

**THE CUSTOM OF THE COUNTRY:
JUSTICE AND THE COLONIAL STATE IN EIGHTEENTH-CENTURY NEWFOUNDLAND**

by

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**A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Graduate Department of History
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Abstract

Peter Gerald Bannister, "The Custom of the Country: Justice and the Colonial State in Eighteenth-Century Newfoundland." Ph.D. Thesis, Department of History, University of Toronto, 1999.

This thesis examines governance in Newfoundland from 1699 to 1832. It explores the formation of a colonial state – from the rule of the fishing admirals to the establishment of representative government – and focuses primarily on the customary legal institutions that arose in Anglo-Irish fishing communities during the eighteenth century. Three topics are covered in detail: naval government in St. John's; surrogate courts in the outport districts; and patterns in the administration of law. The analysis places the use of punishment in the context of the social relations in the fishery, in particular the reliance of capital upon wage labour supplied by indentured servants. Eighteenth-century courts played an active role in disciplining servants and enforcing sectarian regulations.

Challenging an historiography which views early Newfoundland as politically backward and legally anarchic, this thesis argues that an effective colonial state emerged to meet the needs of those in power. The royal navy was the engine of law and authority, supplying the necessary infrastructure for the island's judiciary. Naval governors relied principally on their junior officers, the justices of the peace, and the fish

merchants, who became actively involved in government whenever propertied interests were threatened. While the structure of this system differed markedly from that found in most British colonies, its function remained basically the same: power and authority flowed through institutions designed to uphold the established social order. Defined in the thesis as a "naval state," this regime dominated Newfoundland for nearly a century. In the 1820s the emergence of a bourgeois public sphere spawned a political reform movement that undermined the legitimacy of the island's legal system.

The case of eighteenth-century Newfoundland demonstrates the malleability of the common law tradition in the face of an environment that demanded significant adaptation to local conditions. Government was essentially reactive, limited by available resources, and shaped by individual initiative. The legal system comprised an amalgam of common law, statute law, prerogative writ, and local customs. The large gap that existed between imperial policy and colonial practice formed a distinguishing characteristic of governance prior to 1832.

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Chapter 1

Introduction

This dissertation examines the colonial state in eighteenth-century Newfoundland. Its point of departure is a challenge issued by Pierre Clastres:

Primitive societies are societies without a State. This factual judgment, accurate in itself, actually hides an opinion, a value judgment that immediately throws doubt on the possibility of constituting political anthropology as a strict science. What the statement says, in fact, is that primitive societies are missing something – the State – that is essential to them, as it is to any other society: our own, for instance. Consequently, those societies are *incomplete*; they are not quite true societies – they are not *civilized* – their existence continues to suffer the painful experience of a *lack* – the lack of a State – which, try as they may, they will never make up.¹

Clastres was attacking what he saw as the ethnocentrism and evolutionism in European chronicles of aboriginal societies, but his argument is equally relevant to the study of legal culture in early Newfoundland. The island's historiography remains mired in an outlook that considers the pre-1832 state – and, by extension, Newfoundland society – exclusively in terms of its deviance from the British colonial model and its dearth of modern forms of social control. This orthodoxy is the enduring legacy of nineteenth-century political reformers, who depicted the era of naval government as inherently weak and arbitrary, and those

¹ Pierre Clastres, *Society Against the State: Essays in Political Anthropology*. Robert Hurley, trans. (New York: Zone Books, 1987), p. 189.

historians who uncritically accepted their polemics. It is also a reflection of the broader trend among English-Canadian historians to focus overwhelmingly on the emergence of a "colonial leviathan" and the concomitant expansion of governmental regulation in the mid-nineteenth century.² The primary question addressed by this thesis is, therefore, how was the island governed, if at all, without the institutions established in most British colonies?

With few exceptions, historians have portrayed early Newfoundland as a frontier on the margins of European civilization. It failed nearly every basic test of civil society: social and economic stratification; security of private property; a regular judiciary; political representative institutions, including a local legislature or town corporation; and an independent local press. Whether as cause or effect of these conditions, the island endured the barest rudiments of government.³ Seen in this light, eighteenth-century Newfoundland

² On the historiography of the state, see Allan Greer and Ian Radforth, "Introduction," in A. Greer and I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992), pp. 1-16; Rainer Baehre, "The State in Canadian History," *Acadiensis* 24 (Autumn 1994), pp. 119-133; Louis Knafla and Susan Binnie, "Beyond the State: Law and Legal Pluralism in the Making of Modern Societies," in L. Knafla and S. Binnie, eds., *Law, Society, and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995), pp. 3-33.

³ The development of Newfoundland historiography is discussed further in Jerry Bannister, "'A Species of Vassalage': The Issue of Class in the Writing of Newfoundland History," *Acadiensis* 24 (Autumn 1994), pp. 134-44. The tendency to see the island's early institutions

is suitable only for the study of the privation that necessarily existed prior to achieving appreciable politico-economic development in the nineteenth century. By having a primitive society, the island *ipso facto* did not have an effective colonial state.

This thesis emphatically rejects the evolutionist model. To be sure, the development of institutions followed discernible patterns – the chapters that follow provide an interpretive narrative of Newfoundland from 1699 to 1832 – but it conformed to no predetermined teleology. To begin with the axiom that the island's legal etymology was inherently anomalous entrenches the false conviction that it must be studied solely in terms of its apparent inadequacies. The problem, as Clastres points out, is that this approach engenders value judgments that extinguish any hope of assessing a society on its own terms. The inevitable pitfalls of subjectivity remain, in particular the problematic notion of constructing "a society" to which particular qualities can be ascribed. But to accept the claims of the reformers blocks any chance of analyzing the colonial state with any accuracy: the eighteenth-century legal regime cannot be properly dissected with nineteenth-century instruments. When a colonial reform movement

through the lens of a frontier is clearly evident in a recent comprehensive review of the field. See Olaf Uwe Janzen, "Newfoundland and the International Fishery," in M. Brook Taylor, ed., *Canadian History: A Reader's Guide, Volume One: Beginnings to Confederation* (Toronto: University of Toronto Press, 1994), pp. 280-323.

petitioned the British government to grant representative government in 1832, it was not simply "pushing at an open door" because the island had finally met the criteria of a civilized society.⁴ At the heart of this dissertation rests the task of reconstructing the history of a form of governance that remained basically intact for almost a century. To do so, it aims to avoid what David Hackett Fischer has termed the fallacy of presumptive change.⁵ Before we can assess the changes a system of governance underwent, we must first examine the system itself and the forces which created it.

Defining the Colonial State

As historians have expanded and refined the boundaries of law and legal culture, the idea of the state has expanded exponentially. Michael Braddick argues persuasively that the definition of the state as a purely institutional phenomenon should be abandoned in favour of an inclusive model of state formation. At its extreme, this theory views the state as no less than society, for it encompasses the means by which social power

⁴ Christopher English, "The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819," in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials: Volume One: Law, Politics, and Security Measures, 1608-1837* (Toronto: The Osgoode Society, 1996), p. 316.

⁵ David Hackett Fishcher, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper, 1970), p. 154.

is organized.⁶ Braddick's critique of the traditional notion of the state – in particular his insistence on rejecting the dichotomy of state versus community – bears directly on the legal history of eighteenth-century Newfoundland. At the same time, however, not all forms of social organization can be thrown together indiscriminately to constitute state formation; indeed, it is more accurate to speak of pluralistic, concurrent social regulations. Law and punishment, for example, comprised two facets of the state that cannot be simply lumped in with other elements of governance.⁷

Before analysis of the island's legal system can proceed, the structure of the colonial state needs to be addressed. Although the institutional model cannot be reasonably applied to Newfoundland, where the colonial state never conformed to the British archetype, John Brewer's definition provides a useful starting point. Brewer interprets the state as,

⁶ Michael Braddick, "State Formation and Social Change in Early Modern England: A Problem Stated and Approaches Suggested," *Social History* 16, 1 (January 1991), pp. 1-17.

⁷ Here "governance" is not used in the strict sense of Foucault's model of discipline through regulation. Rather, it describes the range of institutions and practices that comprised a single, historical legal regime and a definable legal culture. This approach draws on both Foucault's theory of normalization and Garland's inclusive model of culture. See Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), pp. 49-55; David Garland, *Punishment and Modern Society: A Study in Social Theory* (Oxford: Oxford University Press, 1990), pp. 193-99.

a territorially and jurisdictionally defined political entity in which public authority is distinguished from (though not unconnected to) private power, and which is manned by officials whose primary (though not sole) allegiance is to a set of political institutions under a single, i.e. sovereign and final, authority.⁸

This dissertation adopts a significantly broader approach: it considers the colonial state as a territorially and jurisdictionally defined entity in which formal and customary sources of legal authority comprise a single administrative regime that exerts effective political and military control over its inhabitants. This definition entails three major assertions: no substantive division existed between formal and customary institutions; public (naval and civil magistrates) and private (merchants and masters) sources of power overlapped; and the colonial state was never static but rather developed according to the variable pressures of contested authority.

Under this model, a functional colonial state requires four essential properties. First, a monopoly must exist over the legitimate use of force: military power is not used indiscriminately but employed by a government to further specific aims within its jurisdiction. Second, persons and institutions are parts of the state apparatus, whether formally or informally, only when they enjoy access to the means to enforce their authority through the state monopoly over legal violence. The

⁸ John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (London: Unwin Hyman, 1989), p. 252.

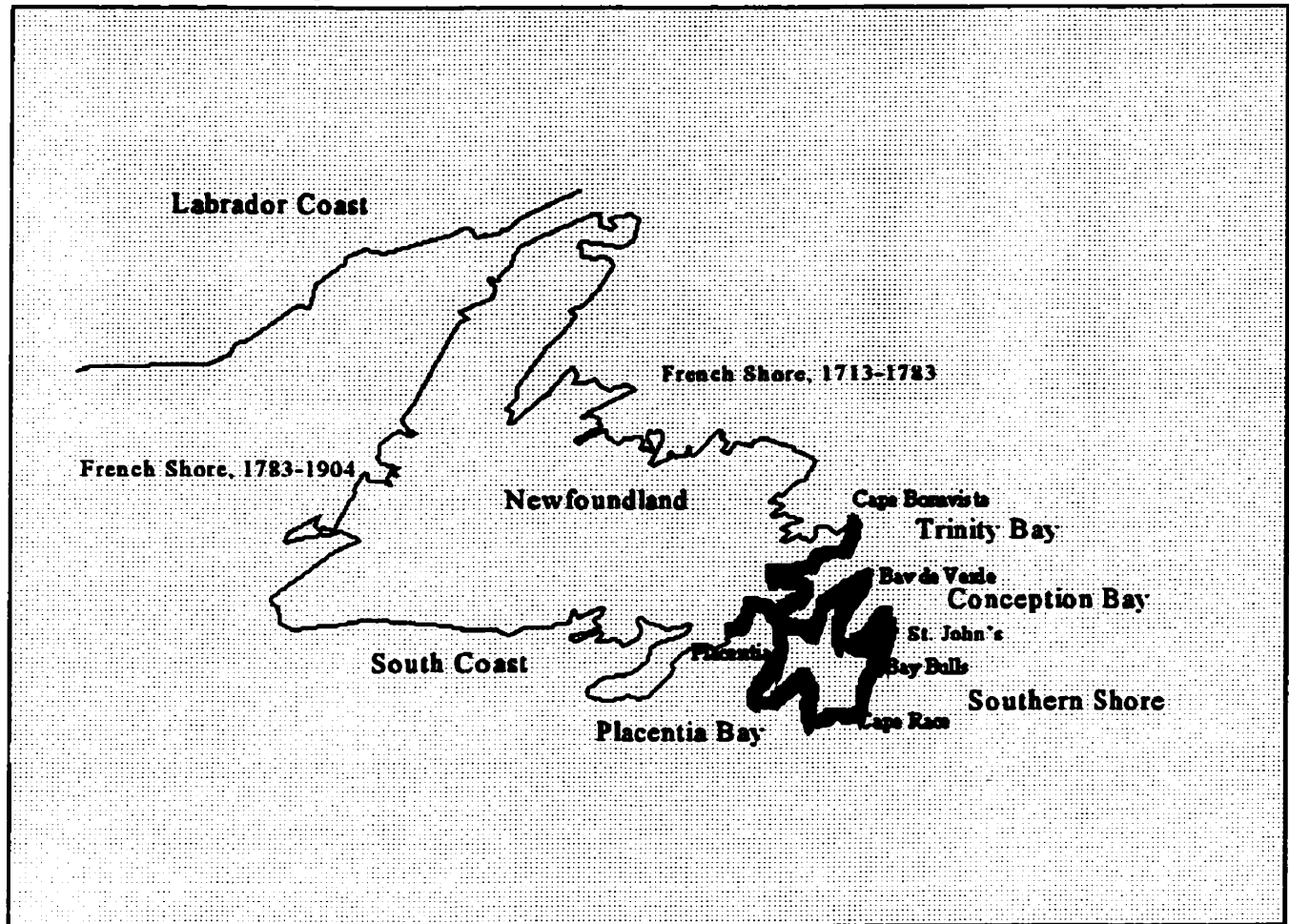
governing regime must have access to the means to legitimize its authority – particularly in the eyes of the propertied classes – through laws that are known, recognizable, compulsory, and at least nominally consistent.⁹ Finally, the government must be able to raise revenues locally to defray the costs of operating basic institutions such as a penal system. Whether accomplished through statutory levies or taxes approved by *ad hoc* committees, these funds are then allocated to a public purse. The chapters which follow argue that the colonial state in Newfoundland met each of these criteria by 1750.

This thesis studies a single colonial jurisdiction. By doing so, it necessarily omits a number of nationalities and geographic areas. It considers only the island of Newfoundland – it does not include Labrador, Anticosti, or St. Pierre et Miquelon – and excludes the portion of the coast under French control. The thesis does not attempt to deal with the administration of the French Shore because Anglo-French relations in this region involved international politics and jurisdictional battles between two sovereign nation-states.¹⁰

⁹ This concept of the state draws on Ralph Miliband, "The State," in Tom Bottomore, ed., *Dictionary of Marxist Thought* (2nd ed. Oxford: Basil Blackwell, 1991), pp. 520-24.

¹⁰ On the French Shore, see F.F. Thompson, *The French Shore Problem in Newfoundland: An Imperial Study* (Toronto: University of Toronto Press, 1961); J.K. Hiller, "Utrecht Revisted: The Origins of French Fishing Rights in Newfoundland Waters," *Newfoundland Studies* 7 (Spring 1991), pp. 23-39; Michael Wilkshire and Frances Wilkshire, "Alliances and Conflicts on the French Shore: Captain Hamon's

Map 1.1. Primary Areas of Anglo-Irish Settlement, 1713-1800



This dissertation focuses on the primary areas of Anglo-Irish settlement. Anglo-Irish communities stretched along the coast from Bonavista in the north – along Trinity Bay, Conception Bay, and the Southern Shore – down to Placentia in the south. The development of the English proprietary colonies established in

Journal, Written in Greenspond in 1770," *Newfoundland Studies* 8 (Fall 1992), pp. 147-154.

the seventeenth century is not addressed in this study.¹¹ The patterns of relations between Europeans and the Beothuck, the aboriginal people of Newfoundland, are briefly discussed in relation to the presence of local government in the eighteenth century.¹²

Social and Economic Contexts

The dissertation places legal culture firmly within the material conditions of the island's economy and the paternalistic relations of its society. In adopting this approach, it employs a framework that considers the interplay between institutions, regulations, and cultural sentiments.¹³ Although each of these

¹¹ On the seventeenth century and early English colonization, see Gillian Cell, *English Enterprise in Newfoundland, 1577-1660* (Toronto: University of Toronto Press, 1969); Peter Pope, "The South Avalon Planters, 1630-1700: Residence, Labour, Demand and Exchange in Seventeenth-century Newfoundland." (PhD thesis, Memorial University of Newfoundland, 1992); Peter Pope, "Fish into Wine: the Historical Anthropology of the Demand for Alcohol in 17th-century Newfoundland," *Social History* 27 (1994), pp. 261-78.

¹² See below, Chapter Two.

¹³ I have chosen to use the term legal culture instead of alternatives such legal ideology because I wish to emphasize that the administration of justice was, first, imbedded within broader patterns of social conflict and, second, filtered through the cultural rituals of court proceedings. On the debates over the concept of legal culture, see, *inter alia*, Roger Cotterrell, "The Concept of Legal Culture," and Lawrence Friedman, "The Concept of Legal Culture: A Reply," both in David Nelken, ed., *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997), pp. 13-32 & 33-41; Jerry Leonard, "(Post) Modern Legal Studies as (Critical) Cultural Studies," in Jerry Leonard, ed., *Legal Studies as Cultural Studies: a reader in (post) modern critical theory* (New York: State University of New York Press, 1995), pp. 1-20; and Peter Sack, "Introduction," in Peter Sack, ed., *Law and Anthropology* (Aldershot: Dartmouth, 1992), pp.

elements is itself an historical construct, by viewing law in the context of social power and the changing forms of governance, the thesis seeks to avoid seeing legal administration only through the lens of statute law.¹⁴ Any study of early Newfoundland must necessarily recognize the gap that existed between policies designed for a mere fishing station and practices adopted to deal with the reality of Anglo-Irish settlement.

The limited formal institutions established in the eighteenth century meant that local authorities necessarily had to make alternative juridical arrangements. Reception and enforcement of English law need to be considered in light of the structure of the migratory fishery and the politics of the West Country merchants. To study local governance in turn requires an examination of the social relations of production, in particular the reliance on wage labour. Many of the distinct characteristics of the island's legal system, such as the prominent role played by surgeons, appear inexplicable unless analyzed in the context of outpost life. The range of available resources – in essence who was willing and able to occupy public office – comprised a

xiii-xxxi.

¹⁴ On the other hand, to adopt an overly-inclusive model entails the hazard of watering down analysis into vague and ultimately empty generalizations. On this point, see David Sugarman, "Writing 'Law and Society' Histories," *The Modern Law Review* 55 (March 1992), pp. 292-307; R. Ross, "The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History," *William and Mary Quarterly* 3rd ser., 50 (1993), pp. 28-41.

crucial factor in the island's legal history. Finally, the core issue of power bears on the island's history as much as that of any other society. Put simply, the study of governance cannot be divorced from what Elizabeth Fox-Genovese and Eugene Genovese see as a central historical question: who rides whom and how.¹⁵

The Atlantic cod fishery dominated Newfoundland society. By the mid-eighteenth century, the migratory fishery had evolved into a hybrid of resident and English-based operations: a significant number of servants and a growing class of planters had begun to settle permanently on the island for the first time. Some year-round settlement had always existed to serve the fishery's needs but was becoming increasingly permanent. The population of settlers on the island reached 3,000 in 1720; it doubled in thirty years and nearly doubled again by 1780, to more than 10,000.¹⁶ According to John Mannion, this was an unusually slow rate of immigration and population growth. Mannion argues

¹⁵ Elizabeth Fox-Genovese and Eugene Genovese, *The Fruits of Merchant Capital* (Oxford: Oxford University Press, 1983), p. 212. On this point as it relates to Newfoundland historiography, see Stuart Pierson, "Review of Ommer, ed., *Merchant Credit*," in *Newfoundland Studies* 8, 1 (1992), esp. pp. 102-03.

¹⁶ Useful only as a rough guideline, the population data are contained in Public Record Office [hereafter PRO], Papers of the Board of Trade [BT], 6/89, p. 167, appendix 1. See also Shannon Ryan, *Newfoundland Consolidated Census Returns* (St. John's: Centre for Newfoundland Studies, Memorial University, 1992), esp. pp. 12-13 & 27-28.

that the sluggish expansion of permanent European settlement represents a salient theme in Newfoundland history.¹⁷

It is difficult to speak of immigration in any traditional sense of the term. Migration and settlement comprised three different modes: seasonal (those who resided only during the summer fishery and returned to England or Ireland each autumn); temporary (planters who stayed for a few seasons and servants contracted to serve two summers and a winter); and permanent (traders and planters with fixed capital, and servants who stayed after serving out their time).¹⁸ By 1715 the growing presence of permanent settlers was creating sustained pressure for some form of local government beyond the system of fishing admirals. The threshold of settlement needed to support basic governmental institutions had been crossed well before the first appointment of a governor and justices of the peace in 1729.

The island's social structure differed considerably from that of Georgian England or colonial America. Newfoundland divided socially into three distinct groups: merchants, planters, and servants. No discernible middle class or community of

¹⁷ John Mannion, "Introduction," in J.J. Mannion, ed., *The Peopling of Newfoundland: Essays in Historical Geography* (St. John's: Institute of Social and Economic Research, 1977), pp. 1-14.

¹⁸ On the patterns of residence and settlement in Newfoundland, see C. Grant Head, *Eighteenth Century Newfoundland: A Geographer's Perspective* (Toronto: McClelland and Stewart, 1976), pp. 82-100; W. Gordon Handcock, *Soe longe as there comes noe women: Origins of English Settlement in Newfoundland* (St. John's: Breakwater, 1989), pp. 91-120

established farmers existed in the eighteenth century. The family did not begin to become the dominant social unit until the late eighteenth century. Prior to 1800, capital relied predominantly upon the wage labour supplied by servants contracted out from English and Irish ports, many of whom had no ties or experience with the fishery. Dominated by young, single men, the migratory fishery had limited demands for women's labour. For most of the eighteenth century, women made up less than a third of the total population.¹⁹

At the top of this society, a caste of British merchants dominated the fishery. Based primarily in Devonshire and Dorset, they controlled the flow of capital and sold the extensive supplies needed each spring, such as food provisions, fishing gear, clothing, and alcohol. Newfoundland had a carrying-trade operated by sack ships, as well as persistent interlopers from New England, but the West Country merchants commanded the bulk of

¹⁹ The summary in this and the following paragraphs necessarily simplifies the complex nature of the island's society and economy. For detailed discussions of socio-economic developments in the eighteenth century, see, *inter alia*, Head, *Eighteenth Century Newfoundland*, esp. pp. 83-94, 100-32, 255-58; Keith Matthews, *Lectures on the History of Newfoundland, 1500-1830* (St. John's: Breakwater, 1988), chs. 14-15; Gerald Sider, *Culture and Class in Anthropology and History: A Newfoundland Illustration* (Cambridge: Cambridge University Press, 1986), chs. 1-3; Handcock, *Origins of English Settlement in Newfoundland*, esp. pp. 243-57; Shannon Ryan, "Fishery to Colony: A Newfoundland Watershed, 1793-1815," in P.A. Buckner and D. Frank, eds., *The Acadiensis Reader, Volume One: Atlantic Canada Before Confederation* (2nd ed., Fredericton: Acadiensis Press, 1990), pp. 138-56; Sean Cadigan, *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland, 1785-1855* (Toronto: University of Toronto Press, 1995), chs. 2-4.

the fishery's capital. They met each August to determine, or break, the price to be paid for cured salt codfish, which they further influenced through the fish culler employed to grade the quality of its cure. After their accounts were settled at the end of the fishing season, most merchants returned to England, where some of them, such as the Lesters of Poole, were prominent members of the gentry.

Planters were middlemen who drew on the merchants' capital and contracted wage labour, though merchants also hired servants directly. Typically, planters owned inshore fishing vessels manned by servants hired for set wages. They were divided between those who settled in Newfoundland and others, known as bye-boat keepers, who came over each summer; but both performed essentially the same economic roles as merchant client and fishing master. By the mid-eighteenth century, their ventures had become largely dependent on the merchant credit: each spring a planter borrowed from a merchant, usually via a local agent, the necessary supplies for the summer fishery; in return he was bound to sell all of his catch only to that merchant's firm. Since merchants influenced both the cost of provisions and the price paid for codfish, planters often found themselves in debt when their accounts were settled in the autumn. Forced to obtain further credit to procure sufficient winter supplies or a passage back to the British Isles, some of them fell into a cycle of debt and dependence in which fish and provisions formed the sole

currency. In order to protect their interests, planters wherever possible searched for ways to cut labour costs.

Servants supplied virtually all of the labour in the fishery. Craftsmen were regularly hired for monthly wages, but no class of artisans emerged until the nineteenth century. Workers in Newfoundland were commonly engaged in England or Ireland in the spring – many were also contracted out locally as needs arose – to serve in the Newfoundland fishery for two summers and a winter for annual wages ranging from ten to twenty pounds. Wage labour dominated the means of production; servants resisted attempts to impose a system of shares. Usually written as a shipping agreement, the covenant stipulated the servants' duties and the terms of service.²⁰ Masters were expected to provide basic services, such as accommodation, as well the servants' passage back to their port of origin. Though some of these obligations became codified in statutory law, others remained unwritten customs. Each spring, for example, servants were expected to sign on the doctor's books of a local surgeon, chosen

²⁰ A standard shipping paper reads: "Then I Thomas Leaman agreed and shipped myself with Mr. William Collens for this Winter, and the next Summer ensuing, and I am to do the best of my endeavour for the good of the voyage; and in consideration of my due performance, I am to have for my wages the sum of £26 sterling; and, after allowing my Country charges, to have the balance of my account in good bills of exchange. To be clear the 20th of September 1788." This document is printed in Sheila Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland, 1792-93* (Wilmington, DE: Scholarly Resources, 1975), p. 427.

by the master, and pay a fee at the end of the fishing season, usually between five and ten shillings.

Working conditions were exacting. During the height of the fishing season, between late June and mid-August, servants could work as much as eighteen to twenty hours a day to take advantage of the run of fish. They were typically organized into crews of six: four men fished in small vessels under the direction of a boats-master; the other two worked ashore preparing the fish under the supervision of skilled splitters and salters. Living conditions were at times brutal, most foodstuffs had to be imported, and there were sporadic reports of near starvation in remote outports. When servants settled up with their masters in the autumn, the stakes were high for both parties.

The relations of production and exchange contained inherent tensions. A fundamental cleavage separated servants from those who contracted their labour. The point of economic exchange – where masters had to settle accounts and to pay outstanding wages – was a forum in which competing interests regularly collided. From the servants' standpoint, securing their wages represented the most important goal. They also brought informations to acquire favourable working conditions, which involved complaints for breach of contract alleging, *inter alia*, that their masters had acted improperly, broken customary arrangements, or had beaten them severely. Servants utilized a range of extra-legal,

and largely unrecorded, measures to promote their interests: from refusal to work or intimidation of their master, to desertion or assault, and to the seizure of goods to secure their wages.

From the masters' viewpoint, the chief objective was to limit costs generally and servants' wages in particular. Masters routinely brought suits against servants for breach of contract on the grounds that the specific duties outlined in the shipping paper were either completed improperly or left undone. Masters often accused servants of general neglect of duty and/or insolence in order to justify withholding all or part of their wages. In some cases, they seized the season's catch as it lay ready for transport, sold it to another merchant agent, and thereby avoided splitting the proceeds to pay for their servants' wages. Masters commonly relied upon the more effective paternalistic practice of using alcohol and other provisions to control labour costs. By advancing servants their wages during the fishing season, usually through the sale of rum, masters could ensure that their servants had little or no claims for wages left when accounts were settled.

Controlling the island's indentured labour represented the government's most pressing concern. With a preponderance of young, unattached men - labouring under harsh conditions and with few local ties to kin - the island had the prime ingredients of a violent society. The penal regime focused primarily on the task of keeping unruly servants in check without disrupting the

fishery. Magistrates therefore gauged sentences cautiously, opting to impose fines whenever feasible. But when offenders posed a threat to the social order, justices ordered severe public whippings designed to send an unequivocal message to troublesome workers. Oscillating between forbearance and retribution, the courts enforced a penal code with minimal cost to maximum effect.

The Custom of the Country

Customary law occupied the centre of the island's legal culture. The custom and usage that emerged in the eighteenth century formed a recognized aspect of the law enforced in local courts. As an unwritten law, a particular custom represented a variant of the common law, provided that it met the criteria of antiquity, continuance, certainty, and reasonableness.²¹ John Reeves, the island's first chief justice, argued that lawful customs had a preeminent place in Newfoundland's constitution:

I have repeatedly held, that the Custom and Usage of Newfoundland should have the ascendancy whenever they can be ascertained to have the genuine Property of Custom and Usage....I am satisfied that for making people happy no less than for doing Justice, nothing is more necessary than

²¹ Giles Jacob, *A New Law-Dictionary: Containing the Interpretation and Definition of Words and Terms used in the Law*. J. Morgan, ed. (10th ed. London: W. Strahan and W. Woodfall, 1783). I thank Professor Douglas Hay for this reference.

preserving inviolate those Rules of Action to which they have been long habituated.²²

At the local level, magistrates routinely invoked custom in their decisions. For example, the same year as Justice Reeves spoke in parliament, Robert Carter, a justice of the peace in Ferryland district, explicitly cited customary law in court. After dismissing a complaint brought by five servants against their master for breach of contract, Carter decreed:

Ordered that Pitlam, Frady, Quirk, & Evoy, be reprimanded and sent back to there duty they being youngsters and not acquainted with the custom of the country, and that Daniel McGrath be punished with twelve lashes and remain in prison, it appears he was the ringleader.²³

Although Carter and Reeves asserted the authority of custom in different settings, they both presumed the existence of an indigenous body of law that lay beyond the realm of statute or prerogative writ.

The customs to which Reeves and Carter referred developed within the common law tradition. To be legally binding, a custom had to be neither arbitrary nor contrary to the public good. Lawful customs could not contradict the prerogative of the Crown nor abrogate a positive statute. Equally important, they could

²² *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 148 [testimony of John Reeves], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 386.

²³ *McGrath, et al. v. Witycombe*, 15 July 1793, Ferryland District (Provincial Resource Library, Newfoundland Collection [hereafter PRL], 340.9/N45 VT, Rare Books).

not be ambiguous or inconsistent, but had to be clearly established and obligatory. To be recognized in law, a custom had to be ancient in the sense of existing from time immemorial, i.e. "time whereof the memory of man runneth not to the contrary." Whereas the test of the fact of antiquity was left to a jury, the question of legality remained the prerogative of the bench. Custom was in theory subject to the doctrine of *strici juris*: it did not become law until recognized by a court. It is important, then, to stress at the outset that the customs enforced in eighteenth-century Newfoundland were for the most part neither illegal nor unusual under English jurisprudence.²⁴

The type of custom explored in this dissertation had a number of distinct characteristics. First, it was not popular, in the sense of being a product of plebeian culture, nor was it an early-modern construct used in defense of encroaching capitalist forms of regulation. Customary laws and courts established in Newfoundland were constituted, manned, and overseen by officials (naval and civil magistrates), and private citizens from the propertied ranks of society (merchants and prominent townspeople). The customs discussed in the following chapters bear little resemblance to the types of cultural expression

²⁴ On the relationship between custom and common law, see A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987), esp. pp. 362-68; R.J. Walker and M.G. Walker, *The English Legal System* (3rd ed. London: Butterworths, 1972), ch. 3; Carleton Kemp Allen, *Law in the Making* (7th ed. Oxford: Clarendon Press, 1964), ch. 2.

described by historians such as E.P. Thompson, Bob Bushway, or Robert Malcolmson.²⁵ In short, this thesis deals with legal – not popular – forms of custom.

Second, custom was at once unwritten law and state law. This thesis rejects the basic interpretive dichotomy of state law (statute) versus folk law (unwritten law).²⁶ State law in early Newfoundland relied extensively upon unwritten law: custom and common law formed the foundation of governance; for most of the eighteenth century, statute law was of secondary importance. The case of Newfoundland suggests that statutory codification was not a precondition of a colonial state; rather, the resiliency of the customary legal system actually facilitated state formation. Naval governors were relatively free to respond to local problems using whatever resources they deemed necessary. Without the constraints of the panoply of English institutions, the island's government was divested of many obligations and processes of accountability. And once the naval regime acquired a basic

²⁵ E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1991); Bob Bushway, *By Rite: Custom, Ceremony and Community in England 1700-1880* (London: Junction Books, 1982); Robert Malcolmson, *Life and Labour in England, 1700-1780* (London: Hutchinson, 1981), ch. 4.

²⁶ A recent collection of essays treats unwritten law and folk law as largely one and the same thing. Alison Dundes Renteln and Alan Dundes employ a series of dichotomies – e.g. oral versus written, flexible versus fixed – to construct an inclusive definition of folk law. See Alison Dundes Renteln and Alan Dundes, "What is Folk Law?" in Dundes Renteln and Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of Lex Non Scripta* (Madison: University of Wisconsin Press, 1995), esp. pp. 2-4.

bureaucratic infrastructure in the mid-eighteenth century, it had the means to collect, preserve, and legitimize its administration. The fact that many aspects of this customary regime were informal did not make them ineffective.

Lastly, custom was rarely ancient in the conventional use of the term. Although some customs of the fishery stretched back to the beginnings of European presence in the sixteenth century, most of the practices that became part of the colonial state first appeared regularly only after 1729. The time needed for a tradition to become an entrenched custom was not as long as some historians have admitted. Eric Hobsbawm's stimulating analysis of the invention of tradition allows for too large a gap between genuine customs and invented traditions.²⁷ In Newfoundland, ancient and recent elements of law melded together to form the basis of the naval state. What made a practice legitimate was how it was perceived by contemporaries, not whether it appears to the modern eye to be a fabrication. When Admiral Mark Milbanke looked back on Newfoundland's legal system, he saw the surrogate court as an institution dating from time immemorial. According to a report he presented in 1789, it had been operative long before the passage of the 1699 act regulating the fishery.²⁸ Yet, as we

²⁷ See Eric Hobsbawm, "Introduction: Inventing Traditions," in E. Hobsbawm and R. Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983), pp. 1-14.

²⁸ *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), f. 22, in Lambert, ed., *House of Commons Sessional*

shall see, the surrogate jurisdiction existed in an inchoate form until the 1730s and was formally constituted only in 1749. The creation of custom was no more a sham than the making of any other type of authority.

Still, with no governor until 1729, no assizes until 1750, and no local legislature until 1832, Newfoundland obviously did not follow the trends that have long occupied legal historians of British colonies. Although this places some limitations on the study of law, it also presents an exceptional opportunity to view the formation of a colonial state in a society where the typical forms of early-modern social control were absent. Eighteenth-century Newfoundland represents an instructive case-study of how formal and informal sources of authority can coalesce to form an effective system of governance. It demonstrates the malleability of the common law tradition in the face of a social environment that demanded significant adaptation to local conditions. The question addressed in the following chapters is not why was law in Newfoundland distinct but rather how did it function with such a limited range of formal institutions.

Rethinking Newfoundland History

Newfoundland historiography presents the eighteenth century as the age when law came to the island through statute and

Papers, Volume 90: Newfoundland, p. 86.

prerogative writ. In charting the progress up the rungs of the reform ladder, historians have defined law almost exclusively in terms of its relative absence before 1791. Overshadowing every study of state formation has been the fact that Newfoundland did not acquire representative government until 1832. While they generally agree on these premises, historians have sharply debated whether this delayed institutional development was part of a pattern of callous neglect by the British government or whether it formed a natural byproduct of a primitive society. The former interpretation represents the orthodox view of the first wave of historiography. Known popularly as the retarded development school, it uncritically accepted the rhetoric of the political reformers who campaigned for a new constitution in the 1820s. Drawing upon liberal ideology, traditional historians believed that the absence of English law and institutions had undermined the island's economic development and denied Newfoundland settlers their constitutional birthrights. Variants of this perspective have emerged in marxist as well as whig historiography, both of which claim that naval government was inherently weak and corrupt.²⁹

²⁹ This interpretation reached its zenith with A.H. McLintock, *The Establishment of Constitutional Government in Newfoundland, 1783-1832: A Study of Retarded Colonisation* (London: Longmans, Green, 1941). Its roots stem from the seminal work, D.W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records* (Belleville: Mika, 1972 repr. of 1895 ed.). This model dominated scholarship until the early 1970s, when it was discredited by Keith Matthews, but it still persists in various forms. Patrick O'Flaherty,

On the other hand, revisionist historians have argued that the island had a limited legal system because it had limited needs. The backward fishing society did not warrant the panoply of English law granted to colonies such as Nova Scotia. Pioneered by Ralph Lounsbury, this position was modified by Keith Matthews but has been resurrected by Christopher English. Whereas Matthews saw the island's customary regime as a highly illegal yet largely functional judiciary, English has argued that the colonial state scarcely existed at all prior to 1815. While stressing that his conclusions are tentative, English has separated statutory law from the humble customs of the outports, and his initial work on Ferryland district follows the path blazed by Lounsbury.³⁰

for example, simply characterizes the entire era as a century of anarchy. See, *inter alia*, Keith Matthews, "Historical Fence Building: A Critique of the Historiography of Newfoundland," *Newfoundland Quarterly* 74 (April 1978), pp. 21-29; Patrick O'Flaherty, *The Rock Observed: Studies in the Literature of Newfoundland* (Toronto: University of Toronto Press, 1979), chs. 2-3; Jerry Bannister, "The Issue of Class in the Writing of Newfoundland History," pp. 134-44; Peter Neary, "The Writing of Newfoundland History: An Introductory Survey," in James Hiller and Peter Neary, eds., *Newfoundland in the Nineteenth and Twentieth Centuries: Essays in Interpretation* (Toronto: University of Toronto Press, 1980), pp. 3-16.

³⁰ Ralph Lounsbury, *The British Fishery at Newfoundland, 1634-1763* (New Haven: Yale University Press, 1934); John Higgins, "How the Rule of Law Came to Newfoundland," *Chitty's Law Journal* 5, 8 (October 1955), pp. 192-200; Matthews, *Lectures on the History of Newfoundland*, ch. 22; Christopher English, "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832," in Knafla and Binnie, eds., *Essays in Modern Legal History*, pp. 73-98; Christopher English, "Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92," *Manitoba Law Journal* 32 (January 1996), pp. 57-78; Christopher English, "The Reception of Law in Ferryland District, Newfoundland, 1786-1812." (Paper presented to the Canadian Historical Association, June 1996).

Regardless of the differences among Newfoundland historians, their work shares a common approach to the island's legal development. Statute law and local customs are still treated as inherently separate entities: the British government used the (enlightened) former to supplant the (backward) latter. The accepted chronology presents a rigidly legalistic picture: anarchy reigned prior to the appointment of a governor and civil magistrates in 1729; thereafter a crude and illegal customary system operated for two generations; in 1787 this regime suddenly collapsed when an appeal in England undermined its legitimacy; in 1791-92 the British government bestowed reforms that overhauled the judiciary; and after 1815 the obsolete system crumbled in the face of an ascendant bourgeoisie and an imperial government which favoured reform.

The fixation on written law inherent in this approach has not changed significantly since the nineteenth century. Both William Carson and Patrick Morris argued that the absence of a legislative assembly meant that the island's settlers were denied law. Left to govern itself with only a handful of archaic statutes enacted in England, eighteenth-century Newfoundland fell into chaos and anarchy.³¹ In a similar vein, Christopher English has limited state law to two sources – statute and prerogative

³¹ William Carson, *Reasons for the Colonizing the Island of Newfoundland* (Greenock: William Scott, 1813), pp. 11-13; Patrick Morris, *Remarks on the State of Society, Religion, Morals, and Education at Newfoundland* (London: A. Hancock, 1827), pp. 10-13.

writ – and he argues that the island's enfeebled state left the outports to depend upon private means of dispute resolution.³² Even the best of recent work in Newfoundland history focuses overwhelmingly on statute law and imperial policy. Sean Cadigan's comprehensive monograph treats common law and local custom as largely insignificant, and overemphasizes the impact of statutory law on local governance.³³ Although Cadigan discredits many of the stubborn myths inherited from the nineteenth-century reformers, he still sees law primarily through the prism of statute.

An alternative interpretation is presented in this dissertation. It rejects the notion that the system that operated from 1699 to 1791 was necessarily illegal, illegitimate, or ineffective. Law did not arrive in neat stages but was continually established, negotiated, and contested. Episodes of reform and reaction – the most important of which was the feud between the justices and the fishing admirals in 1729-32 – illustrate how effective governance emerged out of the struggle for authority. Such contests were not between law and lawlessness but among competing sources of law. Conflict and compromise determined much of what was enforced or disregarded at the local level.

³² English, "Newfoundland's Early Laws and Legal Institutions," pp. 56-57, 78.

³³ Cadigan, *Merchant-Settler Relations in Newfoundland*, pp. 27-32.

No binary division existed between naval and civil authority or written law and local custom. Rather, the legal system comprised an amalgam of four sources of law: common law, statute law, prerogative writ, and local customs. Despite the limited institutions allowed under statutory law and imperial policy, an effective system of governance, based on customs adopted under the rubric of the common law, developed to meet the needs of those in power. This legal regime guided the administration of justice from the 1730s, when the royal navy became the island's dominant administrative force, until a reform movement undermined its authority in the 1820s. While its structure differed markedly from that of other colonial regimes, its function remained essentially the same. Power and authority flowed through institutions and customs designed to uphold the social order and to enforce the rule of naval government.

The case of early Newfoundland indicates that state formation was based on the available social, professional, and material resources. On the one hand, no landed gentry or middle class existed to fill the bench or magistracy, nor were religious clergy yet entrenched throughout the island. The prominent fish merchants were too busy during the short fishing season to become actively involved in local government and most of them returned to England each autumn. Equally significant, the lack of a legislature, local press, and trained lawyers left the island without the tools typically used in common law jurisdictions to

operate and monitor civil courts. Not until 1820 did a bourgeois public sphere finally appear with the advent of an independent press. The rise of bourgeois culture fostered a reform movement that revolutionized local politics in the late 1820s and eventually undermined naval government.

On the other hand, the royal navy filled the basic needs for the administration of law. English historians have thoroughly discredited the traditional view of the Georgian navy as corrupt and inefficient, and its position in Newfoundland requires a complete reappraisal. Far from conforming to the caricature of quarter-deck despotism, eighteenth-century naval administration effectively managed the largest industrial organization in the western world.³⁴ The commodores of the annual squadron proved willing and able to administer law and government at St. John's. And, as we shall see, naval officers convened courts throughout the outport districts, often alongside civil magistrates, and sat on the bench as surrogate judges.

The royal navy was the engine of law and authority in Newfoundland. Its administrative infrastructure formed the mainstay around which the island's district system was built. The

³⁴ See, *inter alia*, Gerald S. Graham, *Empire of the North Atlantic: The Maritime Struggle for North America* (2nd ed. Toronto: University of Toronto Press, 1958); Daniel Baugh, *British Naval Administration in the Age of Walpole* (Princeton: Princeton University Press, 1965); Daniel Baugh, *Naval Administration, 1715-50* (London: Navy Records Society, 1977); and, most importantly, N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (Glasgow: William Collins, 1986).

watershed in the island's legal development – Commodore Rodney's reforms in 1749-51 – drew the royal navy deeply into the local administration of justice and precipitated the emergence of what I have termed a "naval state." The other readily available resource was surgeons, many of whom filled the ranks of the civil magistracy and replaced the coroner's office as the principal agency for investigating homicides. Authority remained diffused and justice varied from district to district, but governors exerted a dominant influence whenever they chose to intervene locally. In the second half of the eighteenth century, the courts reached into nearly every outport along the Anglo-Irish coast.

The chapters employ two basic approaches. Chapters Two through Five examine the structure and operation of the colonial state and the judicial system. They use case-studies and textual analysis to investigate the salient developments from the passage of King William's Act in 1699 to the establishment of representative government in 1832, tracing the long rise and rapid decline of the royal navy in Newfoundland. They divide this era into five periods: the reliance upon *ad hoc* arrangements (1699-1728); the appointment of a governor and the contested imposition of a civil magistracy (1729-1748); the revolution in government and the creation of local bureaucracy (1749-1751); the apogee of the naval state (1752-1815); and the emergence of a colonial reform movement which challenged the customary regime

(1816-1832). Cycles of war and peace in large measure determined the course of legal development. Whereas wars prevented the royal navy from becoming significantly involved in the island's governance, outbreaks of peace saw a resumption of its role in the administration of justice. The judicial system fell into relative atrophy during the War of Jenkins' Ear and the Seven Year's War, for example, but developed remarkably during peace. All of the major legal reforms occurred during periods of peace, with the exception of the American War of Independence, during which concerns over the defence of Newfoundland precipitated an expanded military presence. The French Revolutionary and Napoleonic Wars engendered a socio-economic transformation that spawned the political reform movement.

Chapters Six and Seven examine how the naval state enforced its authority through the administration of law. They address the penal system at the St. John's assizes and in the district courts from 1750 to 1792. Chapter Six assesses the use of mercy and terror at the assizes in light of the broader patterns of punishment. It places capital punishment in the context of a society with marked inequality and sectarian divisions. Hangings assumed a political as much as a penal significance, as local authorities responded to fears of sedition among the Irish Catholic community. Chapter Seven studies the use of noncapital punishment generally, and whippings in particular, in the context of master-servant relations and paternalistic authority. It

argues that the era of the naval state saw a significant use of corporal punishment designed to discipline servants working in the fishery. Far from being a blunt weapon of class rule, whippings and other penal sanctions were carefully employed to enforce the social order while providing limited costs and disruptions to the fishery.

The decision to focus on punishment as an aspect of governance reflects three factors. First, the operation of the courts merits in-depth examination because judicial administration constituted the principal means through which official authority was exercised. With neither a legislature nor a town corporation, Newfoundland had no formal political bodies outside of the governor's office, the sessions held by justices of the peace, and the grand jury. Second, within this system, punishment comprised a central feature of judicial business. The endemic fears of social unrest voiced by merchants and officials are best explored through a survey of pardons and punishments. This approach confronts governance at arguably its most important point: the discretionary use of legal violence. Third, other forms of social regulation – e.g. masters' extra-legal efforts to exert control over their servants – remain extremely difficult to discern from the existing archival records. Potentially rich topics, such as the use of alcohol to manage social relations, cannot be mined very deeply. The records of punishments meted out by the courts offer one of the few avenues through which to

explore the tensions that lay at the heart of Anglo-Irish society.

Finally, this study probes the relationship between imperial policy and colonial governance. Characterized by pragmatism, the British government's administration of Newfoundland tacitly acknowledged that institutions had emerged to meet local needs. Informed that settlement, law, and government operated year-round despite the island's status as a mere fishing station, London resisted taking the necessary steps to bring official policy closer in line with colonial practice. Yet local courts were never reduced to club law or its variants.³⁵ When legal reforms were granted in 1791-92, the new constitution recognized the customary regime that had been in force for over a generation. The gap that existed between official policy and local practice was a defining feature of pre-1832 Newfoundland.

³⁵ On club law, see Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Vancouver: University of British Columbia Press, 1994), ch. 1. For an attempt to apply the model of club law to Newfoundland, see Lounsbury, *British Fishery at Newfoundland*, pp. 352-55.

Chapter 2

Justice without Magistrates:

The Failure of the Fishing Admiral's Constitution

The image of justice in early Newfoundland remains captured in a famous caricature written by D.W. Prowse. In a statement that has become part of the island's national mythology, Prowse asserted:

I will try and describe the fishing admiral, as he appeared to our ancestors, clothed, not in the dignity of office, not in the flowing judicial robes, not in the simple and sober black of the police magistrate, but in the ordinary blue flushing jacket and trousers, economically besmeared with pitch, tar and fish slime, his head adorned with an old sealskin cap, robbed from an Indian, or bartered for a glass of rum and a stick of tobacco. The sacred temple of law and equity was a fish store, the judicial seat an inverted butter firkin. Justice was freely dispensed to the suitor who paid the most for it. In the absence of a higher bribe, his worship's decision was often favourably affected by the judicious presentation of a few New England apples.¹

Prowse had never witnessed any such scene, nor had he ever met a fishing admiral. He was repeating an account written two generations earlier by Patrick Morris, a political reformer who also had never observed a fishing admiral's court.² Morris was

¹ Prowse, *History of Newfoundland*, p. 226. On Prowse's influence, see George Story, "D.W. Prowse and Nineteenth-century Colonial Historiography," in Shannon Ryan, ed., *Newfoundland History 1986: Proceedings of the First Newfoundland Historical Society Conference* (St. John's: Newfoundland Historical Society, 1986), pp. 34-45.

² The passage, which Prowse copied practically verbatim, appears at Patrick Morris, *Arguments to Prove the Necessity of Granting to Newfoundland a Constitutional Government* (London: Hunt & Clarke, 1828), p. 17.

himself relying on an earlier history written by Lewis Amadeus Anspach.³ Both Morris and Anspach, in turn, had been heavily influenced by John Reeves' seminal *History of the Government of the Island of Newfoundland*, which repeated second-hand accounts of alleged corruption.⁴ The problem, of course, is that each of these writers had his own agenda, leaving historians with no reliable secondary source. We know exceptionally little about how the fishing admirals actually conducted themselves, and even less about the role others might have played in maintaining law and order.

This chapter confronts the question of how law was administered during the era of the fishing admirals. Before the appointment of a governor and magistrates in 1729, there were no constables, justices of the peace, nor any other civil law officer in Newfoundland. The British government constituted no

³ Although Anspach had served as a justice of the peace and a surrogate judge from 1802 to 1812, his description of judicial administration drew heavily upon local folklore. Published in 1819, his account is the likely origin of Prowse's celebrated portrait of the fishing admirals, though Anspach included the justices of the peace in his indictment: "It was said of the Fishing Admirals, and of the Justices of the Peace in the out-harbours, that their decisions were uniformly characterized by the grossest partiality and injustice...and as to the resident Justices, a quarter-cask of Lisbon or Madeira, a present of some choice spirits, nay, a barrel of apples, a few bottles of West-Indian pickles...were the usual grounds of the decisions of those administrators of Justice." See Lewis Amadeus Anspach, *A History of the Island of Newfoundland* (London: T. & J. Allman, 1819), p. 177.

⁴ John Reeves, *History of the Government of the Island of Newfoundland* (New York: John Reprints, 1967 repr. of 1793 ed.), pp. 144-54. For a discussion of the influence of Reeves' history, see O'Flaherty, *Studies in the Literature of Newfoundland*, ch. 4.

courts other than the sessions of the fishing admirals and the appeals to the naval commanders. Based on the assumption that the island was a mere fishing station with no permanent or even year-round settlement, official British policy saw no need for law because there was no demand. In other words, without property, in the Lockean sense of both persons and capital, there could be no law. This perspective may have fit the seventeenth-century migratory fishery but did not reflect the society that had developed by 1715.

The fishing admiral's constitution failed to meet the needs of most merchants and planters working in Newfoundland. Within a year of the passage of a statute in 1699, its provisions were contravened or ignored. Thereafter a thirty-year period of petitions, reports, and complaints about the inadequacies of the island's constitution failed to move the British government to introduce new legislation. At the local level, however, events transcended statute and official policy. Informal courts and customs developed as substitutes for English institutions. A series of *ad hoc* arrangements addressed the island's basic needs and established the precedents for the legal system that later became firmly entrenched. The most important aspect of this process was the judicial function of the royal navy, whose officers extended their role well beyond the appellate jurisdiction authorized by statute law.

Newfoundland was distinct in its absence of the conventional fixtures of the colonial state, but those living on the island still drew on a shared legal culture and common law tradition. In 1723-24 a committee at St. John's independently established a local court to dispense justice, for example, and individual initiatives by settlers such as William Keen ensured that steps were taken to combat lawlessness after the royal navy departed each autumn. Yet the naval commodore and his officers represented the only force capable of consistently enforcing English authority throughout the outports. They eventually became the driving force behind efforts to establish relations with the Beothuck and to rein in renegade fishing admirals. In essence, to study the legal history of early Newfoundland is in large measure to chronicle the presence of the royal navy. Despite the fishing admirals' celebrated position in the island's history, they did not figure prominently in its legal development.

King William's Act and Imperial Policy

The history of law in eighteenth-century Newfoundland begins with the 1699 Act to Encourage Trade to Newfoundland, which formed the statutory basis of the island's constitution until 1791. Known popularly as King William's Act, it codified the customary regulations of the fishery established in the Western

Charters first granted to English merchants in 1634.⁵ When the newly-created Board of Trade moved to draft legislation for Newfoundland, merchants from Devonshire petitioned that no governor be sent to the island and that the fishery continue to be governed according to the customs of the migratory fishery.⁶ The 1699 statute accordingly cited the proviso according to ancient custom – a discourse that figured prominently in the development of local law – to legitimize the rule of the fishing admirals, upon whom the legal system relied.

King William's Act confirmed the tradition that the master of the first English ship to arrive in a Newfoundland harbour after March 25th was by right the admiral of that outport for the upcoming fishing season. The second and third masters then became the vice- and rear- admirals respectively. Admirals had the choice of the best fishing rooms – i.e. tracts of the waterfront used for wharves, flakes, and stages – and were empowered to

⁵ On the Western Charters and the seventeenth-century fishery, see Keith Matthews, *Collection and Commentary on the Constitutional Laws of Seventeenth Century Newfoundland* (St. John's: Maritime History Group, 1975), pp. 169-79; Gillian Cell, *English Enterprise at Newfoundland, 1577-1660* (Toronto: University of Toronto Press, 1969); Pope, "The South Avalon Planters, 1630-1700," ch. 4.

⁶ Public Record Office, London [PRO], Colonial Office Papers, series 194 [CO 194], vol. 1, p. 17 (petition from merchants of Barnstaple, 30 November 1696). On the Board of Trade in the context of imperial administration, see Ian K. Steele, "Metropolitan Administration of the Colonies, 1696-1775," in Jack Greene and J.R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution* (Oxford: Basil Blackwell, 1991), pp. 9-14; John Bower, *The Colonial Office Group of the Public Record Office, London, with Particular Reference to Atlantic Canada* (Ottawa: National Archives of Canada, 1974), pp. 1-4.

settle disputes over the possession of the remaining premises. Like the earlier charters, the act contained regulations for the conduct of the fishery, such as prohibitions against damaging stages, stealing fish nets, or selling alcohol on Sunday.⁷

It also reaffirmed the existing method for dealing with serious criminal offences. Suspected felons in Newfoundland had to be brought to England for their trial. King William's Act stipulated that all robberies, murders, felonies, and capital crimes committed in Newfoundland each year after March 25th, were to be tried, determined, and judged in any county of England, under assize commissions of oyer and terminer and gaol delivery. These offenses were to be tried according to the same laws and in the same manner as those committed in England. The task of apprehending offenders and arranging for their transport rested with the fishing admirals, who were further required to preserve the peace and good government in their harbour, to ensure that all of the act's regulations were enforced, and to keep a written journal for each fishing season. To augment this rather limited legal regime, King William's Act offered one significant reform: the naval commanders of the warships sent to patrol Newfoundland each summer could act as appeal judges to the fishing admirals'

⁷ 10 & 11 Wm. III, c. 25, ss. 1-4, 12 & 16 (1698-99). For the complete text of the sections of King William's Act relating to the island's legal system, see below, Appendix 2.1.

decisions.⁸ As we will see, the implications of this provision extended much further than the Board of Trade had originally envisaged.

King William's Act reflected imperial policy toward Newfoundland. The British government viewed the island not as a colony but rather as a seasonal fishing station to be used solely for the benefit of the West Country fishery.⁹ Although never a productive source for sailors, Newfoundland was seen as a nursery for seamen – one in five men brought over each summer had to be a green-man – and the Admiralty played an important role in its administration.¹⁰ Prior to 1811 the prerogative to settle and to hold property was in theory wholly subordinated to the needs of the fishery, although in practice property rights were recognized and enforced. Settlement continued to expand throughout the eighteenth century – often supported by the West Country

⁸ 10 & 11 Wm. III, c. 25, ss. 13-15 (1698-99).

⁹ G.S. Graham, "Newfoundland in British Strategy from Cabot to Napoleon," in R.A. MacKay, ed., *Newfoundland: Economic, Diplomatic, and Strategic Studies* (New York: AMS Press, 1979 rep. of 1946 ed.); John G. Reid, "1686-1720: Imperial Intrusions," in P.A. Buckner and J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Fredericton and Toronto: University of Toronto Press and Acadiensis Press, 1994), pp. 85-93.

¹⁰ On the royal navy and Newfoundland generally, and the relatively few sailors it recruited from the fishery in particular, see Gerald S. Graham, "Fisheries and Sea Power," in G.A. Rawlyk, ed., *Historical Essays on the Atlantic Provinces* (Toronto: McClelland & Stewart, 1967), pp. 7-16; David Starkey, "The West Country – Newfoundland Fishery and the Manning of the Royal Navy," in Robert Higham, ed., *Security and Defence in South-West England before 1800* (Exeter: University of Exeter Press, 1987).

merchants and traders – though its legal status remained uncertain and governors made sporadic efforts to restrict property use to the fishery.¹¹

While some year-round habitation was inevitable and indeed necessary for the operation of the migratory fishery, the trappings of colonial government were not. Conventional wisdom held that the island's limited development did not merit the institutions normally allocated to settled colonies. In his treatise on the British empire, John Oldmixon pronounced that in Newfoundland, "there is no need of much Law, for the inhabitants have not much land and no money."¹² British officials took a pragmatic view toward Newfoundland, remaining skeptical about granting the island its own legislature right up to the eve of representative government in 1832.¹³ As C.A. Bayly has argued, the impact of political ideology in Britain on colonial administration has been exaggerated. London was invariably wary

¹¹ Although A.H. McLintock overstated the case, the potential of British policy to restrict property and settlement rights in Newfoundland has been noted by Keith Matthews and, most recently, Sean Cadigan. See McLintock, *Establishment of Constitutional Government*, ch. 3; Matthews, *Lectures on the History of Newfoundland*, ch. 7; Cadigan, *Merchant-Settler Relations*, ch. 1.

¹² John Oldmixon, *The British Empire in America* (vol. 1, London, 1708), pp. 18-19. This view recurred in William Douglas, *A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of British Settlements in North America* (vol. 1, London, 1755), p. 290.

¹³ On this point, see Jerry Bannister, "The Campaign for Representative Government in Newfoundland," *Journal of the Canadian Historical Association* 5 (1994), pp. 19-40.

of initiating policies which would place added burdens on the treasury.¹⁴ Between 1689 and 1763 parliament passed relatively few acts relating directly to the management of individual colonies. In the wake of the consolidation of the navigation system in 1696, the English government focused on defending specific domestic industries against foreign and colonial rivals. By protecting the West Country interest in the cod fishery, King William's Act formed part of a broader policy of using statutory law to promote English commerce.¹⁵

The 1699 Act has been universally decried as an unmitigated failure. Its provisions did not correspond to the island's actual economic development – the increasingly complex cod fishery encompassed migratory and resident operations, West Country merchants and year-round settlers – and Keith Matthews argued that it was generally ignored in practice.¹⁶ With regard to judicial administration, King William's Act bequeathed an array of problems. It prescribed no specific penalties or punishments for those who broke its regulations or committed crimes other

¹⁴ C.A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London: Longman, 1989), esp. pp. 194-95, 209, 236.

¹⁵ Frederick Madden and David Fieldhouse, "Imperial Policy and Legislation, 1689-c. 1760," in F. Madden and D. Fieldhouse, eds., *The Classical Period of the First British Empire, 1689-1783: The Foundations of a Colonial System of Government* (Wesport, Conn.: Greenwood Press, 1985), pp. 2-5.

¹⁶ Matthews, *Lectures on the History of Newfoundland*, pp. 89-95; idem, *Collection and Commentary on the Constitutional Laws*, pp. 199-201.

than felonies. It limited the magistracy to fishing admirals and naval commanders, neither of whom had legal commissions of the peace. Empowered simply to keep the peace, they had no specific instructions on how to issue warrants, take depositions, or bind persons in recognizance. The admirals were apparently too busy with their own fishing operations and seen as too biased in their judgments to maintain law and order. After the fishing fleet and naval squadron had left in the autumn, no legal authority existed whatsoever. The system of transporting suspected felons back to England proved extremely difficult to carry out. In most cases the logistics and costs of apprehending and incarcerating offenders, and shipping them when the fleet returned to England, outstripped the resources of both the visiting naval commanders and the fishing admirals.

The Failure of Statutory Law

A confidential report commissioned by the British government clearly outlined the problems in King William's Act. In 1701 George Larkin, an English barrister sent to assess colonial policy in North America, spent a month in Newfoundland during the height of the fishing season. Larkin traveled from Carbonear, in Conception Bay, to Fermeuse, on the Southern Shore, and spent considerable time in St. John's, where Arthur Holdsworth, master of the Dartmouth ship *Nicholas*, was admiral of the harbour. He

reported that Holdsworth openly broke the regulations in King William's Act designed to ensure that new fishermen were brought over each year, thereby undermining the policy that the island should produce an annual pool of potential recruits for the royal navy.¹⁷

All along the coast the fishing admirals neglected to hold regular courts or to keep proper journals. Larkin asserted that the admirals deliberately abandoned their duties so that the judicial work fell to the commanders of visiting warships. His report indicated that a nascent naval surrogate system had already taken root:

It hath been customary for the commander in chief upon complaints to send his Lieutenant to the several harbours and coves to decide all differences and disputes that happen betwixt commanders of merchant ships and the inhabitants and planters and betwixt them and their servants.¹⁸

Although he approved of the efforts of the current naval officers to administer law, he claimed that the courts held by most commanders had been unlawful proceedings at best. In addition to accepting bribes, officers reputedly never kept regular minute-books or registers of their decisions. Larkin compiled an abstract of the known rules and decisions and left it, along with a commission for trying pirates, to be used by future officers.¹⁹

¹⁷ A printed extract of Larkin's report appears at Prowse, *History of Newfoundland*, p. 228.

¹⁸ PRO, CO 194/2, p. 132.

¹⁹ PRO, CO 194/2, p. 132.

The report also stressed the need to appoint civil magistrates to administer law after the fleet had departed. According to Larkin, masters and servants were locked in continual battles each winter that frequently erupted into violence; he proposed that one of the prominent inhabitants in each harbour should be appointed as a magistrate. He further advised that a person with formal legal training should be sent to serve annually under the naval commodore or to settle permanently on the island as a judge advocate.²⁰ This magistrate could then summarily hear and determine all the disputes which arose each year by traveling on a circuit to the major harbours. Upon receiving Larkin's report, the Board of Trade tried to persuade the government to draft a new statute for the island's fishery. The committee of trade informed the House of Lords that nearly every clause in King William's Act was being violated because of the lack of penal sanctions and the means of enforcement.²¹ No action was taken, however, and the outbreak of the War of the Spanish Succession preoccupied the British government.²²

²⁰ PRO, CO 194/2, p. 132.

²¹ Matthews, "The West of England - Newfoundland Fishery," p. 261.

²² See James D. Alsop, "The Age of Projectors: British Imperial Strategy in the North Atlantic in the War of the Spanish Succession," *Acadiensis* 21 (Autumn 1991), pp. 30-53.

Following Larkin's report, officers began to keep some formal court records. Naval officers in this sense were the lieutenants, commanders, and captains of the royal navy squadron; occasionally this group included midshipmen who had not yet passed for lieutenant. They are not to be confused with the civilian "naval officers" appointed as recorders of ship movements in colonial ports, who were overseen by the Board of Customs Commissioners and had no affiliation with the royal navy.²³ In 1704, for example, Captain Jonathan Bridge, commander of HMS *Loo* and commodore at St. John's, convened a court along with the local fishing admirals, in which they settled the disputed title to a plantation in Ferryland.²⁴

Propertied interests recognized the need for local government. In 1705 a group of prominent fish merchants petitioned the British government to establish some type of magistracy in Newfoundland. Whitehall asked the Board of Trade for advice on the issue of appointing constables or other magistrates.²⁵ With several outports captured as a result of French raids the previous year, the House of Commons also ordered the Board of Trade to present an account of the Newfoundland fishery. Issued in 1706, the report reiterated Larkin's findings

²³ Steele, "Metropolitan Administration of the Colonies," p. 11.

²⁴ PRO, CO 194/4, p. 195

²⁵ PRO, CO 194/3, p. 243.

and recommended that parliament introduce legislation to decree penalties for offenses committed during the fishing season. Both the commanders and the fishing admirals were to be empowered to levy fines according to the nature of the offence, up to five pounds or, in cases of non-payment, to imprison transgressors for ten days.²⁶

Proposals for statutory reform received little support in parliament, however, and the Board of Trade sought a legal opinion on how to enforce King William's Act. Asked whether penalties could be imposed for violating a statute which did not specify any punishments, the solicitor general replied that offenders could still be legally punished. Such persons could be fined at the discretion of the court, upon being found guilty on an indictment or information, for acting *contra formam statuti*.²⁷ With this rather thin assurance, in 1708 the British government issued a proclamation by Order-in-Council, ordering the strict enforcement of King William's Act. It explicitly censured the fishing admirals for neglecting their duty and directed those

²⁶ British Library [BL], Egerton MS, 921, "State of the Trade to Newfoundland, 1705/06."

²⁷ PRO, CO 194/4, p. 226. In criminal pleading *contra formam statuti* was the standard term used in indictments brought for an offence created by statute and did not denote any penalties for breaking King William's Act other than those already in the act itself, i.e. none.

living in Newfoundland to bring to punishment all those who broke the regulations in King William's Act.²⁸

Problems with the army garrison at St. John's compounded the difficulties of maintaining order. Complaints about the conduct of army officers stationed in Newfoundland had arisen repeatedly after a company of foot had arrived from England in 1698. Inter-service rivalry compounded the problem because the garrison commander was commander-in-chief only during the absence of the naval commodore. A labyrinthine controversy had begun in 1704, when the naval commodore suspended Captain Thomas Lloyd, the garrison commander, and appointed Lieutenant John Moody in his place. In the subsequent claims and counter-claims, which involved the Church of England minister and many of the townspeople, army officers were variously accused of embezzling funds, hiring out soldiers as labourers, beating civilians, and holding illegal court proceedings.²⁹

In the most serious case, Lieutenant Moody was court-martialled for ordering the fatal whipping of a women confined in the garrison fort. A military tribunal convened by the naval

²⁸ PRO, Privy Council Registers [PC] 2/82, p. 122 (Order-in-Council, 26 June 1708).

²⁹ Michael Godfrey, "John Moody," *Dictionary of Canadian Biography* (14 vols. to date, Toronto: University of Toronto Press, 1966-), vol. 2, pp. 486-87. [hereafter *DCB*]. On the St. John's garrison, see James Candow, "The British Army in Newfoundland, 1697-1824," *Newfoundland Quarterly* 79 (Spring 1984), pp. 21-28.

commodore dismissed the charges but problems persisted.³⁰ In 1708 Captain John Mitchell assembled another court in St. John's — this one attended by the local fishing admirals, merchants, and prominent townspeople — at which Captain Thomas Lloyd, who had been reinstated as commander of Fort William, was tried and acquitted of misconduct. After the French captured St. John's, Captain Lloyd was taken prisoner and died in captivity.³¹

In the wake of these problems, Newfoundland received the appointment of its first nominal governor. John Collins, a civilian who had commanded the local militia since 1706, was delegated governor and commander-in-chief from Ferryland to Carbonear island, effectively making him Lloyd's successor. Collins took great pains to stress his title and the fact that several merchants had supported his appointment; he later petitioned the Queen for financial compensation for his service as governor.³² Collins's authority did not reflect any shift in policy, however, and his powers extended only to ensuring the upkeep of forts and coastal defenses. It was Captain Joseph Taylour of HMS *Litchfield* who had decided to appoint Collins. The

³⁰ See the unedited collection, *Tyranny in St. John's, 1705-1706: A Sordid Story from the Colonial Records* (St. John's: Provincial Archives of Newfoundland and Labrador, 1971), pp. 31-43.

³¹ Prowse, *History of Newfoundland*, p. 270.

³² The petition was printed anonymously as *The Case of John Collins, Esq., Governor of Newfoundland, January 21, 1711* (London, 1711 [old style]).

royal navy remained the dominant military power and legal authority in Newfoundland, but the army officers were unwilling to be passed over. In 1709 Captain John Moody concocted his own scheme to reform the island's government. In a memorial sent to the Board of Trade, he proposed that the garrison commander be present at the fishing admirals' courts, with the minutes taken by a clerk acting as a notary public.³³ Moody's persistence paid off when the government appointed him commander of the garrison at Placentia, which France ceded to Britain under the Treaty of Utrecht. Placentia eventually became a power-base from which army officers periodically asserted their independence from the commodore at St. John's.³⁴

The Royal Navy as Legal Agency

The principal outcome of these conflicts was a substantial expansion in the judicial function of the royal navy. Prior to the royal proclamation in 1708, which authorized punishment for offenses against King William's Act, the Board of Trade had made a presentation to the Privy Council on the state of Newfoundland. Condemning the garrison commanders as inept and corrupt, it pointed out that no naval officer had been accused of

³³ PRO, CO 194/4, p. 358.

³⁴ To exacerbate matters, the army garrison at Placentia mutinied in 1714 and Captain Moody remained a thorn in the navy's side. See Michael Godfrey, "John Moody," *DCB*, vol. 2, pp. 486-87.

impropriety, and argued that the commodore should be given a commission to act as commander-in-chief with an indisputable power to command on land. In addition to checking the excesses of the army, this would provide a source of speedy redress for the inhabitants and fishermen.³⁵ Citing the solicitor general's opinion on the enforcement of King William's Act, the Board of Trade advocated extending the powers of the naval commodore:

We humbly offer that he be fully impowered thereby to redress all such abuses and offences as shall be committed at Newfoundland, contrary to the said Act in such Manner as the same have formerly been or lawfully may be redressed or punished according to the known Usage or Customs there.³⁶

In cases where customary laws were uncertain or inapplicable, the commodore was to submit the suspect's name and an account of the incident to the British government so that offenders could be proceeded against in England.³⁷ Such proposals reflected not only the increasingly active role played by officers in administering law in St. John's, but also the fact that government ministers saw the royal navy as the primary means for maintaining order in Newfoundland.

In 1711 Captain Josias Crowe, naval commodore and commander-in-chief, convened the island's first legislative assembly. From August to late October he presided over a series of public

³⁵ *Acts of the Privy Council of England, Colonial Series*, (London: His Majesty's Stationary Office, 1910-), vol. 2, p. 556.

³⁶ *Acts of the Privy Council*, vol. 2, p. 558.

³⁷ *Acts of the Privy Council*, vol. 2, p. 559.

meetings attended by masters of fishing ships, merchants and prominent townspeople, which approved, in his words, "several laws and orders made at St. John's for the better discipline and good order of the people and correcting irregularities."³⁸ Known popularly as "Captain Crowe's Law," the sixteen provisions contained both general regulations and specific warrants. In addition to rulings on property disputes and orders for maintaining coastal defenses, the articles stipulated that servants who hired themselves out to more than one master were to be fined two pounds or whipped three times in public.³⁹ Because the fishery was dependent upon wage labour, this marked an important step in local governance. As we shall see, from the merchants' perspective, disciplining servants represented the foremost task for any local magistracy.

Captain Crowe also established penalties for offences. He forbade the selling of liquor on Sunday, upon a fine or forfeiture of forty shillings for the first offense, eight pounds for the second, with a fine of one shilling for each person found in a disorderly house.⁴⁰ Other measures went unrecorded: in his returns to the heads of inquiry, Crowe simply stated that he had

³⁸ PRO, CO 194/5, pp. 26-27. Titled "Captain Crowe's Law," a slightly different printed version appears in Prowse, *History of Newfoundland*, pp. 271-72.

³⁹ PRO, CO 194/5, p. 27.

⁴⁰ PRO, CO 194/5, p. 27.

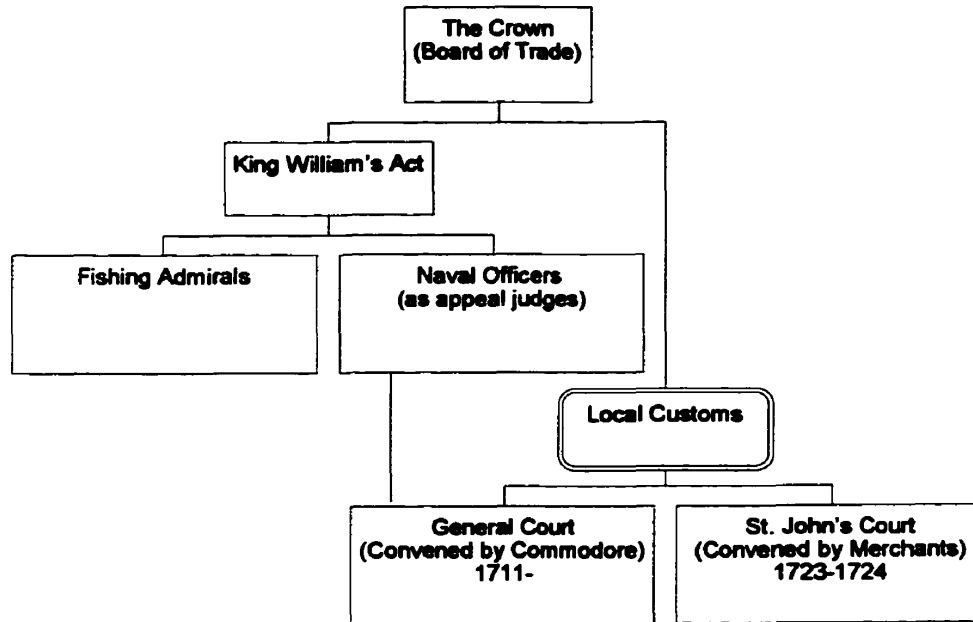
suppressed debauchery "by threats, punishments, and other necessary means."⁴¹ Though Crowe had not acted according to any known instructions, his initiatives established an early precedent for the customary legal system in which the naval commodore – and, after 1729, the island's governor – consulted with merchants and townspeople, and took steps to meet the perceived needs for law and order.⁴² Naval officers held courts that eventually became an integrated part of the island's judiciary.

When Sir Nicholas Trevanion, captain of HMS *York*, arrived in 1712, he operated this customary system as if it had dated from time immemorial. Like his predecessor, Trevanion convened an *ad hoc* legislature in St. John's – attended by the fishing admirals, merchants, and other prominent inhabitants – which debated and adopted six by-laws. He reported that he held a general court twice a week, assisted by the fishing admirals.

⁴¹ PRO, CO 194/5, p. 24. The "heads of inquiry" were included in the articles that comprised the instructions given each year to the commodore and, after 1729, the governor.

⁴² D.B. Quinn, "Josias Crowe," *DCB*, vol. 2, pp. 163-64. Quinn argues that such efforts were isolated and failed to influence subsequent developments, but Crowe's initiatives were part of a broader pattern of naval government that culminated in 1729.

Figure 2.1. The Administration of Law, 1699-1728



To account for its operation, Trevanion stated simply, "whenever differences happened, we endeavoured to settle it."⁴³ During his stay he received complaints about neither the conduct of the fishing admirals nor the implementation of King William's Act. To enforce Sunday observances, he posted orders, appointed a watch, and punished offenders. "I leave this Island in a very

⁴³ *Calendar of State Papers, Colonial Series: America and West Indies* (London: His Majesty's Stationary Office, 1926-), vol. 29, pp. 75-78 [hereafter CSPC].

good condition," he concluded, "and the people very well satisfied."⁴⁴ Such a sanguine voice was rarely heard from Newfoundland. Over the next decade the Board of Trade received a steady barrage of petitions on the need for civil government, regular courts, and winter magistrates.

The Limits to Naval Justice

At the heart of these complaints were two basic constraints on the naval system. First, the judicial arm of the royal navy in Newfoundland did not reach much further than St. John's harbour. Communities in the more remote bays rarely received calls from the squadron's busy frigates which, in any case, were unsuited to navigating narrow coves and shallow harbours. In the early eighteenth century, the squadron sent to Newfoundland usually consisted of two heavy frigates and one armed sloop. Frigates were typically fifth- or sixth- rated ships, with 20-40 guns, a complement of 160-300 men, and a displacement of 450-1000 tons. The flagship of Commodore Rodney, for example, was HMS *Rainbow*, a 40-gun, fifth-rate ship, with 240 men.⁴⁵ Sloops were unrated

⁴⁴ CSPC, vol. 27, p. 75.

⁴⁵ Both the navy's designation of warship types and the size of the commodore's flagship evolved over the course of the eighteenth century. Prior to 1770 commodores on the Newfoundland station often used a 50- or 54-gun vessel as their flagship, though this class was generally considered to be neither a ship of the line nor a frigate in the proper sense of the term. In the 1770s Newfoundland commodores began sailing in 60-gun vessels, such as HMS *Panther*, but this type was becoming obsolete as a line-of-battle ship. During wartime,

warships, with 8-18 guns, 80-130 men, and 140-380 tons. By contrast, the schooners and brigs used in the Newfoundland fishery were commonly two-masted vessels of 30-80 tons.⁴⁶ Not until the second half of the eighteenth century did commodores arrange for their junior officers to command schooners, to cruise specific districts along the coast, and to convene surrogate courts.

Second, regardless of the commodores' efforts, the squadron rarely stayed in Newfoundland for more than ten weeks each year. The length of the commission depended upon a range of factors - from Admiralty politics to the ships' state of repair - but the warships usually arrived off Newfoundland in July or August and returned to England, often via Lisbon, by the end of October. Two constant factors fixed the time of departure: the duty to escort the British fishing fleet and the need to avoid the onset of weather conditions that made the Atlantic crossing excessively hazardous. From the viewpoint of judicial administration, this meant that the island relied upon the fishing admirals for the remainder of the spring and summer. Fishing ships typically began to arrive in early May, after which the fishing admirals were

commodores usually commanded a 64- or 74-gun ship of the line, such as HMS *Monarch* (74), Governor Wallace's flagship in 1794. See Brian Lavery, *Nelson's Navy: The Ships, Men and Organisation, 1793-1815* (London: Naval Institute Press, 1989), pp. 35-52.

⁴⁶ See, Graham, *Empire of the North Atlantic*, pp. 208, 219 & 227; Rodger, *Wooden World*, appendices 1-3.

appointed. No competent legal authority therefore existed on the island from November to April.

The first problem was brought to the government's attention in 1714. Archibald Cummings, a resident trader and government agent for prizes in St. John's, submitted a report on the state of English settlements in Newfoundland. Cummings recommended the appointment of a person to call at all of the outports where the naval commanders had not visited and to hold courts similar to quarter sessions.⁴⁷ He proposed that the British government draft legislation to establish a new legal system for Newfoundland. Over the next year Cummings repeated this scheme in letters and a printed essay.⁴⁸ Such individual efforts were soon joined by appeals from English propertied interests: a public meeting of Bristol merchants in January 1715 heard the report of a committee struck to deal with the British trade to Newfoundland, a copy of which was sent to the Board of Trade. The committee had concluded that in order to end the disorders and commercial abuses which were damaging their fishing operations and trading networks, some type of civil jurisdiction in Newfoundland was absolutely

⁴⁷ PRO, CO 194/5, pp. 91-96.

⁴⁸ Titled, "Considerations on the Trade to Newfoundland," the essay was printed anonymously but is consistent with Cummings' work. The only extant copy appears at PRO, CO 194/5, pp. 198-200.

necessary. The merchants warned that the fishery would never flourish under military government.⁴⁹

Ironically, a separate petition sent the same month blamed those very merchants for blocking legal reforms. Written by James Smith – a local resident hoping to secure a government appointment – it repeated many of the lurid claims casually made about Newfoundland. Smith characterized the island as a miserable place, where “Justice is neither practiced nor known.”⁵⁰ The petition marked an early instalment in a long line of official and semi-official reports that must be treated with caution. Designed to serve primarily the authors’ personal interests, they offered neither general nor accurate statements on the state of law and authority on the island.

With regard to the second issue, the need for winter magistrates, the commodores themselves outlined the situation to the British government. In 1715 Commodore Kempthorn sent a detailed report to the Admiralty that contradicted Smith’s view. Kempthorn saw the navy as the sole guarantor of justice in the outports: the problem was not the navy’s administration but the absence of authority after the squadron had left. Aside from the failings of the fishing admirals, Kempthorn argued, the real issue was the need to appoint someone to maintain order in the

⁴⁹ PRO, CO 194/5, p. 255.

⁵⁰ CSPC, vol. 28, pp. 75-76.

winter. From the naval officers' perspective, the lack of winter justice meant there was always a large backlog of cases waiting to be settled each summer. Equally serious, many crimes allegedly went unpunished during the winter months. Like the Bristol merchants, Kempthorn affirmed that some type of permanent civil magistracy had to be installed on the island.⁵¹

Faced with a veritable deluge of petitions and suggestions, the Board of Trade cautiously sought another legal opinion before taking action. In 1718 it asked the attorney general to rule whether a new statute was needed to appoint magistrates and constitute courts, or whether another royal proclamation would be sufficient. The Board's secretary was told emphatically that simply reiterating King William's Act would have no effect on the administration of justice.⁵² No bill was ever introduced in parliament, but the British government directed the commodore to inquire whether any of the settlers were fit to act as magistrates entrusted with commissions of the peace. Commodore Scott recommended two St. John's residents: William Keen, a New England merchant who had immigrated in 1704, and the former governor, John Collins. Of the two, Keen had a far more zealous temperament, Scott attested, and this proved to be an insightful

⁵¹ CSPC, vol. 28, pp. 310-11.

⁵² PRO, CO 194/6, pp. 1-2.

judgment, for Keen later became the most prominent civil magistrate in early Newfoundland.⁵³

The Board of Trade decided not to make any appointments but instead reviewed its entire policy toward Newfoundland. It commissioned a report calling for a return to the original system of the migratory fishery, whereby the island was treated exclusively as a summer fishing station. The report recommended deporting the planters and traders who had settled in Newfoundland to Nova Scotia or some other British colony. By relocating the entire resident population, the need for civil government would be extinguished and the fishery could return to its proper form as an operation based solely in England.⁵⁴ Such impractical proposals circulated in government circles as late as the 1720s, but the mass deportation of English settlers was never a feasible option. Moreover, the notion that settlement remained inimical West Country interests was out of step with economic reality, since the migratory fishing now depended in large measure upon the resident population. Never strictly forbidden,

⁵³ PRO, CO 194/6, p. 53. See Keith Matthews, "William Keen," *DCB*, vol. 3, pp. 323-24.

⁵⁴ Issued in December 1718, the report was included in the materials considered by the 1793 committee of inquiry, and is reprinted in Lambert, ed., *House of Commons Sessional Papers of the Eighteenth Century: Volume 90, Newfoundland*, pp. 1-22.

Anglo-Irish settlement in Newfoundland, which reached 3,000 by 1730, had become an irrevocable fact.⁵⁵

An Anarchic Society?

