsuperscript{46} Grange’s point here was that jurors were presumably often called upon to determine the facts by applying the law of the case. Were not English jurors often expected to listen carefully to the judge’s explication of the law and to apply the law to the issues at hand to make their verdict? So why, whiggish defenders of jury rights would ask, should criminal libel be different from any other sort of crime? Why should the rights or powers of jurors be drastically curtailed when \textit{political} issues or opinions about governors or ministers were raised in court actions?

\textsuperscript{45} Green, \textit{Verdict According to Conscience}, 318-20; Oldham, \textit{English Common Law in the Age of Mansfield}, 217-19 (and see discussion in Oldham in the pp. following).

\textsuperscript{46} Lord Grange, \textit{The Doctrine of Libels}, 5, 14-15.
What disabled jurors from considering political facts or arguments when these became the central issues in a trial? If jurors could not—or need not—really think through all factual issues involved in a case, why were they there?

Here a second issue arises in England’s seditious libel debate. English proponents of press restrictions, of tough enforcement of libel law, of judicial over jury power—such partisans often explicitly assumed the stupidity or venality of ordinary subjects as jurors. Propagandists for the deference of lessers to their superiors emphasized that jurors were prone to error and corruption. They likewise uplifted judges as trustworthy defenders of justice and right. “A Country Magistrate” was one English theorist who exemplified such views to the very end of the eighteenth century. In 1800, “Country Magistrate” published his Thoughts on the Repeal of the Statute made in the Fifth and Sixth Years of the Reign of King Edward VI, along with Some Observations on the Respect Due to the Authority of Judges. (While adding “and to the Verdict of a Jury” to the end of the second title, Country Magistrate was much more interested in promoting respect for judicial authority. He telegraphed his intentions by dedicating his work to a deceased justice of the Court of King’s Bench.) Ostensibly dealing with trade policy, this tract quickly turned to a proper understanding of jury verdicts in criminal libel cases.47

The tract by “A Country Magistrate” is a textbook example of English authority preaching deference to subjects. Magistrate assumes at the start that all will agree that “[t]he great and leading principles of the common Law of England have been treasured

up in the hearts of a grateful nation.” Fortunately, England’s great legal institutions were not founded upon (and must ever resist) the heat and “prejudice of a moment.” Heated moments of mass confusion or delusion were frequently seen in those “common bubbles” of public prejudice, ephemeral “bubbles of the day” that rapidly “have appeared only to vanish” just as quickly. Happily, the enduring principles of “the common Law of England” were not transitory bubbles of mass ignorance. For what was it that had made England great in the past and would save her again now? A proper deference to “Authority” would preserve Great Britain. In short: “That ‘Reverence is due to authority’ was a principle acknowledged in the patriarchal ages as full as in our own time.” This reverence due authority was a matter of such “intrinsic excellence” that it must “be perpetuated” in law and in all good social institutions.48

After a long explanation of “combinations,” the dangers of the monopolist, and consumption and price conflicts (seeking to puncture several thought bubbles of current popular confusion on sound economics), Country Magistrate finally warmed to his real topic. Magistrate really wanted to warn his country of the danger of ordinary subjects daring to challenge or even to question their betters. “To speak irreverently of the Rulers of the people is, by the common Law of England, a great misdemeanor,” Magistrate asserted. “But a libel on those who are entrusted with the administration of public justice is a much higher offence against the State. It is a kind of aggravated scandal, deliberately committed to paper for the purpose of circulation and perpetuity; and it tends to destroy the cement and fabrick of society, by breeding, in the people, a contempt of Authority, and an aversion to the Laws.” Such irreverence, Magistrate asserted, and such wrongful thought and writing had sparked the French Revolution, after all. Irreverence, “disorder

and confusion” had led to the “abolition of the Prelates in the Church, and Judges in the State…. For they [French revolutionaries] well knew, that a throne, without the props of religion and the law, must soon totter to its fall. Ask that deluded—that infatuated—people how all these ends were effected; and they will tell you by—LIBELS.” Here lay the source of the danger of an autonomous citizenry and independent thought. An infatuated people were all too easily deluded. Jurors, of course, were drawn from just this ignorant and easily misled mass.49

While Country Magistrate was willing to allow that “Free inquiry and the liberty of the press, rightly understood, are the inherent rights of a free people,” the delimiting clause of that phrase covered vast ground. For Magistrate, right understanding was not characteristic of ordinary people. Recent publications in England allegedly had voiced dangerous opinions and a mocking tone that went far beyond the rights of free enquiry and free press, “rightly understood.” Certain magistrates had been called “the dupes of popular clamour.” Magistrate was particularly alarmed by attacks that been launched even on the character of the judges. One author, according to Magistrate, had dared to allege “[t]hat the attention of the Grand Juries … was peculiarly directed by the Judge to a fixed object”—that is, that the judge had launched a political vendetta, misusing jurors to political ends. Assaults of this sort on the integrity of the judges was dangerous and required suppression. Country Magistrate declared that “a licence of such magnitude” must be punished by the common law. What especially riled Magistrate was that writers should attack the legal decisions of the judges. Even solemn addresses to grand juries

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49 “A County Magistrate,” Thoughts on the Repeal, 21-22.
had come under assault in raucous, libelous ballads, “posted at the corner of every street”!  

Coming directly to his point, Country Magistrate made his socio-political position on judges and subjects explicitly clear: “the Decisions of Judges are thus entitled to our utmost deference…. What individual, then, shall arrogantly presume to set up his private judgment against a jurisdiction thus constituted! No well-regulated State can permit it; for, if permitted, Contempt would naturally rise on the ruins of Authority; and some new Touchstone must be resorted to for the discovery of Truth. The Common Law of England, therefore, most strongly prohibits it.” The context of the latter part of this comment (on “a jurisdiction”) seems to refer specifically to the judges of the court of appeals. But Magistrate’s broader point was that all judges compose an “Authority” demanding the complete deference of the subject.  

Now, Country Magistrate did admit that judges may err. But their errors “may be corrected in various legal stages of a cause.” Happily, the reader may rest assured that the errors of judges are rare and not a matter of any great concern. Magistrate further declared that “the verdicts of Juries,” also, demand the subject’s utmost deference “in the same degree.” Yet Magistrate immediately began to backpedal on the degree of deference owed to jury decisions, asserting that jurors’ “conclusions may be erroneous, and, by possibility, (although I ought not to presume that case) corrupt.” Magistrate hesitated to suggest that jurors’ mistakes or corruption should be annulled by “the remedy of attaint.” Prosecuting jurors for decisions that judges found objectionable, historically, had raised great anxiety for English jurors in a number of cases. So, in Bushel’s Case of

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1671, Chief Justice Vaughan had issued an opinion that judges “may not punish or threaten to punish jurors for their verdict.” As one can sense at this point in Magistrate’s tract, and as Thomas Green has observed, public and legal debate over the judicial coercion of juries continued long after Bushel.\(^{52}\)

Rather than press the case that jurors should be attainted for bad decisions, Magistrate satisfied himself with the knowledge that the errors or corruption of juries may be remedied by appeal, where the four judges of the appellate court would set all aright. Moreover, Country Magistrate suggested another remedy to fix all those inevitable jury misjudgments. For “the errors of a Jury [may] be set right by the wise institution of awarding new trials.” After a second jury trial, the “party, who feels himself dissatisfied with a verdict, found on the oath of twelve of his neighbours and equals, has still the right of appealing from their decision. The Court, to whom he states his grievance, is composed of four Judges, all acting under the solemnity of an oath.” And if one of those judges should happen to be the very same judge who had presided over the original trial, not to worry. Though the same judge might hear his own case again on appeal, the odds were against this impropriety.\(^{53}\)

After such comments emphasizing the possibility of error or outright corruption on the part of jurors while celebrating the virtue and capacity for self-correction on the part of judges, one is left to wonder how jury verdicts could possibly be entitled to “our utmost deference,” like judicial decisions. Besides, if jurors’ decisions were readily

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\(^{53}\) “A County Magistrate,” *Thoughts on the Repeal*, 29-30. Country Magistrate does state here that the “errors of a Judge … may be corrected in various legal stages of a cause,” but such errors seem merely theoretical in comparison to jury error, and the serious possibility of judicial corruption seems unlikely and goes without consideration—as opposed to the potential for “corrupt” juries. Even when not actually corrupt, juries here still appear prone to error, unlike the judges.
subject to attain or reversal on appeal or a new trial regardless, what sort of respect could jury judgments deserve?

Country Magistrate clearly believed that the judiciary was the “Authority” to whom ordinary subjects of His Majesty should defer and upon whom the security of the society and state rested. No uppity subject should mock or even seriously question such authority. Mere subjects had dare not presume to judge the judges. Moreover, when jurors, “on their oath … under the direction of the Lord Chief Justice of England, on his oath,” have decided a case, such a decision may be reviewed by learned justices. But to question such judgments in print clearly was beyond the expertise—and right—of any common subject. Country Magistrate’s argument was straightforward: “as I have before observed, for any individual to set up his private opinion against such authority, is a high offence against the Law of England.” And it was needless to cite any particular case law that would justify such an argument. Inferiors obeyed their superiors, and all should obey the courts’ decisions without question. “Cases, on such a subject, are unnecessary: it is a fundamental principle, co-eval with society itself, and recognized by Nations, both civilized and savage.”

Cases might be decided by juries, but those jurors were under the firm direction and control of judges. Those cases could be reviewed by the judges to ensure their justice. More important, still, the judges would ensure that law cases reflected and conformed to the “Law of England.” Any other sort of review, however, involving the “private opinion” of “any individual,” was beyond the pale. In civilized society, learned judges had the final word over lawsuits, criminal cases and the law that decided them. It

54 “A County Magistrate,” Thoughts on the Repeal, 33.
55 Reid, In a Defiant Stance, 65-73.
was essential, therefore, jealously to guard their dignity—to protect it from the meanness of the press and from the “opinion” of ordinary subjects.

So, A Country Magistrate concluded, by scurrilous “publications, Justice may have been arrested in her course; [and] one of the most sacred of all human authorities has, in fact, been calumniated.” Quoting a judicial disciple of Chief Justice Lord Mansfield, Magistrate declared that “‘Nothing can be of greater importance to the welfare of the Public, than to put a stop to the Animadversions and Censures which are so frequently made on Courts of Justice, in this country.’” What really infuriated Mansfield followers, including Magistrate, was that inferiors—subjects—should have license to attack their superiors—in this case, the tory elite. Tory ministers and especially judges should be beyond attack, by law.

To defenders of Britain’s political and legal regime, then, the decisions of English courts were sacrosanct findings of the law. The law was king, beyond public question or debate. But at the heart of Magistrate’s essay lay the premise that the law was what the judges said it was. Colonial Americans were not prepared to accept that premise.

