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Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic

by DANIEL D. BLINKA*

As the twenty-first century begins, we are still perplexed about the proper role of juries in our legal system. Some are understandably concerned about the ability of lay jurors to find facts accurately and reliably, whether in complex civil litigation or even in routine criminal cases.¹ More problematic is the role of the jury as a political agency with the power to nullify established law. Put differently, how do we reconcile obeisance to the rule of law with the jury's raw power to override statutes or settled case law? Some commentators have suggested a principled basis for jury nullification,² yet caprice, emotion, and even whimsy—a troubling mixture—might very well also play into the jury's decision. Perhaps a good part of our difficulty arises from a modern reluctance to view the jury as a political agency of any sort.³ Nonetheless, the historical record reveals that the nation's founders clearly understood the jury's political power and openly embraced it.⁴ In short, the roots of nullification are deep and intertwined around the core ideas and experiences that led to

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1. E.g., Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOLOGY, PUB. POL'Y & L. 765 (1995) (proposing rule changes based in part on concerns that jurors do not adequately appreciate the risk of overly suggestive procedures); Ronald S. Longhofer, *Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335, 337 (1999) (discussing the "daunting" task jurors face in complex cases and recommending techniques to "aid" them).

2. E.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995); David Dorfman & Chris Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861 (1995).

3. See Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224, 230 (1970) (discussing jury instructions under Maryland law, where juries in criminal cases are judges of law as well as fact). Indeed, one "solution" has been to ignore the problem by not permitting arguments or instructions in the apparent hope that jurors are otherwise ignorant of their "power" to nullify. See David Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89 (1995).

4. See Irwin Horowitz & Thomas Willging, *Changing Views of Jury Power: The Nullification Debate, 1787-1988*, 15 LAW & HUM. BEHAV. 165 (1991).

the American Revolution and the new republic.

From the very inception of the American Revolution, Virginia politicized and embraced juries in two striking ways. First, the commonwealth enshrined the jury as the centerpiece of republican legal institutions by broadly expanding its use. The jury thus served as a democratic instrument for popular participation in governance. Second, Virginia simultaneously enlisted the jury to solidify support for the War of Independence an undeniably “political” function. Yet these developments are complex and, to a degree, paradoxical because we also find their chief architect, Thomas Jefferson, simultaneously excluding juries in other “enlightened” reforms (e.g., criminal law) and spearheading a frighteningly broad wartime attainder—a legislative declaration of guilt and death that completely dispensed with juries and even courts.

In sum, Virginia’s experience with juries during the Revolution is important for at least several reasons. First, it offers vital lessons regarding civil rights in times of turmoil and terror. Second, it opens deeper insights into the nature of jury nullification. Third, and closely related, the Virginia experience provides an important perspective regarding how the founding generation understood the jury right.⁵

The venerable jury had performed its ancient common law functions through much of the colonial period, yet Virginians seemed somewhat indifferent toward trial by jury until the mid-eighteenth century.⁶ After 1750, indifferent respect blossomed into affection for one of the few means by which Virginians could voice concerns, participate in official decision-making and vent frustrations. The imperial crisis of 1763 to 1776 witnessed the jury’s apotheosis as both a platform for popular participation and a key element in Revolutionary ideology. When Revolutionary governments reformed the shards of the colonial order, republican principles privileged the jury in unprecedented ways. Reformers burst the common law’s fetters and installed juries in courts of equity and admiralty, two bastions that had long abjured juries. In criminal cases, the jury was given the power to sentence for many offenses as well as to determine guilt or innocence. And building on colonial practice, juries played an expanded role in public administration when they decided not only the need for bridges and mills, but also in effect set the salary for government officials by determining the price of tobacco.

In light of their sweep, their timing, and their purpose, these innovative uses of juries will be called the “Virginia experiment.”⁷ The experiment drew from the well-springs of radical resistance during the imperial

5. See *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling twentyfive years of precedent based on the Court’s reconsideration of the founders’ understanding of the Sixth Amendment confrontation right).

6. John Murrin and A.G. Roeber, *Trial by Jury: The Virginia Paradox (Parts 1 and 2)*, 34 VIRGINIA CAVALCADE 53, 118 (1984-85).

7. Historian Carl Ubbelohde fittingly uses the term “grand experiment” to describe Virginia’s innovative use of juries in admiralty jurisdiction. CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 195 (University of North Carolina Press 1960).

crisis and manifested itself as early as December 1775, some seven months before the Declaration of Independence when Virginia authorized juries to punish the "enemies to America." The core of the innovation, however, was produced by Virginia's law reformers, especially Thomas Jefferson, over the next four years.

As one examines the origins and contours of the experiment, the principle theme that emerges is the deliberate, calculated politicization of law, courts, and jury trials during the Revolutionary era. Nor was it merely rhetoric or ideological cant. Rather, ideas about juries and popular participation in government were institutionalized and played out in the daily workings of the courts.

Perhaps not surprisingly, radical ideas that seemed well-placed in times of tumult, crisis, and upheaval appeared less attractive in a calmer, quieter period. By the late 1780s, many key elements of the "experiment" had been undone, including trial by jury in equity and admiralty. The reasons for their rollback varied. Simple misgivings, procedural awkwardness, and concerns about the unpredictability and caprice of lay men from the lower orders all played a role.

This article has three principle objectives. First, it will explore the Virginia experiment as a dramatic, vastly under-appreciated, and mostly unrecognized episode in American political and legal history.⁸ The article will explain the elements of the Virginia experiment, why they should be considered radically innovative, and their origins in the imperial crisis. In short, one must qualify Akhil Amar's conclusion that trial by jury was a "missed opportunity" for the Revolutionary generation.⁹

Second, the story becomes more coherent if the focus is kept on the experiment's prime mover, Thomas Jefferson, the quintessential democrat, radical leader, and enlightened law reformer. Jefferson championed most of the reforms yet harbored misgivings about juries because they could be beguiled and seduced by emotional, irrational appeals. More precisely, Jefferson's thought and actions manifested a palpable tension between the value he placed on democracy and popular participation, on the one side, and his worship of reason and enlightened certitude on the other.¹⁰ The Virginia experiment, then, is an excellent vehicle for examining Jefferson's evolving ideas about democracy, law, republicanism, and juries. As will be seen, Jefferson applauded and supported the expanded use of juries in civil cases and for sentencing in various war-related

8. See Carl Ubbelohde, *A Review of Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776*, by David R. Owen and Michael C. Tolley, 17 *LAW & HIST. REV.* 408, 410 (1999) (a book review that notes the authors' failure to appreciate the "significance of the whole experiment" as a "goodfaith response to the pre-Revolution unhappiness with juryless trials"); Nancy King, *The Origins of Felony Jury Sentencing in the United States*, 78 *CHI.-KENT. L. REV.* 937, 938 (which begins its consideration of Virginia practice in the 1790s). See also UBBELOHDE, *VICE-ADMIRALTY COURTS*, *supra* note 7.

9. AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83-84, 243-44 (Yale University Press 1998).

10. See *infra* note 20 and accompanying text.

offenses. Yet Jefferson also drafted a proposed "capital code" in which juries played virtually no role in sentencing for most ordinary offenses. And, more troublingly, how is one to understand Jefferson's wartime attainer of Josiah Philips and his accomplices, a legislative decree of death that dispensed with any resort to juries or judicial protection?¹¹

Third, this study of the politicization of law, trials, and juries may help better explain some of the difficult hurdles that the "rule of law" encountered in the early nineteenth century as it presented law as apolitical, scientific, and objective.¹² The difficulties and ambiguities are, again, nicely embodied in Jefferson, who in 1798 proposed a solution to the increasing politicization of law and courts, namely, the election of jurors, whose "honest ignorance" he preferred to the "perverted science" of biased judges. Jefferson's reasoning was tidy and compelling: if trials were political events, jurors should be politically accountable.

In assessing these objectives, the article begins with Thomas Jefferson's training and practice in law, during which he became intimately acquainted with the strengths and weaknesses of juries. Jefferson came of age as a lawyer amidst the imperial crisis, during which he witnessed firsthand the politicization of law, courts, and trials. Moreover, the "free form" nature of the eighteenth-century trial, as exemplified by the celebrated Parson's Cause (1763), was the perfect incubator for overtly politicizing the jury's role. These old-style trials featured juries virtually unbounded by law or facts, literally free to decide cases for themselves. Their verdicts, then, reflected the "general welfare" extolled by the First Continental Congress in 1774.¹³ Yet, if the jury in the Parson's Cause embodied the people's will in its (legally) perverse verdict against an Anglican cleric, it simultaneously represented the triumph of emotion and caprice—and of young Patrick Henry, Jefferson's later rival, who skillfully orchestrated the verdict. Indeed, when Jefferson shuttered his law practice, he knew that he lacked the skill and personality of gifted trial lawyers like Henry (the "Homer of the spoken word"), who had the ability to manipulate and to beguile trial juries. In short, trial by jury presented serious problems for those, like Jefferson, who prized reasoned decision-making.

Next, the article assesses Jefferson's brilliant transition from indifferent lawyer to promising Revolutionary leader in 1774. Jefferson came to the fore because of his powerful writing, reasoned analysis, and advanced radical ideas. Jefferson's *Summary View* carefully traced the colonies' vicissitudes during the imperial crisis and the need for bold action. Among Britain's many sins was its evisceration of meaningful trial by jury, for which Jefferson roundly and eloquently scorned imperial rule.

11. MERRILL PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 46 (Oxford University Press 1970) (Jefferson's thought was "eclectic, dynamic, and pragmatic," not systematic or particularly consistent).

12. See WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* ch. 1 (Oxford University Press 1998).

13. See *infra* note 113 and accompanying text.

Jefferson understood well the ideological saliency of trial by jury that had been cultivated throughout the imperial crisis. Resistance leaders politicized the jury in two senses. First, as seen by the Parson's Cause, actual court cases could occasionally embody popular disapproval of British rule. Second, as a potent symbol the jury right found its way into countless pamphlets and the "court" of public opinion in the form of mock jury trials that dramatized imperial injustice. By late 1775 pamphlets and parades had given way to bloodshed and armed resistance from Virginia to Massachusetts. In giving the "face of law" (George Mason's phrase) to the Revolutionary committees and councils that governed the people amidst the collapse of imperial rule, the Revolutionary leadership gave primacy to juries in identifying and punishing the "enemies to America."

With the formal declaration of independence in the summer of 1776, Americans quickly moved to install new state governments. The next section briefly canvasses the Virginia Declaration of Rights and constitution of June 1776, with special attention paid to trial by jury. Jefferson, who saw the new state governments as the "whole object" of the Revolution, openly criticized Virginia's staid constitution and the failure to have it ratified by the people. Nonetheless, Virginia soon awarded Jefferson the opportunity to effect widespread social, political, and legal change through its justly celebrated law revision committee. Charged with the task of conforming the commonwealth's laws to "our present circumstances," the committee, led by Jefferson, advanced some of the most far-reaching legal reforms in American history, including the abolition of entail and primogeniture. The committee also proposed key elements of the Virginia experiment, radically extending trial by jury into equity and admiralty actions as well as expanding the jury's power to punish offenders who impeded the war effort. Functioning as a peoples' court, of sorts, juries played important roles in public administration outside the bounds of lawsuits or even trials. The experiment's overriding objective, especially evident where juries were used to decide "policy" issues (e.g., official salaries) outside the confines of traditional lawsuits, was to build popular legitimacy for the Revolutionary cause through the common-law jury. Within ten years, however, the experiment was largely undone, particularly in equity and admiralty. The jury's expanded role remained solely within the domain of criminal law, ironically, the one area where Jefferson worked hardest to restrict it.

Jefferson himself ultimately valued the Enlightenment's pursuit of reason more than the virtues of occasionally impulsive, somewhat emotional, and generally uninformed decisions by juries. Two episodes illustrate this critical facet of Jefferson's thinking. Among his most precious law reforms was the proposed capital code, an enlightenment centerpiece of reason and science that precisely calculated the punishment for nearly all serious criminal offenses. And having done the calculations himself, Jefferson saw virtually no role for juries despite their use in sentencing offenders for war-related crimes. While Jefferson contemplated his capital code, which never became law, he implemented its terrible logic in the

attainder against the loyalist brigand and robber, Josiah Philips. The Philips attainder, instigated and drafted by Jefferson, dispensed not only with a jury, but with a court and trial altogether. Moreover, this legislative edict of death reached all who supported Philips. In sum, convinced of Philips' guilt, Jefferson guided Virginia's legislature toward a single, inexorable, chillingly rational solution: death to Philips and his supporters.

The final section concludes with Jefferson's later reflections on trials, juries, and their innately political character. In his popular and remarkably prescient *Notes on Virginia*, written in the 1780s, Jefferson hardly extolled the jury as a "palladium" of liberty when he described its decisions as decidedly better than that of a biased judge but only marginally superior to the chance of the "cross and pile"—the eighteenth-century coin flip. Nor did time soften his views. Jefferson's 1798 proposal for the election of jurors simply assumed the political nature of trials and the judiciary.¹⁴ Beleaguered and besieged by Federalist attacks and war hysteria, he portrayed the jury as a safeguard of sorts against "biased" (mostly Federalist) judges and an instance where "honest ignorance would be safer than perverted science." Thus, capable of little more than "honest ignorance," and apparently incapable of sustained reasoned decision-making, jurors should be politically accountable at the polls.

Since the Supreme Court looks to the historical record when construing the Bill of Rights,¹⁵ the conclusion emphasizes that future cases must grapple with the founders' divided mindset toward juries. The Revolution marked the jury's apotheosis as a political agency, yet the record is also one of retrenchment borne, in part, of concerns about political accountability and capacity for reasoned judgment. Most important, in form and function the trial itself has evolved into a radically different institution than the one found in eighteenth-century North America.

JEFFERSON AND EIGHTEENTH-CENTURY TRIALS

Jefferson: Student and Lawyer

Thomas Jefferson practiced law from February 1767 until August 1774, when the Revolution propelled him into the roles of radical leader, republican statesman, and law reformer. Those seven-plus years of law practice coincided with the quickening of the imperial crisis and the advent of the Revolution, experiences that profoundly shaped Jefferson's thinking about politics, law, and juries. Yet his education and training before 1767 undoubtedly created the cast of mind through which he understood those experiences. More precisely, Jefferson entered the study and practice of law with the benefit of an "enlightened," liberal education

14. Jefferson may have been inspired by the New England practice of nominating grand jurors at town meetings. See JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 287 (Stanford University Press 1959) (1943).

15. See *Crawford v. Washington*, *supra* note 5.

which placed a premium on order, reason, science, and steadfast improvement. Nothing about Jefferson's personality or experience as a lawyer suggests that he was particularly adept at trying cases before juries or nurtured more than a polite, lawyerly respect for this venerable, yet unpredictable institution. Indeed, Jefferson's legal career introduced him to the roles played by caprice and emotion in decision-making while also cultivating a wariness of those who successfully, skillfully manipulated popular opinion.

For a Virginia lawyer born and bred, Jefferson was well-educated for his time. Although his father lacked formal education, Jefferson was placed in an "English school" at age 5 and studied at the "Latin" school at age 9, where he also learned French. When Jefferson's father died in 1757, fourteen-year-old Thomas was sent to live with the Reverend James Maury, a "classical scholar," until his admission to the College of William and Mary in 1760.¹⁶ At the college, Jefferson had the "great good fortune" to study under Dr. William Small, "who probably fixed the destinies of [his] life."¹⁷ Small, who had recently come from Scotland, was a well-educated, demanding, and engaging teacher, "the first truly enlightened or scientific man" young Jefferson had met.¹⁸ Indeed, since the, enlightened Scotsman was the only regular teacher on the faculty for a time (the other teacher had been removed for "rowdyism"¹⁹), he taught Jefferson virtually the entire curriculum of mathematics, natural philosophy, natural history, ethics, rhetoric, logic, and belles letters.²⁰ Jefferson credited Small with providing "my first views of the expansion of science & of the system of things in which we are placed."²¹ In short, Small ignited Jefferson's life-long pursuit of reason, precision, and order in all things. And it was Small who arranged for Jefferson to study law under the tutelage of one of Virginia's finest lawyers and legal minds, George Wythe.²²

Eighteenth-century lawyers were trained in law offices, not law schools. Standardized legal education would not rear its head until well into the nineteenth century. The erstwhile law student of Revolutionary times typically sought out a local lawyer under whom he might serve as a type of apprentice, watching his mentor represent clients, drafting documents under supervision, and "reading" at least some law, although usual-

16. THOMAS JEFFERSON, AUTOBIOGRAPHY 4 (1821) (Library of America 1984). Jefferson wrote the Autobiography at age 77. *Id.* at 3.