In many ways the experience of Newfoundland was not unlike that of the other colonial settlements stretched along the Atlantic seaboard in the early eighteenth century. In the 1710s piracy still threatened maritime communities where the royal navy could not maintain a significant presence.⁵⁶ For pirates the island's fishery represented both a productive recruiting ground and a ready source for provisions. It had been in response to pirate raiding that the British government had first begun to send regular naval squadrons to Newfoundland in the seventeenth century.⁵⁷ The most important repercussion of the reorganization of the imperial state after the Glorious Revolution and the wars conducted by William III had been the massive expansion of the

⁵⁵ This point is nicely summarized in Matthews, *Lectures on the History of Newfoundland*, ch. 3.

⁵⁶ The link between the suppression of piracy and the growth of the British state is superbly made in Robert Ritchie, *Captain Kidd and the War against the Pirates* (Cambridge, Mass.: Harvard University Press, 1986), esp. pp. 137-54. On piracy in the Atlantic generally, see Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* (Cambridge: Cambridge University Press, 1987), ch. 6; and David Cordingly, *Life Among the Pirates: The Romance and the Reality* (London: Little, Brown, 1995), ch. 11.

⁵⁷ Ritchie, *Captain Kidd and the War against the Pirates*, p. 155.

royal navy.⁵⁸ But the increased military presence in North America was tied more to wartime policy than to local needs. The number of warships kept in commission dropped significantly after the Treaty of Utrecht, from over 200 in 1710 to less than 175 ten years later.⁵⁹

The relative decline in naval forces did not go unnoticed by pirate crews cruising off the Newfoundland coast. Few incidents of marauding were reported in official correspondence, but in June 1720 a large raid on the Southern Shore could not escape the government's attention. At the height of the fishing season a crew led by Bartholomew Roberts plundered Trepassey and its adjacent villages.⁶⁰ Such an attack was not an aberration but rather a symptom of the island's position as a breeding ground for piracy. For example, after failing to find work in Placentia Bay, John Phillips promptly joined a pirate crew in 1723, most of whom were tried the following year before an admiralty court at Boston. According to one authority, Newfoundland attracted

⁵⁸ Ritchie, *Captain Kidd and the War against the Pirates*, esp. pp. 62, 155.

⁵⁹ Jan Glete, *Navies and Nations: Warships and State Building in Europe and America, 1500-1860* (2 vols. Stockholm: Almqvist & Wiksell International, 1993), p. 241.

⁶⁰ PRO, CO 194/6, pp. 366-67. See also Clinton V. Black, *Pirates of the West Indies* (Cambridge: Cambridge University Press, 1989), pp. 65-67.

pirates because it was officially neglected and held by the English merely "for the conveniency of the cod fishery."⁶¹

The difference between Newfoundland and other maritime settlements lay in the ability of the local population to respond effectively to concerns over security. Authorities in Boston could convene a special court to deal with piracy, but planters and traders living in Newfoundland relied entirely on the summer visits of the royal navy. Though it may be tempting to label the island as existing in a state of anarchy, the salient fact is that local propertied interests refused to allow this perceived legal vacuum to persist. In 1719 the departing commodore asked William Keen to compile an account of any disorders that took place over the winter. Keen duly related that the day after the navy had left, several fishing masters had publicly insulted a court held by the fishing admirals. He affirmed that during the absence of the warships, the settlers had neither justice nor religion, for "every man does what he lists without control."⁶² Such dramatic language reflected a new activism prevalent among the growing ranks of permanent, year-round settlers.

Keen did much more than pass on complaints. Like other planters and merchants, he took steps to respond to serious

⁶¹ Daniel Defoe, *A General History of the Pyrates*. Manuel Schonhorn, ed. (London, 1972 rep. of 1724 ed.), pp. 345-49. It is now generally believed that this book was written by Captain Charles Johnson. See Cordingly, *Life Among the Pirates*, pp. 10-11.

⁶² CSPC, vol. 31, p. 246.

criminal offences. In 1720 he informed the British government of the murder of Thomas Ford, a prominent merchant in Petty Harbour. Keen had apprehended a suspect and kept him confined at his own expense; he arranged for the suspect, along with two witnesses, to be sent to England in his own sloop, the *Sea Flour*; and he paid for all of this out of his own pocket. Pointing out that he had no legal authority to support his actions, Keen appealed to the British government to "procure for us such power and instructions as may keep us from being destroyed."⁶³

A petition from the inhabitants of Petty Harbour echoed Keen's report. Citing the absence of winter justice, it called for a court to be established at St. John's to punish offenders during the commodore's absence.⁶⁴ The government's reaction reinforced the fact that the settlers' needs for justice would have to be met locally, without support from London: the Board of Trade concluded that such complaints merely provided further grounds to justify deporting the island's settlers in order to rid the government of the problem once and for all.⁶⁵ British officials were determined not to invest the island with formal colonial institutions. As a seasonal fishing station designed to supply sailors for the royal navy, Newfoundland was not to be

⁶³ PRO, CO 194/7, p. 22.

⁶⁴ PRO, CO 194/7, p. 21.

⁶⁵ PRO, CO 195/7, pp. 76-78 (Board of Trade to Lord Carteret, 1 April 1721).

allowed the type of legal system needed to support permanent settlement. Mercantile policy held that local government would necessarily encourage planters and merchants to invest their capital locally, thereby spawning a resident fishery that would in turn compete against the West Country merchants.⁶⁶

Making Colonial Authority

In response to the inertia in imperial policy, merchants and planters in St. John's created their own court. While this was not the only extra-legal proceeding held in early Newfoundland — in 1703 a group of settlers in Trinity Bay had established some type of communal legal code — it marked the first formally established court.⁶⁷ In November 1723 fifty-one men signed a resolution to "embody ourselves into a Community for the mutual preservation of His Majesty's peace and the PROTECTION OF US AND OURS during the winter, that is until the arrival of the British Fishing ship in this harbour." To justify their actions, the assembly cited John Locke's *Essay Concerning the True, Original,*

⁶⁶ Matthews and McLintock both agree on this point. See Matthews, *Lectures on the History of Newfoundland*, ch. 12; McLintock, *Establishment of Constitutional Government*, ch. 1.

⁶⁷ An index to the Newfoundland correspondence simply notes: "Rules agreed upon by several persons combined together; who had withdrawn themselves to an Island in Trinity Harbour." See PRO CO 326/45, 1 December 1703 [not paginated]. See also McLintock, *Establishment of Constitutional Government*, p. 55.

*Extent, and End of Civil Government.*⁶⁸ The meeting nominated three men to serve as justices – John Jago, a chaplain, Samuel Rooke and Allen Southmayd, both merchants – and during the winter of 1723-24 a weekly court was held at Southmayd's house. Of the fifteen recorded cases decided by the court, three were brought for theft and two for assault.⁶⁹

Like the proceedings overseen by Captain Crowe in 1711, the sessions held in 1724 took steps to discipline unruly servants. In February the court heard an information from William Bully against his servant, Thomas Slaughter:

William Bully deposed upon the holy Evangelists that on Sunday the 16th of February, he ordered his servant Thos. Slaughter (then being disordered in drink) to eat his supper and go to bed, and that the said Slaughter refused it, and called him a rascal, scoundrel, and other base names, and struck him and defied any justice – The same day Mrs. Sarah Bully deposed that the said Slaughter called his master scoundrel, dog and told him that he kept company with none but scoundrels, and that he spit in her face.⁷⁰

The court ordered Slaughter to be tied to a post and whipped eleven lashes on the bare back. The justices who sentenced Slaughter explained their decision by stressing that such

⁶⁸ PRO, CO 194/7, p. 247. The passage beginning with "Men being by nature all free, equal and independent..." was copied directly, along with the citation, "page 256, Book 2nd, Chap 8th, Edition 4th, London: printed by John Churchill, 1713."

⁶⁹ The records appear at PRO, CO 194/7, pp. 246-52.

⁷⁰ This quotation is taken from the printed extract in Jeff Webb, "Leaving the State of Nature: A Locke-Inspired Political Community in St. John's, Newfoundland, 1723," *Acadiensis* 21 (Autumn 1991), p. 160. Spelling and punctuation have been modernized.

insolent behaviour threatened the entire social order. Their statement reflected the systemic fear of unrest that coloured the administration of law throughout the eighteenth century:

He [Slaughter] was all that winter mutinous in the highest degree, threatening to burn houses, to cut people down with his hatchet, bringing other man servants into frequent Caballs and admonishing them to abuse their Masters and to withdraw even common decensey and respect, he was so very dangerous and incendiary that in all probability many tumults and disorders would have happened if he had not been brought to publick punishment.⁷¹

The court also heard two disputes over property ownership, which it settled according to the common law principle of possession *vaut titre*.⁷² As we shall see, despite statutory restrictions on the ownership of real property in Newfoundland, English common law guided the adjudication of cases throughout the eighteenth century.⁷³

When the naval commodore returned to England in the fall of 1724, he informed the British government about the courts held the previous winter. In response the Board of Trade merely amended its heads of inquiry to direct the commodore to "make

⁷¹ Quoted from Webb, "Locke-Inspired Political Community in St. John's," p. 161. The use of corporal punishment to discipline servants is examined at length in Chapter Seven.

⁷² This point is made by Jeff Webb. Webb's brief summary of what he terms a "Lockean community" provides a sound analysis of the proceedings in 1723-24. He is one of the few historians to argue that the absence of formal institutions did not mean that the island's settlers were without law. See Webb, "Locke-Inspired Political Community in St. John's," pp. 157, 161-62.

⁷³ See below, Chapter Four.

diligent enquiry into the proceedings of this voluntary new association," and to prevent any ill consequences.⁷⁴ The St. John's court appears to have died out by 1725, but it had clearly established the legitimacy of such *ad hoc* juridical arrangements. Captain Bouler of HMS *Argyle*, moored in St. John's harbour in the summer of 1725, found that no courts had been held during the previous winter.⁷⁵ His counterpart in Placentia, Captain John St. Lo of HMS *Ludlow Castle*, conducted the usual business of working with the fishing admirals to ensure the smooth operation of the fishery. Yet St. Lo took his instructions a step further: he independently appointed a magistrate to maintain order after the royal navy had left.⁷⁶

In the meantime, William Keen continued to petition the British government to appoint winter magistrates. In 1728 Keen reported that he had apprehended a murder suspect and sent him, along with witnesses, to England in a brig chartered at his own expense.⁷⁷ The government might have been content to let this informal system operate indefinitely: it cost nothing and required no political capital. If naval officers wanted to appoint informal justices, and if residents were willing

⁷⁴ PRO, CO 194/8, p. 13.

⁷⁵ PRO, CO 194/8, p. 163.

⁷⁶ PRO, CO 194/8, p. 141.

⁷⁷ PRO, CO 194/8, pp. 181-82.

themselves to apprehend suspected felons, the Board of Trade had no difficulty with the status quo. In the process, however, the notion of appointing magistrates had become an accepted fact. The question now was how they were to be authorized and who was to pay for local legal expenses. When the problem of governing Placentia (under the nominal jurisdiction of Nova Scotia) worsened, the issue of magistrates resolved itself. To confirm Britain's claim over the entire island, in 1728 the Board of Trade recommended that the commodore serve as governor during his residence at St. John's and be empowered to appoint justices of the peace to hold quarter sessions. In May 1729 this proposal was approved by the Privy Council and the island entered a new era of governance.⁷⁸

Postscript: The Persistence of the Frontier

Complaints of anarchy and social disorder did not end in 1729: the appointment of a naval governor marked no *deus ex machina* for British rule in Newfoundland. Visitors continued to portray the island as a wild place where the roots of English civilization had not taken hold. This discourse is best illustrated by the reports from the Church of England missionaries sponsored by the Society for the Propagation of the Gospel. From 1760 to 1790 the clergymen sent to Newfoundland

⁷⁸ PRO, PC 2/90, pp. 488-89.

proffered a steady torrent of protests against the appalling conditions in Trinity and Harbour Grace, where they attempted to establish parishes. Accounts from Reverends Edward Langman and James Balfour depicted a primitive society plagued by privation and ignorance. Balfour's dispatch in 1779 summed up his impression: "In short, there is a raging famine, nakedness, and sickness in these parts."⁷⁹ The missionaries' accounts must be treated with caution because of their own vested interests and evident prejudices.⁸⁰ When Balfour first settled in Trinity in 1764 he noted, "I think these a good natured people. They may be led but not drove."⁸¹ Still, their correspondence provides valuable insights into the perceptions of law and authority in the outports.

To the missionaries outport society appeared thoroughly pagan. Balfour's report on his tour of Trinity Bay in 1772 offers a representative example:

A most barbarous and lawless place. Here it is the usual custom to divert themselves during Sundays with the music of a piper carried in parade thro' the place. All my attempts could not bring them together to public worship. It would make any well disposed person shiver to hear the horrid conversation of profane cursing and swearing ... One league

⁷⁹ *United Society for the Propagation of the Gospel, Calendar of Letters, 1721-1793* (Vol. 5. London: List & Index Society, 1972), p. 61.

⁸⁰ This point has been raised by Handcock, *Origins of English Settlement*, pp. 135-36.

⁸¹ *United Society for the Propagation of the Gospel, Calendar of Letters*, p. 44.

further westward I visited New Perlican where there are eight families one half English, the other Irish, they seemed to me in a state of war with one another. I endeavoured to reconcile them but to no purpose.⁸²

Compounding this perceived social degeneracy was the lack of an effective winter magistracy in the communities stretched along the northeast coast.⁸³ The commissions of the peace periodically lapsed for several years in districts where the surrogate courts had supplanted the courts of session, or along the more remote parts of the coast. No justice of the peace served in Trinity during the winters of 1766-72. In 1786 the justice in Bonavista appealed to the governor to send a warship to his district to help him combat rebellious fishing servants. Acknowledging that maritime navigation in Bonavista Bay was particularly hazardous, he argued that the appearance of the royal navy would put an end to the disorders.⁸⁴ As late as the 1840s, Newfoundland governors received dispatches from the outports essentially the same as those sent three generations earlier.⁸⁵

⁸² Ibid., p. 150.

⁸³ Newfoundland was far from unique in this respect. For an account of the difficulties in administering law along the West Coast, see Hamar Foster, "Mutiny on the *Beaver*: Law and Authority in the Fur Trade Navy, 1835-1840," in Dale Gibson and W. Wesley Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: University of Manitoba Legal Research Institute, 1991), pp. 15-46.

⁸⁴ PRO, Admiralty Papers [ADM] 1/472, p. 233 (Langdon to Elliot, 6 September 1786).

⁸⁵ Gertrude Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto: University of Toronto Press, 1966), pp. 100-09.

Government and the Beothuck

While the British government reformed the legal regime governing English and Irish settlers, its initiatives from 1699 to 1729 had little impact on the treatment of the island's native peoples. Relations between Europeans and aboriginals evolved through three stages. From the arrival of English fishing ships in the sixteenth century to the expansion of settlement and government in the 1750s, there existed extremely little contact between the two cultures. Prior to the mid-eighteenth century, the European presence was largely seasonal and overwhelmingly coastal. Fishermen rarely made incursions inland beyond a few miles to collect firewood. As late as 1765, the best English map of Newfoundland, drawn by Thomas Kitchin, noted that the interior of the island was entirely unknown.⁸⁶

The adaptive response of the Beothuck, the aboriginal people of Newfoundland, was generally to avoid contact where possible and to withdraw into the interior. This was facilitated by the fact that the Beothuck population was relatively small – archeological estimates by Ralph Pastore and James Tuck place the aboriginal population at the time of contact at 500-1000 – and popularized accounts of a native society of more than 15,000

⁸⁶ The map was published in Griffith Williams, *An Account of the Island of Newfoundland, with the Nature of its Trade, and the Method of carrying on the Fishery, with Reasons for the great Decrease of that most Valuable Branch of Trade* (London: Printed for Captain Thomas Cole, 1765), p. 2.

are wildly exaggerated. As English fishing operations expanded, the Beothuck modified the organization of their seasonal movements to rely less upon extended stays along the coast. Retreating inland, they eventually found themselves denied access to the ocean and this made them increasingly dependant upon a narrow range of resources.⁸⁷

The second phase in the history of Beothuck-European relations began in the mid-eighteenth century, when Anglo-Irish settlers began to make deeper forays into the forests for hunting and trapping expeditions. This resulted in more frequent conflicts, since the Beothuck were suspected of repeatedly stealing traps set by furriers. Archeological evidence of Beothuck sites confirms the presence of traps and other implements acquired from settlers. In 1758 a Beothuck girl was brought before the governor and, for the first time, the British organized attempts to establish peaceful relations with the island's native peoples.⁸⁸ These efforts corresponded with the rapid expansion of colonial administration in Newfoundland – in particular the increase in naval personnel – and the government

⁸⁷ Ralph Pastore, "Fishermen, Furriers, and Beothucks: The Economy of Extinction," *Man in the Northeast* 33 (Spring 1987), pp. 47-62; James Tuck and Ralph Pastore, "A Nice Place to Visit But ... Prehistoric Human Extinctions on the Island of Newfoundland," *Canadian Journal of Archaeology* 9, 1 (1985), pp. 69-79; Ralph Pastore, *Shanawdithit's People: The Archaeology of the Beothucks* (St. John's: Breakwater Books, 1992), pp. 1-75.

⁸⁸ Provincial Archives of Newfoundland and Labrador, St. John's [PANL], Colonial Secretary's Letterbook [GN 2/1/A], vol. 2, p. 429.

was able to mount formal expeditions to search for the elusive Beothuck. In 1768 Governor Hugh Palliser ordered Captain John Cartwright to take a party into the interior, but the expedition failed to make actual contact with the Beothuck. Restricted largely to indirect measures, Governor Palliser decreed a proclamation encouraging settlers to facilitate peaceful relations with any aboriginal with whom they made contact. Successive governors and officials issued further reports and directives on how to deal with the Beothuck.⁸⁹

Native-white relations entered a third and final phase with the massive growth of European settlement in the early nineteenth century. Cut off from coastal resources, the Beothuck population, already thinning, began to decline rapidly. At the same time, efforts to establish contact redoubled as a new bourgeois culture sought to protect what were seen as noble savages from barbarous fishermen and ignorant trappers. In 1811 Governor John Duckworth sent another expedition to make peace with the Beothuck. Accompanied by a party of marines, Lieutenant David Buchan met a group of aboriginals at Red Indian Lake. Though the encounter started smoothly, it was marred by the murder of two marines. Subsequent contact resulted in further violence and the capture

⁸⁹ PANL, GN 2/1/A, vol. 3, p. 282 (1765). The history of official efforts to establish relations with the Beothuck is described in detail in Ingeborg Marshall, *A History and Ethnography of the Beothuck* (Kingston & Montreal: McGill-Queen's University Press, 1996), chs. 6-10.

of Demasduit, a Beothuck woman, in 1819. Increased awareness led to the creation of the Beothuck Institution, but this social campaign failed in the face of the declining aboriginal population. Shanawdithit, the last known surviving Beothuck, died in a St. John's hospital in 1829.⁹⁰

The government's treatment of the Beothuck reveals three important facets of the colonial state in Newfoundland. First, prior to the 1750s, local government remained limited to basic jurisdictional duties. Until the naval state emerged in the second half of the eighteenth century, colonial administration was restricted to meeting the settlers' immediate needs: it is not merely coincidental that the efforts to make peaceable contact with the Beothuck coincided with the broader campaign to strengthen the island's judicial system. Second, when official expeditions were eventually sent, they were commanded and controlled by naval officers. As in virtually every other sphere of the island's governance, the royal navy stood at the administrative centre. As the standard-bearer of English civilization, it became the primary agency of European contact. Finally, the bourgeois culture displayed by officers at the turn of the nineteenth century foreshadowed the larger cultural shift

⁹⁰ Marshall, *History and Ethnography of the Beothuck*, chs. 10-14; Ralph Pastore, "The Collapse of the Beothuck World," in P.A. Buckner and David Frank, eds., *The Acadiensis Reader, Volume One: Atlantic Canada before Confederation* (2nd ed. Fredericton: Acadiensis Press, 1990), pp. 11-30.

that enveloped Anglo-Irish Newfoundland from 1810 to 1830. The establishment of the Beothuck Institution was a byproduct of the rise of the same public sphere that undermined the naval state.⁹¹ When the nascent middle class began to voice concern over the fate of the Beothuck, they were also becoming increasingly outspoken about their own desires for greater political rights and freedoms.

In Search of the Fishing Admirals

We know relatively little about the Beothuck people for reasons that are clearly discernable, but the lack of knowledge about the fishing admirals remains bewildering. Who were the admirals and what did they do? The most accurate answer is that they were no different from the island's fishing masters, from whose ranks they were drawn. Masters in this sense denoted captains of fishing ships that made the annual voyage from England to Newfoundland: some were wealthy landowners, but most were lesser merchants with few pretensions to gentility. While the vast majority of these men remain anonymous in official records, there were exceptional families, such as the Holdsworths of Dartmouth, which produced a succession of prominent admirals.⁹²

⁹¹ The rise of bourgeois culture is discussed in Chapter Five.

⁹² On the Holdsworths, see Handcock, *Origins of English Settlement*, pp. 63, 154, 251.

Through the case of Arthur Holdsworth we can trace the career of an eighteenth-century fishing admiral. At the age of thirty-two he assumed an active role in the family business, sailing to Newfoundland with his brother in their ship the *Nicholas*; by 1701 he had become admiral of St. John's harbour, a position he held off and on for the next ten years. He soon asserted himself in local society, creating a minor controversy when he dueled with an army officer over a perceived slight. The officer was later accused of cowardice but the Holdsworths did not suffer from the potential scandal. As the nearest thing to gentry on the island, the family had little to fear from anyone other than the commodore. Highly unpopular among their competitors, the clan expanded their operations into carrying passengers to Newfoundland, thus creating temporary labour gluts.⁹³

Holdsworth also became heavily involved in the petty politics that marked early St. John's. He petitioned against competitors, curried favour with the garrison commander in return for contracts, and interpreted laws and customs as he saw fit. Whether for lack of interest or free time during the hectic fishing season, Holdsworth held no known courts or meetings during his tenure as admiral. After 1711 he stopped sailing to

⁹³ D.B. Quinn, "Arthur Holdsworth," *DCB*, vol. 2, pp. 290-91; *Dictionary of Newfoundland and Labrador Biography*. Robert Cuff, ed. (St. John's: Harry Cuff Publications, 1990), p. 160.

Newfoundland regularly and managed his firm from Dartmouth, where he built a large manor house. In short, he pursued his mercantile interests to the fullest: the legal responsibilities of his office appear to have been of little consequence.⁹⁴

Though Holdsworth was certainly an atypical admiral in many respects, his career reflected a number of broader patterns. The fishing admirals lived in Newfoundland only during the summer months, when they were fixated on ensuring that their fishing operations succeeded. They were particularly pressed for time during the late summer and early autumn – from August to October they had to make all the necessary arrangements for settling contracts, prices, and shipping the codfish to market – but this was precisely when their services as law officers were most needed. Even when they had the opportunity, the admirals were required, in essence, to police their competitors, a situation fraught with potential problems. And, perhaps most importantly, there was no superintending authority other than the commodore, whose power extended only to acting as an appellate judge. In theory, complainants had to approach the admirals before bringing petitions before a naval officer. It is not surprising, then, that the admirals conducted little judicial business. Despite colourful local legends, the fishing admirals never became entrenched tyrants. During their visits to Newfoundland each

⁹⁴ Prowse, *History of Newfoundland*, pp. 227-28

summer, they simply had neither the time nor inclination to enforce their full authority as arbiters of local disputes.⁹⁵

With the appointment of the first governor and magistrates in 1729, the golden age of admirals like Arthur Holdsworth came to an end. They fought hard to preserve their autonomy, but by 1750 their position had changed entirely. As the naval state assumed effective control over the fishery, the admirals became absorbed into the island's legal regime. No longer an independent force, they received their orders from the governor and periodically sat alongside justices of the peace in the district courts. While some cases of minor public offences were referred to them, the admirals' jurisdiction became limited to two areas: property law relating to waterfront premises (known as ship's rooms), and the regulations for curing codfish.⁹⁶ As late as 1792 the governor still sent orders to the admirals to ensure that planters salted and dried fish in the proper manner.⁹⁷

Occasionally the admirals held their own courts to settle disputes over the ownership of property used for the fishery. From 1750 to 1786 thirteen separate hearings were held, during

⁹⁵ On the pace of the seasonal fishery in Newfoundland, see Matthews, *Lectures on the History of Newfoundland*, ch. 9.

⁹⁶ For orders to punish public offences, see PANL GN 2/1/A, vol. 1, p. 76, vol. 5, pp. 4, 18. For orders to enforce fishery regulations, see PANL, GN 2/1/A, vol. 1, p. 157, vol. 3, pp. 234, 289, vol. 6, pp. 96-97, 123, vol. 10, p. 36.

⁹⁷ PANL, GN 2/1/A, vol. 12, p. 139.

which a quorum of three admirals made a ruling after hearing both sides *viva voce*.⁹⁸ These sessions never rivaled the district courts, and they seem to have been convened only when other magistrates were unable to hear a case. Evidence from the court minutes suggests that the admirals were in fact careful and able judges. Familiar with the customs of the fishery and the value of local property, they were well informed of the context behind most property disputes. As a decision made in 1752 indicates, they remained cognizant of the authority conferred by King William's Act:

We the undermentioned Admirals having duly considered the affair concerning the aforesaid plantation and having the Act of Parliament now before us in conformity of the same do confirm the lease or covenant of the said John Mudge to the said William Brothers for the said plantation that he shall peaceably hold and enjoy the same to the full end and term of the said lease or covenant given under our hands at Fermouze [Fermeuse] this 25th July 1752.⁹⁹

Far from being the scourge of Newfoundland history, the fishing admirals of the mid-eighteenth century appear to have been much the same as their mercantile peers. They pursued their own interests and rarely challenged the authority of the naval state. Yet, as we shall see, their acknowledgment of the legitimacy of

⁹⁸ For the sittings of the fishing admirals' courts, see PANL, GN 2/1/A, vol. 1, pp. 90-95, 110, 349, vol. 2, pp. 116, 121, vol. 10, pp. 10-13, 17-19, 75-73, 122-28, 150, 219-23, and vol. 11, pp. 106-11.

⁹⁹ PANL, GN 2/1/A, vol. 1, pp. 349-50.

the civil magistracy came only after a protracted battle that shaped the entire course of the island's legal development.

Conclusion

The appointment of a governor and civil magistracy in 1729 signaled the end of the only period in which the island's Anglo-Irish settlers endured anything close to anarchy. Persistent problems with administering law in outports along the northeast coast paled in comparison to the failure of the fishing admiral's constitution, which was a dead letter from the outset. After thirty years of *ad hoc* measures, the island gained magistrates and the trappings of colonial government, but it did not suddenly acquire law. Unlike an empty vessel ready to be filled with English justice, Newfoundland already had customs which, although inchoate, affected the reception of law. The authority of the new regime was not automatically accepted; rather, it had to be demonstrated and enforced at the local level.

King William's Act remained the only statute law governing Newfoundland. In 1729 the governor and the justices of the peace did not have the statutory authority enjoyed by the fishing admirals. Statute was less a direct obstacle than a fog that obfuscated local developments: it could not prevent merchants, settlers, and naval officers from seeking alternative means of dispute resolution. Yet it did suppress the process of

legitimizing locally-constituted authority. With their position enshrined in statute, the fishing admirals had been circumvented but not extinguished as a legal force. Under the protective awning of parliamentary law, they reasserted their powers after 1729, precipitating a struggle for political and juridical supremacy. Ironically, the admirals used King William's Act to reclaim their full authority only after the death of the regime on which it was based.

Appendix 2.1**King William's Act, 1699**

The following sections from the "Act to Encourage Trade to Newfoundland," (10 & 11 Wm. III, c. 25, ss. 4 & 12-16), outline the judicial system as it existed in statutory law until 1775.

IV And be it further enacted by the Authority aforesaid, that (according to the ancient Custom there used) every such fishing ship from England, Wales or Berwick, or such fishermen as shall, from and after the said twenty-fifth day of March, first enter any harbour or creek in Newfoundland, in behalf of his ship, shall be Admiral of the said harbour or creek during that fishing season, and for that time shall reserve to himself only so much beech or flakes, or both, as are needful for the number of such boats as he shall there use, with an overplus only for the use of one boat more than he needs, as a privilege for his first coming thither; and that the Master of every such second fishing ship, as shall enter any such harbour or creek shall be Vice-Admiral of such harbour or creek during that fishing season; and that the Master of every such fishing ship coming next, as shall enter any such harbour or creek during that fishing season; and that the Master of every fishing ship there, shall content himself with such beech or flakes, as he shall have necessary use for, without keeping or detaining any more beech or flakes, to the prejudice of any other such ship or vessel as shall arrive there; and that such person or persons as are possessed of several places in several harbours or creeks there, shall make his or their election of such place as he or they shall choose to abide in; and shall also, within eight and forty hours after any aftercomers into such place or places shall demand such his or their resolution touching such his or their election (if the weather will so soon permit, or so soon after as the weather will permit) give or send his or their resolution to such aftercomer or aftercomers, touching such his or their election of such place as he or they shall so choose to abide in for the fishing season, to the end that each aftercomer or aftercomers may likewise choose his or their place or places of his or their abode there; and in case any difference shall arise touching the said matters, the Admirals of the respective harbours where such differences shall arise, or any two of them, shall proportion the place to the several ships; in the several harbours they fish in, according to the number of boats which each of the said ships shall keep.

XII And be it enacted by the Authority aforesaid, that no person or persons whatsoever shall, at any time after the said twenty fifth day of March, rind any of the trees there standing or growing upon any occasion whatsoever, nor shall by any ways or means whatsoever set on fire any of the woods of the said Country or do or cause to be done any damage, detriment or destruction to the same, for the use or uses whatsoever, except only for necessary fuel for the ships and inhabitants, and for the building and necessary repairs of houses; ships, boats, and train-fats, and of the stages, cook-rooms, beeches and other places for taking bait and fishing, and for frying, curing and husbanding fish there; and also that no person or persons whatsoever shall, at any time after the said twenty fifth day of march, cast anchor, or do any other matter or thing, to the annoyance or hindering of the hauling of the sayns in the customary baiting places, or shoot his or their sayn or sayns withing or upon the sayn or sayns of any other person or persons whatsoever; and also that no person or persons whatsoever shall, at any time after the said twenty fifth day of March, steal, purloin or take out of the net or nets of any other person or persons whatsoever, lying adrift, or drover, for bait by night, nor steal, purloin or take away any bait out of any fishing boat or boats, or any net or nets belonging to any other person or persons.

XIII And whereas several persons that have been guilty of thefts, robberies, murders, and other felonies upon the land in Newfoundland, and the Islands thereunto adjacent, have many times escaped unpunished, because the trial of such offenders hath heretofore been ordered and adjudged in or other Court of Justice, but before the Lord High Constable, and Earl Marshall of England; for reformation thereof, and for the more speedy and effectual punishment of such offences for the time to come, Be it enacted by the authority aforesaid, that all robberies, murders and felonies and all other capital crimes whatsoever, which, at any time or times after the said twenty fifth day of March shall be done and committed in or upon the land in Newfoundland, or in any of the Islands thereunto belonging, shall and may be enquired of, tried, heard, determind and adjudged in any Shire or County of this Kingdom of England, by virtue of the King's Commission or Commissions or Oyer and Terminer, and Gaol Delivery, or any of them, according to the Laws of this land under for the punishment of such robberies, murders, felonies, and other capital crimes done and committed within this Realm.

XIV And be it further enacted by the authority aforesaid, that the Admirals of and in every port and harbour in Newfoundland for the time being, be and are hereby authorized and required (in order to preserve Peace and good Government amongst the seamen and fishermen, as well in their respective harbours, as on the shore) to see the rules and orders in this present Act contained, concerning the regulation of the fishery there duly put in execution; and that each of the said Admirals do yearly keep a journal of the number of all ships, boats, stages, and train-fats, and of all the seamen belonging to and employed in each of their respective harbours, and shall also (at their return to England) deliver a true copy thereof, under their hands, to his Majesty's most Honourable Privy Council.

XV And be it further enacted by the authority aforesaid, that in case any difference or controversy shall arise in Newfoundland, or the Islands thereunto adjoining, between the masters of fishing ships and the inhabitants there, or any by-boat keepers, for or concerning the right and property of fishing rooms, stages, flakes, or any other building or conveniency for fishing or curing of fish, in the several harbours or coves, the said differences, disputes and controversies, shall be judged and determined by the fishing Admirals, in the several harbours and coves; and in case any of the said masters of fishing ships, by-boat keepers or inhabitants, shall think themselves aggrieved by such judgment or determination, and shall appeal to the Commanders of any of his Majesty's Ships of War, appointed as Convoys for Newfoundland, the said Commander is hereby authorized and empowered to determine the same, pursuant to the regulation in this Act.

XVI And to the end that the inhabitants, fishermen, seamen, and all and every other person or persons residing or being at Newfoundland, or any of the said Islands, or other places, may with all devotion join in their solemn prayers and addresses to Almighty God, for obtaining of his Blessing upon their persons and endeavors; Be it further enacted, that all and every the inhabitants of Newfoundland, or the said Islands or places adjacent near thereto shall strictly and decently observe every Lord's Day, commonly called Sunday; and that none of the said inhabitants (who keep any tavern, alehouse, or other publick house for entertainment) shall entertain or sell, vend, utter or dispose of to any fisherman, seamen, or other person whatsoever upon any Lord's Day or Sunday, any wine, beer, ale, cyder, strong waters or tobacco, or any other liquor or liquors whatsoever.

Source: John Reeves, *History of the Government of the Island of Newfoundland* (New York: Johnson Reprints, 1967 rep. of 1793 ed.), appendix A, pp. i-xv. Cited by Reeves in old style as, Stat. 10 & 11 *Gul.* III. Cap. 25.

Chapter 3

Law and Custom Reconsidered:

The Struggle for Judicial Authority

In their study of the scientific revolution, Steven Shapin and Simon Schaffer employ a metaphor that is useful to analyzing developments within the law. From their perspective, instances of contestation offer invaluable entry points through which to examine the formation of institutionalized systems of ideas. Using the analogy of the ship in the bottle, Shapin and Schaffer suggest that an episode of controversy offers an invaluable opportunity to see that a ship was once a pile of sticks and string and that it was once outside the bottle.¹ In a similar vein, the legal disputes that marked Newfoundland during the 1730s provide rare insights into the process of law-making. These cycles of conflict are as important to the study of governance as periods of apparent consensus, for they shed light on the lines of antagonism and alliance that typically remain hidden from official correspondence. Like any social system, legal institutions were constructs of politics and power. To understand

¹ Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life* (Princeton: Princeton University Press, 1985), p. 7. They cite, as their source for this metaphor, H.M. Collins, "The Seven Sexes: A Study in the Sociology of a Phenomenon or the Replication of Experiments in Physics," *Sociology* 9 (1975), pp. 205-24.

how the island's legal regime became entrenched, it is necessary first to explore its fractious origins.

The period immediately following the establishment of a civil magistracy is crucial to tracing the development of the colonial state in Newfoundland. From 1729 to 1733 two agents of law – the justice of the peace (via commissions granted from the governor), and the fishing admirals (via King William's Act) – competed for control over the means to administer justice. This was not, as traditional historiography suggests, simply a case of obstruction by corrupt fishing admirals against enlightened reforms. Equally important, this legal conflict does not fit the conventional model of state-sanctioned formal law versus popularly-oriented customary law. In Newfoundland the former was far from uniform, and what law the labouring people might resist was itself contested by opposing factions within the ranks of the propertied classes. The struggle for legal supremacy entailed a crisis *within* the law; the question to be decided after 1729 was what type of institutions would govern Newfoundland.

This process of law-making produced a hybrid regime derived from common law, statute law, prerogative writ, and local customs. The point here is more specific than simply legal pluralism.² I argue that the competition between two sources of

² On legal pluralism generally, see John Griffiths, "What is Legal Pluralism?," *Journal of Legal Pluralism* 24 (1986), pp. 1-55; and Louis Knafla and Susan Binnie, "Law and Legal Pluralism in the Making of Modern Societies," in Knafla and Binnie, eds., *Essays in Modern*

authority – both within the boundaries of English legal culture – produced a third type of jurisdiction: an incipient customary regime that became entrenched over the course of a generation. The naval state which emerged in the 1750s and persisted until the 1820s was in large measure a product of compromises made after 1729 to suit the island's politico-economic conditions. To those living in Newfoundland in the late eighteenth century, its judicial system seemed to have operated from time immemorial, but the creation of a local law and legal ideology constituted a recent invention dependant upon contingent events and contested decisions.

This chapter identifies and pursues three themes. First, the construction of the island's legal regime involved a trans-Atlantic process, whereby the government in London (primarily the Board of Trade) and English mercantile interests (principally the merchants of Poole, Dartmouth, and Bristol) played an active role. Through regular reports from the governor and personal meetings after the squadron's return, the Board of Trade was kept well informed of the situation on the ground and amended the annual heads of inquiry to reflect concerns over the administration of law. A parallel private system also influenced the course of state policy: through MPs and municipal officials,

the West Country merchants registered their opposition to legal reforms.

Second, the extent of locally available resources and the nature of the island's social environment fundamentally shaped the development of law. From the outset, governors and magistrates had to adjust local law to reflect conditions that inhibited the simple importation of English institutions. The absence of a gentry or any semblance of a middle class left governors with few options when appointing justices of the peace. As the dominant military force and political authority in Newfoundland, the royal navy filled the need for administrative infrastructure. Third, local customs significantly affected the reception of English law. While many customs were ancient in the sense of originating before written records were kept, others were recent measures, such as the use of fishing admirals' warrants. Within a generation the royal navy itself, through the governor's *de facto* position as chief justice, occupied the centre of an entrenched customary system. The disputes during the 1730s illustrate how long-standing prerogatives could be reasserted in different forms when threatened by administrative measures. For thirty years, the fishing admirals had done little to fulfill their duties as laid down in King William's Act, but they swiftly reclaimed their powers when forced to share authority with civil magistrates.

Installing a Governor and Magistrates

The British government did not consider the reforms instituted in 1729 to signify a major shift in its policy toward Newfoundland. The initial recommendation to appoint a governor and civil magistrates – made in December 1728 by the Board of Trade to the Duke of Newcastle, Secretary of State for the Southern Department – echoed a report issued a decade earlier.³ It claimed that the general contempt for the authority vested by law in the fishing admirals had damaged trade and diminished the reserve of potential sailors for the royal navy.⁴ Additionally, the intransigence of the garrison commander at Placentia needed to be eliminated by establishing the naval commodore as the island's undisputed political and military authority. To justify this move, the Board claimed that several commodores upon the Newfoundland station had already served informally as governors.

The report raised the issue of magistrates as an administrative afterthought. It recommended:

³ From 1724 to 1748 the Duke of Newcastle served as the Secretary of State for the Southern Department, which dealt with the colonies from 1702 until the creation of a separate secretaryship for the American Department in 1768. See Hugh Egerton, *A Short History of British Colonial Policy* (London: Methuen, 1928), pp. 549-53; W.A. Speck, *Stability and Strife: England, 1714-1760* (Cambridge, Mass.: Harvard University Press, 1977), pp. 231-34 & 252-54; and James Henretta, *"Salutary Neglect": Colonial Administration under the Duke of Newcastle* (Princeton: Princeton University Press, 1972).

⁴ *Calendar of State Papers, Colonial Series: America and West Indies* (London: His Majesty's Stationary Office, 1926-), vol. 36, pp. 279-84 [hereafter CSPC].

And if the Commodores were sufficiently empowered to appoint judges and justices of the peace to decide disputes between the inhabitants and distribute justice among them, during the winter season, the miserys of these unhappy people might be abated.⁵

The Board of Trade had yet to formulate any clear strategy on the question of local government. While suggesting that a trained lawyer should be sent to assist the regulation of property disputes, it repeated the proposal, originally advanced in 1718, to deport the island's settlers to Nova Scotia.⁶ In April 1729 a committee of the Privy Council approved the plan to appoint a governor and justices of the peace. The committee stressed the need to bolster the commodore's power to settle property disputes and to establish a magistracy so that "those people who remain upon the Island may not live in a state of anarchy."⁷ To check the perceived social decay of the fishing communities, the Society for the Propagation of the Gospel was asked to send missionaries to Newfoundland. The Board of Trade ordered the usual heads of inquiry to be prepared and met with Lord Vere Beauclerk, who was to command the squadron.⁸

⁵ CSPC, vol. 36, pp. 279-84.

⁶ Ibid.

⁷ CSPC, vol. 36, p. 351. See also *Acts of the Privy Council of England, Colonial Series* (London: His Majesty's Stationary Office, 1910-), vol. 3, pp. 216-17.

⁸ CSPC, vol. 36, p. 375.

Lord Vere had served as commodore the previous year and had already argued the case for legal reform. His 1728 report reiterated the essential points of his earlier dispatches to the Admiralty: the fishing admirals were largely corrupt, habitually incompetent, and held courts only when the naval commanders were present; yet the practice of periodically appointing winter magistrates had no basis in law and their authority was not recognized in the outports. He then astutely summarized the crux of the problem:

[U]nless the Captains of the men of war are present to assist and countenance them [the fishing admirals] at their courts, their meetings would be nothing but confusion, and their orders of no use, which is the reason we are obliged to usurp a power, which I apprehend does not properly belong to us, of publishing orders in our own names to prevent as much as we can the threats of rioting and disorders, which, to the great detriment of the fishery, are generally practiced in our absence.⁹

The British government was unwilling to appoint Lord Vere governor of Newfoundland because it would then lose his parliamentary support. Accordingly, the Board of Trade drafted a commission for Captain Henry Osborn to act as governor, with Lord Vere to serve as commodore of the naval squadron.¹⁰

⁹ CSPC, vol. 36, p. 223 (Lord Vere to Burchett, 19 August 1728).

¹⁰ If Lord Vere had accepted an office of emolument under the Crown, he would have had to vacate his parliamentary seat. He could have stood for re-election, but there was not enough time to make the necessary arrangements, since the convoy was preparing to make sail. The practice of appointing a separate commodore and governor ended when Captain George Clinton assumed both posts in 1731. It revived temporarily in 1750, when Captain Rodney resigned as governor yet continued as commodore, but in this case Rodney remained the

In the meantime, government ministers expressed serious reservations. Officials at the Board of Trade warned that efforts to enforce the fishery's regulations would be ineffective until the British government established a court in Newfoundland with a clear jurisdiction in property law. Further, the proposed changes did not affect felonies committed in Newfoundland, which still could be tried only in England, a system that already had proven unworkable. The Board of Trade suggested that a lawyer should be sent to the island as soon as possible, along with a commission of oyer and terminer, in order to establish some type of local assize jurisdiction.¹¹

The naval governor's commission set clear limits on his legal powers. It empowered the governor to constitute and appoint justices of the peace, who were to hold quarter sessions according to English law. But the governor and his magistrates were forbidden to contravene King William's Act in any way and were ordered not to interfere with the fishing admirals' jurisdiction.¹² The commission placed Placentia under the jurisdiction of the Newfoundland governor and authorized him to

unquestioned *de facto* leader of the island's government.

¹¹ CSPC, vol. 36, pp. 376-77.

¹² CSPC, vol. 36, pp. 376-77. Osborn's name was inserted into the final commission on 22 May 1729. For the text of the governor's commission, see below, Appendix 4.2.

build gaols and court houses throughout the island.¹³ Yet this mattered little when balanced against the fact that the governor was legally obliged to defer to the fishing admirals' powers to hear all causes relating to the fishery. Since nearly every case inevitably involved the fishery one way or another, the governor could not necessarily claim to have the foremost legal authority. As a naval commander, he did have an appellate jurisdiction, but the admirals had remarkably vague – and thus theoretically vast – powers vested in them by King William's Act.

The Task of Building a Judiciary

From the outset the British government tried to address the apparent dearth of formal legal training and institutions in Newfoundland. Raised initially in the Privy Council, a proposal to send guidebooks to accompany the new commissions of the peace was eagerly adopted by the Board of Trade. Before sailing from Spithead, Lord Vere took aboard thirteen copies of King William's Act, one bundle of the Acts relating to Trade and Navigation, as

¹³ The governor's commission was normally issued only once, at the beginning of the standard three-year term, and any amendment to it required a new commission to be issued under the great seal. The appointment as commodore was a temporary rank, typically given to the senior post-captain in charge of a squadron or naval station. The privileges (which included the coveted honour of hoisting a broad pennant) ended with the termination of the squadron's mission and the expiration of the Admiralty commission. See John Hattendorf, "The Royal Navy During the War of the French Revolution and the Napoleonic War," in Dean King, ed., *A Sea of Words: A Lexicon and Companion for Seafaring* (New York: Henry Holt, 1995), pp. 18-23.

well as eleven sets of Shaw's *Practical Justice of the Peace*.¹⁴ Each copy of the manual had the name of one of the island's principal towns impressed in gold letters on the cover.¹⁵ This is the only extant reference to the use of justice's guidebooks in the eighteenth century: it is entirely unknown whether Shaw's manual was ever used by any of the island's magistrates, but my sense is that magistrates never relied on it to any significant extent. Justices who did exhibit legal training, such as Samuel Harris in the 1750s, appear to have acquired their legal knowledge in England. A weakness in Christopher Tomlins' masterful survey of American law is that he tends to assume that magistrates carefully followed the instructions and guidelines in the various editions of manuals printed in England and colonial America.¹⁶ The case of early Newfoundland suggests that a wide gap could exist between what justices were supposed to be doing and what they actually did.

¹⁴ Joseph Shaw, *The Practical Justice of the Peace* (2 vols., London, 1728). On justice's manuals, see Beattie *Crime and the Courts in England*, pp. 59-67; John A. Conley, "Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America," *Journal of Legal History* 6, 3 (December 1985), pp. 257-98.

¹⁵ The towns to receive the manuals were: Placentia, St. John's, Carbonear, Bay Bulls, St. Mary's, Trepassey, Ferryland, Bay de Verde, and Old Perlican.

¹⁶ Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), esp. pp. 232-38.

When Governor Osborn arrived in HMS *Squirrel* in the summer of 1729, he summoned the principal inhabitants to St. John's harbour and publicly read his commission. In the weeks before the squadron returned to England, Osborn had to institute the basic elements of the new legal system, most notably the justices of the peace. The Newfoundland commission of the peace, he later confessed, had been quickly drawn up as best he could manage before receiving orders from the Admiralty to set sail.¹⁷ It combined the form of the English commission of the peace with additional directions for observing the laws and customs of Newfoundland. On the one hand, it included the standard directions given to English justices of the peace: magistrates were to ensure that those who broke the peace either found sufficient security or were imprisoned. Justices were empowered, for example, to convict those who committed fraud through false weights and measures or sold food contrary to English ordinances. They were required to hold general quarter sessions according to common law. These provisions were essentially the same as those contained in commissions of the peace issued throughout Georgian England.¹⁸

¹⁷ CSPC, vol. 36, p. 504 (Osborn to Popple, 14 October 1729).

¹⁸ Quoted from an original blank commission contained in PRO, CO 194/8, pp. 228-32. Commissions of the peace were issued every three years with the appointment of a new governor. A copy of the English commission of the peace appears at E.N. Williams ed., *The Eighteenth Century Constitution, 1688-1815: Documents and Commentary* (Cambridge: Cambridge University Press, 1965), pp. 283-85.

On the other hand, the island's commission curbed the magistrate's jurisdiction to conform to King William's Act. It stipulated that the justices could not prosecute or judge robbery, murder, or any other capital crimes; in such cases they had to arrange for the suspect and witnesses to be sent to England. Magistrates were never to contravene King William's Act in the course of their duty, nor to do anything repugnant to its provisions, and were prohibited from obstructing the fishing admirals in the execution of their office. On top of these restrictions, justices of the peace were also required to aid and assist the naval commanders and the fishing admirals.¹⁹ The commission assigned the island's civil magistracy both the wide-ranging responsibilities accorded English justices and the limited authority concomitant with King William's Act. This arrangement engendered a tripartite judiciary – royal navy, fishing admirals, and justices of the peace – without any clear delineation of legal powers. While the fishing admirals enjoyed the widest prerogative, they were not empowered to issue judicial writs, a right granted only to justices of the peace. Before the new system could function effectively, its distribution of powers and responsibilities would have to be clarified.

More immediate, however, was the problem of appointing a sufficient number of civil magistrates. Governor Osborn had no

¹⁹ See Appendix 3.1.

trouble finding suitable men in St. John's: two of the justices – William Keen and Allen Southmayd – had already served as local magistrates.²⁰ But the lack of acceptable candidates in the smaller outports forced Osborn to create a system of judicial districts encompassing a series of settlements along a specified stretch of the coastline.²¹ Osborn divided the island into the six basic jurisdictions that prevailed to the end of the eighteenth century, each with at least three justices and constables, save Conception Bay.²² Although Lord Vere expressed hopes that the new magistracy would prove popular and effective, Osborn was far less optimistic. In his first report as governor, Osborn cautioned:

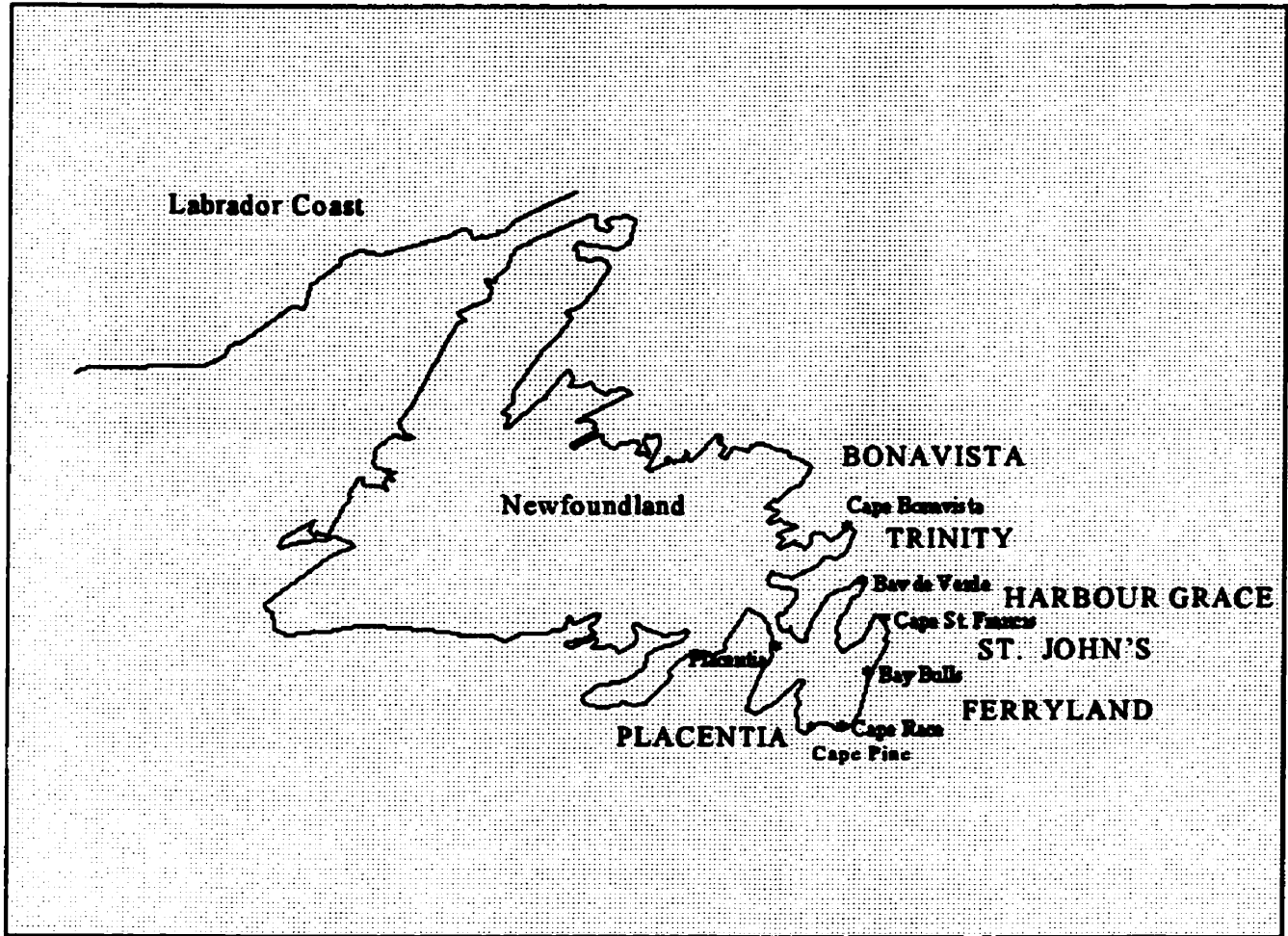
[W]hat yet is to be feared, is that the best of these magistrates are but mean people, and not used to be subject to any government, that no longer than they have a superior amongst them will they be obedient to any orders that are given.²³

²⁰ Keen was well known for his efforts to apprehend offenders and to promote legal reforms; Southmayd had acted as a magistrate in the 1723-24 court at St. John's. See Keith Matthews, "William Keen," *DCB*, vol. 3, pp. 323-24.

²¹ *CSPC*, vol. 36, pp. 471-72.

²² The six original districts were: Bonavista (3 JPs and 3 constables); Trinity (3 & 9); Carbonear-Harbour Grace (none in 1729); St. John's (3 & 7); Ferryland (5 & 5), and Placentia (3 & 4). See *PRO*, CO 194/8, p. 226.

²³ *CSPC*, vol. 36, pp. 504-05.



<u>Districts</u>	<u>Boundaries</u>	<u>Principal Towns</u>	<u>No. Justices</u>	<u>No. Constables</u>
Bonavista	From Cape Bonavista to the Northward	Bonavista, Bayllys Cove	3	3
Trinity	From Cape Bonavista, all of Trinity Bay, to Bay de Verde	English Harbour, New Perlican, Trinity, Old Perlican, Bay de Verde	3	5
Harbour Grace	From Bay de Verde, all of Conception Bay, to Cape St. Francis	Muskete, Carbonear, Harbour Grace, Bay Roberts	2	7
St. John's	From Cape St. Francis southward as far as Bay Bulls	Torbay, Quidi Vidi, St. John's, Petty Harbour	4	4
Ferryland	From Bay Bulls, south to Cape Race, west to Cape Pine	Tods Cove, Ferryland, Fermeuse, Renews, Trepassey	5	9
Placentia	From Cape Pine to Placentia and the west side of the bay	St. Mary's, Placentia, Little Placentia	3	3

Source: Prowse, *History of Newfoundland*, p. 301; PRO, CO 194/9, p. 225.

He repeated the opinion – commonly heard in official circles and repeated uncritically by some modern observers – that the island's people were as primitive as its institutions. Anglo-Irish settlers may have acquired the first layer of English law, but they had yet to prove to London that they could sustain civil government.

Governor Osborn also worked to establish prisons and stocks for the new penal regime. Upon his arrival in St. John's he found no functional gaol, nor any house that could serve as one, and he sent a warrant to the justices of the peace, directing them to organize the building of a prison and the means to pay for it. In August 1729 the magistrates proposed a scheme to raise £150 by taxing the season's fish catch. Osborn approved the plan and authorized the justices to raise a levy: one half a quintal (the standard hundredweight measure) of merchantable (i.e. sellable quality) codfish per fishing vessel; another half a quintal per boat's room (i.e. waterfront premises); and an undetermined, proportionable rate for those not involved in the fishery.²⁴

This tax applied only in St. John's and Ferryland districts, where prisons were to be built, and for only one year. The other districts would rely on stocks for petty offences; serious offenders would be sent to one of the two regional prisons. Osborn confirmed the prison tax through a public proclamation,

²⁴ CSPC, vol. 36, p. 504.

sending additional warrants to the justices to ensure its collection.²⁵ By imposing taxation in a jurisdiction without any form of representative government, Osborn knew he was on uncertain ground.²⁶ Equally important, King William's Act clearly designated the Newfoundland fishery to be a free trade.²⁷

Defining the Boundaries of English Law

With the convoy of fishing ships and naval escorts ready to weigh anchor in early November 1729, Governor Osborn could do no more until the following year. Not surprisingly, after his departure the nascent magistracy ran into problems. Two justices of the peace in Bonavista – who described themselves as “newly appointed justices, not learned in the Law” – sent Osborn a request to clarify their civil jurisdiction: the commissions and instructions had contained no references to causes involving property rights or the recovery of debts.²⁸ In April 1730 Lord Vere Beauclerk and Governor Osborn met with a committee at the Board of Trade to discuss the administration of justice for the upcoming fishing season. Alured Popple, the secretary of the Board of Trade, asked Francis Fane, the solicitor general, and

²⁵ CSPC, vol. 36, p. 516.

²⁶ CSPC, vol. 36, pp. 504-05 (Osborn to Newcastle, 14 October 1729).

²⁷ 10 & 11 Wm. III, c. 25, s. 1 (1698-99).

²⁸ CSPC, vol. 37, p. 79 (Jones and Henning to Osborn, 8 December 1729).

Philip Yorke, the attorney general, to provide opinions on several points of law.²⁹ Lord Vere and Osborn presented four *quaeres*: if the island's inhabitants disobeyed the order to raise the prison tax, in what manner could they be punished; if they ill-treated magistrates or destroyed the stocks, could they be forced to pay for repairs and be corporally punished; could the justices, in the absence of the fishing admirals, decide disputes relating to property; and could Governor Osborn authorize additional taxes to fund public works?³⁰

The reports took different approaches but both criticized the initiative to impose taxation. While Fane expressed doubts over the validity of the magistrates' actions, Yorke ruled emphatically that they did not have sufficient authority to raise funds for building a prison. The attorney general's opinion clearly limited the scope of Osborn's legal regime. Yorke argued that the levy on fishing boats directly contravened not only King William's Act, which exempted the fishery from taxation, but also the English statute regulating gaols, by which such rates could be raised only after a grand jury presentment.³¹ He pointed out

²⁹ PRO, Minutes of the Board of Trade [CO 391], vol. 38, p. 93. Though listed as part of the Colonial Office Papers, this series comprises only the minutes of committee meetings at the Board of Trade and does not contain any colonial correspondence.

³⁰ CSPC, vol. 37, p. 86.

³¹ 10 & 11 Wm. III, c. 25, s. 1 (1698-99); 11 & 12 Wm. III, c. 19 (1700). On the English system for building gaols, see Beattie, *Crime and the Courts in England*, pp. 292-93.

that the island's commissions of the peace required the magistrates to act according to the laws of England. "So far as the people have submitted to this tax," he conceded, "there may be no occasion to call it into question, but I cannot advise the taking of rigorous methods to compel compliance with it."³²

With regard to the second *quaere*, the attorney general stated that actual assaults or resistance to authority were indictable offences punishable by a fine or imprisonment. For contemptuous words spoken to the justices or to their authority, offenders were not liable to be punished corporally but were to be bound in recognizance for their good behaviour.³³ To the third question Yorke gave an unequivocal answer: the justices of the peace could not decide differences relating to property; their powers were restricted to the criminal matters specified in their commission. On the broader issue of the power to raise taxes, he commented that no such authority existed in Osborn's instructions for imposing general taxation without the consent of some assembly of the people.³⁴ Though simple in theory, the division

³² The attorney general's report appears at PRO, CO 194/21, pp. 1-3, with a printed version in George Chalmers, ed., *Opinions of Eminent Lawyers on various points of English Jurisprudence, chiefly concerning the colonies, fisheries and commerce of Great Britain* (Burlington: C. Goodrich, 1858), pp. 536-38. For the solicitor general's report, see CSPC, vol. 37, p. 108.

³³ He pointed out that the fines could then be applied to the cost of repairing damaged stocks or whipping-posts.

³⁴ The report concluded that neither Captain Osborn nor the justices of the peace had the power to raise taxes for public works except in cases cited specifically in statute.

between criminal and civil jurisdictions was largely ignored in practice. On the other hand, the provision for allowing the use of informal meetings to approve local levies was later exploited as a justification for establishing regular taxation throughout the island's districts.³⁵

The Board of Trade decided not to alter its policy toward Newfoundland. Instead, Popple tried to wring some legal justification for the prison tax from the solicitor general. Obliging, Fane eased the concerns raised by the attorney general: "I think that Captain Osborn having acted with so much caution and prudence and not having taken one arbitrary step in the execution of his commission, cannot be liable to a prosecution in England." Although Fane still held that the tax was not entirely agreeable to King William's Act, he believed that Osborn was justified in raising the levy because it represented the only means through which the governor could meet the design and intent of his commission.³⁶

Assuaged by this, the British government made no changes to its instructions to the Newfoundland governor. Popple reassured Osborn:

[Y]ou stand perfectly justified according to his [the solicitor general's] opinion, as so you do in ours, in all the steps you have taken there for preserving the peace and

³⁵ See below, Chapter Four.

³⁶ CSPC, vol. 37, p. 108.

tranquility of the inhabitants, during your absence, more particularly with respect to the building of a gaol.³⁷

If Osborn encountered resistance to the prison rates, a grand jury was to be impaneled to make a presentment at quarter sessions. To avoid any appearances of violating the free trade in the fishery, Popple suggested that the tax be levied in money exchangeable for fish. In June 1730, with the convoy well into the Atlantic, the Board of Trade finally responded to a government query – made the previous year by the Duke of Newcastle – into reputed difficulties in administering law in Newfoundland. Stonewalling for another year, it asserted that Osborn had faithfully discharged the trust reposed in him, and no further information would be available until he returned the following autumn.³⁸

Local Battles for Authority

Governor Osborn soon discovered the extent of resistance encountered by magistrates trying to establish their jurisdictions in the outports. Waiting for him was a dispatch from the Placentia magistrates, recounting how the fishing admirals had successfully challenged their authority. The justices of the peace – Peter Signac, Thomas Salmon, and Thomas Buchanan – reported that the three admirals of the harbour had

³⁷ CSPC, vol. 37, pp. 108-09.

³⁸ CSPC, vol. 37, p. 145.

convened a court in May 1730 to hear two complaints brought by a fish merchant. According to the justices, the admirals had ordered one of the defendants to be imprisoned overnight in the garrison merely because of a trading disagreement.³⁹ The next day the magistrates met Captain William Brooks, the senior fishing admiral, at Salmon's house and told him that the proceedings of the admirals' court constituted an infringement on their authority. Brooks then purportedly claimed that, "the administration of all justice did belong to them, and that we was only winter justices, and that his thought was that our power was only about the affairs of the church and in such small business." The justices offered to hold a meeting to produce their commissions of the peace, but Brooks retorted that he had "no business with our commissions, that he had the Act of Parliament for his." One of the men present allegedly went so far as to pronounce that the admirals had greater legal powers than Governor Osborn.⁴⁰

This altercation provides a rare insight into the highly personalized process through which authority at the local level was negotiated and contested. As tensions rose in the room, Thomas Salmon laid the key to the stocks on the table and declared: "he that had the most right to it may take it."

³⁹ PRO, CO 194/9, pp. 21-22.

⁴⁰ PRO, CO 194/9, pp. 21-22.

Without hesitating, William Brooks snatched it up, affirming that the admirals had the power "to whip and to put in the stocks when they thought fit and to imprison and detain at their pleasure."⁴¹

It is not surprising that the key to the stocks figured so prominently in this confrontation: whoever possessed (both figuratively and literally) the means to punish controlled the symbolic and material centre of judicial power.⁴² According to the magistrates, the admirals not only claimed the right to appoint constables, they also maligned Governor Osborn's authority as based merely on a commission issued by the Privy Council. Forced onto the defensive, the justices decided to wait until Governor Osborn arrived in Placentia to confirm their powers and – equally important, though they did not admit to it – to bolster their damaged social standing.⁴³ When Osborn visited Placentia, he attempted to expand the justices' authority by empowering them to act in any of the island's districts. He hoped this would enlarge the pool of available magistrates and thereby augment their position in outport communities.⁴⁴

⁴¹ Ibid. This passage was underlined in the original, presumably by Governor Osborn.

⁴² The link between control over punishment and the process of upholding social authority is addressed nicely in David Garland's critique of Durkheim's model of hegemony. See Garland, *Punishment and Modern Society*, pp. 54-61.

⁴³ PRO, CO 194/9, pp. 21-22.

⁴⁴ CSPC, vol. 37, p. 263 (Osborn to Popple, 8 September 1730).

The incident in Placentia illustrates how various sources of law became intertwined in the contested imposition of civil authority. The fishing admirals displayed a basic legal knowledge and were well aware of the difference between statutory law and royal prerogative. They used this to argue that their authority (by King William's Act) was inherently superior to that of the governor and the justices (by Order-in-Council). The admirals cited recent customs and popularly-held beliefs, in particular the idea that the magistrates were merely winter justices confined to hearing breaches of the peace. The mistaken notion that the justices were restricted to sitting during the winter months has been widely treated as an accepted fact, but it had no legal foundation whatsoever.⁴⁵ Neither the governor's commission nor the commissions of the peace circumscribed the justices' summer jurisdiction beyond the provisos to obey King William's Act and to assist the fishing admirals. The conflict between the admirals and magistrates demonstrated the consequences of the relative ability of competing legal authorities to enforce their judgements: without the means to chasten the fishing admirals, the justices backed down, effectively conceding the government of Placentia until Governor Osborn arrived.

⁴⁵ Keith Matthews erroneously assumed that the justices' authority was restricted to the winter months: see *Lectures on the History of Newfoundland*, pp. 101-02.

This crisis was not restricted to outports like Placentia, nor did it dissipate with Osborn's arrival. He received further complaints that the fishing admirals had licensed public houses and had repeated the claim that their authority was superior to that of the justices.⁴⁶ The St. John's magistrates reported that the admirals had expanded their jurisdiction beyond disputes concerning the fishery: they now determined criminal cases, sent warrants to constables, and ordered magistrates to assist in carrying out sentences. Governor Osborn responded by sending a pessimistic dispatch to London. He had hoped to be able to inform the British government of the progress brought by legal reforms,

but instead thereof, the Fishing Admirals and some of the rest of the masters of the ships and traders in this Island, has ridiculed the Justices of Peaces authority very much in my absence, and have used their utmost endeavours to lessen them in the eye of the lower sort of people, and in some parts have in a manner wrested their power from them. The admirals have brought the power given them by the Fishing Act in competition with the justices, and have not scrupled even to touch upon mine.⁴⁷

Osborn pointed out that before the appointment of civil magistrates, the admirals had rarely exercised their statutory authority. Since 1729, however, they had used "all the little spiteful things they can against these men because they bear this commission."⁴⁸ Some justices of the peace had become completely

⁴⁶ CSPC, vol. 37, pp. 290-91.

⁴⁷ CSPC, vol. 37, pp. 289-91 (Osborn to Newcastle, 25 Sept. 1730).

⁴⁸ Ibid.

intimidated, refusing to judge certain cases for fear of retaliation from fish merchants. To counteract this trend, Osborn issued a proclamation confirming the justices' powers.⁴⁹

The Reception of Law in Practice

The governor did report progress in the efforts to construct prisons and to establish a penal system. Osborn affirmed that the local tax had been successfully raised and the new gaol was practically completed.⁵⁰ In August 1730 he ordered the prison and court fees to be publicly decreed.⁵¹ To spur the construction of the other regional jail, Osborn traveled to Ferryland to convene a public meeting. Attended by twenty of the principal planters and merchants, the assembly approved plans to raise a levy of one shilling six pence per servant, payable by the fishing masters, to cover the building costs.⁵² Osborn tried to portray this as a type of presentment, but no grand jury sat to consider the

⁴⁹ PRO, CO 194/9, p. 22.

⁵⁰ CSPC, vol. 37, pp. 289-91.

⁵¹ Scheme for court charges:

Prison Keeper: 12 pence per prisoner and 12 upon discharging;
3 shillings per week

Parish Constable: 12 pence for serving warrant in town; 4 pence
per extra mile

Beadle: 12 pence per whipping

Clerk: 12 pence for issuing warrants

See PRO, CO 194/9, p. 41.

⁵² CSPC, vol. 37, p. 290.

proposal at the Ferryland quarter sessions. Moreover, no evidence survives of any grand jury presentments throughout this period.

Magistrates tried as best they could to perform their duties according to their commissions. William Keen, the senior justice in St. John's, launched a coroner's inquest into a homicide at Quidi Vidi in 1730. He directed three surgeons to perform a post-mortem and arranged for the suspect and two witnesses to be sent to England.⁵³ Keen complained to the Board of Trade that he had to pay the entire cost of transporting the suspect and witnesses. He also warned that the tax ordered for building a prison was not being complied with, while many local traders adamantly opposed all forms of civil government.⁵⁴ In an official dispatch sent to London in September 1730, Lord Vere Beauclerk personally apologized for the failures in establishing the new legal regime. He admitted that he originally had intended the justices' powers to be limited to the winter months, but he could not lawfully limit their authority once they had been given commissions of the peace. "I have only endeavoured," he conceded, "to keep them and the admirals quiet, without absolutely determining their several jurisdictions."⁵⁵ What was now needed were clear instructions

⁵³ PRO, CO 194/9, pp. 64-65.

⁵⁴ PRO, CO 194/9, p. 66 (Keen to Popple, 27 October 1730).

⁵⁵ CSPC, vol. 37, pp. 291-92 (Lord Vere to Popple, 26 September 1730).

from the British government on the respective responsibilities and powers of the justices of the peace and the fishing admirals.

In the meantime, the Duke of Newcastle pressed the Board of Trade to devise a plan to rectify the island's administrative problems.⁵⁶ Newcastle asked for another opinion on whether the commissions of the peace contravened the powers given to the fishing admirals by King William's Act. In December 1730 the attorney general submitted a report which concluded that the justices' powers in no way impinged upon the fishing admirals' authority. He also ruled that the admirals' powers extended only to regulating disputes within the fishery. Whereas this constituted a type of civil jurisdiction in particular property cases, the justices' authority extended only to breaches of the peace and other criminal matters.⁵⁷ It appeared, therefore, that a feasible division of legal powers could be made on the basis of criminal versus civil administration, with the former allocated to the justices of the peace and the latter to the fishing admirals.

Numerous points of law remained unsettled, however, and Governor Osborn presented his case when he returned to England. In the winter of 1731 Osborn brought three new *quaeres*: did the

⁵⁶ PRO, CO 194/9, p. 1 (Newcastle to the Board of Trade, 24 November 1730).

⁵⁷ PRO, CO 194/9, pp. 3-6. A printed version of Yorke's report appears in Chalmers, ed., *Opinions of Eminent Lawyers*, pp. 538-41.

fishing admirals have the power to issue warrants to constables, or were they subordinate to the justices of the peace; were the justices entitled to act according to the statute laws of England; and was the governor himself empowered to act as a magistrate and to sit at quarter sessions?⁵⁸ The committee for trade then asked Francis Fane, the solicitor general, for an opinion.⁵⁹ Fane replied that the admirals had no power to send warrants to constables, nor to commit persons to prison or the stocks; they were subordinate to the justices in everything but what related to their authority to settle disputes in the fishery. This was due to the fact that King William's Act did not assign the fishing admirals any specific powers to levy penalties or to inflict punishments.⁶⁰

In a response to the second question Fane gave a clear statement on the reception of English law. In a judgment overlooked by Newfoundland historians, Fane set down the parameters for reception:

I apprehend that all the statute laws made here previous to his Majesty's subjects settling in Newfoundland are in force there, it being a settlement in an infidel country. But as to the laws passed here subsequent to the settlement, I take it they will not extend to this country unless it is particularly mentioned.⁶¹

⁵⁸ PRO, CO 194/9, p. 70.

⁵⁹ PRO, CO 194/9, p. 140 (report of the solicitor general, 24 March 1731).

⁶⁰ See above, Appendix 2.1, sections 14-16.

⁶¹ PRO, CO 194/9, p. 140.

In theory, the date of settlement appears to have been the watershed in the reception of statutory law. In practice, however, magistrates continued to draw on whatever statutes and writs they deemed necessary to execute their commissions. Christopher English's hypothesis that the grant of representative government in 1832 marked when the laws of England ceased to be *ex proprio vigore* in force in Newfoundland appears to be borne out by the evidence.⁶² The question of whether the island was settled in 1731 remained debatable, but Fane evidently viewed the appointment of a governor to be a tacit acknowledgment that colonization had already occurred.

The solicitor general claimed that the governor himself could not act as a justice of the peace because his powers extended only to appointing others to the office. Like the issue of the right to settle permanently on the island, the prerogative of the governor to sit as a judge remained an uncertain point of law, despite Fane's ruling. Prior to 1749 most governors appear to have been wary of establishing any type of formal court – or any acknowledged jurisdiction comparable to a court of chancery – and they rarely strayed very far from their appellate jurisdiction granted by King William's Act. Yet, as we will see,

⁶² Christopher English, "Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92," *Manitoba Law Journal* 32 (January 1996), p. 71. The problem of the reception of English law is discussed in Chapter Four.

the custom of holding a governor's court became entrenched in the second half of the eighteenth century, though this legal innovation had no statutory foundation. In the spring of 1731 the Board of Trade drafted a revised commission for the next governor, Captain George Clinton, directing him to report any anomalies in the judicial system.⁶³

The administration of law in Newfoundland clearly failed to conform to the government's scheme. Apparently oblivious to the opinions of the Crown's law officers, the fishing admirals continued to exercise their newly-discovered powers, defying both the governor and the justices. The fishing admirals of Muskitta had appointed their own deputies to settle cases during the winter and had drawn up arrest warrants.⁶⁴ This was not an isolated incident: in June 1731 the St. John's justices petitioned against the fishing admirals' repeated incursions into areas of civil government, such as appointing constables, and they asked for yet another explanation of the admirals' exact powers under King William's Act. As for their own authority, they declared: "we cannot believe His Majesty's commission, which *without reserve imposes us to act with the same authority as any*

⁶³ PRO, CO 391/38, pp. 68, 77 & 87.

⁶⁴ CSPC, vol. 38, p. 208.

justice of the peace in Great Britain, to be contradictory to the said Act."⁶⁵

This assertion was at best an exaggeration and at worst a deliberate fabrication. The justices' commission not only strictly enjoined them to obey King William's Act, it explicitly forbade them from interfering in any way with the lawful authority of the fishing admirals to settle disputes in the fishery.⁶⁶ Whether these provisos were compatible with the other powers contained in the commission of the peace remained a moot point, but they placed significant restrictions on the justices' authority, which was *ipso facto* not the same as magistrates in England. English magistrates dominated local government: they did not have to share the duties of keeping the peace and settling disputes with law officers such as the fishing admirals.⁶⁷ Captain Osborn, whose warship had arrived before Clinton's, took little time to respond to the magistrates' complaints. He published a proclamation condemning all scandalous and seditious reflections upon His Majesty's authority. Osborn berated the fishing admirals for their arbitrary proceedings and false interpretation of King William's Act. He ordered every person to

⁶⁵ PRO, CO 194/9, pp. 134-35 (petition of William Weston and Allen Southmayd, 10 June 1731). Emphasis added.

⁶⁶ See Appendix 3.1.

⁶⁷ See Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984), pp. 19-45.

show the same respect toward the island's justices of the peace as they would to any magistrate in Britain.⁶⁸

The Expansion of Naval Power

Once Governor Clinton arrived in HMS *Salisbury* in the summer of 1731, the struggle for authority in Newfoundland entered a more ambitious and acrimonious phase. Clinton censured the fishing admirals at Muskitta for usurping the justices' powers – a malfeasance he imputed to sheer ignorance – and kept the admirals' warrant to show the British government how insolent they had become.⁶⁹ Captain Osborn also sent a dispatch to the British government repeating the increasingly common invective against the fishing admirals. Osborn argued that as a result of recent disorders, offenders were escaping with impunity.⁷⁰ He added that Irish convicts were now being shipped to Newfoundland as fishing servants, who he believed were responsible for the recent murder of a woman and four children at Muskitta. By linking the fishing admirals' conduct with fears of serious crime and social disorder, Osborn raised the stakes in the battle for legal supremacy. Throughout his first year as governor, Clinton

⁶⁸ PRO, CO 194/9, pp. 136-37 (proclamation of Captain Henry Osborn, 13 June 1731).

⁶⁹ CSPC, vol. 38, p. 208.

⁷⁰ PRO, CO 194/9, pp. 131-33 (Osborn to Popple, 28 July 1731). Osborn had sent essentially the same letter to the Duke of Newcastle on 25 July.

reproved the fishing admirals and anyone else, including the commander of the army garrison at Placentia, who appeared to resist his authority.⁷¹

Out of this conflict emerged three major developments. First, Commodore Clinton augmented and formalized the system of sending naval warships on cruises along the coast to enforce the governor's authority. He sent junior officers to various outports to administer justice on his behalf, a precursor to the surrogate courts which formed the backbone of the judiciary after 1749. In August 1731, for example, Clinton appointed Lieutenant Richard Hughes temporary captain of HMS *Salisbury*, ordered him to visit the larger outports, and gave him an extensive list of duties: assist the fishing admirals, determine outstanding disputes, prevent illegal trade and smuggling, collect the prison tax, oversee the punishment of offenders, compile the returns for the heads of inquiry, and prevent foreign vessels from fishing contrary to the Treaty of Utrecht.⁷² This resurgence of the custom of naval governance was driven by the nature of the island's legal resources: the royal navy represented the only institution with sufficient means to enforce British policy and the rule of the civil magistracy.

⁷¹ CSPC, vol. 38, pp. 207-08 & 277-78.

⁷² The orders are reprinted in CSPC, vol. 38, pp. 278-280.

Second, Governor Clinton used the nascent surrogate system to tighten his supervision of the justices of the peace and to respond promptly to problems in the outport districts. He worked vigorously to centralize authority and – arguably for the first time in the island's history – correspondence flowed to and from the outports without delay. This was made possible by the royal navy's highly developed administrative apparatus, in which naval clerks and junior officers maintained copious records. Clinton's efficient command structure, which foreshadowed the letterbook system instituted by Governor Rodney, ensured that orders were carried out and carefully recorded in official reports.⁷³

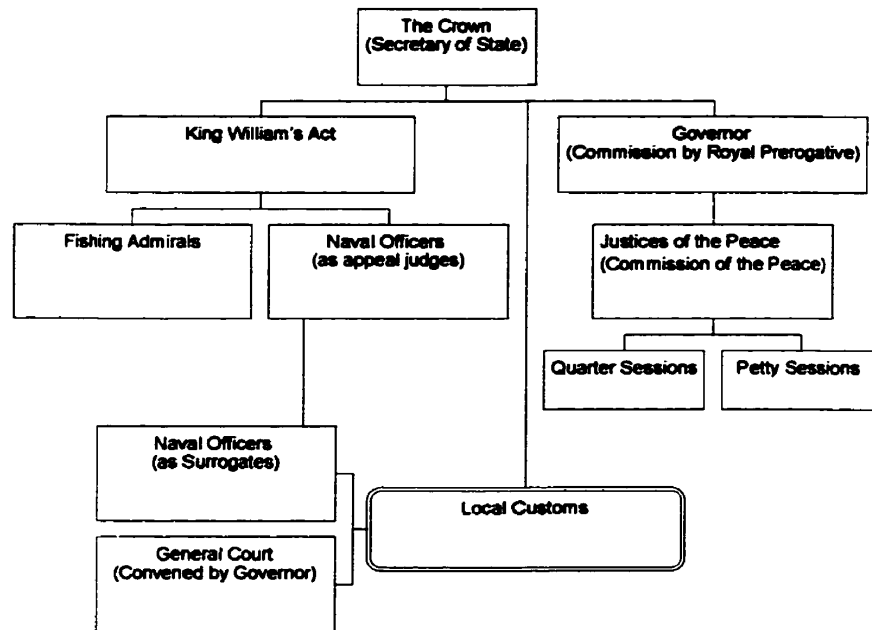
Third, and equally significant, Governor Clinton expanded his authority beyond the prerogative of his commission. Exceeding his appellate jurisdiction, Clinton gave summary judgements in cases presented by written petition. In August 1731, for example, he ordered a planter in Placentia to pay £10 per annum on a £60 debt and, in reply to a second petition, directed the fishing admirals to force another man to pay the balance of an overdue account.⁷⁴ He also issued a series of judicial writs, such as attachment, in areas of law where he had no cognizance. Clinton prohibited a master from selling fish until he had paid his

⁷³ On the administration of the royal navy, see Daniel Baugh, *British Naval Administration in the Age of Walpole* (Princeton: Princeton University Press, 1965); and Rodger, *Wooden World*, pp. 15-29 & 205-11.

⁷⁴ A summary of the orders is printed in CSPC, vol. 38, p. 277.

servant's wages (and had him fined for contempt when he did not comply), directed the Fermeuse fishing admirals to settle disputed merchant accounts according to the contracted price, and issued a writ of attachment to a planter for a £25 debt.

Figure 3.1. The Administration of Law, 1729-1748



The governor also resurrected the custom, last practised in the 1710s, of convening a general court alongside the St. John's fishing admirals. In September 1731, for instance, Clinton and two admirals decided the ownership of a fishing premises in Petty

Harbour.⁷⁵ The governor was well aware of the questionable legality of such proceedings, for two days later he urged the fishing admirals to hold their own courts:

If you remember, upon my arrival here, and publishing my commission; I then declared that I should not sit at any court ashore; but that in compliance with the Act of Parliament, [King William's Act] I should be always ready to hear any appeal that might be made to me on board the *Salisbury*, from any person that judged himself aggrieved by your sentence. But as I am daily pestered with complaints of masters being ill treated by their servants, and servants wronged by their masters ... it makes me very free to say that I think you have been very negligent in the discharge of that duty incumbent on you; that is, the speedy hearing [of] such complaints, and doing justice to the injured party. It is therefore my opinion that you ought ... [to] hold a Court to hear and decide so many controversies as are ready to come before you.⁷⁶

Local developments, particularly appeals from the St. John's magistrates, had pressured Clinton to assume greater legal powers. The justices had warned him that strong measures were especially needed to combat abuses in the fishery and the wave of crimes committed by transported convicts reputedly landed along the coast.⁷⁷

Still, Governor Clinton did not feel beholden to the justices of the peace. In response to complaints of disorders in the public houses at Placentia, he ordered recognizances to be

⁷⁵ CSPC, vol. 38, pp. 281-83.