A proper relation between judges and juries: Judges as representatives of the king and Jurors as embodiment of the people on the eve of Revolution

At the core of the debate on the judges’ power over law was the nature of the relation between judges and juries, and uncertainty about the source of law itself. In the Anglo-American debate over judges’ and jurors’ powers and clearly on display in the Zenger

56 A Country Magistrate, 42.
57 Siebert, Freedom of the Press in England, 380-92; Oldham, English Common Law in the Age of Mansfield, 221-32. Oldham has written: “Mansfield the royalist believed at bottom that political authority emanated from the King; documents [and arguments] advocating the contrary view … were, to Mansfield, patently seditious” (235). A Country Magistrate fully agreed. Inferiors were to defer to superiors, just as jurors were to defer to the judge, especially in the broad “political” questions that could be posed in partisan trials.
case, one frequently gets a sense that, in colonial America, judges were often viewed as on a side opposite that of “the people.” Gordon Wood has well described how many royal judges, viewed as officials of the king often working against the people by the eve of Revolution, evolved into the people’s servants in the new regime. In the period between the American Revolution and the writing of the Constitution, Wood has explained how judges came to be seen as representatives of the people, too, for law-deciding purposes. With the Constitution’s adoption, a collective nation simultaneously provided for and restricted government power while also providing for and restricting the scope of legitimate popular action.58 After the adoption of the Constitution, according to Wood, “the people” came to see themselves as effectively “out-of-doors,” electing lawmakers and watching their actions, without making law themselves. People on juries, too, lost their power to be active themselves in lawmaking—to “decide” matters of law—during the first decades of the nineteenth century. By the end of the first quarter of that century, American judges would largely complete the transfer of law-deciding power out of the hands of juries and into their own. By this time, in other words, American judges would be appropriating the sort of power that Country Magistrate had assumed English judges to have over matters of “law.” 59

Presumably, however, American judges would appropriate law-deciding power in a respectful manner and with limited aims, in deference to a new republican sensibility

58 Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: U of North Carolina P, 1969, 1972), 453-63 (where Americans came to understand that their representatives were merely the “servants of the people with a limited delegated authority to act on behalf of the people” (462), which servants would now include the judges, to preserve the proper separation of powers essential to the new regime); see passim Part Three.

59 These processes are described in Wood, Creation of the American Republic, 319-43, 438-67; Horwitz, Transformation of American Law, in the context of commercial law, especially chap. 7; and in Nelson, Americanization of the Common Law, in chap. 9, “Toward a Modern American Jurisprudence: Judges and Legislators as Makers of Law,” limiting the powers of juries over law, at 165-71.
quite different from A Country Magistrate’s. But during the previous century, on the eve of the American Revolution, the proper relation between the judges and popular juries and their respective powers to decide law continued to be a matter of tense debate, in England as well as in America.

Contrary to the spirit and tone of such writers as John Bowles and A Country Magistrate, other participants in the British and American debate were vigorously defending the power and entitlement of the people—as jurors—to declare what was law in any particular court case. The work of James Erskine, Lord Grange, in 1752 has been mentioned above. His was a powerful voice in the defense of jurors’ rights, particularly in the debate over jury powers in criminal libel cases. In language reminiscent of that of the Old Whigs, Lord Grange feared that, without such jury independence and authority in court cases, schemes would arise to snatch away the “Liberties” of “the People of this Kingdom” and turn them into “the abject Slaves of absolute and arbitrary Rule.”

The use of an Information (by which Zenger had been accused), to evade the need for a popular grand jury, was one sign of the encroachments of slavery. Grange insisted on the necessity of grand juries to provide security to defendants who might otherwise be tried for political or other unjust reasons. And Grange took strenuous issue with the assertion that grand and petit jurors were not to take seriously (and literally) the word false in the language of the typical indictment (or in an Information) in criminal libel cases. How could a defendant charged with having written something “False,” as well as “Scandalous, and Malicious,” be guilty of “False” writing if his words in fact were true?

“False” had become a central term and point of contention in seditious libel accusations. The falsity of the charges against Zenger had been a key issue in Andrew

60 Grange, The Doctrine of Libels and the Duty of Juries Fairly Stated, preface (no p.).
Hamilton’s defense of the printer—that the jurors well knew that what Zenger had printed against the New York governor was not, in fact, false. By the very wording of an indictment (or an Information), “true” statements ought not be considered libelous.

Grange also thought it extremely dangerous to public liberty and to press freedom that “libel” should be treated—by judges—as a matter of “law” to be decided by the judges only. Jurors, instead, should be empowered to decide precisely which statements constituted libel, as a matter of “law.” According to Grange, the problem with judges was that their interests often might be entirely entwined with those of the crown, ministry and prosecution. These forces, Grange warned, were threatening to transform “our Juries … [into] mere Cyphers in the Trial of their Countrymen….” Indeed, Grange raised the specter of what a defendant might do if he faced a corrupt judge “who had a commanding Influence over the rest” (that is, over other judges sitting en banc).

Protecting himself against a charge of seditious libel, Grange wrote that, presently, such a prospect “seems impossible.” Still, judicial corruption might occur someday. Without powerful jurors to protect the defendant, the only obvious final recourse from a tainted trial would be a difficult and uncertain appeal to Parliament. Otherwise, Grange declared, Englishmen had to rely upon the checks and balances provided for in that “curious Mixture of Powers” that “expeditiously co-operate for the Publick Good,” that make for the “Happiness of our Constitution.” The most immediate, down-to-earth protection against tyranny, however, lay in the hands of citizen jurors. It was essential, then, to maintain “that Power which they have always had by our Constitution, and which is our chief Bulwark against what I may call Legal Oppression; which was the Sort of Oppression made Use of by the first Roman Emperors, against those who dared to oppose
the cruel Commands of a whimsical Sovereign or rapacious Prime Minister, either in the Senate” or elsewhere.  

Joseph Towers was another staunch defender of jury powers over matters of law, as well as of fact, in court cases. Although he later became a Presbyterian minister, Towers had started out in life as a printer and had tried to follow his father’s profession as a bookseller. Towers’s strong belief in religious and political freedom joined with his interest in printing, publishing and book sales, to turn him toward the avocation of pamphleteering for whig issues, especially for press and jury rights. In tracts published in 1764 and 1784, Towers wrote vigorous exhortations to potential jurors (and all Englishmen) on how to assert their powers and independence before even the most imperious judge.

Importantly, Towers linked English national pride and national, political security to the institution of trial by jury. English “national liberty” depended, Towers wrote, upon “the freedom of the press, and the rights of juries.” If these core rights should be lost, “either to open violence, or to legal subtilty [sic] and craft, [then the loss of] their other rights will inevitably follow. They will no longer hold their present rank among the nations of the world.” Englishmen would be forced to “bid an eternal farewell to the honour, the dignity, and the felicity of public freedom.” For the English common law was “a subject … of great importance to the general interests of liberty, a subject in which every Englishman is concerned, and … which should be generally understood by

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61 For this and the previous two paragraphs, see Grange, *The Doctrine of Libels*, 8-11, 14 ff., 21, 29-34, 40-41. In these final sentences, particularly by the reference to a Prime Minister, Grange must have known he was flirting with a charge of seditious libel himself. Perhaps this explains why *The Doctrine of Libels and the Duty of Juries* was published anonymously.

men of all ranks, and especially by those who are liable to serve on juries....” It was “men of all ranks,” and particularly potential jurors, who most concerned Towers. He was writing “not for lawyers,” but for the common subject. That common subject, as juror, would have to understand the precious foundation points of the common law precisely because that juror may be called upon, by the necessities of liberty, to use that liberty—to make, or to declare that common law. Even the “most venal partizan of courtly power will hardly have the confidence to pretend” that only “judges appointed by the crown” should have right to decide what was libelous. Such views could never be “compatible with a state of national freedom.”

Of course, Mansfield and his fellow judges in England during the century had been pressing precisely the opposite case and, with Zenger as a leading example, American judges generally followed suit. Unfortunately for the prerogatives of English jurors, judges in England tended to exercise greater control over their juries than could American judges. What explains the higher unwillingness of American jurors to defer to judicial authority in politicized cases, compared to their English counterparts? Why did these arguments for jury power, particularly the power to decide the law in criminal cases, have such appeal for American barristers such as John Adams who, as we have seen, completely adopted the whig belief in such jury power? Did the divisions over jury powers in England and America, as they were seen in practice from the 1750s to the

64 See above in this and the previous chapter, see the argument below, and see Green, Verdict According to Conscience, 278-79; Oldham, English Common Law in the Age of Mansfield, chap. 10; John Brewer, “The Wilkites and the law, 1763-74: a study of radical notions of governance,” in John Brewer and John Styles, ed., An Ungovernable People: The English and their law in the seventeenth and eighteenth centuries (New Brunswick, NJ: Rutgers UP, 1980), 154-60; Pole, “A Quest of Thoughts,” 113-16; Reid, In a Defiant Stance, chaps. 1-7, 9, 16.
Revolution, suggest something about the political differences of those on each side of the Atlantic? Did such divisions over jury rights begin to demarcate an important division between Britons and Americans?

In much of this British pamphlet literature, the writers for and against enhanced jury rights seem to have been groping toward differing conceptions of what made the English, “English.” Was it possible that the English were a nation, in part, because of their laws? That is, was “nationality” becoming something beyond ethnicity or locality? The people of England had from time immemorial, jury rights proponents believed, acted in ways that this study has identified as a form of citizenship, in their service on juries. The English had enjoyed long experience with the exercise of independent and informed judgment, as jurors, in all sorts of cases. As jurors, Englishmen had had to “apply matter of fact and law together.” They thereby had participated in the deciding of what the law meant in any particular case. In interpreting the writings of Sir John Hawles and Sir Edward Coke, Towers insisted that “the right of the jury to determine the law, as well as the fact, even in the most difficult cases, is not here disputed” in their writings. However, the fact that certain of “our Lawyers” had in the past few decades begun to exalt judicial power at the expense of jury rights seemed a new and dangerous innovation to men such as Towers. Such innovation struck at the core of English liberty. Such a transfer of power away from jurors threatened to destroy English “public freedom.” It threatened the very idea of an English people or “nation” by reducing Englishmen to the status of slaves—to degrade the people England into some barbarous horde like that of Turkey.65

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This was the sort of language that had united the Commonwealthmen\textsuperscript{66} and that would be spoken by John Adams, for instance, in resisting British encroachments on the rights of American citizens in their own law court culture. That culture, since Zenger, had increasingly exalted jury authority and power. No one would defend and praise jury power and authority more than Adams.\textsuperscript{67} As will be seen, Adams would use this jury power and independence to the benefit of British soldiers on trial for their lives in Massachusetts, fulfilling what Adams would consider the demands of justice—but also preserving American honor.

In the examination of case after English law case, writers such as Towers, following in the Old Whig concern for “liberty” against the threat of “tyranny” and “corruption,” struggled to make their argument real. They labored to demonstrate what they believed the common law had always guaranteed: the autonomy and authority of the English jury. But as they labored to defend the rights of the English jury, stubborn facts continued to plague them. Towers energetically promoted the power of the jury.

“English juries have been in possession, [from] time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal case brought before them.” Yet he knew that the powerful judges now on the King’s Bench—Lord Mansfield in particular—did not hold this view of jury power or right. Tory judges were citing Coke and Blackstone in their defense of judicial power over that of juries, especially in criminal libel cases. In England, the new reality was that judges, not juries, were gaining the upper hand over law-deciding power. English judges were curbing

\textsuperscript{66} “Commonwealthmen” were the “Old Whigs” of the English Revolution; see the discussion in the previous chapter and below.

\textsuperscript{67} Note John Adams’s staunch support for wide jury power and discretion, discussed above, and see Reid, \textit{In a Defiant Stance}, 28-30, 70-73.
jurers’ authority, especially in criminal libel suits, but they sought to limit jury power more generally too, as they had in Irish courts. And it was precisely this reality that, on the eve of the American Revolution, made the argument for jury power—in England—so difficult and conflicted. From the 1750s through the 1770s, English juries had occasionally exercised independent judgment, contrary to the explicit instructions of English judges in court, but these appear to have been spectacular exceptions to the rule becoming fixed by midcentury in England.\(^{68}\) And in at least a couple of these cases, the English jurors were reported to have consciously followed the precedent set by their American counterparts in the Zenger trial—ignoring the explicit demands of the judge to decide the facts and the law of the case for themselves.\(^{69}\)

But even Towers was forced to confess that “In many instances, the conduct of the judges, in trials for libels, has manifested a most shameful partiality to the crown,” that is, to the prosecution. And beyond libel cases, Towers observed sadly that, too often, judges had manipulated English juries or compelled them to disregard their own fundamental responsibilities and powers. Such judicial suppression of jurors’ independent judgment in cases could be seen repeatedly before the Glorious Revolution, Towers asserted. But shockingly, judicial manipulation of juries had continued since that great event. Judicial interference with and suppression of the jury’s role was nowhere more distressing than in cases of sedition and treason.\(^{70}\) Back in 1764, Towers had written: “That the freedom of the Press may, and sometimes does, degenerate into licentiousness, cannot be disputed; but the laws against sedition and libelling are already

\(^{68}\) Towers, *Observations on the Rights and Duty of Juries*, 32-38, and see ff. for various cases Towers promotes as tending to illustrate jury independence from judicial judgment.