17. *Id.* at 4.

18. PETERSON, *supra* note 11, at 12. Later in life, Jefferson glowingly described his esteemed teacher as "a man profound in most of the useful branches of science, with a happy talent of communication, correct and gentlemanly manners, & an enlarged & liberal mind." JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 4.

19. PETERSON, *supra* note 11, at 12 (describing Small, Jefferson's curriculum, and the removal of the other teacher for unspecified "rowdyism").

20. JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 4. See also PETERSON, *supra* note 11, at 12.

21. JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 4.

22. *Id.* at 4.

ly in a haphazard, scattershot manner.²³

Jefferson was extraordinarily fortunate to study, at least for a time, under Wythe, "my faithful and beloved Mentor in youth, and my most affectionate friend through life."²⁴ Wythe, an accomplished lawyer, later signed the Declaration of Independence, served as the first professor of law at William and Mary, and became Virginia's first chancellor of equity.²⁵ Largely self-taught, Wythe commanded the intricacies of Roman and English law while also having mastered classical languages and humanistic literature. As historian Merrill Peterson observed, Dr. Small cultivated Jefferson's proclivities toward scientific rationalism while Wythe taught him to understand law through the ancients and the humanities.²⁶

Jefferson spent about five years watching lawyers at practice and reading law.²⁷ Wythe guided his study early on, but family responsibilities at the Shadwell farms in Albemarle County soon compelled Jefferson to read extensively on his own.²⁸ Although deprived of Wythe's direct influence, the change freed Jefferson to learn law on his own and to bring to it his own peculiar interests and understanding.²⁹ Much of the self-study was undoubtedly tedious, difficult, and prolonged by Jefferson's duties on the farms and youthful pursuit of romance.³⁰ While battling through Sir Edward Coke's *Institutes of the Laws of England*, he wrote his good friend, John Page, that "I do wish the Devil had old Cooke [Coke], for I am sure that I never was so tired of an old dull scoundrel in my life."³¹ Yet Coke instilled in Jefferson a deep appreciation for understanding law through history, especially the common law's Saxon

23. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 2D ED. 97-102 (Simon & Schuster 1985).

24. JEFFERSON, *AUTOBIOGRAPHY*, *supra* note 16, at 4.

25. PETERSON, *supra* note 11, at 14.

26. *Id.* at 14-15. While in Williamsburg, Jefferson closely associated with the witty, learned, and engaging triumvirate of Small, Wythe, and Governor Fauquier. Peterson describes this "Williamsburg circle" as "Jefferson's university." *Id.* at 15.

27. For general accounts of Jefferson's education as a lawyer, I have relied upon PETERSON, *supra* note 11, at 16-20 and FRANK L. DEWEY, *THOMAS JEFFERSON: LAWYER* 9-17 (University Press of Virginia 1986). Dewey disputes the traditional position that Jefferson spent about five years as a law student, but the fact remains that Jefferson did not begin law practice until 1767. Besides his demanding reading program, Jefferson wrote of attending court "constantly." Letter from Thomas Jefferson to John Page (7 October 1763), in 1 *THE PAPERS OF THOMAS JEFFERSON* 11 (Julian P. Boyd ed., Princeton University Press 1950) (hereinafter, "1 PTJ").

28. In 1769 Jefferson declined to take on his first cousin as a legal apprentice, stating that "I was always of the opinion that the placing a youth to study with an attorney was rather a prejudice than a help" if only because lawyers pushed their "business" on students whose time was better spent in study. Letter from Jefferson to Thomas Turpin (5 February 1769) in 1 *PTJ*, *supra* note 27, at 24.

29. Dewey sets forth a chronology of Jefferson's likely course of self-education between 1762 and 1767. DEWEY, *supra* note 27, at 17.

30. PETERSON, *supra* note 11, at 19.

31. Letter from Jefferson to John Page (25 December 1762) in 1 *PTJ*, *supra* note 27, at 5.

(pre-Norman) roots.³² Indeed, it appears that Jefferson continued to read widely in history and humanities while studying legal texts.³³

It seems, then, that the eclectic and idiosyncratic nature of Jefferson's legal education, building as it did on Small's broadly Enlightened curriculum and Wythe's wide-ranging interests, led him to approach "law as a branch of the history of mankind."³⁴ One senses nothing resembling a "love" for lawyering itself or a burning desire to gain preeminence at the bar, especially in the theatre of trial by jury. Rather, it appears that Jefferson saw law practice as a way to supplement his income from agriculture while being of some use to society.³⁵

Modest as his ambition may have been, Jefferson in 1767 nonetheless gained admission to the small but distinguished group of lawyers licensed to practice before the General Court, colonial Virginia's highest court of law and equity.³⁶ Before the Revolution, Virginia lawyers were technically compelled to choose between a local practice in the county courts or one before the General Court.³⁷ Although a county court practice may have been more financially rewarding, Jefferson seemingly never wavered in his desire for the General Court's ranks. A decade later, writing to his mentor Wythe, himself among the leading lawyers of Virginia's highest court, Jefferson praised the General Court as an "excellent nursery for future judges" and its lawyers as "men of science." In stark contrast stood the county court lawyers, an "inundation of insects" best excluded from the august General Court lest they "consume the harvest."³⁸ Although harsh and disdainful, Jefferson's judgment rested on his intimate acquaintance with the county courts' workings. In 1766 he was appointed a justice of the peace in the Albemarle County court and also frequented the sessions of the neighboring Augusta County court in pursuit of cases.³⁹

Jefferson's law practice consisted mostly of land-related litigation involving petitions and caveats, actions that involved challenges to land patents although in different forums.⁴⁰ Caveats were heard by the Governor's Council (12 prominent men) and petitions were decided by

32. PETERSON, *supra* note 11, at 17-18.

33. See DEWEY, *supra* note 27, at 14.

34. PETERSON, *supra* note 11, at 14.

35. *Id.* at 12-13.

36. Only about eight (8) lawyers were admitted to practice before the General Court. See DEWEY, *supra* note 27, at 2-3.

37. See *id.* at ch. 3 and Appendix B (dispelling the "myth" that Jefferson actually practiced law before the county courts as well as the General Court).

38. *Id.* at 124-25, quoting Jefferson to Wythe (1 March 1779) which is required at 2 THE PAPERS OF THOMAS JEFFERSON 235 (Julian P. Boyd ed., Princeton University Press 1950) (hereinafter, "2 PTJ").

39. DEWEY, *supra* note 27, at ch. 4. The county courts met in quarterly sessions which Jefferson regularly attended.

40. *Id.* at 30.

the General Court (the Council plus the governor sitting as a “court”).⁴¹ In essence, a petition alleged that a current patent holder forfeited any right to the land by failing to pay quitrents or to make required improvements.⁴² A caveat attacked an application for a patent on grounds that the challenger had a superior claim or the applicant had not followed the correct procedures.⁴³ Neither procedure used juries.

Jefferson and Old-Style Trials

Before addressing Jefferson’s experiences as a trial lawyer before juries, it is helpful to remark briefly on the nature of eighteenth-century jury trials.⁴⁴ Such trials were short and, by present standards, remarkably informal in the truest sense of the word. Parties often presented no “evidence” in the form of testimony. (Rules of evidence played virtually no role in the proceedings.) Verdicts were often based on argument and the jury’s knowledge of local events and the parties’ character. The jury itself was usually drawn from “bystanders,” who often included other parties waiting to have their cases called or “idlers” hoping to earn a modest fee for their services. Many jurors—and sometimes the same jury—might hear multiple cases in a single day. Decisions were quick; often the jury never deliberated or even left the courtroom, but rather rendered its verdict after a short huddle from where it sat. Indeed, typical jury trials may have lasted no more than a few minutes.⁴⁵

The celebrated “Parson’s Cause” of 1763 provides a trenchant illustration of this old-style trial and its capacity for nullification, and one which Jefferson would have been acutely aware of given its notoriety and his own personal connections.⁴⁶ The dispute had its origins in the Two-Penny Act of 1758, a debt relief measure that permitted payments of debts and taxes in currency at the rate of two pence per pound of tobacco at a time when tobacco’s market value was nearly triple that amount.⁴⁷ Among those hard hit were the local Anglican clergy, which saw its salary

41. *Id.* at 18, 21-22. Multiple office holding, although alien to modern law and politics, was a common eighteenth-century feature. See Daniel D. Blinka, *Trial by Jury in Revolutionary Virginia: Old-Style Trials in the New Republic* 49-50 (2001) (unpublished PhD dissertation, University of Wisconsin—Madison) (hereinafter, “*Revolutionary Virginia*”).

42. DEWEY, *supra* note 27, at 30.

43. *Id.* at 30.

44. See Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529 (2003); “*This Germ of Rottedness*”: *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135 (2003).

45. See Blinka, *Trial by Jury on the Eve of Revolution*, *supra* note 44, at 562-80.

46. There are no records of Jefferson’s thoughts on the Parson’s Cause. If any existed, they were most probably destroyed in the fire at Jefferson’s Shadwell plantation in February 1770. See Letter by Jefferson to John Page (21 February 1770), 1 PTJ, *supra* note 27, at 34-36.

47. Blinka, *Revolutionary Virginia*, *supra* note 41, at 154-56. Tobacco receipts served as Virginia’s currency in the cash-starved eighteenth-century economy.

effectively reduced by two-thirds.⁴⁸ In 1760, the King in Council formally disallowed the 1758 act.⁴⁹ A number of Anglican ministers then brought legal actions seeking redress (backpay), including the Reverend James Maury, with whom Jefferson had studied until 1760.⁵⁰ Maury brought his suit against Thomas Johnson, who was responsible for collecting the parish taxes and paying Maury. Since Johnson also sat on the Louisa County Court and represented that county in the House of Burgesses (the colonial legislature), Maury's able lawyer, the distinguished Peter Lyon, filed the action in neighboring Hanover County. In November 1763 the Hanover justices of the peace ruled that the Two Penny Act was void from its inception and that Maury was therefore entitled to back pay. The court ordered that a "select" jury be impaneled to determine damages at its December sitting.⁵¹

The December jury trial should have been a straightforward calculation that simply subtracted whatever payment Maury actually received from what he was owed. Undoubtedly hoping to avoid such an outcome, Johnson retained a new attorney for trial, the young Patrick Henry. Henry had already gained a budding reputation for his forensic skills. Decades later, in one of his kindest remarks about Henry, an envious Jefferson gently praised him as the "Homer" of the spoken word.⁵² Yet eloquence aside, Henry's presence may have also been calculated to offset that of his father, who sat on the Hanover court and had ruled against Johnson in November.⁵³ The change of counsel paid the desired dividends.

Although the Parson's Cause is often celebrated as a harbinger of Revolutionary sentiment,⁵⁴ it more clearly illustrates the working of the "old-style trial," which attempted to institutionalize a preference for a hierarchically organized society.⁵⁵ In such trials "character" loomed large because it helped fix one's place in local society. Although the court's order for a "select" jury was intended to identify the "better" sort of men, Maury bitterly observed that the jury was drawn from "among the vulgar

48. See Arthur P. Scott, *The Constitutional Aspects of the "Parson's Cause,"* 31 POLITICAL SCIENCE QUARTERLY 558-77 (Dec. 1916) at <http://dinsdoc.com/Scott~1.html>. A 1748 act fixed the annual salary of Virginia's Anglican clergy at 16,000 pounds of tobacco. The Debt Relief Act of 1758 permitted all debts payable in tobacco for that year to be paid in currency at the rate of two pence per pound. The 1758 act anticipated a crop failure, yet the market price of tobacco swelled to six pence, so debtors naturally took advantage of the act to pay their debts cheaply. *Id.* at 560.

49. See *id.* at 560-61.

50. For Jefferson and Maury, see *supra* note 16 and accompanying text. See also PETERSON, *supra* note 11, at 8-9. The "constitutional" aspects of the Parson's Cause cases are explored by Scott, *supra* note 48.

51. Blinka, *Revolutionary Virginia*, *supra* note 41, at 156.

52. JEFFERSON, *AUTOBIOGRAPHY*, *supra* note 16, at 6.

53. See Blinka, *Revolutionary Virginia*, *supra* note 41, at 156-57 (noting that Lyon reportedly enjoyed listening to Henry's arguments).

54. See Scott, *supra* note 48, at 559.

55. See Blinka, *Trial by Jury on the Eve of Revolution*, *supra* note 44, at 557.

herd" and included several evangelicals and religious dissidents, men unlikely to side with an Anglican clergymen.⁵⁶ Besides the centrality of character, the trial featured little in the way of formal evidence. Lyons called just two witnesses, experienced tobacco dealers who set the market rate for tobacco. Henry offered only a single piece of paper: Maury's signed receipt for the £144 he received as salary.⁵⁷ In short, much of the "proof" was already known by the jurors before the trial began or was provided by the lawyers during argument. Lyon's emphasized the respect that the community owed its Anglican clergy (not a particularly compelling point) and urged it to perform the simple calculation. Rising for the defense, Henry quickly slipped the shackles of law and played to the jury's emotion. Henry colorfully vilified the clergy as "'rapacious harpies' who would 'snatch from the hearth of their honest parishioners his last hoe-cake.'" ⁵⁸ He also tip-toed treason by castigating the king's disallowance of the 1758 act. In conclusion, Henry urged the jury not to award more than a "farthing" in damages.⁵⁹ The jury briefly filed out of the courtroom and returned immediately with a verdict that set damages at just one penny! The many onlookers greeted the one-penny finding with such explosive approval that the panel of justices prudently denied Lyons motion to set aside the verdict.⁶⁰

In short, the Parson's Cause typified the old-style trial's reliance on character, its utter lack of evidentiary rules, and an almost startling informality of proof which pragmatically equated witness testimony, the jury's own knowledge, and counsel's argument. Nor was the jury "bound"—even as a fiction—to follow the judges' instructions on law. Indeed, the judges and lawyers might well provide inconsistent versions of law, as did Henry and Lyon, thereby leaving the jury with a range of choices, including that of following its own lead. "Deliberations" or reasoned decision-making was not the primary objective. Quick verdicts were prized and many Virginia juries delivered their decision without leaving the box. The one-penny finding was also typical, embodying a grudging recognition of the plaintiff's "rights" with an abject refusal to penalize financially the defendant.⁶¹ Even more so than modern jury trials, the eighteenth-century trial favored lawyers who were persuasive, articulate, reacted well on their feet, and who, above all, had the ability to read and respond to the feelings, thoughts, and emotions of the more common sort who comprised juries.⁶² The old-style trial, then, accommodated if not institutionalized nullification.

56. Maury's quotes are taken from HENRY MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC*, 63 (University Press of Virginia 1991). One juror had "publicly damned Parson Henry [Patrick's uncle] as an unconverted wretch." *Id.*

57. *Id.* at 63.

58. As quoted in *id.* at 54.

59. *Id.* at 65.

60. *Id.* at 65-66.

61. See Blinka, *Trial by Jury on the Eve of Revolution*, *supra* note 44, at 579.

62. Mid eighteenth-century society valued face-to-face contact. See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790* ch. 5 (Norton 1982).

And how well did Thomas Jefferson perform in such an environment? The record is ambiguous and incomplete yet fair inferences may be drawn. Jefferson focused his practice, as we have seen, on the General Court where he specialized in technical land litigation. And although he tried jury trials, it is difficult to say how many, identify his role as co-counsel, or adequately assess Jefferson's performance before the jury.⁶³ To be sure Jefferson earns high marks for diligence, preparation, mastery of law, and analytic skills, yet it seems doubtful that his personality and "communication skills" were particularly well-suited to the old-style trial.