⁷⁶ PRO, CO 194/9, p. 109 (Clinton to St. John's fishing admirals, 23 September 1731). The quotation is from the printed version at CSPC, vol. 38, p. 282.

⁷⁷ PRO, CO 194/9, pp. 103-05 (Weston and Southmayd to Clinton, 20 August 1731).

taken for trouble-makers, but he also admonished the local justices for charging exorbitant fees for liquor licences and keeping poor accounts. Upset by this perceived interference, Thomas Salmon and Thomas Buchanan, two of the Placentia magistrates, asked to resign their commissions.⁷⁸ Clinton dismissed Jacob Taverner, a justice in Trinity, for being a dissenter, replacing him with Richard Waterman, to whom Captain Hughes was to administer the necessary oaths.⁷⁹ In his dispatch to the Trinity magistrates Clinton demanded that they cooperate with each other. He explained that it was impossible to maintain an effective government in the face of public disputes.⁸⁰

Resistance to the Magistracy

Some local interests strenuously fought against the efforts to entrench the civil magistracy. A feud between Nathaniel Brooks, the justice of the peace in Bay Bulls, and George Rowe, a ship master acting as a fishing admiral, undercut the governor's authority along the Southern Shore throughout 1731. A prominent English Roman Catholic, Rowe had sent written orders to another

⁷⁸ CSPC, vol. 38, pp. 277-78.

⁷⁹ Most of the officers who acted as surrogate judges were lieutenants, however, when they were given command of a vessel, they assumed the courtesy title of "captain." Midshipmen, who appeared in increasing numbers later in the century, were designated "esquire" in the court records.

⁸⁰ CSPC, vol. 38, p. 278.

master to relinquish a servant's contract. The master's wife had then appealed to Brooks, who responded by informing Rowe that, "a man of your profession hath no authority to grant warrants amongst us Protestants, without a power and authority from King George."⁸¹

The conflict between Rowe and Books reveals how religion could form a powerful social cleavage. Brooks' statement did not reflect simple prejudice but was based on the English Penal Laws cited in his commission of the peace.⁸² The Test Acts of 1673 and 1714 clearly prohibited Roman Catholics from serving as law officers of the Crown.⁸³ Brooks was also likely drawing upon the widely-shared belief, as stated in the Articles of Religion, that the Roman Catholic Church had no jurisdiction in England.⁸⁴ From justice Brooks' perspective, that Rowe was neither Irish nor a

⁸¹ The correspondence between Brooks and Rowe is contained in PRO, CO 194/9, pp. 117-24. The quotations are from the printed extracts in CSPC, vol. 38, pp. 283-84.

⁸² See below, Appendix 3.1, and also Hans Rollmann, "Religious Enfranchisement and Roman Catholics in Eighteenth-Century Newfoundland," in T. Murphy and C. Byrne, eds., *Religion and Identity: The Experience of Irish and Scottish Catholics in Atlantic Canada* (St. John's: Jespersen Press, 1987), pp. 34-52.

⁸³ 25 Chas. II, c. 2 (1673); 1 Geo. I, stat. 2, c. 13 (1714).

⁸⁴ Article thirty-seven, "Of the Civil Magistrates," clearly prohibited government from being subjected "to any foreign jurisdiction," i.e. Roman Catholicism, and affirmed that "The Bishop of Rome hath no jurisdiction in this Realm of England." See *The Book of Common Prayer* (Toronto: Anglican Book Centre, 1962), p. 713. For a recent argument that Protestantism formed one of the primary unifying features in British political culture, see Linda Colley, *Britons: Forging the Nation, 1707-1837* (New Haven: Yale University Press, 1992), pp. 18-54.

servant mattered less than the fact he was a Roman Catholic. But while Brooks focused on the question of religion, Rowe turned to legal issues, in particular the lack of statutory authority for appointing justices of the peace. "I do admire who gave any such fellow as you orders to act or dispute in any manner of justice," Rowe retorted, "although you have had the impertinence of doing it, without either act of Parliament or orders to the Government."⁸⁵

Episodes of contested authority could flare into serious violence. In addition to having to maintain their authority among the merchants and planters who controlled the capital in the fishery, the justices of the peace used force to discipline servants who did not exhibit sufficient deference. Twice during August 1731 the stocks in Trinity were broken by defiant servants, one of whom had tried to murder the presiding magistrate.⁸⁶ In response to the attempted murder, the local magistrates sent a detailed report to their counterparts at St. John's. This dispatch provides one of the few surviving accounts of the local conflicts that underlaid the broader struggle for authority. According to the justices,

⁸⁵ Brooks asked the St. John's justices for advice on how to reply to this insult, but was told to do nothing other than ensure his orders were carried out. See CSPC, vol. 38, p. 284.

⁸⁶ PRO, CO 194/9, pp. 116, 119, & 123 (dispatches from Trinity justices, 17 August 1731).

[L]ast Sabbath Day the 15th of August Mr. Francis Squib, one of his Majesty's justices for this Bay, coming from church finding Thomas Stuard in his house and making a great disturbance with his fellow servants, his master ordered him into the stocks which in a little time after he broke open the stocks and made his escape; the next morning Mr. Squib sent for to take him up for breaking the stock to pieces, this Thomas Stuard got a gun and loaded it with powder & shot, and swore the first man that did offer to take hold of him he would shoot him, there was the constable and several men more, but none dared venture, Mr. Squib goes down into his own boat to take the gun from him, Thomas Stuard put the gun to Mr. Squib's breast and the gun snapt, or else he had killed him on the spot; one of Mr. Squib's men draw'd the shot out of the gun after, and she went off the first time, so having no prison here as yet, we have sent him, gentlemen, to you, and desire that you will order him to be kept in gaol until he shall be thence discharged by due course of Law.⁸⁷

Other skirmishes of this sort went unreported or were mentioned only in passing: Stuard's case survives for study only because it was serious enough to warrant sending the servant to St. John's along with a written report. It is impossible to gauge the level and intensity of such conflict with any accuracy until the 1750s, when justices began to keep local minute-books for the first time.

In addition to tensions between masters and servants, the justices had to contend with their ongoing battle with the fishing admirals for control over the administration of law. In September 1731 the admirals at Placentia attempted to co-opt the army garrison. Claiming that the justices of the peace had neglected their duty, they petitioned the local commander to

⁸⁷ PRO, CO 194/9, p. 116 (Taverner and Floyd to St. John's justices, 17 August 1731).

order his soldiers to patrol the community during the winter.⁸⁸ Angered by such insolence, Governor Clinton submitted a scathing report to the British government. He portrayed Newfoundland as a wild country where only the royal navy stood in the way of a troika of venal fishing admirals, rebellious Roman Catholics, and rapacious merchants. "The ignorant people are possessed therewith," he claimed, "their orders are obeyed, and mine tore, and those I send them by very much abused."⁸⁹ Two fishing admirals had been charged with contempt of court, though the outcome of their trial, if one were held, is unknown. The dispatch received serious attention at Whitehall, in particular Clinton's assertion that it was "*almost impossible to govern such a sort of people under the present Establishment.*"⁹⁰ In November 1731 the Duke of Newcastle again requested the attorney general to recommend measures to overcome the difficulties faced in Newfoundland. Newcastle considered the root of the problem to be the ongoing dispute over whether the justices' commission of the peace contravened King William's Act, and he asked for another

⁸⁸ To exacerbate matters, the local garrison commander asserted that Clinton and Osborn had visited Placentia for only a few hours the entire summer. See CSPC, vol. 38, pp. 274-75 (Placentia fishing admirals to Lt. Gledhill, 10 September 1731, and Gledhill to Duke of Newcastle, 30 September 1730).

⁸⁹ CSPC, vol. 38, pp. 275-76.

⁹⁰ PRO, Secretary of State Papers [SP], 36/25/90, p. 75. This passage was underlined in the original. A copy appears at PRO, CO 194/9, p. 89. I thank Greg Smith for providing copies of several of the State Papers relating to Newfoundland.

opinion on how best to clarify the web of competing legal jurisdictions.⁹¹

Political Machinations in England

In the winter of 1732 the powerful West Country interests backing the fishing admirals counter-attacked. In February the MP for Dartmouth met personally with a committee at the Board of Trade to present a memorial requesting that the justices of the peace be prohibited from hearing disputes in the Newfoundland fishery.⁹² Signed by twenty prominent merchants and traders, including the fishing admiral of St. John's harbour, the petition condemned the civil magistrates as "illiterate persons of mean circumstances," most of whom lived on credit during the winter. It argued that because these justices did not return to England each year, they could not be held properly accountable for their actions. The merchants spared little in this political offensive. They complained of Governor Osborn's unfair and illegal taxes, which allegedly damaged trade and reduced servants to beggary. They requested that the justices of the peace be denied any legal powers during the seasonal government of the fishing admirals, i.e. from May to October each year.⁹³

⁹¹ CSPC, vol. 38, p. 355.

⁹² PRO, CO 391/41, p. 49.

⁹³ PANL, CO 194/23, pp. 152-53.

Similar petitions were sent by the merchants of Poole and Bristol. While the former characterized the island's justices as "New England men of little worth and less reputation," the latter affirmed that they had succeeded in wresting the lawful statutory powers out of the admirals' hands.⁹⁴ By portraying the justices as crass and ungentlemanly provincials, the merchants placed a social as well as a political distance between themselves and the magistracy. Merchants and officials in Poole took additional steps to discredit the Newfoundland justices: the mayor, Timothy Spurrier, took two affidavits from fishing masters describing supposed instances of misconduct by local magistrates. In the first, Peter Shank, master of the *Nancy* – a Poole sloop operating out of Ferryland in the summer of 1730 – stated that when he had moored in St. John's harbour to take on passengers bound for Ireland, William Keen came aboard and summarily imprisoned him. Keen then searched every chest on board, arrested four men and, as a result of the fracas, Shank lost more than half of his fares.⁹⁵

The second affidavit contained two statements from Dorset masters sailing out of Trinity. John Moors of the brig *Agnes* and

⁹⁴ PANL, CO 194/23, pp. 154-55 (petition from merchants of Poole), and pp. 150-51 (petition from merchants of Bristol). The minutes of the Board of Trade refer to the Poole document as a petition from the mayor, aldermen, and merchants. See PRO, CO 391/41, p. 71 (minutes for 22 February 1732).

⁹⁵ PANL, CO 194/23, p. 155-56.

Mary claimed that in the spring of 1731 the local justices had unlawfully arrested one of his servants. Moors's statement clearly illustrates the sharp personal antagonism that characterized the battles between masters and the magistrates:

[T]his deponent says, that he went to the said justices and told them, that one of the men was his servant, and that as he was vice-admiral and duly qualified, he would have a hearing and know by which authority they presumed without his licence to put them in the stocks; who reply'd that if he did not hold his tongue, they would put him in the stocks likewise, and by force and in opposition to this deponent did put the said men in the stocks.⁹⁶

Joseph Vallis, master of the brig *Friends Adventure*, related that when the admirals had posted the price of fish and a list of debt settlements on the church door, the justices tore it down and tied it to the common whipping post.⁹⁷ As had happened in Placentia, the tools of punishment were at the heart of struggles for authority.

This campaign forced the British government to reconsider its support for the Newfoundland magistracy. Although William Keen had sent a strong written answer – Shank's affidavit had formed the basis of another petition filed at Poole – the barrage of criticism prompted the Board of Trade to abandon its efforts to clarify and implement the jurisdictions and relative powers of

⁹⁶ PANL, CO 194/23, p. 156.

⁹⁷ PRO, CO 194/23, pp. 158-59.

the justices and fishing admirals.⁹⁸ As quickly as it had arisen, the question of the reception of English law faded into political oblivion. What now concerned officials was how to prevent further protests and maintain a basic framework for the *de facto* administration of justice.

Administrative Retrenchment

In March 1732 the Board of Trade approached Captain Clinton for advice on how to proceed. Clinton reiterated his earlier criticisms of the admirals' conduct and his acerbic comments about the island's society – gratuitously cursing the Irish as “the scum of that Kingdom” – but he also called for statutory reform. Only by altering King William's Act and giving the island's governor powers equal to his counterparts in North America would the situation finally be improved.⁹⁹ Clinton was trying to salvage the idea that Newfoundland should have institutions similar to those established in official British colonies.

As had occurred a generation earlier, such proposals proved to be politically naive. By the spring of 1732 the British

⁹⁸ Keen's answer is contained in an untitled typescript collection of miscellaneous documents (1731-1743), housed at the Provincial Resource Library, Newfoundland Collection [hereafter PRL], VAULT 338.3 P94, pp. 1-2. A complete copy of this typescript material is also preserved in the records of the Newfoundland Historical Society.

⁹⁹ CSPC, vol. 39, pp. 95-96.

government had reverted to its long-standing position that nothing more should be done in Newfoundland than was absolutely necessary. No further legal opinions were requested from the Crown's law officers, nor was any action taken in parliament. This unwillingness to alter official imperial policy was in part a result of the campaign of the English fish merchants. In the effort to overturn the old myths of West Country tyranny, Newfoundland historians have overstated the case against mercantile influence.¹⁰⁰ To insist that the petitions and appeals against the justices of the peace made no impact in London is to argue directly against the archival evidence. Granted, West Country interests did not control policy toward Newfoundland – in fact, the merchants represented only one contributing factor among many – but in this particular case their efforts tipped the scales in the government's decision-making. The Board of Trade withdrew its support for the justices of the peace, who could no longer rely upon the governor's backing.

Belatedly, the Board of Trade replied to the Duke of Newcastle's requests for a response to the West Country petitions. Its April 1732 report insisted that the justices of

¹⁰⁰ For a summary of the new orthodoxy, see Olaf Janzen, "Response to Garfield Fizzard's essay, 'Newfoundland's First Known School'," *Newfoundland Studies* 12, 1 (Spring 1996), pp. 50-53. On the historiography of the merchants generally, see Sean Cadigan, "Planters, Households and Merchant Capitalism: Northeast-Coast Newfoundland, 1800-1855," in Daniel Samson, ed., *Contested Countryside: Rural Workers and Modern Society in Atlantic Canada, 1800-1950* (Fredericton: Acadiensis Press, 1994), pp. 151-59.

the peace in Newfoundland had not interfered with the fishing admirals but allowed that they may have been guilty of some irregularities. While still blaming the admirals for failing to hold proper courts, the Board of Trade proposed that the island's governor be given three additional instructions: to investigate the complaints contained in the affidavits and petitions; to remove any justice who had acted improperly; and to stamp out all infractions against King William's Act.¹⁰¹ A new article was subsequently added to the governor's instructions requiring him to evaluate the magistrates' conduct. This became an entrenched directive and – as the 67th clause of the heads of inquiry – remained part of the governor's official duties for the next sixty years.

Consequently, the position of the justices of the peace became increasingly untenable. Their legal powers remained ill-defined; governors treated them warily; and they had little support after the naval squadron had departed. Not surprisingly, the British government soon received reports that it had become nearly impossible to find qualified men to appoint as new justices. In 1735 Governor Lee informed the Board of Trade that it was now hard to get anyone to accept the commission.¹⁰² Lee's dispatches over the next two years stressed the insults to which

¹⁰¹ PANL, CO 194/23, pp. 148-49 (Popple to Newcastle, 6 April 1732).

¹⁰² CSPEC, vol. 42, pp. 65-72 (1735 returns to the heads of inquiry).

local magistrates were subjected during the navy's absence.¹⁰³ It would take another generation before justices of the peace finally and irrevocably replaced the fishing admirals as the dominant civil authority throughout the island's districts.

The Ascendency of the Royal Navy

Throughout this period, the royal navy continued to strengthen its role in the administration of law. Captain Edward Falkingham, governor in 1732, informed London that the fishing admirals had lapsed into the practice of leaving disputes to be heard by the naval commanders. Like many of his predecessors, Governor Falkingham convened a public court at St. John's to settle important cases. For example, he exonerated William Keen from the charges laid the previous year in the affidavits registered in Poole. And, like his successors, Falkingham reported that he neither received local complaints against the justices' behaviour nor observed them act outside of their lawful jurisdiction.¹⁰⁴ In 1735 Governor Lee claimed that the problem of army officers meddling in civil government had briefly recurred at Placentia; at St. John's, he had tried to ease the friction

¹⁰³ CSPC, vol. 42, pp. 277-81 (1736 returns to the heads of inquiry), vol. 43, p. 248 (1737 returns to the heads of inquiry).

¹⁰⁴ CSPC, vol. 39, pp. 222-26 (1732 returns to the heads of inquiry).

between the magistrates and fishing admirals by explaining their separate jurisdictions.¹⁰⁵

Governor Lee and his successors emphasized that the royal navy now exercised complete political control and legal authority while on the Newfoundland station. According to Lee, the island had been unfairly maligned as a wild frontier when, in fact, "Blasphemy, profaneness, adultery, fornication, polygamy and incest are crimes I have never had any complaints of while in this part of the world."¹⁰⁶ Throughout the 1730s the authority of the civil magistrates shrank as they became effectively an appendage of the naval administration. By 1738 Governor Vanbrugh felt compelled to assert that the justices were still valuable because they offered a check on the growing number of Irish Catholics who settled in Newfoundland. This reflected the prevailing view of the civil magistracy as simply a tool to deter disturbances in the winter.¹⁰⁷

The emerging naval surrogate system provided the means to meet the basic need for local courts. The judicial capacity of the royal navy at once centralized authority in the hands of the governor in St. John's and extended the reach of the island's legal system along the coast. The practice of sending officers on

¹⁰⁵ CSPC, vol. 42, pp. 65-72.

¹⁰⁶ CSPC, vol. 42, pp. 65-72.

¹⁰⁷ CSPC, vol. 44, pp. 235-37 (1738 returns to the heads of inquiry).

seasonal cruises to outports in place of the governor had, of course, no basis in law other than the governor's own appellate jurisdiction granted by King William's Act.¹⁰⁸ But it worked because the royal navy was ideally suited to administer law in the outports: it had the resources required to enforce its authority, to present itself as an impartial arbiter of justice, and to bestow the majesty of English law. Even the smallest armed sloops used on the Newfoundland station had more than sufficient military resources to impose its authority on any fishing installation: weaponry (cannon and small arms), trained personnel (sailors and marines), and penal facilities (for corporal punishment and brief incarceration).

Equally important, every post-captain was well versed in the task of dispensing justice and meting out punishment. Through both their formidable summary jurisdiction on board individual warships and their service as judges in courts martial, officers gained considerable knowledge of how to maintain law and order. As N.A.M. Rodger demonstrates, officers in the Georgian navy relied far more upon the unwritten customs of the sea than the cumbersome provisions in the Admiralty's *Regulations and Instructions* or the haphazard legal code in the Articles of War.¹⁰⁹ They were expected to act pragmatically to govern as

¹⁰⁸ 10 & 11 Wm. III, c. 25, s. 15 (1698-99).

¹⁰⁹ Rodger, *Wooden World*, ch. 6; John Byrn, *Crime and Punishment in the Royal Navy: Discipline on the Leeward Islands Station, 1784-1812*

effectively as possible in adverse maritime conditions. The corporal punishments most often used in the navy – floggings of up to twenty-four lashes or other relatively swift measures – could be readily transposed for use in fishing outports. Commanders relied largely on the vague thirty-sixth clause in the Articles of War – which stated that where no punishment was specified or appropriate, offenders “shall be punished according to the laws and customs in such cases used at sea” – as authority for meting out whippings with the cat-o’-nine-tails.¹¹⁰ As we shall see, naval surrogates in Newfoundland similarly ordered punishments with numbered lashes.

Unlike the army officers at Placentia and St. John’s, the naval commanders had no fixed economic ties or interests to colour their appearance as impartial and fair authorities. With the squadron present for only a month or two each year, its officers rotating with each commission, and the governors serving no more than three years, the royal navy did not become enmeshed in the divisive credit relationships and bitter petty politics

(Brookfield, Vermont: Scolar Press, 1989), ch 3. For a discussion of the historiography of naval punishment, see Greg Dening, *Mr. Bligh’s Bad Language: Passion, Power and Theatre on the Bounty* (Cambridge: Cambridge University Press, 1992), pp. 113-16 & 377-96.

¹¹⁰ The Articles of War are contained in the 1749 Navy Act (22 Geo. II, c. 33). The *Regulations and Instructions Relating to His Majesty’s Service at Sea* was printed annually after the first edition in 1731, though few alterations were made in subsequent editions. Both the Articles of War and the *Instructions* are reprinted in Brian Lavery, ed., *Shipboard Life and Organization, 1731-1815* (London: Navy Records Society, 1998), part E.

commonly found in the settlers' parochial society. It is no accident that problems of corruption and insubordination were restricted to the British army and garrison commanders such as Lieutenant Moody.¹¹¹

The status of the royal navy was also incomparably superior. Its officers were largely drawn from the ranks of respectable society, many of whom, like Lord Vere, wielded considerable power and influence. While the social gulf separating naval officers and fish merchants has been exaggerated, few local merchants and planters could display pretensions to gentility.¹¹² Fishing admirals might have been able to bully magistrates from their own social caste, but they dared not challenge the character of a naval commander.¹¹³ Officers in the royal navy generally remained aloof from the sharp personal attacks exchanged between the justices and admirals. If the governor chose to intervene locally, as Commodore Clinton did, he could publicly berate both factions without weakening his own authority.

¹¹¹ For a reappraisal of the extent and nature of corruption in the royal navy, see Baugh, *British Naval Administration in the Age of Walpole*, chs. 3, 6-7.

¹¹² John Crowley, "Empire versus Truck: The Official Interpretation of Debt and Labour in the Eighteenth-Century Newfoundland Fishery," *Canadian Historical Review* 70, 3 (September 1989), pp. 311-36.

¹¹³ The social stature of the island's naval officers stretched from the petty bourgeoisie to the peerage. It reached its apogee in 1786, when Prince William Henry (later William IV), who then commanded HMS *Pegasus*, was stationed at Newfoundland and served as a surrogate judge at Placentia. See Rodger, *Wooden World*, pp. 252-72; Prowse, *History of Newfoundland*, p. 365.

Moreover, the British government regularly used the Georgian navy as the standard-bearer of English law and royal sovereignty throughout the empire. The navy's presence in Newfoundland was not comparable to the nineteenth-century gunboat imperialism exhibited in China, nor the brutal subjugation of native communities in British Columbia.¹¹⁴ Models of the dialectic of native-white relations cannot be reasonably applied to Newfoundland, where the royal navy never sustained significant contact with the Beothuck.¹¹⁵ Although the island's sectarian divisions clearly affected naval officers, governors did not construct Newfoundland as an infidel country or an inherently barbaric frontier. Their correspondence portrayed the island as a harsh place inhabited by ignorant fishermen but not beyond the pale of civilization. The British government was at the very least nominally committed to upholding the rule of law in

¹¹⁴ On the royal navy in China, British Columbia, and the Northwest coast, see Christopher Munn, "The Chusan Episode: Britain's Occupation of a Chinese Island, 1840-46," *Journal of Imperial and Commonwealth History* 25, 1 (January 1997), pp. 82-112; Barry Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver, 1984); Gough, "Official Uses of Violence Against Northwest Coast Indians in Colonial British Columbia," in James W. Scott, ed., *Pacific Northwest Themes: Historical Essays in Honour of Keith A. Murray* (Bellingham, 1978), pp. 43-69; Jane Samson, "Commodore Justice on the Northwest Coast: What Law did the Royal Navy Represent and Enforce?" (Paper presented to the legal history conference at the Faculty of Law, University of Manitoba, 3 October 1997).

¹¹⁵ Ralph Pastore, "Archaeology, History, and the Beothucks," *Newfoundland Studies* 9, 2 (Fall 1993), pp. 260-78.

Newfoundland and did not permit the indiscriminate use of military force.

The judicial role of the royal navy functioned within the boundaries of English legal culture. Naval officers brought to the island the symbolic triumvirate of majesty, justice, and mercy. Although there are several parallels with the Anglo-French and European-Native legal relationships – particularly in the areas of accommodation to suit material conditions – the case of Newfoundland was different in that it involved a dispute within a legal culture in the process of formation.¹¹⁶ Displaying the navy's elaborate official ceremonies, as well as the increasingly-standard Admiralty uniform, officers presented outport Newfoundland with a majesty of the law as impressive as that found in any town in rural England. Like the procession of the semi-annual assize circuit, the cruises of the royal navy brought an unequivocal message of legal authority and political power to those occupying the strata of local society.¹¹⁷ In both

¹¹⁶ See, *inter alia*, John Dickinson, "Native Sovereignty and French Justice in Early Canada," and Hamar Foster, "The Queen's Law is Better than Yours: International Homicide in Early British Columbia," both in Jim Phillips, Tina Loo, and Susan Lewthwaite, eds., *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice* (Toronto: Osgoode Society, 1994), pp. 17-40 & 41-111; Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774," in L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: University of Wilfred Laurier Press, 1981), pp. 77-110.

¹¹⁷ On the English assize circuit and the elaborate ceremonies surrounding it, see Beattie, *Crime and the Courts in England*, pp. 314-18; Douglas Hay, "Property, Authority and the Criminal Law," in D. Hay, et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975), pp. 26-32.

form and function, then, the royal navy was a dynamic force in the establishment of an inchoate colonial state.

Whenever possible, governors sent their junior officers on surrogate cruises to impose the government's authority and to settle disputes in the outports. In October 1732, for example, Governor Falkingham sent Lieutenant Steevens to Trinity Bay to hear complaints against the local justices of the peace; after hearing both sides, Steevens summarily dismissed one of the magistrates from office.¹¹⁸ But there were material limits to how far the governor could expand the navy's presence. Lord Muskerry, governor in 1734, ordered Captain Crauford in HMS *Roebuck* to sail for Port-aux-Basques, in order to assert Britain's sovereignty in the region. After reaching Cape Ray, Crauford reported that the coast was so treacherous that it was not safe for any vessel larger than a sloop to sail in with the shore.¹¹⁹ The next year Governor Lee informed London that the naval commanders required better mapping to pilot safely because their warships drew much more water than the bankers used in the fishery.¹²⁰ The difficulty heavy frigates such as the 800-ton *Roebuck* faced in navigating uncharted coasts and shallow harbours inhibited the further development of the surrogate system. This problem was not

¹¹⁸ CSPC, vol. 39, pp. 227-28.

¹¹⁹ CSPC, vol. 41, pp. 273-77 (1734 returns to the heads of inquiry).

¹²⁰ CSPC, vol. 42, pp. 65-72.

adequately addressed until 1749, when Governor Rodney began the practice of commissioning local sloops, and the British Admiralty eventually had schooners custom-built to serve on the Newfoundland station.¹²¹

Jail-Building and other Local Initiatives

Governors repeatedly tried to improve the island's penal regime. In 1732 Governor Falkingham found that the one functional gaol – the regional prison constructed in St. John's – failed to meet the island's needs because of its distance from most outports and the fact that ice conditions rendered it inaccessible during the winter. Falkingham ordered the construction of three additional gaols at Ferryland (where earlier initiatives had been aborted), Trinity, and Bonavista, as well as round-houses at Trepassey, Bay Bulls, and Conception Bay (where no community was specified). The new prisons were never completed, however, and the outports still had no system of incarceration, save placing offenders in the stocks.¹²²

Governors also assumed juridical responsibilities that had been formerly left to the justices of the peace. Falkingham reported that one murder suspect was being held at St. John's: for the first time, the governor and the royal navy handled the

¹²¹ See below, Chapter Four.

¹²² CSPC, vol. 39, pp. 222-26.

entire arrangements for transporting the offender and witnesses to England aboard HMS *Dursley* in the autumn of 1732.¹²³ And in 1733 it was Lord Muskerry – not William Keen, the senior magistrate – who advised the British government that several prisoners were being sent to England to be tried for felonies committed the previous winter.¹²⁴ As a further indication of the governor's personal authority, Muskerry used his drummer to summon opposing parties to a court convened by him to determine a long-standing property dispute.¹²⁵

In 1735 Governor Lee augmented his efforts to maintain an effective judicial administration by lobbying hard for legal reforms. He informed London that prior to his arrival three suspects had been jailed in St. John's for a murder committed at Ferryland. Before Lee had an opportunity to examine the prisoners, two of them escaped over the prison wall; the other was apparently released for lack of evidence. Lee disclosed that he had summarily levied a local tax to fund repairs to the prison in order to prevent future escapes.¹²⁶ In a sign of how things had changed since 1730-32, the move to raise taxes – with neither a grand jury presentment nor a public meeting – received no comment

¹²³ CSPC, vol. 39, pp. 222-26 (1732 returns to the heads of inquiry).

¹²⁴ CSPC, vol. 40, pp. 194-97.

¹²⁵ PANL, GN 2/1/A, vol. 1, p. 233.

¹²⁶ CSPC, vol. 42, pp. 65-72.

from the fishing admirals, nor from the West Country magnates, both of whom were unwilling to challenge the governor's personal authority. Unlike Osborn and Clinton, Lee had acted unilaterally, without any links to the civil magistracy, and presented the initiative as entirely his own doing. He independently recommended that some type of local admiralty jurisdiction be created to combat smuggling and, as a result, the British government established a vice-admiralty court at St. John's in 1737.¹²⁷

Governor Lee also persuaded the Board of Trade to propose granting Newfoundland its own court to hear and determine felonies. Lee noted that he had ordered Captain William Parry to cruise the Southern Shore and South Coast; at Placentia, Parry had taken aboard a prisoner suspected of a murder at Renewes, as well as two material witnesses; and Lee ordered him to transport them to England in HMS *Torrington*. Using this incident as a backdrop, the governor offered a succinct and persuasive case for legal reform:

I must here observe to your Lordships that the conviction of persons who have been guilty of murders, felonies or other capital crimes in this Island, by their trials in England is very difficult for such people, who are the chief evidences,

¹²⁷ Little is known about the early vice-admiralty court: no local records appear until the 1750s, but evidence suggests that it did sit earlier. In 1747 William Keen wrote to Thomas Corbett, the secretary of the Admiralty, to acknowledge receipt of the forms and interrogatories to be used in the vice-admiralty court, of which Keen seems to have been the chief judge. See PRO, ADM 1/3881, letters from Doctor's Commons, 10 November 1747.

will always if possible abscond to avoid being carried as such to England, and I can't but say they have good reasons for so doing; for on such occasions besides their loss of time, by their absence from their home in this country, by which they must inevitably lose the next year's fishing, after the trial of the suspected murderer or felon the evidences are left to return to their families at their own expense, which may put them very much behind hand, if not ruin them in their affairs; this I thought proper to submit to your Lordships approbation.¹²⁸

Similar, if not more compelling, arguments had been made previously by the justices of the peace, but the British government failed to act until Lee's appeal. In April 1738 the Board of Trade prepared to revise the governor's commission to include the power to grant a commission of oyer and terminer. Arguing that this reform bestowed only what was usual in the commissions of all governors of British plantations, the secretary of the Board of Trade asked the solicitor and attorney generals to advise whether it would contravene King William's Act.¹²⁹ After the law officers gave their approval, the proposed amendments were at last presented before the Privy Council.¹³⁰

Aborted Reforms and the Decay of Government

The plan submitted by the Board of Trade described the legal exigencies and the type of court best suited to the island's conditions. It stressed that Governor Lee had precipitated the

¹²⁸ CSPC, vol. 42, pp. 277-81.

¹²⁹ CSPC, vol. 44, p. 62.

¹³⁰ PRO, CO 391/47, p. 39 (minutes for 12 & 13 April 1738).

initiative, citing his 1736 report verbatim, and referred to the law officers' favourable legal opinions. The draft of the new governor's commission – to be given to Captain Philip Vanbrugh, commander of HMS *Chatham* in 1738 – included a clause authorizing him to establish a court of oyer and terminer for trying all criminal causes. Incorporating the same forms as those given to governors in colonial America, these powers were supplemented with restrictions designed to suit a jurisdiction without experienced judges and juries.¹³¹

Vanbrugh's draft instructions contained two significant stipulations. Only one court session was permitted per year, which could be held only during the governor's residence. Second, convicted felons could not be executed in Newfoundland without the permission of the British government. After each assize session had ended, the governor was required to send a report on each trial to London, where decisions would then be made whether to execute those offenders sentenced to death.¹³² However, when the Privy Council considered the commission and instructions, it rejected outright the clause empowering the Newfoundland governor to appoint a court of oyer and terminer. The Order-in-Council simply recorded: "His Majesty does not think it expedient at

¹³¹ PRO, CO 194/21, pp. 7-12.

¹³² Ibid.

present to be given to the said Governor."¹³³ No further explanation was ever given, but the decision was likely in part a reflection of the political aftermath of the West Country campaign against the island's civil magistracy.

In the wake of this decision, the government and courts in Newfoundland slid into a state of relative atrophy. No reforms were attempted during the next decade: magistrates and fishing admirals rarely disturbed the status quo.¹³⁴ With the outbreak of war with Spain in 1739, the Newfoundland squadron was busy with assisting other naval operations in North America. By the time the War of Jenkin's Ear began, the navy had extremely limited resources available to devote to governing Newfoundland. No governor was present in 1744-45, while those appointed in 1746-48 were too preoccupied with their wartime duties to make any impression as local administrators.¹³⁵ Throughout the war, the

¹³³ PRO, PC 2/94, pp. 544-45.

¹³⁴ In 1743 Governor Byng asserted that were it not for three or four traders at St. John's who always opposed the government, there never would be any complaints. See the 1743 answers to the heads of inquiry, contained in an untitled typescript collection of miscellaneous documents (1731-1743), housed at the Provincial Reference Library (Nfld. VAULT 338.3 P94), p. 21.

¹³⁵ Captain Charles Hardy, appointed governor in 1744, never reached Newfoundland because of poor weather conditions. After battling contrary winds for sixty-three days, he returned to England, where he was court-martialled for failing to fulfill his duties (he was later cleared of all charges of professional misconduct). No governor appears to have been appointed in 1745 - Hardy spent the year commanding a squadron off the Portuguese coast - and the commodore of the Newfoundland station was at the siege of Louisbourg. See Lounsbury, *The British Fishery at Newfoundland*, p. 294; Graham, *Empire of the North Atlantic*, p. 150; *Dictionary of Newfoundland and*

commander-in-chief of the North American station was free to summon warships from Newfoundland, where the commodore had scant time to supervise the civil magistracy.¹³⁶ Seeing this decline in the navy's presence, the army garrison commander at Placentia unsuccessfully petitioned to be given the power to appoint justices of the peace.¹³⁷ Meanwhile the island's economy grew, if only marginally, in spite of the war, and by 1750 the resident population had surpassed 6,000.¹³⁸ When the peace of Aix-la-Chapelle freed naval officers again to govern Newfoundland, the administrative problems that plagued the early 1730s still needed to be addressed.

Epilogue: The Cyclical Nature of Legal Conflict

Waves of clashes over law and authority continued to ebb and flow throughout the eighteenth century. Long after the original disputes between the fishing admirals and justices had ended, magistrates found themselves periodically under attack from

Labrador Biography. R.H. Cuff, ed. (St. John's: Harry Cuff, 1990), pp. 143, 353.

¹³⁶ Julian Gwyn, "The Royal Navy in North America, 1712-1776," in Jeremy Black and Philip Woodfine, eds., *The British Navy and the Use of Naval Power in the Eighteenth Century* (Atlantic Highlands, NJ: Humanities Press International, 1988), esp. pp. 133-36.

¹³⁷ PRO, CO 391/56, pp. 42-46; *Acts of the Privy Council*, vol. 4, pp. 55 & 272.

¹³⁸ PRO, BT 6/89, p. 167; Head, *Eighteenth Century Newfoundland*, pp. 54-57.

planters and merchants who challenged their legal powers. The example of D'Eewes Coke's tenure at Trinity provides an illustrative case-study. Soon after his appointment as a justice of the peace, Coke found himself locked in a heated quarrel with George Bayly, a planter at Old Perlican. At a court convened by Captain William Parker and Coke in September 1772, Michael McGrath, one of Bayly's servants, had been summoned to answer for a £7 debt. In response, Bayly wrote to Coke, telling him that he would pay his servants' wages and discharge his men – thereby enabling McGrath to settle his debts in Trinity – after he had cleared his current accounts at Old Perlican. Coke replied that by not immediately obeying the court order, Bayly had shown great contempt toward the governor's authority.¹³⁹

Bayly's rejoinder, which Coke kept to show the next surrogate to visit Trinity, echoed the rhetoric of the 1730s. It affords a fascinating glimpse into local attitudes toward the magistracy:

Yours I received and regarding the demand which G. Moors [the plaintiff] pretends to have on this house am amazed that a man of sense such as I looked upon Mr. Coke should decide an affair of any man without first hearing both parties, as yet you have only heard one man's story and I make not the least doubt when you are acquainted with what our people know of the affair you will change the opinion myself and Mr. MacGrath shall be at Trinity as soon as my affairs will permit at present 'tis impossible for the hurry of business which as a man who has been residing a while in this Country you must know it was this only which has

¹³⁹ PANL, Trinity District Court Records [GN 5/4/B/1], Bayly to Coke (5 October 1772) and Coke to Bayly (8 October 1772).

prevented us being with you personally and no contempt of the Governor as a person who wishes to have some justice established in this Country I hold in as high esteem as any man and this same time give no leave to tell you sir that if you enquire of my own character you will find that in all respects I act as strictly unto honesty as any man yourself not excepted.¹⁴⁰

Infuriated by this, Coke wrote a long response, reminding Bayly that by obstructing the summons - i.e. not settling McGrath's contract and permitting him to sail across the bay to Trinity - he had committed contempt of court.¹⁴¹ The remainder of Coke's letter, quoted in extenso, offers an equally revealing insight into the highly personal nature of judicial authority in the outports:

[I]n one part of your letter you say you looked upon me to be a man of sense, whether you ever did or whether you do now is really of so little consequence that it will never give me one moment's pain (however vain you may think me) I will venture to pronounce that I have sense enough to discern that your servant McGrath is not over burthened with honesty (tho' you may have for ought I know as you tell me as great a share as any man) I heard said McGrath is about to quit your service and as I understand Green Moores demand is upon him only and not upon your house. I think prudent he should give security for his appearance this Sir is the third method I have proposed for settling his affair and this last one purely to prevent your business being hindered and if he does not comply therewith I think it a duty

¹⁴⁰ PANL, GN 5/4/B/1, Trinity District (Bayly to Coke, 9 October 1772).

¹⁴¹ Coke explained that the original writ had been only a summons, not a judgement. He informed Bayly that it was not customary in England for a man who did not appear upon being summoned to court to be automatically liable for costs and damages.

incumbent upon me to proceed against him as the Laws of Newfoundland directs in these and the like cases.¹⁴²

Clearly, justices had to be careful when dealing with men from the propertied classes. Although the days of the endemic conflict of the 1730s were long past, planters and merchants could and did resist the civil magistracy when they saw fit.

Such incidents were not restricted to outport districts. At the same time as Coke was dueling with Bayly in Trinity Bay, the St. John's magistrates informed Governor Shuldham that they too had been insulted in the course of performing their duty. According to the justices, in October 1772 John Hern, a fish merchant, had affronted John Phillips, the high sheriff. The magistrates reacted by summoning Hern, who sent a fellow merchant, Francis Smith, to answer on his behalf. Smith then confronted the entire bench, reputedly saying: "the first that offered to meddle with him he would crop his ears; that he, Mr. Hern was a better gentleman than any of us out of Court."¹⁴³ From HMS *Panther* Governor Shuldham replied to the magistrates' complaint by stressing that he would always support them to the utmost of his power. He authorized them to proceed against the two merchants as the law directed but - in a telling qualification - added that the men should be treated with all the

¹⁴² PANL, GN 5/4/B/1, Trinity District, (Coke to Bayly, 12 October 1772).

¹⁴³ PANL, GN 2/1/A, vol. 5, pp. 7-8 (commissioners of oyer and terminer to Governor Shuldham, 14 October 1772).

decency and indulgence to which they were entitled as gentlemen, merchants, and British subjects.¹⁴⁴

Conclusion

In 1729 the British government had not intended to alter the basic manner in which the island was administered. But once it had established a civil magistracy and the essential trappings of colonial government, both the governors and the justices of the peace moved to administer law as closely as possible to the English model. This in turn touched off a heated battle for political legitimacy and legal power, in which the fishing admirals asserted their new-found statutory prerogative. The trans-Atlantic struggle for authority directly involved West Country officials and several government departments in London. Aside from the immediate political concerns, the British government could not ignore the fishing admirals' protests. Despite the best efforts of the governors – and most modern historians – the admirals could not be easily dismissed as ignorant troublemakers because they offered a cogent legal argument. By appealing to the supremacy of statutory law, the fishing admirals forced the British government onto the defensive. And by 1733 any pretense that the Newfoundland

¹⁴⁴ PANL, GN 2/1/A, vol. 5, p. 8 (Governor Shuldham to the commissioners of oyer and terminer, 15 October 1772).

magistracy would function entirely according to English law had been abandoned.

Law was not simply received in 1729 but was repeatedly established and challenged. The compromises made during the 1730s in large measure determined the structure of the island's courts. What emerged was a viable constitution derived from common law, written law (statute and prerogative writ), and local practices (the customs of the fishery and the royal navy). By 1748 these diverse sources of law mutually reinforced an incipient legal regime that was beginning to accumulate an informal body of case law. Newfoundland was far from unique in this respect: most other territories and settled colonies substantially altered law once it had been received from England. In arguing for a near-total transplantation of English legal culture, David Grayson Allen overstates his case. Reception generally followed the experience of Nova Scotia, where, as Jim Phillips argues, English law was altered in practice and amended by legislation debated and passed in the colonial assembly.¹⁴⁵ The difference for pre-1832 Newfoundland was the absence of a legislative assembly, but this did not mean that law was not adapted to meet local needs. Rather, the process of shaping law to suit the island's material

¹⁴⁵ David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill: Institute of Early American History and Culture, 1981); and Jim Phillips, "'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth-Century Nova Scotia," *Nova Scotia Historical Review* 12 (1992), pp. 87-124.

conditions and legal traditions took place in local courts, not in a colonial legislature.

In Newfoundland, cycles of antagonism and accommodation engendered the beginnings of an unusual yet effective hybrid of *lex scripta* and *lex loci*. Neither of these sources of law was popular, in the sense of originating from the plebeian classes or being designed for their use. As we have seen, E.P. Thompson's model of opposing law (proto-capitalist force in the transition to an industrial economy) and custom (the means to resist the encroachment of bourgeois hegemony through a defensive claim to ancient local practices that constitute law), does not apply to the case of early Newfoundland.¹⁴⁶ The struggle in Newfoundland was between competing forces *within* the law of the ruling elites. How local modes of governance developed can be understood only in the context of the socio-economic forces that formed the material basis of the island's legal culture. Newfoundland did not have a class of landed gentry, professionals, or prosperous farmers with which to staff the magistracy. It had neither a local press nor an established group of trained lawyers and lacked the basis for a bourgeois public sphere in which to debate legal issues. And the resident planters and traders were politically outweighed by the West Country merchants, the majority of whom had little time for, or interest in, the local administration of justice.

¹⁴⁶ Thompson, *Customs in Common*, ch. 3.

On the other hand, Newfoundland did have the regular and assertive presence of the royal navy. Naval officers were both willing and able to manage local government. When used to effect, the navy's efficient administrative apparatus provided a system of communication and transport to deal effectively with problems in the outports. As career officers of a comparatively high social standing without locally vested economic interests, the governors successfully enforced their personal authority. During critical periods, governors used their junior officers to extend law and order beyond St. John's. Ultimately, the struggle for legal authority was won by neither the justices nor the fishing admirals, but by the royal navy and its officers.

Appendix 3.1

The Newfoundland Commission of the Peace

A new set of commissions of the peace was issued every three years at the beginning of a governor's tenure. It was typically conferred by a naval officer, who brought a blank commission to the districts and then arranged for the names to be entered and for the candidates for office to take the necessary oaths. To be removed from office was – both literally and figuratively – to be struck off the commission. The position of keeper of the rolls brought additional emoluments and was in practice given to the most senior justice in each district. The section highlighted in italics comprises the regulations and orders that were specific to the Newfoundland version of the commission. The remainder of the commission is virtually identical to that used in Georgian England.

"By Henry Osborn, Esqr. Governor and Commander in Chief in and over the Island of Newfoundland in America, the Fort and Garrison of Placentia, and all other Forts and Garrisons Erected or to be Erected in that Island.

By virtue of the power and authority given and granted unto me by letters patents at Westminster the One and Thirtieth of May in the Second Year of the Reign of George the Second by the Grace of God, of Great Britain, France & Ireland, King Defender of the Faith, To constitute and appoint Justices of the Peace with other necessary officers and ministers for the better administration of justice and keeping the peace and quiet in the Island of Newfoundland in America. I do constitute and appoint you A.B.C. jointly and severally and every one of you, His Majesty's Justices to Preserve the Peace in the Towns of [- blank -] and parts adjacent thereto in the Island of Newfoundland in America. And to keep and cause to be kept all Ordinances and Statutes set forth and published for the good of the Peace & for the preservation thereof, in all and singular points withing the Towns of [- blank -] and parts adjacent thereto. And to correct & punish all Delinquents in the said Towns of [- blank -] and parts adjacent thereto, that shall do any thing against the forms of those Statutes and Ordinances or any of them. And to make all those who shall either assault the bodies or threaten to fire the houses of any or some of His Majesty's good People, to find sufficient security for their peaceable and good behaviour towards His Majesty and His People before some of you. And if they shall refuse to find such security then you shall cause them to be detained in His Majesty's Prison until they shall find such

security. You or any two or more of you are authorized and appointed to enquire upon Oath of honest and legal men of the Towns and parts adjacent thereto aforesaid by which the truth of the matter shall better be known of all witchcrafts, enchantments, sorceries, magick-arts, transgressions, by forestalling, regrating, or extortions whatsoever, and if all and every other offences and malefaction of which the Justices of His Majesty's Peace may and ought lawfully to enquire, by whomsoever or howsoever done and committed, in the towns and parts adjacent thereto aforesaid or shall hereafter happen to be done or attempted. Also to enquire after all those who in the towns and parts adjacent thereto aforesaid, shall go or reside, or hereafter shall presume to go or reside in a riotous manner, or with an armed force against the Peace to the molestation and disturbance of His Majesty's People, and also of all Hucksters & all other singular persons who have offended or attempted or hereafter shall presume to offend or attempt to offend, in an abuse of weights, or measures, or in selling victuals contrary to the form of the ordinances and statutes, or some one of them set forth and published, for the common benefit of His Majesty's Kingdom of Great Britain and the People thereof, and of whatsoever bailiffs, seneschals, constables, gaolkeepers, or other officers, who in the execution of their office (concerning the premises of some of them) have behaved themselves unduly or hereafter shall presume to behave themselves so, or have been slack, remiss, or negligent, or hereafter shall happen to be so in the towns or parts adjacent thereto aforesaid, and of all and singular points and circumstances or other matters whatsoever or howsoever done and committed in the towns and parts adjacent thereto aforesaid or which shall hereafter happen to be done or attempted, which may more fully concern the truth of the premises or someone of them. And to inspect whatsoever indictments are to be taken (and are not yet terminated) before others lately Justices of Peace in the towns and parts adjacent thereto aforesaid; And to issue and continue processes thereupon against all and every one so indicted or may hereafter happen to be indicted before you, until they may be taken, or surrender themselves, and be outlawed. And to hear and determine all and singular felonies, witchcrafts, enchantments, sorceries, magickarts, transgressions, extortions, riots, indictments aforesaid; and all and other the several premises according to the Laws and Statutes of His Majesty's Kingdom of Great Britain (as in that case is wont or ought to be done) And to cashire and punish said delinquents and any of them for their faults and offences, by fines, redemptions or amerciaments, or in any other manner, as is usual or ought to be done, according to the Law and Custom of the Kingdom of Great Britain, or the tenour of the ordinances and statutes aforesaid. Always provided that if cases of difficulty shall chance to happen such as robberies, murthers,

and felonies and all other capital crimes, you or any of you, shall by no means proceed to give judgment, but take particular care that all persons guilty of such capital offences be sent over to the Kingdom of Great Britain with witnesses, and sufficient proof of their crimes along with them. And therefore you and every one of you are hereby required that you diligently attend to the keeping of the Peace, of the ordinances and statutes and of all and singular other premises, and that you moreover appoint certain days and places, when you and every one of you shall meet to hold and keep general Quarter Sessions of the Peace, and to make enquiry, and to hear and determine all and every the premises and to do and fulfill them in form and manner aforesaid and to adjourn such sessions from time to time and from place to place as shall be most convenient for the dispatch of justice and necessary for the peace and welfare of His Majesty's subjects, according to the Laws and Customs of that part of the Kingdom of Great Britain called England, saving to His Majesty americiaments and all other thing appertaining to Him. You or any two or more of you, by virtue of these presents may cause to appear before you at certain days and places, which you or some two of you as is aforesaid, shall cause to be known so many, and such honest and lawful men of this district by whom the truth of the matter may be more certainly known and enquired into, and furthermore you and every one of you are hereby required and directed to appoint as aforesaid General Quarter Sessions of the Peace, out of such the inhabitants and planters residing and abiding in the towns and parts adjacent thereto aforesaid, a proper number of constables and other ministers of justice as are necessary toward preserving the peace and quiet of His Majesty's subject. Provided also that no such person or persons or other officers and ministers so by you appointed, presume or be suffered to act in such officers or places until he or they have taken the oaths mentioned in an Act passed in the 1st year of the reign of His Majesty King George the First, entitled An Act for the further security of the crown in the Heirs of the late Princess Sophia being Protestants and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors; and also to make and subscribe the declaration mentioned in an Act of Parliament made in the 25th year of the reign of King Charles the Second, entitled An Act for preventing dangers which may happen from Popish recusants, and also have took such proper oath or oaths, as are usually taken in the Kingdom of Great Britain by persons executing such offices and trusts, which oaths and declaration you are jointly hereby authorized and empowered to administer and give to all and every person and persons who ought to take the same, according to the Laws and Customs of Great Britain, and that you nor any of you do any thing by virtue of these presents contrary or repugnant to the Act for Encouraging the Trade to Newfoundland, passed in the

10th and 11th of the Reign of King William the 3rd, nor in any manner obstruct the power thereby given and granted to the Admirals of the Harbour or Captains of the ships of war, or any other matter or thing either prescribed by the said act or by such instruments as you shall receive from me. But that you now any of you and your said inferior officers and ministers whom I or you shall appoint amongst the planters or inhabitants residing or abiding in the towns and parts adjacent thereto aforesaid, be strictly required and enjoined in all cases and time whenever necessary to be aiding and assisting to the utmost of their power to the commodore or commanders of the ships of war and to the several Admirals of their respective harbours, in executing the several good rules and orders prescribed by the said Act for Encouraging the Trade to Newfoundland. I do hereby strictly require all and singular the inhabitants and planters of the towns and parts adjacent thereto aforesaid, to be observant, aiding and assisting unto you and every one of you and the officers and ministers appointed by you and every one of you in preserving the Peace and Execution of the Powers and Authorities herein contained as they will answer the contrary. Finally, I have appointed you [- blank -] keeper of the Rolls of the King's Peace in the said towns and parts adjacent thereto, and for that reason you are to order on the days and at the places aforesaid all briefs, processes, and indictments aforesaid, to come before you and your appointed associates, that they may be inspected and determined in due course of Law as is beforesaid. In testimony whereof I have hereunto affixed my hand and seal. Given the day and date hereof."

Source: PRO, CO 194/8, pp. 228-32.

Chapter 4

Creating Legal Traditions:

The Revolution in Government

From 1749 to 1751 Newfoundland witnessed the single most important series of legal reforms undertaken prior to the grant of representative government. In what amounted to a revolution in government, Captain George Brydges Rodney, appointed governor in 1749, launched an array of initiatives that reshaped both the forms and function of governance. His accomplishments have never been adequately addressed by Newfoundland historians.¹ Governor Rodney's policies centralized government in a manner never before attempted, and by the mid-1750s the royal navy had firmly staked its claim as the unquestioned arbiter of power and authority. The creation of a local collection of court records legitimized this process. Rodney oversaw the first efforts to establish a bureaucratic framework to facilitate the smooth operation of courts in St. John's and the outports. His tenure as commodore also witnessed the foundation of three courts that became pillars of the judiciary: the governor's court, the surrogate courts, and the court of oyer and terminer. In short, these administrative

¹ A recent dictionary of biography contains entries for virtually every governor of Newfoundland except Rodney. See *Dictionary of Newfoundland and Labrador Biography*. R.H. Cuff, ed. (St. John's: Harry Cuff Publications, 1990). As with many other facets of Newfoundland history, D.W. Prowse offers the only appraisal of Rodney's administration. See *History of Newfoundland*, pp. 291-92.

reforms marked the commencement of the naval state that persisted into the 1820s.

This chapter examines these reforms and their implication for the reception of law and the operation of local government. It also studies the *ad hoc* committees of merchants and prominent townspeople that were convened, ordinarily under the direction of a magistrate, to discuss local problems and to approve taxes to fund specific initiatives. The development of such practices is readily discernable, but the reception of English law represents a much thornier topic. Whereas some commentary was made on civil law, criminal law in Newfoundland went largely unremarked by both judges and government officials. Still, those in power displayed a shared understanding of how local institutions were supposed to work. Given the absence of evidence to the contrary, it appears that English statutes were in force in Newfoundland, *ex proprio vigore*, until the establishment of a local legislature. For property law and the law of master and servant, the courts were guided by specific statutes relating to Newfoundland; for criminal law, magistrates followed English jurisprudence. Regardless of the course of legal reception, the direction of the colonial state was unequivocally clear. In the second half of the eighteenth century, the island experienced the ascendancy of the naval state.

The Origins of Reform

To understand the developments in the island's judicial administration, the political context in England must first be considered. Initiatives in Newfoundland coincided with the reform movement that swept London in the years following the peace of 1748. Pushed by a wave of fear over rising urban crime and social disorder, the British government took the unprecedented step of establishing a parliamentary committee in 1751 to recommend changes to the criminal law. Public opinion and the press focused on the crime problem, and writers such as Henry Fielding and Samuel Johnson offered a mixed prescription of legal reform and penal retribution. Comprised of the prime minister, Henry Pelham, and other prominent politicians, the committee presented a wide-ranging report that linked social concerns, particularly vagrancy and brothels, to the need for more effective policing and punishment. The committee sponsored three main pieces of legislation: the Disorderly Houses Act; the Murder Act; and the Dockyards Bill, which stalled in the House of Lords.²

² Jerry Bannister, "Assessing the Bloody Code: Movements Toward 'Reform' of the Criminal Law in England, 1748-1752." (Paper presented to the Canadian and Atlantic Societies for Eighteenth-Century Studies, St. John's, October 1992); Nicholas Rogers, "Confronting the Crime Wave: The Debate over Social Reform and Regulation, 1749-1753," in Lee Davison et al., eds., *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689-1750* (New York: St. Martin's Press, 1992); and, generally, Paul Langford, *A Polite and Commercial People: England, 1727-1783* (Oxford: Oxford University Press, 1989), pp. 155-62.

The Dockyards Bill illustrated not only the government's efforts to find an alternative to transportation but also – and of direct consequence for Newfoundland – the willingness of the Admiralty to become actively involved in making criminal justice policy. Led by Admiral Edward Vernon, the populist hero of Puerto Bello, the royal navy had figured prominently in English politics during Walpole's ministry, and most of its officers were not prepared simply to retire on half-pay after the peace of Aix-La-Chapelle. Though Vernon served on the committee of 1751, it was Lord Anson, the powerful First Lord of the Admiralty, who was the patron of the Dockyards Bill and the driving force for reform in the royal navy.³

From the First Lord's perspective, the Newfoundland station represented a useful tool for furthering his administrative and political aims. The power of the Admiralty Board rested in its ability to reward loyal followers, and its leaders – successively the Duke of Bedford, Lord Sandwich, and Lord Anson – carefully factored political patronage into their decisions. With numerous ambitious officers facing a dearth of prospects for advancement, the appointment as commodore of the island's squadron was highly

³ See Horace Walpole, *Memoirs of King George II*. J. Brooke, ed. (New Haven: Yale University Press, 1985), vol. I, p. 175. On Lord Anson and the royal navy in politics generally, see Lewis Namier, *The Structure of Politics at the Accession of George III* (London: MacMillan, 1965), pp. 29-36; Kathleen Wilson, "Empire, Trade and Popular Politics in Mid-Hanoverian Britain: The Case of Admiral Vernon," *Past and Present* 121 (1988), pp. 74-109.

valued. The flagship of the Newfoundland squadron, HMS *Rainbow*, was one of the coveted warships to remain in full commission: it was part of the convoy that escorted King George II to Holland in 1750 and the following year hosted a formal inspection by the entire Board of Admiralty and a parade of dignitaries. In addition to bestowing a temporary promotion on a post-captain, the commission as commodore and thereby governor of Newfoundland brought the honorific title of Excellency, three years of secure employment, and the chance to earn extra income carrying freight on the return voyage from Lisbon to Portsmouth.⁴ The Newfoundland governor was also given the opportunity to meet officials personally at Whitehall and to correspond confidentially with the First Lord of the Admiralty and the Secretary of State.

It is not surprising that the Admiralty decided to appoint Captain George Brydges Rodney as governor of Newfoundland. In February 1749, when a controversy had erupted among officers over reforms initiated by Lord Anson, Captain Rodney sided with his mentor and supported the ministry.⁵ Equally important, Rodney's political patron, the Duke of Bedford, was now serving as Secretary of State, whose endorsement was necessary because the

⁴ For example, Rodney earned £570 by carrying freight in 1749. Like other governors, he dabbled in the fishery and earned some additional income by transporting cured codfish. See David Spinney, *Rodney* (London: Allen and Unwin, 1969), p. 99.

⁵ Spinney cites Rodney's stand during the February crisis as the determining factor in the decision to appoint him governor of Newfoundland. See *Rodney*, p. 94.

governorship of Newfoundland was a Crown appointment. This remarkably strong political support ensured that, as governor of Newfoundland, Rodney would receive the full backing of the British government. When a committee at the Board of Trade met to consider Rodney's appointment in April 1749, the decision was a *fait accompli*.

Rodney formally held the title of governor for only one year and resigned in 1750. He stepped down because he had anticipated being elected to one of the boroughs controlled by the Duke of Bedford, but he retained his commission as captain of HMS *Rainbow* and commodore of the Newfoundland squadron.⁶ While Captain Francis William Drake of HMS *Mercury* was the titular head of the island's government in 1750-51, Rodney remained the unquestioned *de facto* governor throughout his three years at Newfoundland.⁷ To the office of governor, Captain Rodney brought the reforming zeal of an ambitious officer looking for the chance to make his mark. Since the outbreak of peace left no opportunities to distinguish himself in action, the Newfoundland station represented the only immediate chance to impress his patrons.⁸

⁶ Rodney was eventually returned as an MP in the 1751 by-election for the Admiralty's pocket-borough of Saltash.

⁷ Indeed, Rodney himself later stated that he "had the honour of being Governor of that Island in the years 49, 50, and 51." See Spinney, *Rodney*, p. 98.

⁸ On Rodney's reputation as an able administrator and ambitious officer, see, James Ralfe, *The Naval Biography of Great Britain* (Boston: Gregg Press, 1972 reprint of 1828 ed.), vol. 1, pp. 2-26.

Rodney's administration reveals how individual initiative could transform the governance of a territory without a local legislature. His tenure as governor also demonstrated how political trends in London directly affected events in Newfoundland. In English politics the movement in favour of reform did not necessarily advocate greater humanitarian concern but rather a commitment to more effective government generally and more forceful criminal laws in particular. Although Rodney had a controversial reputation in his later career, in 1749 he acted in accordance with these reformist tenets.

Commodore Rodney decided from the outset to undertake whatever measures were necessary to facilitate his administration.⁹ Having previously visited Newfoundland as a lieutenant under Lord Vere Beauclerk, Rodney took great pains to prepare properly before leaving England. While HMS *Rainbow* was in the dockyard at Woolwich in March 1749, Rodney requested a series of improvements which betrayed a practical knowledge of conditions in Newfoundland. The Admiralty approved a number of changes to his flagship:

⁹ Rodney's administration is chronicled in PRO, 30/20/1-26, known as the Rodney Papers. This remarkably detailed collection, perhaps the best of its kind, contains the logbook of HMS *Rainbow* (PRO, 30/20/4), and Rodney's letterbook as commodore from 1748 to 1752 (PRO, 30/20/6). Despite its richness, it has not been utilized by Newfoundland historians. See Matthews, "History of the West of England - Newfoundland Fishery." (D.Phil. Thesis, Oxford University, 1968), p. 4 [bibliographic pagination]; Rodger, *Wooden World*, p. 374.

A steerage before the Great Cabbin at the bulkhead of which a small office for my clerk to keep my books and accounts in; a cabbin on the quarter-deck for the officers, the Taffrail being of a sufficient height to admit it; and a slight awning to the mizen-mast as the voyage to Newfoundland will require the peoples being sheltered from the Fogs and bad weather incident to those parts.¹⁰

The custom-built cabin for the commodore's clerk facilitated his additional duties as secretary to the governor and clerk of the courts at St. John's. It was in this room that the island's first systematic legal records were compiled. Over the next three years Rodney presided over a variety of projects, such as the building of a hospital at St. John's, the construction of a brewery to supply the navy, and the clearing of local land by his ship's company.

The Beginning of Local Court Records

In 1749 Governor Rodney created the island's first systematic repository for local documents. Known popularly as the "Colonial Secretary's Letterbook," the collection of records begun by Rodney recast local government in Newfoundland.¹¹ As we

¹⁰ Spinney, *Rodney*, pp. 95-102 [quotation at p. 95].

¹¹ There is no archival guide to the series, but the former director of the Provincial Archives of Newfoundland and Labrador, Mr. David Davis, gave an excellent oral introduction, and Ms. Patricia Kennedy, manuscript archivist at the National Archives of Canada, generously provided a written analysis of the collection. I wish to thank both Mr. Davis and Ms. Kennedy for their expert and kind assistance. For one of the few discussions of the Letterbook's importance, see Prowse, *History of Newfoundland*, p. 314. The archival reference is GN 2/1/A.

have seen, no formal court records were kept on the island prior to 1749: only documents sent directly to England or included in the Board of Trade's heads of inquiry were preserved. The Letterbook is by far the most valuable archival source for the study of early Newfoundland. Known publically since Judge Prowse's time, it has never been systematically used for eighteenth-century studies. Bound in annual volumes, it contains all of the materials compiled and collected by the governor's clerk: the court proceedings for St. John's, with copies from many of the outport districts; governor's commissions and public decrees; official correspondence and court orders; and judicial warrants and commissions of the peace. While the records in the Colonial Office Papers overlap somewhat with the Colonial Secretary's Letterbook, only the latter holds the bulk of legal minutiae produced by local courts. It functioned in a manner similar to the collection of naval documents maintained by Rodney's clerk and its format suggests that it was similar to the type of military records commonly kept by officers in both the British army and royal navy.¹²

The Letterbook institutionalized law and government in a manner never before attempted and formed the basis of an inchoate public sphere. Soon after its establishment, it became a public

¹² Patricia Kennedy has pointed out that the Newfoundland Colonial Secretary's Letterbook shares many characteristics of the records kept in Quebec during the military regime (1759-64). Source: personal communication, December 1993.

registry for documents such as deeds, bills of sale, and indentures. In spite of official British policy toward the island – in theory, Newfoundland was still nothing more than a seasonal fishing station – the island had acquired a vital criterion of an effective colonial state. It now had a written record of local law, separate from that kept by officials in London, and the basic framework on which to build a constitution based on a distinct legal culture. The creation of record-keeping facilitated the entrenchment of customary law by providing a written account of legal precedents. This process of recording local laws took place under the rubric of the common law; customs could be only local variations of the general law and could not breach any fundamental principle of the common law.¹³

Over time the known customary laws of Newfoundland were duly recognized by the naval state. When Justice Reeves summarized the island's judicature in 1793, he affirmed that the customary law of Newfoundland should have the ascendancy as long as two conditions were met: the particular customs had genuine usage and were not irregularities or abuses of local norms.¹⁴ In his

¹³ Carleton Kemp Allen, *Law in the Making* (7th ed. Oxford: Clarendon Press, 1964), ch. 2.

¹⁴ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 148 [testimony of John Reeves], in Sheila Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland, 1793-93* (Wilmington, DE: Scholarly Resources, 1975), p. 386. In following this course, Justice Reeves was following standard English jurisprudence. See R.J. Walker and M.G. Walker, *The English Legal System* (3rd edition, London:

testimony before the House of Commons, Justice Reeves described how he had tried to record the many customs he had encountered while on the bench. He personally interviewed people to find out what had been practised earlier in the century. Reeves asserted:

I know of no other way of collecting together the usages and customs of that place; and when they are thus collected, they will become the law of the place, without needing any sanction from Parliament, in the same manner as the Law of England is to be found in the books where decisions are reported.¹⁵

Reeves' comments came in the midst of several references to customs that had already been legally recognized. When officials sought to ascertain the origins of the island's customary law, they consulted the Colonial Secretary's Letterbook.¹⁶ Within two generations, therefore, Rodney's Letterbook had entered the realm of antiquity. By chronicling the accumulation of case law, the Letterbook made possible the local development of written legal knowledge.

Butterworths, 1972), ch. 3.

¹⁵ *Third Report from the House of Commons*, f. 149, in Lambert, ed., *House of Commons Sessional Papers*, p. 387.

¹⁶ In its consideration of the customary right of servants to a lien on their masters' fish catch, parliament relied upon a copy of the earliest extant order. Titled Governor Rodney's Order, and dated 19 August 1749, it was entered as an appendix into the committee's minutes. See *Third Report from the House of Commons Committee*, f. 192, in Lambert, ed., *House of Commons Sessional Papers*, p. 430.

Inventing Jurisdictions (1): the Surrogate Courts

Governor Rodney also transformed the practice of sending junior officers on cruises into a highly organized system of surrogate courts that reached into nearly every fishing village. Rodney began by formalizing the custom of using warships to administer law in the outports. Within a week of warping into St. John's harbour, he ordered his officers to patrol the Newfoundland coast and to call at all the major outports. Captain Jonathan Knight in the sloop *Saltash* sailed south to visit communities along the Southern Shore and Placentia Bay, while Captain Francis Drake proceeded north in *HMS Mercury* along Conception and Trinity Bays, as far as Cape Bonavista. Rodney gave Drake and Knight written instructions to supplement their commissions from the Admiralty, and a blank commission of the peace to be bestowed on "men of probity and good character." The captains' formal responsibilities were to hear cases upon appeal from the fishing admirals and to ensure the enforcement of King William's Act. Informally, they were expected to settle all outstanding disputes and to refer difficult cases to St. John's, where the governor would issue additional orders as circumstances dictated.¹⁷

¹⁷ PRO, 30/20/6, Rodney Letterbook. The manuscript is in its original state: unlike the Colonial Secretary's Letterbook, there are no page or folio references in this unbound archival collection; specific references cannot be made beyond the applicable dates, if known.

Governor Rodney decided to augment this arrangement with two additional floating surrogate courts. He informed the Admiralty that he had received a steady stream of complaints, from almost every part of the island, of illegal trading practices in the fishery and a general lack of law and order. Rodney reported,

I have been necessitated to hire two small vessels in each of which I have put a lieutenant and a sufficient number of men, with orders, one to repair to the Northern parts the other to the Southern, there to administer justice; settle and determine all disputes that may have arisen agreeable to the instructions I have given them on that head.¹⁸

Treated at the time as a purely temporary expedient, this move marked a turning point in the history of the island's legal system. The royal navy had now explicitly committed itself to being the primary agency for the administration of law. With the practice of leasing local sloops – successive governors would contract the building of specifically-designed vessels, which became known popularly as the King's Schooner – the navy extended the government's reach into harbours and coves that the larger frigates had been unable to navigate. This signaled that the royal navy had become a dominant legal force unwilling to leave local governance in the hands of either fishing admirals or justices of the peace. Rodney centralized the process of information-gathering by hiring another sloop and sending a crew around the island to compile the data needed for the Board of Trade's annual heads of inquiry.

¹⁸ PRO, 30/20/6, Rodney Letterbook.

To confirm the legal authority of the officers sent on surrogate cruises, Rodney created a new jurisdiction. Unlike Captains Knight and Drake, the lieutenants to whom he had given the responsibility to convene surrogate courts had no commission from the Admiralty to command a warship. Rodney therefore had his clerk draft two new commissions, which were given to Lieutenants Robert Falkland and Lord Belenden before they sailed from St. John's. As Falkland's commission records, the officers were given conspicuously broad powers:

Whereas divers complaints have been made to me, by the inhabitants of the northern parts of this Island of many illegal practices committed by several people and the great want there of a proper person to administer justice, to prevent the like evil for the future. Being therefore convinced at your good sense integrity and judgement I do hereby require and direct you forthwith to repair to Bonavista and the ports adjacent, and there hear and determine all such causes as shall come before you agreeable to the commission herewith given to you.¹⁹

In his exhaustive report submitted to the British government in 1789, Admiral Mark Milbanke testified that such commissions had no legal foundation but were nevertheless a mainstay of the island's judicial regime.²⁰

This surrogate's commission became a fixture of the Newfoundland legal system. Within a decade it had become as

¹⁹ PRO, 30/20/6, Rodney Letterbook.

²⁰ *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), ff. 7-37, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 71-101.

standardized as the commission of the peace.²¹ Over fifty such commissions were issued in St. John's prior to 1791, when civilians began to be appointed alongside officers to the surrogate bench. Governor Milbanke's report gave a generic example of the surrogate's commission:

I do hereby appoint you [XXX] to be my Deputy or Surrogate, with full Power and Authority to assemble Courts within the District of [XXX] to enquire into all such Complaints as shall be brought before you, except such as are excepted in the Instructions annexed, and to hear and determine the same to all Intents and Purposes as I myself might or could do by virtue of the Power vested in me.²²

Legally, of course, this conferred a power no greater than the governor's own appellate jurisdiction. But in practice the commission represented an authority superior to both the magistrates' commission of the peace and the fishing admirals' statutory prerogative. In effect, while in session the surrogate court was the highest jurisdiction in the districts outside St. John's.

The instructions that accompanied the surrogate's commission directed the officers to assume complete authority upon entering a harbour. As Rodney's orders to Lord Balenden illustrate, these included a wide range of responsibilities:

²¹ See below, Appendix 4.3.

²² *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), f. 14, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p 78.

1st – Herewith you will receive a commission giving you power to administer justice agreeable to the laws and customs of the country, and an Act of Parliament [King William's Act].

2nd – On your going into any port you are to summon the principal inhabitants and all his Majesty's officers civil and military, when you are to cause your commission to be read with all decency and respect.

3rd – You will receive herewith a commission appointing justices of the peace for the District of Ferryland, which you are to deliver them, after administering to them the proper oaths, copies of which you will herewith receive.

4th – You are likewise to tender the oaths to all the inhabitants at the places you call in at, and procure exact accounts of the number of Protestants and Papists inhabiting each port.

5th – You will receive a general scheme of the fishery, which you are to fill up agreeable to the ports you call at.

6th – You are to take notice that all causes relating to the fishery are first to be heard by the Admirals of the respective harbours, the parties aggrieved have an appeal to you, but in case there is no Admiral in port, you are to decide the cause yourself.²³

Significantly, the first clause placed the customs of the country on an equal footing with statutory law: it formally recognized the customary laws by which the island had been governed for generations. While Lord Balenden was ordered to uphold statute law, he was also expected to contravene it by hearing cases summarily when the fishing admirals were out to sea, a situation that occurred frequently during the busy fishing season. The surrogate's instructions tacitly acknowledged that King William's Act provided an insufficient basis on which to administer law.

Naval officers represented the undisputed vehicle for transmitting the majesty of the law. Although the shift in legal

²³ PRO, 30/20/6, Rodney Letterbook. Emphasis Added.

powers had begun in the 1730s, the surrogate system became fully legitimized only under Rodney's tutelage. After 1750 the fishing admirals were no longer an independent force and never again challenged the governor's authority. In many instances, they were co-opted into assisting the naval officers' courts. The justices of the peace also became absorbed into this naval regime, though the final process of amalgamating the civil/district and naval/surrogate systems took another decade to complete.

Legal semantics remained eclectic. As late as the 1780s officers still employed a mixture of titles, most often Deputy Governor, to denote their surrogate's commission. Their proceedings cited a variety of terms – usually General Court or Surrogate Court of Sessions – to describe the same surrogate court. Chief Justice Reeves speculated that the surrogacy had been an idea borrowed from admiralty law,²⁴ though the term was used commonly in ecclesiastical jurisdictions to denote proctors who convened courts on the authority of a senior judge.²⁵ The island's surrogate court was, in fact, simply a more formal organization of judicial practices that had operated in various forms since the turn of the century. As we have seen, the custom of using officers to settle disputes had been known since Larkin's report in 1701, but it was only in 1749 that the royal

²⁴ Reeves, *History of the Government of Newfoundland*, p. 154.

²⁵ W.R. Cornish and G. de N. Clark, *Law and Society in England, 1750-1950* (London: Sweet & Maxwell, 1989), p. 28.

navy emerged as the acknowledged nexus of law and authority throughout Newfoundland. In short, Governor Rodney's successfully recast the island's *lex non scripta* as the king's law.

Inventing Jurisdictions (2): the Governor's Court

Captain Rodney's next move was to establish a governor's court. A direct byproduct of the drive to centralize authority, this third reform became an integral part of the island's constitution. Like the surrogates' proceedings, this court had no legal foundation beyond the governor's instructions and the appellate jurisdiction granted by King William's Act. In 1731 the solicitor general had ruled that the governor could not legally sit as a justice of the peace but could only appoint others to that office.²⁶ However, if Rodney had been aware of this restriction, he entirely disregarded it. He created his own personal court at St. John's to hear and determine a variety of cases, both written petitions (many of which he could hear legally as appeals), and complaints brought *viva voce* in a manner similar to the sessions held by justices in the outport districts. Unlike the general courts convened by commodores in the 1710s, naval governors no longer shared the bench with the fishing admirals, though the St. John's justices often attended as assistants.

²⁶ See above, Chapter Three.

In a treatise on Newfoundland law, Archibald Buchanan, a resident justice of the peace, offered by far the best surviving account of the governor's court.²⁷ Buchanan began by noting that the governors had used their appellate jurisdiction granted by King William's Act as a basis for hearing a wide range of cases, such as actions for the recovery of debts.²⁸ He then compared this prerogative to the powers wielded by governors of other British possessions:

In the West India Islands the Governors have a commission to act as chancellors, and they hold courts of chancery – the Governors of Newfoundland have no such commission. In the West Indies, and on the continent of America, there is a complete establishment of courts of judicature – similar to those in England – There is no such establishment in Newfoundland.²⁹

Buchanan claimed that some Newfoundland governors presided over sessions very similar to courts of chancery, while others refused to exceed their specific appellate authority.³⁰

²⁷ BL, Add. Mss. 38347, Archibald Buchanan, "Concerning Landed Property in Newfoundland." (unpublished treatise, 1786), ff. 373-88. In addition to serving as a JP, Buchanan worked as the island's senior comptroller of customs: see PANL, GN 2/1/A, vol. 8, p. 357 (appointment of comptroller of customs, 1782).

²⁸ Justice Reeves' history confirmed Buchanan's analysis. According to Reeves, "Every matter, civil, and criminal, used to be heard, and determined in open court before the governor." Reeves considered this to be a highly improper practice. See Reeves, *History of the Government of the Island of Newfoundland*, p. 155.

²⁹ BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386.

³⁰ On courts of chancery and the administration of equity, see Cornish and Clark, *Law and Society in England*, pp. 26-27.

The custom of holdings governor's courts had never been legally sanctioned. As Buchanan stated baldly:

Some of the Governors of Newfoundland have held courts (known by the name of the Governor's Courts) for determining actions of debt and causes of contested property, not properly cognizable by Justices of the Peace....The truth is, there is no court, legally established, at Newfoundland for determining questions at common law, which exceed the powers of Justices of the Peace.³¹

Nonetheless, the governor's court operated as a central part of the judiciary until 1781, when an appeal in England challenged its legality, and subsequent governors were unwilling to risk being sued for rendering unlawful judgments.³² Buchanan suggested that the British government formally give naval governors the authority to convene courts of judicature competent to hear actions at common law beyond the jurisdiction of justices of the peace. The most compelling reason to confer such a power on the governor was, he affirmed, the fact that "the people of Newfoundland are disposed to believe that the Governors have the power of holding courts of this sort, if they chuse to exert it."³³ The customary governor's court became entrenched in the island's legal culture in large measure because it had been so firmly established by Governor Rodney.

³¹ BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386. This statement of course excludes maritime law and the actions cognizable by admiralty courts.

³² The demise of the governor's court is examined in Chapter Five.

³³ BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386.

When Rodney inaugurated the governor's court in 1749, he relied upon his personal authority to enforce its administration. As the Letterbook records, the opening of the first court in September 1749 comprised a public demonstration of the governor's power:

The principal inhabitants and others being assembled, the oaths ... [were] administered to such of them as were willing to receive the same, after which the following petitions and complaints were presented to the Governor and read in the presence of the whole assembly.³⁴

During this session Rodney heard five cases brought by written petition, attested to personally by the deponents, only one of which was attended by the defendant. One petition was for trespass, while the other four alleged instances of violent assaults: three of these charged a planter and his servants in Conception Bay with beating and whipping local fishermen; Rodney responded by ordering warrants sent to the district's magistrates to apprehend the accused and bring them before the next sitting of the court. When none of the defendants answered the summons, Rodney ordered warrants for contempt of court to be served by the justices of the peace.³⁵

Effectively assuming the role of chief justice, Governor Rodney worked to ensure that the authority of his court was

³⁴ PANL, GN 2/1/A, vol. 1, p. 43. Rodney administered the oaths of allegiance, supremacy, abjuration, and declaration.

³⁵ The proceedings of the governor's court appear at PANL, GN 2/1/A, vol. 1, pp. 43-46.

properly respected. In a letter to the Conception Bay justices, who had not promptly acknowledged receipt of his warrants, he admonished them for neglect of duty and warned them never to do so again. His rebuke illustrates the personal nature of the governor's administration, on which his reforms depended:

Your behaviour in this affair has obliged me to reprimand you in this manner, for remember Gentlemen, I am sent here to administer Justice to Rich and Poor, without Favour or Partiality; you likewise by the oath you have taken, as Justices of the Peace, are obliged to do the same, in the neglect of which you will not only forswear yourselves, but be liable to be severely punished, according to law, and you may depend upon it, I am not to be trifled with, in the execution of my office; this much I hope will suffice, to remind you of your duty and make you more diligent in the execution thereof for the future.³⁶

The governor's court heard twenty more civil suits, ranging from petitions for wages to disputes over property ownership, before Rodney returned to England in October 1749. In addition, shortly before he left, the St. John's justices held a general session of the peace. It is unknown whether Commodore Rodney attended this court – it seems to have functioned as an autumn quarter sessions – but it did proceed to hear three cases that had originated in the governor's court.³⁷ Based on Rodney's precedent in 1749-51, the governor's court assumed primarily a civil jurisdiction and apparently never proceeded by indictment. It heard a wide range of causes and petitions involving misdemeanours, particularly

³⁶ PANL, GN 2/1/A, vol. 1, p. 44.

³⁷ PANL, GN 2/1/A, vol. 1, pp. 52-55 & 61-62.

assault, many of which were then tried at the St. John's quarter sessions.³⁸

Acquiring a Court: the St. John's Assizes

Commodore Rodney's final reform was to lobby for an end to the system of sending suspected felons, along with witnesses, to England for trial. This campaign for a local court to judge felonies accorded with his broader reform programme but was spurred by having to deal with a homicide at Trinity. Captain Drake, who had been sent there on a surrogate cruise in August 1749, was unsure of how to proceed and wrote to Rodney for instructions. Rodney's response reveals that he was well aware of how difficult it was to bring a murder suspect to justice:

In regard to the affair of the murtherer, I must desire the Justices of the Peace will send me the affidavits of all the evidences concerned, if they think it will be sufficient to condemn the prisoner; they must keep him in close confinement, and send me the reasons under their hands, wherein it will be detrimental to the evidences, should they be obliged to attend the prisoner to England, when I know

³⁸ It must be noted that Rodney was well aware of the limitations of this court. On 3 October 1749 he heard *Miller v. Playters*, in which the plaintiff (a bankrupted merchant) sued his clerk (to whom he had given power of attorney) to recover his effects. The defendant refused to cooperate until the plaintiff had given him sufficient security to cover £6075 drawn in bills of exchange. Rodney then ruled: "The Court having referred all these affairs of Robert Miller and Lionel Playters to be determined in England as they are of too much consequence and too complicated in nature to be determined without the opinion of the ablest lawyers." See PANL, GN 2/1/A, vol. 1, p. 76.

the whole circumstances of this business, they shall receive my further orders therein.³⁹

Rodney was also likely influenced by the local magistrates, in particular William Keen, who had long called for the British government to grant Newfoundland its own assize court. The normally acerbic Keen flattered Rodney as a governor, "who so well know[s] how to keep good order and Government amongst us."⁴⁰

From Woolwich, where HMS *Rainbow* had docked upon returning to England, Governor Rodney wrote to the Duke of Bedford to request that the power to try and punish capital crimes be given to Newfoundland. Stressing that he was acting at the behest of the island's principal inhabitants and traders, Rodney repeated the essential arguments made by Captain Lee in 1736. The practice of having to transport prisoners and witnesses to England was far too cumbersome and costly; potential witnesses were often unwilling to come forward; and, as a result, murders and robberies frequently went unpunished.⁴¹ Complaints about the inadequacy of King William's Act had circulated in government circles since the early eighteenth century. When the magistracy was first established in 1729, the Board of Trade had recommended

³⁹ PANL, GN 2/1/A, vol. 1, p. 34.

⁴⁰ Keen to Rodney (22 November 1749), quoted in Spinney, *Rodney*, p. 91.

⁴¹ PRO, CO 194/12, p. 171.

that a judge be sent to Newfoundland with a commission of oyer and terminer.