\(^{69}\) See above and see the previous chapter, pp. 263-66.

amply sufficient, and much too strong to be left to the arbitrary decision of any Lord Chief Justice.” Towers feared that, while English “liberty” had always been “the admiration and envy of Europe,” such freedom could be lost. “With the Liberty of the Press in particular, Civil Liberty in general is closely and inseparably connected: they will stand or fall together.” But now, a “corrupt ministry” was endeavoring to strip from Englishmen their basic press rights, whereby “any honest Englishman should have courage and patriotism enough to expose the bad measures of such a ministry, and to guard his countrymen against their designs…. The right and duty to criticize a corrupt administration were sure to fall, however, if jurors lost the power to decide the law of seditious libel at trial: “If then the Jury are not to judge of the Law, as well as of the Fact, but to follow implicitly the Judges opinions; they would have nothing to do in such a case, but to find the author of any such production guilty. And thus a man would be legally punished for an action as a crime, for which he would deserve the esteem, and the thanks of all his countrymen.” Speaking truth to power might be a patriotic act. Debate among citizens, even on the merits of the current government, might be a civic right. The privilege to publish, as well as the power of jurors to protect such publication, was of central importance to the citizenry of an English nation. Indeed, these core liberties had made the English distinct from all other peoples, Towers believed. Unfortunately, according to Towers, that sense of an autonomous, thinking citizenry was under attack by the judges and ministry of England, along with that sense of nation that Towers sought to promote.\footnote{Joseph Towers, \textit{An Enquiry Into the Question, Whether Juries are, or are not, Judges of Law, as well as of Fact: With a particular Reference to The Case of Libels} (London, 1764 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]), vi-vii, 10, 25-26, and see also 27-31.}
Towers observed that “attempts [had] been made to establish the Star-chamber doctrines [of Sir Edward Coke, considered above,] concerning libels even in America, and to deprive jurymen there, as well as in England, of the right of determining the law, as well as the fact, in trials for libels”:

Thus in the case of John Peter Zenger, who was tried at New York, in 1735, for printing and publishing two libels against the government, it was contended, by the attorney-general of that province, that, as the defendant’s counsel admitted the publication of the papers, stated in the information to be libels, the jury must find a verdict for the king: “for,” said he, “supposing they were true, the law says, that they are not the less libellous for that; nay, indeed, the law says, their being true is an aggravation of the crime.” The chief-justice of New York also maintained similar doctrines…. The printer was defended with great spirit and ability by ANDREW HAMILTON, Esq; of Philadelphia, who … firmly maintained, that the jury had a right “to determine both the law and the fact.” The jury asserted that right; and accordingly … they found the printer Not guilty.72

The painful truth was that English law court culture had witnessed a sustained attack on the jury prerogative, especially in cases having any political overtone. That attack had also been attempted in America. Colonial Americans knew judges who would have emulated Lord Mansfield and incorporated “Star-chamber doctrines” into colonial American law, had they been able. But American jurors had developed, by the middle of the eighteenth century, a strong resistance to such doctrines and to such judges. Unlike juries in England and certainly unlike those in Ireland, American jurors had developed a reputation throughout the empire for their often tenacious independence.73

America’s political and legal elite, men like Thomas Jefferson and John Adams, also would acquire a reputation for tenacious independence. For colonial lawyers, it

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73 Reid, Constitutional History of the American Revolution, I: The Authority of Rights, 52-59. See also Towers, An Enquiry Into the Question, Whether Juries are, or are not, Judges of Law, as well as of Fact, 9-17, 24 ff; and Reid, In a Defiant Stance, chaps. 1, 9, 13, and especially chaps. 4-5, on the distinctions between Irish (and English) petit and grand juries and those of Massachusetts. John Adams knew what many others throughout the empire knew: that in colonial America, “jurors more than judges or lawyers made the law of prerevolutionary Massachusetts; and in political cases, whig juries made whig law” (p. 30).
might be obvious why they would love to practice before powerful and independent-minded jurors. Barristers such as Andrew Hamilton and John Adams enjoyed tremendous success before such jurors, especially when they could persuade them to ignore the judges’ charge and side with their view of the law.

More important, though, a fundamental difference in attitude toward authority—particularly that of judges—was evolving between the peoples of England and America. This divergence in attitude can be seen among many of the political and legal elite and among the jurors of England, versus those of America. Andrew Hamilton, Adams and Jefferson were examples of Americans who were susceptible to suspicions of judicial authority, and whose lives and careers rose on those suspicions. But jurors were not attorneys. For the most part they were ordinary subjects. The fact was that, in America, both ordinary jurors and men like Hamilton, Adams and Jefferson still took seriously the Old Whig doctrines of the Commonwealthmen from England’s Glorious Revolution. Theirs had been a politics pitting “Liberty” against “Dominion” and promoting an alert citizenry to protect “Liberty” from the abuses of government power. These whig doctrines have been well explored by historians such as Bernard Bailyn and Caroline Robbins. These were doctrines that Lord Grange and Joseph Towers struggled to keep alive and relevant in England, but with less success than the rising radicals in America were able to achieve. The old revolutionary ideals were losing their heat in Hanoverian England, but from mid-century, they were experiencing a rebirth in America.74 At the

heart of these American whiggish ideals—of this tenacious independence—was a new conception of citizenship.

From this broader perspective of the meaning of citizenship, many of these tracts—such as those of Joseph Towers and the others considered here—represent a political dialogue between concerned citizens. This dialogue was directed particularly toward those who might be jurors in future court trials. What was essential, many of these writers were suggesting, was that citizens act as such when called upon to serve as jurors. “Citizens” were those who defended and supported the individual entitlements that these whigs hoped would become the hallmark of citizenship in the modern English world—the identifying badge of a modern British nation. Ever more tracts and “textbooks” were being published to explain the role and responsibilities of jurors to those ordinary subjects who might be called upon to exercise the power of citizenship-by-jury. These Hints to Juries and other such essays sought to lay out the proper role for the autonomous juror in English courts. The authors of these tracts sought to elevate the ideal of the subject-as-citizen, especially against judges who appeared tied to the interests of the government—to the interests of prosecutors, as well as of the monarchy and Parliament. Too often the muscle and reality of such citizenship had been vitiated in England by judges and their allies. They preferred to see subjects defer to their superiors, the judges, in important court cases—especially highly politicized ones. In America, on

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75 See, for example, Baron Thomas Erskine, The Rights of Juries Vindicated … (London, 1785 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]), who argued (to the Court of King’s Bench in 1784 in the Dean of St. Asaph’s case), that “the independent gentlemen of England are thus better qualified to decide from the cause of knowledge … [and] they are full
the other hand, subjects of His Majesty were likely to insist on the right of trial by jury and on their autonomy as jurors. Nowhere did colonial Americans assert their jury right and power more emphatically than in highly politicized cases.²⁶

During the eighteenth century, colonial American law court culture had become Anglicized—in form. But in practice, and by the Americans’ tenacious hold on old whig doctrine, American jurors and attorneys were driving their colonial court culture in a different direction from that of the home country, a fact wistfully noted by English tenders of the old whig flame, now flickering out in England.

The American debate asserting the entitlements and powers of citizen jurors

Three highly charged debates involving the institution of the colonial American jury were launched in the decade leading up to the American Revolution. Two of these debates dealt directly with the American entitlement to trial by jury and the perceived threat to this entitlement by British imperial policy in the colonies. The third “debate” encompassed many of the anxieties of colonial Americans on the eve of Revolution. This third event involved a jury trial—two, actually—in one of the most highly politicized sets of cases ever to be seen in American history. These jurors’ decisions in Boston in 1770 as likely to decide with impartial justice as judges appointed by the crown” (49). He added that jurors had acted and should act “as patriot citizens towards their country,” that is, as just and independent-minded deciders of fact and law in English courts (57). Also see Francis Maseres, An Enquiry into the Extent of the Power of Juries, on Trials of Indictments or Informations … (London, 1785 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]); “A Freeholder,” Hints to Juries in Trials for Libel (London, 1793 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]); Anonymous, Essay on Juries. Published for the Benefit of the Charity Work-House of Edinburgh (Edinburgh: Printed for Mr Creech, 1784 [Eighteenth Century Collections Online. Gale Group: http://galenet.galegroup.com.arugula.cc.columbia.edu]).

²⁶ Harold M. Hyman and Catherine M. Tarrant, “Aspects of American Trial Jury History,” in Rita James Simon, ed., The Jury System in America: A Critical Overview (Beverly Hills; London: Sage Publications, 1975), 28-30. See their argument that “by the 1760s, the colonies’ courts had become, in fact, largely autonomous of the homeland’s” as, “[p]aradoxically, colonists who were concerned particularly with exalting the independence of their courts learned to extol England’s common law’s traditions and aspirations…. As tensions increased in the 1760s between England and her fractious North American offspring, jury independency in America became an essential aspect of colonial rights” (28-29).
represented, to a great degree, a victory for justice for a group that quickly was becoming a feared and despised minority in colonial American society. These jurors’ actions also would prove that American jurors could be fiercely independent decision makers, even when emotions against despised defendants ran high. Finally, in their actions in 1770, two groups of Massachusetts jurors offered a powerful defense for an American jury system that, however politicized itself, proved once more the value of the people’s panel to victims of highly politicized criminal prosecutions.

Two British attacks on American juries and the colonial response—Part I: A fight against writs of assistance and vice-admiralty courts

One might argue that, in some sense, the American Revolution began late in the year 1760. In October of that year, George II died, to be succeeded by his son George III. At the death of the second Georgian monarch, all writs that had run in that king’s name also shortly expired. What this meant for Americans was that colonial courts would have to issue new writs, running in the name of the new monarch. This necessity of new writs created no minor problem in His Majesty’s province of Massachusetts. For in the Bay Colony, James Otis, Jr., who had been advocate general (chief prosecutor) of the Massachusetts Vice-Admiralty Court, resigned his post and joined a challenge against the continued use of writs of assistance in the Bay Colony.

Writs of assistance were court orders empowering customs officials, with the assistance of a public officer such as the constable, to exercise broad powers of search and seizure. Places of search could include private homes, businesses, ships, and other venues or conveyances that might harbor contraband or goods that somehow had escaped proper enumeration or taxation through customs. The customs officer searching by a writ
of assistance did not have to declare in that writ exactly what items he might seize, nor did he have to specify precisely where he wanted to search. Generally the customs officer had to be searching during daylight hours. Otherwise, a customs official did not even have to declare (before any judge or magistrate) any probable cause for his search. He might face a civil suit, however, for a wrongful search, but only if someone were angry or wealthy enough to pursue such a challenge to the government in court. As the home government in England began a more rigorous enforcement of trade regulations in America, following the Sugar Act of 1733, colonial merchants began to bristle at the power of British customs officials and their broad, sweeping powers of search with these writs of assistance. So Otis and another colleague asked a simple question after the death of George II. Could new writs of assistance be issued by just any court, such as the superior court of Massachusetts? In Paxton’s Case, decided in the fall of 1761, Chief Justice Thomas Hutchinson and his fellow superior court judges decided that they had, indeed, the authority to issue new writs to colonial customs officials, giving them broad powers of search to enforce British trade law. John Adams would later declare that, in the ensuing argument over the rights of the people against such sweeping powers of government officials, “the child Independence was born.”