First, someone of Jefferson's personality and temperament would not have been at ease in the free-wheeling swirl of eighteenth-century trials. Historian Merrill Peterson, Jefferson's leading biographer, describes him at age 30 as a man of "forebearance and reserve," a careful thinker who prized "reason and inquiry" and displayed "a penchant for methodical industry, order and system."⁶⁴ Another historian, Joseph Ellis, discerned in Jefferson "a reclusive pattern of behavior with distinctive psychological implications," a man with "an extremely private temperament."⁶⁵ In short, Jefferson the scholarly introvert would not have been playing to his strengths when looking jurors in the eye and attempting to sway them with the spoken word. As Peterson so bluntly put it, Jefferson "was not, in his nature, born for the public."⁶⁶

This in turn relates to a second telling limitation: historians concur that despite his protean talents, Jefferson was a poor public speaker. In his classic study of the Declaration of Independence, Carl Becker famously observed that Jefferson seldom made speeches throughout his political career because "[l]ike many men who write with felicity, Jefferson was no orator."⁶⁷ In the same vein and writing of Jefferson's "marginal" contri-

63. Dewey is the closest student of Jefferson the lawyer. His research discloses Jefferson's role in a number of jury trials but does not tabulate the number of cases tried or evaluate Jefferson's skills as a trial lawyer. See especially DEWEY, *supra* note 27, at ch. 4 (discussing Jefferson's appointment to assist Edmund Pendleton on the "eve" of an assault trial) and ch. 6 (which recounts Jefferson's involvement in the Norfolk anti-inoculation riot trials).

64. PETERSON, *supra* note 11, at 30-31. Born in 1743, the 30-year-old Jefferson was at the crest of his legal career before giving up practice later in 1774.

65. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 39 (Random House 1996).

66. PETERSON, *supra* note 11, at 30.

67. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 194 (Vintage Books 1958) (1922). Becker let Jefferson off the hook, so to speak, by further generalizing that the qualities of effective speaking and writing seldom coincide in the same individual:

It might seem that a man who can write effectively should be able to speak effectively. It sometimes happens. But one whose ear is sensitive to the subtler, elusive harmonies of expression, one who in imagination hears the pitch and cadence and rhythm of the thing he wishes before he says it, often makes a sad business of public speaking because, painfully aware of the imperfect felicity of what he has uttered, he forgets what he ought to say next. He instinctively wishes to cross out what he has just said, and say it over again in a different way—and this is what he often does, to the confusion of the audience. In writing he can

butions to the Continental Congress, historian Ellis also cited this inability—"He could not speak in public"—as his "most glaring deficiency."⁶⁸ Peterson also remarks on Jefferson's "deficiencies" as a speaker, yet concludes that Jefferson "acquitted himself respectably" as a lawyer.⁶⁹ Indeed, Jefferson's focus on petitions and caveats permitted him to draw upon his keen intelligence and immense learning when appearing before the General Court and the Council—essentially, the same persons.⁷⁰ It is tempting to speculate that Jefferson may have eschewed a potentially more lucrative county court practice precisely because it demanded those skills that Jefferson most lacked.

Third, Jefferson's very emphasis on reason, learning, and scholarly detachment were not the strengths of a trial lawyer. Comparing Jefferson and Henry as lawyers, Peterson concludes that Jefferson's "superiority of learning was canceled by Henry's golden throat and folksy ways[.]"⁷¹ And those "folksy ways" often conflicted with reasoned argument. In 1773 Jefferson played a modest role in the infamous Blair divorce scandal that rocked Williamsburg society. Watching the oral argument by Patrick Henry, Jefferson observed that Henry "'avoided, as was his custom, entering the lists of the law, running wild in the field of fact.'"⁷² The phrase is telling. Henry's "running wild in the field of facts" connotes the very antithesis of the reason, precision, and orderliness valued by one who felt more at home in the "lists of the law."

Lessons Learned

In August 1774 Thomas Jefferson turned over the bulk of his law practice to Edmund Randolph, although his plans to retain the caveat cases were quickly washed away by the tidal surges of the Revolution.⁷³ It is difficult to explain Jefferson's decision to forsake lawyering and assume a role among Virginia's radical leadership. Merrill Peterson observes that Jefferson was "remarkably inarticulate about the processes of thought that conducted him to the revolutionary event," perhaps because "[t]heir channels were intricate, devious, and partly hidden from

cross out and rewrite at leisure, as often as he likes, until the sound and the sense are perfectly suited—until the thing *composes*. The reader sees only the finished draft.

Id. at 195 (emphasis original).

68. ELLIS, *supra* note 65, at 42. Political influence in the eighteenth century depended to a great extent on public speaking skills. Ellis observes that the "elevated status of the Virginia delegation derived primarily from its reputations for oratorical brilliance." *Id.* at 43.

69. PETERSON, *supra* note 11, at 21. Peterson notes that Jefferson's "deficiencies" as a speaker were "often noted in later years." *Id.*

70. Patrick Henry retained Jefferson to handle a caveat matter on his behalf. *See* DEWEY, *supra* note 27, at ch.4.

71. PETERSON, *supra* note 11, at 20-21.

72. Quoted in DEWEY, *supra* note 27, at 63.

73. *Id.* at 108. Dewey concludes that Jefferson intended to retain the caveat practice because the cases were fairly straightforward, paid well, and were heard by the Council.

consciousness.”⁷⁴ It may be, however, that the two decisions were unrelated. Put differently, Jefferson may have abandoned law practice regardless of the Revolution, its fortuitous timing serving as a convenient justification for one who struggled to make a living as a lawyer and who lacked talents essential for success at the bar.⁷⁵ Yet in many ways, Jefferson’s deepening devotion to radical politics was a natural transition for one who, as we have seen, “learned law as a branch of the history of mankind.”⁷⁶

Law practice in general, and jury trials in particular, undoubtedly provided Jefferson with trenchant lessons that deeply influenced his views on the Revolution and republican government. First, law was becoming politicized. It cannot be gainsaid that the years of his legal education and law practice coincided with the imperial crisis. To the young law student, the Parson’s Cause embodied law as politics. Henry’s victory took the form of a one-penny finding, an act of defiance expressed in the venerable raiment of the common-law verdict. The Hanover court, clearly intimidated by the verdict’s vocal, popular support, let it stand despite the verdict’s shaky legal moorings. Years later, Jefferson saw firsthand the politicization of law in a less flattering light as a lawyer in the Norfolk anti-inoculation riot cases, where he represented the “enlightened” supporters of inoculation who had been damaged by “mobs” and persecuted by local officials who feared this novel medical technique.⁷⁷

A second lesson followed closely from the first: the danger that biased judges and capricious juries might decide cases based on emotion and irrational impulses, not reason or the law. As we will see, Jefferson struggled for decades to reconcile his enthusiasm for popular decision-making with fears about the public’s capacity to act rationally. Nothing emerges from Jefferson’s experience as a lawyer which suggested that jury verdicts were uniformly, or generally, a superior method of dispute resolution, particularly where reason and science pointed to a certain answer.

Yet a third lesson may have been the most galling and chilling of all: the substantial risk posed by those with the gift to manipulate, to shape, or to influence popular opinions. Skillful trial lawyers, like Patrick Henry, employed their “golden throats” and “folksy ways” to beguile juries through emotion, sentiment, and an appeal to the irrational. Despite his

74. PETERSON, *supra* note 11, at 45.

75. See DEWEY, *supra* note 27, at ch. 11. Dewey reasonably speculates that Jefferson lost interest in the law as early as May 1773, when he inherited substantial property from his father-in-law and became more interested in horticulture and the building of Monticello. If Dewey is correct, these are far less compelling reasons and underscore Jefferson’s deep disenchantment with—or lack of commitment to—law practice. In any event, a decision to invest himself in the radical cause did not foreclose him from practicing law. The two activities were not mutually exclusive, as the career of George Wythe well illustrates.

76. PETERSON, *supra* note 11, at 14.

77. See DEWEY, *supra* note 27, at ch. 6. Jefferson favored inoculation and found himself aligned against a Norfolk “mob” that opposed it out of fear, ignorance, and superstition. Dewey’s account emphasizes the formal legal issues and ignores its political implications, but duly notes Jefferson’s exasperation with biased judges and jurors. Some likened the Norfolk anti-inoculation mob with those that opposed the Stamp Act. *Id.* at 52.

skill with the pen and the written word, Jefferson knew that eighteenth-century law required lawyers to be adept practitioners in an oral culture premised upon face-to-face communications.⁷⁸ And because the same values animated political culture, Jefferson's experiences shaped his later thinking not just about juries, but also the nature of the republic and the law under which it was governed.

JEFFERSON AND THE COMING OF THE REVOLUTION

In July 1774 Jefferson closed his law practice and entered the lists of Revolutionary leadership. In contrast to the "Homeric" Henry, whose personal magnetism and speaking skills marked him for leadership, the taciturn, reflective Jefferson produced a tightly reasoned, persuasively written reflection on the causes of the imperial crisis, the colonies' grievances, and a course of action. The so-called "*Summary View*" also contains glimpses into Jefferson's first pronounced thoughts about the foundations of government and ruminations about the role of trial by jury, the latter a clearly subordinate concern. Both the *Summary View* and Jefferson's abandonment of law practice must be understood in terms of the incipient political maelstrom.

The *Summary View* traversed the principle features of the "imperial crisis," a term that aptly describes the swelling political reaction in North America to the host of imperial "reforms" that followed Britain's 1763 victory in the French and Indian War.⁷⁹ Its high-water marks are well-known.⁸⁰ Throughout most of the long colonial period, English (British) rule was, to put it generously, relatively lax and often to the colonies' benefit.⁸¹ The costly victory over France, however, forced Britain to rethink and then to overhaul its relationship with its North American colonies, which now included Canada. The Proclamation Act of 1763 vainly attempted to curb settlement west of the Appalachians and thereby avoid costly Indians wars.⁸² The Sugar Act of 1764 sought both to raise revenue and to protect British West Indies planters by lowering the duty on sugar, which Britain now intended to collect. Neither act triggered much colonial

78. See ISAAC, *supra* note 62.

79. See FRED ANDERSON, *THE CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766* (Knopf 2000). Although the conflict in North America is commonly called the "French and Indian War," Anderson compellingly demonstrates that it was a world war for imperial domination, fought in the Caribbean, India, and Europe, and on the oceans.

80. See generally MILLER, *supra* note 14; LAWRENCE H. GIPSON, *THE COMING OF THE REVOLUTION: 1763-1775* (Harper Row 1954).

81. Even the trade and commercial restrictions were mostly benign or helped contribute to the economic growth of British North America. See JOHN J. MCCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH NORTH AMERICA: 1607-1789* 50 n. 20 (University of North Carolina Press 1991). See also OLIVER DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* (A.S. Barnes 1963) (1951).

82. "Pontiac's Rebellion" also raged on the frontier in 1763. MILLER, *supra* note 14, at 74-75.

response; indeed, the Sugar Act's impact was confined largely to New England and its rum trade.⁸³ The Stamp Act, however, sparked the first real flashpoint because it was a revenue measure that touched all North American colonies and kindled outrage among influential groups such as lawyers and printers.⁸⁴ Most damnable was its effectiveness: the relatively modest stamp tax was virtually self-enforcing because newspapers and legal documents could only use the hated-stamped paper. Colonial resistance was organized, intense, and effective. Orchestrated "riots" in Boston and New York coincided with unabashed intimidation of Stamp Act collectors throughout the colonies.⁸⁵ Britain repealed the act before its effective date but simultaneously announced the Declaratory Act, which affirmed Britain's right to govern its colonies as it saw fit. So began the pattern of "doing and undoing" as colonial resistance caused Britain to back down repeatedly.⁸⁶ The Townshend Duties of 1767 triggered colonial boycotts and escalating resistance culminating in the Boston Massacre of 1770, after which Parliament repealed nearly all duties, except those on tea. Several years of relative calm ended abruptly when Parliament's ill-conceived plan to salvage the East India Company resulted in the Boston Tea Party of December 1773. Exasperated, Britain imposed the "Coercive Acts" on Boston in early 1774 in the vain hope of delimiting further resistance, but these so-called "Intolerable Acts" sparked outrage and protest throughout North America.⁸⁷ In sum, the "imperial crisis" consisted of increasing colonial resistance to Britain's varied attempts to impose increased hegemony over North America, culminating in the pitched battles of 1775 and independence in 1776.

The *Summary View* by no means marked Jefferson's first interest or involvement in radical politics. Elected to the House of Burgesses in 1768,⁸⁸ Jefferson signed Virginia's Nonimportation Association of 1770 which protested the Townshend Duties and sanctioned county committees to police the boycott's effectiveness.⁸⁹ When news of the Intolerable Acts broke over North America in May 1774, Jefferson helped galvanize popular protest and resistance. The "Fast Day Resolution," signed on May 24, 1774, declared that at 10 a.m. on June 1 members of the House of

83. *Id.* at 105.

84. EDMUND S. MORGAN AND HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 175* (lawyers), 195 (printers) (University of North Carolina Press, 1995) (1953).

85. For Virginia mobs, see *id.* at 189.

86. 1 DAVID RAMSEY, *THE HISTORY OF THE AMERICAN REVOLUTION* 118 (Trenton 1811), as quoted in MILLER, *supra* note 14, at 294.

87. The "Intolerable" or "Coercive Acts" are described at MILLER, *supra* note 14, at 369-76.

88. ELLIS, *supra* note 65, at 31. As Ellis explains, Jefferson's election manifested his political ambition and growing reputation among Virginia's aristocracy.

89. Virginia Nonimportation Resolutions (1770), *reprinted in*, 1 PTJ, *supra* note 27, at 43-47. The association contemplated that local committees of 5 men would inspect goods and enforce the boycott by demanding records, where necessary. Violators would be subject to public censure.

Burgesses would “proceed with the Speaker and the Mace to the Church” where they would “implore the divine Interposition for averting the heavy Calamity, which threatens Destruction to our civil Rights, and the Evils of civil war[.]”⁹⁰ Jefferson later explained that the Resolution deliberately drew upon the precedents of the Puritan Revolution of the 1640s with the intent of “arousing our people from the lethargy into whcy they had fallen as to passing events.”⁹¹ After the Governor dissolved the House of Burgesses, its members gathered in the Apollo Room of the Raleigh Tavern and formed an “association” on May 27, 1774.⁹² The association protested the tax on tea and the “attack” on Massachusetts by advocating a boycott of East India commodities (except spices and saltpeter) and calling for a “general congress” among the colonies.⁹³ In anticipation of a colonial congress, a rump of twenty-five “late” members of the House, including Jefferson, called for a gathering of representatives from across Virginia on August 1 for purposes of instructing the Old Dominion’s delegates.⁹⁴ Of particular significance here is the genuine, recurring concern by Jefferson and the radical leadership both to shape and to draw upon popular support. Later in his life, Jefferson reflected that the assemblies of June 1 (the “fast” day) were “like a shock of electricity, arousing every man and placing him erect and solidly on his centre.”⁹⁵

Jefferson hoped that the *Summary View* would affect (if not embody) the thoughts and actions of the August 1774 Convention as well as instruct its delegates to the First Continental Congress.⁹⁶ Dysentery disabled Jefferson from attending the Convention himself, but he sent copies to Peyton Randolph, its likely chairman, and Patrick Henry.⁹⁷ Although delegates discussed the *Summary View* and “applauded” much of it, the Convention ultimately did not adopt the proposed instructions.⁹⁸ Nonetheless, it influenced early thinking about resistance in Virginia and at the First Continental Congress, marked Jefferson’s entrance into the ranks of the radical leadership, and fully justified his later charge to draft the Declaration of Independence in June 1776.⁹⁹

90. Resolution of the House of Burgesses Designating A Day of Fasting and Prayer, reprinted in *id.* at 105-106.

91. JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 8.

92. *Id.*

93. Association of Members of the Late House of Burgesses, reprinted in *id.* at 107-08.

94. Proceedings of a Meeting of Representatives in Williamsburg (30 May 1774), reprinted in *id.* at 109-10.

95. JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 8.

96. 1 PTJ, *supra* note 27, at 135.

97. JEFFERSON, AUTOBIOGRAPHY, *supra* note 16, at 9. Jefferson rebuked Henry for not circulating the pamphlet either because he disapproved of its views or was too “lazy” to read it. Nonetheless, the *Summary View* was circulated and discussed at the August 1774 Convention.

98. 1 PTJ, *supra* note 27 at 671-76. Edmund Pendleton later recalled that when Jefferson’s views were discussed, there was “applause bestowed on most of them” except for those on free trade. *Id.* at 671-72.