What set Rodney's initiative apart from previous efforts was his political position: his patron, the powerful Duke of Bedford, was Secretary of State. Bedford personally laid Rodney's letter before the Privy Council and successfully lobbied on its behalf. Early in 1750 he informed Dudley Ryder, the attorney general, that the King had provisionally approved the proposal to create some type of jurisdiction in Newfoundland to take cognizance of capital offences.⁴² As had happened during the failed bid for an assize court in 1738, the British government wanted a legal opinion on how to proceed without contravening King William's Act.

The attorney general's report repeated the ruling given twelve years earlier. Ryder stated that King William's Act did not abrogate the royal prerogative to erect and constitute new courts of justice in Newfoundland. He also took the liberty to relate how the matter had been considered and then rejected by the Privy Council in 1738.⁴³ The Duke of Bedford ordered that instructions be drafted – to be laid before the King in Council before the departure of the fishing fleet – authorizing Captain

⁴² PRO, CO 194/12, p. 172.

⁴³ PRO, CO 194/12, pp. 172-73 (report of the attorney general, 30 January 1750). A printed version of Ryder's report appears in Chalmers, ed., *Opinions of Eminent Lawyers*, pp. 541-42.

Francis William Drake, appointed governor for 1750-51, to establish a court of oyer and terminer for the trial of capital crimes in Newfoundland. Worried about the legality of this measure, the Board of Trade asked the attorney general whether this new power could be given by instructions only or whether it had to be inserted in the governor's commission under the great seal.⁴⁴ Ryder argued that it had to be included in the commission, but the manner in which the governor exercised that power could be prescribed and limited by his instructions. Ryder suggested that the applicable clauses in the old instructions to Governor Vanbrugh could be simply inserted into those drafted for Governor Drake.⁴⁵

The governor's instructions significantly limited the scope of the court of oyer and terminer.⁴⁶ They were designed to check potential problems associated with the relative absence of legal experience and education in Newfoundland: the court could sit only once a year, during the governor's residence; convicted felons could not be executed without the prior approval of the British government; and to ensure that the cabinet had the

⁴⁴ PRO, CO 391/57, p. 141 (minutes of the Board of Trade, 26 March 1750).

⁴⁵ PRO, CO 194/12, pp. 175-76; Chalmers, ed., *Opinions of Eminent Lawyers*, pp. 542-43.

⁴⁶ PRO, CO 194/23, pp. 270-71; CO 391/58, p. 149 (minutes of the Board of Trade, 28 March 1750). The Board of Trade sent Bedford a copy of the 1738 commission and instructions, along with Ryder's annotations.

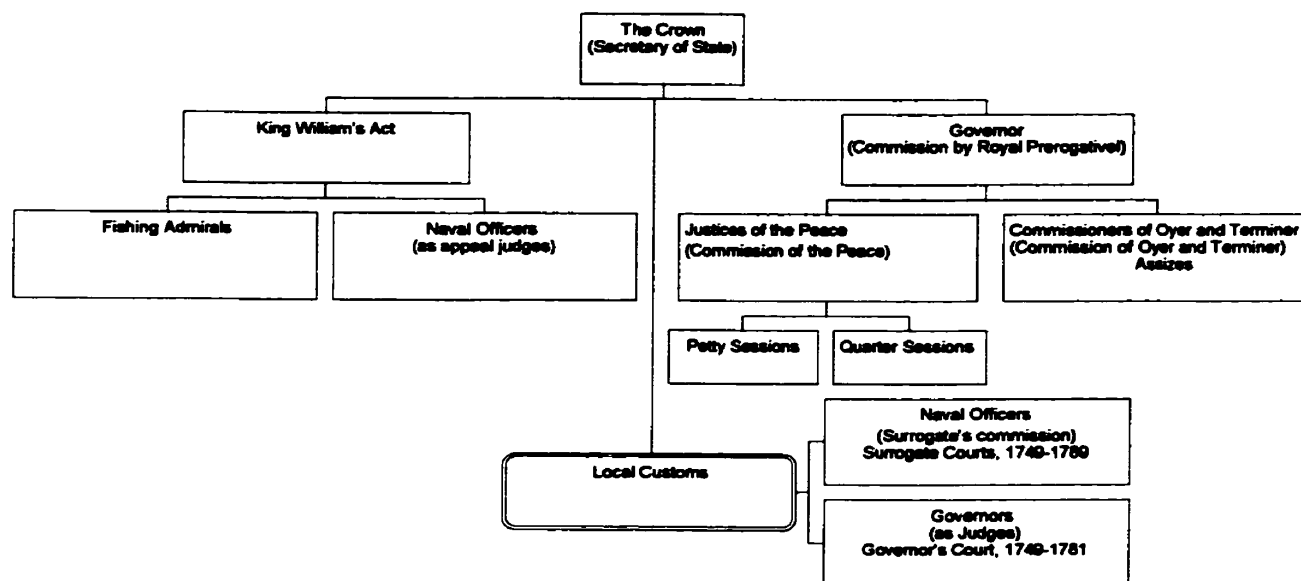
necessary information to decide whether to grant a pardon, a transcript of the trials of reprieved offenders had to be compiled and sent to London.⁴⁷ Lastly, the Newfoundland court was prohibited from hearing any case involving alleged acts of treason.⁴⁸ The Duke of Bedford laid the instructions before the King in Council, where they were accepted without amendment; an Order in Council promulgated the changes to the island's constitution in April 1750. Governor Drake accordingly received an amended list of instructions before setting sail with Commodore Rodney.⁴⁹ Added to the usual heads of inquiry was a 70th article, which required Drake to provide an account of the proceedings of the assize court.

⁴⁷ The records of the court of oyer and terminer are discussed at length below, see Appendix A.

⁴⁸ Ryder added this last provision to the 1738 instructions: see Appendix 3.1.

⁴⁹ PRO, CO 194/12, p. 176; CO 391/58, p. 162. A copy of the Order-in-Council appears at PRO, CO 194/12, p. 177. For Drake's commission, see Appendix 4.2.

Figure 4.1. The Administration of Law, 1750-1792



The Operation of the St. John's Assizes

In August 1750 Governor Drake made the necessary preparations for the first session of the court of oyer and terminer. He sent a memorandum to all the justices of the peace ordering them to erect public notices that the assizes would be held each year in September.⁵⁰ All suspects and witnesses were to be brought to St. John's, presumably before the grand jury sat to

⁵⁰ PANL, GN 2/1/A, vol. 1, p. 111.

consider bills of indictment. On 25 September 1750 Drake issued the first commission of oyer and terminer to seven men, five of whom were justices of the peace.⁵¹ Two days later the court of oyer and terminer held its inaugural session at St. John's, at which Lawrence Kneeves was tried for murder, convicted of manslaughter, and sentenced to be branded on the right hand.⁵²

This first trial displayed many of the characteristics that became part of the customs of the Newfoundland assizes. For example, during each trial the jurors withdrew to deliberate their verdict. Why this practice became an entrenched aspect of judicial procedure was never explained by the bench or the governor. Evidence suggests that the customs of the assizes were in part byproducts of the pressures of available legal resources. In the case of the practice of jurors' withdrawing, the reason for its adoption is discernable when considered in light of the conditions inside the St. John's court house. In 1786 the senior magistrates asked the governor to take steps to repair the building which served as the court house and gaol. Their petition explained,

⁵¹ See Appendix 4.3.

⁵² The full sentence read: "the said Lawrence Kneeves to the gaol of St. John's aforesaid from whence he came should be sent back and there remain till tomorrow twelve o'clock at noon, at which time before the Court house he should be burnt in the right hand with a hot iron markt with the letter R forfeit his goods and chattels paying the charges of the Court and be set at liberty." See *R. v. Kneeves*, 1750 Assizes.

The lower part of the building, which is allotted for the confinement of prisoners, consists only of two small apartments, and as persons committed for offences to be tried at the General Assizes are brought to this place from all parts of this Island, it frequently happens that offenders of different sexes are lodged in the same apartment; and persons committed for petty misdemeanors are confined in the same cell with those who have been convicted of crimes punishable with Death.

The upper part of the building in which we hold our Courts is equally insufficient and equally destitute of every conveniency – both Grand and Petty Juries when there is occasion for their attendance, are under the necessity of retiring to the Church, or to some dwelling house in the neighbourhood, there being no apartment in the Court house in which they can be accommodated.⁵³

Although it is uncertain how many other aspects of the assizes were affected by the state of the court house, magistrates were clearly sensitive to the limited infrastructure upon which they could draw.

Governor Drake followed his instructions to the letter. Two identical copies of the assize proceedings were made: one was inserted into the Colonial Secretary's Letterbook the day of the trial; the other was entered by Governor Drake into the returns to the heads of inquiry.⁵⁴ In the other articles Drake asserted that the justices of the peace were invaluable to the rule of law in Newfoundland, to which the planters had duly submitted. But he warned of the grave danger posed by the large numbers of Irish

⁵³ PANL, GN 2/1/A, vol. 11, pp. 100-101.

⁵⁴ PANL, GN 2/1/A, vol. 1, pp. 192-97; PRO, CO 194/12, pp. 187-191 (returns to the heads of inquiry, 24 December 1750).

Roman Catholics, all of whom were allegedly disaffected to the Crown and refused to take the oaths of allegiance.⁵⁵

Securing the Power to Hang Offenders

Against this backdrop of threatened unrest, Governor Drake successfully petitioned that Newfoundland be given the power to execute felons without the prior approval of the British government. In December 1750 Drake wrote to the Board of Trade to explain his case for this additional reform. While stressing the positive impact of the court of oyer and terminer, he argued that the restrictions on executing felons severely hindered its potential effectiveness. The problem was twofold: the lack of a sufficiently strong prison at St. John's meant that reprieved offenders – who would have to wait at least nine months for the British government's decision whether to grant a pardon – could escape or be rescued after the naval squadron departed in the autumn; second, because of the harshness of the Newfoundland winter and the poor condition of the prison facilities, the offenders who remained incarcerated were liable to die from exposure or hunger before the governor returned in the summer.⁵⁶ When a committee of the Board of Trade met in 1751 to draft the

⁵⁵ PRO, CO 194/12, p. 186. Sectarian tensions are discussed in detail below, see Chapter Six.

⁵⁶ An extract of Drake's letter appears at PRO, CO 194/21, pp. 17-18.

governor's instructions for the upcoming fishing season, it resolved to pass Drake's request on to the attorney general.⁵⁷

The attorney general acceded to Governor Drake's request, but he recommended that the Newfoundland assizes be prohibited from hearing cases involving treason or prosecutions against officers of warships or merchantmen.⁵⁸ Laid before the Privy Council in June 1751, the proposal and the attorney general's recommendation were accepted without amendment. Signaling a significant shift in policy, the Order in Council directed that the second article of the governor's instructions – which required the governor to transport all felons to England for trial, in accordance with King William's Act – be finally revoked. The governor was now empowered to proceed straightaway with the execution of offenders sentenced to death at the St. John's assizes.⁵⁹

This reform did not alter the island's status as a seasonal fishing station: the Privy Council directed Governor Drake to enforce the statutory regulations for the fishery. No move was made to amend King William's Act, which still stipulated that felons be tried only in England, nor to introduce legislation in

⁵⁷ PRO, CO 391/59, pp. 110-111.

⁵⁸ Issued 16 May 1751, the attorney general's opinion is reprinted in Chalmers, ed., *Opinions of Eminent Lawyers*, pp. 543-45.

⁵⁹ PRO PC 2/102, pp. 241-43, (Order-in-Council, 4 June 1751). See Appendix 4.1 for the governor's instructions.

parliament. The commission of oyer and terminer appeared, therefore, to contradict King William's Act.⁶⁰ In 1775-76 doubts over the legality of the Newfoundland assizes arose in the minds of some prospective jurors, who refused to serve on the grounds that the assizes had never been properly established.⁶¹ But according to Governor Mark Milbanke, such protests were the exception, for the vast majority of men agreed to do their duty as jurors when called upon each autumn.⁶²

The Vexed Question: What Laws Were Enforced?

The problem of delineating the reception of English law breaks down into the law of master and servant along with property law, on the one hand, and criminal law on the other. In the former case, the reception of law was relatively clear. Prior to 1775, the law of master and servant derived from common law, local customs (e.g. the law of wages and lien, which had been promulgated in 1749), and the statutes respecting vagrancy and disorderly persons, which magistrates used as authority for ordering corporal punishment for unruly servants. In 1775

⁶⁰ 10 & 11 Wm. III, c. 25, s. 13 (1698-99). Section thirteen directed that all suspected felons were to be brought to England for their trial. See above, Appendix 2.1.

⁶¹ For examples of prospective grand jurors refusing to serve, see PANL, CO 194/33, pp. 93, 120-24; GN 2/1/A, vol. 6, p. 35.

⁶² *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), ff. 12-19, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 76-83.

Palliser's Act conferred a statutory law of master and servant specifically designed for the Newfoundland fishery. The regulations governing master-servant disputes were the most explicitly established aspect of the island's pre-1792 constitution. Given the fishery's reliance on wage labour – and the concern repeatedly expressed by merchants over the need to control servants – this is hardly surprising.⁶³

The Newfoundland law of real property was a modified variant of English law. In 1793 Chief Justice Reeves argued persuasively that three types of title governed the island's law of property: grant, occupancy, and statutory prerogative. On the law of grants, Reeves asserted that they were issued by the governor or a surrogate. Reeves explained,

These were made sometimes generally; sometimes to the grantee for life; and sometimes to him and his heirs; they have of late years been considered as nothing more than grants during pleasure, or at the most, during the time the place granted was used for the fishery; and grants of late have been commonly expressed to be during the King's pleasure, and for the use of the fishery The grants, whether ancient or modern, contain no reservation of rent or any acknowledgment or consideration whatsoever; namely where a piece of land has been granted in consideration of another that had been taken from the grantee for building forts, or some other public service; there are several such grants, and they are considered as the best titles in the Island, on account of this consideration being expressed in them.⁶⁴

⁶³ Palliser's Act is parsed below, see Chapter Seven.

⁶⁴ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), ff. 158-59 [testimony of John Reeves], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 396-97.

The second form of property holding, occupancy, conformed entirely to English law. According to Reeves, three-quarters of the land held in Newfoundland was by simple occupancy, with no written grant whatsoever.⁶⁵

The third type of title derived from the statutes governing the fishery. Both King William's Act (1699) and Palliser's Act (1775) regulated the possession of real property. The fundamental principle was that rights were contingent upon use: title to land lapsed when property ceased to be held in support of a fishing operation.⁶⁶ Statute law reflected imperial policy: in theory, Newfoundland was merely a fishing station where all forms of property were devoted solely to the prosecution of the English migratory fishing.⁶⁷ In practice, local courts invariably dealt with a wide array of property cases. Archibald Buchanan captured the essential point:

The property in land, thus established, may be conveyed to heirs, may be devised by will, may be disposed of by sale, may be let to tenants, may be adjudged to creditors in payment of debt – but it must, in all cases be employed, as the Act directs, in the business of the fishery.⁶⁸

⁶⁵ Ibid.

⁶⁶ 10 & 11 Wm. III, c. 25 (1699); 15 Geo. III, c. 31, ss. 3-8 (1775).

⁶⁷ Imperial policy is best summarized in Matthews, *Lectures on the History of Newfoundland*, ch. 12.

⁶⁸ BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 381.

The stipulation that real property must be held in conjunction with the fishery – and must not interfere with fishing operations – was neither completely nor consistently upheld.

Governors periodically enforced the statutory restrictions to the letter of the law. In 1779 Governor Richard Edwards directed the civil magistrates to make a complete report of the houses in St. John's and to ensure that no new buildings were constructed without his permission.⁶⁹ Edwards then ordered the high sheriff and the justices of the peace to arrange for the demolition of four houses deemed a nuisance to the migratory fishery.⁷⁰ Seven years later, in another wave of administrative initiative, Governor John Elliot published a proclamation forbidding new buildings to be erected below the Upper Path (what is now Water Street), without written authorization.⁷¹ In 1787 Governor Elliot ordered the high sheriff to inspect buildings before allowing any renovations to proceed.⁷² Yet the actual enforcement of the restrictions on real property can be easily overestimated.⁷³ No more than twenty dwellings were ever

⁶⁹ PANL, GN 2/1/A, vol. 8, p. 79.

⁷⁰ PANL, GN 2/1/A, vol. 8, pp. 80-83, 103-05.

⁷¹ PANL, GN 2/1/A, vol. 11, p. 65 (proclamation restricting buildings, 1786), p. 68 (proclamation reiterating King William's Act, 1786).

⁷² PANL, GN 2/1/A, vol. 11, p. 242.

⁷³ McLintock exaggerated both the number of orders restricting property ownership and the degree to which governor's proclamations were actually enforced. See *Establishment of Constitutional*

destroyed by order of the governor: most residents of St. John's enjoyed their property in peace, regardless of its connection to the fishery; and those living in the outports faced even less regulation, leaving the common law preeminent. In effect, settlers enjoyed the right of *possession vaut titre* except in special cases where the courts found a property to be a nuisance to the fishery.

Evidence suggests that the island's criminal law closely followed English jurisprudence. There were four basic sources of local law: King William's Act; the governor's commission; the instructions authorizing the governor to constitute a court of oyer and terminer; and the commission of the peace.⁷⁴ As we have seen, King William's Act specified no punishments for transgressing its provisions. The governor's instructions and commission provided some basic regulations – e.g. no officer of a trading ship could be executed on the orders of the island's assize court – but contained little substantive law. And the commission of the peace actually conferred less authority than that given to English magistrates, since the Newfoundland justices had to work within the parameters of the 1699 Act.

The assize bench was therefore left to follow whatever laws they deemed compatible with their commission of oyer and

Government, esp. appendix 5.

⁷⁴ See Appendices 2.1, 3.1, 4.1, and 4.2.

terminer, which stipulated only that they follow "Law and Justice."⁷⁵ This presumably referred to English law, and trial proceedings indicate that the judges were indeed following English practices. But to what degree magistrates felt bound by statutory law is entirely unknown. For example, no reference was ever made at the Newfoundland assizes to benefit of clergy – no trial transcript records its invocation – but a number of offenders were branded for offenses, such as manslaughter, in a manner that suggests that they had been granted clergy.⁷⁶ Taken together, the evidence indicates that English criminal law, *in toto*, was the law enforced throughout Newfoundland's courts.

Overshadowing the reception of law was the fact that Newfoundland had no legislature in which to pass bills or to debate policy. Without an elected assembly or even a town corporation, the process of making local law fell to the governor and the judiciary. Measures that worked and caused the fewest problems were adopted; the task of reshaping English law through colonial legislation, which occupied a salient feature of politics in most British colonies, did not apply to Newfoundland until after 1832.⁷⁷ The question of reception is interesting,

⁷⁵ See Appendix 4.3.

⁷⁶ The operation of the assizes is discussed in Chapter Seven.

⁷⁷ On the colonial reception of English law, see David Bell, "The Reception Question and the Constitutional Crisis of the 1790s in New Brunswick," *University of New Brunswick Law Journal* 29 (1980), pp. 157-72; Barry Cahill, "How Far English Laws are in Force Here": Nova

then, not because it was contested, but because it received virtually no public comment prior to the nineteenth century. Without an independent press to monitor the judiciary, the island's courts interpreted the varying sources of law according to local imperatives.

Governors and naval officers applied customary law wherever possible. In August 1751, for example, Commodore Rodney ordered Captain Knight, commander of the sloop *Saltash*, on a surrogate cruise, to settle a complaint against a justice of the peace for unlawfully ordering the seizure a planter's fish catch as security for a debt. Rodney's instructions effectively summarized the law of wages and lien that was central to the fishery:

As the justices of the peace are not upon any account to concern themselves in causes relating to the fishery, which by the Act of Parliament are to be under the cognizance of the Fishing Admirals, with an appeal to the captains of His Majesty's Ships who are finally to determine the same, I must therefore desire you will take the complainants under your protection, and if you find their case as represented, don't doubt but you will do them ample justice in causing their effects to be restored, as the servant's debts according to equity and the custom of the country are to be first paid, and likewise reprimand the justice of the peace for presuming to act out of his sphere.⁷⁸

Such involvement in local government extended to setting the annual price of codfish and the rates of servants' wages. In

Scotia's First Century of Reception Law Jurisprudence," *University of New Brunswick Law Journal* 42 (1993), pp. 115-53; Jim Phillips, "'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth-Century Nova Scotia," *Nova Scotia Historical Review* 12 (1992), pp. 87-124.

⁷⁸ PRO 30/20/6, Rodney Letterbook.

September 1751 George Garland, the justice of the peace for Harbour Grace, petitioned Commodore Rodney on behalf of local merchants for permission to lower wages because of the season's poor fish catch. As a civil magistrate in Newfoundland, Garland was prohibited from such action, but Rodney's jurisdiction also did not permit him legally to hear petitions other than appeals against the fishing admirals. Still, Rodney gave his judgement without hesitation: "I can by no means approve of it, as both equity and law declare the labourer to be worthy his hire." He then asked, rhetorically, "had the season been good in proportion as it has proved bad, would the merchants or boatkeepers have raised the men's wages?"⁷⁹ This statement was not a manifestation of anti-merchant bias so much as it was simply a reflection of Rodney's conception of the commodore's responsibility to act as the *de facto* chief justice of Newfoundland.⁸⁰

For some civil magistrates, the laws in force in Newfoundland were no different from those in England. For example, Samuel Harris, a justice of the peace in Trinity, kept a meticulous record of petty and quarter sessions, and all the warrants issued and proceedings held out of sessions in 1757-

⁷⁹ PANL, GN 2/1/A, vol. 1, p. 250.

⁸⁰ For the argument that naval officers shared a marked bias against merchants, see John Crowley, "Empire versus Truck: The Official Interpretation of Debt and Labour in the Eighteenth-Century Newfoundland Fishery," *Canadian Historical Review* 70, 3 (September 1989), pp. 311-12.

58.⁸¹ Harris and the other district magistrate petitioned the governor for permission to use local fines to build a gaol and requested that a sheriff be appointed for Trinity. The practice of impaneling juries without a sheriff, they warned gravely, was contrary to English law and "seems to us not to be strictly legal."⁸² Harris performed his duties as if he were in an English county. He issued detailed instructions to the constables on how properly to raise a hue and cry and to serve a *capias*.⁸³ When he sat at quarter sessions, the trial jury practised pious perjury to convict a man of the misdemeanour of petty larceny rather than the felony of theft over a shilling.⁸⁴

Harris was apparently entirely unaware that he could not legally hear any case outside of criminal offenses and breaches of the peace. The list of thirty-nine warrants, recognizances,

⁸¹ Harris formalized the quarter sessions records as a separate part of the minute-book, titled: "General Quarter Sessions of the Peace holden in Trinity Harbor for the said District on the thirteenth and thirty first of March in the thirty first year [of George II]."

⁸² Letter to Governor Richard Edwards, dated 29 September 1758 and copied into the minutes, Trinity District (PANL, GN 5/4/B/1, box 1).

⁸³ Entered into the back of the minute-book, Harris's three-page instructions were titled: "INSTRUCTIONS FOR THE CONSTABLES OF THE DISTRICT OF TRINITY," which he introduced as: "Your duty is, chiefly, to refrain, or quell all such as in your presence or within your jurisdiction, & limits; by deed or word shall go about to break the peace. To make hue and cry after murderers, robbers and other felons: And to execute all warrants and precepts to you directed; from justices of the peace and superior officers." See PANL, GN 5/4/B/1, box 1.

⁸⁴ See *R. v. Barret*, 1758 Quarter Sessions [undated], Trinity District (PANL, GN 5/4/B/1, box 1).

and orders issued out of sessions from October 1757 to September 1758 included an order to adjust a merchant's account, three orders to settle servants' wages, and a warrant of distress.⁸⁵ Although Harris's careful attention to record-keeping was perhaps unusual, his excursions into civil law were not. As we shall see, the custom of magistrates settling disputes in the fishery – in particular suits for wages and breach of contract – continued until 1775, when it was recognized in Palliser's Act.⁸⁶

Government, Taxation, and Local Assemblies

Throughout this period, the British government remained unwilling to grant Newfoundland any form of representative government beyond grand and petty juries. In place of such formal institutions as a town corporation, a number of local customs emerged to meet the needs of those in power. By the late eighteenth century, the practice of using *ad hoc* meetings of planters, merchants, and magistrates to approve local taxes and other initiatives had become well entrenched. Governors

⁸⁵ The only one of its kind for early Newfoundland, this list was entered separately by Harris at the back of the minute-book, with the title: "The Warrants Issued Adjudications Made and the Other Judicial Proceedings had Out of the Sessions: By Saml. Harris, One of his Majesty's Justices of the Peace for the District of Trinity in Newfoundland (Copied from his Records). I the abovementioned Samuel Harris do under my Hand certifie unto all whom it doth or may concern that this is a true copy of the record or memorial kept by me. Sam Harris." The records run from the beginning of 1757 to the end of 1758: see PANL, GN 5/4/B/1, box 1.

⁸⁶ See below, Chapter Seven.

encouraged magistrates to collect duties to fund construction of court houses and jails, or to defray costs arising from criminal trials, throughout the island's districts: Placentia (1757-58), Harbour Grace (1765, 1771), St. John's (1772-73), Bonavista (1774-75), Bay Bulls (1775), and Trinity (1758, 1777-78).⁸⁷

Following the precedent set in the early 1730s, the grand jury played no formal role in these proceedings.

This system of local taxation did not produce any known complaints or controversies among the propertied classes. Taxes were regularly raised locally in Placentia, for example, where magistrates routinely convened meetings during the annual sitting of the Surrogate Court. As the minutes of the Placentia court indicate, warrants for tax collection comprised a standard element of the naval surrogate's jurisdiction:

Whereas upon the representation of the principal inhabitants that a tax is absolutely necessary for the repairing of the gaol, keeping up the railing of the church yards, the support of the poor, and other necessary services for the publick that may occur, [the court has] ordered a tax of two shillings to be levied on every boatkeeper, fisherman, and servant employed in the fishery in the district of Placentia, for the above services to be continued for one year only.⁸⁸

⁸⁷ PANL, GN 2/1/A, vol. 2, pp. 338-39 (Placentia); vol. 3, pp. 317, 329 & vol. 5, pp. 45, 140 (Harbour Grace); vol. 5, pp. 58, 78-87 (St. John's); vol. 5, p. 207 & vol. 6, pp. 67-78 (Bonavista); vol. 6, p. 71 (Bay Bulls); vol. 2, pp. 437-38, 475-78 & vol. 7, p. 33 (Trinity).

⁸⁸ PANL, GN 5/4/C/1, Placentia District Court Records, (minutes for 21 September 1772). For other instances of local taxation in Placentia, see the court minutes for 2 October 1760, 6 September 1769, 25 September 1770, 1 September 1773, 11 July 1774, and 18 September 1776.

In other instances, governors authorized the justices of the peace to use fines to pay for public works.

The use of meetings and petitions was a long-established form of governance in St. John's. The practice of striking committees to deal with local problems dated back to 1711, when Captain Joseph Crowe presided over a series of public meetings attended by merchants and the other prominent townspeople, which approved local by-laws.⁸⁹ Raising taxes without the approval of an elected assembly appears to be *prima facie* taxation without representation – a practice widely condemned as unconstitutional – and a recent study portrays such levies as extraordinary and illegal measures.⁹⁰ But this view distorts the legal context in which the island's government operated. The Declaratory Act of 1778 applied only to taxes levied by the king and parliament of Great Britain, leaving colonial assemblies relatively free to impose local assessments.⁹¹ Whether an *ad hoc* committee constituted an equitable form of representative government is debatable, but it certainly was not without precedent.

⁸⁹ PRO, CO 194/5, pp. 26-27. Titled "Captain Crowe's Laws," a printed version appears at Prowse, *History of Newfoundland*, pp. 271-72. See also D.B. Quinn, "Josias Crowe," *DCB*, vol. 2, pp. 163-64, and above, Chapter Two.

⁹⁰ Bob Reece, "'Such a Banditti': Irish Convicts in Newfoundland, 1789. Part I," *Newfoundland Studies* 13, 1 (Spring 1997), p. 13

⁹¹ 18 Geo. III, c. 12 (1778). On the distinction between internal and external taxation, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (2nd ed. Cambridge, Mass.: Harvard University Press, 1992), pp. 209-21.

Local government was operated by and for the propertied ranks of Newfoundland society. If their interests were seriously threatened, merchants would meet together to discuss how to respond. For instance, when the landing of a shipload of Irish convicts created a crisis in St. John's in the summer of 1789, an assembly attended by prominent merchants debated what course of action to take. Merchants influenced but did not control such proceedings. In fact the meeting held in July 1789 resembled an assize session more than anything else: the thirteen men who signed the petition included two commissioners of oyer and terminer, the high sheriff, and four grand jurors; three others had served on previous grand juries.⁹² Merchants and prominent planters had long been involved in judicial administration – as we have seen, they had temporarily established their own court in 1723 – and met regularly with the governor to settle disputes over wages and prices, though they were notoriously reluctant to serve on juries during the summer fishery.

⁹² PANL, CO 194/41, pp. 31-32. The signatories to the petition were: William Gaden (commissioner of oyer and terminer); Adam McGlashan (grand juror in 1790); Alexander Stuart (grand juror); Richard Reed (grand juror); Henry Phillips (high sheriff); Nathan Phillips (agent to a merchant house; grand juror in 1786); James Stokes (English merchant; grand juror in 1788); William B. Thomas (English merchant); Robert Tremlett (English merchant; grand juror in 1788); John Gleeson (Irish merchant); Marmaduke Hart (grand juror); Hugh Rowe & Son (English merchants; Thomas Rowe was a grand juror); and John Rogers (commissioner of oyer and terminer). For the grand jury lists, see PANL, CO 194/38, p. 19 (1788), p. 151 (1789), p. 262 (1790); for the commissioners of oyer and terminer, see PANL, GN 2/1/A, vol. 12, p. 7 (1789); and on the merchants, see Keith Matthews, *Profiles of Water Street Merchants* (St. John's: Maritime History Group, Memorial University of Newfoundland, 1980), *passim*.

Merchants rarely became actively involved in government unless their interests were threatened. Habitually fractious and often divided, they united when faced with a common threat, blurring the line between private rights and public justice.⁹³ They presented petitions on an array of issues, from local taxation to the maintenance of coastal defenses.⁹⁴ With few exceptions, Newfoundland merchants considered themselves to be British, sharing a basic principle of political ideology: a commitment to securing the protection of property.⁹⁵ This led them to resist efforts to impose commercial taxes. In 1772, for example, local merchants refused to pay the customs house fees at St. John's. The governor warned that those who did not pay the fees would "answer the contrary at their peril," but no one was ever prosecuted or publically admonished.⁹⁶

⁹³ On the historiography of the merchants, see Sean Cadigan, "Planters, Households and Merchant Capitalism: Northeast-Coast Newfoundland, 1800-1855," in Daniel Samson, ed., *Contested Countryside: Rural Workers and Modern Society in Atlantic Canada, 1800-1950* (Fredericton: Acadiensis Press, 1994), pp. 151-59.

⁹⁴ For examples of merchants' petitions, see PANL, GN 2/1/A, vol. 1, p. 250 (wages, 1751); vol. 4, pp. 14-17 (customs house, 1766); vol. 7, p. 60 (vice-admiralty court, 1777); vol. 7, pp. 92, 105, 120, 132, 139 (defense works, 1778); vol. 10, pp. 38, 40-43 (fish prices, 1784); vol. 12, p. 235 (convoys, 1793); vol. 12, p. 243 (British army garrison, 1794); vol. 12, p. 356 (naval impressment, 1795).

⁹⁵ This is, obviously, an oversimplification, for British historians have long debated the nature of eighteenth-century political ideology. A standard account appears in H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (London: Methuen, 1977), chs. 6-8.

⁹⁶ PANL, GN 2/1/A, vol. 5, p. 59 (Proclamation of Governor Shuldham, 24 June 1772).

Until the 1820s such acts of political independence did not seriously challenge the authority of the naval state. Merchants were in fact seen as the principal source for funding public works. In 1791, for example, Governor Milbanke rebuked the justice of the peace in Trepassey for using the district's funds to pay for maintaining the local fort, pointing out that the fish merchants should pay for any necessary repairs.⁹⁷ However, when the British government moved to impose new import duties on Newfoundland in 1827-28, merchants mobilized politically in a manner never before seen. They organized petitions, joined a coalition battling for political reform, and campaigned for a colonial legislature. They also engaged in protest actions, refusing to allow their ships to carry the mail because it might contain orders relating to the tax. Their participation in the reform campaign transformed local politics and eventually precipitated the grant of representative government in 1832.⁹⁸

Conclusion

The revolution in government that occurred in the mid-eighteenth century presents an apparent paradox. On the one hand,

⁹⁷ PANL, GN 2/1/A, vol. 12, p. 112 (Milbanke to Isaac Follett, 27 September 1791).

⁹⁸ These developments are discussed below, in Chapter Five, and are explored at length in Jerry Bannister, "The Campaign for Representative Government in Newfoundland," *Journal of the Canadian Historical Association* 5 (1994), pp. 22-27.

in the aftermath of Commodore Rodney's reforms, the island's judicial administration was placed on a far more structured footing than ever before. It had three formally-constituted courts, each of which was based on authority conferred via written commission. It also had, for the first time, a local repository for legal records that provided the means to register judicial actions and to preserve a wide range of documents. Using the Letterbook system, the governor was able to increase his level of communication with, and supervision of, outport justices. By 1750 he could also send naval magistrates on surrogate cruises in schooners small enough to get into most outports and to navigate safely along the coast. Bringing the majesty of English law to the outports stretched along the numerous bays, officers convened courts that settled all outstanding disputes.

On the other hand, the process of formalizing and expanding legal power was based largely on customary authority. The surrogate courts – the workhorse of the island's judiciary for the next seventy-five years – had no basis in written law other than the appellate jurisdiction granted by King William's Act. Rodney's reforms actually contravened several tenets of imperial policy and statutory law, such as the fishing admirals' primary role in settling fishing disputes. Neither statute nor prerogative writ supported the creation of the governor's court, though it soon became an entrenched institution. The invention of

the Letterbook was entirely Governor Rodney's own prerogative, regulated by no known laws or ordinances. And the assemblies attended by magistrates, merchants, and other prominent townspeople were merely *ad hoc* measures taken to meet specific local needs.

The solution to this puzzle lies in the malleable nature of common law and local custom. Whereas customary authority afforded governors relative freedom to take the steps they deemed necessary at the same time as conferring legitimacy, the common law provided the basis of jurisprudence at every level. A distinct legal culture grew out of the interplay between custom and common law, meshing civil and naval authority into a single administrative regime. This development was due fundamentally to the presence of the royal navy: the warships that arrived each summer provided the material and cultural resources upon which the edifice of law was built. The naval state that emerged after 1749 bore little resemblance to the image of quarter-deck justice because it operated within the basic framework of English common law.

Appendix 4.1

Governor's Instructions, 1738-1751

What follows is an extract of the article in the governor's instructions authorizing him to constitute a court of oyer and terminer in Newfoundland. Drafted in 1738, it was deleted by the Privy Council, inserted as the 70th article in the instructions given to Governor Drake in 1750, and revised in 1751.

"Whereas we have thought fit by our commission to you for the Government of our said Island of Newfoundland, to give and grant unto you full power and authority to constitute and appoint judges and in cases requisite Commissioners of Oyer and Terminer, [**Here, for the 1750 instructions, the Attorney General inserted: for the hearing and determining all criminal causes, treason excepted**] Justices of the Peace and other officers and ministers for the administration of justice, with power also to pardon offenders and to remit all offences, fines and forfeitures wilful murder only excepted, in which case, you have likewise power on extraordinary occasions to grant reprieves.

It is our express will and pleasure that you do not appoint any such Commissioners of Oyer and Terminer to meet or hold Assizes more than once a year and that only during the time you or the Governor of the Island for the time being shall be resident there and that you do not suffer any criminal to be deprived of life or limb by any sentence of such Court, but in all cases you shall reprieve the criminal until our pleasure be known therein. [**Here, for the 1751 instructions, the Privy Council replaced the underlined passage with: And it is our express will and pleasure that you do not suffer any of the officers of our ships of war or of any of the trading ships of our subjects which shall happen to be there to be there to be deprived of life or limb by any sentence of such Court but in such case you shall reprieve the criminal until our pleasure be known thereon. And you shall take especial care, that all persons guilty of treason be sent over to this our Kingdom with witnesses and sufficient proof of the crime along with them.**] And it is also our express will and pleasure that you do with your answer to the foregoing enquiries return also a full account of what you shall have done in pursuance of this power of appointing Judges, what proceedings have been had before the said Judges, what obstructions or difference you or they have met with (if any) in putting the said powers in execution, and which way you conceive we may contribute to render it more useful and beneficial to all our subjects residing in Newfoundland or

resorting thereto. And particularly that you do by the first opportunity send unto us by one of our principal Secretaries of State and to our Commissioners for Trade and Plantations a Report of all the proceedings in cases where any person is sentenced to the loss of life or limb, in order that the same may be laid before us in council for our pleasure thereon."

Sources: PRO, CO 194/21, pp. 7-12 (original instructions drafted in 1738); vol. 12, pp. 15-16 (report of attorney general in 1750); vol. 12, p. 175 (amendments proposed by the attorney general in 1750); vol. 21, pp. 17-18 (amendments proposed by the attorney general in 1751); vol. 13, pp. 1-2 (copy of Privy Council minutes in 1751); and PRO, PC 2/102, pp. 241-43 (Order-in-Council, 4 June 1751).

Appendix 4.2

The Governor's Commission

This commission was normally granted to the officer appointed to serve as commodore of the Newfoundland station. Upon the approval of the Privy Council, he received the title of governor, and usually served a three-year term concurrently with his Admiralty commission as commodore. Issued only once, the governor's commission was promulgated when the squadron first arrived in St. John's harbour and again by his junior officers when they convened a surrogate court in an outpost.

"George the Second by the Grace of God of Great Britain, France and Ireland King, Defender of the Faith and so forth, To our trusty and well beloved, Francis William Drake Esquire, Greeting.

Whereas We did by our Letters Patents under our Great Seal of Great Britain bearing date at Westminster the twenty sixth day of January in the twenty third year of Our Reign constitute and appoint you the said Francis William Drake to be our Governor and Commander in Chief in and over the Island of Newfoundland in America our fort and garrison at Placentia and all other forts and garrisons erected and to be erected in that Island for and during our will and pleasure as by the same letters patent relation being thereunto had may more fully and at large appear. Now know you, that we have revoked, determined and made void the said recited Letters patent and every clause, article and thing therein contained and we reposing especial trust and confidence in the prudence, courage and loyalty of you the said Francis William Drake of our especial Grace certain knowledge and meer motion have thought fit to constitute and appoint and by these presents do constitute and appoint you the said Francis William Drake to be our Governor and Commander in Chief in and over our said Island of Newfoundland, our fort and garrison at Placentia and all other forts and garrisons erected or to be erected in that Island. And We do hereby require and command you to do and execute all things in due manner that shall belong to your said command and the trust We have reposed in you according to the several powers and directions granted or appointed you by this present commission and the instructions either herewith given to you or by such further powers instructions or authorities as shall at any time hereafter be granted or appointed you under our signet or sign manual by our Order in our Privy Council. And we do further give and grant under you the said Francis William Drake full power and authority from time to time and at all times

hereafter by yourself or by any other to be authorized by you in that behalf to administer and give the oaths mentioned in an Act passed in the first year of our late Royal father's reign, entitled An Act for the further security of His Majesty's person and government and the succession of the Crown in the heirs of the late Princess Sophia being Protestants and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors, to all and every such person and persons as you shall think fit who shall at any time or times, pass into our Island or shall be resident or abiding there. And we do by these presents give and grant unto you full power and authority to constitute and appoint Judges and in cases requisite Commissioners of Oyer and Terminer for the hearing and determining of all criminal causes treason excepted according to Law and for awarding execution thereupon with all reasonable and necessary powers, authorities, fees and privileges belonging thereunto, Justices of the Peace with other necessary officers and ministers for the better administration of justice and keeping the peace and quiet of the said Island which Justices of the Peace so authorized may and shall hold and keep General Quarter Sessions of the peace in such places as you shall appoint according to the Custom of this part of Great Britain called England and to adjourn such Session from time to time and from place to place as shall be most convenient and necessary for the peace and welfare of our subjects inhabiting there. Provided neither you nor they do anything by virtue of this Commission or the powers hereby Granted contrary or repugnant to the Act for Encouraging the Trade to Newfoundland passed in the tenth and eleventh years of the reign of King William the Third [King William's Act] nor any way obstruct the powers thereby given and granted to the Admirals of Harbours or Captains of our Ships of War or any other matter or thing either prescribed by the said Act or by such instructions as you shall received from us as aforesaid. And we do hereby give and grant unto you full power and authority where you shall see cause or shall judge any officers or offenders in criminal matters of for any fines or forfeitures due unto us fit objects of our mercy to pardon all such offenders and to remit all such offences fines and forfeitures, wilful murder only excepted in which case you shall likewise have power upon extraordinary occasions to grant reprieves to the offenders until and to the intent our Royal pleasure may be known therein. And provided also that no person or persons so by you appointed to be justices of the peace as aforesaid or other officers or ministers belonging or appertaining to them do presume or be suffered to act in such office or place until he or they have taken the aforesaid oaths mentioned in the said Act for the Further Security of His Majesty's Person and Government and the Succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and

for Extinguishing the hopes of the Pretended Prince of Wales and his Open and Secret Abettors as also made and subscribed the Declaration mentioned in an Act of Parliament made in the twenty fifth year of the Reign of King Charles the Second Entitled An Act for Preventing dangers which happen from Popish Recusants, and also take such proper oath or oaths as are usually taken in this Kingdom by persons executing such offices and trusts. which said oaths and Declaration you shall administer and give, or cause the same to be administered and given to all and given to all and every person and persons who ought to take the same according to the Laws and Customs of this Kingdom. And we do hereby give and grant unto you the said Francis William Drake full power to erect, appoint and set apart one or more convenient court house or court houses for the more orderly meeting of such justices of the peace in order to hold such their Quarter or other Sessions, which a convenient prison adjoining thereto for the keeping of such offenders as may be found necessary to be committed to safe custody, until all such Court or Sessions can more conveniently be held for trying and delivering offenders against our Laws and the Peace of our subjects. And we do hereby require and command all officers civil and military and all other inhabitants of our said Island to be obedient, aiding, and assisting unto you in the execution of this our Commission and of the powers and authorities herein contained. And in case of your death our will and pleasure is that the person upon whom the command of our ships under your command shall devolve do take upon him the administration of the Government of our said Island, and execute our said Commission and Instructions, and the several powers and authorities therein contained in the same manner to all intents and purposes as you our said Governor and Commander in Chief might or ought to do for and during our will and pleasure. And we do hereby declare, ordain and appoint that you the said Francis William Drake shall and may hold, execute and enjoy the place of our Governor and Commander in Chief in and over our said Island of Newfoundland with all and singular the powers and authorities hereby granted unto you for and during our will and pleasure.

In witness thereof we have caused these our letters to be made patent, witnesses Thomas Archbishop of Canterbury and other Guardians and Justices of the Kingdom at Westminster, the twenty third day of April in the twenty third year of our Reign.

York & York

By Writ of Privy Seal"

Source: PANL, GN 2/1/A, vol. 1, pp. 83-90.

Appendix 4.3

Commission of Oyer and Terminer

This commission was issued annually by the governor and was to be used for only one assize session. The commissioners typically received their commission two weeks before the assizes were to begin.

"By Francis William Drake Esquire Governor

By virtue of His Majesty's Commission made Letters Patent bearing the date at Westminster the twenty third day of April in the twenty third year of His Majesty's reign whereby is given and granted until me full power and authority to constitute and appoint Judges, and in cases requisite, Commissioners of Oyer and Terminer for the hearing and determining all criminal causes (treason excepted) according to Law, and for awarding execution thereupon with all reasonable and necessary powers, authorities, fees and privileges belonging thereunto.

I therefore have appointed and authorized you Michael Gill, Nathaniel Brooks, John DeGrave, George Garland, John Benger, Charles Wally, and George Olive, Esquires Commissioners with full powers and authority to hear and determine all criminal causes (treason only excepted) according to Law and Justice and to proceed to sentence or acquittance as the case shall require.

And I do further appoint you the said Michael Gill, Nathaniel Brooks, John DeGrave, George Garland, John Benger, Charles Wally, and George Olive, Esquires Commissioners or any five or more of you, of which number you Michael Gill, Nathaniel Brooks and John DeGraves shall be one, and that you do make your report to me of all such your proceedings had and done in the causes which shall be brought before you or any of your nominated, authoris'd and appointed as aforesaid.

In Witness therefore I have hereunto affix'd my Hand and Seal at St. John's this twenty fifth day of Setember 1750 and in the twenty fourth year of the reign of His Majesty King George the Second.

[signed] Francis William Drake

By command of the Governor
[signed] Wlm. Hall"

Source: PANL, GN 2/1/A, vol. 1, p. 181

Appendix 4.4

The Surrogate's Commission

The governor issued this commission every spring or early summer to the individual naval officers or midshipmen appointed to serve as surrogates during the upcoming fishing season. In practice, it lapsed as soon as the surrogates returned to the commodore's flagship and the squadron left Newfoundland in the autumn.

"By virtue of the power and authority to me given I do hereby constitute and appoint you James Wallace esq. to be my Deputy or Surrogate with full power and authority to assemble Courts within all that District situated on the coast of Newfoundland from Cape Race to Point La Hume to enquire into all such complaints as may be brought before you (except such as are excepted in the instructions annexed) and to hear and determine the same to all intents and purposes as I myself might or could by virtue of the power and authority vested in me; you have likewise power and authority to seize and detain in order to proceed to condemnation all uncustomed prohibited or run goods that may be found within the aforesaid limits or ports adjacent; and I do give and grant unto you James Wallace, full power and authority to administer the several oaths to any person or persons you shall think fit, agreeable to the several Acts of Parliament made in that behalf; I do strictly enjoin all Admirals of harbours all Justices of the Peace, all officers civil and military and all others his Majesty's Leige subjects to be aiding and assisting to you the said James Wallace and to obey and put into execution all such lawful orders as you shall give unto them, as I myself might or could do by virtue of the power and authority vested in my. Given under my hand and seal this 1st day of May 1772. M. Shuldham" [Governor of Newfoundland].

Source: PANL, GN/5/4/C/1, Placentia District Court (minutes for 1 May 1772).

Chapter 5

A Fief of the Admiralty:

The Rise and Fall of the Naval State

On 11 May 1830 George Robinson, the Tory MP for Worcester, rose in the House of Commons to speak on the state of Newfoundland. A partner in a Newfoundland merchant firm, Robinson had become the chief parliamentary spokesman for the reform coalition that had recently emerged in St. John's. After a brief introduction, he focused on the question of the island's legal regime:

It was one of the oldest colonies in our possession, and though of that importance which should entitle it to a well regulated and proper administration of its affairs, they had for a long period been conducted in a manner which was anything but calculated to promote the prosperity of that island. Newfoundland had been long regarded as a fief of the Admiralty, and a naval officer was from time to time sent there to administer its affairs. He was allowed to remain but a short time, and was recalled to make room for some other naval officer; and in consequence of this species of management, though no one of our colonial settlements possessed greater natural advantages than Newfoundland, yet there was not one that had made so little progress in population, in wealth, and he might add in civilization.¹

Robinson was invoking the spectre of naval government after it had ceased to dominate the political landscape of Newfoundland. He knew that naval officers had played a major role in the administration of justice, but his remarks betrayed a lack of knowledge about how naval government had operated. Ironically, as

¹ *Hansard's Parliamentary Debates*. New Series. (London: T.C. Hansard, 1830), vol. 24, p. 581 [*Parliamentary Debates*].

reformers were using the island's legal history as a rhetorical device, the past was being forgotten. In the process, a system of governance that had survived for nearly a century became a political backdrop. While scholars have reappraised much of the reformers' legacy, the history of the royal navy in Newfoundland remains trapped in medieval metaphors.

This chapter examines the development of the colonial state from the end of Governor Rodney's reforms in 1751 to the beginning of representative government in 1832. It traces the patterns of governance using case-studies to assess the administration of law in St. John's and the outport districts. The island's institutions continued to develop according to the initiative of the governor and his junior officers, whose ability to become involved in the judiciary depended upon whether they were free from the demands of wartime service. Authority was never completely uncontested: the customary regime that emerged in the 1750s faced repeated challenges, in Newfoundland and in England, which precipitated a crisis in 1788-89. Yet, despite statutory reforms in 1791-92, the basic mode of governance did not change significantly until the 1820s. Without a local legislature or a bourgeois public sphere, naval governors were relatively free to act as they saw fit. Political representation continued to function via petitions and *ad hoc* committees struck by magistrates and merchants to deal with local problems.

This era has been seen largely through the lens of imperial policy. Eighteenth-century Newfoundland was no more than a great ship moored off the Grand Banks, a seasonal fishing station with the barest features of civil society.² Naval government remains in the shadow of William Carson and Patrick Morris, both of whom portrayed it as inherently weak and inevitably arbitrary.³ The colonial state is still viewed in terms of official policies that restricted formal institutions: local customs were merely stand-ins for the real thing.⁴ The legal system that governed Newfoundland prior to the 1820s was remarkably stable and effective, however, and the gap that existed between imperial policy and local practice did not hinder the administration of justice. Naval and civil magistrates exercised legal authority and merchants became actively involved in government when their interests were threatened. Before the advent of an independent press in the nineteenth century, local officials and magistrates were not subjected to critical public evaluation. Under such a

² As G.O. Rothney put it: "In official eyes, 'Newfoundland' became simply the English fleet moving west across the ocean in the spring, and returning back home to England again in the autumn." See *Newfoundland: A History* (Canadian Historical Association Booklet no. 10, Ottawa, 1964), p. 11.

³ William Carson, *Reasons for the Colonizing the Island of Newfoundland* (Greenock: William Scott, 1813), pp. 11-13; Patrick Morris, *Remarks on the State of Society, Religion, Morals, and Education at Newfoundland* (London: A. Hancock, 1827), pp. 10-13.

⁴ On the dominance of imperial policy in Newfoundland historiography, see Janzen, "Newfoundland and the International Fishery," in Taylor, ed., *Canadian History: A Reader's Guide*, esp. pp. 301-02.

regime, official policy was alternatively upheld, ignored, or superseded, depending upon local conditions. This "naval state," as I have termed it, was essentially reactive, limited by available resources, and shaped by individual initiative.

The case of eighteenth-century Newfoundland points to the need to reassess the problem of state formation. While Sean Cadigan has established a sophisticated model of economic development, the island's state has received little scholarly attention.⁵ Studies by Patrick O'Flaherty and Christopher English have begun the process of critically examining the judiciary, but both have employed a narrow model of state formation that cannot adequately account for the development of the island's legal system prior to 1832.⁶ In light of the recent renaissance in Canadian research on the colonial state, the example of early Newfoundland demonstrates the need to broaden the analytical scope to include customary sources of law and

⁵ Cadigan, *Merchant-Settler Relations in Newfoundland*, chs. 5-6. On the post-1832 era, see Philip McCann, "Culture, State Formation and the Invention of Tradition: Newfoundland, 1832-1855," *Journal of Canadian Studies* (Spring/Summer 1988), pp. 86-103.

⁶ Patrick O'Flaherty, "The Seeds of Reform: Newfoundland, 1800-1818," *Journal of Canadian Studies* 23, 3 (Fall 1988), pp. 39-56; O'Flaherty, "Francis Forbes," *DCB*, vol. 7, pp. 301-04 ; English, "Legal Development of Newfoundland, 1791-1832," in Knafla and Binnie, eds., *Essays in Modern Legal History*, pp. 73-93; Christopher English, "Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92," *Manitoba Law Journal* 32 (January 1996), pp. 57-78.

government.⁷ The absence of modern forms of social control, such as professional policing or a centralized bureaucracy, did not compromise the ability of the naval state to enforce its authority. With the backing of merchants and the military, the governor and magistrates could administer law without having to answer to an independent press or an elected assembly. The naval state was not a particularly fair or just form of governance, but it had its own rule of law, its own legitimacy in the eyes of the propertied classes, and its own methods for maintaining order.

The Impact of War and Invasion

As had happened in 1744-48, the military operations in the 1750s placed serious strains on the naval administration on which the island's government depended. When the Seven Years' War broke out officially, no governor was sent to Newfoundland, nor did any naval surrogate visit the outport districts. Unlike during the War of Jenkin's Ear, however, from 1756 to 1763 the naval state did not collapse.⁸ With Rodney's reforms now entrenched at St.

⁷ See, *inter alia*, Greer and Radforth, "Introduction," in Greer and Radforth, eds., *State Formation in Mid-Nineteenth-Century Canada*, pp. 1-16; Rainer Baehre, "The State in Canadian History," pp. 119-133; Louis Knafla and Susan Binnie, "Beyond the State: Law and Legal Pluralism in the Making of Modern Societies," in Knafla and Binnie, eds., *Essays in Modern Legal History*, pp. 3-33.

⁸ Ralph Lounsbury noted the impact of war on the naval government in Newfoundland but overstated the relative decline in naval government. He characteristically dismissed the naval officers as alternatively autocratic or impotent at the best of times, noting that they sent few reports to England during the Seven Years' War. Lounsbury then

John's, the island no longer endured periods of sustained administrative atrophy. Captain Richard Edwards, appointed governor in 1757, presided over the governor's court, sent orders to the outport magistrates, and commissioned a junior officer to convene surrogate courts. Governor Edwards ordered a local militia to be formed and took steps to establish authority in St. Pierre, where a justice of the peace had been installed since 1753.⁹ Following the precedent first set by Governor Lee in 1735, Edwards authorized taxes to be levied locally without a grand jury presentment.¹⁰ And he instituted a binding subscription for the construction of a new church at St. John's.¹¹

tied this trend to the apparent total (and anomalous) lack of representative government and the fact that the island was unable – because it was “too isolated, its society too primitive” – to support formal legal institutions. Although based on a misreading of a narrow range of Colonial Office Papers, this view is still the accepted interpretation. However, the records of Colonial Secretary's Letterbook illustrate that the naval administration was definitely active throughout 1756-63. See Lounsbury, *The British Fishery at Newfoundland*, esp. p. 309. For a favourable reading of Lounsbury, see Christopher English, “The Reception of Law in Ferryland District, Newfoundland, 1786-1812.” (Paper presented to the Canadian Historical Association, 1996), p. 2

⁹ On the administration of justice at St. Pierre, see PANL, GN 2/1/A, vol. 2, p. 69 (appointment of a Newfoundland justice of the peace), vol. 3, pp. 57-9 & 80 (orders for the apprehension of a murder suspect).

¹⁰ PANL, GN 2/1/A, vol. 2, pp. 338-39 & 437.

¹¹ On the formation of the militia and the building of the church, see Prowse, *History of Newfoundland*, pp. 294-96.

Against this apparent strength of the central administration must be balanced the limited naval resources available during wartime service. From 1757 to 1759 only one officer – Lieutenant John Chapman of HMS *Gosport* – was sent on the annual surrogate cruises. Lieutenant Chapman had the demanding task of having to sail south to Placentia and then north to Trinity Bay, holding courts with the local justices throughout August and September. He did not have the benefit of a sloop or other vessel small enough to navigate shallow harbours and uncharted coasts safely until August 1759, when Governor Edwards commissioned him to command the schooner *Surprize*. Remarkably, Chapman managed to convene courts in three districts – Placentia, Trinity, and Ferryland – and entered his proceedings into the Letterbook.¹²

Governor Edwards' successor, Captain James Webb, appointed a surrogate in 1760 but no formal courts were held. Governor Webb convened the governor's court at St. John's during his first year, but he died in May 1761, shortly before he was to return with the squadron; in his place the British government appointed

¹² PANL, GN 2/1/A, vol. 2, pp. 314, 426 & 502 (commission of Lt. Chapman, 1757-58), pp. 323-40 & 455-60 (proceedings of surrogate court at Placentia, 1757-58), pp. 462-63 (proceedings of surrogate court at Trepassey, 1758), p. 375 (proceedings of surrogate court at Trinity, 1757); GN 2/1/A, vol. 3, p. 6 (proceedings of surrogate court at Trinity, 1759), p. 22 (proceedings of surrogate court at Ferryland, 1759). These records are partially duplicated in the surviving district minute-books, which also contain proceedings not recorded in the Letterbook, such as Chapman's surrogate court in Trinity in 1758. See PANL, GN 5/4/B/1 (Trinity District, minutes for 27-29 September 1758); PANL, GN 5/4/C/1 Placentia District (minutes for 28 August to 2 September 1758).

Captain Thomas Graves. Graves probably did not receive a full briefing by the Board of Trade and, not surprisingly, he neither reconvened the governor's court nor commissioned an officer to hold surrogate courts in 1761. The following summer he faced a different obstacle: the French captured St. John's in June 1762. Intercepted off the Grand Banks by an English sloop and informed of the invasion, Graves proceeded to Placentia to await reinforcements from Halifax. In September an expeditionary force under General Amherst recaptured St. John's and the French squadron retreated under cover of fog.¹³

Despite the disruption caused by the invasion, the naval government wasted little time in reasserting its authority. Governor Graves relied upon the surrogate courts to re-establish law and order. In Placentia, where the French had not attacked, Captain William Brown convened a court, but he could not visit the northeast coast until October.¹⁴ During the summer of 1762 the French had captured several outports and destroyed

¹³ Graham, *Empire of the North Atlantic*, pp. 190-92; William Whiteley, "Thomas Graves," *DCB*, vol. 4, pp. 380-82; and Olaf Janzen, "The French Raid upon the Newfoundland Fishery in 1762: A Study in the Nature and Limits of Eighteenth-Century Sea Power," in William Cogar, ed., *Naval History: The Seventh Symposium of the U.S. Naval Academy* (Wilmington: Scholarly Resources, 1988).

¹⁴ PANL, GN 5/4/C/1, Placentia District (minutes for 18 August 1762). The records list Brown as "esquire," with no mention of an officer's commission: he was likely a midshipman aboard Graves' flagship; he would have assumed the courtesy title of captain while commanding the king's schooner and holding courts.

considerable property in Harbour Grace, Carbonear, and Trinity, where they burned numerous wharves, stages, and boats.

When a French naval squadron secured the surrender of Trinity harbour, the commander summoned the justices of the peace and ordered them to requisition local supplies for the occupying force. This created a controversy when Benjamin Lester, one of the magistrates involved, negotiated a deal whereby most of his property was spared. After the French had left, several planters accused Lester of colluding with the enemy and taking their cattle to supply the French. In response to these allegations, Governor Graves suspended Lester's commission and sent Captain Brown to hold a surrogate court to look into the entire affair.¹⁵

When the king's schooner arrived in Trinity harbour, Lester went aboard to meet with Captain Brown. Lester's private diary provides the only extant account:

[W]ell received considering the number of complaints against me; he intends to hold a court tomorrow eight o'clock; the Doctor [Samuel Harris, the senior magistrate in the district] went onboard this afternoon, was with him sometime and was told the Governor was very angry with me.¹⁶

¹⁵ Gordon Handcock, "The Lester Diaries." (Paper given to the Wessex Society, St. John's, February 1995), pp. 17-19; Gordon Handcock, *The Story of Trinity* (Trinity, NF: Trinity Historical Society, 1997), pp. 15-18; D.F. Beamish, "Benjamin Lester," *DCB*, vol. 4, pp. 491-92.

¹⁶ Dorchester Records Office, [DRO] D/LEG D365/F8, Records of the Lester-Garland Families, Diary of Benjamin Lester (entry for 6 October 1762). Although I have consulted the original manuscript at the DRO, this quotation is from the printed transcript prepared by Professor Gordon Handcock at Memorial University of Newfoundland, as are all subsequent references in this chapter. Citations to this manuscript source will be hereinafter shortened to Lester Diary Mss.,

Brown made it clear he would not come ashore to Lester's house until the matter was settled. The next day in court two planters presented their complaints against Lester — he offered to compensate them from his own herd of cattle — and Captain Brown successfully arbitrated the dispute. Brown dined with Lester that evening. Petitions by servants for their wages comprised the bulk of the court's business over the next two days.¹⁷ On 11 October, Lester noted, two servants were corporally punished, but no record of their trial exists — if one had been held — and they were probably whipped for looting during the French occupation.¹⁸ The punishment was apparently carried out on the authority of Harris and John Garret Blake, the other justice of the peace.

After the whippings, Benjamin Lester again entertained Captain Brown at his home. Lester recorded that Brown was annoyed with the local justices for sending one of the whipped men to the king's schooner without his permission.¹⁹ Brown set sail the next morning, joined by Lester in his own sloop, and the two

with date of diary entry. I wish to thank Professor Handcock not only for freely discussing the diary with me and sharing his wealth of knowledge, but also for generously providing me with a full copy of the computerized transcript, over which he has sole copyright.

¹⁷ PANL, GN 2/1/A, vol. 3, pp. 167-69 (minutes of the Trinity surrogate court, 7-9 October 1762). The district minute-book contains no proceedings for 1762.

¹⁸ Lester recorded: "John Tibbs and his brother William both whipped at the gallows with halters about their necks." See Lester Diary Mss., 11 October 1762.

¹⁹ Lester Diary Mss., 11 October 1762.

vessels made a smooth passage across the mouth of Trinity Bay. The ships took the well-known passage inside of Baccalieu Island, doubled Cape St. Francis, and anchored in St. John's harbour after less than twenty-four hours at sea. Lester promptly waited on Governor Graves aboard his flagship, the 54-gun HMS *Antelope*, where he was "tolerably well received."²⁰ At the governor's court, Lester settled a servant's petition for wages and sailed back to Trinity with his reputation officially restored.²¹

Magistrates, Merchants, and Surgeons

The events of 1762 illustrate three key aspects of the administration of law. First, the minutes of the district courts are neither a complete nor an unbiased index of judicial business. As in England, magistrates did not record instances of summary punishments of vagrants and disorderly servants.²² This trend in under-reporting extended to disputes among planters and merchants, such as the complaints against Benjamin Lester. No official records exist of the controversy surrounding Lester's actions: we are left only with his version of what happened.

²⁰ Graves ordered Lester to pay for the gunpowder that the French occupying force had requisitioned at Trinity – Lester had taken the powder out of the local fort and had given it personally to the French commander – at a predetermined price. See Lester Diary Mss., 13 October 1762.

²¹ Lester Diary Mss., 27 October 1762.

²² On the responsibilities of a single justice, see Landau, *The Justices of the Peace*, pp. 6-30.

Reliance solely upon the district minute books therefore produces a skewed picture of social harmony and deference. Law was not, as Christopher English claims, automatically deferred to by all levels of the community.²³ Magistrates were usually able to enforce their authority with the backing of the royal navy, but this did not mean that serious controversies did not occur, nor that surrogates did not get dragged into the parochial disputes among planters and merchants. Power was continually tested, resisted, and negotiated by all ranks of local society. The island's fishing communities were no more deferential than other maritime settlements that relied upon wage labour.²⁴

Second, the incidents at St. John's and Trinity demonstrate how the authority of the governor and his officers operated on

²³ English, "Reception of Law in Ferryland District," p. 24.

²⁴ The question of whether maritime culture (usually depicted in picaresque terms) was somehow inherently distinct from mainstream Anglo-American society has been a topic of much debate. Whereas Judith Fingard has argued that the popular culture of sailors had little in common with the social norms in Canadian ports, David Alexander concluded that seamen were simply "working men who got wet." This debate is not particularly relevant to the case of early Newfoundland because maritime culture and the culture of the island's coastal communities were in my view essentially one and the same thing. One of the more interesting aspects of Newfoundland popular culture is the degree to which the work of maritime life – i.e. the fishery – was synonymous with Newfoundland society writ large. See, *inter alia*, Judith Fingard, *Jack in Port: Sailortowns of Eastern Canada* (Toronto: University of Toronto Press, 1982); David Alexander, "Literacy Amongst Canadian and Foreign Seamen, 1863-1869," in R. Ommer and G. Panting, eds., *Working Men Who Got Wet* (St. John's: Maritime History Group, 1980), pp. 3-33. The course of this ongoing debate is reappraised in Daniel Vickers and Vince Walsh, "Young Men and the Sea: The Sociology of Seafaring in Eighteenth-Century Salem, Massachusetts," *Social History* (forthcoming 1998), *passim*.

two interrelated levels. From his flagship in St. John's harbour, the commodore wielded broad powers as governor and *de facto* chief justice. Naval surrogates carried this authority to the outports, where they demanded and received acquiescence from merchants and local magistrates. Captain Brown exercised discretion – his surrogate court kept selective minutes – and he socialized ashore only when he saw fit. Benjamin Lester might intimidate planters and cajole justices of the peace, but he dared not directly confront an officer in the royal navy.²⁵ In effect, the surrogacy created in the outports a layer of authority separate from, though not necessarily adverse to, the fish merchants and the civil magistracy.

Third, merchants influenced but did not control local government. Justices of the peace were mainly drawn not from the ranks of merchants and planters, but from the numerous surgeons

²⁵ The situation in Newfoundland was not comparable to the experience of the royal navy in colonial America, where it had difficulty imposing its authority after 1765. The problems encountered by naval officers sent to enforce trade and revenue acts in the thirteen colonies were the result of an exceptional political crisis, not a reflection of the inherent weakness of naval authority. The navy may well have inspired little awe in American courts and customs houses from 1765 to 1775, but neither did any other agency of British rule. In societies marked by revolutionary fervor – where British sovereignty was challenged by colonial elites – the navy's problem was not its inability to administer law but rather its incapacity to quell political unrest among British subject. On the royal navy in colonial America, see Julian Gwyn, "The Royal Navy in North America, 1712-1776," in Jeremy Black and Philip Woodfine, eds., *The British Navy and the Use of Naval Power in the Eighteenth Century* (Atlantic Highlands, NJ: Humanities Press International, 1989), pp. 143-44; Neil Stout, *The Royal Navy in America, 1760-1775* (Annapolis: Naval Institute Press, 1973), ch. 6.

who worked in the outports. Lester invariably referred to Samuel Harris as the Doctor – the colloquial term for surgeons in Newfoundland – and Harris treated him personally for a variety of medical ailments.²⁶ Surgeons were a fixture of the eighteenth-century fishery. John Reeves, the island's first Chief Justice, observed that "in every harbour, almost, there is resident a surgeon, or medical man."²⁷ To protect their interests, merchants in each harbour contracted surgeons to provide basic medical services to the working population. In a system dating back to the seventeenth century, at the start of the fishing season each servant had to enter his or her name on the doctor's books of a surgeon, usually chosen by the master, and pay a flat fee at the end of the summer. Servants who needed special care for injuries or extended illness paid additional charges.²⁸

Evidence suggests an abundance of medical practitioners in outport communities, such as Trinity, which had at least five

²⁶ Born 1725 at Dartmouth, Harris had practiced medicine at Trinity from 1747 to 1798. See Nigel Rusted, "Medicine in Newfoundland c.1497 to the early Twentieth century: The Physicians and Surgeons, Biographical Gleanings," *Memorial University Occasional Papers in the History of Medicine* 14 (1994), p. 47.

²⁷ PRO, BT 1/8, p. 59, (Report on the Judicature in Newfoundland, 5 December 1792). Though "doctor" was used colloquially, formal records invariably stipulated "surgeon." Reeves claimed that surgeons in Newfoundland earned around £500 per year, though evidence points to more modest incomes.

²⁸ The judicial role of surgeons is discussed further in Jerry Bannister, "Surgeons and Criminal Justice in Eighteenth-Century Newfoundland," in Greg T. Smith, Allyson N. May, and Simon Devereaux, eds., *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie* (Toronto: Centre of Criminology, 1998), pp. 110-12.

known surgeons in the late eighteenth century. In addition, there were several surgeons and apothecaries attached to the army garrison at St. John's and Placentia, as well as a surgeon on each warship on the Newfoundland station. Like those in Nova Scotia, surgeons attached to the military in Newfoundland could become established members of colonial society. They earned incomes that could surpass £100 for a single fishing season, making them the nearest thing to a professional class on the island.²⁹

Consequently, surgeons were frequently appointed to serve as justices of the peace. Twelve surgeons can be positively identified as active magistrates. Three of the commissioners of oyer and terminer – D'Ewes Coke, Thomas Dodd, and Jonathan Ogden – were also practising surgeons (Coke and Ogden were later appointed chief justices of the supreme court).³⁰ Surgeons

²⁹ Accounts of medicine in early Newfoundland are contained in *The Journal of James Yonge, 1647-1721, Plymouth Surgeon*, F.N.L. Poynter, ed. (London: Longmans, 1963), pp. 58-60, 120, 133-37; *The Newfoundland Journal of Aaron Thomas, Able Seaman in H.M.S. Boston*, J. Murray, ed. (London: Longmans, 1968), esp. p. 158. See also Rusted, "Physicians and Surgeons," pp. 37-73. I am grateful to Professor J.K. Crellin for his help with the Faculty of Medicine sources at Memorial University.

³⁰ In most districts surgeons served as magistrates: Francis Bradshaw (Trepassey and Placentia); Nicholas Brand (Ferryland); John Brown (Placentia); John Clinch (Trinity); D'Ewes Coke (Trinity and St. John's); Charles Cramer (Fortune Bay); John Dingle (Bay Bulls); Thomas Dodd (St. John's); Jarvis Gossard (Placentia); Samuel Harris (Trinity); John Mills (Trinity); and Jonathan Ogden (St. John's). William Lilly, the coroner in Harbour Grace, was also a justice of the peace. Their commissions are recorded in PANL, GN 2/1/A, vol. 2, p. 101, vol. 5, p. 97, vol. 6, p. 7, vol. 10, pp. 22-28, 163-72, vol. 11, pp. 198, 428, and vol. 12, p. 70. See also PRO, BT 1/8, p. 59;

possessed three qualities desirable for local magistrates: they were relatively learned, actively willing, and readily available. The British government approved this trend because it viewed surgeons as enjoying greater economic independence than other candidates for office. Surgeons were still somewhat dependant upon the merchants because they decided whose doctor's books the servants signed on to each summer. John Reeves concluded,

However, notwithstanding this, the surgeons is usually fixed on for as justice; being less interested than the merchants; less in the merchant's hands than the boatkeeper, or planter; and certainly better fitted by education than either of them.³¹

He also recommended giving commissions of the peace to the Church of England missionaries sent by the Society for the Propagation of the Gospel, but they were too few to be a significant source for potential justices.³² By the 1780s several surgeons – most notably D'Ewes Coke – had become effectively permanent, full-time magistrates, earning most of their income through court fees and emoluments.³³

PRO, BT 6/57, pp. 191-96; Rusted, "Physicians and Surgeons," pp. 12-14, 22-30, 42, 47; and Prowse, *History of Newfoundland*, p. 662.

³¹ PRO, BT 1/8, pp. 59-60.

³² On the S.P.G. in Newfoundland, see H.P. Thompson, *Into All Lands: The History of the Society for the Propagation of the Gospel in Foreign Parts, 1701-1950* (London: S.P.C.K., 1951), ch. 6.

³³ Coke had served in various official capacities from 1772, when he was first appointed JP at Trinity, until 1797, when he resigned as chief justice due to ill health. Judge Prowse, who was no flatterer of the early justices, referred to Coke as "a man of considerable ability, and firm, determined character." See Prowse, *History of*

An End to Salutary Neglect?

At the end of the Seven Year's War the government of Newfoundland was reorganized. The Peace of Paris returned the islands of St. Pierre et Miquelon to the French but gave Newfoundland jurisdiction over Labrador, Anticosti, and the Magdalen Islands. Established imperial historiography sees 1763 as a watershed in British colonial administration: the age of salutary neglect had come to an end. Newfoundland historians have accordingly argued that the island entered a new era during which the British government took a far more activist role in its governance.³⁴ In 1764 the privy council appointed Captain Hugh Palliser as governor; his vigorous five-year tenure witnessed a series of major initiatives. Governor Palliser stepped up the policing of treaty rights on the French Shore, assisted Moravian missionaries in Labrador, arranged for a survey by James Cook, and attempted to establish relations with the Beothuck.³⁵

Newfoundland, p. 360.

³⁴ Lounsbury, *British Fishery at Newfoundland*, p. 304; Matthews, *Lectures on the History of Newfoundland*, p. 123. See, generally, Ian K. Steele, "Metropolitan Administration of the Colonies, 1696-1775," in Jack Greene and J.R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution* (Oxford: Basil Blackwell, 1991), pp. 11-16; James Henretta, "Salutary Neglect": *Colonial Administration under the Duke of Newcastle* (Princeton: Princeton University Press, 1972); Ian R. Christie, *Wars and Revolutions: Britain, 1760-1815* (Cambridge, Mass.: Harvard University Press, 1982), ch. 4.

³⁵ See, *inter alia*, Matthews, *Lectures on the History of Newfoundland*, ch. 20; William Whitely, "Governor Hugh Palliser and the Newfoundland and Labrador Fishery, 1764-1768," *Canadian Historical Review* 50, 2 (June 1969), pp. 141-63; and Crowley, "Empire versus Truck," pp. 311-

Above all, Newfoundland historians have emphasized Governor Palliser's role in upholding the regulations of the English migratory fishery to counteract the truck system used by local merchants and planters. These efforts culminated in a 1775 statute, known popularly as Palliser's Act, which revised many of the regulations governing the fishery but did not significantly alter the island's system of government. Historians have debated the merits of Palliser's policies, but they generally agree that his governorship represented a clear departure from previous naval regimes.³⁶ Recently, Sean Cadigan has argued that the law of wages and lien contained in Palliser's Act was a pivotal force in the history of the fishery. Armed with the right to a lien on their masters' fish catch to secure their wages, servants brought so many successful suits against planters that it forced the abandonment of wage labour and precipitated the rise of the family fishery.³⁷ But neither Cadigan nor his predecessors have examined the impact of Palliser's regime on the operation of the naval state, preferring instead to focus on the island's economy.

36.

³⁶ For discussions of the rather labyrinthine historiography surrounding Palliser's Act, see Olaf Janzen, "Newfoundland and the International Fishery," in Taylor, ed., *Canadian History: A Reader's Guide*, pp. 298-302; and Sean Cadigan, "Seamen, Fishermen The Role of the Wages and Lien System in the Decline of Wage Labour in the Newfoundland Fishery," in Colin Howell and Richard Twomey, eds., *Jack and Tar in History: Essays in the History of Maritime Life and Labour* (Fredericton: Acadiensis Press, 1991), pp. 105-12.

³⁷ Cadigan, *Merchant-Settler Relations*, ch. 5.

Far from being a break with the past, however, Governor Palliser's administration marked the continuation of a trend stretching back two generations. As had occurred in 1749, the onset of peace in 1764 released naval officers stationed at Newfoundland from the exacting demands of wartime service. Palliser built upon the foundation of legal reforms laid by Governors Clinton and Rodney, in particular the system of surrogate courts in the outports. Palliser's first move, even before he arrived in Newfoundland, was to establish the commissions and districts to be allocated to his junior officers. He added the innovation of formally matching these naval zones with the civil districts of the justices of the peace, thus cementing the link that had first been made by Clinton in the 1730s.

Using the Colonial Secretary's Letterbook, Palliser ensured that the administrative jurisdictions were formally recorded and absorbed as part of the judicial system. The strengthened surrogate courts covered all of the coast and islands under the governor's jurisdiction. Like the reforms undertaken in 1729, this move was designed to project British sovereignty as well as the rule of law. With five ships stationed around the island - plus the king's schooner or other small craft at his disposal - Governor Palliser had ample resources with which to operate the judiciary and to implement whatever policies he saw fit.

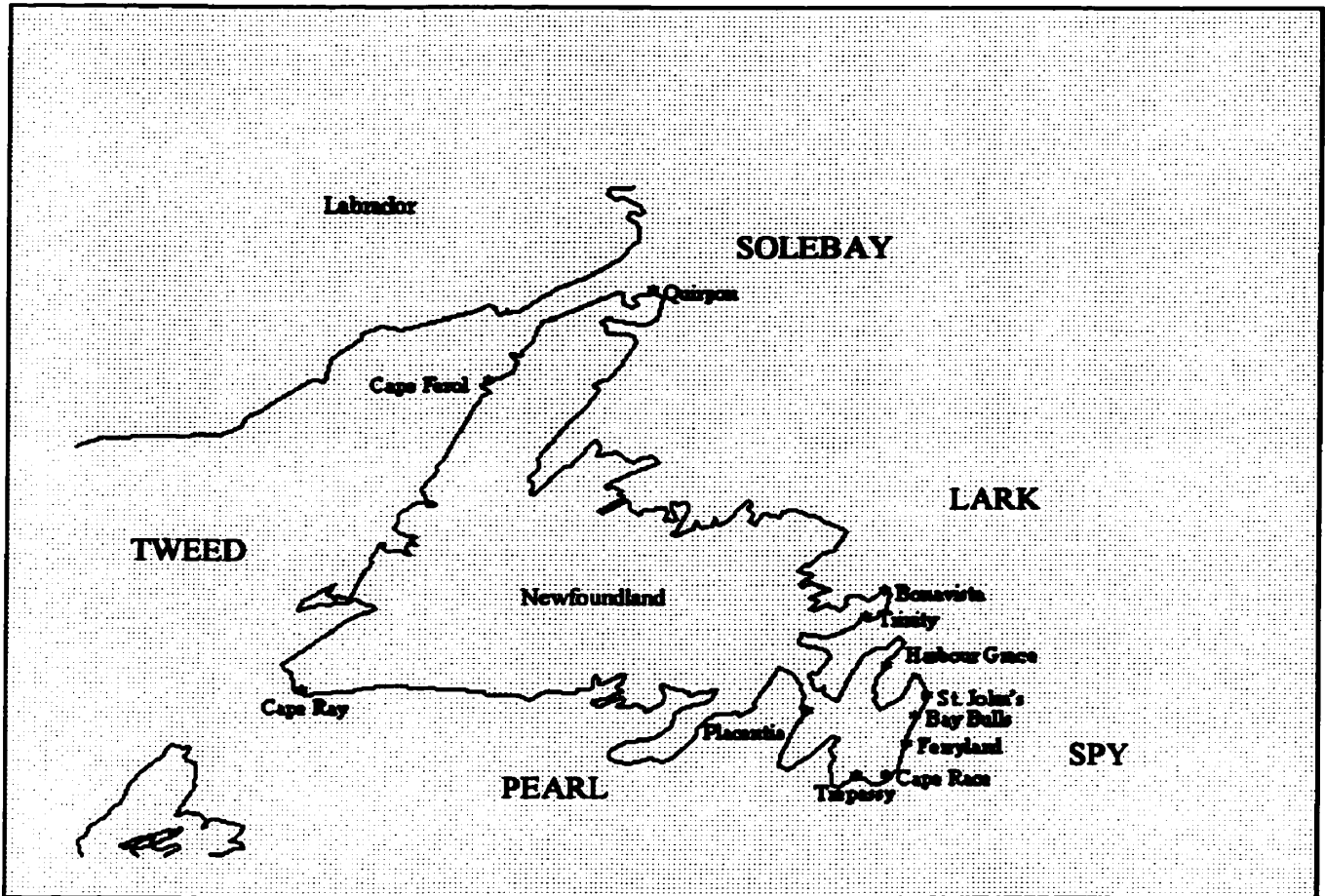
The Operation of the District System

The surrogate court convened by Captain Charles Sexton at Placentia in September 1764 provides an excellent example of how this district system operated. Upon arriving in HMS *Pearl* Captain Sexton held eight sittings by adjournments during the fifteen days his warship was in port. The court proceeded according to the daily business brought personally before the surrogate: on two occasions it convened but did not hear any cases.³⁸ This indicates both an attention to administrative detail and the fact that the judicial system likely met the basic needs of the local community. One of Captain Sexton's first duties was to assert British sovereignty via the governor's commission. Sexton took pains to promulgate Palliser's decrees, ensuring that they were copied into the district minute-book.³⁹ He also used the surrogate court to certify locally a decision that had been made by the governor's court at St. John's.

³⁸ PANL, GN 5/4/C/1, Placentia District (minutes for 26 September 1764).

³⁹ PANL, GN 5/4/C/1, Placentia District, minutes for 17 September 1764 (Proclamation of Governor Hugh Palliser, 14 July 1764).

Map 5.1. Palliser's Scheme of Civil & Naval Districts, 1764

Surrogate's Commissions

Capt. Hay	HMS <i>Solebay</i>	from Quirpon to Ferol and the coast of Labrador
Capt. Perceval	HMS <i>Tweed</i>	from Cape Ferol to Cape Race
Capt. Thompson	HMS <i>Lark</i>	from Cape Race to Quirpon
Capt. Sexton	HMS <i>Pearl</i>	from Cape Ray to Cape Race, including the Magdalen Islands
Capt. Phillips	HMS <i>Spy</i>	from Cape Race to Bay Bulls

Commissions of the Peace

To the Northward	Bonavista Trinity Harbour Grace St. John's Bay Bulls Ferryland	William Keen, jun. Samuel Harris; John Garret Blake Charles Garland Michael Gill; Edward Langman Nath. Brooks Peter Weston; Robert Carter
To the Southward	Renews Trepassy Placentia	Richard Ball William Jackson Robert. Edgecombe; Jonathan Haddock

Source: PANL, GN 2/1/A, vol. 3, pp. 222-23.

Upon hearing a suit for trespass, Governor Palliser had examined both parties, fined the defendant £10 in damages, and stipulated that the verdict be confirmed at the next sitting of the Placentia district court. Captain Sexton worked cooperatively with Robert Edgecombe, the senior justice of the peace.⁴⁰ The surrogate court apparently heard all of the outstanding cases in Placentia: of the seven suits brought before Sexton, four were for servants' wages, two for ownership of local property, and one for a disputed hand-note.⁴¹

Captain Sexton's court functioned as a forum for transacting the business of local government. In effect, it substituted for the quarter sessions that figured prominently in the management of English counties and towns. Sexton's judicial administration conflicts with the caricature of quarter-deck justice: he dismissed one case for want of evidence and another because of a lack of material witnesses.⁴² In his capacity as deputy governor, Captain Sexton issued a grant for a piece of land and conferred seven licenses to sell liquor. He also received a petition from

⁴⁰ For example, when Michael Brazil appeared in court to give an affidavit, he was sworn by both Sexton and Edgecombe.