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77 See M. H. Smith, The Writs of Assistance Case (Berkeley: U of California P, 1978), chaps. 1-4, especially pp. 29-35 (noting that, by 1733, although the writs were now written in English rather than Latin, they still were complex and “practically as unreadable as ever,” p. 35), pp. 65-66 (on the real power of the writs as “a fairly sophisticated piece of customs weaponry” in Boston, where “the enforcement regime was alive and kicking”), 95-124, chaps. 10-12, 15-16. See also Hiller B. Zobel, The Boston Massacre (New York; London: Norton, 1970), 12-15. See the case in Superior Court, August Term I Geo. 3 (1761), in Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, Josiah Quincy, Junior (Boston: Little, Brown, 1865), 51-57. In contrast to the lack of specificity in writs of assistance about the places to be searched and the items that might be seized, as well as the lack of probable cause for the issuance of such writs, note the search and seizure requirements of the US Constitution’s Fourth Amendment, prohibiting the use of any such writs of assistance in the new American regime. John Adams used the phrase “the child Independence” and extended the metaphor in a letter to William Tudor, March 29, 1817, in Wroth and Zobel, ed., Legal Papers of John Adams, II, 107.
Central to the whole debate over officials’ use of writs of assistance was the question of whether juries should be able to decide common law court cases involving challenges to the “abuse” of those writs. It became clear to many colonials that London and colonial administrations hoped to deny American subjects the right to jury trials when officials abused their powers with writs of assistance. If imperial and colonial administrations thought that Americans would submit quietly, they should have thought again. The child Independence was about to throw a tantrum.

From the colonists’ point of view, several British laws and policies after 1760 virtually begged for an American tantrum. Take that latest tax on sweet living, the Sugar Act of 1764. George Grenville’s ministry in London, confronting a gargantuan national debt from the Seven Years’ War, thought that Americans ought to pay their fair share for the defense of the British realm in the new world. With the Sugar (or American) Act of 1764, Parliament lowered the duties on molasses but—more important than the tax itself—it tightened the customs rules for enumerating vessel cargoes. For safe measure, the act also required that vessels shipping goods from anywhere in the empire to America be loaded or, if security required, be reloaded in England. That way, colonials would be less likely to be able to finagle cargo lists and the enumeration of items imported. As a result, the Americans would have to pay the legal taxes on imports—in full. Up till then, colonials often had been able to avoid a highly scrupulous accounting of customs taxes. With a wink from local customs officials, colonial importers had been able to “estimate” cargoes at lesser values and pay less in taxes accordingly. This process had been known as “compounding,” an informal way of settling tax accounts with customs. Presumably the process meant less difficulty for everybody; but it also meant lower tax receipts for

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78 Smith, *The Writs of Assistance Case*, 96-121, 320-86.
Britain. Now, tightened imperial tax enforcement and shipping procedures threatened to end a happy, simple business scheme, one that had been helpful to the cash-strapped colonial American economy.⁷⁹

More serious still, royal officials now could file suits against merchants and ship owners for the forfeiture of cargoes—and even their vessels—found to be in violation of the new rules. And those suits could be heard, not just in colonial common law courts by juries, but in the courts of vice-admiralty, where judges (and usually a single judge) decided such suits by civil law—without citizen juries. Heaping insult upon injury for the colonies, a new vice-admiralty court was created in 1764 with jurisdiction to hear cases for all of America, sitting at Halifax. The journey to Nova Scotia was a long, expensive trek, even from Boston, for the merchant or ship owner who wanted to argue his case before the vice-admiralty judge in that court.⁸⁰

Thus, in one swipe, the home government at London had managed to combine two attacks on colonial autonomy, as the Americans saw it. While the empire enforced new, harsher tax, search and trade policies, London simultaneously was removing from the colonies a significant portion of their local control over legal decision making.⁸¹

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⁷⁹ Customs and tax policy, as well as “compounding,” are discussed in Zobel, *Boston Massacre*, 15-21.


⁸¹ Of course, it must be remembered that the vice-admiralty courts, sans jury, had existed for a long time, to the approval of most seamen, officers and owners of ships. Procedures in these civil courts were usually simpler and resolutions quicker than could be the case with jury trials in common law courts. See Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill: U of North Carolina P, 1960), viii-ix, 6-7, 10-12, noting that struggles between the common lawyers and the civil lawyers of the admiralty courts had long raged among English lawyers, though not among the Americans, where such legal specialization was virtually unknown, 15-19; and see Snell, *Courts of Admiralty and the Common Law*, 83-89 ff., 130, 186-88, 193. Linked with the Grenville and Townshend Acts, of course, Americans
Many contemporary colonial commentators saw the new emphasis on trying colonials accused of trade policy violations in vice-admiralty courts as a significant revocation of Americans’ Magna Carta privilege of trial by jury. In his 1764 pamphlet attacking the Sugar Act’s changes to Americans’ court and jury rights, Boston whig barrister Oxenbridge Thacher declared that “[t]he power therein given to courts of admiralty alarms [Americans] greatly. The common law is the birthright of every subject, and trial by jury [is] a most darling privilege. So deemed our ancestors in ancient times, long before the colonies were begun to be planted. Many struggles had they with courts of admiralty, which, like the element they take their name from, have divers times attempted to inundate the land…. Hence the watchful eye the reverend sages of the common law have kept over these courts.” But now, American liberties were thoroughly endangered, according to Thacher:

"Now by the act we are considering, the colonists are deprived of these privileges: of the common law, for these judges are supposed to be connusant only of the civil law; of juries, for all here is put in the breast of one man. He judges both law and fact, and his decree is final; at least it cannot be reversed on this side [of] the Atlantic. In this particular the colonists are put under a quite different law from all the rest of the King’s subjects: jurisdiction is nowhere else given to courts of admiralty of matters so foreign from their connusance…. Let me mention one thing that is notorious: these courts have assumed (I know not by what law) a commission of five per cent to the judge on all seizures condemned. What chance does the subject stand for his right upon the best claim when the judge, condemning, is to have an hundred or perhaps five hundred pounds, and acquitting, less than twenty shillings?"

Here, again, suspicions about the integrity and disinterest of the judges were front and center in the American argument for the need for common law juries to hear cases in

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common law courts. And Thacher was not alone in fearing perfidious judges in faraway courts.

In his *Rights of the Colonies Examined*, written that same year but published the next, in 1765, Stephen Hopkins of Rhode Island also attacked the Sugar Act’s changes to Americans’ court and jury entitlements—while additionally striking at the integrity of the judiciary of the vice-admiralty court:

> Enlarging the power and jurisdiction of the courts of vice-admiralty in the colonies is another part of the same act, greatly and justly complained of. Courts of admiralty have long been established in most of the colonies, whose authority were circumscried within moderate territorial jurisdictions; and these courts have always done the business necessary [in maritime legal matters]…. But now this course is quite altered, and a customhouse officer may make a seizure in Georgia of goods ever so legally imported, and carry the trial to Halifax at fifteen hundred miles distance; and thither the owner must follow him to defend his property; and when he comes there, quite beyond the circle of his friends, acquaintance, and correspondents, among total strangers, he must there give bond and must find sureties to be bound with him in a large sum before he shall be admitted to claim his own goods…. If the judge can be prevailed on (which it is very well known may too easily be done) to certify there was *only* probable cause for making the seizure, the unhappy owner shall not maintain any action against the illegal seizer for damages or obtain any other satisfaction, but he may return to Georgia quite ruined and undone in conformity to an act of Parliament.⁸³

On and on pamphlet writers complained about Parliament’s new designs on American entitlements—especially to strip colonials of their common law jury rights and to impose on them venal judges. According to these writers, London seemed to think that “unless the colonies are stripped of the *trial by jury*, and courts of *admiralty are* established in which judges from England—strangers, without connection or interest in America, removable at pleasure, and supported by liberal salaries—are to preside; unless informers

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are encouraged and favored, and the accused most rigorously dealt by, that the tax will be eluded—and these severities are excused on account of their supposed necessity."\textsuperscript{84}

Clearly this latest Sugar Act and the new vice-admiralty court with jurisdiction over all of North America were bound to strike a tender nerve throughout the continent. Massachusetts provides an example. The Bay Colony’s reaction culminated in a joint conference committee report from the legislature that, thanks to Governor Thomas Hutchinson, got rather watered down. The Massachusetts complaint did not demand parliamentary representation for the colonials if Britain were going to engage in American taxation, as some had wished. Radical whig leaders in Massachusetts had sought to combine tax and representation issues in an address to the king and the entire Parliament. Hutchinson’s committee side-stepped this embarrassment toward London. The committee did, however, complain to the House of Commons that Britain’s use of the vice-admiralty courts was denying colonial Americans one of their most precious rights as Englishmen—their right of trial by jury.\textsuperscript{85} Although no one knew it then, colonial American grievances against their local administrations and the home government were only beginning.

It may be too much to say that the hatred of broad-ranging writs of assistance and their enforcement in vice-admiralty courts caused the American Revolution,\textsuperscript{86} but the


\textsuperscript{85}Zobel, \textit{The Boston Massacre}, 23.

fears arising from these core issues would be addressed by both the Declaration of
Independence and the Constitution of 1787. Those core issues included the abuse of
writs of assistance to allow sweeping searches as well as the denial of the power of juries,
particularly in the juryless courts of vice-admiralty, to decide cases involving disputes
over those searches. Actually, the English had tried for more than a century after the first
Navigation Act of 1660 to tighten Britain’s trade and tax policies. Colonial Americans
increasingly had resisted the use of vice-admiralty courts employing civil rather than
common law. For colonial Americans had learned how to bend the common law to their
advantage, especially when colonial American subjects sat as citizen jurors deciding the
facts (and law) of such cases. Juryless civil law—based on continental and originally on
Roman law—and its civil law-based courts denied ordinary colonists that opportunity, as
citizens, to influence the making and application of their own law.87

Actually, the independence of American juries was becoming a serious law-
enforcement problem for the empire. Colonial jury power and independence was
precisely the problem the home government had hoped to solve by enforcing its
navigation acts and customs officials’ writs through the admiralty courts. Unfortunately
for the empire’s masters, the plan did not work out easily or neatly in the empire’s
American periphery. For example, vice-admiralty courts in the colonies had one serious
problem. Too many colonial American vice-admiralty judges were “local men.” Even
though they had been appointed by London, these local men had good reasons to be wary
of making enemies of important local merchants—their socially significant and

87 For an overview of the civil versus English common law traditions, compare John Henry Merryman, The
Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America
1966); and R. C. Van Caenegem, The Birth of the English Common Law (Cambridge: Cambridge UP,
1973).
influential fellows in colonial society. Thus some in London feared that such local men would not be sufficiently firm in the execution of their judicial duties.\(^88\)

One of the merchants whom any admiralty judge presumably would not want to anger was Boston’s John Hancock. In April of 1768, Hancock’s ship, the *Lydia*, returned from London to Boston’s harbor. Customs officials, or tidewaiters, boarded the vessel to search for contraband goods. Legally, the tidewaiters could not go below main deck to search, and Hancock ordered his captain to prevent them from trying. Violating a number of statutes, the next night, one of those tidewaiters, Owen Richards, crept aboard the *Lydia* and apparently began rummaging around below deck to see what he could see. Soon caught below deck, Richards was interrogated by Hancock and his crew. They seem to have put the fear of God into Richards, releasing him only when they had finally judged him harmless, or stupid. (Two years later, Owen Richards would meet a grisly fate in a tarring-and-feathering, described in the third chapter of this study. Though he would vehemently deny the accusation, his molesters punished him for being a “common Informer.”)\(^89\)

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\(^88\) Admiralty court judges were likely to be “local men” before the consolidation of the vice-admiralty court in Nova Scotia as well as after its quick demise. See Mann, “A Great Case,” in Hartog, ed., *Law in the American Revolution*, 8-10. For a thorough discussion of these courts, their judges and their powers, see Ubbelohde, *The Vice-Admiralty Courts and the American Revolution*. He wrote to set straight the “half-truths concocted by patriot propagandists in the decade before the Declaration of Independence [that] have survived historical investigation,” “many of [whose] tales have been unquestioningly accepted and repeated” to the present (viii-ix). But the broad power of the admiralty judges and the lack of jury participation in these civil law jurisdictions was no tale, as Ubbelohde makes clear, pp. 5-8, 12-15, passim. The Navigation Act of 1696 granted the vice-admiralty courts equal jurisdiction with common law courts in cases involving trade and taxation (15), setting a time bomb for Anglo-American relations. Henry J. Bourguignon also provides a helpful discussion in *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828* (Cambridge: Cambridge UP, 1987, 2004). He describes how the British developed the admiralty courts, based on the simpler and quicker justice available under civil law, for the intended benefit of seamen, merchants and ship owners (1-15). He also outlines the English hostility to these juryless courts, their conflicts with lawyers and judges of the common law courts, and the growing American hostility to the admiralty courts, 15-29, 39-65, 202-4.