99. PETERSON, *supra* note 11, at 69.

The *Summary View* set forth the colonists' "complaints" and the "redress" sought from the King for their "injured rights."¹⁰⁰ The "complaints" were many and manifold. Past kings had divided colonies and granted lands to proprietors, mistakes which his "majesty's prudence and understanding would prevent him from initiating at this day." Parliament had abridged the colonies' "natural right" to "free trade with all parts of the world."¹⁰¹ It had also "intermeddled" in the colonies' "internal affairs" and sold lucrative posts to his majesty's "favorites." Yet these past violations which occurred "at more distant intervals" were far "less alarming" than "injuries" inflicted since 1763:

Single acts of tyranny may be ascribed to the accidental opinion of the day; but a series of oppressions, begun at a distinguished period, and pursued unalterably thro' every change of ministers, too [sic] plainly prove a deliberate, systematical plan of reducing us to slavery.¹⁰²

With this preface, Jefferson enumerated the manifold elements of this "systematical plan" in no discernable systematic order. They included, of course, the "parliamentary usurpations" of the Sugar Act, the Stamp Act, the Townshend Duties, and the Declaratory Act.¹⁰³ When faced with justifiable colonial resistance, Britain responded by stationing troops which "made the civil subordinate to the military."¹⁰⁴ Other examples of retaliation included the dissolution of colonial legislatures and the Coercive Acts directed at Massachusetts.¹⁰⁵

Of special interest, Jefferson condemned the denial of trial by jury in resounding terms. He warmed to the task by vigorously criticizing the punishment of the entire "ill-fated" colony of Massachusetts for the transgressions of an "exasperated" few "who threw the tea into the ocean and dispersed without doing any other act of violence." The Tea Party provided no warrant for punishing all of Boston based on the "partial representations of a few worthless ministerial dependants, . . . without calling for a party accused, without asking a proof, without attempting a distinction between the guilty and the innocent[.]"¹⁰⁶

In more direct terms, the 1774 act "for the suppression of riots and tumults" allowed the royal governor to transport those accused of crimes such as murder to Britain for trial in the court of the King's bench "by a jury of Middlesex." Witnesses would be subjected to monetary recognizances that required them to appear in Britain for the trial. And should they make the difficult voyage, "who are to feed the wife and children whom he leaves behind"? Yet trials in Britain ultimately devastated the

100. Draft Instructions to the Virginia Delegates in the Continental Congress (1774), reprinted in 1 PTJ, *supra* note 27, at 121-35.

101. *Id.* at 123.

102. *Id.* at 125.

103. *Id.* at 126.

104. *Id.* at 134.

105. *Id.* at 126 (suspension of the New York legislature), 127-28 (Massachusetts).

106. *Id.* at 127.

accused most of all:

And the wretched criminal, if he happen to have offended on the American side, stripped of his privilege of trial by peers, of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn.¹⁰⁷

Of telling importance was the emphasis not just on trial by jury, but the vicinage itself. This passage points to the emptiness of a jury trial, at least as understood in the eighteenth century, where the jurors themselves are unfamiliar with events or the parties' character, and the accused had no hope of offering witnesses (character or other). In short, a meaningful trial by jury was something local in nature, something intimate, something that could not be replicated by the procedural mockery of the 1774 act. And in the event that readers might shrug off the danger as endemic to Bostonians, Jefferson referenced a 1772 admiralty act to the same effect which had been unsuccessfully protested by "the several colonies."¹⁰⁸ Indeed, the burning of the British naval vessel *Gaspee* by Rhode Islanders in 1773 triggered threats to try the criminals (who were never identified) in England.¹⁰⁹ With a dramatic flourish, Jefferson argued that the evisceration of trial by jury might itself justify a violent response, for "[t]he cowards who would suffer a countryman to be torn from the bowels of their society in order to be thus offered a sacrifice to parliamentary tyranny would merit the everlasting infamy now fixed on the authors of the act!"¹¹⁰

Although not formally adopted by the Virginia Convention, the *Summary View* was later printed in Philadelphia and discussed by the First Continental Congress.¹¹¹ Jefferson's primary purpose was to lay the "groundwork" for independence while stopping short of an explicit proclamation.¹¹² The First Continental Congress, however, took a measured response that fell well short of Jefferson's hopes. After barring the importation and exportation of trade goods with Britain, the First Continental Congress appealed to the "inhabitants" of Quebec for support against British oppression, taking care to spell out the benefits of trial by jury for the many French-speaking residents:

[The right of trial by jury] provides that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a

107. *Id.* at 128-29.

108. *Id.* at 129. The 1772 act is cited as 12. G. 3. c. 24.

109. PETERSON, *supra* note 11 at 69. Britain's anger at the burning of the *Gaspee* was well known, but the incident is not specifically referenced in the *Summary View*, perhaps because the Rhode Islanders had gone "over-the-top" and weakened rather than strengthened Jefferson's argument.

110. 1 PTJ, *supra* note 27, at 129.

111. *Id.* at 672-673. Boyd concludes that Patrick Henry took copies with him to Philadelphia "and doubtless other members of the Virginia delegation did so likewise." *Id.* at 673.

112. PETERSON, *supra* note 11, at 76-77 (the word "groundwork" is Peterson's).

fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him; a sentence that cannot injure him, without injuring their own reputation, and probably their interest also; as the question may turn on points, that, in some degree, concern the general welfare; and if it does not, their verdict may form a precedent, that, on a similar trial of their own, may militate against themselves.¹¹³

Thus, the first Congress, like Jefferson, drew from the well-spring of common-law rights and emphasized the jury's charge to determine the "general welfare."¹¹⁴

In no sense was the denial of the right to a trial by jury of the vicinage the linchpin of Jefferson's *Summary View*, the heart of which concerned the "political relation between us and England."¹¹⁵ It was one grievance among many. Yet he argued the jury right with some passion and conviction, and at a time when he was still, just barely, a practicing lawyer. And while he lacked the "folksy" skills of the best trial lawyers, Jefferson undeniably appreciated that such gifts were completely useless if trials were held before London-area juries at the King's bench. Trials before colonial juries effectively blunted Britain's ability to use colonial courts to squelch colonial resistance. And recourse to trials in London or the use of jury-less British admiralty courts provided compelling rhetoric for radicals intent on building the case for independence.

REVOLUTIONARY GOVERNMENT

In late 1776 the Virginia Assembly appointed Jefferson to a committee charged with reforming the commonwealth's law in light of Revolutionary principles. The reformers produced some of the most celebrated acts of American legal history along side of other significant legislation that has failed to garner the recognition it deserves. Among the underappreciated were the provisions that dramatically expanded the traditional role of juries. Yet in order to fully appreciate these innovations in juries, context is critical.

Radicals leaders, including Jefferson, keenly appreciated the importance vel non of building popular support for resistance and independence. The *Summary View* vividly captured the jury's importance to resistance leaders in 1774 and its continuing role in the imperial crisis. In Virginia the centrality of the county courts to social and political life guaranteed that they would play a key role in the process. As courts became more politicized, law served as a fuel that stoked the furnace of Revolution. And the venerable jury provided both an avenue for popular

113. Continental Congress to the Inhabitants of the Province of Quebec, quoted in *CONTEXTS OF THE CONSTITUTION* 694 (Neil H. Cogan ed., New York, Foundation Press 1999).

114. There is no evidence suggesting that the *Summary View* in any way motivated or even inspired Congress's language. The ideas were common currency that Jefferson and the Congress used to their advantage.

115. JEFFERSON, *AUTOBIOGRAPHY*, *supra* note 16, at 9.

participation and a vent for politicized legal issues.¹¹⁶ When Jefferson's law reform commission began work in late 1776, it necessarily drew from events and ideas integral to the imperial crisis.

Engaging the People: The Jury's Role

In galvanizing support for resistance, "trial by jury" played dual roles which contributed to the politicization of law and courts. First, as formal expressions of public will, jury verdicts could embody support for resistance and, eventually, for revolution. Second, as an abstraction, the right to trial by jury resonated deeply in popular thought while serving as a potent symbol of liberty. Jefferson well understood both roles.

No better example of a jury's value in defying imperial power could be found than the Parson's Cause of 1763. Indelicately ignoring law and fact, the Hanover County jury awarded the Reverend Maury a single penny, a paltry finding that seemingly mocked Britain's disallowance of the Two-Penny Act while affirming the justness of the act itself. Despite the verdict's manifest weakness on the law, the judges dared not overturn it in the face of popular enthusiasm. In sum, the "general welfare" (to use Congress's phrase) had been set forth in a solemn public act—the verdict.¹¹⁷

Mock jury trials were more effective means of protest, as they did not depend on the serendipity of actual litigation, the proceedings could be publicly staged in an entertaining way, and the outcome was a foregone conclusion. In September 1765, while Jefferson studied law, resistance to the Stamp Act swept across Virginia. Richard Henry Lee used his slaves as jailers, sheriff, and executioners for show trials of British Prime Minister George Grenville and George Mercer, the designated local stamp collector. To the public's delight, the effigies were hanged and burned.¹¹⁸ The real Mercer no doubt took note as later "mob" action, also fomented by Virginia's gentry, quickly forced Mercer's resignation.¹¹⁹ During the summer of 1774, as Jefferson penned the *Summary View*, other Virginians conducted a jury trial of Lord North for "high treason" based on his having traduced the rights of freeman by introducing unconstitutional taxes. A "court of liberty" arraigned the putative North, who pleaded not guilty. The "court" then swore in "a special jury of freeman" who patiently listened to defendant's explanation before convicting him. Standing at the gallows, the ersatz Lord North confessed his transgressions and begged

116. Blinka, *Revolutionary Virginia*, *supra* note 41, at ch. 3.

117. *See supra* note 113 and accompanying text. Radicals also used juries to prove the colonies' respect for law, fairness, and justice, as shown by John Adam's role in the acquittal of a British officer charged in the Boston Massacre. *See* HILLER ZOEEL, *THE BOSTON MASSACRE* (Norton 1970).

118. Blinka, *Revolutionary Virginia*, *supra* note 41, at 164.

119. MORGAN, *supra* note 84, at 161, 189. Lee himself had applied for the post of stamp collector but wisely withdrew when he better comprehended the act's incendiary effect on the colonies. *Id.* at 305.

other British ministers not to repeat his mistakes. Despite his contrition, North was hanged and his body burned.¹²⁰

The mock proceedings dramatically highlighted the increasing politicization of Virginia justice. In 1765 some county courts shuttered their doors rather than conduct proceedings on the hated stamped paper. Several courts reconvened but only after declaring the Stamp Act “unconstitutional” and announcing that they would proceed using unstamped paper.¹²¹ So too in 1774 the General Court closed its doors when its lawyers refused to appear following Governor Dunmore’s dissolution of the Assembly and condemnation of the day of fasting and prayer. Local courts continued to meet but pointedly refused to hear cases brought by British creditors.¹²²

Colonial protests drew upon a rich and varied rhetoric that privileged trial by jury as a core political right, as evidenced by Jefferson’s *Summary View* and the first Congress’s address to the inhabitants of Quebec. And its roots ran deep.¹²³ The Westmoreland Resolves of February 1766, supported by Richard Henry Lee and other leading men of the county, attacked the Stamp Act because it had traduced two “fundamental rights”: namely, the right to be taxed only by one’s elected representatives and the right to trial by jury.¹²⁴ Although radicals drew from diverse but complementary well-springs,¹²⁵ an appeal to the colonists’ “common-law rights” carried special resonance. A careful student of the Revolution’s intellectual origins, historian Forrest McDonald, concludes that among the pantheon of common law rights, “the genuinely crucial right was that of trial by jury.”¹²⁶ The common-law jury’s raw power to determine facts and law insulated the people from oppression by the king, judges, and even legislatures.¹²⁷

The imperial crisis heightened the perceived value of jury trials by threatening to undermine or deny the right altogether. In 1767 the British created vice-admiralty courts in Boston, Philadelphia, and Charleston in order to enforce the Townshend Duties. Operating without juries, the

120. George M. Curtis, *The Virginia Courts During the Revolution* 135-36 (1970) (unpublished PhD dissertation, University of Wisconsin—Madison).

121. Blinka, *Revolutionary Virginia*, *supra* note 41, at 164-65.

122. Curtis, *supra* note 120, at 110-15.

123. See UBBELOHDE, *VICE-ADMIRALTY COURTS*, *supra* note 7.

124. *THE COMMITTEES OF SAFETY OF WESTMORELAND AND FINCASTLE* 99-100 (Richard Harwell, ed., Virginia State Library 1956).

125. Modern historians have stressed the role played by republican ideology in the imperial crisis. The master works are BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (Harvard University Press 1992) (1967) and GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (Knopf 1992). A useful overview of ideology and Revolutionary America appears in STANLEY ELKINS AND ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 3-29 (Oxford University Press 1993).

126. FORREST McDONALD, *NOVUS ORDO SECLORUM* 40 (University Press of Kansas 1985).

127. *Id.*

admiralty courts eluded the legal blockade posed by hostile colonial courts.¹²⁸ Virginia's burgesses who opposed the duties worried about rumors that Parliament proposed to transport resistance leaders to England for trial under an old treason statute.¹²⁹ Jefferson's *Summary View*, as we have seen, revived similar fears of treason trials before hostile English courts in the crisis of 1774.¹³⁰

Yet despite their veneration of trial by jury, radicals occasionally acknowledged that the institution had its limitations and flaws. Jefferson himself echoed the popular belief that for Americans trials in England before English juries gutted the right:¹³¹ juries of the vicinage meant jurors familiar with one's character, local customs, and events. And even local juries did not always guarantee "justice." In 1766 John Chiswell, a notable member of Virginia's gentry, murdered an inn keeper who had insulted the drunken Chiswell. Despite the findings of a local examining court, the General Court in Williamsburg released Chiswell on bail despite practice and precedent to the contrary. Critics blasted the action as evidencing that "family and fortune" apparently "entitles a man to superiority."¹³² More devastating were the perceived parallels between the reviled Stamp Act and the local partiality shown Chiswell. Indeed, some found the latter more threatening because "this must affect our lives, while that [the Stamp Act] could only affect our estates."¹³³ Most ominously, rumors swirled that Chiswell's powerful cronies planned to stack the jury with a "menial or pliable tribe of bystanders."¹³⁴ Champions of the Parson's Cause verdict knew very well that a jury's composition might well foretell the outcome of a case, and that its composition could be manipulated by those in power.¹³⁵ To be sure the Chiswell case was aberrant and drowned out by the far louder and larger chorus that praised the jury trial, but those who knew it best understood its limits even if they did not always choose to articulate them.

"Face of Law": Committees, Juries, and "Enemies to America"

In addition to Revolutionary ideology and the jury's radical role (mock and actual) in the imperial crisis, the Virginia Experiment drew upon lessons taught by the shadow government of conventions and

128. MERRILL JENSEN, *THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION, 1763-1776* 273-280 (Oxford 1968).

129. WARREN M. BILLINGS, ET AL., *COLONIAL VIRGINIA: A HISTORY* 317 (KTO Press 1986).

130. See *supra* note 100 and accompanying text.

131. See *supra* note 106 and accompanying text.

132. *Virginia Gazette* (Purdie & Dixon), 6 Nov. 1766.

133. *Virginia Gazette* (Purdie & Dixon), 18 July 1766.

134. *Id.*

135. Chiswell died before trial, probably as a suicide. For a discussion of the Chiswell case, see Blinka, *Revolutionary Virginia*, *supra* note 41, at 165-67.

committees that effectively governed Virginia from late 1774 until statehood in 1776. The committees and conventions helped fill the lacunae of authority caused by the virtual collapse of colonial government in Virginia while also building popular support for resistance and eventually independence. In December 1775 the Virginia convention literally revolutionized the use of juries in order to combat the "enemies to America." Indeed, George Mason had stressed the growing need for local committees to wear "the Face of Law."¹³⁶ Deeply involved in the Revolutionary movement, Jefferson closely tracked these developments.