⁴¹ PANL, GN 5/4/C/1, Placentia District (minutes for 13-28 September 1764). Captain Sexton likely heard several additional cases: there is at least one page missing from the minute-book for the proceedings of his court.

⁴² PANL, GN 5/4/C/1, Placentia District (minutes for 25 September 1764).

the local planters on problems in the provisioning trade in Placentia.⁴³

Such proceedings were part of a broader trend whereby petitions replaced grand jury presentments as the primary means of local representation. In the outport districts, merchants and magistrates preferred the custom of holding an *ad hoc* meeting, which either acted summarily or, if it entailed a substantial project, solicited the governor's approbation. When the justices of the peace in Trinity wanted to construct a local gaol in 1758, for example, they asked Governor Edwards for permission to appropriate the district's fines for the building costs. They couched their request in terms of the need to avoid a grand jury presentment:

Tho' we might without troubling your Excellency build one with the consent of a dozen of the principal inhabitants reduced to the form of a presentment at Sessions. This method would be followed by many inconveniences to us - and we beg your Excellency will take the premisses into consideration and grant us an order for building and maintaining a gaol.⁴⁴

The inconvenience to which they referred was the difficulty of persuading local merchants to attend court sessions during the

⁴³ PANL, GN 5/4/C/1, Placentia District (minutes for 25-26 September 1764).

⁴⁴ PANL, GN 2/1/A, vol. 2, p. 437 (Samuel Harris and John Garrett Blake to Governor Edwards, 19 August 1758).

busy summer fishery.⁴⁵ Governor Edwards approved the magistrates' request, and no presentment was ever issued on the building of the Trinity gaol.⁴⁶

The high level of cooperation between justices and naval surrogates shown during Captain Sexton's visit to Placentia was echoed throughout the island. In Trinity district, joint sessions held by justices of the peace and naval surrogates settled over forty per cent of the total cases heard from 1760 to 1790.

Table 5.1. Distribution of Cases in Trinity District, 1760-1790

<u>Composition of the Presiding Magistracy</u>			
	Justices	Surrogate	Surrogate and Justices
Number of Cases Heard	25	63	67
Proportion of Caseload	16%	41%	43%

Total Number of Cases: 155

Source: See Appendix B

These data likely underestimate the number of actions heard by the justices of the peace, who did not keep as formal records as the naval officers. The joint sessions convened by the surrogate

⁴⁵ The reluctance of merchants to serve as jurors during the summer fishery also contributed to the dearth of coroner's juries convened in Newfoundland: in 1772 D'Ewes Coke complained bitterly that he could not persuade merchants in Trinity to sit on a jury to investigate a homicide. See Bannister, "Surgeons and Criminal Justice," p. 114.

⁴⁶ PANL, GN 5/4/B/1, Trinity District, minutes for 19 August 1758 (copy of magistrates' letter), and 29 September 1758 (original letter from Captain John Chapman to Harris and Blake).

and magistrates in the autumn – often termed a surrogate court of sessions or general court of sessions – combined the broad powers of quarter sessions with the wide jurisdiction afforded by the surrogate's commission. At four of the sessions at Trinity, the local fishing admiral sat alongside the magistrates as an assistant. Autumn quarter sessions, which had become formalized as "surrogate courts" by 1770, heard virtually every type of dispute except for capital offenses. The appearance of the king's schooner formed a familiar part of seasonal life throughout the outports.

Evaluating the Surrogate Courts

By tightening the bonds between the civil and naval magistracy, Governor Palliser ensured that the surrogate courts operated as effectively as possible. From the administrative centre of St. John's, where Palliser presided as *de facto* chief justice, the governor heard petitions and complaints from the outports, sending surrogates to the districts to implement orders as circumstances dictated. The district system provided an efficient method of communication and law enforcement. As a custom that had operated since at least 1701, when first noted in Larkin's report, the role of the royal navy had evolved from Captain Crowe's general court in 1711 – through Clinton's reforms in 1731 and Rodney's reorganization in 1749 – to become a highly developed and deeply entrenched judiciary. As we have seen, the

royal navy was ideally suited to this judicial function because it had the material resources needed to convey English majesty and law to the outports.

This regime was the most practicable available framework in which to administer law. Even if the British government had been willing and able to construct roads as overland links to the outports, sailing ships would still be a far more efficient means of transport. Nearly every settlement in Newfoundland sat immediately on the coast and the island's interior was largely unknown to Europeans. Excursions inland were usually made only to hunt, trap, or collect firewood. As Benjamin Lester reported in 1762, with favourable winds a sloop could make the run from Trinity to St. John's harbour in less than two days; two hundred years later, to drive by automobile between the two communities was still a day-long journey.

The problem was that weather conditions often forced delays and made many cruises quite hazardous. Justice Reeves saw this as a serious drawback to the surrogate system.⁴⁷ Yet this was true for every fishing ship and applied to road travel as well. Surrogate cruises restricted to the months the royal navy was stationed at Newfoundland – usually from mid-summer to early

⁴⁷ See PRO, BT 1/8, pp. 61-62 (Report on the Judicature in Newfoundland, 5 December 1792). Reeves nevertheless viewed the surrogate courts as crucially important to the administration of justice in the outports. On Reeves' administration see Peter Neary, "John Reeves," *DCB*, vol. 5, pp. 636-37.

autumn – but historians have exaggerated the degree to which this hampered the navy's effectiveness.⁴⁸ Few ships sailed freely around the island until the ice had cleared in May, and maritime traffic slowed considerably when winter storms began hitting the coast in late November. In other words, even if the royal navy had been stationed at Newfoundland year-round, its officers would have been unable to sail on regular surrogate cruises for the better part of six months each year.

The annual courts held by the governor and the surrogates reflected the seasonal nature of the eighteenth-century fishery. As a proportion of the population, permanent settlers had steadily increased but were still dwarfed by the thousands who came over each year to work in the summer fishery. In 1763, for example, the population was calculated at 13,112 in the summer and 7,497 in the winter.⁴⁹ Justice was unquestionably needed year-round, which the civil magistrates provided, but was particularly imperative when the population climaxed during the summer: virtually every important economic activity took place during the late summer and early autumn. At the height of the fishery from late June to mid-August, servants could work as much

⁴⁸ The need for ships to deliver services to the outports continued beyond the age of sail. See Ronald Rompkey, *Grenfell of Labrador: A Biography* (Toronto: University of Toronto Press, 1991), pp. 31-34 & 98-99.

⁴⁹ Ryan, *Consolidated Census Returns*, p. 56.

as eighteen to twenty hours a day to take advantage of the run of fish.

Effective courts were particularly needed from mid-August to late September. This period witnessed four major events: breaking the price of fish in August, in which the governor consulted with the merchants to determine the rate for the season's catch; culling the fish locally to determine its market-grade; loading quintals of salted cod-fish, during which disputes over ownership and thefts often occurred; and settling contracts, in particular servants' covenants, when quarrels over outstanding wages produced a flood of petitions and complaints.⁵⁰ The surrogate and governor's courts were convened purposely to coincide with the needs of the local economy. Not only did the governor's court arbitrate civil disputes each autumn, for example, but it also fined those who contravened the set price for provisions.⁵¹ By the time the naval squadron was ready to set sail with the fishing fleet in the autumn, few serious cases remained to be heard.

⁵⁰ Matthews, *Lectures on the History of Newfoundland*, ch. 9; Harold Innis, *The Cod Fisheries: The History of an International Economy* (2nd ed. Toronto: University of Toronto Press, 1954), esp. p. 306; Shannon Ryan, *Fish Out of Water: The Newfoundland Saltfish Trade, 1814-1914* (St. John's: Breakwater Press, 1986), ch. 1. On the terminology used in the fishery, see Story, Kirwin & Widdowson, eds., *Dictionary of Newfoundland English*, pp. 63-63, 129, 399-400, 463, 547-48.

⁵¹ In 1781, for example, Governor Edwards fined Luke Ryan £10 for selling beef for 3 pence more per pound than was legally allowed. See PANL, GN 2/1/A, vol. 9, p. 257. For other examples of the role of the courts in regulating prices, see GN 2/1/A, vol. 3, pp. 123-26; vol. 7, p. 131; vol. 8, p. 12; vol. 10, pp. 38-43.

Equally important, the cost of the surrogate system was met entirely by the imperial government. No records exist of any naval officers ever receiving special emoluments or additional pay for working as surrogate judges. The governor received a salary of £500 but did not accept any known payments for operating his court at St. John's. By contrast, other local officials – the prison keeper, constable, beadle, and clerk – charged at least one shilling each time their services were used.⁵² The commissioners of oyer and terminer and the sheriff were each paid two guineas for every trial at the assizes.⁵³ A New England physician visiting Newfoundland estimated the cost of prosecuting a typical case at the court of oyer and terminer to be £20. Judging this to be an exorbitant expense, he claimed that those victimized by crime were so distressed at the prospect of having to pay the court fees that they often decided not to prosecute.⁵⁴ When civilians began to sit on the surrogate bench after 1790, Justice Reeves warned that acquiring a sufficient number of qualified men to serve as justices for reasonable pay represented the judiciary's most pressing problem.⁵⁵

⁵² PRO, CO 194/9, p. 41.

⁵³ PANL, GN 2/1/A, vol. 9, p. 204.

⁵⁴ BL, Add. Mss. 15493, Dr. Gardner, "Some facts collected, and observations made on the fisheries, and government of Newfoundland." (unpublished mss., 1784), f. 29. Gardner correctly noted the fees charged by the commissioners of oyer and terminer: his estimates on the costs of prosecution are therefore probably fairly accurate.

⁵⁵ PRO, BT 1/8, pp. 82-83.

The use of warships provided a substitute for much of the machinery needed to operate a system of courts. Every frigate on the Newfoundland station had a clerk proficient in record-keeping; the rated warships had a company of marines assigned to serve under the commodore; and many ships carried chaplains who were active in the fishing communities.⁵⁶ Even the smallest schooners and armed sloops could serve as temporary prison facilities to confine offenders awaiting punishment or transport to the St. John's gaol. The court of oyer and terminer depended upon warships to ensure that offenders in the outports were brought to the annual assizes held at St. John's. As Simon Devereaux has demonstrated, the costs of operating a centralized penal system were prohibitive in the eighteenth century: the British government assumed added expenses only when forced to adopt reforms.⁵⁷ With an entire budget of less than £1,200, the island's government was not in a position to embark on large-scale projects.⁵⁸ In 1787 Governor Elliott estimated that the expense of building a new court house and gaol at St. John's

⁵⁶ Rodger, *Wooden World*, pp. 26, 40, 55, 66, 245, 258; Waldo E.L. Smith, "The Navy as Moral Guardian: Newfoundland," in W.E.L. Smith, *The Navy and its Chaplains in the Days of Sail* (Toronto: Ryerson Press, 1961).

⁵⁷ Simon Devereaux, "Convicts and the State: The Administration of Criminal Justice in Great Britain During the Reign of George III." (Ph.D. Thesis, University of Toronto, 1997), ch. 4.

⁵⁸ On the cost of colonial administration as an important factor in imperial policy, see C.A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London: Longman, 1989), pp. 195 & 209.

would be over £1,000 and, not surprisingly, the proposal was never implemented.⁵⁹

With the district system augmented by Governor Palliser, the island enjoyed a dual magistracy of naval officers and justices of the peace, as well as a three-tiered judiciary. The island had a *de facto* supreme court (governor's court and St. John's assizes), a local administration (sessions held by JPs), and a circuit system (surrogate courts). The close relationship between surrogates and justices of the peace ensured that the naval officers were never wholly unprepared when they visited outport communities. In addition to the interviews with officials at the Board of Trade, governors could also consult long-serving justices when sitting on the bench or formulating decisions based on written appeals. In other words, the district system mitigated against the danger that newly-appointed officers would be incapable of dealing with local problems.

Historians have tended to cite uncritically the reports from officials and governors, many of whom either had their own personal agenda or were simply giving a view from retirement.⁶⁰ For example, long after his tenure as governor, Admiral Graves provided an oft-quoted assessment:

⁵⁹ PANL, GN 2/1/A, vol. 11, p. 114 (civil establishment, 1787), and p. 268 (estimate for building a new gaol and court house, 1786).

⁶⁰ This problem is most severe in Lounsbury, *British Fishery at Newfoundland, passim*, though it recurs in McLintock, *Establishment of Constitutional Government*, esp. ch. 3.

The first summer the Governor cannot be supposed to know anything of ye matter – the second he has treasured up an heap of inconsistent & opposite account of the Customs and Interest of the Country delivered to him just as the views of the party's lead them – the third summer he begins to know People somewhat & to distinguish between truth & falsehood, then he is turned out and heard of no more, so that were he ever so well inclined, & to take ye utmost pains, no great matter could be expected from him .⁶¹

Such statements have to be balanced against specific contexts – in this case, Graves had replaced Governor Webb at the last minute and had not been fully briefed before he sailed to Newfoundland in 1762 – and the disparity between rhetoric and action. Admiral Rodney, who had presided over the most important reforms in pre-1832 Newfoundland, offered a sour appraisal in 1775, which did not reflect his actual administration as governor.⁶²

For the modern historian, the task is to navigate between the conflicting accounts supplied by contemporary observers. The starkest differences typically exist between the official reports of the army commander and the naval governor, both of whom had professional interests at stake. In 1785, for example, Major Elford, commander of the local garrison, sent a pessimistic dispatch to the Secretary of State:

⁶¹ Quoted from Whitely, "Thomas Graves," *DCB*, vol. 4, p. 382.

⁶² Writing as the conflict with America was erupting into war, Rodney portrayed Newfoundland in the 1750s as riddled with rebellious American merchants and traders, but while governor he had shown no difficulty getting along with William Keen – the most prominent New Englander on the island – or any other Americans, for that matter. See Spinney, *Rodney*, p. 98.

I wish, my Lord, we had more troops here, this place is really of too much consequence to be neglected, and requires some necessary Acts of Parliament to be made for the salvation of it, but with the present mode of government it is impossible – an Admiral is appointed Governor for three years, of which he stays here three months each summer, the first of which he knows nothing about the condition of this place, the second a little, and the third he is indifferent about it as he is not coming again – in his absence we are governed by Justice of the Peace (for I have no civil authority invested in me) some of whom from their poverty are induced to do things apprehensive to individuals and injurious to the community at large.⁶³

A year later, Admiral John Elliot, the naval governor, gave an account that contradicted Elford's report:

It is with particular pleasure that I embrace this opportunity of acquainting your Lordship, that when I arrived here there was not a single man in prison; and that, owing to the many prudent regulations established by the late Governor Vice-Admiral Campbell, and the moderation and judgment with which they have been enforced by the magistrates in their respective districts, I have not had a single complaint ... from any part of the Island.⁶⁴

Both men no doubt exaggerated their claims in order to further their ambitions, but their comments raise the question of whether the impact of the royal navy should be measured solely in terms of the time the governors actually spent on the island.

I would argue that the effect of the royal navy extended well beyond the period its warships were stationed at Newfoundland. John Reeves, who was no apologist for the navy, portrayed its officers as champions of the rule of law:

⁶³ PANL, CO 194/36, pp. 15-16 (Elford to Lord Sydney, 14 May 1785).

⁶⁴ PANL, CO 194/36, pp. 134-35 (Elliot to Lord Sydney, 12 August 1786).

A *Surrogate* is well known in Newfoundland, as legally deputed by the governor, to act as his deputy. Under this character the authority of the governor was exercised very beneficially. The time of *surrogating* was looked forward to as a season when all wrongs were to be redressed against all oppressors; and this naval judicature was flown to by the poor inhabitants and planters, as the only refuge they had from the west country merchants, who were always their creditors, and were generally regarded as their oppressors.⁶⁵

Reeves overstated the case but still captured the essential role of the surrogate system: whether the annual surrogate courts were entirely fair or just mattered less than the fact that they were seen to represent law and order. Justices of the peace in the fishing outports relied upon the surrogate courts, where they sat alongside naval officers, as an opportunity to settle serious disputes and to complete outstanding judicial business. After Captain Sexton sailed from Placentia in 1764, for example, the magistrates reverted to holding petty sessions when the need arose. The next spring, one of the justice of the peace bound two planters in recognizance on condition that they personally appear at the next session of the surrogate court.⁶⁶ The district system had become a custom which local magistrates took for granted as part of the natural course of governance.

⁶⁵ Reeves, *Government of Newfoundland*, pp. 154-55. Emphasis in original.

⁶⁶ PANL, GN 5/4/C/1, Placentia District (minutes for 23 May 1765). The planters were bound for £50 each.

Making Law without a Legislature

The written law of Newfoundland altered substantially during Palliser's tenure as governor. Upon his arrival in 1764, he stepped up enforcement of the customary law of master and servant. He reiterated the proclamation issued a decade earlier by Governor Bonfoy for the adjudication of master-servant disputes according to ancient custom, in particular the servants' right to a lien on the season's fish catch.⁶⁷ This discourse of custom permeated the administration of justice in a manner similar to the liberal ethos of the nineteenth century: in both cases inclusive rhetoric and an appeal to legal traditions were used to legitimize essentially hegemonic power.⁶⁸ In practice, the customs of the island's fishery comprised a mixture of the laws, regulations, and traditions adopted over time to ensure the smooth operation of the local economy. Provisions were recurrently adjusted and augmented according to the perceived needs of those in power. While some aspects doubtless were ancient – in the sense of originating in time out of memory – others were recent measures. Particular customs found to be

⁶⁷ PANL GN 2/1/A, vol. 2, pp. 63-64 (Bonfoy's proclamation); vol. 3, p. 275 (Palliser's decree).

⁶⁸ On liberal discourse, see Loo, *Making Law and Authority in British Columbia*, esp. pp. 5-7.

against natural reason could be overruled by judges of the high courts.⁶⁹

Legal reform comprised part of the broader process of enforcing local authority. To ameliorate persistent problems in settling accounts at the end of the fishing season, Governor Palliser issued a notice to all merchants and traders, asking them to meet and consult with each other, in order to recommend ways to improve the existing system for collecting debts.⁷⁰ At the same time, Palliser published another proclamation, this one directed to the planters and all others concerned in the fishery. It clearly illustrates the process of law-making:

And whereas I have it under consideration to make one general order rule or regulation for a certain and speedy method by which merchants may recover their debts, in order to enable me at the same time to provide a security for the boatmen and fishermen against all sorts of impositions and oppressions from the merchants, I desire you will meet and consult together and let me know what has been the ancient practice before these illegal methods became so common what are the several hardships the fishermen feel and suggest to me the method you think best to answer these ends.⁷¹

⁶⁹ According to English jurisprudence, "Time out of mind is where no man then living hath heard or known any proof to the contrary: If two or more witnesses can depose that they heard their fathers say it was a custom all their time; and that their fathers heard their grandfathers say it was so also in their time; it is enough for the proof of a custom." See Giles Jacob, *A New Law-Dictionary*. J. Morgan, ed. (London: Strahan & Woodfall, 1783). I thank Professor Douglas Hay for this reference.

⁷⁰ PANL, GN 2/1/A, vol. 3, pp. 242-43 (governor's proclamation, 3 September 1764).

⁷¹ PANL, GN 2/1/A, vol. 3, p. 243 (governor's proclamation, 3 September 1764).

By working to identify and enforce legitimate local customs, Palliser was adhering to English common law.⁷² He was especially careful to differentiate between ancient customs and recent abuses in the fishery. Enforcing the authority of particular customs determined by a jury (i.e. an assembly of planters and merchants) represented a central aspect of the common law tradition. Seen in this light, Palliser was merely acting as a presiding judge.⁷³

But law-making in eighteenth-century Newfoundland was distinct in one important respect. In most official British colonies, law-making on such a scale – in this case, the heart of the island's contract law – would have involved a legislature or other type of assembly formally constituted by statute and reported in the local press.⁷⁴ In Newfoundland, the governor presided over such proceedings: he alone issued proclamations to confirm decisions and, at his discretion, lobbied the British government to draft legislation. The crucial difference between these two processes was political representation: whereas the

⁷² Allen, *Law in the Making*, ch. 2; Walker and Walker, *The English Legal System*, chs. 1 & 3.

⁷³ On the common law as a system of customary law, see A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987), esp. pp. 362-68.

⁷⁴ Tully, "Political Development of the Colonies," pp. 27-38; Bailyn, *Ideological Origins of the American Revolution*, ch. 2; W.S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland & Stewart, 1965), ch. 5.

propertied classes in colonial America registered their opinions in local legislatures, in Newfoundland the naval governor controlled how questions of law were presented to the British government.⁷⁵

Governor Palliser chose to frame his initiatives in the language of liberating an oppressed people. In his returns to the 1764 heads of inquiry, he asserted that "the greatest part of the inhabitants live as mere savages, without religion," and, as a result of chronic indebtedness, they were "little better than slaves."⁷⁶ Faced with Palliser's impassioned arguments for reform, the British government directed the Board of Trade to prepare extensive reports on the state of the fishery.⁷⁷ Lord Grenville's ministry considered making major changes in imperial policy toward Newfoundland, but the entire matter was dropped when the Rockingham Whigs came to power. In the wake of the Stamp Act crisis, the island fell off the political map.⁷⁸

⁷⁵ Of course, when merchants wished to protest against either a governor's administration or an official policy, they could pursue the matter in England. As we saw in Chapter Three, merchants could indeed exert political pressure in London – as they did in the early 1730s – but this required considerable time and organization, and did not guarantee access to the corridors of power.

⁷⁶ BL, King's Mss. 205, ff. 323-79 "General Reports of the State of the American Colonies." Quotation at f. 354.

⁷⁷ The 1765 reports are reprinted in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 25-46.

⁷⁸ Matthews argued that the proposed reforms would have given the island colonial status and perhaps representative government by 1770. See *Lectures on the History of Newfoundland*, p. 123. On the Stamp Act crisis, see Peter Thomas, "The Stamp Act Crisis and its

In the absence of a new statute or prerogative writ, proclamations from the naval governor continued to guide the administration of justice. In September and October 1764 Palliser issued four decrees which revised the regulations governing debt, contract, and vagrancy. He sought to establish rules for settling contracts in a manner that protected servants' wages fairly and proportioned outstanding debts equitably. First, he ordered all masters and employers of fishing servants to settle their contracts within six days of the expiration of the terms stated in their shipping papers. Masters who refused to do so were required to victual their servants and to pay them their regular wages until the outstanding accounts were finally settled.⁷⁹ Second, Palliser outlawed the practice of summarily seizing fish catches as collateral or payment for debts. Recognizing the servant's lien to protect their wages, he ruled that creditors,

according to ancient custom content themselves with such proportion of their debts as shall be voluntarily and freely paid and delivered by the debtors and when any doubt shall arise or suspicion that the debtors hath not wherewith to discharge his just debts, servant's wages that then the creditors do secure to be by them paid the wages due to the servant's employed in the fishery that the voyage may be continued to the end of the season and a just division of

Repercussions, including the Quartering Act Controversy," in Greene and Pole, eds., *The American Revolution*, pp. 113-25.

⁷⁹ PANL, GN 2/1/A, vol. 3, p. 271 (governor's decree, 31 October 1764).

the debtor's effects to be made to each creditor in proportion to their respective debts.⁸⁰

In taking such action Palliser was upholding official prohibitions against the truck economy.⁸¹ The British government wanted fishing servants to be paid their lawful wages and to leave the island when their contracts expired in the autumn.

Governor Palliser's other two decrees applied the policy of preventing surplus labour from accumulating during the winter.⁸² While recognizing servants' rights to their wages, Palliser also sought to keep them from becoming indebted or idle. He issued a proclamation designed to stop the practice of allowing servants to purchase liquor on credit. It directed the island's magistrates not to compel any master to pay for their servants' debts to publicans or others retailing liquor.⁸³ While this measure checked servants' behaviour indirectly – the logic being that unpaid debts would result in less credit and therefore less drinking – Palliser's fourth decree placed considerable restrictions on the rights of the island's labourers, most of

⁸⁰ PANL, GN 2/1/A, vol. 3, p. 275 (governor's decree, 3 September 1764).

⁸¹ Crowley, "Empire versus Truck," pp. 311-36.

⁸² The policy that the fishery should be a nursery for sailors, supplying a pool of newly-trained seamen each year, had been enshrined in King William's Act. Dieters had not been singled out, but the intent of the law was clearly to prevent the accumulation of a local glut of experienced sailors who would depress the demand for green men from England. See 10 & 11 Wm. III, c. 25, ss. 9-10 (1698-99); Head, *Eighteenth Century Newfoundland*, pp. 92-93.

⁸³ PANL, GN 2/1/A, vol. 3, p. 251 (governor's decree, 2 October 1764).

whom were Irish Roman Catholics. "For better preserving the peace preventing robberies, tumultuous assemblies, and other disorders of wicked and idle people remaining in the country during the winter," Palliser ordered:

That no Papist servant man or woman shall remain in any place where they did not fish or serve during the summer preceding.

That not more than two papist men shall dwell in one house during the winter, except such as have protestant masters. That no Papist shall keep a publick house or vend liquor by retail.

That no person keep dyeters [dieters] during the winter That all idle disorderly useless men and women be punished according to law and sent out of the country.⁸⁴

The law to which Palliser referred was likely the English statute governing vagrancy. By the Vagrancy Act of 1744, persons deemed to be idle or disorderly could be sentenced to a term of transportation.⁸⁵

Although King William's Act of 1699 remained the sole statute governing the island's fishery, by 1770 the naval state had acquired a significant body of state law. When the British government drafted new legislation for Newfoundland, it drew on the regulations already in force at the local level. The 1775 "Act for the encouragement of the Fisheries carried on from Great Britain," known colloquially as "Palliser's Act," codified

⁸⁴ PANL, GN 2/1/A, vol. 3, p. 272 (governor's decree, 31 October 1764).

⁸⁵ 17 Geo. II, c. 5, s. 23 (1744). On this use of transportation, See Beattie, *Crime and the Courts in England*, p. 512-13.

Palliser's decrees on wages, debt, contract, and vagrancy.⁸⁶ While recognizing the servants' right to a lien on their masters' fish catch, it criminalized breach of contract, providing for the corporal punishment of disorderly servants. The restrictions on Roman Catholics were not included, but all servants now faced stiff penalties for neglect of duty or desertion.⁸⁷ Palliser's Act confirmed the judicial role that civil magistrates had been performing for over a generation. It empowered justices of the peace to hear and determine any wage dispute or offence committed by masters or servants against its provisions.⁸⁸ As a result, statutory law began to reflect local practices that had long been based on common law and the customs of the fishery.

Warships and State Formation

Throughout this period the royal navy continued to expand its presence in Newfoundland. In 1772, and again in 1790, the Admiralty contracted Benjamin Lester to build two armed sloops to join the schooners already in service.⁸⁹ The number of warships

⁸⁶ 15 Geo. III, c. 31 (1775).

⁸⁷ The penal sanctions in Palliser's Act are discussed in detail below, in Chapter Seven.

⁸⁸ 15 Geo. III, c. 31, ss. 17-18 (1775). The St. John's vice-admiralty court was also authorized to judge master-servant cases, though it never assumed a role comparable to the governor's court or the district courts.

⁸⁹ PRO, ADM 1/470, pp. 87 & 145; Derek Beamish, "Benjamin Lester," *DCB*, vol. 5, p. 491.

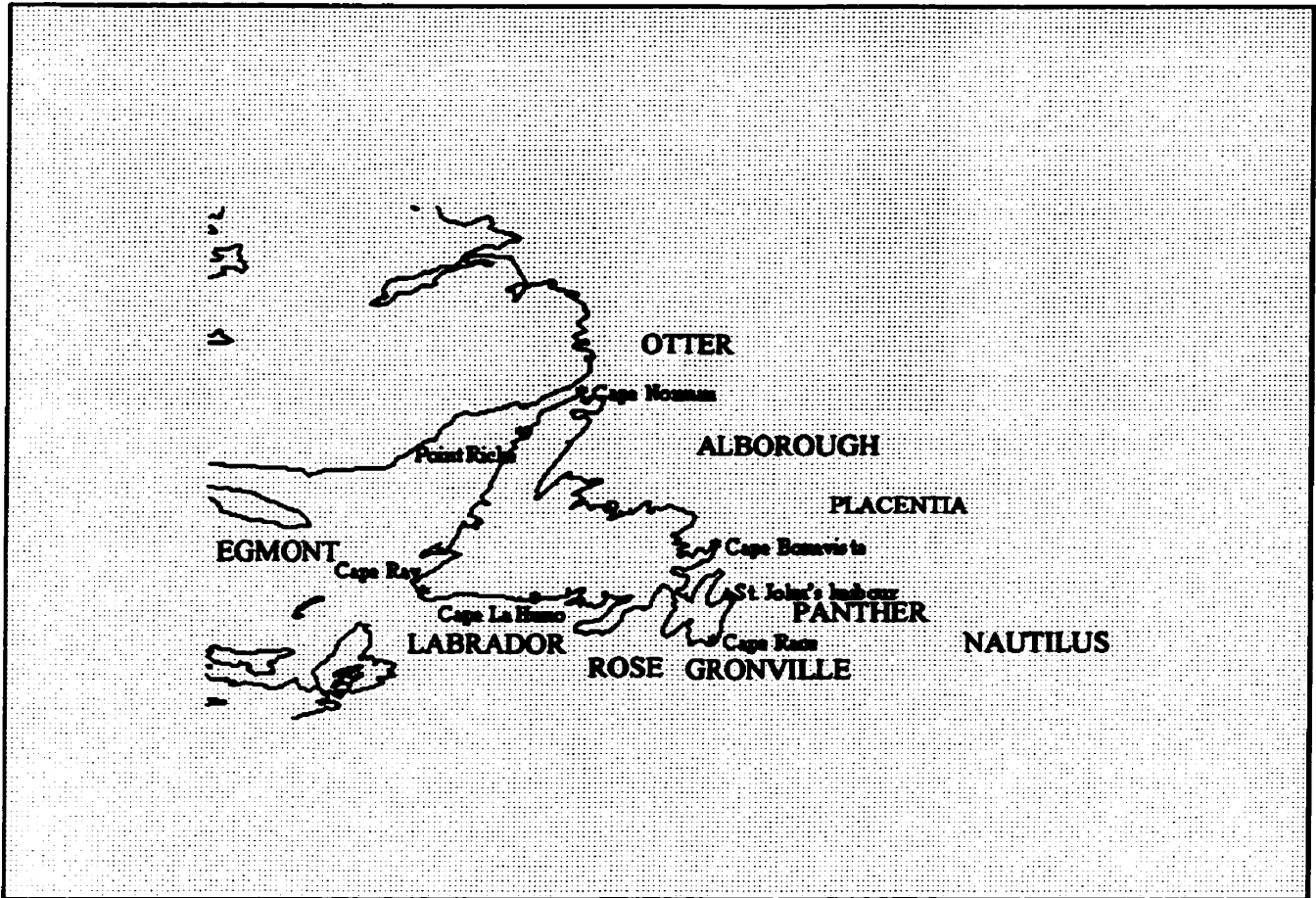
reached nine in 1773, enabling the governor to enforce his authority throughout the island. The outbreak of the American Revolutionary War intensified this process. In 1778 local merchants requested protection against American privateers: they successfully petitioned the government to station warships in Newfoundland year-round and promised to defray the costs of coastal defenses.⁹⁰ Demands from the North American station temporarily drained the squadron – only three armed sloops were stationed in 1775-76 – but by 1777 the ships patrolling Newfoundland consisted of two 60-gun ships of the line, plus seven frigates and armed sloops.⁹¹ When the Americans captured the frigate HMS *Fox* off Newfoundland in June 1777, the Admiralty quickly dispatched a line-of-battle warship, HMS *Bienfaisant*, to bolster the island's squadron.⁹²

⁹⁰ PANL, GN 2/1/A, vol. 7, pp. 92, 105, 120, 132, & 139.

⁹¹ Graham, *Empire of the North Atlantic*, p. 208; Olaf Janzen, "The Royal Navy and the Defence of Newfoundland during the American Revolution," *Acadiensis* 14, 1 (Autumn 1984), pp. 24-48.

⁹² David Syrett, *The Royal Navy in American Waters, 1775-1783* (Aldershot: Scolar Press, 1989), p. 72.

Map 5.2. Warships on the Newfoundland Station, 1773



<u>Vessel</u>	<u>Naval Station</u>
HMS Panther	St. John's Harbour
HMS Alborough	From Cape Bonavista to Cape Norman
HMS Rose	From Cape Race to Cape La Hune
HMS Nautilus	On the Grand Banks and along the coast from St. John's to Cape Race
HMS Otter	On the coast of Labrador and the northwest coast of Newfoundland from Cape Norman to Point Riche
Egmont (schooner)	At the Magdalen Islands from Cape Norman to Point Riche
Labrador (armed schooner)	From St. Lawrence Harbour to Cape Ray and off the islands of St. Pierre and Miquelon
Placentia (armed schooner)	From St. John's Harbour to Cape Norman and on occasional services
Gronville (brig)	Carrying on a survey of the coast from Point Lance to Cape Race and from thence as far to the northward as possible

Source: PRO, ADM 1/470, p. 158

The increase in military force was part of a larger policy of deterrence designed to contain American and French expansion. Despite the failure of British strategic planning, the deployment of naval forces largely succeeded in protecting the fishery.⁹³ The commitment to become more deeply involved in Newfoundland precipitated other initiatives, the most important of which was the surveys conducted by Captain James Cook in the 1760s. In 1766 Captain Cook published his first detailed surveys of the south and west coasts: based on these charts, a new map of the entire island became available in 1775; this gave naval officers a far more accurate knowledge of the navigable waters, thereby strengthening the entire surrogate system.⁹⁴ And, with several vessels stationed in Newfoundland year-round, officers could now convene surrogate courts during the winter months. In January 1779, for example, Captain Thomas Durell sailed to Trinity to oversee a homicide investigation conducted by the local magistrates.⁹⁵

⁹³ Stout, *The Royal Navy in America*, ch. 10; Nicholas Tracy, *Navies, Deterrence, and American Independence: Britain and Seapower in the 1760s and 1770s* (Vancouver: University of British Columbia Press, 1988), ch. 6.

⁹⁴ On Captain Cook's surveys, see Head, *Eighteenth Century Newfoundland*, pp. 161-65 & 180-84; for a sample of Cook's cartography, see J.R. Hill, ed., *The Oxford Illustrated History of the Royal Navy* (Oxford: Oxford University Press, 1995), p. 193.

⁹⁵ At a "special court" presided over by Durell, and attended by the district justices, depositions were taken from all of the available witnesses, including those who could speak only Irish, and the evidence formed the basis of the subsequent prosecution at the autumn assizes. See Bannister, "Surgeons and Criminal Justice," pp. 123-24.

As a consequence of the naval buildup, the British government appointed the first civil secretary to assist the island's governor. In 1779 Aaron Graham, an English lawyer, arrived at St. John's to serve under Governor Richard Edwards.⁹⁶ Graham continued in this position until he returned to England in 1791. During his twelve-year tenure, he was universally regarded by the governors and magistrates as an able and efficient administrator and, according to some, the "greatest civil servant in the history of Newfoundland."⁹⁷ Graham took over the government's record-keeping - he issued all of the governor's decrees and drafted most of the writs himself - and thereby ensured a relatively high degree of administrative continuity. To be sure, this nascent bureaucracy was pathetically small compared to most of the larger colonies in North America, but it met the basic needs of propertied interests in Newfoundland. Governor Elliot successfully lobbied the Secretary of State to give Graham a regular salary, and in 1787 the position of civil secretary was allocated £182 per annum.⁹⁸ Although not as dramatic or far-reaching as Governor Rodney's reforms in 1749, the advent of the office of governor's secretary, who continued to be augmented by

⁹⁶ Cuff, ed., *Dictionary of Newfoundland and Labrador Biography*, p. 131.

⁹⁷ Calvin Evans, "Aaron Graham," *DCB*, vol. 5, p. 361.

⁹⁸ PANL, CO 194/41, pp. 23-25; GN 2/1/A, vol. 11, p. 144 (civil establishment of Newfoundland, 1787).

the commodore's clerk serving aboard his flagship, further entrenched the naval state.

During the 1770s and 1780s, naval governors also significantly expanded the district system. Both the number and the range of judicial districts increased, in each of which justices of the peace were appointed. Naval surrogates conferred commissions of the peace in four new districts: Fogo Island (1776); Fortune Bay, on the western side of the Burin Peninsula (1784); Great St. Lawrence, on the eastern side of the Burin Peninsula (1787); and St. Mary's, on the Cape Shore of the Avalon Peninsula (1785).⁹⁹ By 1790 the areas under the jurisdiction of the naval state stretched from Cape Ray on the southwest corner of the island, to Fogo Island off the northeast coast.

When placed in the broader context of colonial development, the naval state in Newfoundland appears as effective as most other local regimes in North America. In colonial America and the early Republic, state authority was generally weak and institutional coercion relatively limited compared to Great Britain. Local law-enforcement and penal practices varied markedly from region to region; the administration of justice was often ineffective and arbitrary.¹⁰⁰ Gordon Wood persuasively

⁹⁹ PANL, GN 2/1/A, vol. 6, p. 109 (Fogo Island), vol. 10, p. 28 (Fortune Bay), vol. 11, p. 201 (Great St. Lawrence), vol. 10, p. 215 (St. Mary's).

¹⁰⁰ Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," *American Journal of Legal History* 26 (1982), pp.

argues that the imperial state had a limited presence in colonial America:

Royal authority operated much of the time on the surface of American life, masking the confused reality of decentralized institutions and localized authorities that made up the central governance of the colonies....In this respect colonial society resembled more the hodgepodge of local privileges and liberties that confronted the French monarchy in the eighteenth century than it did the relatively agreeable and integrated relationship between the crown and local authorities worked out in Great Britain. Consequently, the colonists had little understanding of state authority, of a united autonomous political entity that was completely sovereign and reached deep into the localities. And thus they were not prepared to accept that authority when after 1763 it tried to intrude into their lives.¹⁰¹

A byproduct of the dearth of formal systems of social control was the evolution of locally-oriented cultural rituals that replaced the criminal law as the principal forum for regulating community relations.¹⁰²

The inability of colonial states to enforce official authority beyond garrison towns and regional capitals was not restricted to the rebellious thirteen colonies. Across British North America, official authority was often contested, superseded, or simply ignored. In addition to the fur trade

293-325; Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *American Journal of Legal History* 26 (1982), pp. 326-53; Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), pp. 47-51.

¹⁰¹ Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1991), pp. 109-24 [quotation at p. 111].

¹⁰² Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 3rd series, 47, 1 (January 1990), pp. 3-29.

territories, areas dominated by either staple industries or large-scale employment of wage labour witnessed systemic violence and outbreaks of unrest.¹⁰³ Episodes such as the Shiner's War in Upper Canada demonstrated the limits to authority. Even in relatively quiet rural townships the local magistracy could have difficulty imposing its authority.¹⁰⁴ Authoritarian administrations dominated by the British military – most notably the government in Halifax – were the exception rather than the rule of the colonial experience.¹⁰⁵

Challenging Customary Law

In the 1780s a series of problems in the judiciary burst into a large-scale crisis which temporarily paralyzed the legal regime on which the island's governors had relied since 1749. The debacle stemmed from a prosecution brought in Exeter against

¹⁰³ Ruth Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s," *Labour/Le Travailleur* 7 (1981), pp. 9-39; Michael Cross, "The Laws Are like Cobwebs: Popular Resistance to Authority in Mid-Nineteenth Century British North America," in T.G. Barnes, et al., eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984); Loo, *Making Law, Order, and Authority*, ch. 1.

¹⁰⁴ Susan Lewthwaite, "Violence, Law, and Community in Rural Upper Canada," in Jim Phillips, Tina Loo, and Susan Lewthwaite, eds., *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice* (Toronto: The Osgoode Society, 1994), pp. 353-86; Michael Cross, "The Shiners' War: Social Violence in the Ottawa Valley in the 1830s," *Canadian Historical Review* 54 (1973), pp. 1-26.

¹⁰⁵ Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815," *University of Toronto Law Journal* 42 (1992), pp. 401-49; Barry Cahill, "The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution," *Acadiensis* 26, 1 (Autumn 1996), pp. 52-70.

Governor Richard Edwards for a decision he delivered in 1780 during a sitting of the governor's court. The details of the case were murky even to those who attended the trial. It appears that a planter in financial trouble had brought an action against Governor Edwards to recover an allegedly unlawful fine levied by the governor's court. The suit was settled out of court, but its effects were far-reaching. Aaron Graham summarized the situation in his testimony before a House of Commons committee in 1793:

[F]rom the beginning of the establishment of a fishery upon that Island, there have been courts for the trial of civil actions; at St. John's, it was held by the Governor; at the Out Ports, by the Captains of the Ships of War, who were called Governor's Surrogates; neither the Governor's nor the Surrogate's powers were doubted, until about the year 1780, when Governor Edwards had an action commenced against him, which was tried at Exeter (for a decision of his made at St. John's). That the witness attended the trial and the matter by the recommendation of the judge was left to arbitration; from that time he frequently heard, both in Newfoundland and in England, the powers of the Governor and his Surrogates spoken of as illegally assumed by them; Admiral Campbell, who was Admiral Edwards's successor, would not sit as a judge; but the practice continued by the surrogates at the out ports.¹⁰⁶

Though Admiral Edwards bristled at suggestions that he had somehow been at fault, the ramifications of the affair were more important than what actually had transpired in Exeter.

As a customary institution, the governor's court had no formal legal basis other than the appellate jurisdiction granted

¹⁰⁶ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 2 [testimony of Aaron Graham], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 240.

to naval officers by King William's Act. Admiral Milbanke, governor in 1789-92, considered it imprudent to risk his reputation and fortune, "in defence of a custom, which, if not a bad one, had never been legally sanctioned."¹⁰⁷ Efforts were made to transfer the governor's customary jurisdiction to three other courts – the Fishing Admirals' courts, the sessions held by the justices of the peace in the outports, and the Vice-Admiralty Court at St. John's – but none proved practicable. There is only one extant reference to a governor's court being held after the trial in Exeter – in 1785 a court convened by the governor and a bench of justices heard a property dispute – but this did not mark its resurgence.¹⁰⁸ The governor's court never recovered from the incident in 1780 because subsequent governors knew full well that the stakes were now too high. They had good reason to fear lawsuits arising from their actions on the bench: the governor's court was a customary institution that had never been tested under English law. In fact, legal opinions given in the 1730s had ruled that the governor could not sit as a justice of the peace.¹⁰⁹ The demise of the governor's court illustrated how

¹⁰⁷ *Report upon the Judicature of Newfoundland* (31 December 1789), f. 7, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 71.

¹⁰⁸ PANL, GN/2/1/A, vol. 10, p. 162. The governor in question was Captain John Campbell.

¹⁰⁹ See above, Chapter Three.

quickly a particular custom could be undermined when it relied upon a voluntary bench and locally-constituted authority.

The reluctance of governors to serve as judges left naval surrogates to shoulder an increasingly heavy caseload. Yet their powers also derived from customary law, and the surrogate courts soon came under scrutiny by English courts. At the Devonshire Quarter Sessions in 1788, Richard Hutchings, an English merchant, successfully appealed a decision made in a surrogate court by Captain Edward Pellew (later Viscount Exmouth). The previous year Hutchings had sued a planter in the Ferryland district court to recover a debt; after the civil magistrates had ruled against him, he appealed to Pellew, who upheld the judgement. Upon returning to England, Hutchings brought an action of trespass, and the presiding judge found that Pellew did not have lawful authority to hear Hutchings' case.¹¹⁰ The basis of the judgment by the Devonshire bench was likely the fact that King William's Act gave naval commanders the power to act as appeal judges only for decisions made by the fishing admirals.¹¹¹

This judgment wreaked havoc on the administration of law in Newfoundland. In April 1789 the crisis worsened when Hutchings' solicitor threatened further legal action against Captain Pellew.

¹¹⁰ PANL, CO 194/21, pp. 254-56 (report submitted by Admiral Milbanke and Mr. Graham, undated [c. December 1789]); Keith Matthews, "Richard Hutchings," *DCB*, vol. 4, pp. 443-44; Matthews, *Lectures on the History of Newfoundland*, pp. 135-41.

¹¹¹ 10 & 11 Wm. III, c. 25, s. 15 (1698-99).

Pellew appealed to Admiral Mark Milbanke, who was to begin his first year as governor that summer, to help him secure a defense lawyer from the British Admiralty. Pellew pointed out that it would be "extremely cruel to subject me to such an expense for having simply done what I conceived to be my duty."¹¹² Faced with a deteriorating situation, Aaron Graham intervened on Captain Pellew's behalf. Explaining the history of the island's customary judiciary, Graham asked Admiral Milbanke to arrange for the Crown's law officers to consider the entire matter.¹¹³ Throughout the early summer of 1789 Milbanke worked aboard his flagship, HMS *Salisbury*, preparing the squadron for the Atlantic crossing, while he awaited word on what was to be done with the surrogate courts.

Governor Milbanke did not receive the legal opinion until the day he was to set sail from Spithead. According to the report, neither the governor nor the surrogates could legally sit as judges in civil causes.¹¹⁴ This placed Milbanke in a precarious position. On the one hand, word of Hutchings' suit had already reached Newfoundland, where naval officers were unwilling to hear the scores of cases in which writs had been issued. On the other

¹¹² PRO, ADM 1/472, p. 305 (Pellew to Milbanke, 19 April 1789).

¹¹³ PRO, ADM 1/472, pp. 303-04 (Graham to Milbanke, 24 April 1789), p. 307 (Thomas Gretton to Pellew, 6 April 1789).

¹¹⁴ PRO, ADM 1/472, p. 312 (Milbanke to Philip Stephens, 24 July 1789); Calvin Evans, "Aaron Graham," *DCB*, vol. 5, p. 361.

hand, the British government had neither constituted a new jurisdiction to replace the surrogate courts nor provided instructions on how to administer justice in the interim. Even before he set foot on the island, then, Milbanke's administration had received its first blow.

Legal Reform and the Irish Convicts Controversy

Unsure of how to proceed, Milbanke approached Aaron Graham for advice on how to administer civil law under the cloud of Hutchings' suit. Graham recommended that Milbanke use the clause in his governor's commission empowering him to appoint judges – specifically commissioners of oyer and terminer and justices of the peace – as a basis to establish a court of common pleas to settle the backlog of cases that had piled up.¹¹⁵ Graham later testified that this rather spurious use of the commission was designed to cause as little disruption as possible to the customary legal system. As he explained it,

[Governor Milbanke] appointed the captains of the ships of war to be Judges at the out ports on their respective stations, so that they only changed the name of Surrogate with that of Judge, and continued to do the business exactly or nearly in the same manner as they had before been used to it; the principal alteration was in the appointment of the court at St. John's, where, instead of sitting as a Judge himself, he appointed three gentlemen to sit as Judges.¹¹⁶

¹¹⁵ For the legal powers contained in the governor's commission, see above, Appendix 4.2.

¹¹⁶ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 4 [testimony]

In September 1789 Milbanke appointed seven men, including Graham, to be judges in the Court of Common Pleas, three of whom – Coke, Ogden, and Buchanan – were already serving as justices of the peace.¹¹⁷

Courts of common pleas were duly held in the districts of Ferryland and Harbour Grace in September and October 1789.¹¹⁸ Pronouncing the new courts an unqualified success, Governor Milbanke reported: "during my short stay there they decided in the most formal manner near thirty causes, without meeting with the smallest obstruction."¹¹⁹ In spite of such optimism, the British government had not sanctioned this legal innovation. Milbanke would have to wait until he returned to London to secure approval for his initiative.

While Milbanke and Graham had been dealing with problems in the legal system, another crisis was brewing. In July 1789 over a hundred Irish convicts had landed at Bay Bulls and Petty Harbour. Dumped by the master of the *Duke of Leinster* without sufficient

of Aaron Graham], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 242.

¹¹⁷ PANL, GN 2/1/A, vol. 12, p. 13 (notice of appointments, 17 September 1789).

¹¹⁸ PANL, GN 5/4/C/1, Ferryland District Court Records (minutes for 29 September & 1 October 1789); PANL, GN 5/1/B/1, Harbour Grace District Court Records (minutes for 19-22 October 1789).

¹¹⁹ *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), f. 11, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 75.

provisions, the convicts made their way to St. John's, where authorities struggled to cope with a potentially disastrous situation. All of the convicts were in immediate need of food and shelter; many were suffering from gaol fever, which quickly spread throughout the community; and some were dangerous offenders, a fact brought home when an attempt was made to set fire to the town. Soon after arriving in Newfoundland, Governor Milbanke arranged to ship the convicts to England before the autumn departure of the naval squadron.¹²⁰ Milbanke informed William Grenville, Secretary of State in the ministry of Pitt the Younger, who in turn notified the Irish government.

In November 1789 Dublin responded by furiously protesting against any plans that would see the convicts returned to Irish soil. Governor Milbanke thus found himself at the center of a political battle between the British and Irish governments.¹²¹ In December Dublin repeated its attack on the Newfoundland governor: John Fitzgibbon, the Irish Lord Chancellor, asserted that Milbanke had committed "an act highly indiscreet at best," and

¹²⁰ The Irish convicts crisis is examined in detail in Jerry Bannister, "Convict Transportation and the Colonial State in Newfoundland, 1789," *Acadiensis* 27, 2 (Spring 1998), pp. 95-123.

¹²¹ The correspondence between London and Dublin is contained in Historical Manuscripts Commission, 30th Series, *Manuscripts of J.B. Fortescue Preserved at Drogheda* (London, 1892-1927), vol. 1, pp. 538-61 [*Drogheda Papers*]. I thank Simon Devereaux for generously sharing his research materials on Irish transportation. The impact of the landing of the Irish convicts on British penal policy is reappraised in Simon Devereaux, "Irish Convict Transportation and the Reach of the State in Late Hanoverian Britain," *Journal of the Canadian Historical Association* 8 (1997), pp. 61-86.

caustically remarked that the Admiral would never deign to come to Ireland to defend himself.¹²² Grenville ignored the virulence but pounced on the fact that statutory law entitled Ireland to transport convicts only to a British colony.¹²³ In a statement often cited by historians, Grenville declared:

Newfoundland is in no respect a British colony, and is never so considered in our laws. On the contrary, the uniform tenor of our laws respecting the fishery there, and of the King's instructions founded upon them goes, as I apprehend, to restrain the subjects of Great Britain from colonizing in that island. I am not quite certain, but I believe that this policy is carried so far as even to authorize the Governor to remove by force the British fishermen who may show a disposition to settle on the island, and remain there during the winter.¹²⁴

He was asserting that since the convicts had not been transported to an official colony, their sentences had not been legally executed. The Irish government could therefore detain the convicts in Dublin and arrange to transport them somewhere else. Grenville's statement represented no more than an attempt to solve the immediate problem of the Irish convicts, and formed

¹²² *Dropmore Papers*, vol. 1, p. 548 (Fitzgibbon to Grenville, 2 December 1789). The tone of Fitzgibbon's remarks did not reflect Irish nationalism: one of the most powerful Protestant politicians in Dublin, he became an advocate of the Act of Union in 1800-01. See J.C. Beckett, *The Making of Modern Ireland, 1603-1923* (2nd ed. London: Faber and Faber, 1981), pp. 232-36, 268-71.

¹²³ The Irish statute in question was 26 Geo. III, c. 24, ss 64-70 (1786).

¹²⁴ *Dropmore Papers*, vol. 1, p. 549 (Grenville to Fitzgibbon, 2 December 1789).

neither a general nor an accurate statement on the operation of the island's government.¹²⁵

The disparity between official imperial policy and the actual administration of Newfoundland was larger than the Irish government could have imagined. As we have seen, in official terms Newfoundland was not a colony but a seasonal fishing station. It provided a nursery for British sailors and a means for the Admiralty to check French expansion. It was, to repeat a hackneyed quotation, "a great English Ship moored near the Banks during the fishing season, for the convenience of the English fishermen."¹²⁶ However, as Keith Matthews clearly demonstrated, implementation of policy varied considerably according to economic pressures and political expediency.¹²⁷ Domestic politics and European imperatives determined the course of British colonial administration far more than the particular legal or

¹²⁵ For examples of how historians have misinterpreted Grenville's statement, see W. S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland and Stewart, 1965), p. 110; Ann Gorman Condon, "1783-1800: Loyalist Arrival, Acadian Return, Imperial Reform," in P.A. Buckner and J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Fredericton: Acadiensis Press, 1994), p. 189.

¹²⁶ *Second Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (April 1793), f. 16 [testimony of William Knox], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 188.

¹²⁷ Matthews, *Lectures on Newfoundland*, p. 123. On government and policy generally, see Keith Matthews, "History of the West of England - Newfoundland Fishery." (D.Phil. Thesis, Oxford University, 1968), pp. 337-66.

political concerns of the colonies themselves.¹²⁸ Chief Justice Reeves decried the neglect fostered by the West Country merchants:

The consequence has been, that Newfoundland has been peopled behind your back; you have abandoned it to be inhabited by any one who chooses, because you thought appointing a Governor would constitute a Colony and encourage population.¹²⁹

Reeves exaggerated both the influence of English merchants and the degree of official neglect – as recently as 1786 the British government had received a detailed report on law, government, and the island's growing population – but he accurately identified the gap that existed between policy and practice.¹³⁰

In December 1789 Grenville reiterated his position that Newfoundland's status as a mere fishing station meant that the Irish convicts' sentences had not been carried out. To back his claim he cited "the Act of William and Mary and that of 1773 respecting the fishery there."¹³¹ Not surprisingly, Fitzgibbon

¹²⁸ See C.A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London: Longman, 1989), pp. 8-11, 93-95. On this point, see also Gerald Graham, *Empire of the North Atlantic: The Maritime Struggle for North America* (2nd ed., Toronto: University of Toronto Press, 1958), p. 144.

¹²⁹ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 172 [testimony of John Reeves], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 410.

¹³⁰ See PRO, BT 6/89, pp. 10-20, 78-87, 167 (evidence given on law and government in Newfoundland, January 1786). Appendix no. 1 listed the annual population of Newfoundland from 1718 to 1785.

¹³¹ *Dropmore Papers*, vol. 1, p. 553 (Grenville to Fitzgibbon, 9 December 1789).

replied that he could not find any 1773 statute (Palliser's Act of 1775), but he had perused King William's Act and its provisions for "temporary property" in Newfoundland. Still, Grenville's scheme had the desired effect. Fitzgibbon reported that his government had recalled a revenue cruiser sent to block any attempt to land the convicts in Ireland and – while maintaining that Milbanke had acted improperly – informed Grenville that he had reconsidered the affair in light of the fact that "*Newfoundland is not a British colony.*"¹³² Betraying a mistaken impression that settlement was strictly forbidden in Newfoundland, which British officials were not about to correct, Fitzgibbon conceded:

Certainly, if the King's subjects are by law prohibited from remaining in Newfoundland after the fishing season, with a view to prevent them from interfering with the persons who carry on the business of the fishery, this will go a great way to justify Governor Milbanke in the act which he has done; and if we are enabled to stand upon his conduct as justifiable by the laws of England, I am ready to agree with you that the British Government could not dispose of our convicts in any other way than that in which I fear that have already been disposed of.¹³³

With the primary legal obstacle removed, the crisis diffused and the convicts were finally returned to Dublin in January 1790. "I

¹³² *Dropmore Papers*, vol. 1, p. 554 (Fitzgibbon to Grenville, 14 December 1789). Emphasis in original.

¹³³ *Ibid.*

am in great hopes," Hobart wrote to Grenville, "that you have given us a loop hole, which will get us out of the scrape."¹³⁴

The loophole provided by Newfoundland's legal status proved to be sufficient. Though the fate of most of the Irish convicts remains unknown – Bob Reece has traced twelve of them in a shipment of convicts transported from Cork to New South Wales in 1791 – the affair was over as far as the island's government was concerned.¹³⁵ Able to return to his programme for legal reform, Governor Milbanke submitted a comprehensive report to the Home Secretary and the Committee of the Privy Council for Trade.¹³⁶ Compiled by Aaron Graham, it outlined the problems in the civil courts and argued strongly in favour of the court of common pleas.¹³⁷ And, in response to petitions by West Country merchants

¹³⁴ *Dropmore Papers*, vol. 1, p. 560 (Hobart to Grenville, 22 January 1790).

¹³⁵ Bob Reece, "'Such a Banditti': Irish Convicts in Newfoundland, 1789. Part II", *Newfoundland Studies* 13, 2 (Fall 1997), pp. 139-40.

¹³⁶ British colonial administration had changed considerably since the mid-eighteenth century: Burke's Act of 1782 had abolished the Board of Trade; for the next four years the Home Office dealt with colonial affairs; in 1786 management of the colonies was transferred to a committee of the Privy Council for Trade and Plantations; in 1794 the Secretary of War became nominally responsible for the colonies; and in 1801 the Colonial Office was established. For an overview, see Egerton, *History of British Colonies Policy*, esp. p. 551.

¹³⁷ *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), ff. 7-37, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 71-101.

against the new court, Milbanke restated his case in February 1790.¹³⁸

But London took no action. In July 1790 Governor Milbanke appealed to Grenville that the Admiralty had ordered him to sail for Newfoundland, but he still had not received any word about his proposed reforms.¹³⁹ Belatedly, the Committee for Trade heard the report of the attorney and solicitor generals, both of whom ruled that the island's court of common pleas was "not founded on any authority legally given to the said Governor, and cannot be supported or justified by law."¹⁴⁰ The British government informed Governor Milbanke that it would not constitute any new courts in 1790, directing him instead to rely upon the justices of the peace to hear civil actions.¹⁴¹ When Milbanke returned to Newfoundland he again operated the court of common pleas and — not for the first time in the island's history — official policy was subordinated to administrative expediency.¹⁴²

¹³⁸ "Letter from Admiral Milbanke," (20 February 1790), in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 102-08.

¹³⁹ PANL, CO 194/38, p. 190 (Milbanke to Grenville, 6 July 1790).

¹⁴⁰ PRO, PC 2/135, pp. 201-10 (23 July 1790). Quotation at p. 205.

¹⁴¹ PANL, CO 194/38, pp. 192-93 (Evan Nepean to Milbanke, 24 August 1790).

¹⁴² Reeves, *History of the Government of Newfoundland*, pp. 166-67.

Statutory Reform and the Resiliency of the Naval State

When legislation was passed in 1791, it provided only for a temporary court of civil jurisdiction. The Judicature Act was limited to one year, during which John Reeves, the newly-appointed chief justice, would assess the requirements for the administration of law in Newfoundland.¹⁴³ In November 1791 Reeves prepared his first report on Newfoundland's legal system in which he sketched plans for a new judiciary. He concluded by recommending that the British government establish some type of legislature in Newfoundland. Specifically, parliament "should give out of its hands, a small portion of its Legislative Authority and confer it, where it can be exercised with more circumspection and effect." Reeves continued:

I propose that the Governor of Newfoundland should be authorized with the advice (but not to be controlled by such advice) of a certain number of persons not being more than five justices of the peace, five merchants, five boatkeepers, and five other persons, whom he may please to summon (meaning to select some out of the different classes of men in the Island) and the Chief Judge and two Assessors of the Supreme Court, to make bye laws, and regulations.¹⁴⁴

Such a measure would have forced the British government to acknowledge formally that Newfoundland had become a settled colony.

¹⁴³ 31 Geo. III, c. 29 (1791). See also Peter Neary, "John Reeves," *DCB*, vol. 6, pp. 636-37.

¹⁴⁴ PANL, CO 194/38, pp. 317-18 (report on judicature of Newfoundland, 28 November 1791). Reeves submitted this report to Henry Dundas, Secretary of State, and sent a second to the Committee for Trade on 16 December 1791: see PRO, PC 2/136, p. 540.

Justice Reeves soon abandoned the concept of a legislative council in favour of more pragmatic measures. His second report advised the British government not to alter the basic framework of the island's governance. After visiting the outports in 1792, he affirmed, "I am convinced, from what I there saw, that there is less need of regulations than of persons to execute them; and that instead of making new laws, we should first find a new set of magistrates to execute the old ones."¹⁴⁵ In the wake of Hutchings' suit, naval officers withdrew from their customary position as sole surrogate judges. Governors began to appoint civilians as surrogate judges, but officers and midshipmen continued to sit on the bench, usually alongside their civilian counterparts. Following a legal tradition that stretched back nearly a century, the commodore and his junior officers dominated the administration of law whenever they chose to intervene locally.¹⁴⁶

Justice Reeves' recommendations formed the basis of Newfoundland's constitution for the next thirty years. In 1792 a second Judicature Act created a supreme court for both civil and criminal jurisdiction, and entrenched legally the system of

¹⁴⁵ PRO, BT 1/8, p. 83 (report on judicature of Newfoundland, 5 December 1792).

¹⁴⁶ See the list of civilian appointments at PANL GN 2/1/A, vol. 12, pp. 210-12 (Surrogates' commissions, 11 October 1793).

surrogate courts that had long operated customarily.¹⁴⁷ The supreme court and surrogate courts were to have a monopoly on civil actions, save maritime causes (to be heard in the vice-admiralty court), and wage disputes (which could be heard in courts of sessions or before two justices of the peace). The 1792 Act was for one year only and had to be renewed annually until 1809, when the judicial system was made permanent in statute law.¹⁴⁸ The British government was trying to close the gap between imperial policy and local practice, but it did so by tailoring law to available legal resources. Far from being seen as an aberration, this preference for local customs conformed to the English common law tradition. As Reeves explained to the House of Commons in 1793:

It is a peculiar property of the law of England to give sanction and effect to local usages and customs that have prevailed for length of time. If the law of England is the rule of decision in Newfoundland, the customs and usages of Newfoundland would thereby become established, because the law of England opens and receives the customs and usages of the place into itself as a part of it, and the usage and custom would then become the law of the land by virtue of the force and efficacy given to them by the law of England.¹⁴⁹

¹⁴⁷ 32 Geo. III, c. 46 (1792). A summary of Reeves' 1791 report and a concomitant draft of the 1792 Judicature bill appear at PANL, CO 194/38, pp. 328-53.

¹⁴⁸ 49 Geo. III, c. 27, s. 2 (1809).

¹⁴⁹ *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 148, in Lambert, ed., *House of Commons Sessional Papers, Volume 90*, p. 386. On the place of local custom in English jurisprudence, see Lobban, *The Common Law and English Jurisprudence*, pp. 2-18.

Existing institutions, such as the surrogate courts, were favoured over innovations, in particular the court of common pleas. The supreme court augmented the judiciary but did not alter the basic structure of the island's government.¹⁵⁰

The statutes of 1791-92 were not rungs in a teleological ladder of legal progress. The naval state continued to function essentially the same as it had prior to Governor Milbanke's tenure. With the exception of the governor's court, which was never revived, successive naval governors – most of whom were now admirals, rather than post-captains serving as commodores – performed their duties as their predecessors had done. Admiral William Waldegrave, governor from 1797 to 1800, sporadically enforced the regulations governing the migratory fishery, such as the restrictions on real property, and preferred to take a pragmatic view toward governance. As Patrick O'Flaherty has noted, despite the official pretense that Newfoundland was merely a seasonal fishing station, informal representative structures – particularly *ad hoc* meetings by merchants and magistrates – functioned year-round in St. John's. Throughout his

¹⁵⁰ On the supreme court, see Patrick O'Flaherty, "Francis Forbes," *DCB*, vol. 7, pp. 301-04; Bruce Kercher, "Law Reports from a Non-Colony and a Penal Colony: The Australian Manuscript Decisions of Sir Francis Forbes as Chief Justice of Newfoundland," *Dalhousie Law Journal* 19, 2 (Fall 1996), pp. 417-24.

administration, Governor Waldegrave refused to initiate any reforms to the island's legal regime.¹⁵¹

In 1803 Governor James Gambier took the unusual step of criticizing imperial policy toward Newfoundland. At the end of his governorship, Gambier wrote to the Secretary of State:

The present system of policy is insufficient for effecting the happiness and good order of the community which is the chief end of all government. This I attribute to the want of a power in the Island for framing laws for its internal regulation, and for raising sums necessary to promote any measure of public utility.¹⁵²

The proposal met with silence in London, and Gambier's successors reverted to a conservative stance on the question of legislative government. From 1810 to 1812, for example, Governor John Duckworth successfully resisted challenges to the status quo from a nascent reform movement led by William Carson, a Scottish physician.¹⁵³ Denouncing Carson as a troublemaker, Duckworth deflated any hopes that Newfoundland would be granted representative government in the foreseeable future.¹⁵⁴

When a large-scale crisis hit Newfoundland in 1816-17, the local response was strikingly similar to the measures taken in

¹⁵¹ Patrick O'Flaherty, "William Waldegrave," *DCB*, vol. 6, p. 796-97.

¹⁵² Quoted in Frederic Thompson, "James Gambier," *DCB*, vol. 6, p. 271.

¹⁵³ Carson had emigrated to Newfoundland in 1808: over the next thirty years he remained at the heart of colonial politics and the edge of agitation for reform. See Patrick O'Flaherty, "William Carson," *DCB*, vol. 7, pp. 151-56.

¹⁵⁴ William Whitely, "John Duckworth," *DCB*, vol. 7, p. 274-75.

1789. In the face of disastrous fires, waves of bankruptcies, and outbreaks of civil unrest, merchants in St. John's organized public meetings, established a committee, and proposed measures for the immediate relief of the community. In January 1817 Captain David Buchan, a resident surrogate magistrate at St. John's, convened a public meeting to nominate a committee, consisting of merchants and other prominent citizens, which then acted as an informal legislature. It passed a series of resolutions that included the division of the town into a system of wards.¹⁵⁵ Local merchants also traveled to London to testify before a committee of inquiry at the House of Commons, where they warned against embarking on new initiatives in Newfoundland.¹⁵⁶ From all appearances, it seemed as though the naval state would remain intact for another generation.

The Public Sphere and the Birth of Political Opposition

Despite the perseverance of the naval state, beneath the political surface surged forces that threatened the entire system of governance. The decade after the peace of 1815 witnessed the advent of bourgeois culture in St. John's. The roots of this social revolution grew out of the island's remarkable economic

¹⁵⁵ *Royal Gazette* (St. John's), 21 January 1817 (report of a public meeting held 10 January 1817).

¹⁵⁶ Sean Cadigan, "The Staple Model Reconsidered: The Case of Agricultural Policy in Northeast Newfoundland, 1785-1855," *Acadiensis* 21, 2 (Spring 1992), p. 54.

development during the French Revolutionary and Napoleonic Wars. As Newfoundland transformed into a populous colony with a resident fishery, incipient political institutions emerged in St. John's, such as the Society of Merchants and the Benevolent Irish Society.¹⁵⁷ Accompanying these organizations came a momentous development: the first local printing press in Newfoundland. Operating under licence from the governor, in 1807 John Ryan began the *Royal Gazette*, a weekly paper published in St. John's devoted largely to government notices, official proclamations, and mercantile advertisements.¹⁵⁸ Although Ryan could initially publish only materials approved by the governor's office, the appearance of a local press marked a formative stage in the monitoring of state power. For the first time, the court calendar and the outcome of trials were published, providing a basis of accountability that far outstripped the traditional forms of communication. The press facilitated the creation of a *public* space in which the bourgeoisie could fix its place in the social environment, identify its local interests, and promote its own particular causes.¹⁵⁹

¹⁵⁷ In 1815 the Island's population was over 40,000, and Irish Catholics comprised a large majority in St. John's. See Shannon Ryan, "Fishery to Colony," pp. 138-56; O'Flaherty, "Seeds of Reform," 45-9.

¹⁵⁸ Patrick O'Flaherty, "John Ryan," *DCB*, vol. 7, pp. 762-66.

¹⁵⁹ On the creation of a public sphere generally, see Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Thomas Burger, trans. (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1991), esp. pp.

By 1820 the press contained newspapers that were clearly independent of the naval state. St. John's had two major papers – the pro-reform *Public Ledger* and the *Mercantile Journal* – and a third, the pro-Catholic *Newfoundlander*, appeared in 1827.¹⁶⁰ Government policies were subjected to potentially critical public evaluation; the governor's office could no longer monopolize the process of political legitimization. Freedom of speech became a pivotal factor in the eventual downfall of the naval state.¹⁶¹ The press did not invent political opposition but rather revolutionized its means of expression.

Early demands for reform had come primarily from St. John's merchants. The Society of Merchants petitioned repeatedly for advantages in trade, vowing to defend the colonists' rights secured by the British constitution. A significant challenge to the governor's authority emerged in 1811, when local merchants organized meetings to discuss grievances over a statute

19-26; Craig Calhoun, "Habermas and the Public Sphere," in C. Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, Mass.: Massachusetts Institute of Technology, 1992), pp. 2-41. On the cultural impact of the growth of a local press, see Robert Darnton, *The Kiss of Lamourette: Reflections in Cultural History* (New York: Norton, 1990), chs. 7-9.

¹⁶⁰ Suzanne Ellison, *Historical Directory of Newfoundland and Labrador Newspapers, 1806-1996* (St. John's: Memorial University, 1997), pp. 108-16 & 132-33.

¹⁶¹ On the origins of freedom of the press in England, see Valerie Frith, "'That Men May be Warned': The Legacy of Tutchin's Case," in Smith, et al., eds., *Criminal Justice in the Old World and the New*, pp. 208-34.

authorizing the lease of ships' rooms as private property.¹⁶² In the island's first protest pamphlet, William Carson openly criticized the seizure of common property without the inhabitants' consent.¹⁶³ Dr. Carson's next tract warned the government not to insult the rights of Britons living in Newfoundland. The colonists deserved, he concluded, "what is unquestionably their right, a civil Government, consisting of a resident Governor, a Senate House, and House of Assembly."¹⁶⁴ From its beginnings, reform rhetoric identified social progress closely with the attainment of formal institutions comparable to other colonies and the constitutional rights granted to all British subjects.

The gathering movement in favour of reforming the island's legal system was part of a broader wave of political upheaval that swept the British Isles in the early nineteenth century. British and Irish reformers campaigned for an end to slavery, public whippings, and other practices deemed contrary to the

¹⁶² Ships' rooms were tracts of waterfront land which, with the decline of the migratory fishery, had effectively become public property. The Act 51 Geo. III, c. 45 (1811) empowered the governor to tender building lots for thirty-year leases. See Prowse, *History of Newfoundland*, 386; Sean Cadigan, "The Role of the Fishing Ships' Rooms Controversy in the Rise of a Local Bourgeoisie: St. John's, Newfoundland, 1775-1812." (Unpublished mss., Centre for Newfoundland Studies, 1992).

¹⁶³ William Carson, *A Letter to the Members of Parliament of the United Kingdom* (Greenock: W. Scott, 1812), pp. 3-4.

¹⁶⁴ William Carson, *Reasons for Colonizing the Island of Newfoundland* (Greenock: W. Scott, 1813), pp. 3-4, 6-8, 12-13, 24-6.

natural rights of man. Irish politicians worked particularly hard to persuade the British government to repeal the penal laws affecting Roman Catholics.¹⁶⁵ As Keith Matthews argued, reformers in Newfoundland – many of whom had emigrated recently from Ireland and Britain – drew upon this larger cultural milieu to formulate their demands for an end to naval government.¹⁶⁶ But the impact of events and trends in Britain on the course of reform in Newfoundland can be easily exaggerated. The notion that the reformers were somehow “pushing at an open door” distorts the contexts of both local politics and imperial policy.¹⁶⁷ The Colonial Office remained wary of bestowing legislative authority on British possessions.¹⁶⁸ Prior to 1828 public opinion in Newfoundland was divided on the question of reform. The merchant elite did not support the campaign for representative government

¹⁶⁵ On the political environment in Britain and Ireland, see Linda Colley, *Britons: Forging the Nation, 1707-1837* (New Haven: Yale University Press, 1992), ch. 8; Thomas Hachey, et al., *The Irish Experience* (New York: M.E. Sharpe, 1996), ch. 5.

¹⁶⁶ Keith Matthews, “The Class of ‘32: St. John’s Reformers on the Eve of Representative Government,” *Acadiensis* 6, 2 (Spring 1977).

¹⁶⁷ English, “Official Mind and Popular Protest in a Revolutionary Era,” in Greenwood and Wright, eds., *Canadian State Trials*, p. 316.

¹⁶⁸ P.A. Buckner, *The Transition to Responsible Government in British North America, 1815-1850* (Westport: Greenwood Press, 1985), pp. 15-18, 151, 294; Peter Burroughs, “Liberal, Paternalist or Cassandra?: Earl Grey as a Critic of Colonial Self-Government,” *Journal of Imperial and Commonwealth History* 18 (January, 1990), pp. 33-35.

until they became convinced that it was in their immediate economic interests.¹⁶⁹

Cause Célèbres and the Campaign against Naval Justice

In 1820 the reformers created an organized movement focused on overturning the naval state and the island's traditional institutions. The battle against naval government began with the surrogate courts. Agitation centred on the cases of two fishermen – James Lundrigan and Philip Butler – who were publicly whipped in July 1820 after receiving default judgements in surrogate court for outstanding debts. An Irish Roman Catholic, Lundrigan had owed a £28 debt to local merchants and refused to answer his summons to court. Arrested during the night, he was taken to a naval vessel, charged the next day with contempt of court, and sentenced to thirty-six lashes. After the punishment, which saw Lundrigan collapse after fourteen lashes, the court ordered the Conception Bay fisherman to relinquish his house and assets to his creditor. Butler's case followed a similar course, and both men brought actions of trespass in the supreme court, alleging assault and false imprisonment against the presiding surrogates.¹⁷⁰

¹⁶⁹ See Jerry Bannister, "The Campaign for Representative Government in Newfoundland," *Journal of the Canadian Historical Association* 8 (1994), pp. 27-40.

¹⁷⁰ Patrick O'Flaherty, "James Lundrigan," *DCB*, vol. 6, pp. 409-11.

In November 1820 a meeting in St. John's, chaired by Patrick Morris,¹⁷¹ protested the cruel and ignominious punishment inflicted for trifling causes, and appointed a committee to draft a petition to the Crown.¹⁷² The committee included the leaders of the St. John's Irish Catholic community who formed the backbone of the early reform movement.¹⁷³ Their petition detailed the flaws in the surrogate system and linked the need for a reformed judiciary directly to the absence of a local legislature.¹⁷⁴ Determined to win their place in the circles of power, middle-class Catholics also supported the campaign to repeal the religious penal laws.

As had happened during the fishing admiral's controversy a century earlier, political protest involved manoeuvres on both sides of the Atlantic. After presenting memorials for legal reform to Governor Hamilton, the committee sent a representative, William Dawe, to convey its petition to the British parliament.

¹⁷¹ Morris had emigrated from Ireland in 1804, entered the mercantile trade, and soon became a prominent public figure. See John Mannion, "Patrick Morris," *DCB*, vol. 7, pp. 623-34.

¹⁷² Anon, *A Report of Certain Proceedings of the Inhabitants of the Town of Saint John, in the Island of Newfoundland, with the view to obtain a REFORM of the LAWS, more particularly in the mode of their administration, and an INDEPENDENT LEGISLATURE* (St. John's: Printed by Lewis Ryan, 1821), esp. pp. iv, 10-11.

¹⁷³ *Report of Certain Proceedings*, p. 11. Eight of the thirteen men appointed to the committee were Roman Catholics. See John Mannion, "Henry Shea," *DCB* vol. 6, pp. 709-11; Derek Bussy, "Patrick Doyle," *DCB*, vol. 8, pp. 234-35; O'Flaherty, "Seeds of Reform," p. 43.

¹⁷⁴ *Report of Certain Proceedings*, pp. 12-13, 19-20.

Dawe also carried letters asking Lord Holland, who led a circle of liberal Whigs, and the prominent reform advocate Sir James Mackintosh, to represent the reform committee's interests.¹⁷⁵ When the House of Commons considered the petition in May 1821, Mackintosh asserted that he knew of "no other colony which more required the constant vigilance of a local assembly than Newfoundland." He took particular aim at the naval regime:

The courts in question were called Surrogate Courts; the judges were principally composed of officers of the navy. Punishment for contempt was, he admitted, resorted to by courts of justice in England; but he believed the use of the lash in such cases was altogether unknown in this county; it was, however, the ordinary mode of punishment adopted in Newfoundland.¹⁷⁶

As to the root of the problem, Mackintosh charged:

The mode of proceeding in these floating courts was not regulated by the common law of England, so much as the discipline and practice of the navy. The system was a bad one, but was, he believed, the remains of a system which was still worse.¹⁷⁷

¹⁷⁵ The Newfoundland reformers were thereby able to capitalize on political trends in contemporary England. See Greg Smith, "Civilized Women Don't Want to See That Sort of Thing: The Decline of Physical Punishment in London, 1760-1840," in Carolyn Strange, ed., *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver: University of British Columbia Press, 1996), pp. 37-41.

¹⁷⁶ *Parliamentary Debates, New Series*, vol. 5 (28 May 1821), pp. 1015-16; *Journals of the House of Commons*, vol. 76 (1821), p. 388.

¹⁷⁷ *Ibid.*

Despite the reformers' efforts, the Colonial Office sent clear instructions to Governor Hamilton that it did not intend to establish a legislature in Newfoundland.¹⁷⁸

The public outcry against the surrogate courts marked only the first salvo in a larger struggle against the naval state. Reformers incessantly attacked naval government as arbitrary, outmoded, and incompetent. The fervor reached new heights with the publication of an anonymous pamphlet which detailed the history of the administration of law, culminating in the whipping of Lundrigan and Butler. On the problem of finding the cause of this "mal-administration of justice," it contended:

[I]t is easy to comprehend that portion that must be of widely spreading magnitude, when it is considered that every new squadron of ships of war, and every single ship that arrives on the station, in their commanding officers, furnishes a new set of itinerant judges, who, under every disqualification for the office, save the authority which they derive under the commission of the Governor, are dispersed along the coasts of the Island to exercise the functions of judges, in criminal as well as civil causes, in the surrogate and sessions courts.

The indictment of the naval state did not end there:

When to the numberless errors in judgment, inevitably incident to such judges, and the consequent injuries to the rights of parties, are superadded the intemperate and unlawful finings, imprisonments, and floggings which they have inflicted; it becomes to a reflecting mind, a matter of surprise, how the moral relations of society have been held

¹⁷⁸ On 17 May 1821 Governor Hamilton forwarded this letter to the reform committee. See *Report of Certain Proceedings*, pp. 31-2.

together, amid the heart-burnings and resentments which such a system of judicature must inevitably generate.¹⁷⁹

For three generations, official correspondence and printed accounts had portrayed the naval governor and the surrogate system as the very bastion of English justice in Newfoundland. Within the space of a few years, however, the reform press had savaged the navy's reputation.

The Fall of the Naval State

In 1824 the reformers scored their first major victory. The British government introduced a bill that signaled the dismantling of the naval state. The Judicature Act abolished the surrogate courts and provided for a charter of incorporation to make town by-laws.¹⁸⁰ With the end of the surrogate courts, the island had shed one of the principal features of naval government. Having sat as judges since at least 1701, when George Larkin first reported the custom, naval officers in Newfoundland finally lost their prerogative to administer law. In 1825 the British government issued a Royal Charter to institute the changes outlined in the Judicature Act. It granted Newfoundland

¹⁷⁹ Anon., *Observations on the Present State of Newfoundland, in reference to its Courts of Justice* (London: A. Hancock, 1823), p. 2. The pamphlet was addressed to Lord Bathurst, the Colonial Secretary, and signed by "Britannicus."

¹⁸⁰ 5 Geo. IV, c. 67 (1824). Two other acts passed in 1824 also revised aspects of the island's legal system: the Fisheries Act (5 Geo. IV, c. 51), and the Marriage Act (5 Geo. IV, c. 68).

official colonial status, a revamped supreme court, and an executive council. It also made the governorship a civil appointment, no longer under Admiralty jurisdiction.¹⁸¹

Sir Thomas Cochrane, the first governor under the new constitution, was a captain in the royal navy and somewhat of a martinet.¹⁸² His presence ensured that the trappings of the naval state persisted after the island had become an official colony. In early 1826 Governor Cochrane held meetings with merchants and prominent reformers in order to discuss the creation of a town council in St. John's. But the process abruptly ground to a halt when a bloc of leading merchants opposed the plans for reform. Merchants in St. John's had, in fact, never fully backed the early reform movement: now a conservative faction publicly objected to the establishment of a town council. This split between conservative and reformist parties inhibited further political changes. By mid-1827 representative government still appeared to be a rather distant goal.¹⁸³

To keep the campaign for a local legislature alive, the reformers clung to their crusade against the navy state. These

¹⁸¹ The 1825 Royal Charter, which was promulgated on 2 January 1826, was printed in Henry Winton, ed., *Select Cases from the Records of the Supreme Court of Newfoundland* (St. John's: Henry Winton, 1829), pp. 559-74. See also the *Mercantile Journal* (St. John's), 5 January & 2 March 1826.

¹⁸² Gertrude Gunn, *Political History of Newfoundland*, pp. 2-5.

¹⁸³ These developments are examined in detail, in Bannister, "Campaign for Representative Government," pp. 25-26.

polemics were no longer restricted to anonymous pamphlets and letters to the editor. In 1827 Patrick Morris launched a full broadside against the evils of the old regime:

The government of Newfoundland by the Admirals of the British fleet exhibits examples of the danger of placing uncontrolled power in the hands of any man or set of men, and affords melancholy proofs that English gentlemen – the representatives of a constitutional king – of the highest rank in the truly honourable profession to which they belonged – did, in the exercise of power, act more like Persian satraps or Turkish bashaws than men who, it is to be supposed, were well read in the constitutional history of their country.¹⁸⁴

The reformers kept invoking this argument as long as it boosted their cause. By doing so, naval government entered the realm of caricature and legend, alongside the fishing admirals, to form one of the core myths of Newfoundland nationalism. By the time Judge Prowse published his seminal history of the island, the eighteenth-century had become a dark age of anarchy.¹⁸⁵

Meanwhile the reformers found another theme to complement their attacks on naval government. In late 1827 the British government announced the imposition of new duties on imports into the colony. Such a move contravened the traditional exemption of the fishery from taxation and would cut directly into the operations of the St. John's merchants. It also united the

¹⁸⁴ Patrick Morris, *Remarks on the State of Society, Religion, Morals, and Education at Newfoundland* (London: A Hancock, 1827), p. 10.