What made the *Lydia* case significant was the move by the Customs Board to avoid a regular indictment of Hancock. The board evidently feared that grand jurors would refuse to indict, and that trial jurors would not convict their influential, popular neighbor. So the board resorted to the use of admiralty jurisdiction. The administration felt that this latest instance of Hancock’s alleged smuggling must be turned to a good example—a warning to others. Thus the board weighed bringing him to trial by means of an Information in the superior court. But better yet, why not try Hancock in the vice-admiralty court? When Massachusetts attorney general Jonathan Sewall refused to cooperate by filing the necessary “Information,” however, the board appealed to the Treasury in London. Happily for Hancock, the Treasury refused to reverse Sewall’s decision.\(^90\) Their hopes of punishing him were dashed for the moment. But the Massachusetts administration was not through with John Hancock.

A month after the *Lydia* episode, another of Hancock’s ships, the *Liberty*, arrived at Boston and was promptly seized by the customs officers for permit violations. After the Boston mob indulged in several acts of violence against the American Board of Customs Commissioners and threatened their families, the customs officials exacted their revenge. They libeled (condemned in civil law) the *Liberty* in the court of vice-admiralty. A trial to condemn *Liberty* in the admiralty court—without a colonial jury—could only provide electrifying propaganda against the empire. Worse for the empire’s cause, the commissioners moved against Hancock himself. Against his better judgment, Attorney General Sewall did proceed, now, to the vice-admiralty court with smuggling charges against Hancock and five of his men. They stood accused, in part, of somehow sneaking off the *Liberty* £3000 worth of wine, which had never been recovered. In all,

\(^{90}\) Ibid.
Hancock and his fellow defendants stood to lose some £54,000 in penalties. Heaping insult upon his legal jeopardy, Hancock was jailed pending trial, and the vice-admiralty court set his bail at an astonishing £3,000. To put such an amount in perspective, Bostonians then were lucky if they enjoyed a total worth of £50.\(^1\)

For his trial in vice-admiralty court, Hancock was fortunate to have “a rising young lawyer,” John Adams, for his defense. Adams offered the factual arguments one would expect of any competent defense attorney in court. For example, Adams argued that Hancock had not been personally involved in the unloading of any wine from the Liberty. As a sharp attorney-at-law, Adams was also prepared to argue the law of the case. He objected to the prosecutor’s inappropriate mixing of civil law practice with that of common law, depending on what would best suit the crown’s immediate legal argument. And Adams emphasized one other point in his case to the admiralty judge: in that court of vice-admiralty, Hancock was denied his hallowed rights as an Englishman under Magna Carta to have his peers hear his case.\(^2\)

As Adams wrote in his legal notes for presentation at trial:

The People of England are attached to Magna Carta. By the 29\(^{th}\) Chapter of that Statute, [as Adams had earlier translated from the Latin,] “No freeman shall be taken or imprisoned or disseised of his freehold or liberties or free customs or outlawed or exiled or any otherwise destroyed, nor will we [King John, but also his heirs and successors] pass upon him nor condemn him, but by lawful judgment of his peers or the law of the land.” This 29. Chap. of Magna Carta, has for many Centuries been esteemed by Englishmen, as one of the noblest Monuments, one of the firmest Bulwarks of their Liberties—and We know very

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well the Feelings and Reflections of Englishmen whenever this Chapter has been infringed upon even in Parliament.

Adams’s clear implication was that his fellow colonial subjects might assert their entitlement once more, even against an Act of Parliament that now infringed upon Americans’ right to jury trial. Adams demanded for the English in America a crucial entitlement. He made this demand in an admiralty court that denied this essential Magna Carta right to jury trial. Within a decade, the Declaration of Independence would recall to the British this very point. Americans would no longer be subject to the rule of British superiors. Americans would become autonomous citizens, of full equality with their English “Brethren”—indeed, a nation—by asserting and winning their political “liberties.” Central to those liberties was the right to be judged by one’s fellow citizens, as Adams now declared, in his defense of John Hancock in 1768.

Adams made his defense of the entitlement of citizens—against the posture of deference expected from the subject—explicit in his defense of Hancock. He complained of the hardship imposed on colonials accused of violating “the Trade and Revenues” acts of Parliament. Americans, Adams decried, could be prosecuted or sued “in any Court of Vice Admiralty, which may or shall be appointed over all America,” meaning that American defendants could be dragged across the continent for trial. A trial far away from the defendant’s home would guarantee, obviously, that no local jury of peers could possibly hear that defendant’s case. But of course, a key advantage of vice-admiralty courts to the British ministry and its American executive appointees was the absence of those independent, often whiggish, pro-defense jurors. Adams bitterly complained that

93 Wroth and Zobel, ed., *Legal Papers of John Adams*, II, 200-201. In the Adams quotation above, his Latin citation from Magna Carta has been replaced here with his own English translation from the Latin, done in 1769. See *Legal Papers of John Adams*, II, p. 201, n. 98.
the admiralty courts judged “Not by a Jury, not by the Law of the Land, [but] by the civil Law and a Single Judge. Unlike the ancient Barons [who forced Magna Carta upon King John], The Barons of modern Times have answered that they are willing, that the Laws of England should be changed, at least with Regard to all America, in the most tender Point, the most fundamental Principle.” As if Adams had wished to fire the first salvo of the Revolution, he railed against the vice-admiralty courts, juryless trials, and the subjugation of the American colonists in language like that which the revolutionaries would shortly use:

Here is the Contrast that stares us in the Face! The Parliament in one Clause guarding the People of the Realm [by Magna Carta], and securing to them the Benefit of a Tryal by the Law of the Land, and by the next Clause [of the Sugar Act of 1764], depriving all Americans of that Priviledge. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly, a Repeal of Magna Carta, as far as America is concerned?94

Here was the cause that Americans would take into revolution against their British masters. Americans would not be “degraded below the Rank of an Englishman,” even if Englishmen themselves, in their courts at home, did not fully rise to that noble rank, where their liberties were concerned. Englishmen at home had been locked in a hard struggle with their judges, after all, particularly over jury rights and powers. But the reality of the rights of Englishmen, in England, was of little concern to John Adams. Rather, Adams was demanding the rights of Englishmen—in America. He chafed at the thought that Americans could be so disdainfully treated as second-class citizens. Such treatment marked the condition of the most base subject, or, as the revolutionaries would

so often put it, of “slaves.” Adams declared, as he asserted Hancock’s entitlements as an equal citizen of the empire. “The Statute 4 G. 3. [the Sugar Act] takes from Mr. Hancock this precious Tryal Per Legem Terræ, and gives it to a single Judge. However respectable the Judge may be, it is however an Hardship and severity, which distinguishes my Client from the rest of Englishmen.” Adams was adamant that his client be preserved in (what later would be termed) his basic citizenship rights.

The lengthy trial of John Hancock before Judge Robert Auchmuty in vice-admiralty court immediately became a highly political one, discussed up and down the Atlantic coast. As happens so often in such high profile, politicized trials—and as had been the case for Zenger—this suit made Hancock famous. It dragged on until March of 1769, as testimony, going back and forth over who had actually seen what, went nowhere. That March, the vice-admiralty judge and the prosecutor were promoted to higher courts, offering the prosecution the excuse simply to drop the matter. Thus the vice-admiralty court trial of John Hancock crumpled. But the American hatred of vice-admiralty courts and their fears of losing their right to trial by jury were only heating up. Conflicts over jury powers and rights were breaking out elsewhere.

**An Analogue: A jury rights battle in New York—The local British administration versus the rights of citizens in their law court culture**

In New York between 1764 and 1765, the royal governor and his subjects were enjoying their own battle over jury powers and the entitlements of their provincial law court

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culture. The case involved Thomas Forsey’s suit against Waddel Cunningham, in an action of trespass, for Cunningham’s assault and battery of Forsey. The trial jury had awarded Forsey over £1000 in damages, a substantial award for the period. In a move that most New Yorkers would revile, Cunningham’s attorney asked Lieutenant (and Acting) Governor Cadwallader Colden for an order to appeal the jury’s judgment to the acting governor and his Council for a new hearing. No fan of New York jurors or of attorneys, for that matter, Colden was happy to oblige. According to legal historian Julius Goebel, this was “the first time an appeal [of this type, from common law court to the New York Council] was attempted in a common law case in New York.” Up until then, appeals had been by the ordinary writ of error, issued by a court, whereby judicial mistakes in court procedure might be reviewed by a hearing in the superior court. Now, however, Colden sought to review not just any judicial errors, but to reevaluate the merits of the case itself. Apparently Colden sought to use an administrative review of this case to take a swipe at attorneys in general and at the judges in particular, men he took to be in league with his political rivals, several large New York proprietors. For Colden, annulling a jury decision of New York commoners would simply have been icing on this cake.\(^98\)

Colden’s actions were bound to provoke a negative reaction from many New Yorkers. For the governor and council to take on such court functions appeared a clear threat to the power and responsibility of courts—in particular, to the jury’s power to decide with finality the facts of the case. Could a jury’s decision on the facts of a case be reviewed, perhaps reversed, by a governor-in-council? Colden’s actions looked like an

executive power grab—an effort “to strengthen the Crown’s hand in colonial jury deliberations,” as two students of the case have written. The governor’s actions would have “permitted Colden to review not only the colony’s laws, but also the merits and facts in the original controversy as affected by those laws. In short, Colden had discerned a way to short-circuit colonial juries in courts of first resort…” He certainly hoped to tighten executive (and thereby royal) control over juries, and to begin correcting jury behavior he found objectionable.99

New Yorkers rebelled against Colden’s scheme. Even the colony’s Council ruled against the governor in the end. New York Justice Horsmanden, writing an opinion on the governor’s plan, called the proposal, “‘which would inquire into the merits of an adjudicated case and not merely of errors on the record, a villainous thrust at the jury.’” After all, virtually all colonial Americans now believed that only their juries—not judges—had the final say over the facts of those cases where jurors sat in judgment. And many, including Andrew Hamilton and John Adams, had even insisted that juries must have the final say over the law in any court trial, as well. New York’s legislature promptly praised the New York judiciary for having come to the defense of their jurors’ rights and role in this matter. The legislature simultaneously reprimanded the lieutenant governor for his proposal.100

At this stage, at least, New York’s colonial judges would close ranks with attorneys to defend the interests of their institution—the entitlements of their shared law court culture. For the moment, New York’s judiciary protected that colony’s law courts

from executive interference by defending the independence and role of their juries. At least as important, the earlier Dutch versus English rivalry in New York, discussed in the previous chapter, now was resolving into a new rivalry, pitting colonial New Yorkers seeking to protect their law court culture against an “English,” royal administration seeking new power over it. In New York, in other words, the earlier national rivalry of Dutch against English threatened to evolve into a new national rivalry, pitting an English “court” faction against a nascent American “country” faction—fighting over control of the law courts—with deadly consequences to English governance in its colony if the division took root and grew.\footnote{See the previous chapter’s discussion of a “court” faction or party under the governor and a “country” faction under the Morrisites, and cf. the discussion and use of party labels in Bonomi, A Factious People, 237-67; Kammen, Colonial New York, chap. 8. For the origins of “court” and “country” party labels in English politics, see Bailyn, Ideological Origins of the American Revolution, 33-54.} This New York fight over its law court culture provides one illustration of how, as Revolution approached, colonials came to see theirs as a struggle to protect their entitlements—and their law court culture—from what was beginning to look like a foreign administration with designs on those entitlements—and especially on jury power.