The First Congress formally called for the creation of local committees of safety to enforce its economic sanctions against Britain. The Continental Association declared that British imports would effectively cease as of December 1, 1774.¹³⁷ Exports to Britain would stop on September 10, 1775, a delay of a year that permitted colonists to sell their crops while clutching a slender hope for reconciliation. Congress enjoined "every county, city and town" to form committees of observation elected by those eligible to vote for local representatives. The committees' role was to expose publicly those "enemies of American Liberty" who violated the Association.¹³⁸

Committees quickly formed across Virginia. By December 1775, most of its counties and three towns had formed committees in the areas essential to the Association's effectiveness.¹³⁹ Although varying in size, composition, and method of selecting members, the committees shared two salient features: they embodied popular participation and yet consisted primarily of locally influential men of standing who were active in the resistance.¹⁴⁰ The beleaguered and splenetic Virginia governor, Lord Dunmore, offered a clearly jaundiced yet accurate portrayal of the committees' activities:

There is not a Justice of the Peace in Virginia that acts, except as a Committee-man. The abolishing of the Courts of Justice was the first step taken, in which the men of fortune and pre-eminence joined equally with the lowest and meanest.¹⁴¹

136. Quoted in JOHN E. SELBY, *THE REVOLUTION IN VIRGINIA* 78 (Colonial Williamsburg Foundation 1988).

137. 1 *Journals of the Continental Congress* 75-80 (Washington, G.P.O. 1904) (the "Association"). The Continental Association drew upon the very similar Virginia Association that was announced in August 1774. 1 *PTJ*, *supra* note 27, at 137-41.

138. *Journals of the Continental Congress*, *supra* note 137, at 79. Quotes from the Continental Association were taken from Larry Bowman, *The Virginia County Committees of Safety, 1774-1776*, 79 *VIRG. MAG. OF HIST. AND BIOG.* 322 (1971).

139. See Bowman, *supra* note 138, at 322-23. See also DAVID AMMERMAN, *IN THE COMMON CAUSE* 106 (University Press of Virginia 1974) (finding that 51 of 61 Virginia counties—83 percent—and 3 towns formed committees).

140. Westmoreland County's committee consisted of 35 members, including 16 who had signed the county's association against the Stamp Act in 1766. Many were influential within the county. On the western frontier, Fincastle County's committee consisted of only 15 men, but many were its leading citizens. *THE COMMITTEES OF SAFETY OF WESTMORELAND AND FINCASTLE*, *supra* note 124, at 16-17.

141. Quoted in *id.* at 19. Ammerman concurs that the committees "affected almost every conceivable aspect of colonial life." AMMERMAN, *supra* note 139, at 111.

In general, the committees performed four primary functions which suffused judicial and administrative roles with radical politics. First, they detected violators of the Association's export and import provisions and exposed them to censure.¹⁴² Second, they regulated the prices merchants could charge for goods in order to prevent price gauging and the inevitable popular backlash that might sap the resistance movement.¹⁴³ Third, and most ominously, the committees worked to raise men, money, and materiel for war.¹⁴⁴ Fourth, they helped build and maintain support for resistance by publicly exposing and castigating non-conformists who criticized the committees and the cause of liberty.¹⁴⁵ Non-conformists included those who flouted regulations on consumption intended to promote healthy republican habits of "frugality and simpl[e] living."¹⁴⁶

Jefferson's interest in the committees' work transcended his role as a resistance leader. In December 1774 he wrote members of the Virginia committee of correspondence for guidance about the disposition of a window sash he had ordered from Britain before the Association had been enacted but which might arrive in violation of its non-importation provisions. Jefferson promised he would heed the dictates of the committee and the association.¹⁴⁷

Committees took on the appearance of courts when they summoned suspected offenders, conducted hearings, examined witnesses, issued findings, and admonished those found guilty. Their primary goals, however, were not to adjudicate disputes, punish offenders, or seek retribution, rather, the committees sought legitimacy and popular support for resistance. Recalcitrant offenders were publicly exposed and stigmatized. Those who repented and sought the committees' forgiveness represented a public victory for the cause of resistance.¹⁴⁸ Despite, their judicial trappings, the committees heard cases without a specially denominated "jury." At first blush this seems incongruous or even hypocritical, but the committees did not hold themselves out as "courts of law" and their composition provided an avenue of popular participation. Colonial county courts usually consisted of a panel of three to five judges appointed by the governor. The committees were substantially larger, usually number about 21 members who were elected by the county's "patriotic" freeholders. In short, compared to colonial courts the committees were strikingly more

142. Bowman, *supra* note 138, at 325-28.

143. *Id.* at 330-31.

144. *Id.* at 334.

145. *Id.* at 328.

146. AMMERMAN, *supra* note 139, at 116.

147. 1 PTJ, *supra* note 27, at 154.

148. See THE COMMITTEES OF SAFETY OF WESTMORELAND AND FINCASTLE, *supra* note 124, at 32-34, recounting the contrition of David Wardrobe, who either saw the light of the Revolutionary cause or succumbed to threatened action against his position as a school teacher. Not all were so easily intimidated. See e.g., *id.* at 52-53. Henry Glass "damned" the committee "and declared he did not regard them and would sell his goods as he pleased and in their teeth."

democratic in composition and method of selection.¹⁴⁹

While committees built support at the county level across Virginia, the conventions worked to solidify the resistance movement and preserve order on a centralized, colony-wide basis. The first convention which convened in August 1774 had met briefly to elect Virginia's delegates to the First Continental Congress and formulate an "association" for economic retaliation against Britain. The conventions of 1775 and 1776 struggled to meet the exigencies of escalating resistance and violence while maintaining internal order amidst the collapse of colonial government.

The March 1775 convention met primarily to address the need for military defense. Jefferson sat on a committee that reinvigorated the militia law of 1738 and called for troops, ammunition, and other martial supplies.¹⁵⁰ The convention also implored county courts to curtail their dockets, especially in debt cases, in order to minimize economic hardship.¹⁵¹

Despite this gesture toward a more centralized policy, the Revolutionary movement remained mostly local and somewhat fragmented. The so-called "Gunpowder Plot" of April 1775 occurred when Governor Dunmore seized the gunpowder stored in the Williamsburg magazine during a surprise raid. City officials, backed by a local "independent company" of troops, later confronted Dunmore, who lied that he had removed the powder to safeguard it from "Negroes." As word spread across Virginia, other independent companies gathered and marched on Williamsburg. Peyton Randolph, the speaker of the House of Burgesses and delegate to the Second Continental Congress, hurriedly convened a misnamed "Council of War" at Fredericksburg on May 1 to defuse sentiment toward armed violence. The ad hoc council condemned Dunmore's actions and ordered the companies to return to their homes. All obeyed, except Patrick Henry's Hanover company, which had deliberately avoided the Fredericksburg council and sought justice on its own terms. An influential planter, Carter Braxton, finally persuaded Henry to hold off while a peaceful resolution was sought. Dunmore ultimately agreed to pay 230 pounds for the stolen powder, a settlement largely extorted by Henry's threat of force. Most important, the Gunpowder Plot revealed the need for more centralized supervision of the resistance effort, especially the local committees and independent companies.

Events soon induced the necessary political will to action. Although the Gunpowder Plot paled in comparison to the bloody fighting near Boston, where hundreds perished at Lexington, Concord, and Bunker Hill, Virginia too teetered on the brink. Wild rumors circulated that Dunmore had dug an underground fuse to the Williamsburg magazine so that he could destroy the city if necessary. Dunmore further exacerbated local fears by forbidding extra-legal conventions and later fleeing with his fam-

149. Blinka, *Revolutionary Virginia*, *supra* note 41, at 187-88.

150. 1 PTJ, *supra* note 27, at 160.

151. William E. White, *The Independent Companies of Virginia, 1774-1775*, 86 VIRG. MAG. OF HIST. AND BIOG. 49 (1978).

ily to a nearby British warship. Resistance leaders seized upon Dunmore's flight as an abdication of power and an opportunity to fill the resulting vacuum.¹⁵²

When the July convention opened, concrete steps were taken toward enhancing centralized control and reducing the risk of local fragmentation.¹⁵³ Jefferson's duties in Congress precluded him from attending the Virginia convention, but he corresponded with its leaders and undoubtedly followed its actions closely.¹⁵⁴

First, the convention abolished the "independent" companies and consolidated Virginia's military resources into three regiments based on military districts that grouped counties along geographic lines. Each district was charged with raising and supporting a company of men. Democracy was curbed along with localism. No longer would companies elect officers; rather, a select group from each district, drawn from among the constituent counties' committees of safety, would appoint them.¹⁵⁵ Second, the July convention regularized the form and structure of the county committees because of the "many inconveniencies" caused by overly-large bodies and members who sometime served without limit, "which is incompatible with the principle of representation."¹⁵⁶ Henceforth, county committees were to consist of "twenty-one of the most discreet, fit, and able men" of the county elected annually by those eligible to elect burgesses. Elections were to occur in November 1775.¹⁵⁷ Third, county committees were enjoined to obey the directives of the Continental Congress and the Virginia convention:

And to the end this ordinance may be duly carried into execution, and the duties required of certain persons therein named faithfully discharged, It is hereby further declared and ordained, That if any sheriff, mayor, chairman, or clerk of a

152. *Id.* at 157-58. See also BILLINGS, *supra* note 129, at 342-43.

153. See *The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, 9: 9-74 (William W. Hening, ed., University Press of Virginia 1969, facsimile reprint) (ordinances of the July convention). Not to be overlooked, the convention "legalized" its own existence. The two earlier conventions—August 1774 and March 1775—had been "expedient" in light of Virginia's "critical and dangerous state." *Id.* at 56. Now it was "indispensably necessary for the oppressed people of this country"—at least its freeholders—to elect annually two delegates from each county to represent them at a convention that following May. *Id.* at 54-55.

154. Letter by Jefferson to the President of the Virginia Convention (11 July 1775), in 1 PTJ, *supra* note 27, at 223. The letter apprised the July Convention of Congress's actions and implored it to prepare for "the worst events." He also urged the Convention to send a "few gentlemen of genius and spirit to the military school before Boston to learn that necessary art." No formal military school was established, but the instruction of cadets under George Washington's tutelage had been discussed by Congress. See *id.* at 224.

155. *The Statutes at Large*, *supra* note 153, 9: 35. See also White, *supra* note 151, at 160-61. White found that military discipline among the independent companies was unacceptably low. Companies voted not only for their officers, but also voted whether to obey orders. Desertion and insubordination became rampant.

156. *The Statutes at Large*, *supra* note 153, at 9: 57-59.

157. *Id.* at 9: 58. Each committee was to select its own chairman and clerk, and could authorize a committee of correspondence or other subcommittees as deemed necessary.

committee, or any other person named herein who is required to do any particular act, or perform any certain duty, shall perversely, obstinately, or willfully refuse or neglect to comply with the directions of this ordinance, such person so offending, and being adjudged guilty thereof by the committee of the county or corporation where such delinquency may happen, shall be deemed an enemy to American liberty and the welfare of this country, and be subject to the censures of the continental association, in such cases provided.¹⁵⁸

The nascent “supremacy clause” was obviously intended to avoid the embarrassment and danger of reprisal posed by Henry’s maverick actions that April. Congress and the convention would demarcate the “line of duty.”

Finally, the convention created a colony-wide “Committee of Safety.” Composed of eleven members and led by Edmund Pendleton, the Committee of Safety included some of Virginia’s most powerful resistance leaders.¹⁵⁹ Like the dictators of republican Rome who governed in times of emergency, its members served a term of just one year unless the convention decreed otherwise. The Committee of Safety, a civilian authority, commanded Virginia’s military, whose officers were “required to pay strict obedience” to its orders. The colony-wide committee also corresponded with the county committees in order to obtain “authentic intelligence” and to ensure its orders were carried out.¹⁶⁰

As Virginians consolidated the resistance movement, tension with Britain increased precipitously, culminating in bloody fighting in the southern Chesapeake. After fleeing the capital, Dunmore led British troops on a series of raids and later established a base of operations in Norfolk. In November 1775 he stunned Virginians by offering freedom for slaves who deserted their masters and joined his “Ethiopian Regiment.”¹⁶¹ On December 9, 1775 Dunmore’s troops, including the Ethiopian Regiment, fought Virginia’s 2d Regiment at Great Bridge, near Norfolk. After a brief but bloody fight, the Virginians forced the British to withdraw and eventually abandon Norfolk as well.¹⁶² Inexplicably, they later plundered and burned the town.¹⁶³

Thus when the December Convention convened, it presided over a people torn by war, by economic distress, and by severely divided loyalties. Dunmore retained fierce loyalist support in the southern Chesapeake. The resistance movement, while gaining increasing strength, did not yet command enough support for independence.¹⁶⁴ The burning of Norfolk,

158. *Id.* at 9: 60. The same ordinance also provided that the committees shall “confine themselves within the line of duty prescribed by the continental congress and the general convention, and shall not assume to themselves in any other power or authority whatever.” *Id.* at 59.

159. *Id.* at 9: 49.

160. *Id.* at 9: 49-53. The Committee of Safety directed troop movements, deployments, and encampments. It also had full authority to contract for services and supplies.

161. SELBY, *supra* note 136, at 60-68.

162. *Id.* at 69-74.

163. BILLINGS, *supra* note 129, at 344.

164. SELBY, *supra* note 136, at 79.

even more than Henry's free-lancing in the spring, hammered home the need to maintain order, assume the appearance of lawful government, and permit some measure of popular participation.

The December Convention's lasting contribution to the Revolutionary cause was its fascinating "ordinance for establishing a mode of punishment for the enemies to America in this colony" (hereinafter, the "Enemies to America Act").¹⁶⁵ Seven months before the Declaration of Independence, Virginia's patriots portrayed themselves as "Americans" and branded their opponents "enemies." "Dangerous attempts" had been made to subvert Virginians' rights and liberties, the act's preamble observed, and despite a "human disposition" to accommodate the opposition, more stringent measures were necessary. The Enemies to America Act granted a sixty-day safe harbor during which "white persons" who had armed themselves against the colony could surrender and, apparently, redeem their good standing. After the sixty days had lapsed, harsh penalties awaited those who "assisted" the "enemy" by enlisting as a soldier, by giving intelligence, by furnishing arms, provisions, or naval stores, or by bearing arms against the colony.¹⁶⁶ Offenders could be imprisoned for an unspecified term and their estates, real and personal, subjected to confiscation and liquidation in payment of his "just debts." In all cases, the Committee of Safety had the discretion to grant pardons when satisfied that the offender was appropriately repentant, but the convention retained the ultimate say over whether the offender's estates were to be restored.

To give added teeth to the Continental Association, the Enemies to America Act strengthened enforcement by authorizing the confiscation of illegally imported or exported goods, wares, and merchandise. Even a written order for illegal imports violated the Association. Besides confiscation, illegal importers could be barred from any further trade in Virginia.

The act's sweeping terms granted broad discretion to officials responsible for its enforcement. Defining Virginia's "enemies" and determining their proper punishment had been left deliberately vague. The act also established a judicial structure that tacitly drained authority from the county courts and, in some ways, from the local committees of safety in favor of the centralized Committee of Safety.

First, the act established an admiralty court with jurisdiction over all offenses involving vessels and their cargo. Obviously, the linchpin of the Association's embargo concerned shipments of exports and imports. By stripping local committees of jurisdiction over "vessels and their cargoes" and placing it in a single court, the Convention hoped to attain more consistent, effective enforcement of the Association as well as dispose of "prize" cases. The Convention appointed Edmund Randolph, John Blair,

165. *The Statutes at Large*, *supra* note 153, at 9:101-107. The act's title, which juxtaposes "enemies to America" with the reference to "colony," nicely reveals the Convention's divided mind.

166. *Id.* at 9:102.

and James Holt to serve as the three admiralty judges, based on their firm commitment to the resistance effort and, presumably, their willingness to work in harmony with the Committee of Safety.¹⁶⁷

For violations not involving “vessels and cargoes,” the act authorized special commissions composed of 5 men drawn from each county committee. The commissions were to sit as a “court” at the local courthouse where they had “full power and authority” to implement the act with the sheriff’s assistance.¹⁶⁸ The commissions literally split the difference between the old courts and the local committees. The largely defunct colonial courts had ceased to function except for criminal cases and although many justices of the peace were devoted to the resistance movement, not all could be trusted.¹⁶⁹ Yet the local committee themselves, despite the July reforms, were still unwieldy and not always obedient.¹⁷⁰ By giving Virginia’s Committee of Safety the ability to select 5 commissioners from among the 21 local committee members, the act provided latitude to select those who were diligent, reliable, and less likely to stray from centralized direction. Defendants also had the right to appeal judgments to the Committee of Safety.