¹⁸⁵ See O'Flaherty, *Studies in the Literature of Newfoundland*, ch. 4.

fractious merchant interests against the proposed tax.¹⁸⁶ Using George Robinson, an MP in the House of Commons, the St. John's Chamber of Commerce registered its protest in the British parliament.¹⁸⁷ With the five-year term of the Judicature Act soon to expire, in May 1828 Robinson asked the British government to strike a committee of inquiry to consider amendments to the island's constitution.¹⁸⁸

Equally important, in a series of editorials the local press transformed concerns over the proposed import duty into a cogent argument for further legal reforms. When John Shea, editor of the *Newfoundlander*, reported on the duty in 1827, he noted the economic implications but then continued: "such a tax on a Colony like ours, without representation, would be a direct violation of the pledge given by the Government to the Colonies after the American Revolutionary War."¹⁸⁹ In April 1828, he appealed against the government's evident intention to practise "taxation without

¹⁸⁶ PANL, CO 194/78, pp. 131-34 (petition of the Chamber of Commerce, 9 October 1827).

¹⁸⁷ The proposed 2.5 per cent duty covered all imported items except salt and potatoes. The British government also planned to impose new taxes on wine and liquor. See the editorial in the *Public Ledger*, 22 April 1828.

¹⁸⁸ A transcript of the parliamentary debate appears in the *Public Ledger*, 18 July 1828.

¹⁸⁹ *Newfoundlander*, 21 November 1827. The son of the reformer Henry Shea, John Shea established the *Newfoundlander* in 1827. See John Mannion, "Henry Shea," *DCB*, vol. 6, p. 711.

representation."¹⁹⁰ Similarly, Henry Winton, editor of the *Public Ledger*, argued that he did not object to the duty itself but to the absence of the *right* to collect and appropriate the funds it would produce.¹⁹¹ On this point the reformers were on firm ground, for the 1778 Declaratory Act clearly stated that parliament would not impose internal taxation on any British colony.¹⁹²

From 1828 to 1832 the island's reform movement grew into a broad-based coalition centred on the aim of gaining representative government. With representatives from outport districts and delegations in London, the movement became increasingly public, holding open-air meetings at which hundreds of people signed petitions. Using a variety of arguments – such as the potential savings to the British treasury – the reformers gained support in parliament and worked to undermine Governor Cochrane.¹⁹³ In the House of Commons, George Robinson pulled off a remarkable coup: on 13 September 1831 – the evening reserved for

¹⁹⁰ In June 1828 Shea questioned whether the new tax would be used to build "a new goal, infirmary, work-house, treadmill...to improve our morals." See *Newfoundlander*, 9 April 1828, 19 June 1828.

¹⁹¹ In addition, a letter by "Mercator" on 25 December 1827 argued: "taxation without representation is contrary to the express promise of Great Britain to her colonies, and to the spirit of the British Laws." On 25 April 1828 Winton warned that under the present system the tax would be imposed "while the people remain relatively unconscious." See *Public Ledger*, 25 December 1827, 22 April 1828, 25 April 1828.

¹⁹² 18 Geo. III, c. 12 (1778).

¹⁹³ See Bannister, "Campaign for Representative Government," pp. 28-40.

the third reading of the Reform Bill – he interrupted the proceedings to state that the government's neglect of Newfoundland had compelled him to speak on a local subject. Before the packed assembly of MPs, he declared, "The Colony was a fief of the Admiralty, and on that account the situation of it was kept a secret." Robinson concluded his speech with a call for the British government to grant Newfoundland a local legislature.¹⁹⁴

By making the question of the island's governance a public litmus-test of the Whigs' liberalism, Robinson embarrassed the government into taking action. The Grey administration commissioned a Colonial Office report to determine the best way to establish an elected assembly in Newfoundland. In January 1832 the British government announced that it had decided to grant the island representative government. After a decade-long cycle of struggle the reform movement had achieved its ultimate goal.¹⁹⁵ And, with the beginning of electoral politics, the last vestiges of the naval state were swept away.

¹⁹⁴ *Parliamentary Debates*, vol. 6 (13 September 1831), pp. 1377-387 [quotation at p. 1378]. The *Public Ledger* printed a complete transcript on 15 November 1831.

¹⁹⁵ The announcement first appeared in letters printed in the *Public Ledger*, 27 March 1832.

Conclusion

Why did the structure of the island's legal system remain intact for such an extended period of time? Put most simply, the naval state survived because it protected the interests of those in power. From 1730 to 1830 the governor, magistrates, and merchants constituted a *de facto* legislature and executive to approve and enforce local policies. This arrangement was limited to specific projects, such as building court houses and other public works, or defraying the cost of criminal trials. Merchants did not become heavily involved in local government unless they perceived their interests to be directly threatened, as they did in 1729-31, 1788-89, 1816-17, and 1828-32. From London's perspective, government in Newfoundland functioned relatively well, cost comparatively little, and caused few political problems. When the island's governance briefly occupied the centre of a dispute between London and Dublin in 1789, for example, the British government used Newfoundland's lack of colonial status as a political loophole. Britain's policy toward the island was not wholly neglectful, nor was it inherently repressive or particularly enlightened. Rather, it followed the path of least resistance until forced in 1791-92 to legislate the minimum changes required for a functional judiciary. The Colonial Office was highly skeptical about establishing a local legislature in 1832 and did so only when spurred by a determined reform movement.

As the dominant force in the development of law for over a century, the royal navy represented everything about the eighteenth century that the reformers had come to despise. The problem for modern historians has been to see past the rhetoric of the reform movement and the uncritical treatment it has received at the hands of both nationalist and revisionist scholars. This chapter has insisted upon considering the pre-1832 judiciary on its own terms, in its historical context. The emergence and function of established courts and entrenched legal authority was the most important factor in the development of Anglo-Irish society in Newfoundland, where formal means of dispute resolution had failed to meet local needs. To be sure, the island's experience was distinct, but the process through which its legal system evolved bears on other, larger problems about defining the boundaries of law and legal culture. Narrow interpretations of the state cannot be reasonably applied to Newfoundland, where, as in most colonies, material and social conditions demanded significant adaptation to the English model.

The limited administrative apparatus in eighteenth-century Newfoundland both inhibited governors' abilities to act unilaterally and encouraged the process of working with magistrates and merchants. With neither an elected assembly nor an independent press to monitor or question decisions, governors were relatively free to act as they saw fit. They had no vested economic or political interests to protect locally, aside from

their naval squadron, and were spared much of the parochial politics that eclipsed many colonial governments. Since their appointments were usually for three years – prior to 1818, they resided at St. John's only from mid-summer until the departure of the naval squadron in early autumn – they seldom embarked on overly ambitious projects.

While accountability to London tempered this political autonomy, the emergence of an independent press revolutionized it. As Governor Milbanke discovered in 1789-91, the British government periodically rejected local initiatives, though it rarely reprimanded governors. A generation later, Governor Cochrane too had to be careful in his dealings with London, but he faced an opposition movement for the first time in the island's history. Nourished by an expanding bourgeois public sphere, the St. John's press scrutinized the administration of law in a manner unimaginable in 1790. Yet one element transcended the eras of Milbanke and Cochrane: pragmatism guided the implementation of imperial policy to a far greater degree than statutes or mercantile tenets. The British government allowed the island to develop a system of local governance that had its own legitimacy, authority, and rule of law. With the advent of the first local elections in 1832, the struggle within Newfoundland for political power had only just begun. After more than a century of dominating the island's judicial administration, the royal navy became merely an ancillary to civilian rule.

Chapter 6

Mercy and Discretion:

The Patterns of Criminal Justice

This chapter explores the judicial power of the naval state in practice. It addresses the question of how authorities administered law. This issue was of particular importance to the island's government and judiciary because of the lack of jails and houses of correction, and the fact that the naval presence usually lasted only for a few months each year. The task of bringing offenders to justice at the autumn assizes represented the sole opportunity to punish capital offences until the squadron returned the following summer. For the governor at St. John's, this constituted the climax of the seasonal administration: supervising the assize session and the punishment of felons was the last official duty carried out before the flagship set sail. It marked both the literal and figurative affirmation of the state's ultimate power to legally kill its own citizens. The decision of whom and how to punish – essentially the selection of those offenders deemed worthy of mercy – comprised the most dramatic expression of discretionary authority. Analyzing this process provides the means to probe not only the inner workings of the naval state, but also the

propertied interests which it upheld and the social norms it enforced.¹

This study covers the entire span of the court of oyer and terminer, from its inception in 1750 to its replacement by the supreme court in 1792.² It examines state-sanctioned pardons and capital punishment; whipping and other secondary punishments are discussed in the next chapter. Three main topics are investigated: the varying structure of the pardon process; the incidence and patterns of judicial mercy; and the function of capital punishment. These issues are addressed in the context of the underlying question of why some offenders were hanged while others were set free. The discretionary application of the rule of law forms the core theme throughout this discussion. Evidence from the assize records points to two pivotal criteria rooted in class: the perceived character of the offender and the seriousness of the offence. These twin factors, both of which measured the degree of threat felt by the local community, emerged during criminal trials and spilled over into the post-conviction deliberations. From this perspective, the criminal trial represented the first stage of the penal regime: it afforded the principal opportunity to assess the character of an

¹ On this point, see Hay, et al., "Preface," in Hay et al., eds., *Albion's Fatal Tree*, p. 13.

² The chapter uses a database of all of the known cases before the court of oyer and terminer. The archival records of the assizes are discussed below, at Appendix A.

offender and the gravity of the offence. This chapter therefore considers trial and punishment as parts of a single judicial continuum.

Compared to contemporary England and Nova Scotia, the regime for punishing capital offences was lenient. The rate of pardons granted to offenders convicted at the St. John's assizes was relatively high: more than seventy per cent of those condemned to death received pardons, three-quarters of which were given without any restrictions or secondary sentence.³ Following the pattern generally found in colonial America, Newfoundland witnessed few executions.⁴ From 1750 to 1791 ten men and one woman were hanged at St. John's. Executions were restricted to the crimes of murder, forgery, and rape: no one was ever executed for a property offence. Trends in Newfoundland reflected the patterns of punishment in the Georgian navy, in which few offenders were hanged but many received harsh corporal punishments. Governors brought the navy's legal culture to their

³ The pardon rate for all offences was roughly 60% in England and 55% Nova Scotia. See Beattie, *Crime and the Courts in England*, pp. 433-35; Phillips, "Operation of the Royal Pardon in Nova Scotia," pp. 423, 431, 436 & 441.

⁴ On patterns of punishment in colonial America, see *inter alia*, Preyer, "Penal Measures in the American Colonies," pp. 326-53; Linda Kealey, "Patterns of Punishment: Massachusetts in the Eighteenth Century," *American Journal of Legal History* 30 (1986), pp. 177-82; Jeffrey Sawyer, "'Benefit of Clergy' in Maryland and Virginia," *American Journal of Legal History* 34 (1990), pp. 49-68.

role as both appellate judges and sole executive authority overseeing the administration of justice.

The pardon process varied considerably according to the governor's administrative initiative. Some offenders remained incarcerated in difficult conditions over a year before being released, thereby making reprieves a *de facto* sentence to imprisonment. Yet the heavy use of pardons did not mean that the penal system was necessarily weak. On the contrary, the mercy dispensed by the governor represented an expression of power as dynamic as public hangings. Pardons were granted in a manner calculated to reinforce the governor's authority and to legitimize the judiciary as effectively as possible. Reprieved felons and the community at large were reminded that only an act of gratuitous compassion separated freed offenders from those on the gallows.

Decisions over whom to execute involved much more than the apportionment of culpability. Hanging represented a political as much as a criminal punishment: fears of sedition among the island's Irish community figured prominently in nearly every execution under study. As in England and many British colonies, the Irish were a favoured target for state repression. A combination of exemplary capital punishment and recurrent whipping was used to punish servants, the majority of whom were Roman Catholics, to the end of the eighteenth century.

Verdicts and the Pardon Process

From 1750 to 1792 the court of oyer and terminer tried eighty-six men and women for crimes ranging from murder to larceny. Of the accused, sixty-four were found guilty, fifteen not guilty, and two were dismissed before a verdict was given; the results of five criminal trials are unknown. Of those found guilty, twenty-three were given secondary punishments and thirty-eight were sentenced to death; the sentences of two offenders were not recorded because they had been condemned to death for another crime during the same assize session, while one man convicted of manslaughter was discharged without punishment.

Table 6.1. Pardons Granted to Offenders, 1750-1791

Offence	Condemned to death	Free pardon issued	Pardoned on condition of transportation
Murder	18	11	0
Rape	3	2	0
Burglary	1	1	0
Forgery	6	3	0
Larceny	10	3	6
Receiving stolen goods	1	1	0
All offences	38	21	6

Source: see Appendix A

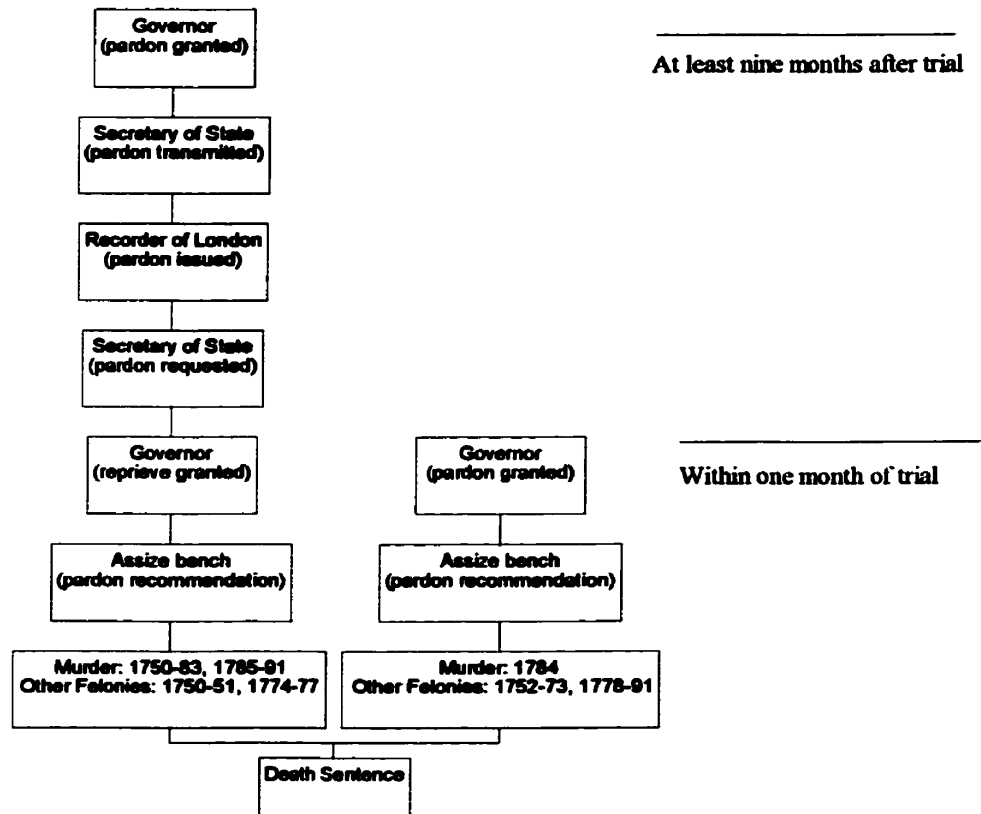
Although the evidence clearly points to a high pardon rate (71%), the pardon process itself was not uniform and varied according to the initiative of the commissioners of oyer and terminer and the governor. The data must therefore be treated with caution, since the government did not treat all of those condemned to death in the same manner. In theory, the system of dispensing judicial mercy was definitively established in 1751, remaining unchanged throughout the period under study. At the close of the assize session, the commissioners of oyer and terminer submitted a report to the governor in which they summarized the case of each offender condemned to death. These reports usually included a recommendation on whether to issue a reprieve (for those convicted of murder), or a pardon (for all other felonies). The governor had to make all the necessary decisions before the autumn departure of the naval squadron. He had four options: issue a warrant of execution and supervise the public hanging; grant a free pardon (for all felonies save murder); grant a pardon contingent upon a secondary punishment; issue a reprieve and, upon arrival in England, refer the case to the Secretary of State (for murder only). The British government considered reprieves of those convicted of murder in conjunction with the governors' report and the transcripts of the offenders' trial. The Secretary of State then arranged for pardons to be issued through the Recorder of London, and transmitted the

warrant to the governor before he returned to the island the following summer.

In practice, however, the pardon process was much more complex. A dual system evolved in which some governors exercised their full power to pardon offenders, while others referred the cases of all those condemned to death to the Secretary of State. The tendency of some governors not to use all of the powers granted by their commissions did not indicate that offenders were spared the rigors of the law; rather, by passing on a reprieved offender's dossier to London, some governors ensured that he or she would spend at least nine months imprisoned in difficult conditions. Those whom the governor himself pardoned were freed within a month of their trial.

This gap between theory and practice was evident in the first assize session held after Governor Drake had persuaded the British government to give the governor the power to order executions or pardons in Newfoundland. Except for cases of treason, which the assize court could not hear, and murder, for which the governor could issue only reprieves, the island's government had full jurisdiction over the apportionment of

Figure 6.1. The Pardon Process, 1750-1792



mercy.⁵ Unlike Nova Scotia, where the governor exercised full control over the pardon process, in Newfoundland the judicial system apparently reverted repeatedly to a position of dependence upon direction from London.⁶ As we will see, the practice of

⁵ See above, Appendix 4.1.

⁶ On the structure of the Nova Scotian judicial system, see Phillips, "Operation of the Royal Pardon in Nova Scotia," pp. 410-13. On the institutional framework of the royal pardon in England, see J.M. Beattie, "The Royal Pardon and Criminal Procedure in Early Modern England," *Historical Papers* (1987), pp. 9-22; J.M. Beattie, "The Cabinet and the Management of Death at Tyburn after the Revolution of

altering procedures in order to seek guidance for some cases did not mean that governors did not exert effective control over the decision-making process.

At a court of oyer and terminer held in September 1751, William Fielding, a soldier in the local garrison, was convicted of rape and sentenced to death.⁷ Fielding was the first offender condemned to death in Newfoundland, and Governor Drake chose to issue a reprieve.⁸ Drake sent a transcript of the trial to London, where Dudley Ryder, the attorney general, was asked for an opinion whether Fielding should be pardoned. Ryder did not directly address Fielding's culpability but focused instead on an irregularity he had discerned in the trial transcript. He noted that two of the depositions used in the trial apparently had not been personally attested to in court. Only the victim had given evidence *viva voce*, and she had equally implicated another soldier, whom the jury acquitted for the same crime. Whether the problem arose out of an incomplete trial transcript is uncertain, but Ryder was left with serious doubts. He explained to Holderness:

1688-1689," in Lois Schwoerer, ed., *The Revolution of 1688-1689: Changing Perspectives* (Cambridge: Cambridge University Press, 1991), pp. 218-33; Simon Devereaux, "The Criminal Branch of the Home Office, 1782-1830," in Smith, et al., eds., *Criminal Justice in the Old World and the New*, pp. 270-308.

⁷ *R. v. Fielding*, 1751 Assizes. The complete archival references for each assize year are listed in Appendix A.

⁸ *R. v. Kneeves*, 1750 Assizes; *R. v. Fielding*, 1751 Assizes.

As the jury may have been influenced by the first mentioned written depositions, and no body can judge how far a cross-examination of those witnesses (if an opportunity had been given for it, by an open personal examination of them, in the presence of the Court and the prisoner), might have cleared his innocence, especially in a matter that may depend upon seemingly little circumstances, I humbly submit it to his Majesty's great wisdom, whether the prisoner may not be a proper object of his Royal Mercy.⁹

On the basis of this recommendation, the British government, acting via writ of the Privy Council, granted Fielding a pardon.¹⁰ This is the only extant record of a pardon request being referred to the Crown's law officers. The Secretary of State alone handled all subsequent cases of reprieved offenders, placing requests for pardons before the king-in-council without prior consultation with other officials.

The deliberations over the Fielding case denoted two interrelated characteristics of the island's system for granting royal pardons. First, governors seemed to be uncertain in their course of action. They appeared reluctant to act independently in a matter where a life was at stake. This was partly due to the fact that the governorship normally rotated every three years: prior to the appointment of a civil secretary in 1779, some

⁹ PRO, SP 36/118, p. 83 (Ryder to Holderness, 14 March 1752). I thank Professor John Beattie for this reference.

¹⁰ Fielding's pardon was inserted in the general pardon issued for the convicts at Newgate, and then registered at St. John's in August 1752, sometime after which the governor ordered Fielding to be released. See PANL, GN 2/1/A, vol. 1, p. 311 (pardon of William Fielding, 24 March 1752), p. 312 (Holderness to Drake, 28 March, 1752).

recently-appointed governors were apparently unaware of the actions taken by their predecessors. Second, the British government was itself somewhat unsure of how to conduct the island's pardon process. Holderness was evidently not properly informed of the legal powers given to the island's governor. The root of this problem was the relative infrequency of requests to consider the cases of offenders reprieved in Newfoundland: from 1755 to 1770, for example, no cases whatsoever were referred to the British government. Individual initiative of officials in both London and Newfoundland acquired a greater importance, therefore, because the procedure for granting pardons never became clearly established. In effect, the lack of consistency in the pardon process further enhanced the governor's discretionary authority.

For some offenders the pardon process was as much punishment as it was mercy. For example, in the aftermath of the first executions in Newfoundland in 1754, Governor Bonfoy reprieved five of the nine persons convicted for the murder of William Keen, the island's senior civil magistrate. Before sailing from St. John's, Bonfoy sent a dispatch to the Board of Trade reporting that he would convey the full transcript of the offenders' trial when he arrived in England.¹¹ He did not, as his

¹¹ *R. v. McGuire et al.*, 1754 Assizes. See also PANL, CO 194/13, p. 209 (Bonfoy to Halifax, 13 October 1754). Bonfoy enclosed the deposition of Nicholas Tobin, one of the conspirators in the botched burglary, who had turned king's evidence, upon whom the prosecution

predecessors had done, contact the Secretary of State and – perhaps due to bureaucratic confusion – no action was taken during the winter of 1754-55.¹² Bonfoy's successor reported that on his arrival he discovered that five men lay under sentence of death: having no orders on how to proceed, he decided to keep them in jail for another year.¹³ No governor was appointed for Newfoundland in 1756, and the offenders were not released until September 1757.¹⁴

Despite its ostensible confusion, the judicial process worked according to design. Mercy and terror equally reinforced the rule of law and the established social order.¹⁵ From 1754 to

relied.

¹² In 1752 the British government had ordered that all regular correspondence should be sent only to the Board of Trade. Copies of the March 1752 order-in-council and the accompanying instructions were registered locally (PANL, GN 2/1/A, vol. 1, pp. 313-18). It is doubtful whether Bonfoy's October 1754 report was ever forwarded to the Secretary of State: the original letter is cited as received on 18 November 1754, but the date of reading at the Board of Trade is left blank. Bonfoy's full report (dated 21 February 1755) was eventually read at the Board of Trade on 29 March 1755. See PANL, CO 194/13, pp. 153, 212.

¹³ PANL, CO 194/13, p. 194 (Dorrill to Board of Trade, 22 January 1756).

¹⁴ In May 1757 the British government issued a pardon and sent it to the new governor, Captain Richard Edwards. Finally, on 3 September 1757, Governor Edwards ordered the five men to be released from custody. See PANL, GN 2/1/A, vol. 2, p. 308-09 (copy of the pardon of Laurence Lamley, Paul McDonald, John Moody, John Munhall, and Dennis Hawkins, 10 May 1757), p. 310 (Holderness to Edwards, 14 May 1757), p. 308 (Governor's orders, 3 September 1757).

¹⁵ On the power of mercy, see Hay, "Property, Authority, and the Criminal Law," pp. 40-49; Garland, *Punishment and Modern Society*, pp. 16-22; Carolyn Strange, "Introduction," in C. Strange, ed., *Qualities*

1757 for example, the judiciary accurately reflected fears generated by the most infamous crime ever to occur in early Newfoundland. Even before the one woman and eight men – four of whom were soldiers – were convicted of murder, the courts had registered the seriousness of the offence. Prior to their trial, the court heard a petition from the commissioners of oyer and terminer which alleged that, because of the outrages committed by the soldiers, the townspeople were “constantly in fear of their lives.” The judges asked Governor Bonfoy to deport those soldiers identified as troublemakers and to keep the others confined to their garrison as much as possible.¹⁶ Although St. John’s had no local press, officials and residents had ample means to communicate their sentiments in public.

Bonfoy ordered the five respited men to be dealt with in a manner similar to the four offenders hanged after the close of the assize session. As the warrant sent to the high sheriff demonstrates, mercy mitigated punishment but not guilt:

[A]s I have thought fit to respite the execution of Lawrence Lamley, Paul McDonald, John Moody, John Munhall and Dennis Hawkins, until his Majesty’s Royal Will and Pleasure be known therein, you are therefore hereby required and directed to repair on board His Majesty’s Ship *Penzance* [the governor’s flagship, where they had been confined] at 11

of Mercy: Justice, Punishment, and Discretion (Vancouver: University of British Columbia Press, 1996), pp. 6-18.

¹⁶ Bonfoy did not accede to the request since it was beyond his powers to deport soldiers convicted of no crime. See PANL, CO 194/13, pp. 162-63 (petition of commissioners of oyer and terminer, 19 September 1754).

o'clock this morning and take [them] under your charge ... and to proceed with them in the same manner as you did with the others executed, until you come to the gaol, when you are to cause Lawrence Lamley and Paul McDonald to be put therein, and to deliver up John Moody, John Munhall and Dennis Hawkins to the officer appointed to receive them, in order to their being confined in the garrison.¹⁷

The men were probably led in a procession under guard from the dockside along the waterfront street known as the Lower Path at a time calculated to attract as many townspeople as possible. Emanating from the commodore's flagship – the figurative and literal source of power – this ceremony doubtless made a deep impression because St. John's had witnessed the island's first hangings over the previous two days.¹⁸ Three years later, the fate of the five offenders was still a public event. When Governor Edwards conveyed the pardon to Newfoundland, it was publically read at the St. John's court house, and a group of prominent citizens successfully petitioned Edwards to deport the men from Newfoundland.¹⁹

¹⁷ PANL, GN 2/1/A, vol. 2, p. 183 (Bonfoy to William Thomas, 12 October 1754).

¹⁸ The question of how the target audience themselves – i.e. the plebs, who in this case were overwhelmingly indentured servants – viewed such messages is, of course, extremely difficult to answer. For the view of mercy as public theatre designed nakedly to reinforce political power, see V.A.C. Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford: Oxford University Press, 1994), pp. 543-54. On the contentious question of cultural hegemony generally and the social face of deference toward legal authority, see Thompson, *Customs in Common*, pp. 87-96.

¹⁹ PANL, GN 2/1/A, vol. 2, pp. 308-10.

The operation of the pardon process depended largely upon the governor's initiative. This wide latitude of discretionary authority reached the extremities of caution and efficacy in 1777 and 1784: in the former instance, the British government refused to consider the cases of two offenders, convicted of burglary and forgery, whom Governor Montagu had reprieved; in the latter, Governor Campbell independently granted a free pardon to a woman convicted of murder. These cases demonstrate that the aftermath of the Keen murder represented the exception rather than the rule: most governors were reluctant to order executions. If there appeared to be any circumstances favourable to an offender, the commissioners of oyer and terminer encouraged the governor to dispense mercy without equivocation.

The problem Governor Montagu faced in 1777 was essentially of his own creation. At the assizes held in October 1776 three men – John Cox, Lawrence Hallahan, and Lawrence Dalton – were sentenced to death.²⁰ Cox had been convicted of burglary, while Hallahan and Dalton were both found guilty of forging bills of exchange. Within a week of the assizes, Governor Montagu granted a free pardon to Dalton, who was then released without any conditions, but issued reprieves to Cox and Hallahan. Montagu chose to treat the offences differently despite the fact that he

²⁰ *R. v. Cox, R. v. Hallahan, and R. v. Dalton, 1776 Assizes.*

had the power to pardon all three felonies.²¹ Why he pursued this course of action remains unclear, but the seriousness of the two offences presumably dissuaded him from granting free pardons.²² In his report to London, Governor Montagu left the fate of Cox and Hallahan up to the British government.²³

The Secretary of State informed him that the cabinet had approved the free pardon granted to Dalton but refused to consider the cases of Cox and Hallahan. Pointedly reminding the Newfoundland governor of his power to grant full pardons in such cases, Lord George Germain told Montagu to care take of the matter himself.²⁴ Germain arranged for Dalton's pardon to be passed under the Great Seal - a moot point, since Dalton had already been a free man for five months - and Governor Montagu was left with no choice but to deal with Hallahan and Cox when he

²¹ PANL, GN 2/1/A, vol. 6, pp. 172-73.

²² Cox had committed two separate burglaries, during which he had stolen several pounds worth of personal property; Halluran had confessed to forging three notes, together valued over £20, before the trial jury returned its verdict. Montagu could have issued pardons on condition of a secondary punishment such as transportation. The decision not to do so may have arisen because the option of transportation to America had ended with the recent outbreak of the Revolutionary War.

²³ PANL, CO 194/33, pp. 11-12 (Montagu to Germaine, 12 November 1776). Montagu had wasted little time: he wrote from HMS *Romney* as it lay at anchor at Spithead, before he had received a leave of absence to visit London.

²⁴ PANL, CO 194/33, p. 72 (Germaine to Montagu, 21 January 1777).

returned to Newfoundland the following summer.²⁵ Montagu granted Cox a free pardon and sent the high sheriff a warrant for the execution of Hallahan.²⁶

Seven years after the British government had reprimanded Montagu for not exercising his full legal prerogative, Governor Campbell actually exceeded the powers conferred by his instructions. At the 1784 assizes Sarah Spry was convicted of murdering her child.²⁷ The case did not come under the 1624 Infanticide Act because Spry was married; instead, she had been tried for the common law offence of murder. In order to secure a conviction in such cases, the prosecution had to demonstrate that the child had been born alive and the mother had deliberately killed it.²⁸ The trial jury nevertheless found Spry guilty and the court sentenced her to death. Governor Campbell faced two

²⁵ PANL, CO 194/33, p. 79 (Montagu to Germaine, 5 February 1777), p. 104 (Montagu to Germaine, 26 February 1777), p. 112 (Germaine to Montagu, 21 February 1777).

²⁶ To justify his actions, Montagu informed London that Hallahan had been a hardened offender. See PANL, GN 2/1/A, vol. 6, p. 194 (warrant for the execution of Lawrence Hallahan, 10 May 1777), p. 195-96 (free pardon given to John Cox, 10 May 1777); CO 194/33, p. 133 (Montagu to Lord Germaine, 11 June 1777).

²⁷ *R. v. Spry*, 1784 Assizes.

²⁸ On the prosecution of infanticide, see R.W. Malcolmson, "Infanticide in the Eighteenth Century," in J.S. Cockburn, ed., *Crime in England, 1550-1800* (London: Methuen, 1977), pp. 187-209; Allyson May, "'She at first denied it': Infanticide Trials at the Old Baily," in Valerie Frith, ed., *Women and History: Voices of Early Modern England* (Toronto: Coach House Press, 1995), pp. 19-25. On patterns in Canada, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society & Women's Press, 1991), pp. 112-39.

clear choices – issue a warrant of execution or a reprieve – but decided to pursue a third course. Directly disobeying his instructions, he granted Spry a pardon.

In this case, the type of offence shaped how mercy was administered. According to the pardon issued by the governor, Spry had killed a bastard child, and the fact that she had committed adultery had likely precipitated her conviction in the first place. She also confessed that she had delivered the child; this compounded her culpability because it removed doubts over whether the child had been stillborn. These two incriminating factors probably had induced the magistracy to charge Spry with murder and not a misdemeanour offence, such as public nuisance, for which similar cases were tried in the district courts.²⁹ As the only indictment and conviction for infanticide throughout the period under study, this had been an atypical murder case from the outset.³⁰

The commissioners of oyer and terminer recommended that Spry not be executed. They asserted that the only positive evidence that she had given birth to the child and had killed it was her own confession. They further pointed out that, although she was

²⁹ The prosecution of infanticide as public nuisance is discussed in Bannister, "Surgeons and Criminal Justice," pp. 125-26.

³⁰ Unfortunately, the only surviving evidence is the governor's pardon, in which he comments on the case and the subsequent report of the commissioners of oyer and terminer. See GN 2/1/A, vol. 10, p. 112 (pardon of Sarah Spry, 23 October 1784).

guilty of covering up the birth, this was not serious enough to justify capital punishment. The emphasis on concealment indicates that the bench viewed the offence primarily under the terms of the Infanticide Act³¹ – which singled out concealing a child's birth as the pivotal criterion for proving guilt – and not the common law offence of murder. Although the court had sentenced Sarah Spry to death, the bench did not necessarily consider her to be guilty of a capital felony. As John Beattie has demonstrated, by the late eighteenth century women were almost never hanged for committing infanticide. In England a shift in sentiment generally, and in attitudes toward infanticide in particular, had produced a legal culture in which it was no longer acceptable to execute a woman for killing an infant.³² Placed in this context, Governor Campbell's decision to exceed his judicial powers appears to have been a considered judgment. Spry may have been technically guilty of murder, but both the

³¹ 21 Jas. I, c. 27 (1624).

³² Beattie, *Crime and the Courts in England*, pp. 118-24. Beattie pursues his argument on cultural sentiment further in "Violence and Society in Early-Modern England," in A.N. Doob and Edward Greenspan, eds., *Perspectives in Criminal Law: Essays in Honour of John Edwards* (Aurora, Ontario: Canada Law Books, 1985), pp. 36-60. The widely-accepted notion of an eighteenth-century transition in attitudes toward punishment is rooted in the seminal work of Norbert Elias, and has been critically reassessed by David Garland. See N. Elias, *The Civilizing Process, Volume 1: The History of Manners* (Oxford: Blackwell, 1994 reprint of 1939 ed.); Garland, *Punishment and Modern Society*, ch. 10.

bench and the governor chose to treat her case pragmatically and to avoid the long delay which a reprieve would entail.

The flexibility of the pardon process also allowed governors to refer problematic cases to the British government. At the 1790 court of oyer and terminer, Cornelius Bryan, an Irish fishing servant, was tried for the murder of his master, Henry Brooks.³³ The homicide had taken place while they were working aboard a banker sailing in Trepassey Bay. During the trial one of the crewmen gave eye-witness testimony of how Bryan had brutally murdered Brooks with a hatchet, thrown the body overboard, and fled to St. Pierre. The trial jury found him guilty, the court condemned him, and the sentence stipulated that his body be hung in chains after the execution. The commissioners of oyer and terminer did not recommend a reprieve, leaving Governor Milbanke to decide Bryan's fate. Milbanke chose to let the law take its course, but had doubts whether the murder had occurred within the jurisdiction of Newfoundland or on the high seas.³⁴ If the crime had taken place more than three miles offshore, it would be within the jurisdiction of the British Admiralty, and Bryan would have to be re-tried in England before an Admiralty Court.³⁵

³³ *R. v. Bryan*, 1790 Assizes.

³⁴ PANL, GN 2/1/A, vol. 12, pp. 98-99 (Milbanke to Henry Philips, 29 October 1790).

³⁵ On the Admiralty Courts, see Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* (Cambridge: Cambridge University Press,

Milbanke granted Bryan a reprieve and asked the British government to rule whether the case lay within the cognizance of the Newfoundland assizes.³⁶ The government's lawyers reported that they were unable, on the basis of the trial transcript, to determine where the homicide had taken place. It is, in fact, curious that Governor Milbanke had neglected to order the local justices of the peace to investigate precisely where the offence had been committed before writing to the Secretary of State. Judging from the trial transcript, it is highly unlikely that the banker had been more than a few miles off the Newfoundland coast. Henry Dundas, the Home Secretary, directed Milbanke to conduct an inquiry to ascertain the location of the offence. Dundas advised that if it had occurred within the island's jurisdiction, "the nature of this man's case seems to His Majesty to be such as to make it necessary for the sake of Publick Justice that his sentence should be carried into immediate execution."³⁷ If it had taken place on the high seas, then the prisoner and the witnesses were to be brought to England as soon as possible.

Though it followed the profile of the pardon process, the reprieve of Bryan did not function as an act of mercy. He was

1987), pp. 312-17.

³⁶ PANL, CO 194/38, pp. 209 (Milbanke to Grenville, 28 November 1790).

³⁷ PANL, CO 194/38, pp. 234-35 (Dundas to Milbanke, 15 July 1791).

allowed to live another year merely because Governor Milbanke wanted to solicit guidance from the British government.³⁸ Armed with unequivocal instructions, Milbanke ordered John Reeves, the island's recently-appointed chief justice, to prepare a report on the Bryan case. Reeves viewed the jurisdictional problem to be a relatively minor concern: he declared that he could find no evidence that the offence had taken place on the high seas.³⁹ More important was the "wish of the people of the place," as well as a recent grand jury presentment, both of which called for Bryan's execution. He recommended that the law take its course, and Bryan was hanged in October 1791.⁴⁰

The Selection of Offenders

Why were some offenders granted mercy while others were punished? As in Georgian England and British colonies such as Nova Scotia, post-conviction decision-making was highly

³⁸ Governor Milbanke took the unusual step of formally acknowledging Dundas's letter before sailing from Portsmouth. Milbanke had been a highly decisive administrator in nearly every other matter he faced as governor: the evident reticence he showed in handling the Bryan case may have been due to the fact that Newfoundland had not seen a public hanging for over a decade. See PANL, CO 194/38, p. 236 (Milbanke to Dundas, 17 July 1791).

³⁹ PANL, CO 194/38, pp. 274-75 (Reeves to Milbanke, 20 October 1791).

⁴⁰ PANL, GN/2/1/A, vol. 12, p. 99 (warrant for the execution of Cornelius Bryan, 26 October 1791).

discretionary.⁴¹ "Discretion" in this sense refers to the deliberate calibration of punishment by judges and government ministers. It does not denote the type of crude bigotry portrayed in V.A.C. Gatrell's recent monograph. For Gatrell, English justice was little more than a corrupted sham marked by mayhem in the courtroom and mediocrity on the bench.⁴² The evidence from the court proceedings in Newfoundland confirm the earlier, more sophisticated model proposed by E.P. Thompson. According to Thompson, criminal justice was not a blunt weapon of class oppression but rather a finely-tuned instrument, rooted in social relations yet operated in large measure within the confines of the rule of law.⁴³

In eighteenth-century Newfoundland, the post-conviction deliberations were particularly critical because of the limited time between the end of the assizes and the departure of the governor. During this brief period, which rarely exceeded three weeks, governors had not only to decide which offenders to reprieve, pardon, and punish; they also had to make all of the

⁴¹ On the role of discretion in this process, see Peter King, "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800," *Historical Journal* 27 (March 1984), pp. 37-48; Phillips, "Royal Pardon in Nova Scotia," pp. 407-10, 439-49.

⁴² Gatrell, *The Hanging Tree*, chs. 18-20.

⁴³ E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (2nd ed. London: Penguin, 1977), esp. pp. 258-69. For an approach that effectively builds upon Thompson's model, see David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), esp. pp. 189-97.

necessary arrangements such as building a gallows and to oversee the execution of the sentences. In the meantime, the convoy of fishing ships had to be organized and the naval squadron provisioned for the Atlantic crossing. It is not surprising that petitions for clemency never figured prominently. Interested parties - especially those living in the outports - would have had little time to compile a petition. Prior to 1792, the governor received only one written request to pardon an offender. Governors acted decisively in most areas within their jurisdiction and their circumspection in handling cases of convicted felons appears on the surface to be at odds with the general tenor of the naval state. In the absence of an executive council to confer with, governors had to rely on the justices and, after 1779, the permanent civil secretary. The commissioners of oyer and terminer were empowered only to issue an advisory report and did not meet formally with the governor. Governors were therefore solely responsible for the decision of whether to hang an offender.

The legal culture which the governors brought with them from their experiences as career naval officers undoubtedly affected their attitudes toward punishing offenders. Compared to civilian courts, the rate of executions ordered by naval courts martial was remarkably lenient. Despite the wide range of capital offences enforceable under the royal navy's penal code, most executions were for murder or sodomy. Property offences and other

serious crimes, such as desertion, rarely attracted the death penalty: three-quarters of those sentenced to death for desertion were pardoned. According to N.A.M. Rodger, officers showed a marked reluctance to hang sailors, preferring instead to use floggings where possible. Rodger argues that this legal culture formed "an organic response to the nature of life at sea," one which officers were unlikely to abandon in a familiar maritime environment such as Newfoundland.⁴⁴ Extensive work by John Byrn on the Leeward Islands station confirms Rodger's findings.⁴⁵ The trend toward leniency did not carry over to corporal punishments, which were a fixture of shipboard life.⁴⁶ Left to decide the fate of an offender who would probably not be hanged in the Georgian navy, governors exercised caution.

The use of pardons did not signify inaction or a lapse in authority. Mercy was a highly calculated tool used to reinforce

⁴⁴ Rodger, *Wooden World*, pp. 218-29 [quotation at p. 229]. On the structure of the navy's penal regime, and the changes it underwent during the Napoleonic Wars, see Brian Lavery, "Introduction," in Lavery, ed., *Shipboard Life and Organization*, pp. ix-xv.

⁴⁵ John Byrn, *Crime and Punishment in the Royal Navy: Discipline on the Leeward Islands Station, 1784-1812* (Aldershot: Scolar Press, 1989), ch. 3 & appendix D. Greg Denning argues that Byrn underestimates the frequency of whipping in the royal navy, though he does not question the rate of executions ordered by courts martial. See Denning, *Mr. Bligh's Bad Language*, pp. 113-16 & 377-96.

⁴⁶ The use of naval-style whipping in the district courts is discussed below, in Chapter 7.

the authority of the island's government.⁴⁷ In a largely illiterate society, such as eighteenth-century Newfoundland, mercy represented what Rhys Isaac has termed a "ritual for memorization," for it reaffirmed both the symbolic and the material social order through the invocation of the king's will and pleasure.⁴⁸ The ceremonial procession of the men pardoned for Keen's murder in 1754 formed a public statement that the only difference between those granted mercy and those on the scaffold was the governor's benevolence.

Such potent messages were not restricted to cause célèbres. In 1773, for example, Governor Shuldham commuted the death sentences of two men and one woman – all of whom had been convicted of theft – to a seven-year term of transportation.⁴⁹ In the warrant to the high sheriff, Shuldham stipulated: "you are to cause them to be carried under the gallows with halters about their necks, [and] this order to be read to them."⁵⁰ The

⁴⁷ This is not to suggest any sort of Durkheimian model of punishment as the embodiment of society's moral order. In the first place, whose morality was at stake is entirely unclear and Durkheim's holistic approach does not fit the island's highly stratified society. Whether "society" was actually bound together or rent apart by the actions of the penal regime matters less than the fact that punishment and mercy were calculated to allay the fears of the governor, the magistrates, and the propertied interests they sought to protect. On Durkheim see Garland's reappraisal in *Punishment and Modern Society*, chs. 2-3.

⁴⁸ See Rhys Isaac, *The Transformation of Virginia, 1740-1790* (New York: Norton, 1982), esp. pp. 90-94.

⁴⁹ *R. v. Burk et al.*, 1773 Assizes.

⁵⁰ PANL, GN 2/1/A, vol. 5, pp. 185-86 (Shuldham to Jonathan Phillips, 9 October 1773).

spectacle of the scaffold was not restricted to actual hangings, therefore, but stood as a broader metaphor for justice: the terror of physical suffering could be effectively invoked through mercy as well as punishment.⁵¹ The decision of whom to hang and to pardon – and, as we will see, the fate of the corpses of executed offenders as well – belonged exclusively to the crown.

These choices hinged on the twin factors of the perception of the offence and the offender. The character of the offender and the threat the crime posed to the social order comprised the most important criteria: only if both were sufficiently serious – i.e. they had crossed the threshold of fear that separated an offender befitting mercy from one deserving execution – would the governor sign an execution warrant.⁵² Class played a major role in this selection process, but it cannot alone account for the specific ways in which the colonial state dispensed mercy to

⁵¹ On the spectacle of the scaffold, see Michel Foucault, *Discipline and Punish: The Birth of the Prison*. Alan Sheridan, trans. (New York: Random House, 1977), pp. 32-69; Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression, from a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press, 1984).

⁵² As Jim Phillips notes, John Beattie's work on the royal pardon has alternated somewhat between affording primacy to the nature of the offence and the character of the offender. Evidence from the Newfoundland assizes suggests that the two factors were, in fact, symbiotic and cannot be easily separated. See Beattie, *Crime and the Courts in England*, pp. 430-49, and "Cabinet and the Management of Death," pp. 230-31; Phillips, "Royal Pardon in Nova Scotia," p. 408-9.

individual offenders.⁵³ The majority of capital offenders, as well as the resident population generally, were indentured servants. Unless a servant had committed a crime directly against his or her master, the government had to rely upon essentially intra-class issues in its deliberations. In most cases, the governor noted only that "some favourable circumstances" had come to his attention, prompting him to rule against allowing "the law to take its course," which was the favoured euphemism for ordering an offender to be executed.

Women and Criminal Justice

As in Georgian England, women in Newfoundland were significantly more likely to be granted mercy than men. John Beattie argues that the reluctance to subject women to the full rigor of the law was not the result of chivalry in any real

⁵³ The relationship of offenders to the means of production cannot be used as an automatic or direct index either to their propensity to commit specific offences (whether as a form of proto-political protest or in defense of custom), or the type and rate of punishments imposed by the courts. However, examples of this reductionist approach, in particular Peter Linebaugh's study of crime and punishment in London, do not abrogate the need to consider class as a crucial factor in decision-making, in spite of attempts by John Langbein to paint all social history with the same brush. See, *inter alia*, John Langbein, "Albion's Fatal Flaws," *Past and Present* 98(1983), pp. 96-120; Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London: Penguin, 1991); John Langbein, "Culprits and Victims," *Times Literary Supplement* (11 October 1991), p. 27. For a somewhat balanced perspective, see Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," in Adrian Wilson, ed., *Rethinking Social History: English Society, 1570-1920 and its Interpretation* (New York: St. Martin's Press, 1993), pp. 201-65.

sense, but rather a reflection of the fact that women posed a less serious threat than men.⁵⁴ Beattie's model is borne out in the evidence for Newfoundland, where women comprised a tenth of the total accused tried at the assizes. Women seem to have been treated less harshly in the island's courts than they were in contemporary Halifax, though the number of cases is too small to draw any firm conclusions.⁵⁵ Of the nine women brought to trial in Newfoundland, six were found guilty, five were sentenced to death, and one was hanged.⁵⁶ Only two women received secondary punishments: Margaret Penny and Winnifred Ryan (alias Burk) were both sentenced to seven-year terms of transportation; Penny had been sentenced for receiving stolen goods in 1751, while Ryan had been condemned for theft and given a conditional pardon in 1773.

⁵⁴ This does not mean that women were not prosecuted vigorously for property offences, particularly simple larceny. Beattie points out that from 1690 to 1720 women made up about half of the total defendants at the Old Bailey in London. The point is they were typically convicted of offences that involved no serious violence and little direct confrontation with a victim. See Beattie, *Crime and the Courts in England*, pp. 436-39; idem, "The Criminality of Women in Eighteenth-Century England," *Journal of Social History* 8 (1975), pp. 80-116; idem, "'Hard-pressed to make ends meet': Women and Crime in Augustan London," in Frith, ed., *Women and History*, pp. 103-07.

⁵⁵ Jim Phillips has found a limited gender gap in convictions for capital offences (19% of women and 33% of men), and rough parity for noncapital offences (49% and 43% respectively). See Jim Phillips, "Women, Crime, and Criminal Justice in Early Halifax, 1750-1800," in Jim Phillips, Tina Loo, and Susan Lewthwaite, eds., *Essays in the History of Canadian Law, Volume Five: Crime and Criminal Justice* (Toronto: The Osgoode Society, 1994), pp. 174-96.

⁵⁶ See *R. v. Penny and Penny*, 1751 Assizes; *R. v. Coffin*, 1752 Assizes; *R. v. McGuire, et al.*, 1754 Assizes; *R. v. Power and Shea*, 1759 Assizes; *R. v. Power and Fling*, 1772 Assizes; *R. v. Burk et al.*, 1773 Assizes; *R. v. Shea*, 1782 Assizes; and *R. v. Stry*, 1784 Assizes.

No woman was ever sentenced to public whipping, either at the assizes or the district courts, though many informal punishments were likely carried out in local communities.⁵⁷

References to women being punished occasionally appear in private records. For example, in his personal diary for March 1762, Benjamin Lester, one of the Trinity justices of the peace, noted an incident that never appeared in any court record: "Fine mild Weather ... James Terril & Jonah Moores came over to complain of their Men, & Harvey's Wife. I ordered them to Duck her."⁵⁸ It is entirely unknown how common such punishments were — there are no other known instances of women being ducked underwater as punishment — since they were unlikely to be considered serious enough to warrant entry in a justice's minute-book.⁵⁹ Lester's remarks provide a glimpse of the customs that operated alongside English criminal law but were rarely recognized by the courts. The extent to which magistrates

⁵⁷ In both Georgian England and Nova Scotia, women convicted of petit larceny were whipped. In Halifax the whipping of women was no longer public by the 1780s but was still inflicted as late as 1791. In London the corporal punishment of women was not uncommon but declined markedly in the late eighteenth century. See Phillips, "Women, Crime, and Criminal Justice," p. 182; Smith, "The Decline of Physical Punishment in London," in Strange, ed., *Qualities of Mercy*, pp. 37-41.

⁵⁸ Lester Diary Mss., undated entry for March 1762.

⁵⁹ On the regulation of women, see Sean Cadigan, "Whipping Them into Shape: State Refinement of Patriarchy among Conception Bay Fishing Families, 1787-1825" in Carmelita McGrath, Barbara Neis, and Marilyn Porter, eds., *Their Lives and Times: Women in Newfoundland and Labrador* (St. John's: Killick Press, 1995), pp. 48-59.

employed such customary laws cannot be estimated with any accuracy.

In some instances women did commit transgressions that attracted the government's attention. In 1757 Eleanor Moody was banished from the island for being a nuisance and, in 1771, the fishing admirals at Fogo were ordered to admonish Mary Bond for being a disorderly woman.⁶⁰ Women who committed such moral offences were, as Jim Phillips argues, seen as doubly deviant, in the sense that they had contravened both the criminal law and their prescribed gender role.⁶¹ It is not surprising that Eleanor Power was the only women ever executed: she had joined an all-male gang with her husband and dressed in men's clothing the night of Keen's murder. Similarly, both Margaret Penny and Winnifred Ryan had committed their offences with male accomplices, thereby drawing themselves into the public sphere dominated by men.

The underlying reason why females comprised such a small proportion of offenders punished at the assizes was the dearth of women in eighteenth-century Newfoundland. According to Grant Head, the island was unusual among all British North American societies for its abnormally low percentage of women.⁶² Dominated

⁶⁰ PANL, GN 2/1/A, vol. 2, p. 368 (1757), vol. 5, p. 4 (1771).

⁶¹ Phillips, "Women, Crime, and Criminal Justice," p. 184.

⁶² Head, *Eighteenth Century Newfoundland*, p. 145.

by young, single men, the migratory fishery produced little demand for women's labour: families did not become the standard social unit until permanent, year-round settlement grew significantly in the late eighteenth century.⁶³ Prior to 1750, women made up roughly fifteen per cent of the total population; that proportion grew to twenty-one per cent in 1775 and to thirty-eight per cent in 1795.⁶⁴ The increase in the number of women, most of whom were Catholics from the Waterford area, sparked fears that the island's Irish servants would become an entrenched, cohesive community that would threaten the interests of the Protestant elite. In response, in 1764 the government ordered that no shipping master could land an Irishwoman without first providing security for her good behaviour. And in 1777 the governor issued a proclamation forbidding any woman to be brought

⁶³ On women in the fishery, see Marilyn Porter, "'She was Skipper of the Shore-Crew': Notes on the History of the Sexual Division of Labour in Newfoundland," in McGrath, et al., eds., *Their Lives and Times*, pp. 33-47; Dona Lee Davis, "'Shore Skippers and 'Grass Widows': Active and Passive Women's Roles in a Newfoundland Fishery," in Jane Nadel-Klein and Dona Lee Davis, eds., *To Work and to Weep: Women in Fishing Economies* (St. John's: Institute of Social and Economic Research, 1988), pp. 211-30; Cadigan, *Merchant-Settler Relations*, ch. 4; Handcock, *Origins of English Settlement*, pp. 31-32.

⁶⁴ Adult resident population, selected years:

<u>Year</u>	<u>Masters</u>	<u>Men Servants</u>	<u>Mistresses</u>	<u>Women Servants</u>
1725	324	1764	235	68
1750	850	5413	609	310
1775	1396	5722	990	512
1795	2042	5021	1896	792

Source: Ryan, *Newfoundland Consolidated Census Returns*, pp. 27, 46, 67.

from Ireland to Newfoundland, but such efforts at social regulation proved ineffective.⁶⁵

The pressure on the courts to provide protection against male violence increased as the female population expanded. For example, in 1773 Bridget Kent petitioned Governor Shuldham for redress for the ill treatment she had received during her passage from Ireland. Four years later Governor Montagu revoked the liquor license of John Phillips, a publican, for beating a black servant-girl.⁶⁶ The presence of women in the fishery also prompted moves toward greater regulation: in 1780 Governor Edwards sent a proclamation to the justices in each district condemning the incidence of "rude behaviour to women of boat's crews employed in jigging squid."⁶⁷ But there was no substantive campaign to institute moral regulation formally until the emergence of a bourgeois public sphere and a local reform movement after 1815.⁶⁸ Two generations after Irishwomen had been banned from coming to Newfoundland, Patrick Morris, a prominent

⁶⁵ PANL, GN/2/1/A, vol. 3, p. 230 (1764), vol. 7, p. 35 (1777).

⁶⁶ PANL, GN 2/1/A, vol. 5, p. 74 (1773), vol. 7, p. 123 (1777).

⁶⁷ PANL, GN/2/1/A, vol. 9, p. 27 (1780).

⁶⁸ On the model of separate spheres, see Janet Guildford and Suzanne Morton, "Introduction," in J. Guildford and S. Morton, eds., *Separate Spheres: Women's Worlds in the 19th-Century Maritimes* (Fredericton: Acadiensis Press, 1994), pp. 9-21. To what degree this approach applies to nineteenth-century Newfoundland remains uncertain: there is a pressing need for a historical study of the roles of women in the island's public discourse. The issue of gender and the reform movement is discussed briefly in Bannister, "Campaign for Representative Government," p. 30.

Irish Catholic reformer, cited the crucial role women played in keeping the fishery productive and its men virtuous.⁶⁹ Prior to the 1790s women remained a minor juridical and penal concern simply because they did not yet occupy a large segment of the island's society.

Women who were convicted of capital offences encountered contradictory responses from the jury and the bench. As we saw with the case of Sarah Spry, a guilty verdict could be effectively overturned during the pardon process; for the magistracy and the governor, moral transgressions did not constitute sufficient grounds on which to execute a woman. This disparity between the trial and post-conviction stages is clearly evident in the case of Mary Power.⁷⁰ Along with Robert Fling, who was rumored to be her lover, Power was charged with murdering her husband at Trinity in May 1772. During the funeral of the victim, Maurice Power, the rector noticed that the corpse had marks of violence on it; he promptly stopped the service and notified D'Ewes Coke, who was then working as a surgeon in

⁶⁹ Patrick Morris, *Remarks on the State of Society, Religion, Morals, and Education at Newfoundland* (London: A. Hancock, 1827), pp. 13-14.

⁷⁰ *R. v. Power and Fling, 1772 Assizes.*

Trinity.⁷¹ Coke performed a post-mortem, convened a jury to view the body, and sent a full report to Governor Shuldham.⁷²

From the outset of the criminal investigation, Mary Power's scandalous reputation figured prominently. Without eye witnesses, authorities had to rely upon circumstantial evidence and the character of the accused and her accomplice. As Coke's report summarized,

First, the wife having been known to have had great differences with him and to have left him night after night, and gone with a gallant to lodge at other houses, declaring she would no longer live with him (the husband)... [lastly] the man who cohabited with her was seen about the house the same morning very early, and upon being told that she had murdered her husband replied 'he did not wonder at it.'⁷³

Medical evidence was not introduced at the trial – apparently unable to make the voyage from Trinity to St. John's, Coke and the jurors did not attend the trial – and the prosecution's case against Power hinged on her disreputable behaviour. The jury found her guilty but acquitted Fling, who was deported from Newfoundland for his part in the affair.

Power was suspected of being pregnant, however, and the court ordered a jury of women to conduct a physical examination.

⁷¹ Report of Rev. James Balfour, 12 October 1772, in *United Society for the Propagation of the Gospel Calendar of Letters*, p. 150.

⁷² The case is discussed in Bannister, "Surgeons and Criminal Justice," p. 114.

⁷³ PANL, GN 2/1/A, vol. 5, pp. 15-22 [quotation at p. 18].

This process was essentially the same as that practiced in England, where a woman would be examined by a jury of matrons after "pleading her belly."⁷⁴ Three days after being sentenced to death, Mary Power was examined by three women, sworn to serve as a jury, who gave their verdict at the court house. According to their report, Power was about five months pregnant, and the commissioners of oyer and terminer recommended that the governor grant her a reprieve.⁷⁵ In theory, pregnant women were to be confined in jail and executed after giving birth; in practice, few women were ever hanged after the termination of their pregnancy.⁷⁶ Given the rate of pardons granted in Newfoundland, it is highly unlikely that Power would have been executed once it was known she was pregnant.

When Governor Shuldham issued a reprieve, he cited not only Power's pregnancy, but also the apparent lack of evidence of her guilt. He noted that the commissioners of oyer and terminer had reported that there existed no positive proof that Power had committed the murder.⁷⁷ It is uncertain whether the commissioners

⁷⁴ Beattie, *Crime and the Courts in England*, pp. 430-31; James Oldham, "On Pleading the Belly: A History of the Jury of Matrons," *Criminal Justice History* 6 (1985), pp. 1-64.

⁷⁵ PANL, CO 194/30, pp. 135 (report of Elizabeth Fleming, Susanah Eales, and Joanna Cheek, 17 October 1772).

⁷⁶ Beattie, *Crime and the Courts in England*, pp. 430-31.

⁷⁷ PANL, GN 2/1/A, vol. 5, p. 147 (Shuldham to commissioners of oyer and terminer, 24 October 1772).

had prepared a separate written report or had met with the governor personally, but the evidence points to the latter.⁷⁸ Although no records or minutes exist of any governor convening a meeting with the commissioners of oyer and terminer, I suspect that they informally discussed the fate of those sentenced to death at the assizes. If this is so, then the magistracy and the governor together may have acted in a manner similar to an executive council.⁷⁹

Criminal Trial and the Determination of Punishment

The concerns raised over Power's culpability bear on the broader question of the link between trial and punishment. It is difficult to discern a direct correlation between the conduct of a criminal trial and the commissioners' report in most cases, but illuminating references occasionally surface. After the 1785 assizes, the commissioners suggested that James Phillips, who had been convicted of theft, should not be allowed to hang. No

⁷⁸ Above their recommendation to Governor Shuldham is a second statement which was crossed out in the original. It repeats most of the final recommendation but also refers to insufficient evidence during the trial. I would speculate that the commissioners deemed it more prudent to present these concerns in person. The trial transcript indicates that the evidence against Power was indeed largely circumstantial. See PANL, CO 194/30, p. 135.

⁷⁹ Governor Shuldham sent Power's dossier to the Secretary of State, who arranged for a free pardon to be issued through the Recorder of London, and she was finally released from prison in June 1773. See PANL, CO 194/31, p. 19 (Dartmouth to Shuldham, 10 April 1773), p. 23 (Shuldham to Dartmouth); GN 2/1/A, vol. 5, p. 155 (copy of royal pardon of Mary Power, 3 April 1773), p. 156 (Shuldham to the high sheriff, 23 June 1773).

transcript of the trial appears to have been compiled; the only surviving reference to Phillips' case is the judges' report. Yet it sheds valuable light on the overlapping and occasionally contentious jurisdictions of the trial jury (questions of fact), the court (questions of law), and the judges and the governor (questions of justice). Discarding the standard formula, the commissioners tacitly acknowledged the injustice of Phillips' death sentence:

It is our duty to recommend to your Excellency's clemency James Phillips now under sentence of Death who from all the circumstances of his case appears less guilty in our opinion than the person admitted in King's Evidence — Your Excellency will also please to observe by our return, that he is strongly recommended by the Jury for mercy.⁸⁰

Three days later Governor Campbell granted Phillips a free pardon. Convicted of theft from a merchant's store, Phillips likely would have been punished with at least a dozen lashes if he had been tried for petit larceny in a district court. Because the judiciary and the governor were unwilling to execute offenders for property offences, those tried locally before justices of the peace or naval surrogates faced a comparatively harsher penal regime.

Where complete court records are available for study, evidence confirms that post-sentencing deliberations were in some instances an extension of the debates that dominated the criminal

⁸⁰ PANL, GN 2/1/A, vol. 10, p. 187 (commissioners of oyer and terminer to Governor Campbell, 8 October 1785).

trial. The case of John Delaney, who was sentenced to death at the 1786 assizes, indicates the degree to which the dynamics of the courtroom could affect the pardon process. Charged with fatally beating his wife, who died three weeks after the assault, Delaney was tried for murder largely on the basis of medical evidence and character witnesses.⁸¹ No one had seen the accused strike his wife the night of the alleged attack and the prosecution relied heavily on the post-mortem report. Testimony by a surgeon who had treated the victim – and by those who alleged that, on her deathbed, she had blamed her husband – also figured prominently during the trial.

The admittance of dying declarations by victims was an accepted practice both in England and at the Newfoundland assizes. As recently as 1780 such testimony had been allowed in a murder trial, but in the Delaney case the commissioners of oyer and terminer were noticeably stricter in their interpretation of what constituted legal evidence.⁸² The judges gave an unusually direct charge to the trial jury at the 1786 assizes: they raised doubts whether the victim had died of illness, dismissed most of the testimony as mere hearsay, and concluded that the prosecution

⁸¹ *R. v. Delaney, 1786 Assizes*. This case is discussed further in Bannister, "Surgeons and Criminal Justice," pp. 118-21.

⁸² On deathbed declarations at the Newfoundland assizes, see Bannister, "Surgeons and Criminal Justice," pp. 117-32; on the use of such evidence at the Old Bailey in London, see Thomas Forbes, *Surgeons at the Bailey: English Forensic Medicine to 1878* (New Haven: Yale University Press, 1985), pp. 24-25.

had produced no evidence that Delaney had actually beaten his wife "in such a manner as was likely to cause her death." Faced with what amounted to a direct command from the bench, the jurors asked the court to clarify the status of the hearsay evidence:

Q: Are we to lay any particular stress upon the declaration of the deceased when upon her death bed?

A: You are to regard that declaration no further than it agrees with the rest of the evidence and is substantiated by other proof; on the other hand great attention is due to that part of the prisoner's proof which tends to contradict and set aside the force of that declaration.

Q: Is the aforesaid declaration of the deceased to be considered as legal evidence?

A: No; of itself it is not legal evidence, and ought to have no weight with you further than you find it supported with other sufficient proof.⁸³

Exercising remarkable independence, the jury found Delaney guilty of murder.⁸⁴

In their report to the governor, the judges denounced the verdict. Referring to the court transcript, they returned to the issue they had vainly pursued during the trial:

That this man did actually beat his wife at the time specified in his indictment and that her death was occasioned by such beating, are points which have not been established by positive and object evidence. But the general tenor of his conduct towards his wife and her declaration

⁸³ *R. v. Delaney*, 1786 Assizes.

⁸⁴ The independence exhibited by the jury in the Delaney case was generally rare in English courts. See T. A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), pp. 283-88.

when on her death bed have no doubt had great weight with the Jury.⁸⁵

This time their efforts had the desired effect. Governor Elliot reprieved Delaney and urged the Secretary of State to arrange for a pardon:

And as many circumstances appear upon the minutes of his trial (particularly in the evidence of Peter Le Breton [the surgeon who treated the deceased] and Patrick Phelan [a priest who ministered to the victim], as well as in the judge's charge to the Jury, and also in their letter to me annexed to the proceedings) which induce me to think that the poor woman fell a victim rather to improper medical treatment than to the ill usage she received from her husband. I beg leave in the most earnest manner to recommend him as a fit object of His Majesty's mercy.⁸⁶

Though highly irregular, Elliot's gratuitous speculation about Le Breton's medical expertise went unremarked by the British government. Delaney was given a free pardon when the governor returned to Newfoundland in July 1787 and supplied with a full account of the property that had been attached upon his commitment for trial.⁸⁷ In effect, the commissioners of oyer and terminer had managed to undo what they deemed an improper verdict.

⁸⁵ PANL, CO 194/ 36, p. 242 (commissioners of oyer and terminer to Governor Elliot, 10 October 1786).

⁸⁶ PANL, CO 194/36, p. 215 (Elliot to Lord Sydney, 24 November 1786). The reprieve of Delaney, dated 13 October 1786, appears at PANL, GN 2/1/A, vol. 11, p. 97.

⁸⁷ PANL, GN 2/1/A, vol. 11, p. 174 (pardon of John Delaney, 13 December 1786), pp. 175-76 (Elliot to the high sheriff, 16 July 1787), p. 183 (order to render account to John Delaney).

Yet, even in this case, in which specific concerns over evidence appear to have guided the decision-making process, the twin issues of the perceived threat of the offence and the offender remained the decisive variables. In the first instance, the fact that Delaney was convicted of beating his wife shaped how the homicide was perceived from the outset. Violence against women appears not to have been viewed as a type of crime serious enough to warrant execution or any of the secondary punishments ordered by the assize court.⁸⁸ Seven men were tried at the St. John's assizes for crimes against women (two for murder and five for rape), five of whom were sentenced to death. Only one offender was ever punished – John Stackebald was executed for rape in 1762 – and, as we will see, the governor ordered Stackebald to be hanged for reasons that had little to do with the crime for which he was indicted. The fact that three men were convicted of rape indicates that sympathy among jurors toward female victims may not have been atypical, though it may also have reflected the fact that two of the three offenders were Irish labourers.⁸⁹ The bench and the governor were unwilling to

⁸⁸ On violence against women and the courts, see Phillips, "Women, Crime, and Criminal Justice," pp. 188-96; Backhouse, *Petticoats and Prejudice*, pp. 168-86.

⁸⁹ The three convictions for rape were: *R. v. Fielding*, 1751 Assizes; *R. v. Stackebald*, 1762 Assizes; and *R. v. Hogan*, 1774 Assizes. Fielding was a private in the local army garrison, while Stackebald and Hogan were both Irish fishing servants. On the importance of men's class/ethnicity in the patterns of prosecution for rape, see Carolyn Strange, "Patriarchy Modified: The Criminal Prosecution of

see men – particularly husbands who assaulted their wives – punished for crimes against women.

Equally important in the apportionment of punishment was the assessment of the character of the victim and offender. It is impossible to separate the issue of the principals' reputation from the perceived seriousness of their offence: the question of who had committed the crime against whom determined in large measure how a specific offence was seen by jurors, the bench, and the governor. The impact of character evidence recorded during a criminal trial extended beyond the courtroom. When Governor Elliot referred to the defense witnesses' testimony and the charge to the jury, he was drawing the Secretary of State's attention to material which bore directly on the character of John Delaney and his deceased wife. Elliot singled out the testimony of Patrick Phelan, a Catholic priest who had asserted that not only did Ann Delaney fail to report the alleged assault committed by her husband, but she also was "jealous of her husband the prisoner, thinking he had attachments to other women." The judges' instruction to the jury reinforced this perception:

[T]he prisoner in his defence has charged the deceased with being very foolish or flighty (as he termed it) and says that she frequently without any provocation would call out murder and that she did so when in bed on the third of April last; it is in proof that she called out murder that night,

Rape in York County, Ontario, 1880-1930," in Phillips, et al., eds., *Crime and Criminal Justice*, esp. pp. 238-40.

but no one has proved that she had any provocation for so doing; the prisoner's evidence have made it appear that she frequently in the day time would run out into the path and cry murder, when the prisoner was within doors, or at a distance from her; this flighty conduct appears to have arose from jealousy.⁹⁰

John Delaney testified that his wife had exhibited fits of peevishness, suffered from ill health, and was feeble-minded. Such claims failed to raise sufficient doubts in the minds of the jurors but coloured the governor's view of the case.

The judges' reference to the defense constituted a highly unusual step. No other surviving charge to a trial jury contains such an implicit endorsement of the testimony of an accused felon. The court's treatment of John Delaney's testimony signaled that he was a creditable witness and had a trustworthy character. Although Delaney was an Irish Roman Catholic, he occupied a solidly respectable rung of the island's social strata as a local shopkeeper. Well aware of the potential advantage his reputation offered to his defense, Delaney had taken the opportunity to cross-examine the first prosecution witness:

Q: Did you hear me say I would kill my wife?

A: I heard you say you would do for her.

Q: Where was I then?

A: In your house.

Q: Who sent for my son?

A: Doctor Breton.

Q: Was it after you heard the deceased cry murder that you saw her go to Mr. Thistle's?

A: It was.

⁹⁰ R. v. Delaney, 1786 Assizes.

Q: What do you know concerning my character?

A: I always found you fair and honest in your dealings.⁹¹

This brought Delaney's character to the court's attention, linking his reputation to the material facts of the case. He mounted a formidable defence and called several witnesses, thereby distinguishing himself from the typical offender. The majority of those tried at the assizes were fishing servants – designated labourer in the standard indictment format – who said little or nothing in their defense.⁹² Delaney was clearly not part of this class: he did not work with his hands and could speak fluent English (some defendants could speak only Irish). In short, he was the type of offender who posed the least threat to the established social order and had committed an offence against a social inferior.

Social Status and Judicial Discretion

Class formed the basis on which an offender's character was judged. Only those who were not servants could exhibit pretensions to any semblance of gentility in the island's fishing society. Honest and faithful servants were doubtless esteemed, but their legal status was tied closely to their masters. Court minutes typically identified fishermen by referring to their

⁹¹ Ibid.

⁹² The lack of substantive defenses mounted by servants accused of felonies echoed the pattern in Georgian England. See Beattie, *Crime and the Courts in England*, p. 350.

master – in some instances, servants' names were not recorded – and, under Palliser's Act, labourers without a shipping paper were considered vagrants.⁹³ By contrast, from the rank of master upwards – this group included planters, surgeons, shopkeepers, clerks, mercantile agents, and merchants – defendants appeared in court as independent persons to whom the court extended ample opportunity to mount a defense. These men could carry poor reputations, but they entered the courtroom as a caste indisputably superior to the common fishermen.⁹⁴

⁹³ 15 Geo. III, c. 31, ss. 12-17 (1775). It is, of course, anachronistic to speak of class in the strict sense of the term. But the wide social gap between the indentured servants who worked in the fishery and the mercantile clique who controlled the fishery's capital produced an inherent inequality in material and cultural power that carried over into the courtroom. It remains debatable whether capitalist forms of exploitation existed in early-modern maritime societies. Despite the debates over whether proletarianization could precede industrialization, the fundamental imbalance in social power in Newfoundland cannot be denied, nor (as we will see in the Chapter Seven) can it be doubted that masters used the island's legal system to discipline workers through state-sanctioned floggings. On this point, see Marcus Rediker's remarks in, "Roundtable: Reviews of Marcus Rediker, *Between the Devil and the Deep Blue Sea*, with a Response by Marcus Rediker," *International Journal of Maritime History* 1,2 (December 1989), pp. 311-57; Bannister, "Issue of Class in the Writing of Newfoundland History," pp. 134-44.

⁹⁴ On class dynamics within the criminal trial in England and Nova Scotia, see Douglas Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century," in J.S. Cockburn and T.A. Green, eds., *Twelve Men Good and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988), pp. 305-57; idem, "Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850," in D. Hay and F. Snyder, eds., *Policing and Prosecution in Britain, 1750-1850* (Oxford: Clarendon Press, 1989); and Jim Phillips, "Halifax Juries in the Eighteenth Century," in Smith, May, and Devereaux, eds., *Criminal Justice in the Old World and the New*, pp. 174-82.

Analysis of trials for capital offences reveals the class-based nature of criminal justice. Eleven of the eighty-six defendants can be positively identified as having a status above that of labourer. Only one of them was charged with a property offence: eight indictments were for murder, one for assault and battery, and one for rescuing prisoners from gaol. Of those found guilty, four were fined, three were sentenced to death, and one offender was given a free discharge. Not surprisingly, none was ever whipped or received any other type of corporal punishment. The fines were levied for offences – grand larceny, manslaughter, assault, and rescuing prisoners – for which fishing servants were whipped or branded. Of those sentenced to death, two were granted free pardons, while one offender, William Martin, was hanged for murdering a servant in 1786. Martin was an exception, however, because he was a suspected lunatic and had lost whatever reputation he once possessed. In court he mounted a poor defense, called no character witnesses, and was obviously feared by the villagers who testified against him.⁹⁵

⁹⁵ The Martin case is discussed in detail in Bannister, "Surgeons and Criminal Justice," pp. 129-30.

Table 6.2. Sample of Defendants Tried at the Assizes

Year	Defendant	Status	Offence	Verdict	Sentence	Pardon
1751	Massey	esquire	rescue of prisoners	guilty	fine: £10	
1751	Pike	planter	grand larceny	guilty	fine: £60	
1774	Scott	agent	murder	not guilty		
1775	Cameron	esquire	murder	guilty: murder	death	yes: set free
1777	Hawkins	army officer	murder	not guilty		
1779	Malloney	merchant	assault & battery	guilty	fine: £180	
1779	Crew	agent	murder	not guilty		
1780	Cook	planter	murder	guilty: manslaughter	fine: £5	
1786	Martin	planter	murder	guilty: murder	death	no: hanged
1786	Delaney	shopkeeper	murder	guilty: murder	death	yes: set free
1789	Disney	planter	murder	guilty: manslaughter	discharge: unconditional	

Source: see Appendix A

Sample: All defendants above the social status of labourer/servant.⁹⁶

⁹⁶ "Agent" denotes those who worked as clerks, middlemen, and traders in conjunction with a merchant firm. Many of these men were, in fact, junior merchants working to accumulate enough capital to establish their own operation. Most of them were literate, and they identified themselves with the Protestant mercantile elite as much as possible. "Planter" refers to those who owned some capital, or had access to credit, and operated their own fishing ships. They usually employed several indentured servants. This group includes "bye-boatkeepers," a term used to describe those who returned to England each autumn, as opposed to the true "planters," who planned to settle permanently in Newfoundland. In practice, there was little difference between these two sub-groupings, both of which occupied a rung well above servants on the island's social ladder. "Esquire" is the term used in the indictment, and it conferred the status of gentleman. No additional information could be found on the two men who were referred to in

Social class was a principal but not determinative factor in the apportionment of punishment. In 1779, for example, John Malloney, a prominent Harbour Grace merchant, was charged with assaulting and wounding William Lilley, the local justice of the peace. Witnesses for the prosecution reported that Malloney had threatened to murder his wife, brandished a cutlass while in a public street, and cut Lilley in the face when he tried to quell the fracas. Malloney called only one defense witness, who testified that he had heard Lilley say, "you are not a gentleman," to which Malloney allegedly replied, "I am as good a gentleman as yourself."⁹⁷ Malloney was convicted of assault and battery and fined £180, the highest amount ever decreed by a Newfoundland criminal court. Perhaps the wealthiest person ever tried at the assizes, Malloney could not avoid punishment, in part because he had assaulted a highly respected member of Harbour Grace society.⁹⁸ This intra-class offence could have been

this way. See Story, et al. eds., *Dictionary of Newfoundland English*, pp. 6, 53, 77-78, 382; and, generally, Cadigan, *Merchant-Settler Relations*, ch. 6.

⁹⁷ R. v. Malloney, 1779 Assizes.

⁹⁸ There is little information available on the Malloney family business, but he was the only person identified specifically in an indictment as a "merchant," a term never used lightly in Newfoundland. Gordon Handcock identifies a Mallowney as a farmer/planter, who employed at least four servants in Trinity Bay. The Malloney family did not become part of the island's mercantile elite, however. William Lilly had recently come to Newfoundland as a Loyalist: he became a full-time magistrate, serving as coroner, justice of the peace, and notary public. The Lilly clan eventually rose to prominence in the legal profession. See Handcock, *Origins of English Settlement in Newfoundland*, pp. 31, 138-39; Matthews,

settled privately or through binding arbitration, but Malloney's conduct had seriously eroded his social standing. By neglecting to offer a vigorous defense he had significantly diminished the likelihood of receiving a lesser sentence.

Character was not a fixed commodity but had to be demonstrated in court. Here gentlemen enjoyed a distinct advantage: they could draw on their education and cultural experiences to prepare a superior defense.⁹⁹ For example, Samuel Disney, an Irish planter charged with the murder of his servant, took great pains to offer an eloquent statement on his behalf. Disney's address at the 1789 assizes was a model of courtroom oratory:

[He] said he would rest his defence on the evidence now before the Court; Adding that he has been taught to consider his house as his castle, sacred for the defence, protection and safety of his person: That knowing that the deceased had got in his hands a loaded gun belonging to him the prisoner, and being well acquainted with the violence of his temper, he the prisoner did not hesitate to believe that he would carry his alarming threatenings into immediate execution, if not effectually prevented: That when he saw the deceased, after bursting open the door, about to enter the room with a gun in his hands ready to be fired off, he considered that no time was to be lost in providing for his own safety: That the remembrance of this action would all his lifetime be, in the utmost degree, uneasy and painful to him: But that he left it to the Court and Jury to consider whether the truly dangerous and alarming situation he then stood in did not

Profiles of Water Street Merchants, pp. 2-25; Cuff, ed., *Dictionary of Newfoundland and Labrador Biography*, pp. 198-99.

⁹⁹ On the social stratification in Georgian society, and the genteel world to which West Country magnates such as Benjamin Lester belonged, see Roy Porter, *English Society in the Eighteenth Century* (2nd ed. London: Penguin, 1990), chs. 2 & 6.

fully justify him in obeying the dictates of the first law of nature by taking the life of his assailant for the preservation of his own.¹⁰⁰

Disney was found guilty of manslaughter and discharged without any fine or penal sanction. While a wide range of factors undoubtedly influenced judges' decision, Disney's defense was critically important. Having acknowledged shooting the victim, he had to persuade the jury that he had acted in self-defence.

Defendants were not passive agents in the construction of character. Respectable men could rely upon their previous reputation, providing the bench with a powerful tool with which to argue for mercy. The case of Alexander Cameron, convicted in 1775 for the beating death of his wife, witnessed the most blatant use of an offender's social status as a rationale for granting a pardon. In court Cameron had maligned his deceased wife as a drunken menace, and then turned to his main point:

[He] begged that his former character might be considered for the goodness of which he appealed to several gentlemen then in Court to whom he had been well known for many years and who gave him the character of a very honest industrious and inoffensive man.¹⁰¹

In their report to the governor, the commissioners of oyer and terminer asserted that Cameron had exhibited no real intention to commit murder. No one, including Cameron himself, had testified to that effect, but it enabled the judges to undermine the jury's

¹⁰⁰ *R. v. Disney*, 1789 Assizes.

¹⁰¹ *R. v. Cameron*, 1775 Assizes.

verdict. Having raised doubts over the conviction, they highlighted the "well known good character the said Alexander Cameron always had before that unhappy affair."¹⁰² Governor Duff repeated these assertions in his report to the Secretary of State and Cameron received a free pardon.¹⁰³

The assessment of character was not restricted to determining whether an offender had a respectable reputation. At the other end of the social spectrum stood those whose very lack of social status attracted paternalistic consideration from the court. These offenders did not pose a major threat to the local community: they warranted mercy because of special circumstances – such as youth, race, or not having committed a previous offence – that mitigated their culpability.¹⁰⁴ Such paternalistic discretion figured prominently in at least three of the capital cases under study. In 1784 Thomas Adams, a black servant-boy, was sentenced to death for theft; he had confessed to stealing goods worth £5 from a merchant's storehouse. As the commissioners' report illustrates, Adams' deficit of social standing worked in his favour:

¹⁰² PANL, CO 194/32, P. 108 (commissioners of oyer and terminer to Governor Duff, 17 October 1775).

¹⁰³ PANL, CO 194/32, p. 106 (Duff to Lord George Germaine, 21 November 1775), pp. 146-47 (Germaine to Duff, 27 November 1775).

¹⁰⁴ For an analysis of how criteria such as youth factored into the pardon process, see King, "Decision-Makers and Decision-Making," pp. 42-58.

As the said Thomas Adams appeared to the Court to be sensible of the heinousness of the crime for which he was indicted, and had made all the restitution in his power by delivering up the goods and as he is a *poor young negro boy, who had not the benefit of a Christian education* and this being his first offence so far as is known to the Court, We humbly recommend him to your Excellency to mitigate or alter his punishment so that his life may be spared.¹⁰⁵

Governor Campbell granted Adams a free pardon.¹⁰⁶

Public Hangings at St. John's

The remainder of this chapter examines the cases where the government chose not to extend mercy. It explores the role of executions in the broader patterns of governance, focusing specifically on the relationship between punishment and the island's sectarian divisions. The eleven hangings that took place between 1750 and 1791 followed the model of capital punishment in Georgian England.¹⁰⁷ They were all public events, designed to

¹⁰⁵ PANL, GN 2/1/A, vol. 10, p. 119 (commissioners of oyer and terminer to Governor Campbell, 21 October 1784). Emphasis added.

¹⁰⁶ PANL, GN 2/1/A, vol. 10, p. 121 (pardon of Thomas Adams, 23 October 1784). The following year the court faced a different dilemma. James Cunningham, sentenced to death for forgery, had exhibited signs of insanity. After conducting an investigation, the judges concluded that he was a lunatic and thereby not criminally responsible. Unlike the case of William Martin, Cunningham had displayed no violent tendencies, and the governor agreed to issue a free pardon. See PANL, GN 2/1/A, vol. 10, p. 185 (commissioners of oyer and terminer to Governor Campbell, 8 October 1785), p. 186 (pardon of James Cunningham, 11 October 1785). The treatment of offenders thought to be insane is discussed in Bannister, "Surgeons and Criminal Justice," pp. 129-30.