Two British attacks on American juries and the colonial response—Part II: A fight against the Stamp Act

To the dismay of many colonials, Britain continued its assaults on American court and jury rights, as Americans conceived of them. At least as important as the issue of Parliamentary taxation, colonial subjects increasingly perceived their rights—as autonomous decision makers in their own courts—as under siege. And colonial subjects continued to resist these encroachments on the entitlements of jurors as the arbiters of fact and law in their courts.
Another major British assault on colonial jury autonomy, as Americans saw it, came with the Stamp Tax Act of 1765, requiring that taxes be paid for stamps applied to paper products, for the most part. Such paper products included newspapers and their advertising, pamphlets and broadsheets, books, college diplomas, and other items such as playing cards, as well as paper used in court proceedings. Though these taxes were not terribly onerous, colonial Americans took great exception to an unprecedented imperial regulation of a critical means of colonial communication. In particular, Americans were angered that, once again, Parliament had authorized prosecutions under the act before the judges of those hated courts of vice-admiralty. The Stamp Act appeared as only the latest evidence that Parliament was determined to curtail the powers of juries in colonial America. That stamp distributors stood to profit handsomely from the scheme did not enhance the popularity of the legislation in the colonies.  

The American response to this latest assault on their juries (and on their purses) had its formal, lawyerly side. Colonials united to form the Stamp Act Congress to resist British enforcement of the act and unify the colonial response. But the American response could also become informal and quite ugly. Boston mobs attacked and hanged (in effigy) stamp distributor-designate Andrew Oliver, and they trashed his house. The mob also destroyed the home of the Chief Justice and Lieutenant Governor, Thomas

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Hutchinson, holding him responsible for enforcement of the despised anti-jury law and its taxes. The mob actually threatened the lives of Hutchinson and his family. They were saved only by their timely escape from their home, which was set to the torch. At least as important as these acts of violence, however, the vice-admiralty court offices were attacked and nearly all its records burned. The violence in Boston grew so intense that the common law courts had to close, out of fear that the use of stamped paper in court proceedings would provoke further riots and see those courts destroyed as well. Tensions somewhat eased only when stamp distributor Oliver resigned out of terror, leaving no one to manage the distribution of the hated stamps in the province. With Oliver’s resignation, the customs house and the Suffolk inferior court eventually reopened, stamps or no. The superior court under Justices Hutchinson and Peter Oliver struggled to avoid violating the law; they resisted holding superior court without the use of stamped paper even though the stamps were nowhere to be found.103

So the superior court judges dragged their feet, delaying any new business. With Hutchinson’s reputation among most Massachusetts subjects now in ruins (despite some sympathy for the loss of everything he owned in Boston), the governor had to reconcile himself to the obvious. In Massachusetts and throughout America, citizen power would enforce itself one way or another. If closed courts meant that juries could not defend the rights of citizens in court, then mobs would do so, on the streets. And it simply made no difference to point out that mob violence, after all, had closed the courts. Citizens were taking matters into their own hands. One could well say that, in the case of the Stamp Act and its enforcement, the mob had won. Of course, one could significantly add that the mob had received crucial support from London merchants, who also petitioned

103 See the comment and sources in the following note.
Parliament to scrap the act. Parliament repealed the odious legislation the following year. Clearly, Hutchinson had no hope of enforcing it in the Bay Colony anyway. After the violence that had affected him so personally, Hutchinson could have been forgiven if he harbored feelings of helplessness in the face of forces beyond his control. And who could have blamed Hutchinson for feelings of deep resentment over the horrific effects of the Stamp Act? Ironically, in fact, he had always opposed that law.  

Adding to the irony of the man’s life, there was so much that Thomas Hutchinson could not understand about the ideology and about the source of anger in his fellow citizens of Massachusetts. But one thing Hutchinson did see clearly. As quoted by his biographer, “‘Authority is in the populace,’ Hutchinson wrote, [and] ‘no law can be carried into execution against their mind….’  [N]o law was safe from challenge….’ The growing sense of popular entitlement—its powerful expression in the mobs of the streets and in the juries of the courts—told Hutchinson that America was “‘very near to independence.’”

Meanwhile the violence, especially in the Bay Colony, led directly to the British decision to send troops from Halifax and Ireland to Boston in the months after Parliament’s repeal of the Stamp Act. The arrival of those troops created vastly greater tensions between the civilian population and those unfortunate British redcoats, mostly laborers who were merely following their orders, moving to where they were told.

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104 For this and the previous paragraph see Zobel, *The Boston Massacre*, 28-47. Prominent London merchants’ petitions to Parliament, urging the repeal of the Stamp Act, can be found in Morgan, ed., *Prologue to Revolution: Sources and Documents*, 129-31, and in Commager, *Documents of American History*, I, 59-60. Hutchinson’s opposition to the act, his being trapped by events and forces beyond his control, and his inability to comprehend the passions of his neighbors are described by Bernard Bailyn in *The Ordeal of Thomas Hutchinson* (Cambridge, MA: Harvard UP, 1974), 62-63 ff., 74-80, 68-69. Morgan and Morgan, *The Stamp Act Crisis*, point out the colonial courts remained open throughout the crisis only in Rhode Island, in part because the General Assembly of that colony “promised indemnity to all officers who disregarded the Stamp Act.” 183.

105 Bailyn, *Ordeal of Thomas Hutchinson*, 73-74.
Doubtless most of those soldiers did not want to be in Boston. Their presence, however, would spark one of the most famous of colonial American political trials. Could American jurors exercise their independence, autonomy and power, and defend Old-Whig values, while also protecting the rights of soldiers—an occupying army in their midst? Could Massachusetts jurors do justice to “foreign” troops who they believed were bent on their subjugation?

**Citizen jurors of Boston judge the perpetrators of a “massacre” and promote their own cause: upholding justice, even to an enemy**

The “Boston Massacre” in the spring of 1770 has been thoroughly recounted and interpreted elsewhere, so another detailed examination of that tragedy will not be attempted here. In short, all of those involved in the horror that unfolded on the streets of Boston town had blood on their hands. The colonists were by no means innocents. In retrospect, and from a perspective beyond the needs of American national myth-making, the riotous colonials cannot be portrayed as any sort of heroes, though the dead no doubt deserved to be mourned. Nor were the townspeople merely victims in the violence of that snowy March evening. The best account of the British army’s firing upon the unruly and provoking Boston crowd presents the natives as spoiling for a fight with young soldiers. The redcoats were frightened but also angry at their ill treatment by the mob. Several in the crowd actually yelled “Fire!” at the troops—taunting them, daring them to shoot. The soldiers then heard someone in their own line order them to fire. Only much later would Private Hugh Montgomery confess, to his attorney, that it was he who had shouted for the troops to fire. Captain Thomas Preston, the officer in command that evening, had given no such order. The soldiers—feeling pressed by the crowd, verbally

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assaulted, now shoved and struck, now hit by chunks of hard ice—lost all professional discipline. Eight colonial Americans fell just after 9 p.m. Five died of their wounds. Bostonians had lost their minds in rage at the “foreign” troops in their midst. Their rage would not soon cool. For Preston and his men, the nightmare had just begun.¹⁰⁷

Preston and his soldiers were arrested, imprisoned and tried for murder—a hanging offense in Massachusetts necessitating a jury trial. They had every reason to fear that the Boston mob would supply their jury. The resolution of this tragedy, however, would prove once more the power of the colonial jury system—however politicized itself—now in the most highly politicized trials imaginable. The Boston Massacre trials would prove once again the benefit of the panel of twelve to defendants, particularly to those desperate and unpopular. These trials offered a signal model of a colonial people who had become sufficiently “educated” to assert their power in their law court culture—and yet still do justice, even to their political oppressors.

The Boston Massacre cases would become a precious example of how highly politicized trials might yet escape the enormous pressure to conflate vengeance into justice, because of the decision-making power of the autonomous panel of twelve independent-minded “citizens.” American jurors again would demonstrate independent judgment and act as a check on crown (or prosecution) power. Just as important, in the King, or, Rex v. Preston and in Rex v. Wemms et al., two different juries would vindicate the rights of a despised few. For as defense attorney Josiah Quincy would tell the jurors,

¹⁰⁷ The best discussion of the massacre and the trials that followed is in Zobel, *The Boston Massacre*; the discussion in this paragraph is based on pp. 184-205, 300. The trial discussion of the current study is also based on *Reports of cases argued and adjudged: in the Superior Court of Judicature of the province of Massachusetts Bay, between 1761 and 1772, Josiah Quincy, Junior*, Court of General Sessions of the Peace, 1771; and on the Record of “His Majesty’s Superior court of Judicature Court of Assize & General Goal Delivery,” held in Boston, Suffolk County, beginning August 28, 1770, 52-56; in Reel 15, “Superior Court of Judicature, 1769-1770,” Massachusetts Archives legal collection, Boston; cited hereafter as “Superior Court of Judicature.”
“‘The eyes of all are upon you…. Patience in hearing this cause is an essential requisite; candor and caution are no less essential…. Nay, it is of high importance to your country, that nothing should appear on this trial to impeach our justice or stain our humanity.’”

Quincy emphasized that all in colonial society—soldiers, governors, and citizens alike—were equal in their obligations to each other under the law. That argument likewise could have extended to the obligations of the imperial center to its colonial peripheries. But from the American point of view, the British had already made it abundantly clear that, for Americans, there was no legal, political, or any other meaningful equality of protection within the empire. Colonial Americans became conscious of their need for unity and of their difference from the English within the empire, when that empire, politically and legally, slapped them in the face with the difference. From the point of view of most Bostonians, an occupying army in their midst was proof enough of London’s intentions toward its colonial subjects.

Any argument for equal colonial entitlements within the empire was bound to be abhorrent to those committed to enforcing the deference of inferiors (or “subjects”) to their superiors. Major-General Thomas Gage, for example, spoke for those who were appalled at uppity colonials who did not know and keep their place—at the bottom of the socio-political, legal and imperial order. He was contemptuous of the American who, in “this Country, where every man studys Law, … interprets the Law as suits his Purposes.”

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108 Zobel, The Boston Massacre, 278.
109 That is to say, in a system of hierarchical (but possibly overlapping) spheres of governmental responsibility—what eventually would be called federalism—power, authority and entitlements would need to be at least somewhat reciprocal, to genuinely connect parties both above and below. It is the author’s view that London’s refusal to recognize any need for reciprocity between dominion and liberty, between the center and periphery, led to the failure of Britain’s first empire.
Why, American jurors or justices of the peace could even have an “Officer of Rank and long Service” cashiered for provocation. The Boston Massacre trials would strike decisively at the attitudes of those like Gage.