Finally, the Enemies to America Act truly revolutionized the English common law. It provided that “in all trials pursuant to this ordinance, the commissioners aforesaid shall cause a jury to be summoned, and proceed in the same manner as hath been heretofore observed for the trial of civil causes in this colony.”¹⁷¹ Put another way, both the admiralty court and the special commission courts now had to incorporate juries of freeholders into their decision-making. Guaranteeing the right to trial by jury in admiralty cases—an innovation undoubtedly motivated, if not necessitated, by the patriots’ harsh and incessant criticism of British vice-admiralty courts that sat without juries—broke sharply with age-old precedent.¹⁷² More intriguingly, the act characterized the trials as “civil,” not “criminal” causes. The Convention’s intent is manifestly unclear. The phrase could reflect the jury’s authority to determine the offender’s “just debt,” his ownership of property, and the fairness of confiscation and liquida-

167. Blair and Randolph were lawyers and Holt was a Williamsburg merchant. In earlier fighting, patriot forces had captured nearly a dozen ships. The convention adjudicated the disposition of those “prizes” but established the admiralty court in anticipation of more such cases. SELBY, *supra* note 136, at 76.

168. *The Statutes at Large*, *supra* note 153, at 9: 105.

169. See SELBY, *supra* note 136, at 76, who observes that many of the county committees were the “old county courts under a different name.”

170. See *Id.* at 78. As late as December, a number of local committees had not conducted elections as required by the July Convention.

171. *The Statutes at Large*, *supra* note 153, at 9: 106.

172. *Id.* Perhaps the change was so jolting that some later questioned whether the December Convention actually authorized jury trials in admiralty courts. The following spring the May Convention confirmed what seemed obvious from the act’s original language: contrary to ancient precedent, the right to trial by jury extended to admiralty courts. *Id.* at 130-31.

tion, all issues familiar to civil litigation. Or it might signal a somewhat greater tolerance for commissioners, or the Committee of Safety itself, stepping in and policing the juries' verdicts, especially when they favored the defendant. An acquittal in a criminal case largely precluded any tampering by the judge. A defense verdict in a civil case, however, could more easily be set aside and trial ordered before a new, perhaps more amenable panel.¹⁷³

In sum, the Enemies to America Act blended courts, conventions, and committees, local and central. The act promised to transform the local committees of safety into something more closely resembling regular courts of law, at least when they performed adjudicative tasks under the Association. Guaranteeing the right to trial by jury not only accommodated revolutionary rhetoric, it also purchased legitimacy by inviting popular participation in official decision-making through a classic common-law institution. As George Mason had urged, the "face of law" had to be placed quickly on the shadowy authority of committees and convention. Jefferson, who understood law through history, undoubtedly absorbed, sympathized, and ultimately drew from these lessons.

REVOLUTIONARY LAW REFORM AND THE "SPIRIT OF '76": JURIES AND THE PEOPLE

With the advent of independence, Virginia found itself within a "constitutional moment" as it consciously resculpted the structure of its government and laws.¹⁷⁴ In its Declaration of Rights, which privileged the jury in two different sections, and through the work of its law reform commission, led by Jefferson, Virginia evinced optimism and even enthusiasm about the jury as a vehicle for popular participation. Yet one also finds palpable wariness about the suitability of juries and, more fundamentally, the capacity of the people, for their new roles. In short, the Virginia experiment's designers were not idealists swept away by rhetoric or blinded by abstractions, rather, they approached their work with a keen awareness of the people's limits. In particular, Jefferson deeply appreciated that trial by jury opened the door to emotional, sometimes capricious decision-making.

"The Whole Object": Independence and Republican Government

In May 1776 the Second Continental Congress anticipated that the united North American colonies stood at the very brink of declaring independence. The battles in Massachusetts and Virginia portended the fierce fight at Moore's Creek Bridge, North Carolina, in the spring of 1776. Meanwhile, New Hampshire had already replaced its colonial charter with

173. See 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS 150* (University of North Carolina Press 1992).

174. BRUCE ACKERMAN, *WE THE PEOPLE* 6-7 (Harvard University Press 1991).

an interim written constitution in January and South Carolina followed suit in March. On May 10, 1776 Congress recommended that all colonies "adopt such government as shall in the opinion of the people, best conduce to the happiness and safety of their constituents in particular and America in general."¹⁷⁵

Virginia's May Convention was prepared. It quickly resolved that Congress should formally and unequivocally declare independence. The Convention also appointed a drafting committee to prepare a state bill of rights and constitution.¹⁷⁶ Led by the talented George Mason, the Convention approved the Declaration of Rights on June 12, 1776 and a constitution just three weeks later on June 29.¹⁷⁷

Virginia's constitution blended familiar colonial forms with Revolutionary innovations, yet overall it was a strikingly conservative document. The state's three "departments" strongly resembled their colonial antecedents. For example, the eight-man Privy Council, which counseled the governor, drew on the now-defunct colonial governor's council (which had also inspired the state-wide Committee of Safety). The imperial crisis had, however, surely influenced governmental forms. The strongest department was clearly the legislature, which annually elected a governor who could not serve more than three consecutive terms.¹⁷⁸ For Virginians, however, their primary contact with government came at the local level in the courthouse. And the 1776 constitution envisioned no radical overhaul of county government; rather, it looked to a reworking of the county courts by the new General Assembly, which itself had the power to appoint local justices of the peace. Put differently, the local committees of safety, elected by the county's freeholders and now playing the role of local courts, were not embraced by the constitution. Only the jury, as we shall see, offered the people a voice in local affairs.¹⁷⁹

Befitting the rhetoric devoted to trial by jury during the imperial crisis, it was hardly surprising that two provisions of the Declaration of Rights addressed the jury. One section governed criminal trials:

That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage; without whose unanimous consent, he can not be found guilty; nor can he be compelled to give evidence against himself. And that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.¹⁸⁰

175. 4 Journal of the Continental Congress, *supra* note 137, at 342.

176. SELBY, *supra* note 136, at 94-101.

177. See SELBY, *id.* at ch 6.

178. Blinka, Revolutionary Virginia, *supra* note ___, at 212-214. It is not my purpose to review exhaustively the prime features of the 1776 constitution and how it departed from, or reflected, the colonial antecedents.

179. *Id.* at 217-218.

180. 1 ROBERT RUTLAND, THE PAPERS OF GEORGE MASON 288 (University of North Carolina Press 1970).

Another, shorter section addressed civil cases:

That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.¹⁸¹

Mason offered the original drafts of both provisions, which were later modified by the drafting committee. The committee adopted the bulk of the criminal provision but added the adjective “impartial” before “jury of the vicinage,” a vivid reminder that not just any twelve jurors will do. More significant, it substituted the last sentence in place of one that would have permitted arbitrary arrests, unsupported by evidence, in times of “actual invasions or insurrection.” Mason’s proposal for jury trials in civil cases was adopted nearly verbatim, but the committee’s deletion of a single word foreshadowed future developments: Mason proposed to provide trial by jury in “all controversies” involving property and suits “between man and man.” A bit more wary of such far reaching changes, the committee struck the word “all.”¹⁸²

Together, the two jury provisions had a four-fold significance. First, trial by jury was not a single undifferentiated right, rather, it served multiple functions which would have to be worked out in the future. Second, these differences begot other distinctions. Not only must the criminal jury be “impartial,” it must be drawn from the “vicinage” (the locale where the crime occurred) and unanimous in its verdict. The civil provision omits any reference to vicinage, unanimity, or, for that matter, impartiality. Third, the different wording strongly suggested an increasing but still inchoate awareness that civil and criminal trials were somehow fundamentally different, and perhaps the roles played by juries should be different.¹⁸³ In the criminal provision the jury right is nestled among other procedural rights designed to safeguard individual freedom, such as the accused’s right to notice of the charges.¹⁸⁴ In civil suits between individuals, including those over property rights, there is no readily identifiable oppressor. The jury’s role is to settle “controversies” over property. Finally, one is struck by the obviously lukewarm, largely hortatory endorsement of juries in civil disputes. Juries were “preferable to any other” mode of trial and “ought to be held sacred”—hardly a ringing affirmation, particularly in light of the committee’s redaction of language

181. *Id.*

182. *Id.* at 277-78.

183. Obviously, colonial law followed British practice and formally distinguished between civil and criminal trials. See 3 William Blackstone, *Commentaries on the Laws of England* chs. 22 and 23 (1768; reprint, University of Chicago Press 1979). Yet the homogenized nature of colonial justice blended not only the executive, judicial, and legislative roles into an unrecognizable hash, it also blurred the lines between civil and criminal cases. The constitutional moment of 1776 was not, however, an effort to recapture a lost-Blackstonian purity, but a fresh attempt to draw important distinctions between civil and criminal trials in the republic.

184. Historians are divided over the merits of Mason’s draft. Leonard Levy is highly critical, branding it “careless” and displaying “bad draftsmanship.” LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 407-08 (Oxford University Press 1968). Levy is persuasively rebutted by Rutland. 1 *Papers of George Mason*, *supra* note 180, at 281.

suggesting that parties had a right to jury trial in “all” civil “controversies.” In sum, civil and criminal jury trials were assuming different roles. The former seemed less essential than the latter, and perhaps different in nature as well.

Jefferson was disappointed by Virginia’s constitution.¹⁸⁵ Obligated by his Congressional duties to remain in Philadelphia, he pined to participate because a new government was the “whole object” of the Revolution.¹⁸⁶ From Philadelphia, Jefferson submitted multiple drafts of more radical proposals—which were politely received by the convention but largely overlooked. Later that year, however, as a member of the newly-elected General Assembly and the prime-mover on a committee appointed to revise Virginia’s laws, Jefferson would have a concrete opportunity to implement his evolving ideas, particularly as they relate to juries.

Laws to Govern “Our Present Circumstances”: Law Reform and Juries

Law reform in Virginia embodied a multi-faceted effort to adjust common-law institutions, such as the jury, in light of Revolutionary thought, events, and necessity. Many of these ideas permeated the polity, but it fell to Jefferson and his committee to articulate and specify how the new state government and its laws would operate. Not surprisingly, their innovations and radical proposals also harbored many of the ambiguities, compromises, and misgivings shared by others.

After approving Virginia’s Declaration of Rights and constitution, the May Convention instructed local committees to muster additional men and officers for what would likely be a protracted, difficult struggle to achieve militarily what had been declared politically.¹⁸⁷ The Convention also responded to the pressing and immediate need to maintain order and assure justice while the details of the new legal order were worked out. The ordinance’s preamble nicely portrayed a radical mindset tempered by pragmatic concerns:

WHEREAS it hath been found indispensably necessary to establish government in this colony, independent of the crown of Great Britain, or any authority derived therefrom, and a plan of such government hath been accordingly formed by the general convention but it will require some considerable time to compile a body of laws suited to the circumstances of the country, and it is necessary to provide some method of preserving peace and security to the community in the meantime. . . .¹⁸⁸

Until directed otherwise, courts were to apply a melange of colonial statutes, revolutionary ordinances, “the common law of England,” and English statutes in effect prior to 1607.¹⁸⁹

185. 1 PTJ, *supra* note 27, at 330.

186. *Id.*

187. *The Statutes at Large*, *supra* note 153, at 9: 135.

188. *Id.* at 9:126.

189. *Id.* at 9:127.

When the first General Assembly convened in October 1776, it lost little time in providing some new direction. After revising the tobacco inspection act and shoring up enforcement of the Association,¹⁹⁰ the Assembly moved to broaden and deepen support for the Revolution by “repealing” Parliamentary acts that had punished religious dissenters while also freeing them from obligations to pay church levies.¹⁹¹

Two statutes foretold the radical potential for Virginia law reform. The first statute, influenced by Jefferson, defined the crime of treason against the independent state of Virginia.¹⁹² The treason act self-consciously attested to the former colony’s newly proclaimed sovereignty and drew upon more than ten years of criticism aimed at Britain’s incessant threats to try American radicals as traitors in London. The Assembly narrowly and carefully defined treason as either waging war against “the commonwealth” or aiding its enemies. The proof requirements were stringent: treason had to be manifested by overt acts; merely “compassing” (imagining) treasonous thoughts was insufficient. Moreover, the prosecution had to show either a voluntary confession or testimony by two “lawful witnesses” to the traitor’s “open deed.”¹⁹³

A far more pressing problem than treason,¹⁹⁴ which after all applied only to apostates, were the many thousands, especially in southern Virginia, who remained loyal to Britain and actively opposed the new government. The Assembly made it unlawful for any person to defend openly British authority or to incite others to “resist the government of this commonwealth as by law established.” The act also punished those who maliciously “discouraged” men from enlisting in service to the commonwealth or who even “dispose[d] them to favor the enemy.” The penalties were harsh: a fine not to exceed £20,000 or imprisonment for not more than five years, as determined by a jury.

The act is striking for two reasons. First, it criminalized loyalist behavior. Loyalists (or laggards) no longer faced the muted wrath of a local committee whose primary weapon was public shaming.¹⁹⁵ Second, and more important, the act reposed in the jury the power to punish. Put differently, the jury would determine not only guilt, but also the amount of any fine and the duration of imprisonment, subject to the specified lim-

190. *Id.* at 9:153.

191. *Id.* at 9:164.

192. PETERSON, *supra* note 11, at 132-33.

193. *The Statutes at Large*, *supra* note 153, at 9:168. Convicted traitors faced death without benefit of clergy. Their lands and chattels were forfeit to the state, except for the widow’s dower. Yet no “such attainder” resulted in a “corruption of blood” whereby the family suffered for the traitor’s own acts. For the common-law of treason, see LACY B. SMITH, *TREASON IN TUDOR ENGLAND: POLITICS AND PARANOIA* 136 (Princeton University Press 1986).

194. See PETERSON, *supra* note 11, at 132 (noting that Virginia executed no one for treason during the Revolution and generally manifested “forebearance and moderation”).

195. See *supra* note 148 and accompanying text (discussing the Wardrobe and Glass cases).

its. The commonwealth's juries would inevitably be comprised of patriots who supported independence.¹⁹⁶ The act thus allowed common men to participate in politically charged cases through a mechanism with impeccable legal and political legitimacy. Jury sentencing fully comported with the floodtide of republican rhetoric, the experience of local committees and the revolutionary precedent that required the use of juries in admiralty litigation. Allowing "the people" to decide guilt and assess punishment insulated Virginia courts from criticism that judges or laws were arbitrary and vindictive. In this way a court's judgment might better reflect the community's sense of what the accused had done and how it ought to be dealt with, thereby promoting acceptance of judicial decisions and acquiescence in Revolutionary law.

On November 5, 1776, in just its ninth formal act, the Assembly appointed a five-person committee to revise Virginia's laws. The act monumentally understated the enormous challenges that loomed: Adopt Virginia's laws to "our present circumstances."¹⁹⁷ Yet the Assembly well understood that those "present circumstances" included not just Virginia's newly declared independence and republican constitution, but war, bitter social conflict, and economic devastation. For these reasons, as well as the time it would take to review just the laws, the Assembly set the due date at June 18, 1779. It appointed a distinguished group of men whose fidelity to the revolt was unquestioned: Thomas Jefferson, Thomas Ludwell Lee, George Mason, Edmund Pendleton, and George Wythe. Mason and Lee played little or no role, leaving the lion's share of the work to Jefferson, Pendleton, and Wythe.¹⁹⁸ All three had been active in Virginia's movement from resistance to revolution. Their experience and erudition in law, especially as practiced in Virginia, gave them a firm sense of what needed to be changed, or left alone, under the "present circumstances."

The committee approached the revision with the two overarching objectives that, while not exactly inconsistent, created a tension necessitating trade-offs and compromises: somehow liberty and popular government must be reconciled with reason and objectivity. Both goals stemmed from the eighteenth-century Enlightenment. A republican government of the people had no need for feudal vestiges such as primogeniture or entail. Court reforms, particularly the expanded use of juries, permitted people to become more involved in official decision-making. In short, the committee jettisoned archaic feudal remnants that sharply limited opportunities for social and economic improvement, and serviced only an increasingly

196. See *The Statutes at Large*, *supra* note 153, at 9: 416-17 (trial and grand jurors were to be "good and lawful men"; those who resisted the Revolution were, of course, "enemies to America" and hence ineligible).

197. *Id.* at 9:175.

198. Mason begged off because he was not a lawyer and felt "unqualified" for the task. Lee excused himself for the same reason and died a short time thereafter. 2 PTJ, *supra* note 38, at 315.

outmoded view of a static hierarchical society. Moreover, the people were-entitled to a voice in their government and laws.