¹⁰⁷ The execution warrants appear at PANL, GN 2/1/A, vol. 2, pp. 181-82 (1754), vol. 3, p. 164 (1762), vol. 6, p. 194 (1777), vol. 8, p. 149 (1780), vol. 10, pp. 97-98 (1786), vol. 12, p. 99 (1791). On capital punishment in Hanoverian England, see, *inter alia*, Hay,

achieve maximum exposure to the local community. The offenders were all hanged on a temporary scaffold; evidence suggests that most of the executions took place on the highland overlooking the town, near Fort Townsend.¹⁰⁸ The hangings served to exact vengeance and final retribution upon the bodies of the condemned and to deter others from committing offences through the terror of the gallows.

Governors personally decreed how the hangings were to be carried out. After the assize session had ended, the governor signed each execution warrant sent to the high sheriff.¹⁰⁹ The order directed the sheriff to take the prisoners under his charge at a specific time and to bring them in public procession to the gallows. To ensure that as many people as possible attended the

"Property, Authority and the Criminal Law," pp. 32-40; Beattie, *Crime and the Courts in England*, pp. 451-56, 530-38; Steven Wilf, "Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England," *Yale Journal of Law and the Humanities* 5, 1 (Winter 1993), pp. 51-78; J.S. Cockburn, "Punishment and Brutalization in the English Enlightenment," *Law and History Review* 12, 1 (Spring 1994), pp. 155-79.

¹⁰⁸ In only one instance did the execution warrant specify the location of the execution: those sentenced to death for the murder of William Keen in 1754 were executed on the victim's wharf. The only eye-witness account of a hanging is contained in the diary kept by a visiting sailor in 1794. See *The Newfoundland Journal of Aaron Thomas, Able Seaman in H.M.S. Boston*. Jean Murray, ed. (London: Longmans, 1968), p. 179.

¹⁰⁹ On the role of government and politics in this process, see Beattie, "Cabinet and the Management of Death," pp. 230-31; Carolyn Strange, "The Lottery of Death: Capital Punishment in Canada, 1867-1976," *Manitoba Law Journal* 23, 3 (1996), pp. 594-619; David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), esp. pp. 51-60.

hangings, all of the executions took place between ten in the morning and noon. The importance of this juristic ritual is evident in the warrant for the first executions in 1754:

You are therefore hereby required and directed to repair on board HMS Penzance at eleven o'clock this morning and take under your charge Edmund McGuire and Math. Halluran and to see the said sentence executed in the manner following, at twelve o'clock this noon you are to cause the said Edmund McGuire and Mathew Halluran to be hanged by their necks on the gibbet erected on the wharf of Mr. Wlm. Keen until they are dead and then their bodys to be taken down and hung in chains on the place appointed for that purpose, and for so doing this shall be your sufficient warrant.¹¹⁰

In most cases a party of soldiers attended the execution, acting as a security cordon between the crowd and the gallows, and providing yet another symbolic reminder of the government's presence.¹¹¹

There is only one contemporary account of a hanging in the eighteenth century. In 1794 Lieutenant Richard Lawry, an officer aboard HMS *Boston*, was murdered while leading a press gang in St. John's. Aaron Thomas, who served as an able seaman in the *Boston*, kept a journal describing the incident and the execution of the two men condemned for the murder. Thomas was in the crowd that attended the hangings, which took place two days after the assize session ended. His first impression was of the hangman:

¹¹⁰ PANL, GN 2/1/A, vol. 2, pp. 181-82 (warrant for the execution of McGuire and Hallahan, 10 October 1754).

¹¹¹ Soldiers were likely present at every hanging. Specific orders for a party from the local garrison to muster at the place of execution appear at PANL, GN 2/1/A, vol. 6, p. 200 (1762), vol. 12, p. 124 (1791).

An Executioner is so detested in this Country that were he known he would entail disgrace on his posterity. The person who filled this office to the murderers did his business in disguise. He wore a wig made of black sheep's wool which covered his head and shoulders, he had a mask on, and was covered with a large long cloak.

He then turned to the condemned men:

The two culprits walked from the Gaol to the fatal spot. Each wore on his head a kind of bonnet or turban made of fine linen, which contained three or four yards at least. The hangman, malefactors and priest (for they were Roman Catholic) walked in a group and were surrounded by the military, who formed a very strong guard.¹¹²

Clergymen were likely present at every execution in order to minister to the offenders during their final hours.¹¹³

Hangings were an expression of the raw power of the colonial state. Thomas's account confirms the presence of several aspects of executions in Newfoundland that marked hangings in England.¹¹⁴ First, there was a significant threat of civil unrest and rebellion, directed against the execution generally and the

¹¹² *Journal of Aaron Thomas*, pp. 179-80.

¹¹³ When five soldiers were ordered to be hanged at St. John's in 1800, Bishop James Louis O'Donel described the difficult task faced by priests: "I have a vast heap of trouble on my hands as I must be very soon preparing no small number of the Newfoundland Regiment for death." See Byrne, ed., *Gentlemen-Bishops and Faction Fighters*, p. 171.

¹¹⁴ V.A.C. Gatrell provides a thorough examination of the public emotions evoked by hangings. Though Gatrell's study of the pardon process is flawed, his analysis of punishment becomes much more incisive the closer it gets to the gallows. He argues persuasively that historians should not approach the subject of state-sanctioned killing as if it were simply a normative function of a criminal justice system. See Gatrell, *The Hanging Tree*, chs. 1-3.

hangman in particular.¹¹⁵ It was public, with the masses in attendance, and considerable drinking might have taken place. But hangings were not, as Thomas Laquer has claimed, a plebeian carnival where the crowd caroused in the face of the spectacle of death.¹¹⁶ On the contrary, Thomas gave the impression that the condemned men had prepared carefully for their deaths, and they doubtless had been assisted by friends and family. Executions were in many ways political as much as legal events. What message the crowd before the gallows took from the hanging is of course unknown, but its purpose was unequivocal in its clarity.

Yet the jurisdiction of the colonial state did not end with the offender hanging at the end of a rope. Those condemned to death had forfeited not only their lives but the fate of their bodies as well, over which the governor exerted total control.¹¹⁷ All of the men and women hanged in the eighteenth century were denied a Christian burial. Following the governors' instructions, the bodies were buried next to the gallows immediately after

¹¹⁵ On the battles that periodically erupted around the gallows, see Peter Linebaugh, "The Tyburn Riot Against the Surgeons," in Hay et al., eds., *Albion's Fatal Tree*, pp. 65-117.

¹¹⁶ T.W. Laquer, "Crowds, Carnivals and the English State in English Executions, 1604-1868," in A.L. Beier, et al., eds., *The First Modern Society: Essays in Honour of Lawrence Stone* (Cambridge: Cambridge University Press, 1989), pp. 305-99. For a critique of Laquer's argument that executions were ritualized carnivals, see Gatrell, *The Hanging Tree*, pp. 90-105.

¹¹⁷ On the importance of controlling bodies to state-sanctioned criminal justice, see Foucault, *Discipline and Punish*, esp. pp. 22-31.

being taken down. Three offenders received a further indignity: their bodies were hanged in chains after they had been executed and displayed in gibbets erected in prominent places.¹¹⁸

By ordering these additional acts of retribution, governors were following practices long established in England.¹¹⁹ All three of the men hanged in chains had been convicted of murder, an offence that came under statutes designed to mete out punishments beyond that apportioned to other felons. In 1754 Governor Bonfoy informed London that two men had been hanged "according to the late Act of Parliament provided in the case of Murder."¹²⁰ Bonfoy's initiatives did not end there, for he sent an order to all of the district magistrates:

Whereas I think it for the good of this Island in General, that gallows should be erected in the several districts in order to deter frequent robbery's that are committed by a parcee of villians who think they can do what they please with impunity. You are therefore hereby required and directed to cause gallows to be erected in the most publick places in your several districts, and cause all such persons as are guilty of robbery, felony or the like crimes, to be sent round to this place, in order to take their tryals at

¹¹⁸ The orders to hang the corpses in chains are recorded at PANL, GN 2/1/A, vol. 2, pp. 181-82, vol. 12, p. 99.

¹¹⁹ Beattie, *Crime and the Courts in England*, pp. 520-38; Randall McGowen, "The Body and Punishment in Eighteenth-century England," *Journal of Modern History* 59, 4 (1987), pp. 651-79; Joanna Innes, "The 'Bloody Code' in Context: Eighteenth Century Criminal Legislation Reconsidered." (typescript mss., Centre of Criminology, 1994).

¹²⁰ PANL, CO 194/13, p. 171. Bonfoy was likely referring to the Murder Act of 1752 (25 Geo. II, c. 37), which authorized the corpses of convicted murderers to be hanged in chains and denied a Christian burial. See Beattie, *Crime and the Courts in England*, pp. 529-30.

the annual assizes held here, as I am determined to proceed against all such, with the utmost severity of the law.¹²¹

Drawing on English legal culture, the island's governors relied upon the periodic use of terror to respond to fears of social unrest.

Irish Catholics and the Naval State

As in Georgian England, the Irish received a disproportionately harsh share of capital punishment.¹²² The trend in Newfoundland is unmistakably clear: of the eleven people hanged prior to 1792, all but one were Irish.¹²³ To be sure, Irish Roman Catholics made up the majority of the people living in eighteenth-century Newfoundland, but they never comprised more than two-thirds of the total population. In 1764 Governor Palliser estimated that Catholics outnumbered Protestants by a three-to-one margin, but this marked the apogee from which the Irish population rapidly declined in the late eighteenth

¹²¹ PANL, GN 2/1/A, vol. 2, p. 183.

¹²² On the punishment of Irish offenders in England, see Linebaugh, *London Hanged*, ch. 9.

¹²³ Nine men and one woman were identified as Irish in their indictments: Edmund McGuire, Matthew Halluran, Robert Power, Eleanor Power (1754 Assizes); John Stackebald (1762 Assizes); Laurence Hallahan (1777 Assizes); Michael Darrigan (1780 Assizes); William Martin (1786 Assizes); Cornelius Bryan (1790 Assizes); and Patrick Murphy (1791 Assizes). Patrick Noddy, the only Englishman to be hanged, was executed in 1791 for forgery. According to Chief Justice Reeves, Noddy had been previously convicted at Exeter and was considered to be a hardened offender. See PANL, CO 194/38, pp. 276-77 (Reeves to Milbanke, 20 October 1791).

century.¹²⁴ The relative severity with which the courts punished Irish capital offenders was rooted in the relationship between the island's Protestant mercantile elite and Catholic fishing servants.

Irish Catholics constituted a distinct people in eighteenth-century Newfoundland. The vast majority of them came from an area concentrated around Waterford city and its environs.¹²⁵ They were a relatively cohesive group with a shared culture, most of whom were bilingual or spoke only Irish; it was not uncommon for translators to be needed in court because witnesses could not understand English. Governors portrayed the Irish as a united community, despite the divisions between factions from Munster and Leinster.¹²⁶ They reputedly had strong Jacobite sentiments and were repeatedly accused of being disloyal to the British Crown.

¹²⁴ Composition of Resident Population:

<u>Year</u>	<u>Catholic</u>	<u>Protestant</u>	<u>Total</u>	<u>% Catholic</u>
1754	4,929	2,374	7,303	67
1768	6,653	4,942	11,595	57
1797	6,708	4,674	11,382	59
1803	8,008	11,021	19,029	42
1816	20,800	21,098	41,898	49

Source: Ryan, *Newfoundland Consolidated Census Returns*, pp. 56, 103.

¹²⁵ John Mannion, "Introduction," in Mannion, ed., *The Peopling of Newfoundland*, p. 8; Cecil Houston and William J. Smyth, *Irish Emigration and Canadian Settlement: Patterns, Links, and Letters* (Toronto & Belfast: University of Toronto Press and Ulster Historical Foundation, 1990), pp. 7-8, 62-71.

¹²⁶ John Mannion, "Old World Antecedents, New World Adaptations: Inistioge (Co. Kilkenny) Immigrants in Newfoundland," *Newfoundland Studies* 5, 2 (Fall 1989), pp. 103-76; Cyril Byrne, "Introduction," in Byrne, ed., *Gentlemen-Bishops and Faction Fighters*, pp. 9-22. Translators were needed at the 1751, 1786, and 1789 Assizes.

Officials expressed grave fears that the Irish would support the French if the island were invaded. In 1750, Governor Drake warned that the Roman Catholics were "notoriously disaffected to the Government, all of them refusing to take the Oaths of Allegiance when tended to them."¹²⁷ Authorities suspected that the Irish community was rife with secret societies, such as the Whiteboys who allegedly came to Newfoundland in the 1760s.¹²⁸

The murder of William Keen in 1754 confirmed these fears. It shook the local community: Keen had been the island's most prominent magistrate and the crime had all the markings of a well-planned conspiracy.¹²⁹ Four of those tried for the murder were Irish soldiers in the St. John's garrison; two others, Robert and Eleanor Power, were a married couple who played a leading role. A witness turned king's evidence recounted in court how the gang planned the robbery and had each kissed a prayer book to seal their compact. Edmund McGuire, the ringleader, had reputedly vowed that he "would be revenged upon old Keen for

¹²⁷ PRO, CO 194/12, p. 186.

¹²⁸ On the Whiteboys in Newfoundland, see the report from Reverend Edward Langman, dated 8 November 1766, in *United Society for the Propagation of the Gospel, Calendar of Letters*, p. 46; on their origins in Ireland, see James Donnelly, "The Whiteboy Movement, 1761-5", *Irish Historical Studies* 21, 81 (March 1978), pp. 20-54; and on use of the term in local nomenclature, see Story, et al. eds., *Dictionary of Newfoundland English*, p. 610.

¹²⁹ Keith Matthews, "William Keen," *DCB*, vol. 3, pp. 323-24.

something that had passed before."¹³⁰ Armed with muskets, bayonets, and scythes, the group had rendezvoused at midnight the night of the murder, carefully posting armed lookouts before entering the house. MacGuire and Halluran then went upstairs to the bedroom and viciously attacked Keen when he awoke during the burglary.

The homicide provoked a swift reaction from the island's judiciary. All of the defendants were convicted. Four of them – McGuire, Halluran, Robert Power, and Eleanor Power – were hanged before the governor returned to England. But these punishments did not assuage the anxieties of the residents and government at St. John's. In the only published account of Newfoundland during this period, Griffith Williams reflected what was likely a commonly-held view among the British in St. John's:

At this time great numbers of *Irish Roman Catholics* were in the Island as servants...they became the most outrageous set of people that ever lived: Robberies were committed almost every day in one place or other, the magistrates insulted in the execution of their office, and the Chief Justice [William Keen] murdered; many hundreds of the West of *England* people were afraid of going over, many of the *Newfoundland* men left the Island, and the *Roman Catholics* transported themselves by hundreds from *Ireland*.¹³¹

¹³⁰ *R. v. McGuire, et al., 1754 Assizes.*

¹³¹ Griffith Williams, *An Account of the Island of Newfoundland, with the Nature of its Trade, and the Method of carrying on the Fishery, with Reasons for the great Decrease of that most Valuable Branch of Trade* (London: Printed for Captain Thomas Cole, 1765), p. 9. Emphasis in original. Williams was a Welsh officer in the Royal Artillery stationed at St. John's.

The murder of Keen entered the island's cultural memory as a moral lesson of what would happen to the Protestant elite if the Irish were not held in check.

The government's response to Keen's murder manifested the fears expressed by Williams. In 1755 Governor Richard Dorrill promulgated a local penal code against Roman Catholicism. These regulations went further than the English Penal Laws.¹³² Dorrill strictly forbade the celebration of mass, the penalties for which included arrest, fines, and house-burnings.¹³³ He outlawed the hoisting of Irish colours or flags, an offence also punishable by fines.¹³⁴ These decrees were no idle threats: at a surrogate court held at Harbour Main in Conception Bay, two planters were convicted of allowing a priest to celebrate mass on their property; they were fined (£50 and £20 respectively), their buildings were burned to the ground (homes, stages, and store-rooms); and they were banished from the community. Four other men

¹³² On the Penal Laws in Great Britain and Ireland and their application in Newfoundland, see Raymond Lahey, "Catholicism and Colonial Policy in Newfoundland, 1779-1845," in Terrence Murphy and Gerald Stortz, eds., *Creed and Culture: The Place of English-Speaking Catholics in Canadian Society, 1750-1930* (McGill-Queen's: Montreal and Kingston, 1993), pp. 49-53; Raymond Lahey, *James Louis O'Donel in Newfoundland, 1784-1807* (St. John's: Newfoundland Historical Society, 1984), pp. 3-7; and Hans Rollmann, "Religious Enfranchisement and Roman Catholics in Eighteenth-Century Newfoundland," in T. Murphy and C. Byrne, eds., *Religion and Identity: The Experience of Irish and Scottish Catholics in Atlantic Canada* (St. John's: Jespersen Press, 1987), pp. 34-52.

¹³³ PANL, GN 2/1/A, vol. 2, pp. 202, 216, 251-62, 264 & 277.

¹³⁴ PANL, GN 2/1/A, vol. 2, p. 253.

who confessed to being practising Roman Catholics were fined and banished from their homes.¹³⁵

As Raymond Lahey and Cyril Byrne have noted, these measures were as much political as religious in nature. They reflected fears of an Irish rebellion and alliance with the French.¹³⁶ Although the Seven Year's War had not yet officially begun, armed conflict with France had already broken out. Governor Dorrill's actions in Newfoundland need to be placed in the context of the simmering European war and the 1745 Jacobite rebellion in Great Britain. Moreover, the enforcement of the penal laws in Newfoundland coincided with the expulsion of the Acadians from Nova Scotia.¹³⁷

As the Seven Year's War entered its final phase, the French captured St. John's. In June 1762 a French regiment took over the

¹³⁵ For a printed account of these proceedings, which took place during the sitting of a surrogate court in September 1755, see Prowse, *History of Newfoundland*, p. 294.

¹³⁶ Dorrill's administration in 1755 was draconian but so were other regimes in British territories and colonies at this time. The balanced account offered by Lahey and Byrne contradicts that of other historians, particularly Ralph Lounsbury, who is still cited as an authority on pre-1763 Newfoundland. Lounsbury claimed that Dorrill's actions were part of a hysterical reaction - its "arbitrariness shows the danger of entrusting too much civil power to an officer of the navy" - but he fails both to place the island's government in its broader context and to note that such extreme measures were the exception, not the rule, of naval government in Newfoundland. See Byrne, "Introduction," in Byrne, ed., *Gentlemen-Bishops and Faction Fighters*, pp. 6-9; Lahey, *James Louis O'Donel*, pp. 5-6; Lounsbury, *British Fishery at Newfoundland*, pp. 302-03.

¹³⁷ W.J. Eccles, *France in America* (2nd ed. Markham, ON: Fitzhenry & Whiteside, 1990), pp. 188-200.

town's government and its accompanying naval squadron plundered English settlements all along the northeast coast. Liberated in September by a British expeditionary force, St. John's was firmly under Governor Graves's control by October 1762.¹³⁸ One of the first tasks Graves faced was to determine how to deal with alleged cases of Irish collaboration with the French. For his part, Griffith Williams had no doubts that the Irish were guilty of collusion with the enemy:

[A]t the time the French took the Country, the Irish were above six times the number of the West Country and Newfoundlanders: In short, they were in possession of above three quarters of the fish rooms and harbours of the Island, who consequently received the French with open arms. And during the time the French were in possession of the Island, the merchants and inhabitants suffered more cruelties from the Irish Roman Catholics, than they did from the declared enemy.¹³⁹

If Graves wanted to punish those who aided the French, he would have to arrange for trials in England because the court of oyer and terminer was prohibited from hearing cases of treason.

Meanwhile an opportunity arose to set a local example. When the St. John's magistrates resumed their offices, Esther Merrifield swore a deposition that she had been raped during the French occupation. She accused John Stackebald, who was explicitly identified as an Irishman, of the crime, alleging that he and two others had sexually assaulted her on the road to

¹³⁸ Graham, *Empire of the North Atlantic*, pp. 190-92; William Whiteley, "Thomas Graves," *DCB*, vol. 4, pp. 380-82.

¹³⁹ Williams, *Account of the Island of Newfoundland*, pp. 9-10.

Torbay. At the assizes held in November, Merrifield testified that she had not reported the crime earlier because the enemy was then in possession of St. John's.¹⁴⁰ Stackebald was convicted of rape and sentenced to death. The commissioners of oyer and terminer did not recommend a reprieve for Stackebald, who had attempted to escape by setting fire to the gaol.

Collusion with the enemy appears to have been the crime for which Stackebald was ultimately hanged. As Graves noted in the execution warrant,

It further appearing from the affidavits of persons of undoubted testimony that the prisoner had been *guilty of many treasonable acts* during the time the French were in possession of this place, there seems to be no room to extend His Majesty's Royal Mercy to the unhappy person under sentence of Death nor any cause why the said sentence should not be carried into execution.¹⁴¹

It is unclear exactly what weight was given to Stackebald's suspected collaboration – the only other incriminating factor was his arson attempt – but evidence points to treason as the primary reason behind the decision to execute Stackebald. The indictment for rape provided a way for the island's government to circumvent the prohibition against trying cases of treason at the Newfoundland assizes. Whether this was a calculated plan is

¹⁴⁰ *R. v. Stackebald*, 1762 Assizes.

¹⁴¹ PANL, GN 2/1/A, vol. 3, p. 164 (warrant for the execution of John Stackebald). Emphasis added.

uncertain, but Stackebald's hanging undoubtedly augmented the efforts to re-establish British sovereignty over St. John's.¹⁴²

In the aftermath of the war, tensions between the naval state and Irish Catholics eased somewhat. Governor Dorrill's draconian penal code was the exception rather than the rule: his successors adopted a *modus vivendi* which developed into limited toleration in 1779 and a formal grant of liberty of conscience in 1784.¹⁴³ The status of Roman Catholicism remained insecure, however, and conflict loomed beneath the political surface.¹⁴⁴ A visiting American warned of impending trouble:

From the present situation everything seems unfavourable to the security of that country. The late wretched peace has thrown a strong French garrison in the neighbourhood of the Island, and given them an exclusive right to take and cure fish on the whole west side of it....Added to this the Roman Catholics have this very year (1784) been indulged with leave to erect a mass house at St. John's, and the officiating priest is an Irish gentleman who was chaplain last war to a French regiment, and it is probable, he is now on half pay from that Crown. The Danger arising from this indulgence is, that as more than two-thirds of the inhabitants are Irish (or descended from Irish parents), of course we may conjecture that most of them are Roman Catholics.¹⁴⁵

¹⁴² William Whiteley, "Thomas Graves," *DCB*, vol. 4, pp. 380-82.

¹⁴³ The 1784 grant of liberty of conscience appears at PANL, GN 2/1/A, vol. 10, p. 138.

¹⁴⁴ The same year as Governor Campbell issued the grant of religious toleration, he ordered the Placentia magistrates to deport a Roman Catholic priest considered to be "of a very violent spirit." See PANL, GN 2/1/A, vol. 10, p. 197.

¹⁴⁵ BL, Add. MS 15493, Dr. Gardner, "Some Facts Collected, and Observations Made on the Fisheries and Government of Newfoundland." (unpublished treatise, 1784), f. 12.

The outbreak of rioting in Ferryland in 1788, as well as Father O'Donel's ongoing dispute with an itinerant priest, further strained relations between the Irish community and the magistracy.¹⁴⁶ O'Donel had established excellent relations with the naval government, but the appointment of Admiral Mark Milbanke as governor in 1789 marked a resurgence in anti-Catholic policy. Milbanke viewed tolerance of Catholicism as an encouragement to Irish servants to settle in Newfoundland after they had served out their contracts. He refused O'Donel's request to build a chapel in Ferryland and tried to restrict the growth of Irish settlement in Newfoundland.¹⁴⁷

The Persistence of Sectarianism

Conflict between Roman Catholics and the Protestant elite continued well after 1792, when the supreme court replaced the court of oyer and terminer. The executions which Aaron Thomas witnessed in 1794 marked another attempt to use capital punishment to discipline the island's Irish community. Lieutenant Lawry had died after being attacked by a crowd trying to rescue Irish fishermen who had been pressed into the navy. The homicide prompted a swift reaction: Governor Wallace personally directed

¹⁴⁶ Rollmann, "Religious Enfranchisement and Roman Catholics," pp. 34-52; Lahey, "Catholicism and Colonial Policy," pp. 49-55.

¹⁴⁷ Frederic Thompson, "Mark Milbanke," *DCB*, vol. 5, pp. 595-96; Lahey, *James Louis O'Donel*, pp. 15-30.

the investigation, offered a reward for information on the crime, and held an elaborate funeral with full military honours. The bodies of the two men convicted of murder were, in accordance with the Murder Act, handed over to surgeons to be dissected and anatomized after being cut down from the gallows.¹⁴⁸

Fears of social unrest preceded and followed the hangings of the Irish offenders. The grand jury asked Governor Wallace to delay the departure of the naval squadron until all those responsible for the murder could be brought to justice. Citing the ferment raised in the town, the jurors affirmed that the continued presence of the royal navy was needed to uphold law and order. They pointed out that the army garrison was too weak to quell serious outbreaks of unrest.¹⁴⁹ The twin fears of rebellion by the Irish and invasion by the French intensified during the resumption of war. The governor declared martial law when an enemy fleet was sighted off the coast in 1796.¹⁵⁰ Equally important, the United Irish Rising reverberated in Newfoundland, where a conspiracy among the soldiers garrisoned at the St. John's spread in 1799-1800. The local commander brutally crushed a botched rebellion in May 1800. Five of the United Irishmen were summarily tried and hanged on a public street; three others were

¹⁴⁸ PANL, GN 2/1/A, vol. 12, pp. 293-96, and p. 299 (warrant for the execution of Garrett Farrell and Richard Power, 30 October 1794).

¹⁴⁹ PANL, GN 2/1/A, vol. 12, p. 297.

¹⁵⁰ PANL, GN 2/1/A, vol. 12, p. 369.

sent to Halifax for court martial, where they too were eventually executed.¹⁵¹

Sectarian conflict outlived the naval state. The grant of representative government in 1832 inaugurated a lengthy and bitter political battle between the Protestant elite (largely Conservatives), and the Catholic establishment (mostly Liberals).¹⁵² As had happened in 1754 and 1762, the events of 1799-1800 shaped the island's cultural memory; fugitives from the United Irish Rising were rumoured to have settled along the Southern Shore and in Conception Bay. In the 1830s systemic violence erupted in Harbour Grace and Carbonear, where sectarian divisions became enmeshed with class conflict and political rivalry.¹⁵³ When Phillip Henry Gosse, a prominent naturalist who emigrated in 1835, reflected on his earlier life in Newfoundland, he commented that there had been a "habitual dread of the Irish as a class which was more oppressively felt than openly expressed." Upon leaving the island, he had told his friends that "when we got to Canada, we might climb to the top of the tallest

¹⁵¹ The only study of the United Irish uprising in Newfoundland (a fascinating topic in need of a thorough analysis), is Cyril Byrne, "Ireland and Newfoundland: The United Irish Rising of 1798 and the Fencible's Mutiny in St. John's, 1799." (Unpublished paper presented to the Newfoundland Historical Society, 1977). On the United Irish movement generally, see Beckett, *Making of Modern Ireland*, ch. 13.

¹⁵² Gunn, *Political History of Newfoundland*, chs. 1-2.

¹⁵³ Linda Little, "Collective Violence in Outport Newfoundland: A Case Study from the 1830s," *Labour/Le Travail* 26 (Fall 1990), pp. 7-35.

tree in the forest and shout 'Irishman!' at the top of our voice, without fear."¹⁵⁴

Conclusion

Punishment was imbedded in the island's legal culture. Discretion marked each stage of the penal process, from sentencing to the gallows: judges and governors decided not only who to select for punishment, but also how to mete out mercy and retribution. The flexibility of the pardon process gave governors a wide range of options. They undoubtedly drew upon their experiences in the royal navy, where capital punishment was treated as a last resort. But the high pardon rate in Newfoundland did not reflect judicial weakness, for mercy formed a powerful tool used to reinforce the legitimacy of the naval state.

At bottom, public hangings represented expressions of social fear. The two factors that divided offenders granted pardons from those sent to the gallows were the perceived seriousness of the offence and the character of the offender. Those who did not pose a significant threat to the Protestant elite were prime candidates for mercy. The degree to which jurors and judges perceived an offender to be culpable depended in large measure

¹⁵⁴ Quoted in R.G. Moyles, *"Complaints is many and various, but the odd Divil likes it": Nineteenth Century Views of Newfoundland* (Toronto: Peter Martin Associates, 1975), p. 84.

upon the social currency he or she possessed. Defendants who could present a respectable character in court and could mount a serious defense were at a distinct advantage. The class-bound nature of this selection process is clearly evident in the sentences handed down at the assizes. Justice may well have been an integral part of English legal ideology, but it mattered little in the face of entrenched prejudices. Under the shadow of endemic anxieties over sedition and unrest, the trials and executions of Irish men and women in the eighteenth-century became political events. From the perspective of the St. John's establishment, the naval state was the bulwark of law and the protector of property.

Chapter 7

Punishment and Paternalism:

The Operation of the Penal Regime

This chapter studies the use of noncapital punishments during the height of the naval state. Two basic factors shaped the form and function of secondary punishments: the dearth of administrative infrastructure, other than that provided by the royal navy; and the absence of an elected assembly, lawyers, and a local press. From 1750 to 1800 Newfoundland had no houses of correction or other places of incarceration beyond small gaols, which could be used only as brief holding facilities; nor did it have a legislature in which to debate penal policy or to pass acts affecting criminal justice. What follows therefore confronts two major questions. What modes of punishment emerged to replace the range of options available to courts in other British jurisdictions? And how was justice calibrated without a bourgeois public sphere in which to register fears of crime and attitudes toward punishment? Placed in the context of a society dominated by economic and sectarian tensions – in particular the recurrent fear of unrest among Irish servants – these questions strike at the heart of understanding governance in Newfoundland.

Analysis of the patterns of noncapital punishment reveals four distinct characteristics. First, like the island's judiciary generally, the penal system was a cooperative regime of naval and

civil magistrates. While sitting as surrogate judges, naval officers acted in concert with the justices of the peace throughout the districts; in St. John's, the commissioners of oyer and terminer handed down sentences as a group and worked closely with the governor. No discernable gap existed between naval and civilian authority. The royal navy formed the mainstay of the administration of law yet never became an independent judicial force. This high degree of collaboration between naval and civil magistrates fostered a legal culture in which there appeared to have been few disagreements – at least among the law officers and the island's elite – over punishments meted out at the district courts or annual assizes. In other words, naval and civil justice appeared to be essentially one and the same thing. Given the highly flexible nature of the royal navy's customary system of punishment, as well as its reliance on whippings and other relatively swift sanctions, its relative success in adapting to the island's conditions is not surprising. As in the Georgian navy, punishment in Newfoundland was highly discretionary, relying far more upon unwritten customs, as well as the immediate dictates of specific incidents and offenders, than on statutory law or formal legal codes.

Second, magistrates employed a relatively narrow range of punishments suited to local conditions. At the assizes, the commissioners of oyer and terminer sentenced offenders to four types of noncapital punishments: transportation to America, prior

to 1775, and banishment; burnings in the hand with a hot iron; public whippings by numbered lashes at a whipping post; and fines and court costs. The surrogate courts and the sessions held by justices of the peace enjoyed a greater range of sentencing options: whippings, from a few lashes up to a hundred; banishment from the island or the local district; temporary imprisonment in irons or the stocks; a range of fines payable to the crown or the district treasury; and other minor sanctions, such as a public apology. Imprisonment was ordered by the district magistrates on only four known occasions. Banishment and the stocks together made up less than a tenth of all sentences. Two punishments dominated the administration of justice: fines, which comprised over two-thirds of all sentences; and whippings, which were recorded in a fifth of the total cases. This does not indicate a paucity of choices but rather the fact that magistrates demonstrably favoured some punishments over others.

Third, the penal regime relied upon public whippings to discipline servants working in the fishery. Justice was not oriented primarily toward protecting of property. Policing property was crucial during the early autumn, when the salt codfish was graded, loaded, and shipped to market; yet for the remainder of the year it was a secondary issue. The courts relied on making examples of individual offenders through the swift punishments of fines and whippings because it fit the needs of those in power: masters could ill afford to have their servants

imprisoned and thus unable to work during the hectic fishing season. Whether deducted directly from wages or levied otherwise, fines kept servants indebted to their creditors and under firm control. The shame and humiliation inflicted by public whippings offered an effective method to reinforce paternalistic power. Justices of the peace and naval surrogates favoured whippings as a means of setting an example to deter servants from a range of actions that included not only theft, but also insolence or any other behaviour that challenged the master's authority. In short, corporal punishment comprised a central feature of local governance.

Finally, the structure of the penal regime remained remarkably consistent throughout the eighteenth century. Changes over time occurred primarily in response to particular waves of fear of crime and social unrest. No large-scale shifts in sentiment or penal practices arose until the emergence of a bourgeois public sphere and a reform movement after 1815. Nonetheless, local events – particularly the labour glut in Trinity in the late 1760s and the Ferryland riot in 1788 – could provoke severe reactions that significantly affected the broader pattern of punishment. The fines levied to punish the Ferryland affray, for example, comprised one-third of all recorded sentences given in the district courts, totaling slightly less than all other fines put together. This chapter explores trends in noncapital punishments within the context of such incidents

that skewed the overall pattern. By including both quantitative evidence and case-studies, it attempts to provide a balanced overview of how criminal justice functioned under the naval state.

Patterns of Sentences at the Assizes

The number of offenders sentenced at the St. John's assizes was relatively small. Compared to Georgian England and colonies such as Nova Scotia, the punishment of serious felonies was lenient. As we have seen, less than a third of those sentenced to death between 1750 and 1792 were actually executed: no offender was ever hanged for a property offence.¹ Faced with a small number of offenders, the bench and the governor exercised a high degree of discretion. The assize court relied upon five types of secondary punishments to deal with a limited range of offences.

The number of sentences handed down at the assizes was a reflection of both the high cost of prosecution and the preference to settle cases in the outport districts. The court of oyer and terminer was generally restricted to hearing only capital offences. If an individual wanted to bring a prosecution, the chances of success were actually better in the district

¹ By contrast, 41% of the total number of offenders sentenced to death in England, and 44% of those condemned in Nova Scotia, were executed. Of those convicted of property offences, the executions rates were 38% and 27% respectively. See Phillips, "Operation of the Royal Pardon in Nova Scotia," pp. 423 & 431; Beattie, *Crime and the Courts in England*, pp. 433-35.

courts, where the bench did not sit under the shadow of the death penalty. Mounting a trial at the assizes entailed far greater expenses and inconvenience for all those concerned.

Table 7.1. Noncapital Punishment at the Assizes, 1750-1791

<u>Offence</u>	<u>Punishment</u>				
	Transportation	Branding	Whipping	Banishment	Fine
Conceal/flight from Murder	4	1			
Manslaughter		1			1
Assault and wound					1
Rape					
Forgery					
Larceny	9	3	3		4
Receiving stolen goods	1				
Rescue Prisoners					1
Other*				2	
All offences	14	5	3	2	7

source: see Appendix A

* The court ordered two men found not guilty of murder to be banished from Newfoundland.

The average cost of prosecution was estimated to be around twenty pounds. The fees of the bench and other officials, who were each paid two guineas per trial, absorbed much of this expenditure, which had to be borne by the local community in some cases.² The zeal with which the magistracy collected fines and

² The court fees are listed at PANL, GN 2/1/A, vol. 9, p. 204. For orders to raise local levies in order to pay for trials at the assizes, see GN 2/1/A, vol. 5, p. 207, vol. 6, pp. 67-68, 71-75, 84.

court costs lends support to a contemporary claim that the high cost of mounting a prosecution discouraged victims from taking their case to the court of oyer and terminer.³ And the logistics of apprehending, incarcerating, and transporting an offender undoubtedly dissuaded many potential prosecutors and witnesses from coming forward.

Well aware that these difficulties increased dramatically when the naval squadron left in the autumn, governors pushed the justices of the peace to send suspected felons to St. John's before the end of summer and to settle any remaining cases themselves in petty sessions. Such attitudes were rarely voiced openly but represented part of an established legal culture. An order from Governor Duff in 1775, sent to three recently-appointed justices in Trinity, was one of the few expressions of the pragmatic view held by the government:

Enclosed I return the depositions and papers relative to your apprehending and sending to this place two persons on a charge of stealing a small quantity of [fish] oil. *I am much surprized* that you should think of putting the publick to the expense a twelve month in prison or until the next General Assizes, as there is not a possibility of bringing such an affair to Trial this Fall, the Court of Oyer and Terminer being ended. The offenders are sent back, and you will proceed against them as a bench of Justices ought to do, I mean as committing a petit Larceny.⁴

³ Gardner, *Observations Made on the Fisheries, and Government of Newfoundland*, p. 26.

⁴ PANL, GN 2/1/A, vol. 6, p. 44 (Duff to Trinity justices, 12 October 1775). Emphasis added.

While the district courts represented the workhorse of the judicial system, the assize court was still the island's highest jurisdiction. Few offenders were sentenced at the court of oyer and terminer, but the punishments meted out at St. John's were important public events and carefully-staged displays of the authority of the naval state.

With the exception of transportation, the forms of punishment remained consistent throughout the eighteenth century. Transportation changed from a specific term in colonial America to a way of deporting offenders back to their country of origin. An offender convicted of larceny in 1752, for example, was sentenced to be transported to any of His Majesty's colonies in America for a seven-year term. Returning early from transportation was a capital offence.⁵ Six years later the court stipulated simply that an offender sentenced to transportation be sent to any country other than Great Britain.⁶ By the time the American War of Independence had broken out, judges clearly recognized the limitations of transportation and it assumed a function essentially the same as banishment. In 1780 the sentence of three men stated that they were to be deported back to Ireland and never to return to Newfoundland on pain of death.⁷

⁵ *R. v. Swiney*, 1752 Assizes.

⁶ *R. v. Gilmore, et al.*, 1758 Assizes.

⁷ *R. v. Crow, et al.*, 1780 Assizes.

There are no extant references to how transportation was actually carried out. No records survive of the island's government making any contractual agreement with a local shipping master to take transported offenders: it is most likely that the offender was simply placed on the first available ship. The only instance in which the governor arranged for a vessel to be fitted as a convict ship occurred in 1789, when a shipload of Irish convicts had landed at Bay Bulls and Petty Harbour. But this case was exceptional: the measures taken by the magistracy dealt only with the immediate problem of deporting the convicts.⁸ As we shall see, when local authorities wanted to punish a large group of offenders, such as the Irish community in Ferryland, they chose punishments that netted hundreds of pounds for the public treasury.

Fines represented as much a means of generating revenue as a criminal punishment. Because the government could raise taxes only through grand jury presentments and *ad hoc* committees convened to deal with a specific problem, there was a constant shortage of funds available for large-scale public works. Planters and merchants benefitted from this situation – they vehemently resisted attempts to impose standardized government taxation for general purposes – but the magistrates at times viewed this as a serious difficulty. When the St. John's justices

⁸ This incident is discussed at length in Bannister, "Convict Transportation and the Colonial State," pp. 95-123.

petitioned the governor on the need for a new district prison, they raised the question of how to generate revenues in the absence of an elected assembly:

How that expense may be defrayed we pretend not to point out. Here we have no funds of legal establishment, as in the several counties of England, to be applied to the support of the Public Police; and the circumstances of the greatest part of the people who carry on the fishery are such that little is to be expected from a voluntary contribution -- The small sums arising from fines and forfeitures may be sufficient to keep the Court-house in repairs, when built, but are totally inadequate to the expense of building a new one.⁹

Governor Elliot agreed: he ordered plans to be drawn up and made a request to the British government for £1079 needed for the new prison; not surprisingly, no such funds were forthcoming from London.¹⁰

Sentencing patterns reflected the reliance on fines as a means of generating revenue. When John Malloney, a Conception Bay merchant, was fined for assaulting a justice of the peace, for example, the commissioners of oyer and terminer drew attention to the monetary needs of the court. Though the judges explicitly

⁹ PANL, GN 2/1/A, vol. 11, pp. 100-02 (justices to Governor Elliot, 13 October 1786). Governors were well aware of this problem too: in 1777 Governor Montagu informed London that the St. John's jail needed repairs and the funds collected from fines provided only enough for basic upkeep. See PRO, CO 194/33, pp. 75-76.

¹⁰ PANL, CO 194/36, pp. 195-202.

stipulated the different fines in their judgment, the charges were listed separately:¹¹

Account of Mr. John Malloney's charges --	
A Fine to the King for a breach of the Peace	£50
Damages to be paid to Mr. Lilley	£100
To five evidences at £1.1 day for four days each	£21
To charges of the court [the assize bench]	£9.10.6
[Total]	£180.10.6

Malloney's fine was exceptionally high, but the average of the other charges was still £19, a heavy sum for any planter or merchant and more than what the average servant could hope to earn in an entire year. The net effect of these fines on the island's treasury was significant; the meticulous records kept by the high sheriff showed a current-account balance of £211.18.5 in 1781.¹²

Levies on offenders were not limited to such fines, however, for many had to pay court costs to secure their release. Those sentenced to corporal punishment could therefore receive additional charges up to £10. The court set the precedent for this combination of public humiliation and financial indemnity at the first assize session. Lawrence Kneeves received a sentence that would be repeated four times at the court of oyer and terminer:

¹¹ *R. v. Malloney, 1779 Assizes*. This list appears immediately after the sentence in the transcript and was not appended or copied down separately in the margin. I suspect that it was part of the sentence itself and may well have been read out in the courtroom.

¹² PANL, GN 2/1/A, vol. 9, pp. 298-301.

[B]e returned to the gaol from whence you came and there remain till tomorrow twelve o'clock at noon, when before the court house of St. John's you [will] receive the punishment of being burnt in your right hand with a hott iron marked with the letter R, your goods and chattels forfeited (if any) and after paying the charges of the court be sett at Liberty.¹³

Orders to pay court fees were also used in conjunction with whippings. Of the three offenders whipped by order of the assize bench, two of them were civilians who had to pay fees to attain their release from jail after being flogged.¹⁴

The punishment of the third offender sentenced to be whipped was particularly severe. Nicholas Shortill, a soldier in the St. John's garrison, was convicted of larceny and sentenced to "three times thirty nine lashes," after which he was turned over to Captain Pitts, his commanding officer. According to the court minutes, Pitts had promised to punish the defendant as a deserter as soon as the trial was over.¹⁵ Shortill's punishment involved the most lashes - 117, if it was carried out fully - ever ordered in any Newfoundland court. But it had two characteristics shared by nearly every whipping ordered in St. John's or the outport districts: it was fixed by numbered lashes inflicted at a whippings post, and designed to be as public an event as possible. The vast majority of orders to whip offenders stayed

¹³ *R. v. Kneeves*, 1750 Assizes.

¹⁴ See *R. v. Hoare*, 1751 Assizes; *R. v. Knowlan*, 1776 Assizes.

¹⁵ *R. v. Shortill*, 1774 Assizes.

within the biblical limit of forty lashes in a single punishment.¹⁶

Whippings were elaborate rituals of public humiliation designed to respond specifically to an offence. Secondary punishments could also be added to the primary sentence at the judges' discretion. When Patrick Knowlan was convicted of larceny, his sentence, quoted in extenso, contained an array of conditions calculated to exact maximum retribution:

Patrick Knowlan, whereas you have been indicted for feloniously stealing taking and carrying away from the shop of Peter Primm one counterpane value two pence the sentence therefore now to be passed on you by the judgement and opinion of the Commissioners of Oyer and Terminer is that you Pat. Knowlan be forthwith whipped by the Common Whipper with a halter about your neck that is to say, you are to receive on your bare back twenty lashes at the common whipping post, then to be led by the halter to the public path just opposite Mr. Peter Primm's door and there receive twenty lashes as before and then led as before to the Vice Admiral's Beach and there to receive twenty lashes [and] to pay the charges of the Court, to depart this Island by the first vessel bound for Ireland, never to return on pain of having the same punishment repeated every Monday morning and to be kept in prison till you go on board.¹⁷

When this punishment is considered in its full context, the impression of its relative severity increases dramatically.

¹⁶ The "biblical limit" was the prohibition in the bible (Deut. 25: 2-3; 2 Cor. 11:24) against whipping a man more than 40 lashes. Deuteronomy stipulates: "And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number. Forty stripes he may give him, and not exceed: lest if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee."

¹⁷ R. v. Knowlan, 1776 Assizes.

Offenders may have been executed at a lower rate at St. John's than at London or Halifax, but the apparent trend toward leniency stopped abruptly at the point of corporal punishment.¹⁸

The Context of Corporal Punishment

In using noncapital punishments in this manner, judges in Newfoundland were following broader patterns of sentencing found throughout the British empire. In the era before the rise of the penitentiary, corporal punishment occupied a central role in the penal continuum because judges needed effective sentencing options to use in the majority of cases that did not warrant execution. Throughout colonial America, local courts adopted a variety of measures designed to humiliate and chastize offenders. Kathryn Preyer argues that "of possible corporal punishments in non-capital offences whipping was everywhere the method most frequently employed," with numbered lashings up to the biblical limit a common practice.¹⁹ According to Rhys Isaac, the Virginian practice of branding offenders granted benefit of clergy created a social stigma that became a ritual for cultural memorization, a

¹⁸ As we saw in Chapter Six, under thirty per cent of those condemned at the Newfoundland assizes were hanged; by contrast, over forty per cent of offenders sentenced to death in England and Nova Scotia were executed. See Phillips, "Operation of the Royal Pardon in Nova Scotia," pp. 423 & 431; Beattie, *Crime and the Courts in England*, pp. 433-35.

¹⁹ Preyer, "Penal Measures in the American Colonies," pp. 327-53 [quotation at p. 348].

punishment that seared the mentalité as well as the flesh.²⁰ For early Upper Canada, Peter Oliver argues that judges preferred to use fines where possible at quarter sessions; at the assizes, they used banishment with regularity, reserving whippings as a punishment for larceny. Oliver's evidence suggests that whipping was an exceptionally feared punishment.²¹

In assessing the relative impact of corporal punishment, analysis cannot be based solely on quantitative evidence. In the first place, as David Neal points out, there is the question of how thoroughly punishments were carried out. Whipping until blood ran, which was a common practice in England, could entail as few as four or five strokes. Lashes that were inflicted at the cart's tail, as most were in Georgian England, depended in large part on how slowly the wagon proceeded along the streets.²² But in Newfoundland, colonies such as New South Wales, and throughout the royal navy, whipping was an exact science. The details of when and where to whip, how many lashes to inflict, and what type of lash to use were stated with precision. The cat-o'-nine-tails, with its twenty-seven heavy knots, delivered a far more severe

²⁰ Isaac, *Transformation of Virginia*, p. 92.

²¹ Peter Oliver, *"Terror to Evil-Doers": Prisons and Punishments in Nineteenth-Century Ontario* (Toronto: The Osgoode Society, 1998), pp. 16-29.

²² David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), p. 51. On whipping in England, see Beattie, *Crime and the Courts in England*, pp. 461-64 & 485-87.

lashing than a simple whip.²³ Neal argues that corporal punishment in New South Wales was actually harsher than that meted out on slave plantations. A threatened slave rebellion had resulted in the abandonment of the cat-o'-nine-tails in punishment. And whereas plantation owners usually felt obliged to keep within the biblical limit for whippings, punishment in New South Wales regularly exceeded forty lashes with the cat.²⁴

Neal's attempt to compare punishment under slavery with that in a penal colony is less useful than his emphasis on seeing the quality of punishment on equal terms with quantity. Greg Denning takes aim at both issues in his study of the mutiny on HMS *Bounty*. Denning argues that the rate of whippings and the context of punishment must be considered equally, since there are limits to how far historians can take what he sees as the cliometrics of violence.²⁵ This point is particularly important to the study of early Newfoundland because the court records indicate only a portion of the total punishments that actually took place. As we

²³ A legal punishment in the royal navy until 1881, the cat-o'-nine-tails was made up of nine pieces of cord, about half a yard in length, tied to a thick rope which served as the handle. Each of the nine cords had three knots spaced together near the striking end. A variant called the thieves' cat, used to punish larceny, contained even larger and harder knots. See King, ed., *A Sea of Words*, p. 120; Brian Lavery, *Nelson's Navy: The Ships, Men and Organisation, 1793-1815* (London: Naval Institute Press, 1989), pp. 216-20.

²⁴ Neal, *Rule of Law in a Penal Colony*, pp. 27-39.

²⁵ Greg Denning, *Mr. Bligh's Bad Language: Passion, Power and Theatre on the Bounty* (Cambridge: Cambridge University Press, 1992), pp. 62-65 & 113-132

will see, the district minute-books provide fascinating but fragmentary glimpses of the enforcement of local authority through the use of the lash.

Even in St. John's, where the assize proceedings provide a relatively complete account of sentences, not all punishments appear in the official court records. The commander of the St. John's garrison complained in 1753 that one of his soldiers had been illegally incarcerated and whipped on orders of a civil magistrate. The soldier had been allegedly imprisoned twenty days for stealing three potatoes; when no one appeared in court to testify against him, he was summarily whipped twenty-one lashes.²⁶ Justice William Keen, who had ordered the arrest and punishment, made no memoranda of the incident. It is uncertain how common such incidents were, but evidence suggests that non-capital punishment was not contingent upon securing a conviction at the assizes. For example, the commissioners of oyer and terminer petitioned Governor Shuldham in 1774 to deport a suspected felon whose bill of indictment had been returned ignoramus. Frustrated by the grand jury, the judges appealed that they had proceeded as far as their powers allowed, warning that such a dangerous offender should not be set free. Shuldham

²⁶ PRO, CO 194/13, p. 146.

promised to take the necessary measures to deal with the man as soon as possible.²⁷

In such cases the governor could arrange for troublemakers to be pressed into the navy, though officers would be reluctant to take on hardened criminals. If the offenders were experienced seamen, their chances of being sent aboard a warship increased considerably. Although there is little evidence of Newfoundland fishermen being pressed locally, I suspect that many incidents went unreported.²⁸ In 1775 the commissioners of oyer and terminer asked Governor Duff to find a place for three offenders in his squadron. Their memorandum provides an excellent example of how easily informal punishments of servants could be arranged:

William Gale, John Saunders, and John Hogan, the three men who were committed to gaol for bringing in the schooner *George-Yard* from the Banks contrary to the will and consent of the master, have been tried for the same and are sentenced to forfeit their wages and to serve His majesty.²⁹

Doubtless glad to have three additional sailors who could be rated able seamen, Duff arranged for them to be received on board

²⁷ PANL, GN 2/1/A, vol. 5, p. 115.

²⁸ On impressment, see Rodger, *Wooden World*, pp. 164-82; Nicholas Rogers, "Liberty Road: Opposition to Impressment in Britain during the American War of Independence," in Howell and Twomey, eds., *Jack Tar in History*, pp. 53-75.

²⁹ PANL, GN 2/1/A, vol. 6, p. 40 (commissioners of oyer and terminer to Governor Duff, 7 October 1775). Although the request was made by the commissioners of oyer and terminer, the three men had not been tried at the assizes. Guilty of breach of contract at worst, the men probably had been convicted by either the vice-admiralty court or two justices sitting in petty sessions.

HMS *Romney*. How many other fishermen shared a similar fate in the eighteenth century remains entirely unknown. The only reported incident of organized impressment occurred in 1794, when an officer was murdered while leading a press gang in Newfoundland.³⁰

The District Courts

The vast majority of punishments were meted out by the district courts. Magistrates ordered at least 352 secondary punishments from 1751 to 1796: while the data provide only a partial picture, they do indicate several distinct sentencing patterns. Women made up a small proportion of the total number of offenders punished; no woman was ever corporally punished. Of the range of different noncapital punishments available to magistrates, they relied overwhelmingly on whipping and fines, which together constituted nearly ninety per cent of all penal sanctions. Transportation, banishment, and corporal punishments other than whipping were never used to any significant extent; only four men were sentenced to terms of incarceration. Individual incidents significantly skewed the overall pattern.

³⁰ Prowse, *History of Newfoundland*, p. 654. This incident is discussed above, in Chapter Six.

Table 7.2. Noncapital Punishment at the District Courts

Type of Punishment	Men	Women	Total	% of total punishment
Whipping	67	0	67	19
Banishment from Newfoundland	6	1	7	2
Banishment from Newfoundland: convicted in Ferryland riot, 1788	11	0	11	3
Banishment from District	3	1	4	1
Ordered to serve in Royal Navy	1	0	1	0
Deported as a vagrant	1	0	1	0
House pulled down	2	0	2	0.5
Fines	119	10	129	37
Fines: convicted in Ferryland riot, 1788	115	0	115	33
Placed in stocks	9	0	9	3
Imprisonment	4	0	4	1
Public apology ordered	2	0	2	0.5
All punishments	340	12	352	100

Source: see Appendix B

Sample: selected years, 1751-1796

Fines levied against those convicted for an affray in Ferryland in 1788 matched the total number issued throughout the period under study. Whippings comprised nearly a fifth of all punishments, but when the fines for the Ferryland riot are subtracted from the total, that proportion rises to twenty-eight per cent

The use of fines in the district courts followed the pattern at the assizes. Seen as the principal means of raising local revenues, fines were levied for a wide range of misdemeanours, the most common of which was simple assault or trespass. These

actions ranged from criminal trials to civil litigation. At the Harbour Grace quarter sessions in 1789, for example, David Bolan was convicted of contempt of court for obstructing local constables in executing their duty. The court ordered Bolan to pay fines that amounted to an entire season's wages: nine pounds for the offence; three pounds two shillings court costs; and an undetermined amount in recognizance for his good behaviour.³¹ At the other end of the spectrum were suits designed to wage personal vendettas through the courts. For instance, in 1795 Michael Ryan prosecuted four local women for assault in Ferryland, alleging that he had been battered with stones. But the justice of the peace recorded: "defendants in justification said that the plaintiff had several times behaved rude to them and as a punishment they were determined to 'hustle' him as they term'd it." Finding that the women had no evident malice, the court reprimanded both parties and fined them each four shillings.³²

The Ferryland Riot

Countless similar cases came before the courts each year, but a single incident eclipsed all of them in its scope. During

³¹ *R. v. Bolan*, Harbour Grace District, 5 October 1789 (PANL, GN 5/4/B/1).

³² *Ryan v. Wheaton et al.*, Ferryland District, 21 March 1795 (PRL, 340.9/N45 VT Rare Books).

two weeks in September 1788, the Ferryland district court convicted 155 men – nearly the entire adult male Irish population of the community – for “riotously and unlawfully assembling during the Winter to the great terror and injury of all His Majesty’s subjects.” The men were fined an average of £5 each, and the total amounted to £640. Ten of those fined were sentenced to be deported to Ireland, of whom five forfeited all of their wages and one received thirty-nine lashes; another man was sentenced to ninety lashes.³³

Little is known about the riot other than that it occurred during the previous winter and involved a battle among the local factions from Leinster and Munster. Why the incident attracted such a draconian reaction is entirely uncertain. Once raised, however, the ire of the magistracy – led by the presiding naval surrogate, Captain Edward Pellew – was unequivocally clear. After noting that ten of the men had absconded, the court decreed:

That all and each of them do forfeit all the wages may be due to them for their services in the fishery – That they are all of them banished from this District as vagrants and to receive if they should be so daring as to return 39 lashes on their bare backs with a cat of nine tails.³⁴

In the aftermath of this incident, the merchants and prominent planters held a meeting, petitioned Governor Elliot, and formed a

³³ See the minutes for 17-30 September in the Ferryland district records (PANL, GN 5/4/C/1).

³⁴ Ibid.

committee to oversee the building of a district gaol to deter future outbreaks of unrest.³⁵

Although the web of factors behind the entire affair will never be sorted out, its roots ran deeply into the island's sectarian culture. Religion shaped not only the trend in public executions, as we have seen, but also the patterns of noncapital punishment. Despite the grant of toleration in 1784, the status of Roman Catholicism remained insecure. In Ferryland, Father O'Donel, who was from Munster, was locked in a bitter battle with Patrick Power, an itinerant Catholic priest who rallied the opposing Leinster faction to oppose O'Donel's efforts to establish a parish in Ferryland.³⁶ In a letter to Governor Elliot, O'Donel maintained he had taken no part in the riots, which he saw as a byproduct of "deep rooted malice in the hearts of the lower class of Irishmen," combined with liquor, ignorance, and a proclivity to spend too much time playing hurling.³⁷

In a letter to a fellow priest, O'Donel was far less charitable toward the judiciary. Acknowledging the ongoing feud between himself and Power, O'Donel claimed that the local

³⁵ PANL, GN 2/1/A, vol. 11, pp. 388-90 (Ferryland petition), pp. 437-41 (Governor Elliot's orders).

³⁶ Lahey, *James Louis O'Donel*, pp. 5-15.

³⁷ O'Donel to Elliot, undated 1788, in Cyril Byrne, ed., *Gentlemen-Bishops and Faction Fighters: The Letters of Bishops O Donel, Lambert, Scallan and Other Irish Missionaries* (St. John's: Jesperson Press, 1984), pp. 70-71.

magistracy had taken advantage of the division between the factions from Munster and Leinster. O'Donel's comments provide a rare glimpse into how the courts were perceived by those outside the circles of power:

Mr. Carter Judge of the Admiralty for the Island lives in Ferryland where his Father is Justice of the Peace. *This man got many a luscious morsel before my arrival by the fines levied on those rioters, and his son, expecting the dealing of one party of them by supporting the opposition, promised Power his protection which he afford him in a very able manner for he & the parson went round with the surrogate to tutor him who indeed wanted no stimulative as he is a most bitter enemy to Roman Catholics; the surrogate got your letter from Power which he got translated aboard his frigate.*³⁸

On the question of anti-Catholicism, O'Donel was speaking from personal experience. Two years earlier Prince William Henry (later William IV), who was serving as a naval surrogate at Placentia, had physically assaulted Father O'Donel. Appalled at the religious toleration that had developed under Governor Campbell – at Placentia, a priest had been permitted to celebrate mass in the local courthouse – the Prince reputedly plotted to murder O'Donel, who went into hiding until the naval squadron left St. John's.³⁹

³⁸ O'Donel to Father Troy, 16 November 1788, in Byrne, ed., *Letters of Irish Missionaries*, p. 74. Emphasis added.

³⁹ Lahey, *James Louis O'Donel*, pp. 5-9. According to Lahey, Prince William Henry insulted O'Donel in public and threw an iron file at him through a window, wounding him in the shoulder. O'Donel reported that he had heard rumours that the Prince planned to run him through with his sword and get witnesses to testify that it was self-defense.

Prince William Henry, like Captain Pellew, had sent an explicit message to the Irish community. In place of fines, the Prince favoured the use of exemplary corporal punishments, in particular public whipping. Writing to his father, George III, he gave a vivid account of how he had suppressed a group of allegedly rebellious Irishmen:

[A]s it was a Sunday, the Irish servants came in from fishing, and after having got drunk they assembled to the number of 300 before where the magistrates lives and abused him grossly, upon his going out to disperse them. They attempted to break the constables' staves and threw large pieces of rock and stones at the civil officers. The magistrates immediately came on board to acquaint me of the riot. I then went on shore with the boat manned and armed and the marines: upon out landing they dispersed and I pursued them over the beach till the ringleader was apprehended: I then called a Court, and sentenced him to receive a hundred lashes, which punishment was immediately inflicted with the utmost severity.⁴⁰

The Prince could have responded to the situation in any number of ways, from imprisoning the leaders on his ship, placing them in the stocks, or meting out fines. Yet he chose to set an example by severely whipping one man. As part of the cultural transference from the royal navy to the customary laws of Newfoundland, the practice of relying upon whipping formed a defining characteristic of the eighteenth-century penal regime.

⁴⁰ Prince William Henry to King George III, 21 September 1786, in A. Aspinall, ed., *The Later Correspondence of George III* (Cambridge: Cambridge University Press, 1962), vol. 1, p. 249. This case was not included in the sample used for this chapter.

Religion, Class, and the Naval State

The actions taken by Captain Pellew and Prince William Henry cannot be dismissed simply as isolated incidents of petty tyranny or expressions of individual prejudice. In the first place, the use of noncapital punishment in such cases was a highly calculated act: Prince William Henry did not summarily line up all the rioters and have them beaten, nor did he press the troublesome fishermen into the navy. Instead, he selected the person deemed to be the ringleader and convened a surrogate court. Penal severity and judicial discretion went hand in hand. The use of judicial force was not a mere act of official brutality but rather an aspect of a regime calibrated to maintain authority through the deployment of regular examples and periodic terror.

Second, and more importantly, the key to understanding the penal regulation of the Irish in Newfoundland lies in the fact that punishment was oriented as much around class as it was around religion. As we have seen, the bulk of the planters and merchants in pre-1792 Newfoundland were from the English West Country.⁴¹ Put simply, the island had a propertied class dominated by one religious faction and a labour force supplied by another. One of the consistent tenets in imperial policy toward Newfoundland was the aim to prevent surplus labour from

⁴¹ See above, Chapter Six, and Matthews, *Lectures on the History of Newfoundland*, pp. 149-60.

accumulating during the winter. Merchants, planters, and their legitimate servants were never prohibited from settling on the island. But servants who lived in Newfoundland without a written contract to serve under a master were referred to as dieters, a designation that linked idleness with a propensity for crime and social unrest.⁴²

In 1764 Governor Palliser promulgated a penal code designed to control the mobility of labourers, most of whom were Irish Catholics. In a series of orders published together as a single decree, Palliser imposed three oppressive restrictions on Roman Catholics: they were not to overwinter in a community where they had not worked the previous summer; no more than two men could live in a single house together, unless they had a Protestant master; and they were prohibited from keeping a public house or retailing liquor. Further, no one was permitted to give dieters room and board during the winter, while all men and women deemed to be disorderly or useless were to be punished under the Vagrancy Act and deported from Newfoundland.⁴³ This proclamation, which magistrates were to read at Quarter Sessions each year, was renewed by Governor Byron in 1770.⁴⁴ Enforcement varied

⁴² Head, *Eighteenth Century Newfoundland*, pp. 82-100; Handcock, *Origins of English Settlement in Newfoundland*, pp. 91-120.

⁴³ PANL, GN 2/1/A, vol. 3, p. 272 (governor's decree, 31 October 1764). Palliser's initiatives are examined above, in Chapter Five.

⁴⁴ PANL, GN 2/1/A, vol. 4, p. 285 (re-issuing of Palliser's decree, 1770).

according to administrative initiative, for governors and surrogates enforced or ignored regulations as they saw fit.

Palliser's Act of 1775 codified the regulations that had been previously left to the governor's discretion. It prohibited labourers who were not indentured servants from remaining on the island after the summer fishery had ended. Masters were not allowed to ship seamen or fishermen to Newfoundland without first entering into a written agreement, signed by both parties, stipulating the servants' wages, conditions of service, and date of termination. The statute required masters to reserve or deduct from their servants' wages an amount (not to exceed forty shillings) sufficient to pay for their passage home. The intention was clearly to rid the island of potential dieters:

[S]uch hirer or employer shall, at the end of each fishing season, or at the expiration of the covenanted time of service of such seaman or fisherman, pay, or cause to be paid, to the master of a passage or other ship, who shall undertake or agree to carry such seaman or fisherman home to the country whereunto he belongs.⁴⁵

Most of these men were Irish Roman Catholics, a fact lost on no one in the eighteenth century. Fear of social unrest underlaid the desire to control masterless men. Poverty, lawlessness, and Irishness were inexorably linked in the minds of many who, like

⁴⁵ 15 Geo. III, c. 31, s. 13 (1775).

the rector at Trinity, believed, "necessity obliges the Irish to mob frequently."⁴⁶

Whippings in the Outport Districts

The heavy use of whippings instead of other secondary punishments, such as transportation, did not mean that the penal regime was lenient. The courts ordered public whippings for a wide range of misdemeanours, from assault to simple breaches of the peace. Over three-quarters of all whippings – the punishment given most often to offenders convicted of theft – involved more than twelve lashes by the cat-o'-nine-tails. Roughly half of the incidents of whipping entailed the punishment of various forms of property offences. About thirty per cent were for a range of other transgressions, such as assault and various public offences. And a fifth were inflicted in cases that clearly involved disciplining servants, punishing a range of actions that came under the rubric of insolence toward their masters. Whipping had two chief characteristics: it was never used to punish an offender from the propertied classes; and its use was neither consistently nor completely recorded in the minute books.

⁴⁶ *United Society for the Propagation of the Gospel, Calender of Letters*, p. 152.

Table 7.3. Whipping at the District Courts

Type of Offence	Flogging, unnumbered	Till bloody	1-12 lashes	13-39 lashes	40+ lashes	Total
Burglary				1	1	2
Larceny		1	2	25	1	29
Receiving stolen goods				2		2
Insolence, idleness	3		1	7		11
Breach of contract, desertion				2		2
Assault and battery	6		1	1	1	9
Breach of peace, rioting/affray				6	1	7
Drunkenness				1		1
Perjury				1		1
Sodomy				1		1
Vagrancy	1					1
Unknown				1		1
All offences	10	1	4	48	4	67

Per Offender, by sentence.

Source: see Appendix B

From the perspective of the magistracy, whipping was seen as a defining feature of the naval state. When Sir James Mackintosh gave a speech in the House of Commons in favour of reforming the island's legal system, a former naval surrogate rose to give one of the few first-hand accounts of how corporal punishment was used by the courts. According to Hansard's *Parliamentary Debates*:

Sir I. Coffin said, he was many years ago in Newfoundland, and never saw any law there but the cat-o'-nine-tails. He was a surrogate himself, but he never ordered more than a dozen lashes.⁴⁷

Representatives from the island's reform committee, who had been sitting in the gallery, printed a slightly different account:

Sir. I. Coffin gave his testimony to the defective system of the Surrogate Courts. He had himself been a Surrogate. The mode of proceeding was, whenever the Surrogate or Admiral went on shore at any of the settlements, he took a boatswain's mate with him, and when any of the persons engaged in the fishery was brought before him for any offence, he ordered him a dozen lashes, and then sent him back again on board his fishing boat. That was the law in his time.⁴⁸

Coffin's emphasis on the number of lashes reflected the fact that naval officers were not formally permitted to summarily inflict more than twelve – in practice, captains typically ordered up to twenty-four lashes for minor offences – and the MP probably did not want to implicate himself in a technically illegal act.⁴⁹ Clearly, in Coffin's mind, magistrates relied upon whipping as a basic tool in their day-to-day work.

⁴⁷ *Parliamentary Debates, New Series*, vol. 5, p. 1016 (28 May 1821). See also *Journals of the House of Commons*, vol. 76 (28 May 1821), p. 388.

⁴⁸ Anon, *A Report of Certain Proceedings of the Inhabitants of the Town of Saint John, in the Island of Newfoundland, with the view to obtain a REFORM of the LAWS, more particularly in the mode of their administration, and an INDEPENDENT LEGISLATURE* (St. John's: Printed by Lewis Ryan, 1821), p. 37.

⁴⁹ On the regulations governing the use of whipping on warships, see Rodger, *Wooden World*, pp. 218-21.

From the standpoint of the English establishment, serving as a magistrate in Newfoundland represented the dirty work of colonial administration. When the niece of Major John Cartwright, who had been a naval lieutenant stationed at Newfoundland from 1766 to 1770, edited her uncle's papers, she dismissed his entire tenure as a surrogate judge:

Without entering into a detail of the petty disputes among so mixed a set of persons as would naturally compose the population of a colonial fishing station, it may merely be observed, that he fulfilled the duties of his irksome office with that spirit of patient investigation, that anxious regard for truth, which accompanied every act of his life.⁵⁰

Views of the judicial system depended largely upon the author's social position. As Chief Justice Reeves himself confessed in 1791, many of the officers and officials brought with them a preconceived prejudice against coarse merchants and masters, though this usually faded after a year or so. Reeves claimed that spending a summer on the island had changed his mind entirely.⁵¹

Contemporaries were well aware of the social tensions that underscored the use of corporal punishment. Two manuscript accounts illustrate the range of attitudes toward disciplining servants. The first, provided by a visiting physician, has been cited approvingly by liberal historians. It linked the plight of servants directly to the island's lack of proper institutions:

⁵⁰ F.D. Cartwright, ed., *The Life and Correspondence of Major Cartwright* (vol. 1, New York: Augustus Kelly, 1969 rep. of 1826 ed.), p. 31.

⁵¹ PANL, CO 194/38, p. 305.

The common fishermen...are hired from ten to thirteen pounds for two summers and one winter, but as the merchants cannot employ so many of them by ten thousand in the winter, as they can during the fishing seasons, of course they must either stay there, and starve, or return home...finding himself in this melancholy situation, cut off from all hope of ever being able to provide for a family, or old age, by continuing where he is deprived of the laws of his country, and every other blessing indulged by every wise, and equitable governments.⁵²

Conversely, Benjamin Lester, arguably the most powerful merchant in Newfoundland, offered a harsh indictment of how punishment was not serious enough. Comparing the English fishery with the French, he wrote in his diary:

It's no wonder the French beat us in the fishery, their wages is not quite to ours by one quarter, their boats and craft not half the expense, and their crews under such regularity, that if a fisherman sleeps on the ledge and is caught, he is liable to have what punishment the captain [may] please to inflict on him, even to break a limb, if done while he is asleep, and no law to injure him. This is a vast difference, when our villains will neglect going out and when out, sleep when they please, can give surly answers if the master finds fault, and at last be obliged to pay them wages, notwithstanding such neglects.⁵³

A third, rather shrewd observation was made by Edward Burd, a visiting Scottish supercargo. Burd summed up the island's fishery as having extremely expensive provisions, relatively costly

⁵² Gardner, *Observations Made on the Fisheries, and Government of Newfoundland*, p. 29. For an example of the use of this source by whig historians, see Prowse, *History of Newfoundland*, pp. 356-57.

⁵³ Lester Diary Mss., 30 July 1767. Spelling and punctuation have been modernized.

labour, and clearly arduous working conditions. He affirmed, "the very honestest of them will cheat you if he can handsomely."⁵⁴

From the viewpoint of servants facing the prospect of the lash, however, the administration of law loomed ominously. Floggings of more than a dozen lashes by the cat-o'-nine-tails instilled a variant of terror as real as public executions. In the aftermath of Captain Pellew's proclamation on the Ferryland rioters, several of the men who had absconded tried to strike a deal: they would give themselves up if the magistrates promised not to have them whipped. The justices of the peace allowed the request on condition that the men board a ship headed to Ireland at the first opportunity.⁵⁵

On the other side of the judicial fence, there existed at least some resistance to participating in corporal punishments. In 1785 a constable in Bay Bulls refused to carry out a court order to whip an offender. The report sent to Governor Campbell revealed how the use of whipping had become a fixture of the island's legal regime. Forced to find some justification for ordering the constable to personally carry out a whipping, the justice of the peace asked several settlers who had previously served as constables. He informed Campbell that they had all

⁵⁴ PRL, NR/Vault 971.8/EX8, "Extracts Taken from a *Journal of a Voyage to Newfoundland, in 1726-27 on the Ship Christian of Leith.*" Entry for 22 September 1726. Spelling and punctuation have been modernized.

⁵⁵ PANL, GN 5/4/C/1, Ferryland District (minutes for 3 & 25 October 1788).

declared that it had been customary for the constable to punish delinquents when no other person could be procured.⁵⁶ In spite of the magistrate's protest, the constable still refused to whip any offender.

Punishment and Master-Servant Relations

It is impossible to separate punishment from the broader process of disciplining servants. Masters prosecuted servants for offences such as theft as a means to enforce their authority in the workplace. At the Trinity surrogate court in 1766, for example, a master prosecuted his servants for stealing provisions. The case was clearly framed in terms of securing protection from unruly servants:

Complaint was made by W. Jones of English Harbour against Math. Moor, Richard Parsons and Wlm Watts for breaking open several times his storehouse and thence stealing rum, his property which gave him cause to suspect he had been a great sufferer by those villains as two of them were his own servants. Math. Moor and Rich Parsons freely confessed that the charge was true and said Parsons made oath that Watt was in on one of the thefts an accomplice when two quarts of rum were stole and it appearing by the report of his master Jones as well as by his own acknowledgment that he (Watt) had many times been guilty and received punishment for theft.

The magistrate took this opportunity to send a message to the community:

It was ordered that in order to deter all servants from such practices for the future that Math. Moor and Rich Parsons shall receive two dozen lashes with a cat of nine tails on

⁵⁶ PANL, GN 2/1/A, vol. 10, pp. 154-55.

their bare backs at the common whipping post and that the said Richard Watts being an old and hardened offender shall as a more severe example receive at the same time and in like manner three dozen lashes.⁵⁷

The courts did not draw on the law of master and servant to order whippings in cases of theft, but the punishment functioned effectively to discipline workers.

The statute law of master and servant did provide for punishment in cases of breach of contract. Palliser's Act of 1775 contained a wide range of provisions regulating master-servant relations.⁵⁸ Masters were prohibited from bringing servants to Newfoundland without the governor's permission (s. 12). All servants were to have a written contract which, if a dispute arose, the master was obliged to produce in court (ss. 13 & 15). During the period of service, masters were forbidden from advancing servants more than half their wages, forty shillings of which was to be withheld to pay for the servants' passage home at the expiration of the contract (ss. 13-14). All of the fish and oil produced by the masters' fishing operation were liable first for the payment of servants' wages (s. 16).

Any servant who willingly absented himself without permission – or neglected or refused to work according to the terms of the contract – was to be fined two days pay for each day

⁵⁷ *Jones v. Moor et al.*, 27 September 1766, Trinity District (PANL, GN 5/4/B/1).

⁵⁸ 15 Geo. III, c. 31 (1775). The context of Palliser's Act and the island's historiography are discussed above, see Chapter Five.

of absence or neglect of duty. Those who absented themselves without leave for five days were deemed deserters and thereby forfeited all of their wages to their master. Surrogates and justices of the peace were empowered to issue arrest warrants for deserters and, on the oath of at least one creditable witness, to confine them in prison until the next sitting of the surrogate court or court of session. Convicted deserters were liable to be publicly whipped as vagrants and shipped back to their country of origin (s. 17). Lastly, the district courts of session and the St. John's vice-admiralty court were empowered to hear and determine any wage dispute or offence committed by masters or servants against the Act's provisions (s. 18).

Newfoundland historians have focused on the wages and lien system in Palliser's Act, but the salient aspect of the law of master and servant was the effective criminalization of breach of contract. Justices presided over the enforcement of a penal regime that employed whippings to punish actions that threatened the master's authority. Sean Cadigan has argued that in spite of the provisions in Palliser's Act for whipping servants for breach of contract, "local courts chose to ignore them."⁵⁹ The problem with this argument lies not in its inaccuracy – Cadigan's monograph deals primarily with the post-1791 legal regime in

⁵⁹ Cadigan, *Merchant-Settler Relations*, p. 84. Cadigan makes this claim based on his sample of the Harbour Grace district court records after 1787.

Conception Bay – but in the broader assumption that magistrates were somehow reluctant to discipline servants in the eighteenth century.

The danger of ignoring the use of whipping and other corporal punishments to discipline servants extends beyond the narrow confines of legal history. Cadigan concludes that the pressures engendered by the judicial resistance to enforce servant discipline eventually undermined the system of wage labour and contributed to the rise of the family fishery in the nineteenth century. Servants won an overwhelming proportion of their suits to recover wages, thus placing their masters, who were typically planters, in an increasingly untenable financial position. With indentured labour becoming increasingly unattractive, fishermen turned to their family and kin to supply the bulk of the labour needed for fishing operations.⁶⁰ Newfoundland was practically unique, therefore, in that the potential for judicial repression of indentured labour was never realized. Cadigan's work forms part of a broader reaction in Newfoundland historiography against what is seen as liberal/marxist myths of class oppression. In other words, the

⁶⁰ Cadigan, *Merchant-Settler Relations*, ch. 5.

scale is now tipped in favour of stressing servants' rights over labour discipline.⁶¹

However, eighteenth-century Newfoundland did not diverge from the trend in the Anglo-American law of master and servant to criminalize breach of contract.⁶² In the first place, servants in other districts did not fare half as well as those in Harbour Grace in the late-eighteenth century. In Trinity, servants initiated three-quarters of the total actions, but they never won more than half of the total suits from 1765 to 1790. The frequency of master-servant disputes brought before the district courts waned as the fishery's reliance on wage labour started to decline. During the heyday of the migratory fishery, the government was particularly concerned over the flow of labourers into Newfoundland. It is therefore not surprising that sixty per cent of the total master-servant cases in Trinity occurred in the

⁶¹ Thus, in a recent review article, Olaf Janzen asserts: "Recent work by Sean Cadigan, Peter Pope, John Crowley and others...indicates that 'debt slavery,' which did come to characterize the relationship between fisherman and merchant in the nineteenth and twentieth centuries, was far from absolute in the eighteenth century, and that the emerging truck system was a mutually beneficial relationship, *if not necessarily an equitable one*. To employ words like 'slaves' is to perpetuate an outmoded mythology." See Olaf Janzen, "Response to Garfield Fizzard's essay, 'Newfoundland's First Known School,' *Newfoundland Studies* XI, 1," in *Newfoundland Studies* 12, 1 (Spring 1996), p. 52. Emphasis added.

⁶² See Douglas Hay and Paul Craven, "Master and Servant in England and the Empire: A Comparative Study," *Labour/Le Travail* 31 (Spring 1993), pp. 175-84; Paul Craven and Douglas Hay, "The Criminalization of 'Free' Labour: Master and Servant in Comparative Perspective," *Slavery & Abolition* 15 (1994), pp. 71-101.

1760s, when Irishmen from Leinster and Munster flocked to Newfoundland in search of work.⁶³

Table 7.4. Verdicts in Master-Servant Cases in Trinity, 1765-1790

years	for servant	for master	servant ordered to be whipped	case dismissed
1765-70	16	22	5	3
1771-75	7	5	1	2
1776-80	1	1	0	0
1781-85	2	4	2	0
1786-90	1	1	0	1
Total	27	33	8	6

Source: See Appendix B

The naval surrogate in Trinity from 1766 to 1770 was Lieutenant John Cartwright, commander of HMS *Guernsey*.⁶⁴ A vigorous administrator, Cartwright maintained excellent relations with the English fish merchants: during this period Benjamin Lester never lost a major suit. In 1766 Lester brought an action against Edward Cole for refusing to ship himself (i.e. agree to carrying out an indenture) and another servant for deserting his service. Lester's offer of three pounds was considered charity in a season that witnessed a glutted labour market.⁶⁵ Both

⁶³ Head, *Eighteenth Century Newfoundland*, ch. 7.

⁶⁴ On Cartwright's tenure as a surrogate, see Cuff, ed., *Dictionary of Newfoundland and Labrador Biography*, p. 53.

⁶⁵ See Gordon Handcock, *The Story of Trinity* (Trinity, NF: Trinity Historical Society, 1997), esp. pp. 10-12, 61-62.

defendants were seen as part of a dangerous group of idle Irishmen. Lieutenant Cartwright ruled,

In order therefore to suppress such wick'd practices and intolerable idleness it is hereby ordered as an example to others that the said Cole and Mahany shall at the common whipping post receive on their bare backs two dozen lashes each with a cat of nine tails.⁶⁶

This decision enforced a paternalistic law of master and servant. In effect, surplus labourers had to accept any contractual terms offered to them under threat of corporal punishment and deportation as vagrants.

Paternalism Reconsidered

Magistrates used a variety of sanctions to punish those who transgressed the local social order. Servants enjoyed conditional privileges, not inalienable rights: what paternalism granted it could also take away. In using the term paternalism, I follow the approach taken by Gerald Sider.⁶⁷ According to Sider, the seemingly-mutual, personal ties between masters and servants

⁶⁶ *Lester v. Cole & Mahany*, 1 November 1766, Trinity District (PANL, GN 5/4/B/1).

⁶⁷ Gerald M. Sider, *Culture and Class in Anthropology and History: A Newfoundland Illustration* (Cambridge: Cambridge University Press, 1986). Sider's work contains a number of flaws – he oversimplifies aspects of the island's early fishery and government – and Newfoundland historians, led by Sean Cadigan, have vociferously rejected his conclusions. That being said, Sider's provocative monograph remains one of the most penetrating studies of Newfoundland society. His model of paternalism provides a particularly useful means for understanding master-servant relations in the eighteenth century. For a review of the historiography, see Bannister, "The Issue of Class in the Writing of Newfoundland History," pp. 134-44.

masked a fundamental imbalance in material power. Sider's model offers a highly useful framework for studying social relations generally and the administration of law in particular.⁶⁸ In an incisive analysis of paternalistic authority, he examines the process by which a master provided food and drink (over which masters often had a monopoly) to his servants during holidays in the late-eighteenth century. Sider's analysis directly bear on the study of law and custom:

The food, if not the drink, conveyed a double message: He was the source of what they ate, and he was the source of the special food for special occasions. In the context where labor served "by the custom of the fishery," and where servants and masters had their rights and claims adjudicated time after time in the courts by reference to the "custom of the fishery," it is not insignificant that masters would mediate, with so basic a symbol as food, servants' customary occasions.⁶⁹

Whether or not a merchant or planter acceded to a servant's request or periodically acted altruistically is not the point: what matters, at bottom, is that such decisions were almost exclusively within the master's discretion.⁷⁰

⁶⁸ For a critique of the traditional model of paternalism, see Douglas Hay, "Patronage, Paternalism, and Welfare: Masters, Workers, and Magistrates in Eighteenth-Century England," *International Labor and Working-Class History* 53 (Spring 1998), pp. 27-45.

⁶⁹ Sider, *Culture and Class in Anthropology and History*, p. 55.