The scholar of the Boston Massacre and the subsequent trials has described the powerful influence in Massachusetts of the Radicals, those whig opponents of royal power in the colonies. Hiller Zobel has noted that these Radicals in the Bay Colony—including the likes of Sam Adams, James Otis Sr. and Jr., William Molineux and the Sons of Liberty, among others—allegedly controlled every non-crown institution in the colony, including the selection of grand and petit jurors. Presumably they were able as well to influence the selection of the legal defense team for the British soldiers indicted for the massacre. Zobel has raised the question of how the despised solders were able to obtain such a powerful whig defense team as John Adams and Josiah Quincy. After all, one might assume that such whigs or Radicals hoped that the soldiers would have the weakest possible legal representation. That way, the hated redcoats might be convicted and imperial policy would suffer a serious blow in America. Perhaps as with the Stamp Act, the British would have to pull back from their latest projection of imperial power. Surely, given their control of the colony, Massachusetts Radicals would also pack the juries of the massacre trials to guarantee convictions of the foreign troops in their midst. At the least, Massachusetts Radicals would want to deliver the strongest possible retribution against the many imperial abuses that they had suffered.

If the Radicals really did control much of Massachusetts politics on the eve of Revolution, probably they wanted to protect themselves from any potential backlash by arranging the best possible counsel for the British troops on trial. Massachusetts boasted

no better defense attorneys than John Adams, Josiah Quincy and Robert Auchmuty (the latter an “ultraloyal crown servant,” as Zobel characterizes him). If the redcoats were convicted of murder with this defense team, no one would be able seriously to argue that they had not enjoyed the best counsel available. Indeed, Zobel argues soundly that the Boston whigs were anxious to deny anyone the opportunity to argue that the counsel, jurors or that the trial of the soldiers had been somehow tainted or that the odds had been stacked against them.\(^{112}\)

Besides, the Radicals should have been able to rest easy in this case. Surely any Boston jury would convict the perpetrators of a “massacre.” The event had been widely publicized in newspapers throughout the colonies. Henry Pelham had drawn a clever cartoon of the bloody event, printed and mass-marketed by Paul Revere. The Revere engraving vividly (if inaccurately) portrayed British troops in bright, blood-red uniforms, standing in neat formation like a firing squad, calmly gunning down their horrified victims. With black-humored editorial flourish, the cartoon had the murderers standing in front of “Butcher’s Hall,” a shop unknown to colonial Boston. It is inconceivable that any sighted person missed seeing a copy of that engraving in 1770. Moreover, if the Tories published their “Fair Account” of the Boston Massacre, the Radicals responded in kind, with their “Narrative” of the tragedy. Such tracts and newspaper debate ensured a thoroughly poisoned community from which to choose a jury. The hostile climate to the defense caused a delay in the trial for many months. Captain Preston’s trial, the first of two dealing with the massacre, did not begin until October of 1770.\(^{113}\) When Preston’s

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\(^{112}\) For this and the preceding paragraph, see Zobel, *Boston Massacre*, 169, 221, 231, 242.

\(^{113}\) Ibid., 211-14; plate of the engraving of Paul Revere from print by Henry Pelham is to the right of p. 100.
trial finally did commence, front and center would be the problem of how to select twelve fair-minded men to judge his case.

Rex v. Preston and Rex v. Wemms et al. were two very different trials heard by two very different sets of jurors. The first trial, of Thomas Preston, was a murder case in which the captain of the day found his life in jeopardy for allegedly ordering his troops—unlawfully—to open fire on civilians. To save his life, Preston’s defense had to argue that he had given his men no order to fire. Essentially, then, Preston’s defense could only be that his men acted independently and unlawfully. The second trial would be that of the other soldiers under Preston’s command. For those men to escape conviction for murder, the soldiers presumably would plead that they had simply followed their commander’s order to shoot. Refusal to carry out such an order normally would have been an unlawful death-penalty offense for the men. The brutal fact facing John Adams and the defense team was that two trials were required, with the defense in each trial essentially leveling a charge at the other side of the defense. Despite the official record of the trial, in which Thomas Preston, along with all his men, together stood accused—that they all did “feloniously willfully and of their malice aforethought assault” and murder their victims—and despite the pleas of Preston’s men that they not be tried separately, Preston did stand trial first, and alone.\textsuperscript{114} Apparently, Adams and his partners realized there was no way for the two separate defense arguments to succeed together in a single trial. This defense strategy, however, did not relieve the soldiers of the anxiety that they might be sold out to defend their commanding officer.\textsuperscript{115}


\textsuperscript{115} Wroth and Zobel, ed., \textit{Legal Papers of John Adams}, III, 16-20.
Little is known about how the jury was chosen in Preston’s trial, though the trial’s historian has concluded that the Preston jury was effectively “packed” with tory sympathizers, including “[p]lump Gilbert DeBlois, the well-to-do Boston merchant,” who had “given Preston political background information about as many [potential] jurors as he could, particularly the ones from Boston.” After a number of potential jurors fell from preemptory challenges, and with the venire list exhausted, the court began to look for talesmen, or members of the audience and passers-by who might be seated to fill five remaining chairs. DeBlois and four others, presumably loyalists, joined the foreman, Boston soap maker William Frobisher. Many of these jurors were not Bostonians and many held strong pro-British or pro-army opinions. Hence Zobel concludes that the jury was “fixed.” Zobel does not give sufficient consideration to the suspicion that the prosecution in the case—officers of the crown—would likely have been less than zealous in seeking the conviction of British soldiers, particularly their gentleman captain. Zobel does raise the specter that the trial was essentially a “charade,” since Preston presumably could have depended on his governor (or his king) to pardon him, had the worst prevailed.\footnote{Zobel, \textit{Boston Massacre}, 245-47; Wroth and Zobel, ed., \textit{Legal Papers of John Adams}, III, 19. See Chapter 1 of this study for a discussion of several of the jurors mentioned here.}

It seems more likely that each side in Rex v. Preston had an interest to avoid turning the case into either a state show trial or a pro-defense charade. Presumably each side anticipated its success in the outcome. But the Boston superior court was caught between an imperial power that would not take kindly to having its soldiers condemned for murder, and a local populace that was demanding nothing less. Within this political vise, then, a trial as impartial as possible was achieved—given the frenzy of the town and
the nature of the widespread propaganda that had for months whipped up anti-soldier sentiment in Boston and throughout the colonies, and the political pressures against conviction. Zobel reports that few were shocked when the jury returned a verdict of “not guilty” in Preston’s case. While many townspeople had wanted to see Preston hang, to take responsibility for the tragedy, even many radicals had to admit that the accusation that Preston himself had commanded his troops to fire was contradicted by testimony and simply was not credible. Besides the makeup of his jury, Zobel concludes, “to be fair about it, [given] the nature of the evidence, the results surprised no one.” Even “arch-radical” William Palfrey admitted that doubt remained about whether Preston had given an order to fire. As Preston was permitted to “go without day,” one suspects that even many radicals breathed a silent, if disappointed, sigh of relief.117 Colonial justice in this case was not a sham, and this proceeding was no Stalinist show trial. Preston was hustled out of Boston a free man, intact in his rights, life and limb, if shorn of his pride.118

Rex v. Wemms et al. would present more difficult problems for the defense team of Adams and his colleagues. Since Preston had been acquitted of having given orders to shoot on the people of Boston, that left his men in a most uncomfortable position, as apparently they had feared. When the superior court reconvened on the third Tuesday of November, 1770, the first criminal case to be heard involved a marine, John King, indicted for the murder of seaman William Frazer, during an argument on a navy boat. King’s jury found him guilty, but only of manslaughter rather than of murder. King asked for benefit of clergy, “which was granted him by the Court: And then the Prisoner was burnt upon the brawn of his left thumb with the letter T in open Court,” and he was

117 Zobel, Boston Massacre, 265; “Superior Court of Judicature,” October 30, 1770, 52-53.
118 Wroth and Zobel, ed., Legal Papers of John Adams, III, 50-98.
released. King had avoided a hanging by this archaic English practice of a formulaic expression of contrition and a branding of his hand. No one could get away with murder, but one might get away with manslaughter—once: the branding prevented any future reprieves for this offense. Then followed the trial of the massacre’s soldiers, who must have been praying for a similar escape from the gallows, if outright acquittal was impossible.119

Indicted for murder were the following soldiers (identified in class as “laborers” in the court record): William Wemms, James Hartegan (or Hartigan), William McCauley, Hugh White, Matthew Killroy, William Warren, John Carroll, and Hugh Montgomery, along with several others. As in the Preston trial, Chief Justice Hutchinson did not sit, though he was still formally the chief justice. Had some or all of the soldiers been convicted of murder, Hutchinson stood ready to order the judges to respite their conviction. Hutchinson thus recused himself to avoid the possible embarrassment of having to annul his own judicial proceedings. Presumably the judges of the superior court were aware of Hutchinson’s intentions regarding the fate of the prisoners. In part because of this awareness, the presiding judges probably were determined to allow a truly impartial and fair proceeding to unfold. The jury selection also showed a greater attempt toward impartiality and “blind” justice: potential jurors were examined for bias as they had not been in the Preston case. No juror in the soldiers’ case hailed from Boston itself, to the chagrin of Sam Adams. To most onlookers, however, the Wemms et al. jury appeared as neutral as could be, especially given the circumstances. At length, the jury was impaneled, its members apparently harboring no overt (and perhaps no strong covert)

feelings or partisanship for or against the Radical cause. Of course, who could know for sure?

In his defense of the troops, Josiah Quincy’s comment to the jurors, that the “eyes of all are upon you,” has already been noted. But he also told the jurors that “You are to think, judge, and act, as Jurymen, and not as Statesmen.” What Quincy meant was that everybody in the court understood why British troops had landed in Boston. All colonists knew that tensions between imperial authority and local subjects had arisen and were now boiling over. Quincy wanted to dissuade the jurors from thinking they could stick it to the empire by convicting its soldiers for murder. He sought to lower the jurors’ sights to the immediate issue at hand. Without emphasizing the extent of the bad behavior of the citizens of Boston toward the redcoats—an indictment of Boston’s community that John Adams was determined not to permit—Quincy wanted his jurors to steer beyond “affections” or prejudices against his clients. Quincy was telling his jurors to forget the imperial context and to recognize that local tensions could not justify hanging poor laborers who, as soldiers, had themselves been placed in a horrible situation. Essentially, Quincy suggested to the jury that both Boston and the soldiers had been victims of events. As to those soldiers on trial, they had behaved terribly, but not criminally—not with criminal intent. Indeed, perhaps there had been gunfire in both directions; it was impossible to prove precisely which soldier had shot which particular citizen. Here, then, was substantial reason for jurors to acquit the defendants.