The committee's work also encompassed a second cluster of vital concerns, namely, the Enlightenment's emphasis on reason, objectivity, and the rule of law.¹⁹⁹ Jefferson noted that the law revision was undertaken "with a single eye to reason, and the good of those for whose government it was framed."²⁰⁰ One discerns in this sentence a whiff of arrogance and elitism, a sense that the public's voice was welcome except where the committee identified rules so sound and so compelling (thanks to the "single eye of reason") that all should follow them for their own "good."

The committee first met in Fredericksburg on January 13, 1777, to plan its work. A simple restatement of existing law was never considered because it conflicted with the committee's charge. At the other pole, the revisors also rejected the radical extreme of abolishing all existing laws and preparing a modern version of Justinian's Institutes tailored to "present circumstances." An "Institutes" would have compelled the committee to reduce all law to a single text, an arduous, largely hopeless task that also risked ignoring the public's shifting needs. The committee's plan, according to Jefferson, consisted of five principles that dramatically (and no doubt deliberately) understated the extent to which their proposals modified existing law:

[1] The Common Law not to be meddled with, except where Alterations are necessary.

[2] The Statutes to be revised and digested, alterations proper for us to be made; the Diction, where obsolete or redundant to be reformed; but otherwise to undergo as few Changes as possible.

[3] The Acts[of the English Common-wealth to be examined.

[4] The Statutes to be divided into Periods: the Acts of Assembly, made on the same Subject to be incorporated into them.

[5] The Laws of the other Colonies to be examined, and any good ones to be adopted.²⁰¹

Years later while in Paris, Jefferson wrote that it would have been "dangerous" to attempt a written explication of all laws, including the common law. In his *Notes on the State of Virginia*, Jefferson candidly explained the method adopted by the committee:

The plan of the revival was this. The common law of England, by which is meant, that part of the English law which was anterior to the date of the oldest statutes extant, is made the basis of the work. It was thought dangerous to attempt to reduce it to a text: it was therefore left to be collected from the usual monuments of it. Necessary alterations in that, and so much of the whole body of the British statutes, and of acts of assembly, as were thought proper to be retained, were digested into 126 new acts, in which simplicity of stile was aimed at, as far as was safe.²⁰²

199. See CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 102-03 (Yale 1932).

200. 2 PTJ, *supra* note 38, at 307 (quoting Jefferson).

201. *Id.* at 325 (spelling and capitalization as original).

202. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 137 (William Peden ed., Norton 1972) (1787).

Thus, the common law with its helpful but maddening vagaries formed the superstructure upon which the committee worked.

Despite abundant optimism and the committee's diligence, talent, and hard work, the revision never quite "came into focus." The committee's work culminated in a report of June 18, 1779, which historians have accurately described as "drawn out" and an "anticlimax."²⁰³ The sense of disappointment stems from several developments. First, there is the sheer bulk of proposals. The committee prepared 126 bills covering nearly all facets of Virginia law. Second, their breadth and diversity made them difficult to comprehend as a coherent whole. Third, some of the more intricate and most ambitious bills, such as proposals for public education and reform of capital punishment, never became law. The few genuinely innovative bills that passed, such as the abolition of entails and primogeniture and the statute guaranteeing religious freedom, represented an "occasional landmark" against an otherwise obscure background of "ordinary legislation."²⁰⁴

It has also proven enormously difficult to identify "the revision." More precisely, one must distinguish pre-existing law, the committee's proposals, and the legislation enacted by the General Assembly. Responding to urgent political demands, the committee quickly drafted certain legislation and submitted it for the General Assembly's adoption long before the report's due date in June 1779.²⁰⁵ In looking at the legislation between 1776 and 1779, it is not always clear whether the ideas emanated from the committee or from the General Assembly. The final report of June 18, 1779 incorporated some of this earlier, extant legislation, but many of its provisions were not reviewed until the mid-1780s.²⁰⁶ Thus, the revision's enormous size, its amorphous nature, its overall failure to become law, and its piecemeal consideration over a ten-year period all combined to make "the revision" remarkably difficult to assess.

What is clear, however, is that Jefferson "was nominally and actually the leading figure in the revision" of the commonwealth's laws.²⁰⁷ And after 1776 Virginia experimented with juries to a degree hitherto

203. 2 PTJ, *supra* note 38, at 305 (never "came into focus"; "drawn out"; "anti-climax").

204. *Id.* The significance of the act abolishing entails is still debated among historians. Although some historians have dramatically downplayed the significance of this legislation, Holly Brewer persuasively argues that Jefferson's reform did effect radical change. Holly Brewer, *Entailing Aristocracy in Colonial Virginia: Ancient Feudal Restraints and Revolutionary Reform*, 54 WM. & MARY QUARTERLY, 3d ser., 307 (1997).

205. *See*, for example, Bill No. 7, "A Bill Giving Certain Powers to the Governor and Council for a Limited [sic] Time," which was introduced on January 13, 1778 and passed on January 22. 2 PTJ, *supra* note 38, at 363-64.

206. Moreover, the Assembly considered some of the bills in 1779 but postponed further consideration of the entire package until October 1785, a delay of six years. It adopted only about a third of the bills in 1785 but delayed even their implementation until January 1787, ostensibly so that the Assembly could closely scrutinize the remainder in October 1786. When it did consider the rest of the revision, the Assembly rejected the vast bulk of it. *Id.* 305-09.

207. *Id.* at 313.

unknown in Anglo-American law. Innovative legislation authorized juries to engage in selected matters of public administration, to decide factual issues in admiralty courts and in equity actions, and to sentence criminals in addition to adjudging their guilt. The experiment confirmed the extent to which revolutionary ideology and the democratic experience of government by committee affected the function of courts and juries in the new republic. In the first flush of revolution these influences resulted in a greater involvement of the people in formulating and implementing the law through the ancient institution of the jury.

The sections below canvass each of these experiments. Each development will be assessed in light of prior Anglo-colonial practice, how the Virginia innovation changed that practice and conformed to revolutionary imperatives, and the role played by the law revision committee (Jefferson, Wythe, and Pendleton). Historians have occasionally looked at individual pieces of this grand experiment, but the innovations have never been adequately explicated or appreciated as a coherent whole that gave voice to the committee's daunting mission: reconcile reason with popular participation.

The Jury and Public Administration

Revolutionary Virginia relied upon juries to help decide a host of issues which, for lack of a better term, are best conceptualized as involving "public policy" because they affected the community, not just parties to a lawsuit. To take the most dramatic example, juries established salaries for public officials: a verdict with no lawsuit, no parties, and no trial. Although most provisions were built solidly upon colonial precedent, others reflected the exigencies of war and radical republicanism's eagerness to find new outlets for the people's voices. The Virginia Assembly, sometimes assisted by Jefferson and the revisors, found the jury an expedient adjunct to decision-making in some contexts, but never came close to surrendering its own autonomy.

The commonwealth jury's public policy role built upon earlier practice. In colonial Virginia, juries helped determine internal-improvements by deciding appropriate locations for roads and mill dams.²⁰⁸ Grand juries regularly indicted negligent road overseers, cheats who tendered "seconds" of tobacco, and others who violated regulatory laws, such as those concerning ordinaries (taverns and inns). During the imperial crisis, local committees of safety actively policed the community's adherence to the boycott. In their size and operation, the committees functioned as a people's court where all members were both judge and jury. When the Commonwealth of Virginia formally opened the doors of its courthouses in 1777, it reestablished the demarcation between judges and jurors while retaining and expanding the jury's role in public administration.²⁰⁹

208. See Blinka, *Revolutionary Virginia*, *supra* note 41, at ch. 2.

209. See *The Statutes at Large*, *supra* note 153, at 9: 178 (continuing the power of the committee of safety) and 9: 218 (October 1776 act extending the commission of the court of oyer and terminer until the general court was established).

Early wartime legislation reflected juries' traditional roles in public matters, dramatically adjusted for the exigencies of Revolution. Government contractors who diverted funds or neglected their responsibilities handicapped the war effort. Explaining that "no adequate remedy" existed to cure this "evil," the General Assembly designed a quick and inexpensive procedure for collecting misappropriated funds: a jury trial on both breach and damages could occur within as little as ten days from the date that the contractor received notice of the deficiencies.²¹⁰ The Committee of Revisors later embraced the substance of this act in a more succinct, comprehensive proposal directed at all who misappropriated "public money" for "public use." Within 15 days of serving written notice on offenders, courts were to "instantly" impanel juries to decide all issues.²¹¹ The Assembly enacted the revised version in 1786.²¹²

Wartime conditions necessitated new economic regulations, mostly aimed at profiteers, that gave grand juries and trial juries some voice in alleviating badly depressed markets. In 1777-78 the Assembly passed various acts directed at "forestallers," "regraters," and "engrossers" who exploited short supplies and inflated prices.²¹³ In particular, unscrupulous entrepreneurs stood to gain enormously from a government forced to pay high prices to feed, clothe and arm its fighting forces. George Mason excoriated those "'divers persons devoting themselves to avarice and extortion, and intending to amass riches out of the ruins of their country, or treacherously to betray it into the hands of its enemies by forestalling and engrossing the provisions necessary for the sustenance of its armies in the ensuing campaigns.'"²¹⁴ As we will see in the discussion of criminal

210. *Id.* at 9: 300. In addition to the summary jury trial against derelict public contractors, the statute provided even more streamlined methods for collecting against public debtors, such as paymasters, who diverted funds.

211. 2 PTJ, *supra* note 38, at 624-5 (Bill No. 108). In some cases only ten days written notice was required before the "instant" jury trial. Adjournments could be granted only for "good cause."

It is unclear what role, if any, the revisors played in the original 1777 legislation. The revisors also proposed Bill No. 12, which defined and delimited the duties of the public treasurer and authorized the General Court to "empanel instantly" a jury in actions against "obligors." *Id.* at 374. Bill No. 12 was a "briefer" version of legislation enacted in 1776, which set forth the duties of the public treasurer but did not include the "speedy" jury feature for trials against "obligors." 2 PTJ 374 ("briefer"). See *The Statutes at Large*, *supra* note 153, at 9: 199.

212. *Id.* at 12: 352-53.

213. *Id.* at 9: 382. A "forestaller" was in effect a "price fixer." A "regrater" was one who bought goods at a fair or market and then resold the same goods (at the same or a higher price) within four miles of the place of original purchase; in short, a regrater attempted to "corner" a market. Similarly, an "engrosser" was a wholesaler who bought imported goods or manufactured products solely for purposes of resale.

The Assembly struggled to reconcile regulations against forestallers, etc. with the obvious need for public contractors to supply the army and build fortifications. Loopholes abounded and Jefferson assisted in trying to close them. The complex history of this legislation is nicely summarized at 2 PTJ, *supra* note 38, at 564-65.

214. 2 PTJ, at *supra* note 38, at 564 (quoting Mason).

jury trials, the act featured a tripartite penalty scheme in which the jury sentenced third and subsequent offenders to a term of imprisonment left to its discretion.²¹⁵ Of special note for now is the juxtaposition of the jury's extraordinary power to punish third offenders with its lack of any role in sentencing first and second offenders. Jefferson helped draft the original legislation, which the Assembly enacted in early 1778 and amended later that same year.²¹⁶ In 1779 the Committee of Revisors also formally reported a comprehensive bill on forestalling, etc. that stressed scrupulous enforcement followed by truly "speedy" trials.²¹⁷ Grand juries were to be "particularly" charged and placed under an oath ("specially") "that they will present all such offences against the same coming to their knowledge, which presentments shall be tried in a summary way, by a jury to be impannelled and charged, unless the court, for very good cause to them shewn, shall continue the same."²¹⁸

Other legislation reaffirmed the jury's longstanding role in internal improvements, such as the placement of ferries, mill dams, and roads.²¹⁹ For example, twelve "able and discreet freeholders of the vicinage," men likely to be familiar with local conditions, were to meet at the site of a proposed road, view the land, and consider all circumstances, including the land's use and the need for additional fencing. To ensure the jurors' impartiality, local land owners could not provide them with "meat or drink"—at least until the report was sealed and returned to court.²²⁰

By far Revolutionary Virginia's most innovative use of the jury was in setting official salaries based on the market price of tobacco. In eighteenth-century Virginia tobacco was money (quite literally). Warehouse receipts and bills of exchange served as common currency for all forms of transactions.²²¹ After declaring independence, Virginia indexed most offi-

215. See *infra* note 274 and accompanying text.

216. 2 PTJ, at *supra* note 38, at 564 (recounting the legislative history and Jefferson's role).

217. *Id.* The committee's proposal is contained in Bill No. 89. See *id.* at 561-63. Bill No. 89 is based on various drafts of the forestalling/engrossing acts adopted by the Assembly. *Id.* at 564.

218. *Id.* at 563. The Assembly considered the revisors' bill in 1785 but never enacted it.

219. Bills No. 46 (roads), No. 47 (ferries), and No. 48 (mill dams) at *id.*, 448, 454, and 464. For the acts as adopted by the General Assembly, see *The Statutes at Large*, *supra* note 153, at 12: 174-80 (roads) and 187-90 (mill dams). Boyd observes that the bill on ferries modified and restated legislation dating to 1748. 2 PTJ, at *supra* note 38, at 463. The same is true of Bill no. 50, which was a "simplified restatement" of earlier legislation, again from 1748, for appointing public storehouses and setting prices. *Id.* at 468-70.

220. Maintaining established roads had always been a problem. Since the colonial period, grand juries had regularly presented road overseers who failed in their duties. Blinks, *Trial by Jury on the Eve of Revolution*, *supra* note 44, at 542. A 1779 statute provided that surveyors who failed to perform their duties were subject to forfeitures of 10 pounds upon the "presentment of the grand jury." *The Statutes at Large*, *supra* note 153, at 10: 165. This streamlined process, probably building on colonial precedent, permitted swift and relatively easy actions against derelict road overseers while permitting some degree of jury oversight.

221. See JOHN J. MCCUSKER, *MONEY AND EXCHANGE IN EUROPE AND AMERICA, 1600-1775* 117 (University of North Carolina Press 1978).

cial salaries to the prevailing price of tobacco. Thus compensation for the governor, the council, the state's highest judges, and even the tobacco inspectors turned on the crop's market price.²²² And by 1780 Virginians had hit upon a seemingly impartial, fair, and politically astute means of pegging the price of tobacco: let a jury decide.

Put another way, juries established the value of tobacco in a completely non-adjudicative posture: there were no parties, no witnesses, and no questions of law, but only a "verdict" that reflected the prevailing price of tobacco. Colonial juries frequently heard cases, especially debt actions, for the sole purpose of valuing old obligations in current money.²²³ Now, however, juries were asked to perform this role outside the realm of litigated private disputes. Each October the county grand jury estimated "the current price of transfer tobacco" for purposes of setting the compensation in money for tobacco inspectors.²²⁴ Salaries for the governor, the privy council, the state treasurer, the attorney general, the public auditors, and other state officers were also set by statute in specific amounts of tobacco (e.g., the governor received 60,000 pounds of tobacco annually). To protect against financial windfalls or disasters triggered by a fluctuating market, salaries were to be paid on a quarterly basis. And each quarter the grand jury attending the General Court established the prevailing value of tobacco during the preceding term.²²⁵ Later when it appeared that the grand jury's valuations resulted in "inadequate" salaries, the Assembly thoughtfully supplemented them with a fixed rate of specie to be "discharged in current money of the state." Again, the grand jury determined the exchange rate between specie and Virginia's paper money.²²⁶ Salaries for Virginia's most powerful judges were also fixed by weight of tobacco as valued by juries. To guard against judicial overreaching or other mischief, the General Assembly stripped Virginia's "judiciary department" (i.e., the state court judges) of the power to impanel juries for valuation. Instead, the justices of the peace in Henrico County, the seat of the capital, Richmond, convened quarterly juries "to enquire into and assess upon oath the value of tobacco in current money."²²⁷

Elegantly republican in design, the valuation system did not work well. Undoubtedly, the depressed tobacco market resulted in low salaries and unhappiness by both ill-paid officials and distressed tax payers. Empanelling grand juries became difficult. By spring 1781 British forces

222. *The Statutes at Large*, *supra* note 153, at 10: 278.