⁷⁰ This approach differs from the model of paternalism used by Bryan Palmer and Sean Cadigan, both of whom lay greater stress upon reciprocity and communal links. See Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (2nd ed. Toronto: McClelland & Stewart, 1992), pp. 41-48; Cadigan, *Merchant-Settler Relations*, pp. 83-86 & 116-20. In eighteenth-century Newfoundland - particularly from 1750 to 1775, when the reliance upon

To be sure, Governors routinely responded favourably to petitions for wages and redress for breach of contract. But these choices were the prerogative of the governor, his surrogates, and the justices of the peace. Such discretion can be plainly seen in Governor Byron's orders to Robert Carter, the justice at Ferryland, in response to a servant's petition:

You will enquire into this matter and see him paid if no reasonable objection appears thereto, [servants] taken ill after they are shipped must be taken care of by their masters and be paid their wages at the expiration of their time: likewise being an Act of Providence and not of theirs, yet where circumstances shall be made appear against servants, who shall abuse an indulgence of this sort, by feigned sickness or sickness brought on by drunkenness the masters may deduct two days for one of every day neglected of their duty.⁷¹

Allowing such indulgences meant neither that magistrates were recognizing a legal right, nor that servants necessarily felt beholden because of such treatment.

As a group of servants on the Southern Shore discovered in 1790, benevolence and discipline were flip sides of the same coin. Suspected of having stolen some salt codfish from a merchant's flake, twelve men were examined by the local justice of the peace. Three of them confessed and were convicted of larceny, but the merchant recommended one man, who was his

indentured labour was at its peak – many of the institutions of bourgeois society which worked to enforce moral regulation and vertical social bonds (e.g. clergy and churches) had not yet become entrenched.

⁷¹ PANL, GN 2/1/A, vol. 4, pp. 263-64. Emphasis added.

servant, for mercy because he was "an old man hitherto bearing an exceeding good character."⁷² While the court sentenced all three to be deported to Ireland, it gave one of them an additional sentence:

Decreed that Thomas Quinn be punished with twenty four lashes on his bare back, as follows, viz. eight at the point beach, eight at the north side room, and eight at the court house, and to walk from place [to place] with a fish hung round his neck.⁷³

There is no evidence to suggest that Quinn was any more guilty of the crime than his two accomplices. The determining factor behind the decision to whip him instead of the others was simply the prerogative of the bench, which followed the lead of the complainant. From the servants' perspective, the capriciousness of paternalism meant that they had little influence over their fate when they entered the courtroom as defendants. If they were granted mercy, it was due to the whim of magistrates and masters who together selected those worthy of special consideration.

As Greg Dening points out, the incidence of judicial violence cannot simply be counted but must be measured in terms

⁷² The minutes stipulate that Patrick Lundrigan was a servant of the merchant whose fish had been stolen, and the other two men - Roger Dullahanty and Thomas Quinn - may also have been working under the complainant's direction. The men testified that they had been drunk the night of the theft and could not remember exactly what they had done.

⁷³ *Hill v. Quinn, Dullahanty, and Lundrigan*, 14 October 1790, Ferryland District (PRL, 340.9/N45, VT, Rare Books). The original information had been taken by Henry Sweetland, a local JP, who issued a search warrant and then examined the suspects. The hearing and sentencing took place two weeks later, at a formal sitting of Sweetland and two other justices of the peace.

of social impact. The bare numbers of punishments – which were not inconsiderable in eighteenth-century Newfoundland – mattered less than the context in which they occurred.⁷⁴ Magistrates at times explicitly cited the threat of corporal punishment in order to discipline servants. In Ferryland 1785, for example, James Kane brought an information against three of his servants for refusing to work. The court ruled that the men were guilty of disobeying their masters' orders; they were each fined two days wages and ordered to return peaceably to their duty. If any future complaint should be made, the servants were to be summarily whipped.⁷⁵ Legal power could be wielded as much by sheer intimidation as by individual acts of judicial violence, and the spectre of punishment and brutality penetrated deeply into the mentalité of maritime life. This did not mean that state law and class oppression became one and the same thing.⁷⁶ Rather,

⁷⁴ Dening, *Mr. Bligh's Bad Language*, esp. pp. 113-115. On this point see also E.P. Thompson, "Folklore, Anthropology, and Social History," *Indian Historical Review* 3 (1977), p. 255.

⁷⁵ *Kane v. Colbert et al.*, 30 August 1785, Ferryland District (PRL, 340.9/N45, VT, Rare Books).

⁷⁶ The fact that punishment was rooted in class did not mean that it was determined by it. The careful employment of penal sanctions in Newfoundland conflicts somewhat with the model advanced by Marcus Rediker. The difference between my position and Rediker's is one of degrees. Where Rediker sees what amounts to naked class conflict between workers (violent popular resistance) and capital (violent legal repression), I would argue that Newfoundland magistrates were far more circumspect in their use of corporal punishment. What made whipping so effective was not its indiscriminate application but rather its deliberate calibration in response to varying local conditions. See Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World*,

magistrates carefully measured their responses to crime, unrest, and disobedience using an array of penal tools.

Four court actions brought in the space of a year in Trinity displayed the multiple faces of paternalistic authority. First, in May 1755, John Stanweth, a ship's carpenter, complained that John Goold, a fishing servant, had struck him in the face. In response, Thomas Warden, the local justice of the peace, ordered Goold to receive a dozen lashes at the whipping post.⁷⁷ At the next sitting of the court, Benjamin Lester alleged that John Walden, one of his servants, had been drunk and ill-behaved. According to the memorandum,

The next day John Walden down upon his knees in publick company and acknowledge[d] what he had said to be false and asked Mr. Lester's pardon and it was forgiven him upon condition not to be guilty of the like for the future. The above was done before me Thomas Warden justice.⁷⁸

This act of contrition symbolized the potent mix of retribution and mercy, of personal relations and public authority, which suffused the administration of law. The third example occurred in November 1755, when the servants' contracts were being settled. John Brock brought an information against one of his servants for refusing to go to sea. The magistrates issued a warrant for the

1700-1750 (Cambridge: Cambridge University Press, 1987), ch. 5.

⁷⁷ *Stanweth v. Goold*, 30 May 1755, Trinity District (PANL, GN 5/4/B/1, box 1).

⁷⁸ *Lester v. Walden*, 18 June 1755, Trinity District (PANL, GN 5/4/B/1, box 1).

man to return to work and, if he did not, authorized Brock to seize his servant's chest, clothes, as well as any other property, and "turn him out of doors and not allow him any victuals."⁷⁹ Such a threat loomed particularly large as winter approached and the servant would have been hard pressed not to relent. Lastly, in February 1756, Warden recorded that John Johnson was put into the stocks for being drunk and abusive toward his master.⁸⁰ As calculated examples in a small community, such incidents were more than sufficient to establish an effective penal code.

As the fishing season progressed through the summer, justices of the peace and naval surrogates became drawn into disputes between masters and servants or among planters and merchants. The latter concerned roughly legal equals - or, at the very least, those for whom fines or arbitration were used instead of whippings - but the former was distinctly the terrain of the magistracy. Like justice in many colonial territories, the bulk of business before the courts involved minor suits for debts less than £75 or petitions for unpaid wages under £25.⁸¹ Petty

⁷⁹ *Brock v. Sargent*, 12 November 1755, Trinity District (PANL, GN 5/4/B/1, box 1).

⁸⁰ See the minutes for 15 February 1756, Trinity District (PANL, GN 5/4/B/1, box 1).

⁸¹ For a sense of the economic relations (i.e. debt, credit, and contracts) and the judicial business typically brought before courts in fishing communities, see Daniel Vickers, *Farmers and Fishermen: Two Centuries of Work in Essex County, Massachusetts, 1630-1850*

complaints raised by disgruntled servants and masters comprised much of what justices of the peace faced year after year.

Many of the suits brought before the courts each autumn were the climax of a running battle that can be discerned only through an extended case-study. In 1773 Walter Welch presented a petition to the surrogate court in Ferryland detailing how he had been beaten and unfairly dismissed by his master, William Saunders.⁸² Contracted to work as a splitter, Welch had arrived in Ferryland the previous May. After returning from his first fishing voyage, he was ordered to work with the shore-crew washing fish.⁸³ Saunders admonished him for doing a poor job and struck him two or three times, upon which Welch complained to Robert Carter, the local justice of the peace. Summoned to explain the beating, Saunders told Carter that the next time he thought Welch deserved it, he would beat him even worse. Welch asked to be released from his contract, but Saunders refused, claiming that Welch was a good splitter and he could not do without him. Welch then allegedly skulked away and hid himself. Saunders remonstrated to

(Chapel Hill: Institute of Early American History and Culture, 1994), pp. 150-203.

⁸² *Welch v. Saunders*, 11 September 1773, Ferryland District (PRL, 340.9/N45, VT, Rare Books).

⁸³ Welch was apparently contracted by Saunders in Ireland. Whether he had worked previously in Ferryland is uncertain, but he probably had some experience, since splitters required a relatively high degree of skill. To be forced to work ashore washing fish would have been an insult to any experienced splitter.

Carter, who ordered a fine of three shillings for each day Welch neglected his duty.

Some time later another altercation occurred when Welch returned the key to the provisions chest. Saunders apparently thought too much had been taken and ordered Welch to go to sea again. The next morning he commanded Welch to cut wood and afterwards refused to allow him to bring his clothes to the washer-woman. Ordered back to work, Welch refused on the grounds that it was a Sunday. His master then pushed him into his house and struck him twice on the nose; he ran outdoors but was struck on his side and collapsed, bleeding over the dirty linen he was still carrying; seeing this, Saunders kicked it into the dirt. The next morning Welch again went to Carter. Saunders informed Carter that Welch had refused to work and was "otherwise very saucy for which reason he struck him." He said he was now willing to release his servant from his indenture, but Welch maintained he would serve his whole time and then have his wages.

But Carter would have none of this and gave Welch his clearance. He asked for the shipping paper, which Welch refused to give up, and Carter replied that if he did not deliver it within twenty-four hours, he would be flogged. At the surrogate court - where Captain James Howell Jones presided alongside Carter - Welch was found to be "a very troublesome and litigious person and has several times neglected his duty." The court sentenced him to receive corporal punishment and to be paid only

for the time he had done his duty. For the assault Saunders was fined three pounds. While a cursory reading of this decree might suggest a simple case of punishment for insolence and a fine for assault, the dispute between Welch and Saunders had encompassed specific grievances over an entire fishing season. Through the use of violence, the law (rules for neglect of duty), control of work conditions, and then violence again, Saunders reacted to perceived instances of substandard performance, desertion, improper use of provisions, and refusal to work. In response, Welch sought redress through the law (by appealing to justice Carter), objected to unfair work conditions, complained again to Carter, and then petitioned the surrogate court. Carter discharged his office according to the customs of the country, by which he tried to arbitrate the dispute, then fined Welch for desertion, and finally used the threat of flogging. None of these proceedings would have been recorded if Welch had not petitioned the visiting naval surrogate. Unfortunately for Welch and countless other servants, in such cases the surrogate courts consistently upheld the authority of the local justice of the peace.

Conclusion

Whipping was a hallmark of the naval state. It occupied a central place in the legal culture of eighteenth-century Newfoundland. In many respects, the island's fishing servants were in a position similar to the convicts in New South Wales. In both cases a class of labourers worked under an indenture and penal code designed to ensure discipline through exemplary punishment. The cat-o'-nine-tails was a feared tool of repression when used to effect: punishment was highly discretionary; decisions about when and how to punish servants remained the prerogative of individual masters and magistrates. They made their decisions based on the common law, local customs, and paternalistic authority.

Two basic forces shaped the use of non-capital punishments in Newfoundland. The limited administrative infrastructure available in the eighteenth century meant that local government could not embark on large-scale initiatives such as prison-building or the frequent use of transportation, both of which required funds beyond the means of the naval state. Without a local legislature in which to pass bills of appropriation, the island's government had to rely upon the taxes periodically approved by *ad hoc* committees and raised by the district magistrates. The courts still enjoyed a range of options in meting out noncapital punishments, from banishment to the stocks.

In practice, judges and magistrates displayed an overwhelming preference for two types of punishment: fines and whippings. While the former represented an expedient means to raise funds locally, the latter formed the primary tool of discipline.

Second, the magistracy deliberately used noncapital punishments to reinforce the social order in local communities. Designed to discipline unruly servants as much as to castigate offenders, punishment reflected both the island's culture and its relations of production. Planters and merchants were never subjected to whippings, while the threat of corporal punishment hung over everyone else working in the fishery. Additionally, the naval state targeted Irish Roman Catholics generally and dieters in particular: edicts of toleration could not mask the fact that aspects of the religious penal laws remained in force prior to 1829. As part of the cultural transference from the royal navy to the island's fishing society, whippings comprised a central feature of the penal regime. Naval justice had become such an integral facet of the judicial system that no one publicly questioned its role until the 1820s, when reformers first portrayed it as a symptom of tyranny. To those living in the eighteenth century, the cat-o'-nine-tails was part of the customs of the country – no less legitimate than the naval state itself.

Chapter 8

Conclusion

This study began with the premise that eighteenth-century Newfoundland needs to be studied on its own terms. It has rejected the view of nineteenth-century reformers who condemned this period for their own narrow political purposes, as well as those modern scholars who have accepted such polemics at face value. Although historians have overturned many misconceptions about the island's economy, the legacy of the Whig perspective of law and government continues to skew Newfoundland historiography: the image of corrupt fishing admirals and quarter-deck justice represents one of the enduring national myths of Newfoundland. Evolutionism in whatever guise – whether the focus on the delayed transition to industrial capitalism, or the less-sophisticated description of the taming of the maritime frontier – insists on imposing a false cohesion on developments which were complex and subject to pressures alien to the 1830s. The first concern of this dissertation has been to reconstruct, at least in part, the structure, growth, and operation of a system of governance that survived basically intact for a century.

This undertaking bears not only on Newfoundland history, but also on the broader study of the pre-industrial colonial state. It affords an instructive case-study in which to examine the function of customary sources of law and authority. The

development of what I have termed a "naval state" demonstrates the need to widen the orthodox view of regulation to include custom and common law as potent legitimizing forces. Statute law was never the dominant means through which state power was organized. Customary arrangements could function as effectively as the panoply of English law established in other colonies; the absence of the standard array of formal institutions did not necessarily produce an enfeebled state. Newfoundland was not unique in this respect: all British colonies had informal networks which played key roles in political as well as judicial administration. What set the island apart was the fact that these customs – most notably the governor's court, the surrogate system, and the *ad hoc* local committees – substituted for the legal regimes entrenched elsewhere in statutory law. Put simply, local customs were not merely temporary stand-ins for the real thing.

At the same time, the model of the colonial state cannot be diluted so far as to include every conceivable source of local authority. The naval state had recognized and enforced boundaries. Clear divisions existed between legitimate forms of authority that fell within the ambit of the state and extralegal actions prohibited by governors. Governors and surrogates encouraged private arbitration where possible and were careful not to upset existing structures of social control, but they

never condoned whippings carried out summarily by masters against their servants. Exercising the basic function of a colonial state, the naval government maintained a monopoly over the means to exercise legal violence.

The importance of the royal navy cannot easily be overemphasized. Warships on the Newfoundland station provided the infrastructure, personnel, legitimacy, and material force needed to administer law. This is not to suggest that the colonial state and the royal navy in Newfoundland were one and the same thing. The judicial regime relied heavily upon civil magistrates – particularly the commissioners of oyer and terminer and the justices of the peace – who presided over the assizes and quarter sessions. It was a cooperative system of civil and naval authority: magistrates and officers never became rivals for power. The former performed a role similar to their counterparts in other British colonies, serving as the bulwark of local government and the only legal authority after the naval squadron left each autumn.

Individual initiative marked the administration of justice – some magistrates adhered to statutory law while others did not – but with few exceptions they upheld the authority of the naval state. As distinct as early Newfoundland was, those committing offences found themselves confronted with personnel and processes similar to those found throughout the British Empire. The most significant difference between magistrates in Newfoundland and

those in other colonies was the fact that the island's justices could count on the regular presence of the royal navy to reinforce their authority. Arguably the most powerful military organization in the western world, the royal navy conferred unrivaled material and symbolic power. It also acted as a check on the magistracy, for governors did not hesitate to dismiss justices of the peace when faced with serious complaints of misconduct from the outport districts.

The history of pre-1832 Newfoundland demonstrates the danger of studying governance solely from the perspective of statutory law and imperial policy. It echoes an argument made by C.A. Bayly that the statements of written constitutions and formal minutes are poor guides to exploring social and political developments, since there are distinct limitations to legal history based on what officials tell their lawyers they are doing.¹ For the historiography of Newfoundland, the risks are doubly high because of the large gap that existed between imperial policy and local practice. In short, the view from the statute books is at odds with the archival manuscripts. This does not mean that the island was subjected to acute localism, as some have contended.² The legal cultures of St. John's and the outports had far more in common than they had differences. Analysis of the district

¹ Bayly, *Imperial Meridian*, p. 9.

² For a recent call for more regional studies of local outports, see Janzen, "Newfoundland and the International Fishery," p. 324.

records, assizes minutes, and colonial correspondence indicates a remarkable uniformity when considered in light of contemporary maritime conditions. Few doubts seem to have existed in the minds of governors or magistrates that they were participants in a single political jurisdiction. Whatever differences they had were offset by the shared traditions provided by the common law.

The endemic concern among officials and merchants to keep the labour force in check represents a central theme of eighteenth-century governance. Managing master-servant relations was the single most important task for the courts. The protection of property remained a secondary problem, largely because merchants were not particularly vulnerable to the threat of larceny for most of the year. In effect, criminal law and the law of master and servant merged to form a single legal code that relied on exemplary corporal punishments to discipline unruly servants. When the structure of the island's fishery transformed from a reliance on wage labour to family-based operations, the demands on the judicial system changed accordingly. Coupled with a broader shift in sentiment away from physical punishment, and the rise of bourgeois culture after 1815, these developments placed increasing strains on the penal regime that operated under the aegis of the naval state.

Placed in this context, legal culture cannot be adequately understood outside of the social relations of production and exchange. Specific incidents which skew the overall pattern, such

as the Ferryland affray in 1788, have to be assessed through micro-studies of the parochial politics that marked outport life. Reception and adaptation of institutions are best viewed through the lens of colonial society: salient features in the administration of justice appear as simply unique or inexplicable unless examined in terms of the social makeup of fishing communities. For example, the prominence of surgeons in the island's judiciary was a byproduct of their place in the eighteenth-century fishery. Surgeons provided medical services in nearly every outport community, making them the closest thing to a professional class on the island.

Permeating this study has been the idea of the custom of the country. It has been relevant not only for the specific practices it alluded to at the time, but also for the broader concept that eighteenth-century Newfoundland had its own legal culture, one which naval surrogates readily identified and incorporated into their decisions. While English common law shaped the island's legal regime, *lex loci* comprised the defining characteristic of governance. Customs were not popular traditions but rather forms of law developed by and for the magistracy and those with access to the circles of power. Law was in turn molded by contestation: the struggle for authority from 1729 to 1733 had a lasting impact on state formation. Compromise arrangements made between local factions, and the acceptance of a hybrid magistracy, set the

conditions for the reliance on naval authority. Seen in this light, legal pluralism was more a dynamic *within* the law than it was a matrix of codes on the boundaries of law and society.³ The island's legal system drew together written and unwritten sources of law: prerogative writ, statute, common law, and local custom. Contrary to a recent interpretation, statute formed the least important element of state law in Newfoundland.⁴ Eighteenth-century courts relied upon an amalgam of customary practices and legal regulations which mutually reinforced a single legal regime.

Law was an expression of social power. Whether in the courtroom, at the whipping post, or around the scaffold, those living in Newfoundland were reminded of who ruled whom. Punishment and mercy were dispensed according to the threats perceived by the propertied classes. Merchants and planters had a reputation to lose; servants had a character to prove. The gulf between these two worlds was symbolically and materially displayed through the discretionary application of punishment. The courts played a formative role in shaping legal culture.⁵ The social cleavage of religion theoretically transcended economic divisions, but prior to 1815 it reinforced existing power

³ Griffiths, "What is Legal Pluralism?," pp. 5-7.

⁴ Cadigan, *Merchant-Settler Relations*, pp. 15, 27-32, 83-86.

⁵ For an excellent discussion of how local courts could shape cultural memory, see Isaac, *Transformation of Virginia*, ch. 5.

structures. Although official persecution of Roman Catholics was episodic – Governor Dorrill's draconian administration in 1755 was the exception, not the rule – the courts recurrently used punishment to assuage fears of Irish sedition and unrest. Public hangings of Irish offenders formed political statements designed to affirm the authority of both the naval state and the St. John's elite. Only after 1832 did Catholic officials and politicians begin to exert political influence on a par with their Protestant counterparts.

All these events took place in a trans-Atlantic context. To stress the need to consider events in Britain and Ireland entails much more than merely acknowledging the importance of the imperial system. Seasonal migrations of men and women across the Atlantic involved a cultural transference, but this was not a one-way process. Voyages from ports such as Poole and Waterford to Newfoundland were short by most colonial standards: crossings rarely exceeded four weeks. Sailing to Newfoundland was not comparable to the experience of American colonists, many of whom considered the move to be a decisive break with the Old World.⁶ From the perspective of state formation, the close ties merchants and planters maintained with the West Country had a direct impact on the making of imperial policy. When fish merchants sought to

⁶ John Elliott, "Colonial Identity in the Atlantic World," in Nicholas Canny and Anthony Pagden, eds., *Colonial Identity in the Atlantic World, 1500-1800* (Princeton: Princeton University Press, 1987), p. 7.

block an initiative or to push for reforms, they turned to London, where they gained access to the corridors of power. Political machinations in England played a significant role in Newfoundland, particularly in the 1730s and again in the early 1830s.

A crucial difference separated the course of politics before and after the 1815. Whereas the absence of a bourgeois public sphere had afforded governors and magistrates a remarkably wide latitude throughout the eighteenth century, the establishment of an independent press changed the rules of the game entirely. The growing public sphere spawned a plethora of new forms of social regulation, but the emergence of an opposition press in the 1820s was by far the single most important development. Relying upon newspapers and pamphlets, the colony's reform movement successfully targeted naval government as the root of all the island's problems. Once cast as the very bastion of enlightened justice, the royal navy became fodder in the campaign for representative government. Ultimately, the creation of a bourgeois public sphere signaled the end of the naval state.

Behind all of these events and patterns rested the twin factors of force and legitimacy. Without force – in essence the material means to impose a political will and legal jurisdiction – the colonial state would never have grown significantly in the eighteenth century. This criterion was met by the royal navy, the engine of law and government for 130 years. With up to nine

warships stationed around its coast, Newfoundland experienced a degree of military governance with few parallels in British North America. To be sure, this regime was seasonal, but so too were many aspects of British justice generally, such as the assize circuit. Naval officers sustained the legitimization of governance: they brought the majesty of law to St. John's and the outports. Able administrators, they presided over the birth of bureaucracy. The revolution in government initiated by Governor Rodney in 1749 transformed a rather nebulous judicature into a coherent, cohesive legal system.

This is not to suggest that governance in pre-1832 Newfoundland was socially just. The inequities noted by Patrick O'Flaherty were indeed byproducts of the lack of representative institutions.⁷ Local courts never operated in an abstract setting: eighteenth-century Newfoundland was, above all, a face-to-face society in which personal relations, appearances, and character determined where one sat within ones caste. It would be a mistake to assume that those with little social currency automatically deferred to their betters or meekly accepted the rule of the magistracy. Despite the trend in recent historiography to downplay labour discipline, the eighteenth-century legal system worked first and foremost to protect

⁷ Patrick O'Flaherty, "Government in Newfoundland before 1832: The Context of Reform," *Newfoundland Quarterly* 84, 2 (Fall 1988), pp. 26-30; idem, "The Seeds of Reform," pp. 40-56.

propertied interests. Servants who disobeyed their masters or displayed signs of insolence were liable to be corporally punished. As we have seen, this was no idle threat. Magistrates ordered fishermen to be publicly whipped with the cat-o'-nine-tails for a range of transgressions, from vagrancy to breach of contract.

To argue that the island's legal development was simply backward cannot account for the effectiveness of the naval state. Two generations ago Ralph Lounsbury suggested that early Newfoundland endured a limited political and legal system because it had a primitive society in which there existed neither need nor demand for representative government.⁸ Recently, Christopher English has argued that the restrictions imposed by King William's Act of 1699 stunted state formation. Humble fishing villages got by with the barest forms of parochial government: as late as 1815, only the rudiments of a state had been achieved.⁹ But to stress Newfoundland's anomalous legal status fails to adequately address the structure and operation of its government. More specifically, to conflate the growth of bourgeois society with the operation of an effective colonial state obscures the function of customary institutions. With three layers of authority – the governor's office at St. John's, the surrogate

⁸ Lounsbury, *The British Fishery at Newfoundland*, esp. pp. 307-10.

⁹ English, "The Case of Newfoundland, 1789-1819," in Greenwood and Wright, eds., *Canadian State Trials, Volume One*, pp. 296-322.

courts in the districts, and the sessions held by justices of the peace – the system of policing and punishment in Newfoundland was as strong as that in other rural societies in British North America. From the viewpoint of most Anglo-American colonists, the British fiscal-military state maintained a limited presence outside of garrison towns and regional capitals.¹⁰

This brings us back to the problem of defining the colonial state. To view governance from the altitude of imperial policy overlooks much of what was happening on the ground. As Michael Braddick contends, the pre-industrial state was not a purely institutional phenomenon.¹¹ In other words, it comprised much more than the sum of its bureaucratic parts. Given the range of available resources and the nature of local conditions, the seasonal judiciary of the naval governor and his junior officers provided a remarkably effective administrative regime. The involvement of merchants and magistrates in local government –

¹⁰ The best summary of this argument is Wood, *The Radicalism of the American Revolution*, chs. 7-8. On the question of defining the function of state formation, American and Canadian historians present starkly different interpretations. Whereas the former tend to emphasize the local forms of communal regulation that prevailed prior to 1800, the latter have focused primarily on identifying the origins of the state apparatus that emerged after 1830. On Canadian historiography, see Baehre, "The State in Canadian History," pp. 119-33.

¹¹ Michael Braddick, "State Formation and Social Change," p. On this point, see also Michael Ignatieff, "State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment," in Stanley Cohen and Andrew Scull, eds., *Social Control and the State: Historical and Comparative Essays* (Oxford: Basil Blackwell, 1983), pp. 96-101.

particularly their use of *ad hoc* committees – formed a substitute for the institutions granted to most British colonies.¹² When the island's customary sources of authority are considered as parts of the colonial state, the relative effectiveness of the naval regime can be clearly discerned. The malleability of the common law tradition allowed eighteenth-century Newfoundland to develop a legal system that met the needs of those in power.

¹² Thus informality (which Greenwood and Wright see as characterizing the administration of law in pre-1832 Newfoundland) does not denote ineffectiveness. See F. Murray Greenwood and Barry Wright, "Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada," in Greenwood and Wright, eds., *Canadian State Trials, Volume One*, pp. 14-15.

Appendix A

Archival Records of the Court of Oyer and Terminer, 1750-1791

There is no archival cataloging for the records of the court of oyer and terminer. Rather, the minutes are scattered throughout two series of government documents: the Colonial Office Papers, and the Colonial Secretary's Letterbook.

The Governor ordinarily appended the court proceedings to his returns to the Board of Trade's heads of inquiry, dispersed in the Colonial Office Papers [CO 194], housed at the Public Record Office, with copies at the Provincial Archives of Newfoundland and Labrador, and the National Archives of Canada. These minutes were sent, along with the returns to the fishery, directly to the Secretary of State, usually as soon as the governor's flagship had anchored at Spithead after returning from Newfoundland. Copies were occasionally sent directly to the Admiralty.

The records were also copied locally into volumes of the Colonial Secretary's Letterbook [GN 2/1/A], housed only at the Provincial Archives of Newfoundland and Labrador. These proceedings were entered by the governor's secretary immediately after the assize session had ended. Where complete transcripts were made, the minutes entered into the Letterbook appear to have been identical to those sent to the Secretary of State, though differences in handwriting confirm that separate clerks were often employed. These two primary sources often provide identical sets of records. However, the Colonial Office Papers have gaps for the 1750s, and the Letterbook mainly has only summaries for the 1770s and 1780s. Manuscript materials provide the only reports: there was no newspaper in Newfoundland until 1807.

The assize minutes vary considerably according to the initiative of the clerks, the judges, and the governor. While some proceedings contain a complete transcript of every trial - including grand jury indictments, depositions, testimony, charges to the trial jury, and the judges' reports - others supply only a summary of the cases of those offenders sentenced to death. There are no discernable patterns in the quality of record-keeping, and each case had to be traced individually in the manuscript sources.

Sampling was not employed. As much information as possible was gathered on each trial, though gaps undoubtedly remain. For example, in 1784 the governor referred to the cases of several defendants who were acquitted but whose trials are not cited in any of the records. But nearly all of the punishments meted out

by the courts upon convictions at the assizes appear to have been recorded in either the Letterbook or the Colonial Office Papers.

The following list contains all of the known references to every trial at the court of oyer and terminer. The assize records are broken down into four categories, under the heading of "cases heard?":

- Yes: Cases came to trial and full proceedings have survived for study.
- Partial: Cases were heard, but only partial notes or summaries are available, either because no full transcript was prepared at the time or none has survived for study.
- No: Assize session convened, but there were no cases to be heard and the grand jury returned no true bills. Assizes terminated without any offender being brought to trial.
- Unknown: It cannot be determined whether an assize session was convened for that year, whether it convened and no cases were heard, or whether the proceedings were kept and have not survived.

Unless otherwise noted, all of the archival citations refer to materials housed at the Provincial Archives of Newfoundland and Labrador. The first archival entry for each year denotes the set of records cited in the text of the thesis.

<u>Assize Year</u>	<u>Cases Heard?</u>	<u>Archival Location and Notes</u>
1750	Yes	CO 194/12, pp. 184-191 GN 2/1/A, vol. 1, pp. 181-97 CO 194/25, pp. 92-96
1751	Yes	CO 194/13, pp. 14-23 CO 194/23, pp. 270-310 GN 2/1/A, vol. 1, pp. 283-304
1752	Yes	CO 194/13, pp. 50-69 CO 194/23, pp. 270-310 GN 2/1/A, vol. 2, pp. 1-31
1753	No	
1754	Yes	CO 194/13, pp. 153-171 CO 194/23, pp. 270-310 GN 2/1/A, vol. 2, pp. 135-42 & pp. 171-81
1755	Yes	GN 2/1/A, vol. 2, pp. 239-42
1756	-- No governor present in Newfoundland --	
1757	No	
1758	Yes	GN 2/1/A, vol. 2, pp. 441-52
1759	Yes	GN 2/1/A, vol. 3, pp. 18-21
1760	Unknown	
1761	Unknown	
1762	Yes	CO 194/15, pp. 70-73 GN 2/1/A, vol. 3, pp. 155-59
1763	No	
1764	No	
1765	No	
1766	Unknown	

<u>Assize Year</u>	<u>Cases Heard?</u>	<u>Archival Location and Notes</u>
1767	Unknown	
1768	No	
1769	No	
1770	No	
1771	Yes	CO 194/30, pp. 88-90
1772	Yes	CO 194/30, pp. 132-36 CO 194/31, pp. 18, 23
1773	Partial	CO 194/31, pp. 90-91 GN 2/1/A, vol. 5, p. 96
1774	Yes	CO 194/32, pp. 17-31
1775	Yes	CO 194/32, pp. 106-116
1776	Yes	GN 2/1/A, vol. 6, pp. 174-94 CO 194/33, pp. 11-30 & 72-79
1777	Yes	CO 194/33, pp. 140-152
1778	No	
1779	Yes	GN 2/1/A, vol. 7, pp. 19-47
1780	Yes	GN 2/1/A, vol. 8, pp. 117-146
1781	Yes	GN 2/1/A, vol. 9, pp. 322-332
1782	Partial	GN 2/1/A, vol. 9, pp. 365-66
1783	Unknown	
1784	Partial	GN 2/1/A, vol. 10, pp. 112-21 CO 194/36, pp. 70-74
1785	Partial	GN 2/1/A, vol. 10, pp. 185-89
1786	Yes	CO 194/36, pp. 215-243

<u>Assize Year</u>	<u>Cases Heard?</u>	<u>Archival Location and Notes</u>
1787	No	
1788	No	
1789	Yes	CO 194/38, pp. 122-78
1790	Yes	CO 194/38, pp. 202-12
1791	Partial	CO 194/38, pp. 274-77 GN 2/1/A, vol. 12, pp. 97-99

Appendix B

Sample of the Newfoundland District Court Records

The records of the courts convened in the districts outside St. John's are a hybrid of the proceedings of justices of the peace and naval surrogates. Fishing admirals also periodically sat alongside the justices and the surrogates during the autumn quarter sessions, which were often referred to as a surrogate court of sessions. These archival records have been cataloged separately as minutes of the court of sessions and surrogate court. Prior to 1792, however, these proceedings included a wide range of data on both justices of the peace and naval officers serving as surrogates: governors and magistrates did not differentiate between the jurisdictions of naval and civil magistrates. The distinction between courts of session and surrogate courts has therefore been replaced in this thesis by the term "district courts," which denotes all of the sessions held in the outport districts by the authority of naval and/or civil magistrates.

In practice, the minute books functioned as the local repository for all legal records, from minutes of quarter sessions to private indentures. Record-keeping varied markedly according to the initiative of the senior justice of the peace and the visiting naval officer. Even within a single series of records, the quality of the minutes depended entirely upon the presiding magistrate: while some noted every warrant issued out of sessions, others kept records of only trial proceedings. Pagination in original documents, where it appears, is unreliable: court proceedings can be accurately cited only by date. Regional variation among the different communities was less a product of actual legal practices than of uneven record-keeping: the regular presence of the naval surrogates each autumn ensured a basic level of uniformity in judicial procedures.

These minute books comprise only a portion of the overall business of the district courts. The bulk of correspondence between the governor and the justices of the peace, as well as virtually all of the orders sent by the governor to the outports, are preserved in the Colonial Office Papers and the Colonial Secretary's Letterbook. Research into these sources demonstrates that the minute books alone cannot be relied upon as a comprehensive primary source for the island's legal history. There is some overlap between the district proceedings and the colonial correspondence - for example, visiting naval surrogates often entered the governor's annual proclamations into the minute books - but many important developments appear only in the

records preserved at St. John's. The minute books seem to have been kept in the local communities where the district courts were convened; appeals and other memoranda were often copied locally and transmitted to the governor via the naval surrogates.

All of the records for the districts listed below have been sampled. Except for the district of Trinity, research was confined largely to criminal proceedings, criminal trials, and the range of noncapital punishments meted out for various common law offences. Since magistrates were not legally bound to keep written accounts of all their actions taken out of sessions, the total number of punishments actually carried out cannot be determined. The minute books probably include references to less than half of the total whippings inflicted from 1751 to 1796. Nonetheless, the proceedings provide insights into the variety of court actions and the range of punishments employed by the local magistracy. For example, the sample confirms that public whippings were used to punish indentured servants for insolence toward their masters and simple breaches of the peace.

In the case of Trinity, a complete transcript was compiled of all the judicial business, including every writ and order relating to civil causes. The Trinity minute books are by far the most detailed and complete of all the district records. They give a relatively accurate indication of the makeup of the judicial business conducted in the outports. Over 300 separate entries, ranging from formal writs to daily memoranda, were made from 1760 to 1790: a total of 149 criminal and civil actions were heard by the magistracy. These cases break down into four basic categories: civil suits between and among merchants and planters (20%); causes between masters and servants (44%); criminal trials (12%); and other types of actions, such as disputes over wills, or those which could not be completely identified (24%). This breakdown is similar to the patterns identified by Gordon Handcock in his pioneering study of Trinity Bay.¹

The bound minute books are located at the Provincial Archives of Newfoundland and Labrador [PANL] and the Provincial Resource Library [PRL], Newfoundland Collection. In addition, miscellaneous minutes kept by surrogates and justices of the peace were entered into the Colonial Secretary's Letterbook [PANL, GN 2/1/A], some of which provide the only extant references to early court proceedings.

¹ See W. Gordon Handcock, *Soe longe as there comes noe women: Origins of English Settlement in Newfoundland* (St. John's: Breakwater, 1989), pp. 134-37.

SAMPLE OF MINUTES

<u>District</u>	<u>Years</u>	<u>Archival Reference</u>
Trinity	1753-1794	PANL, GN 5/4/B/1, boxes 1 & 2
	1757	PANL, GN 2/1/A, vol. 2, p. 375
	1759	PANL, GN 2/1/A, vol. 3, p. 6
	1762	PANL, GN 2/1/A, vol. 3, pp. 167-69
Ferryland	1751	PANL, GN 2/1/A, vol. 1, p. 243
	1753-1754	PANL, GN 2/1/A, vol. 2, pp. 117-25
	1757	PANL, GN 2/1/A, vol. 2, p. 373
	1759	PANL, GN 2/1/A, vol. 3, p. 22
	1773-1796	PRL, 340.9/N45 VT, Rare Books
	1786-1791	PANL, GN 5/4/C/1
	1789-1790	PANL, GN 5/1/B/1
Placentia	1754	PANL, GN 2/1/A, vol. 2, pp. 78-80
	1757-1786	PANL, GN 5/4/C/1
	1757-1762	PRL, 340.9/N45 VT, Rare Books
	1757-1758	PANL, GN 2/1/A, vol. 2, pp. 323-40
Harbour Grace	1754	PANL, GN 2/1/A, vol. 2, p. 159
	1765	PANL, GN 2/1/A, vol. 3, pp. 312-13
	1788-1791	PANL, GN 5/4/B/1
	1787-1792	PANL, GN 5/1/B/1
Trepassey- St. Mary's	1751	PANL, GN 2/1/A, vol. 1, pp. 227-36
	1758	PANL, GN 2/1/A, vol. 2, pp. 462-63
	1789-91	PRL, 340.9/N45 VT, Rare Books
Bay Bulls	1751	PANL, GN 2/1/A, vol. 1, p. 265
	1753	PANL, GN 2/1/A, vol. 2, p. 69

BIBLIOGRAPHY

I. PRIMARY SOURCES

A) Archives

1) Newfoundland and Labrador

- i) Provincial Archives of Newfoundland and Labrador
- ii) Newfoundland Provincial Resource Library
- iii) Centre for Newfoundland Studies, Memorial University
- iv) Maritime History Archive, Memorial University

2) Canada

- i) National Archives of Canada

3) United Kingdom

- i) Public Record Office
- ii) British Library
- iii) Poole Borough Archives
- iv) Dorchester Records Office

B) Published Editions of Source Material

C) Published Books and Pamphlets

II. SECONDARY SOURCES

A) Unpublished Theses

B) Reference Works

C) Monographs and Essays Collections

D) Articles

I. PRIMARY SOURCES

A. ARCHIVES

1. NEWFOUNDLAND

i) Provincial Archives of Newfoundland and Labrador

Colonial Secretary's Letterbook

GN 2/1/A Volumes 1-12: Bound Papers, 1749-1792

*Extracts of Government Records*GN 2/1/B Typed Extracts, 1749-52, 1780-84, 1789-25
GN 1/13/1-4 Non-series, Miscellaneous, 1709-1800*Bound Minute Books of the Newfoundland District Courts*GN 5/4/B/1 Court of Sessions
Trinity, 1753-92
Harbour Grace, 1788-91GN 5/4/C/1 Court of Sessions
Ferryland, 1786-91
Placentia, 1757-85GN 5/1/B/1 Surrogate Court
Harbour Grace, 1787-92
Harbour Grace, 1775-1804 (Proclamations)
Ferryland, 1789-90*Vice-Admiralty Court*

GN 5/5/A/7 St. John's, 1789, 1795-96

*Colonial Office Papers*CO 194 Volumes 1-42: Papers Relating to
Newfoundland. Correspondence with the Board
of Trade and Secretary of State, 1696-1798
(microfilm)*Society for the Propagation of the Gospel in Foreign Parts*

Can I. Series C, Letterbooks, 1721-93 (microfilm)

- ii) Provincial Resource Library, Newfoundland Collection
Bound Minute Books of the Newfoundland District Courts

340.9/N45 VT, Rare Book Cabinet

Ferryland, 1773-1796
 Placentia, 1757-1791
 St. John's, 1758-1759
 Trepassey-St.Mary's-Bay Bulls, 1789-1791

Typescripts of Primary Documents

Extracts from Colonial Office Papers, 1731-43

"Extracts taken from a *Journal of a Voyage to Newfoundland in 1726-27*," by Edward Burd

"Tyranny in St. John's, 1705-06: A Sordid Story from the Colonial Records"

- iii) Centre for Newfoundland Studies, Memorial University of Newfoundland

Typescripts of Primary Documents

Commission appointing Francis William Drake to be Governor, 1750

Correspondence between the Colonial Office and the Governor, 1780-1825, known as the "D'Alberti Papers"

Depositions taken by William Keen, 1731-1732

Extracts of Commissions and Court Records, 1749-1752

"Report to the Right Honourable Henry Dundas Respecting Newfoundland, December 1792," by John Reeves

Papers of the Society for the Propagation of the Gospel in Foreign Parts

CNS 567 Journals, 1701-1800 (microfilm)
 CNS 471 Series A-C, C/A, M Letterbooks (microfilm)

Newfoundland Newspapers

Royal Gazette	(St. John's, 1807-1832)
Mercantile Journal	(St. John's, 1816-1827)
Public Ledger	(St. John's, 1820-1832)
Newfoundlander	(St. John's, 1827-1832)
Conception Bay Mercury	(Harbour Grace, 1829-1830)

iv) Maritime History Archive, Memorial University of Newfoundland

The Keith Matthews Collection

Miscellaneous collection: extracts of documents
relating to Newfoundland

2. CANADA

i) National Archives of Canada

Colonial Office Papers

MG 11	CO 194/1-42: Papers Relating to Newfoundland. Correspondence with the Board of Trade and Secretary of State, 1696-1798 (microfilm)
-------	--

3. UNITED KINGDOM

i) Public Record Office

Admiralty Papers

ADM 1	Volumes 470-72: Admiral's Dispatches, 1766-92
	Volume 3881: High Court of Admiralty, 1747

Papers of the Board of Trade

- BT 6 Volume 57: Correspondence relating to
 Newfoundland, 1706-1801
- Volume 89: Report of Admiral Hugh Palliser,
 1786
- Volume 90: Minutes, 1768-86

Colonial Office Papers

- CO 5 Volume 200: Miscellaneous Correspondence,
 relating to America and the West Indies
- CO 194 Volumes 1-12: Newfoundland Outgoing
 Correspondence, 1696-1751
- CO 195 Volumes 5-7: Newfoundland Incoming
 Correspondence, 1710-21
- CO 391 Volumes 38-59: Minutes of the Board of Trade,
 1729-1751

The Rodney Papers

- PRO 30/20 Volume 4: Log-book of HMS *Rainbow*, 1749-1751
- Volume 6: Letter-book of Commodore Rodney,
 1749-1751

Secretary of State's Papers

- SP 36 Volumes 90-118: Miscellaneous References to
 Newfoundland

Privy Council Papers

- PC 2 Volumes 60-135: Privy Council Registers,
 1703-1791

ii) British Library

- Add MS 9747 Blathwayt Papers: Petitions and Correspondence from Newfoundland, 1699-1701
- Add MS 35913 Hardwicke Papers: Petitions and Correspondence from Newfoundland, 1711-1712
- Add MS 36218 Harkwicke Papers: Appeal from the St. John's Vice-Admiralty Court, 1760
- Add MS 38347 Liverpool Papers: Archibald Buchanan, "Concerning Landed Property in Newfoundland" (manuscript treatise, 1786)
- Add MS 38352 Liverpool Papers: Reports on Newfoundland Judicature, 1792-1794
- Add MS 15493 Dr. Gardner, "Some facts collected, and observations made on the fisheries, and government of Newfoundland, showing the many advantages, which will arise to this Kingdom on colonizing that Island, to which is added a plan for a speeding settling of it." (manuscript treatise, 1784)
- Egerton MS 921 "State of the Trade to Newfoundland" (1705-1706)
- King's MS 205 "General Reports of the State of the American Colonies" (1764)

iii) Poole Borough Archives, Dorset

The Beamish Collection

Miscellaneous collection: extracts of documents relating to Newfoundland

Court Records

- QSF 1-146 Printed minutes of Quarter Sessions
- QSF 1-274 Printed indictments at Quarter Sessions
- S 17-35 Printed extracts from the Quarter Session Minute Books, 1769-73

iv) Dorchester Records Office, Dorset

Newspapers

The Sherbourne Mercury (1737-1749)

Records of the Overseers of the Poor

PE/PUD/OV Parish of Puddletown (1770)

PE/CEA/OV Parish of Cerne Abbas (1779)

PE/PL/OV Parish of Poole (1787)

Papers of the Lester-Garland Families

D/LEG Diaries and Accounts of Benjamin and Isaac
Lester, 1761-1802

A computerized typescript reproduction of the entire Lester Diary was prepared under the direction of Professor Gordon Handcock at Memorial University. A complete copy is in the author's possession.

B. PUBLISHED EDITIONS OF SOURCE MATERIAL

Acts of the Privy Council of England: Colonial Series. Vols. 2-5 (1680-1783). London: His Majesty's Stationary Office, 1910-12.

Calendar of State Papers, Colonial Series: America and West Indies. Vols. 27-44 (1712-1738). London: His Majesty's Stationary Office, 1926-69.

Calendar of Treasury Books and Papers. London: His Majesty's Stationary Office.

Journals of the House of Commons.

Journals of the House of Lords.

Manuscripts of J.B. Fortescue Preserved at Dropmore. Vols. 1-2 (1789-1791). London: Historical Manuscripts Commission Reports, 1892-1927.

- United Society for the Propagation of the Gospel: *Calendar of Letters, 1721-1793*. London: List and Index Society, Special Series, 1972.
- Aspinall, Arthur, ed. *The Later Correspondence of George III*. Vol. 1. Cambridge: Cambridge University Press, 1962.
- Bromley, J.S., ed. *The Manning of the Royal Navy: Selected Public Pamphlets, 1693-1873*. London: Navy Records Society, 1974.
- Byrne, Cyril J., ed. *Gentlemen-Bishops and Faction Fighters: The Letters of Bishops O Donel, Lambert, Scallan and other Irish Missionaries*. St. John's: Jespersen Press, 1984.
- Cartwright, F. D., ed. *The Life and Correspondence of Major Cartwright*. 2 vols. London: Augustus Kelley, 1969 repr. of 1826 ed.
- Cell, Gillian, ed. *Newfoundland Discovered: English Attempts at Colonization, 1610-1630*. London: The Hakluyt Society, 1982.
- Chalmers, George, ed. *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain: Collected and Digested from the Originals in the Board of Trade, and other Repositories*. Burlington: C. Goodrich, 1858.
- Chippindall, W.H., ed. *Memoirs of Lieutenant-Colonel Samuel Gledhill, Lieutenant-Governor of Placentia and Commander-in-Chief of Newfoundland from 1719 to 1727*. Kendal: Titus Wilson, 1910.
- Copley, Stephen, ed. *Literature and the Social Order in Eighteenth-Century England*. London: Croom Helm, 1984.
- Cuff, Robert and Wilton, Derek, eds. *Jukes' Excursions, Being a Revised Edition of Joseph Beete Jukes' "Excursions In and About Newfoundland During the Years 1839 and 1840."* St. John's: Harry Cuff, 1993.
- Gwyn, Julian, ed. *The Royal Navy and North America: The Warren Papers, 1736-1752*. London: Navy Records Society, 1973.
- Lambert, Sheila, ed. *House of Commons Sessional Papers of the Eighteenth Century: Volume 90, Newfoundland, 1792-93*. Wilmington, DL: Scholarly Resources, 1975.

- Lavery, Brian, ed. *Shipboard Life and Organization, 1731-1815*. Aldershot, UK: Navy Records Society, 1998.
- Lubbock, Basil, ed. *Barlow's Journal of His Life at Sea in King's Ships, East & West Indiamen from 1659 to 1703*. By Edward Barlow. London: Hurst & Blackett, 1934.
- Lysaght, A.M., ed. *Joseph Banks in Newfoundland and Labrador, 1766: His Diary, Manuscripts and Collections*. Berkeley: University of California Press, 1971.
- Matthews, Keith, ed. *Collection and Commentary on the Constitutional Laws of Seventeenth-Century Newfoundland*. St. John's: Maritime History Group, Memorial University of Newfoundland, 1975.
- Murray, Jean, ed. *The Newfoundland Journal of Aaron Thomas, Able Seaman in HMS Boston*. London: Longmans, 1968.
- Owen, J.H. and Barnes, G.R., eds., *The Private Papers of John, Earl of Sandwich, First Lord of the Admiralty, 1771-1782*. London: Navy Records Society, 1932.
- Poynter, F.N.L., ed., *The Journal of James Yonge, 1747-1721*. London. Longmans, 1963.
- Ranft, B., ed. *The Vernon Papers*. London: Navy Records Society, 1958.
- Schonhorn, Manuel, ed. *A General History of the Pyrates*. By Daniel Defoe [Charles Johnson]. London: J.M. Dent & Sons, 1972 repr. of 1724 ed.
- Stephenson, Carl; and Marcham, Frederick, eds., *Sources of English Constitutional History*. New York: Harper & Brothers, 1937.
- Tunstall, B., ed. *The Byng Papers*. London: Navy Records Society, 1930.
- Williams, E.N., ed., *The Eighteenth Century Constitution, 1688-1815: Documents and Commentary*. Cambridge: Cambridge University Press, 1965.
- Winton, Henry, ed. *Select Cases from the Records of the Supreme Court of Newfoundland*. St. John's and London: Henry Winton and Baldwin & Cradock, 1829.

C. PUBLISHED BOOKS AND PAMPHLETS

- Anon. *Observations on the Present State of Newfoundland in Reference to its Courts of Justice, Local Government and Trade, in a letter addressed to the Right Honourable Henry Earl Bathurst.* London: Printed by A. Hancock, 1823.
- Anon. *A Report of Certain Proceedings of the Inhabitants of the Town of Saint John, in the Island of Newfoundland, with the view to obtain a REFORM of the LAWS, more particularly in the mode of their administration, and an INDEPENDENT LEGISLATURE.* St. John's: Printed by Lewis Ryan, 1821.
- Anon. *The Case of John Collins, Esq., Governor of Newfoundland, January 21, 1711.* London, 1711.
- Anspach, Lewis Amadeus. *A History of the Island of Newfoundland.* London: Printed for the Author, 1819.
- Bristow, J. *Brief Remarks on a Pamphlet, entitled "Arguments to Prove the Policy and Necessity of Granting to Newfoundland a Constitutional Government".* Poole: Printed by Moore and Sydenham, 1828.
- Carew, Bampfylde-Moore. *The Life and Adventures of Bampyfylde-Moore Carew.* Exon: Printed for Joseph Drew, 1745.
- Carson, William. "Distress in Newfoundland." Letter to the editor published in the *Colonial Journal* III (1817).
- _____. *A Letter to the Members of Parliament of the United Kingdom of Great Britain and Ireland, on the Address of the Merchants and Inhabitants of St. John's in the Island of Newfoundland to the Prince Regent.* Greenock, Printed by William Scott, 1812.
- _____. *Reasons for Colonizing the Island of Newfoundland.* Greenock: Printed by W. Scott, 1813.
- Cartwright, George. *A Journal of Transactions and Events During a Residence of Nearly Sixteen Years on the Coast of Labrador.* 3 vols. Newark: Allin and Ridge, 1792.
- Cochrane, Lord. *The Autobiography of a Seaman.* London: Constable, 1995 repr. of 1861 ed.

- Douglass, William. *A Summary, Historical and Political, of the First Planting, Progressive Improvements and Present State of the British Settlements in North America*. 2 vols. London: R. Baldwin, 1755.
- Geare, Allen, Ebenezer: or, a Monument of Thankfulness. London: Printed for A. Bettesworth, 1708.
- Morris, Patrick. *Arguments to Prove the Necessity of Granting to Newfoundland a Constitutional Government*. London: A Hancock, 1828.
- _____. *Observations on the Government, Trade, Fisheries and Agriculture of Newfoundland*. London: A Hancock, 1824.
- _____. *Remarks on the State of Society, Religion, Morals and Education at Newfoundland*. London: A Hancock, 1827.
- Oldmixon, John. *The British Empire in America*. 2 vols. London: J. Nickolson, B. Tooke, 1708.
- Osborne, Thomas. *A Collection of Voyages and Travels*. London: T. Osborne, 1745.
- Ralfe, J. *The Naval Biography of Great Britain: Consisting of Historical Memoirs of those Officers of the British Navy who Distinguished Themselves during the Reign of His Majesty George III*. Boston: Gregg Press, 1972 reprint of 1828 ed.
- Reeves, John. *History of the Government of the Island of Newfoundland*. New York: Johnson Reprint Corporation, 1967 reprint of 1793 ed.
- Rogers, Robert. *A Concise Account of North America*. London: Printed for R. Rogers, 1765.
- Sheffield, Lord. *Observations on the Manufactures, Trade and Present State of Ireland*. London: J. Debrett, 1785.
- Thompson, Thomas. *Considerations on the Trade to Newfoundland*. London: Andrew Bell, 1711.
- Williams, Griffith. *An Account of the Island of Newfoundland, with the Nature of its Trade, and Method of Carrying on the Fishery, with Reasons for the Great Decrease of that most Valuable Branch of Trade*. London: Printed for T. Cole, 1765.

II. SECONDARY SOURCES

A. UNPUBLISHED THESES

- Cadigan, Sean. "Economic and Social Relations of Production on the Northeast Coast of Newfoundland, with Special Reference to Conception Bay, 1785-1855." Ph.D. Dissertation, Memorial University of Newfoundland, 1991.
- Davies, Glanvill James. "England and Newfoundland: Policy and Trade, 1660-1783." Ph.D. thesis, University of Southampton, 1980.
- Field, A.M. "The Development of Government in Newfoundland, 1638-1713." M.A. thesis, University of London, 1924.
- Matthews, Keith. "A History of the West of England-Newfoundland Fishery." D. Phil. thesis, Oxford, 1968.
- Morton, W.L. "Newfoundland as an Aspect of Colonial Policy." B. Lit. thesis, Oxford University, 1936.
- Paterson, Janet. "The History of Newfoundland, 1713-63." M.A. thesis, University of London, 1931.
- Pope, Peter. "The South Avalon Planters, 1630-1700: Residence, Labour, Demand, and Exchange in Seventeenth-Century Newfoundland." Ph.D. Thesis, Memorial University of Newfoundland, 1992.
- Rothney, Gordon O. "History of Newfoundland, 1754-1783." M.A. thesis, University of London, 1934.

B. REFERENCE WORKS

- Bottomore, Tom, ed. *A Dictionary of Marxist Thought*. 2nd ed. Oxford: Basil Blackwell, 1991.
- Bower, John. *The Colonial Office Group of the Public Record Office, London, with Particular Reference to Atlantic Canada*. Ottawa: National Archives of Canada, 1974.
- Colledge, J.J. *Ships of the Royal Navy: An Historical Index*. London: Newton Abbot, 1969.

- Cuff, Robert, ed. *Dictionary of Newfoundland and Labrador Biography*. St. John's: Harry Cuff, 1990.
- Egerton, Hugh Edward. *A Short History of British Colonial Policy*. 8th ed. London: Methuen, 1928.
- Ellison, Suzanne. *Historical Directory of Newfoundland and Labrador Newspapers, 1806-1996*. St. John's: Memorial University of Newfoundland, 1997.
- Greene, Jack; and J.R. Pole, eds. *The Blackwell Encyclopedia of the American Revolution*. Oxford: Basil Blackwell, 1991.
- King, Dean, ed. *A Sea of Words: A Lexicon and Companion for Patrick O'Brian's Seafaring Tales*. New York: Henry Holt, 1995.
- Lavery, Brian, ed. *Shipboard Life and Organization, 1731-1815*. Aldershot: Navy Records Society, 1998.
- Rusted, Nigel. *Medicine in Newfoundland c. 1497 to the early 20th Century: The Physicians and Surgeons, Biographical Gleanings*. St. John's: Faculty of Medicine, Memorial University of Newfoundland, 1994.
- Ryan, Shannon. *Newfoundland Consolidated Census Returns, 1698-1833*. St. John's: Centre for Newfoundland Studies, Memorial University of Newfoundland, 1992.
- Story, G.M., et al., eds. *Dictionary of Newfoundland English*. 2nd ed. St. John's: Breakwater, 1990.

C. MONOGRAPHS AND ESSAY COLLECTIONS

- Acheson, T.W. *Saint John: The Making of a Colonial Urban Community*. Toronto: University of Toronto Press, 1985.
- Allen, Carleton Kemp. *Law in the Making*. 7th ed. Oxford: Clarendon Press, 1964.
- Alexander, David. *Atlantic Canada and Confederation: Essays in Canadian Political Economy*. Compiled by Eric Sager, Lewis Fischer, and Stuart Pierson. Toronto: University of Toronto Press, 1983.

- Backhouse, Constance. *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada*. Toronto: The Osgoode Society and Women's Press, 1991.
- Bailyn, Bernard. *The Ideological Origins of the American Revolution*. 2nd ed. Cambridge, Mass.: Harvard University Press, 1992.
- _____. *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution*. New York: Random House, 1986.
- Bayly, C.A. *Imperial Meridian: The British Empire and the World, 1780-1830*. London: Longman, 1989.
- Beattie, J.M. *Attitudes Towards Crime and Punishment in Upper Canada, 1830-1850: A Documentary Study*. Toronto: Centre of Criminology, 1977.
- _____. *Crime and the Courts in England, 1660-1800*. Princeton: Princeton University Press, 1986.
- Brewer, John. *Party Ideology and Popular Politics at the Accession of George III*. Cambridge: Cambridge University Press, 1976.
- _____. *The Sinews of Power: War, Money and the British State, 1688-1783*. London: Unwin Hyman, 1989.
- Buckner, Philip; and David Frank, eds. *The Acadiensis Reader, Volume One: Atlantic Canada Before Confederation*. Fredericton: Acadiensis Press, 1990.
- Buckner, Philip; and John Reid, eds. *The Atlantic Region to Confederation: A History*. Fredericton and Toronto: University of Toronto and Acadiensis Press, 1994.
- Bushway, Bob. *By Rite: Custom, Ceremony and Community in England, 1700-1880*. London: Junction Books, 1982.
- Byrn, John. *Crime and Punishment in the Royal Navy: Discipline on the Leeward Islands Station, 1784-1812*. Brookfield, Vermont: Scolar Press, 1989.
- Cadigan, Sean T. *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland, 1785-1855*. Toronto: University of Toronto Press, 1995.

- Calhoun, Craig, ed. *Habermas and the Public Sphere*. Cambridge, Mass.: Massachusetts Institute of Technology Press, 1992.
- Canny, Nicholas; and Anthony Pagden, eds. *Colonial Identity in the Atlantic World, 1500-1800*. Princeton: Princeton University Press, 1987.
- Christie, Ian R. *Wars and Revolutions: Britain, 1760-1815*. Cambridge, Mass.: Harvard University Press, 1982.
- Clastres, Pierre. *Society Against the State: Essays in Political Anthropology*. New York: Zone Books, 1987.
- Cockburn, J.S. *A History of English Assizes, 1558-1714*. Cambridge: Cambridge University Press, 1972.
- Colley, Linda. *Britons: Forging the Nation, 1707-1837*. New Haven: Yale University Press, 1992.
- Cordingly, David. *Life Among the Pirates: The Romance and the Reality*. London: Little, Brown, 1995.
- Corrigan, Philip; and Derek Sayer. *The Great Arch: English State Formation as Cultural Revolution*. Oxford: Basil Blackwell, 1985.
- Davison, Lee; Tim Hutchcock; Tim Keirn; and Robert Shoemaker, eds. *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689-1750*. New York: St. Martin's Press, 1992.
- de Certeau, Michel. *Heterologies: Discourse on the Other*. Brian Massumi, trans. Minneapolis: University of Minnesota Press, 1986.
- Dening, Greg. *Mr. Bligh's Bad Language: Passion, Power and Theatre on the Bounty*. Cambridge: Cambridge University Press, 1992.
- Dickinson, H.T. *Liberty and Property: Political Ideology in Eighteenth-Century Britain*. London: Methuen, 1977.
- Eigen, Joel Peter. *Witnessing Insanity: Madness and Mad-Doctors in the English Court*. New Haven: Yale University Press, 1987.

- Emsley, Clive. *Crime and Society in England, 1750-1900*. London: Longman, 1987.
- Fingard, Judith. *Jack in Port: Sailortowns in Eastern Canada*. Toronto: McClelland & Stewart, 1982.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Alan Sheridan, trans. New York: Pantheon, 1978.
- Fraser, Robert, ed. *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography*. Toronto: The Osgoode Society, 1992.
- Garland, David. *Punishment and Modern Society: A Study in Social Theory*. Oxford: Clarendon Press, 1990.
- Gatrell, V.A.C. *The Hanging Tree: Execution and the English People, 1770-1868*. Oxford: Oxford University Press, 1994.
- Gibson, Dale; and Wesley Pue, eds. *Glimpses of Canadian Legal History*. Winnipeg: Legal Research Institute of the University of Manitoba, 1991.
- Gladstone, Jane, et al., eds. *Criminology: A Reader's Guide*. Toronto: Centre of Criminology, 1991.
- Greer, Allan; and Ian Radforth, eds. *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*. Toronto: University of Toronto Press, 1992.
- Guildford, Janet; and Suzanne Morton, eds. *Separate Spheres: Women's Worlds in the 19th-Century Maritimes*. Fredericton: Acadiensis Press, 1994.
- Habermas, Jurgen. *The Structural Transformation of the Public Sphere*. Thomas Burger, trans. Cambridge, Mass.: Massachusetts Institute of Technology Press, 1989.
- Halpert, Herbert; and G.M. Story, eds. *Christmas Mumming in Newfoundland: Essays in Anthropology, Folklore, and History*. 2nd ed. Toronto: University of Toronto Press, 1990.
- Handcock, W. Gordon. *Soe Longe as There Comes noe Women: Origins of English Settlement in Newfoundland*. St. John's: Breakwater, 1989.

- Hay, Douglas, et al., eds. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. New York: Pantheon, 1975.
- Head, Grant. *Eighteenth Century Newfoundland*. Toronto: McClelland and Stewart, 1976.
- Henry, Brian. *Dublin Hanged: Crime, Law Enforcement and Punishment in Late Eighteenth-Century Dublin*. Dublin: Irish Academic Press, 1994.
- Hiller, J.K.; and Peter Neary, eds. *Newfoundland in the Nineteenth and Twentieth Centuries: Essays in Interpretation*. Toronto: University of Toronto Press, 1980.
- Hindus, M. *Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878*. Chapel Hill: University of North Carolina Press, 1981.
- Houston, Cecil; and William Smyth. *Irish Emigration and Canadian Settlement: Patterns, Links, and Letters*. Toronto and Belfast: University of Toronto Press and Ulster Historical Foundation, 1990.
- Howell, Colin; and Richard Twonmey, eds. *Jack Tar in History: Essays in the History of maritime Life and Labour*. Fredericton: Acadiensis Press, 1991.
- Hunt, Alan; and Gary Wickham. *Foucault and Law: Towards a Sociology of Law as Governance*. London: Pluto Press, 1994.
- Ignatieff, Michael. *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*. New York: Pantheon, 1978.
- Innis, Harold A. *The Cod Fisheries: The History of an International Economy*. Toronto: University of Toronto Press, 1954.
- Isaac, Rhys. *The Transformation of Virginia, 1740-1790*. New York: Norton, 1982.
- Kaye, Harvey. *The British Marxist Historians*. Oxford: Basil Blackwell, 1984.
- Kealey, Gregory. *Workers and Canadian History*. Montreal and Kingston: McGill-Queen's University Press, 1995.

- Knafla, Louis; and Susan Binnie, eds. *Law, Society, and the State: Essays in Modern Legal History*. Toronto: University of Toronto Press, 1995.
- Knorr, K.E. *British Colonial Theories, 1570-1850*. Toronto: University of Toronto Press, 1944.
- Krantz, Frederick. *History From Below: Studies in Popular Protest and Popular Ideology*. Oxford: Basil Blackwell, 1985.
- Lambert, Sheila. *Bills and Acts: Legislative Procedure in Eighteenth-Century England*. Cambridge: Cambridge University Press, 1971.
- Landau, Norma. *The Justices of the Peace, 1679-1760*. Berkeley: University of California Press, 1984.
- Langford, Paul. *A Polite and Commercial People: England, 1727-1783*. Oxford: Clarendon Press, 1984.
- Leyton, Elliot, et al., eds. *Violence and Public Anxiety: A Canadian Case*. St. John's: Institute of Social and Economic Research, 1992.
- Linebaugh, Peter. *The London Hanged: Crime and Civil Society in the Eighteenth Century*. London: Penguin, 1991.
- Loo, Tina. *Making Law, Order, and Authority in British Columbia, 1821-1871*. Toronto: University of Toronto Press, 1994.
- Lounsbury, R.G. *The British Fishery at Newfoundland, 1634-1763*. New Haven: Yale University Press, 1934.
- McGrath, Carmelita, et al., eds. *Their Lives and Times: Women in Newfoundland and Labrador: A Collage*. St. John's: Killick Press, 1995.
- MacNutt, W.S. *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857*. Toronto: McClelland and Stewart, 1965.
- Manning, Helen Taft. *British Colonial Government after the American Revolution, 1782-1820*. New Haven: Yale University Press, 1933.

- Mannion, J.J., ed. *The Peopling of Newfoundland: Essays in Historical Geography*. St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1977.
- Matthews, Keith. *Lectures on the History of Newfoundland, 1500-1830*. St. John's: Breakwater, 1988.
- McLintock, A.H. *The Establishment of Constitutional Government in Newfoundland, 1783-1832: A Study of Retarded Colonization*. London: Longmans, Green, 1941.
- Nadel-Klein, Jane; and Dona Lee Davis, eds. *To Work and to Weep: Women in Fishing Economies*. St. John's: Institute of Social and Economic Research, 1988.
- Neal, David. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*. Cambridge: Cambridge University Press, 1991.
- Neale, Jonathan. *The Cutlass and the Lash: Mutiny and Discipline in Nelson's Navy*. London: Pluto Press, 1985.
- Middleton, Richard. *The Bells of Victory: The Pitt-Newcastle Ministry and the Conduct of the Seven Years' War, 1757-1762*. Cambridge: Cambridge University Press, 1985.
- Namier, Sir Lewis. *The Structure of Politics at the Accession of George III*. 2nd ed. London: Macmillan, 1957.
- Noel, S.J.R. *Politics in Newfoundland*. Toronto: University of Toronto Press, 1971.
- O'Flaherty, Patrick. *The Rock Observed: Studies in the Literature of Newfoundland*. Toronto: University of Toronto Press, 1979.
- Oliver, Peter. *'Terror to Evil-Doers': Prisons and Punishments in Nineteenth-Century Ontario*. Toronto: The Osgoode Society, 1998.
- Palmer, Bryan. *Working Class Experience: Rethinking the History of Canadian Labour, 1800-1991*. 2nd ed. Toronto: McClelland and Stewart, 1992.
- Perkin, Harold. *Origins of Modern English Society*. London: Ark Paperbacks, 1967.

- Phillips, Jim, et al., eds. *Essays in the History of Canadian Law, Volume Five: Crime and Criminal Justice*. Toronto: The Osgoode Society, 1994.
- Porter, Roy. *English Society in the Eighteenth Century*. 2nd ed. London: Penguin, 1990.
- Prowse, D.W. *A History of Newfoundland*. 2nd ed. London: Macmillan, 1895
- Radzinowicz, Leon. *A History of English Criminal Law and its Administration from 1750, Volume I: The Movement for Reform*. London: Stevens & Sons, 1948.
- Rawlyk, G.A., ed. *Historical Essays on the Atlantic Provinces*. Toronto: McClelland and Stewart, 1967.
- Rediker, Marcus. *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750*. Cambridge: Cambridge University Press, 1987.
- Renteln, Alison Dundes; and Alan Dundes, eds. *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*. 2 vols. Madison: University of Wisconsin Press, 1995.
- Ritchie, Robert. *Captain Kidd and the War Against the Pirates*. Cambridge: Harvard University Press, 1986.
- Rodger, N.A.M. *The Wooden World: An Anatomy of the Georgian Navy*. Glasgow: Fontana Press, 1986.
- Rogers, J.D. *Newfoundland*. Oxford: Clarendon Press, 1911.
- Romney, Paul. *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899*. London: The Osgoode Society, 1986.
- Rothman, David. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston: Little Brown, 1971.
- Ryan, Shannon. *Fish out of Water: The Newfoundland Saltfish Trade, 1814-1914*. St. John's: Breakwater, 1986.
- Ryan, Shannon, ed. *Newfoundland History, 1986*. St. John's: Newfoundland Historical Society, 1986.

- Samson, Daniel, ed. *Contested Countryside: Rural Workers and Modern Society in Atlantic Canada, 1800-1950*. Fredericton: Acadiensis Press, 1994.
- Sharpe, J.A. *Crime in Early Modern England, 1550-1750*. London: Longman, 1984.
- Shoemaker, Robert. *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c. 1660-1725*. Cambridge: Cambridge University Press, 1991.
- Sider, Gerald. *Culture and Class in Anthropology and History: A Newfoundland Illustration*. Cambridge: Cambridge University Press, 1986.
- Speck, W.A. *Stability and Strife: England, 1714-1760*. Cambridge, Mass.: Harvard University Press, 1979.
- Spinney, David. *Rodney*. London: Unwin, 1969.
- Stone, Lawrence, ed. *An Imperial State at War: Britain from 1689 to 1815*. London: Routledge, 1994.
- Strange, Carolyn, ed. *Qualities of Mercy: Justice, Punishment, and Discretion*. Vancouver: University of British Columbia Press, 1996.
- Thomas, Gerald; and J.D.A. Widdowson, eds. *Studies in Newfoundland Folklore: Community and Process*. St. John's: Breakwater Books, 1991.
- Thompson, E.P. *Customs in Common: Studies in Traditional Popular Culture*. New York: The New Press, 1991.
- _____. *Whigs and Hunters: The Origins of the Black Act*. 2nd ed. London: Penguin, 1977.
- Thompson, H.P. *Into All Lands: The History of the Society for the Propagation of the Gospel in Foreign Parts, 1701-1950*. London: Billing & Sons, 1951.
- Thompson, F.F. *The French Shore Problem in Newfoundland: An Imperial Study*. Toronto: University of Toronto Press, 1961.
- Tomlins, Christopher. *Law, Labor, and Ideology in the Early American Republic*. Cambridge: Cambridge University Press, 1993.

- Tracy, Nicholas. *Navies, Deterrence, and American Independence: Britain and Seapower in the 1760s and 1770s*. Vancouver: University of British Columbia Press, 1988.
- Vickers, Daniel. *Farmers and Fishermen: Two Centuries of Work in Essex County, Massachusetts, 1630-1850*. Chapel Hill: Institute of Early American History and Culture, 1994.
- Ward, J.M. *Colonial Self-Government: The British Experience, 1759-1856*. London: MacMillan, 1976.
- Warner, Oliver. *A Portrait of Lord Nelson*. London: Reprint Society, 1958.
- Weaver, John. *Crime, Constables, and Courts: Order and Transgression in a Canadian City, 1816-1970*. Montreal and Kingston: McGill-Queen's University Press, 1995.
- Wood, Gordon. *The Radicalism of the American Revolution*. New York: Random House, 1991.

D. ARTICLES and PAMPHLETS

- Amory, Hugh. "Henry Fielding and the Criminal Legislation of 1751-2," *Philological Quarterly* 50, 2 (1971).
- Amussen, Susan Dwyer. "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England," *Journal of British Studies* 34, 1 (January 1995).
- Antler, Steven. "The Capitalist Underdevelopment of Nineteenth-Century Newfoundland," in R.J. Brym and R.J. Sacouman, eds. *Underdevelopment and Social Movements in Atlantic Canada*. Toronto: New Hogtown Press, 1979.
- Baehre, R. "From Bridewell to Federal Penitentiary: Aspects of Prisons in Nova Scotia to 1880," in P. Girard and J. Phillips, eds., *Essays in the History of Canadian Law, Vol. 3: Nova Scotia*. Toronto: The Osgoode Society, 1990.
- _____. "The State in Canadian History," *Acadiensis* 24, 1 (Autumn 1994).

Baker, G. B. "So Elegant a Web: Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada," *University of Toronto Law Journal* 38 (1988).

Bannister, Jerry. "'A Species of Vassalage': The Issue of Class in the Writing of Newfoundland History," *Acadiensis* 24 (Autumn 1994).

_____. "Convict Transportation and the Colonial State in Newfoundland, 1789," *Acadiensis* 28 (Spring 1998).

_____. "Surgeons and Criminal Justice in Eighteenth-Century Newfoundland," in *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie*. Greg T. Smith, Allyson N. May, and Simon Devereaux, eds. Toronto: Centre of Criminology, 1998.

_____. "The Campaign for Representative Government in Newfoundland," *Journal of the Canadian Historical Association New Series* 5 (1994).

Barnes, T.G. "'As Near as May Be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749," in T.G. Barnes, et al., eds., *Law in a Colonial Society: The Nova Scotia Experience*. Toronto: Carswell, 1984.

Bartlett, The Hon. Rupert. "The Legal Profession in Newfoundland." St. John's: Newfoundland Law Society, 1984.

Beattie, J.M. "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," *Law and History Review* 9, 2 (Fall 1991).

_____. "The Cabinet and the Management of Death at Tyburn after the Revolution of 1688-1689," in Lois Schwoerer, ed., *The Revolution of 1688-1689: Changing Perspectives*. Cambridge: Cambridge University Press, 1991.

_____. "The Criminality of Women in Eighteenth-Century England," *Journal of Social History* 8 (1975).

_____. "Violence and Society in Early-Modern England," in A.N. Doob and Edward Greenspan, eds., *Perspectives in Criminal Law: Essays in Honour of John H. J. Edwards*. Aurora, Ontario: Canada Law Books, 1985.

- Bell, D.G. "The Reception Question and the Constitutional Crisis of the 1790s in New Brunswick," *University of New Brunswick Law Journal* 29 (1980).
- Bleasdale, Ruth. "Class Conflict on the Canals of Upper Canada in the 1840s," *Labour/Le Travail* 7 (1981).
- Braddick, Michael. "State Formation and Social Change in Early Modern England: A Problem State and Approaches Suggested," *Social History* 16, 1 (January 1991).
- Cadigan, Sean. "Planters, Households and Merchant Capitalism: Northeast-Coast Newfoundland, 1800-1855," in Daniel Samson, ed., *Contested Countryside: Rural Workers and Modern Society in Atlantic Canada, 1800-1950*. Fredericton: Acadiensis Press, 1994.
- _____. "Seamen, Fishermen and the Law: The Role of the Wages and Lien System in the Decline of Wage Labour in the Newfoundland Fishery," in Colin Howell and Richard Twomey, eds., *Jack Tar in History: Essays in the History of Maritime Life and Labour*. Fredericton: Acadiensis Press, 1991.
- _____. "The Staple Model Reconsidered: The Case of Agricultural Policy in Northeast Newfoundland, 1785-1855," *Acadiensis* 21, 2 (Spring 1992).
- _____. "Whipping them into Shape: State Refinement of Patriarchy among Conception Bay Fishing Families, 1787-1825," in C. McGrath, B. Neis, and M. Porter, eds., *Their Lives and Times: Women in Newfoundland and Labrador: A Collage*. St. John's: Killick Press, 1995.
- Carlson, Terry. "Dealing with Offenders: An Historical Perspective," in Gail Burford, ed., *Ties that Bind: An Anthology of Social Welfare in Newfoundland and Labrador*. St. John's: Jespersen Press, 1997.
- Cockburn, J. S. "Punishment and Brutalization in the English Enlightenment," *Law and History Review* 12, 1 (Spring 1994).
- Cross, M.S. "'The Laws are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America," in T.G. Barnes et al., eds., *Law in a Colonial Society: The Nova Scotia Experience*. Toronto: Carswell, 1984.

- Devereaux, Simon. "The City and the Sessions Paper: 'Public Justice' in London, 1770-1800," *Journal of British Studies* 35, 4 (October 1996).
- Ekirch, Roger. "Great Britain's Secret Convict Trade to America, 1783-1784," *American Historical Review* 89, 5 (December 1984).
- English, Christopher. "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832," in L. Knafla and S. Binnie, eds., *Law, Society, and the State: Essays in Modern Legal History*. Toronto: University of Toronto Press, 1995.
- _____. "Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92," *Manitoba Law Journal* 32 (January 1996).
- _____. "The Development of the Newfoundland Legal System to 1815," *Acadiensis* 20, 1 (Autumn 1990).
- _____. "The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819," in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials, Volume One: Law, Politics, and Security Measures, 1608-1837*. Toronto: The Osgoode Society, 1996.
- Hay, Douglas. "The Laws of God and the Laws of Man: Lord George Gordon and the Death Penalty," in John Rule and Robert Malcolmson, eds., *Protest and Survival: The Historical Experience: Essays for E.P. Thompson*. London: Merlin Press, 1993.
- _____. "The Meanings of the Criminal Law in Quebec, 1764-1774," in L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada*. Waterloo: University of Wilfred Laurier Press, 1981.
- Higgins, John G. "How the Rule of Law Came to Newfoundland", *Chitty's Law Journal* 5,8 (October 1955).
- Hiller, J.K., et al. "Panel Review: Newfoundland's Past as Marxist Illustration," *Newfoundland Studies* 3, 2 (1987).
- Innes, Joanna. "Prisons for the Poor: English Bridewells, 1555-1800," in Francis Snyder and Douglas Hay, eds., *Labour, Law, and Crime: An Historical Perspective*. London: Tavistock, 1987.

- Innes, Joanna; and John Styles. "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," in Adrian Wilson, ed., *Rethinking Social History: English Society, 1570-1920 and its Interpretation*. New York: St. Martin's Press, 1993.
- Janzen, Olaf. "Newfoundland and the International Fishery," in M. Brook Taylor, ed., *Canadian History, A Reader's Guide, Volume One: Beginnings to Confederation*. Toronto: University of Toronto Press, 1994.
- _____. "'Une Grande Liaison': French Fishermen from Ile Royale on the Coast of Southwestern Newfoundland, 1714-1765," *Newfoundland Studies* 3, 2 (1987).
- _____. "The Royal Navy and the Defence of Newfoundland During the American Revolution," *Acadiensis* 14 (1984).
- Jones, David. "A Legislative History of the Newfoundland Judicature Act, 1791-1984." St. John's: Law Reform Commission, 1985.
- Kealey, Linda. "Patterns of Punishment: Massachusetts in the Eighteenth Century," *American Journal of Legal History* 30 (1986).
- King, Peter. "Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800," *Historical Journal* 27, 1 (March 1984).
- Landsman, Stephen. "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-Century England," *Cornell Law Review* 75, 3 (March 1990).
- Langbein, John. "Albion's Fatal Flaws," *Past and Present* 98 (February 1983).
- _____. "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources," *University of Chicago Law Review* 50, 1 (Winter 1983).
- Lahey, Raymond. "Catholicism and Colonial Policy in Newfoundland, 1779-1845," in Terrence Murphy and Gerald Stortz, eds., *Creed and Culture: The Place of English-Speaking Catholics in Canadian Society, 1750-1930*. Montreal and Kingston: McGill-Queen's University Press, 1993.

- Little, L. "Collective Action in Outport Newfoundland: A Case Study from the 1830s," *Labour/Le Travail* 26 (Fall 1990).
- Mannion, John. "Irish Merchants Abroad: The Newfoundland Experience, 1750-1850," *Newfoundland Studies* 2 (1986).
- Marquis, Greg. "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography," in W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History*. Ottawa: Carleton University Press, 1988.
- Martin, Ged, "Convict Transportation to Newfoundland in 1789," *Acadiensis* 5, 1 (Autumn 1975).
- Matthews, Keith. "Historical Fence Building: A Critique of the Historiography of Newfoundland," *Newfoundland Quarterly* 9 (Spring 1978).
- _____. "The Class of '32: St. John's Reformers on the Eve of Representative Government," *Acadiensis* 6 (Spring 1977).
- O'Flaherty, Patrick. "Government in Newfoundland before 1832: The Context of Reform," *Newfoundland Quarterly* 84, 2 (Fall 1988).
- _____. "The Seeds of Reform: Newfoundland, 1800-1818," *Journal of Canadian Studies* 23, 3 (Fall 1988).
- Paley, Ruth. "An Imperfect, Inadequate and Wretched System?: Policing London Before Peel," *Criminal Justice History* 10 (1989).
- Phillips, Jim. "'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth-Century Nova Scotia," *Nova Scotia Historical Review* 12 (1992).
- _____. "The Operation of the Royal Pardon in Nova Scotia, 1749-1815," *University of Toronto Law Journal* 42 (1992).
- _____. "Women, Crime, and Criminal Justice in Early Halifax, 1750-1800," in J. Phillips, T. Loo, and S. Lewthwaite, eds., *Essays in the History of Canadian Law, Volume Five: Crime and Criminal Justice*. Toronto: The Osgoode Society, 1994.
- Preyer, Kathryn. "Penal Measures in the American Colonies: An Overview," *American Journal of Legal History* 26 (1982).

- Rollmann, Hans. "Religious Enfranchisement and Roman Catholics in Eighteenth-Century Newfoundland," in Terrence Murphy and Cyril Byrne, eds., *Religion and Identity: The Experience of Irish and Scottish Catholics in Atlantic Canada*. St. John's: Jespersion Press, 1987.
- Romney, Paul. "From the Types Riot to the Rebellion: Elite Ideology, Anti-Legal Sentiment, Political Violence, and the Rule of Law in Upper Canada," *Ontario History* 79 (1987).
- Strange, Carolyn. "The Lottery of Death: Capital Punishment in Canada, 1867-1976," *Manitoba Law Journal* 23, 3 (1996).
- Styles, John. "Print and Policing: Crime Advertising in Eighteenth-Century Provincial England," in Douglas Hay and Francis Snyder, eds., *Policing and Prosecution in Britain, 1750-1850*. Oxford: Clarendon Press, 1989.
- Vickers, Daniel. "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 3rd series, 47 (January 1990).
- Whiteley, W. "Governor Hugh Palliser and the Newfoundland and Labrador Fishery, 1764-1768," *Canadian Historical Review* (1969).
- _____. "Newfoundland, Quebec, and the Administration of the Coast of Labrador, 1774-1783", *Acadiensis* 6 (1976).
- Wilf, Steven. "Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England," *Yale Journal of Law and the Humanities* 5, 1 (Winter 1993).