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120 Zobel, *Boston Massacre*, 269-71. The jurors, led by foreman Joseph Mayo of Roxbury, a militia captain, are listed in “Superior Court of Judicature,” 56.
If Quincy did not want the jurors to act as “Statesmen,” hoping they would cleave to a narrow sense of duty to judge only the motivation or intent of these particular defendants, Adams urged the jurors to be statesmen and political arbiters as well. Adams asked his jury essentially to indicted someone else by acquitting these defendants. Boston rioters were not to blame for the tragic reaction of the soldiers in King Street, according to Adams. No, the real culprit and inspiration for the violence in the colony had been “His Majesty’s Government and its local representatives,” as Hiller Zobel has characterized Adams’s argument. After all, these poor, wretched soldiers had been doing someone else’s bidding. They were foreigners, in a town in which they did not belong, confronting a mob. As Adams told his jurors:

We have been entertained with a great variety of phrases, to avoid calling this sort of people [whom the soldiers had attacked] a mob.—Some call them shavers, some call them genius’s.—The plain English is gentlemen, most probably a motley rabble of saucy boys, negroes and molattoes, Irish teagues [sic] and outlandish jack tarrs.—And why we should scruple to call such a set of people a mob, I can’t conceive, unless the name is too respectable for them:—The sun is not about to stand still or go out, nor the rivers to dry up because there was a mob in Boston on the 5th of March that attacked a party of soldiers.—Such things are not new in the world, nor in the British dominions, though they are comparatively, rarities and novelties in this town. Carr a native of Ireland [that is, Irish mob leader turned Bostonian Patrick Carr, who had died of his wounds in the massacre] had often been concerned [as a participant] in such attacks, and indeed, from the nature of things, soldiers quartered in a populous town, will always occasion two mobs, where they prevent one.—They are wretched conservators of the peace!

Hence, when young, poor, ignorant British troops confronted a mob of local civilians, the results were not hard to predict. The guilt did not inherently lie in either of the two groups that clashed that evening in King Street. The problem lay in the presumption of the imperial masters who had so misguidedly set those miserable troops on patrol there.

122 Zobel, Boston Massacre, 290-91.
123 Wroth and Zobel, ed., Legal Papers of John Adams, III, 266. Carr is described in Zobel, Boston Massacre, 199.
“Facts are stubborn things,” Adams told the jury. If one mob of local ruffians had made “an assault … to endanger their lives,” then the opposing mob of wretched soldiers “had a right to kill in their own defence.” Killing in self defense was homicide, but not murder, under the common law of Massachusetts. Any individuals whom the jurors held responsible for homicide in this case should be convicted of the lesser offense of manslaughter. Justice Trowbridge, in his charge to the jury, emphasized the distinction between murder and manslaughter, pointing out that manslaughter was “the unlawful killing of another without malice express or implied.…”124 The jurors were thoroughly briefed, then, on how they might convict killers while still acquitting them of murder, a mandatory hanging offense. The only question was: would these Massachusetts jurors seek vengeance or would they reason their way toward a calm, unbiased, rational outcome in this case? More to the point: could these jurors send a focused, political message to the empire without overreaching? Could they hand down what could only be seen as a very political judgment, in a very political case, that yet would not embarrass their courts or themselves, or perhaps even bring a firestorm down upon them? Or would they succumb to the fury still raging throughout Boston?

On December 5, the jury acquitted completely all but two of the British troops accused of murder in King Street. Privates Matthew Killroy and Hugh Montgomery were found not guilty of murder, but of manslaughter. Evidence in court had pointed to these two soldiers particularly as responsible for at least some civilian deaths. The two men

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prayed for benefit of clergy, as had John King in the trial before theirs. Like King, each was “then burned in his left hand” and released.  

**Conclusion: Where Subjects had been Citizens—and even Statesmen**

The superior court jurors of Suffolk had demonstrated that they could rise above anger and lust for vengeance. In taking advantage of the argument of John Adams, they spoke as “Jurymen” *and* as “Statesmen.” Those jurors delivered justice and they made a statement to the empire: that royal troops were not above the law, but that colonial law would not become a vehicle for the exercise of vengeance or naked power by colonial juries.

American jurors could and did exercise popular power in highly politicized cases. In the course of exercising that power they became a power themselves. As that power rendered its judgment on the lives of British soldiers, the effects of that power were surely apparent in the faces of all present—surely in the eyes of those soldiers. But while American jurors could exercise popular authority over very political questions in cases presented at trial, Massachusetts jurors were not simpleminded pawns for any political party. Sam Adams and his radical friends were influential and powerful in the life of colonial Boston. They hated the British troops in their midst and wanted them gone. As the student of the Massacre, Hiller B. Zobel, has noted, all those influential, powerful Boston leaders had wanted and expected Suffolk jurors to vote to hang the defendants.  

While Preston had sat in prison awaiting his trial, he strongly feared that he would be sentenced to die; and if the jury did not convict him, Preston agonized that, one night, the

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125 Wroth and Zobel, ed., *Legal Papers of John Adams*, III, 312-14; “Superior Court of Judicature,” at the left side of p. 56.  
mob would break into the prison and drag him out to lynch him. A contemporary observer wrote during that June that “it was everybody’s opinion poor Preston would be hanged.”\textsuperscript{127} Indeed, the reason the Sam Adams crowd was willing to see the likes of John Adams defend the soldiers was precisely because they “failed to consider the possibility of an acquittal.” As Zobel has shown of Boston’s radicals, “[s]upremely confident that neither public opinion nor local jurors would return any verdict but condemnation, they were expansively willing to let the military have the best lawyers available; that way, no one could later taint the proceedings with unfairness.”\textsuperscript{128}

But it would be as false to claim that Boston’s jurors here were mere agents of the tories as it would be to make them lackeys for the radicals. The fact remains that colonial jurors had been their own agents and had exercised their own judgment. Not even imperial soldiers were above the law in colonial courts. In colonial American law court culture, jurors defended the rights even of a despised minority of foreign troops sent into their land to subdue them. John Adams later confided to his diary that a “Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.”\textsuperscript{129}

In retrospect, it is hard to argue with Adams on this point. Adams was proud of having served the cause of justice. He was equally proud of having preserved the honor of his fellow citizens. Adams had defended the highest ideal of the law, as the impartial

\textsuperscript{127} Ibid., 236; Christian Barnes to Elizabeth Smith, June, 1770, in Nina Moore Tiffany and Susan I. Lesley, ed., \textit{Letters of James Murray, Loyalist} (Boston: no pub., 1901), 178; Zobel and Wroth, ed., \textit{Legal Papers of John Adams}, III, 12-15.

\textsuperscript{128} Zobel, \textit{Boston Massacre}, 221.

equator of the protections for all. He had used colonial American common law to defend those who represented, to most Bostonians, a foreign threat to that very ideal. But Adams had not labored alone.

Colonial American jurors had here defended a principle that sparked a national revolution with world-wide consequence: that all “subjects” of any nation ought to be possessed of basic entitlements that no “superior” in the state may simply ignore. It mattered little whether those subjects were simple residents of a colonial town, soldiers from Ireland or Nova Scotia, criminals or debtors, merchants, ship owners or humble printers. Six years after the Boston Massacre trials, Americans would declare precisely this principle in launching their revolution against the mightiest empire the world had yet known. American subjects within the British empire would declare themselves citizens of a new order. In truth, those American subjects had long been powerful arbiters of fact and even of law, as “citizens” within their own law court culture. There, they had long been highly independent, autonomous actors—citizens—in at least one milieu within the old regime.

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Conclusion:

Where Subjects were Citizens

In the several decades leading to Independence, colonial American law court culture, with powerful, independent jurors at its heart, had constituted a middle ground where competing parties regularly met to settle many types of legal and even political quarrels. This middle ground presented a level field where private individuals as well as the state (or colonial administration) met to adjudicate their disputes. On this middle ground, those parties were compelled to meet each other as legal equals, precisely because of the rules and nature of that colonial American law court culture. American law court culture became a great equalizer of legal parties—even the state—in a way that English and Irish courts at the time were not.¹ This colonial law court culture became significant particularly by eroding the attitude of deference inherent in the sense of “subjecthood” in those subjects of His Majesty’s thirteen colonial possessions. At least as important, this colonial American law court culture proved detrimental to the maintenance of imperial power in those North American colonies.²

This environment of law, its language, organization and functioning, educated American colonists in the nature and preservation of their individual entitlements, as was argued in the Introduction and first chapter of this study. Participation in this court culture gave many ordinary men the experience of autonomous “citizenship” through the

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² See the previous note and see Chapters 4 and 5 of the current study.
exercise of genuine—and genuinely perceived—governmental power in civil and criminal trials, an experience explored in the second and third chapters above. Alexis de Tocqueville considered the early American jury system to be “a free school which is always open and in which each juror learns his rights” in the exercise of representing his fellows, in rendering judgment in court. Besides learning their rights, jurors also aided in the execution of the law, directly handling significant power in the process.

Tocqueville’s insight thus suggests the starting point and guiding thesis of this study.³

For this education—by service on juries and by the experience gained from jury work—gave many colonial American men a sense of autonomous citizenship that differed vastly from a posture of passive subjecthood that deferred to social and political “authority.” Paradoxically perhaps, ordinary colonial men, in subjection, as was said, to their English king (or queen), always had assumed a different stature, one of power and dignity, while serving as jurors in colonial law court culture. These jurors, when rendering judgment in trials, did not appear bowed in subjecthood. Rather, they acquired real autonomy, individual and collective independence and authority, while they served on those panels of twelve.⁴ Jurors always had been representatives of their communities as the judges of the facts and even the law of their cases in their colonial courts, as illustrated in the final two chapters of this investigation.

Colonial American jurors spoke for their fellow subjects to defend their equal rights as citizens. In civil debt cases, when jurors ruled, they protected the financially weak or desperate in lawsuits where the financial superior in that debt relationship

⁴ See Chapter 4 above, including discussion there of the concept of “subjects” of a monarch as being in real subjugation to their liege lord, their “sovereign lord the king” (or queen).
refused to extend that mercy or leniency which jurors believed was required in the case. And in criminal trials in the superior court, jurors could be tough on crime yet show striking tenderness, compassion and mercy toward neighbors in distress, notably toward at least some African Americans fighting their captivity and toward women in an age when effective birth control did not exist.⁵

When these individual entitlements became inflected by larger, political issues, seen most strikingly in the Zenger press freedom case in New York, colonial American jurors led, in significant cases from at least the 1730s, in imagining a broader perspective and framework for the exercise of civil liberties. When the imperial government pursued policies that taxed colonial Americans in novel ways; when Britain curtailed colonial jury rights and threatened to move trials far from their local venues; when London ordered soldiers into volatile locales such as Boston after the Stamp Act crisis of 1765—colonists came to recognize their American legal rights and culture as distinct from those of the British. Colonial Americans came to see their collective entitlements—including their right to genuine power within their law court culture—as under mortal threat. The colonists came to see themselves, that is, as separate from their English Brethren with whom Americans had, until then, shared many common bonds. England’s breaking of those bonds represented far more than the termination of a legal contract, in the eyes of men such as John Adams.⁶ England’s actions—especially its assault on colonial jury rights—represented a refusal to heed “the Voice of Justice.” These were injuries that no court, no jury, could heal. By the summer of 1776, not even George III could repair the injustices Americans had felt in the policies and actions taken under his name. For these

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⁵ Such issues were explored in Chapters 2 and 3 of this study.
⁶ See the latter part of Chapter 5, dealing particularly with the Boston Massacre trials but more broadly noting Adams’s concerns over England’s assault on colonial American jury rights and powers.
reasons, in part, Americans declared His Majesty’s moral claim on their allegiance empty and finished, appealing their case to the highest courts of all—to the “Opinions of Mankind” and to “the Supreme Judge of the World.” After all, during the quarter century before Independence, if their law court culture had taught colonial Americans anything, it had taught them that opportunities always may arise in the right of an appeal. Of such were the fundamental entitlements of citizenship in colonial America’s law court culture.

After Independence, American citizens would continue to debate and redefine the meaning of citizenship. In the years to come, American citizens would be the judge of the reality of their legal equality and power within the new institutions, courts and juries established under their own name.

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7 Chapters 4 and 5 above; Pauline Maier, introd., The Declaration of Independence and the Constitution of the United States (New York: Bantam, 1998), from The Declaration at 53, 57, and see her introd. at 11-15. 8 The evolving use of appeals from inferior to superior courts was a major focus of Chapters 2 and 3.
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