223. Blinka, *Trial by Jury on the Eve of Revolution*, *supra* note 44, at 540.

224. *The Statutes at Large*, *supra* note 153, at 10: 274. Later legislation extended the valuation process to fees owed to jurors, witnesses, and sheriffs. *See id.*, 10: 489 (repealing this discretion and adopting a set rate of exchange).

225. *Id.* at 10: 278.

226. *Id.* at 10: 433.

227. *Id.* at 10: 277. The act provided that jurors had to be freeholders "in some part of the commonwealth" but had to be inhabitants of Henrico County. This permitted the use of city dwellers provided they owned the minimum amount of land anywhere within the commonwealth.

invaded Virginia. The General Assembly acknowledged the difficulty of securing sufficient grand jurors during the "present term" and hence permitted the use of bystanders to set the price of tobacco.²²⁸ Eventually, the Assembly adopted fixed fees payable in specie for jurors, witnesses, and sheriffs, perhaps because it sensed that jurors could not be trusted to set their own fees.²²⁹

In sum, during the Revolution Virginia used juries as a mechanism permitting public participation in some realms of official decision-making. The Assembly built upon colonial practice as well as the state's experience with the revolutionary committees. The road and mill dam provisions trod in well-worn colonial ruts while the salary-valuation procedures were routes freshly cut by the Revolution. The Assembly entrusted the Henrico County jurors with the responsibility of setting the state judges' salaries in part because the separation of powers precluded the legislature from performing this role. Nor could the judges themselves be trusted; the valuation jury had to "be free from the control of any of the supreme courts."²³⁰ The jury's valuation represented a long-standing jury function transformed by the Revolution and designed to help legitimate the new government. Indeed it embodied a radically extreme version of "no taxation without representation": the people's elected representatives in the General Assembly set the gross annual compensation for public officials and the people themselves, as jurors, calibrated the precise value in accordance with market conditions that affected all Virginians alike.

A final point: The tobacco valuation scheme underscored that juries were not necessarily synonymous with "trials." Put differently, the jury's politicization had cut it loose from its moorings in the common-law trial.²³¹

Juries in Admiralty

Virginians vividly displayed their revolutionary mettle by mandating the use of juries in admiralty courts. This legislative innovation, strongly endorsed and carefully shepherded by Jefferson, marked a clear break with British practice and accorded with one of the most deeply held and loudly voiced tenets of revolutionary rhetoric.

The "admiralty grievance" emerged at the inception of the imperial crisis in the 1760s.²³² First established in the seventeenth-century, the

228. *Id.* at 10: 402.

229. *Id.* at 10: 489.

230. *Id.* at 10: 277.

231. For a final example, see Bill No. 100, which governed the procedures for impeachments. Although the House of Delegates initiated the process and ultimately decided the case, Bill No. 100 provided that "every fact so put to issue shall be tried to a jury." 2 PTJ, *supra* note 38, at 591. The bill was eventually enacted into law in the late 1780s. See *id.* at 592.

232. This account of the "admiralty grievance" relies upon John P. Reid, *Constitutional History of the American Revolution: The Authority of Rights* ch. 21 (University of Wisconsin Press 1986).

English vice-admiralty court largely served as a trade court enforcing the Navigation Acts. Its jurisdiction slowly expanded in an ad hoc manner throughout the eighteenth century.²³³ Provincial admiralty courts existed in some colonies. In 1764 the Sugar Act established a vice-admiralty court in Halifax, Nova Scotia, that had concurrent jurisdiction with the provincial courts. More troubling, the admiralty prosecutor (or informer) had the choice of forum and could effectively preclude a contest by choosing Halifax. Although removal to Nova Scotia never became a problem in practice, the venue rule provoked bitter criticism.²³⁴ The Stamp Act (1765) exacerbated the threat and spread the protest across British North America by imposing admiralty jurisdiction on trade violations that had no discernable connection with seas, rivers, or any amount of water.²³⁵ The Townshend Duties (1767) created three additional vice-admiralty courts in Boston, Philadelphia, and Charleston.²³⁶

Colonists fought this cascading expansion of admiralty jurisdiction for several reasons. First, at its core, the novel expansion of admiralty courts upset traditional practices and marked Parliament's intrusion into matters formerly handled in colonial courts. Second, admiralty jurisdiction portended seemingly onerous, unfamiliar legal procedures. Admiralty courts sat without juries, required heavy bonds to preserve claims to confiscated property, saddled the claimant with the costs of maintaining the action, and imposed an extraordinarily difficult burden of proof on the claimant seeking the return of confiscated property.²³⁷

The apparent unfairness of admiralty trials permeated revolutionary rhetoric and became embedded in its ideology.²³⁸ No jury meant that colonial offenders could not bank on a sympathetic buffer between themselves and the trade laws.²³⁹ Admiralty also featured trials conducted by a single judge, a characteristic shared with the civil law systems of the European continent. Although this procedure eventually became the norm in the nineteenth century, Virginians were familiar with trials conducted by panels of judges. Moreover, the single admiralty judge was an

233. See GIPSON, *supra* note 80, at 82.

234. According to Reid, only one case was removed to Halifax. REID, *supra* note 232, at 177-83. See also UBBELOHDE, VICE-ADMIRALTY COURTS, *supra* note 7, at 82.

235. See GIPSON, *supra* note 80, at 81 (observing that even in England revenue issues were transferred to the vice-admiralty courts because of sympathetic local juries).

236. UBBELOHDE, VICE-ADMIRALTY COURTS, *supra* note 7, at 131.

237. See DICKERSON, *supra* note 81, at 212.

238. McDONALD, NOVUS ORDO SECLORUM, *supra* note 126, at 40-41, 115. See also UBBELOHDE VICE-ADMIRALTY COURTS, *supra* note 7, at ch. 6.

239. A 1536 statute extended admiralty jurisdiction to crimes committed on the seas and permitted trial by jury as a way of offsetting other strict procedural requirements adopted from the civil law. Convictions ordinarily required either two witnesses to the same act or a confession, which often necessitated torture, a procedure not ordinarily employed in English procedure. Juries, it seems, could convict on a lesser showing. See THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 662 (5th ed., Little Brown 1956). Whatever the case, admiralty judges invariably sat without juries by the mid-eighteenth century and it does not appear that the Revolutionary leaders used this precedent in their protests.

appointee of the king who served at the king's pleasure. Since the judge also shared in a percentage of fees collected from confiscated goods, colonists held little confidence that such judges would be unbiased, impartial, or even sympathetic to their pleas.

Thus, when in October 1776 Virginia's lawmakers adopted admiralty jurisdiction they followed Jefferson's lead by creating a court that reflected revolutionary sentiment and built upon the admiralty commissions that had enforced the Association since late 1775.²⁴⁰ In light of her maritime interests, the admiralty court was an issue of "first importance" and Jefferson quickly took the lead in drafting its structure.²⁴¹ Boyd concludes that Jefferson's admiralty bill "proceeded from this rough draft to final enactment with fewer amendments than almost any other legislation from this pen[.]"²⁴²

Virginia's admiralty court consisted of three judges, any two of whom constituted a quorum, and thereby eliminated the threat represented by a single judge. And unlike the British admiralty judge who served at the king's pleasure and risked becoming a royal puppet to maintain tenure, Virginia's judges held office "for so long time as they shall demean themselves well therein."²⁴³ Nor would claimants be arbitrarily saddled with excessive costs; rather, the Virginia admiralty court awarded only "reasonable costs" in appropriate cases.²⁴⁴ The General Assembly was also mindful of how British admiralty jurisdiction had expanded beyond traditional concerns with trade. In order "[t]o prevent all doubts which may arise," the assembly declared that the admiralty court had no jurisdiction in capital cases.²⁴⁵ Serious felonies were to be tried in the General Court. In sum, the state admiralty court closely tracked the structure that had policed the Association during the prior year.

Sharply breaking with British practice, the Virginia admiralty court used juries to try issues of fact:

All matters of fact put in issue shall be tried by jury, unless in cases of captures from an enemy, which shall be tried by the court; but if such capture be from an enemy with whom the United States of America are or may be at war, then such trial shall be by court or jury, as the American Congress shall direct.²⁴⁶

The admiralty act thus comported with revolutionary rhetoric and built upon the solid foundation laid by the Convention government. It will be

240. *The Statutes at Large*, *supra* note 153, at 9: 202-06.

241. 1 PTJ, *supra* note 27, at 606 ("first importance").

242. *Id.* at 649. The revisors also reported Bill No. 92, which largely restated the 1776 act, in their 1779 report. 2 PTJ, *supra* note 38, at 572.

243. *The Statutes at Large*, *supra* note 153, at 9: 202.

244. *Id.* at 9: 205.

245. *Id.* at 9: 203.

246. *Id.* at 9: 205. Jefferson's original draft is identical. 1 PTJ, *supra* note 27, at 648. Other states also provided for juries in admiralty action (e.g., North Carolina). UBBELOHDE, VICE-ADMIRALTY COURTS, *supra* note 7, at 197, 211. The revisors' report of 1779 altered the jury language to read "In a case where both parties are citizens of the commonwealth. . . ." 2 PTJ, *supra* note 38, at 574.

recalled that the December 1775 Enemies to America Act had required the admiralty commissions to employ juries in policing the Association.

Jefferson's enthusiasm had even deeper roots. In his *Summary View* of 1774 he had railed against the numerous depredations against American liberty, including Britain's evisceration of the jury trial.²⁴⁷ Two years later the Declaration of Independence indicted the king for "depriving us in many cases of trial by jury" and for shielding British officials from justice through "mock trials."²⁴⁸ Most important, Jefferson's draft of a Virginia constitution provided that "all facts" in admiralty courts "shall be tried by jury upon evidence viva voce."²⁴⁹

The routine use of juries in admiralty cases constituted a clear, dramatic break with British justice. Not only did admiralty juries institutionalize decade-old rhetoric and revolutionary ideology, it dove-tailed nicely with other innovative uses of juries. Yet jury trials and viva voce testimony were cumbersome, expensive, somewhat slow, and also injected uncertainty into the proceedings, concerns that would later overshadow their benefits. Virginia was spared, however, from having to repudiate its "disastrous" experiment with admiralty juries.²⁵⁰ Virginia's admiralty court disappeared with the adoption of the federal constitution in 1788, which ceded admiralty jurisdiction to the federal government. Federal admiralty courts did not adopt the use of the juries.²⁵¹

Civil Juries

In June of 1776 Thomas Jefferson drafted the Declaration of Independence while in Philadelphia representing Virginia in the Continental Congress. Much of his energy and attention, however, remained focused on events in Virginia where George Mason's committee was drafting a plan of government. For Jefferson the drafting of a written constitution was, simply put, "the whole object" of the Revolution.²⁵² In his own drafts of a Virginia constitution, he carefully described the various courts that would exercise the judicial function.²⁵³ Turning to

247. 1 PTJ, *supra* note 27, at 128-29. Jefferson, it will be recalled, especially excoriated the parliamentary act permitting the trial of alleged American criminals in English courts.

248. *Id.* at 431 (Declaration of Independence as adopted by Congress).

249. *Id.* at 343. Boyd observes that Jefferson drafted all of the judiciary bills that were introduced in 1776—those for establishing a court of appeals, a high court of chancery, a general court, and a court of admiralty, and a bill for "better regulating" the count courts. Each measure "reflected the ideas set forth in [Jefferson's] constitution." *Id.* at 605.

250. See UBBELOHDE, VICE-ADMIRALTY COURTS, *supra* note 7, at 199, which characterizes the "grand experiment" with admiralty juries as "disastrous," especially in prize cases.

251. See *id.* at 201.

252. 1 PTJ, *supra* note 27, at 329. Jefferson explained that a plan of government was "the whole object of the present controversy; for should a bad government be instituted for us in the future it had been as well to have accepted at first the bad one offered to us beyond the water without the risk and expense of contest." *Id.* at 330.

253. See *id.* at 329 (note).

procedure, Jefferson heartily embraced the common-law jury trial, along with its viva voce process, and made its use seemingly mandatory in all judicial proceedings involving issues of fact:

[A]ll facts . . . in causes whether of Chancery, Admiralty, Ecclesiastical or Common law shall be tried by jury upon evidence viva voce unless in those cases where the courts of Common law now permit the use of depos[itions] or of witnesses out of the colony.²⁵⁴

In the end the Virginia Convention relied primarily on George Mason's draft for its 1776 constitution. Nonetheless, Jefferson's work on the revision reflects many of the ideas he first expressed about a state constitution, including an expanded role for the people through juries.²⁵⁵ Escheats and equity provide two vivid examples.

First, Virginia's revolutionaries resurrected and modified the ancient feudal device of escheats to justify the forfeiture of loyalists' land. An "astounding revival of feudal practice," escheats nonetheless comported with the venerable common law and the state's republican constitution (thereby providing the necessary "face of law").²⁵⁶ The critical concern, of course, was determining who in fact had remained loyal to the king and hence warranted the escheat. For this purpose, Jefferson employed inquest juries consisting of "fit persons."²⁵⁷ In sum, the escheat law tabbed the jury with the politically sensitive task of determining one's political loyalties in war-riven Virginia.

Second, in October 1777 the Virginia Assembly established a court of equity, designed by Jefferson, that superficially resembled its English progenitors but which more clearly reflected the institutional innovations borne of the Revolution.²⁵⁸ The High Court of Chancery consisted of three judges selected by both houses.²⁵⁹ The judicial oath literally bespoke independence: the judges should decide cases according to "equity and good conscience, and the laws and usages of Virginia." And, more important, all contested issues of fact "shall be tried by a jury upon evidence given viva voce," although the parties could waive both rights and proceed to bench trial based on depositions.²⁶⁰ To promote the convenience of jury trials in

254. *Id.* at 343.

255. *Id.* at 605.

256. PETERSON, *supra* note 11, at 124 ("astounding revival"). Peterson notes the irony of Jefferson, "the most enlightened statesmen of his time," carrying out whole-sale confiscations "in the shadow of feudalism." *Id.* The Virginia escheat system, and its motivation, is described by Peterson. *Id.* at 123-24.

257. 2 PTJ, *supra* note 38, at 410. The revisors' proposed escheat law was enacted by the Assembly in 1779. See *The Statutes at Large*, *supra* note 153, at 10: 115-17. The legislative history is recounted at 2 PTJ, *supra* note 38, at 412. Peterson described the process as follows: "The procedure called for the use of inquests to determine if the holders of real estate were, in fact, British subjects; if they were the property reverted by way of escheat to the commonwealth." PETERSON, *supra* note 11, at 24. Peterson concludes that the confiscation program "failed dismally." *Id.*

258. 1 PTJ 619. Jefferson was the primary draftsman of this legislation.

259. *The Statutes at Large*, *supra* note 153, at 9: 389

260. *Id.* at 9: 394. Jefferson's original draft read simply:

equity, the act required the sheriff to summon bystanders to sit at the ready on each day of the chancery court's sessions.²⁶¹

The preference for jury trial in equity stood English law on its head.²⁶² The division between equity and common law jurisdiction had developed haphazardly over the centuries. Adding to the confusion, equity and the common law borrowed doctrine from one another and greatly overlapped in certain areas.²⁶³ Although the substantive differences between the two were elusive, an indisputably wide gulf separated the procedures used in equity courts from those used at common law. The hallmarks of the common law trial consisted of *viva voce* (oral) testimony by witnesses subject to cross-examination before a jury. Equity's procedures were taken from the canon law. Chancellors in equity almost always based their decisions on sworn pleadings and written depositions by witnesses without a jury's input. Parties could offer lawful evidence in equity through the device of written interrogatories, an option unavailable at common law. Finally, equity courts had available a far wider range of remedies (e.g., injunctions).²⁶⁴ Whether a party filed in equity or at common law, the procedures came as a "package." In short, the allocation of issues to common law or equity was largely haphazard yet carried significant procedural ramifications; the distinction was manifestly not "the product of a rational choice between issues which were better suited to court or to jury trial."²⁶⁵

All matters of fact material to the determination of the cause which in the course of the proceedings shall be affirmed by the one party and denied by the other, shall be tried by Jury, for which purpose an issue or issues shall be made up by declaration and plea as hath heretofore been used in Chancery when issues have been specially directed to be made up and tried by Jury.

1 PTJ, *supra* note 27, at 615.

An amendment to the original 1776 bill added the *viva voce* requirement with the proviso that depositions could be used where witnesses were unavailable. The legislative history is recounted at *id.* at 620 n. 12. It is unclear whether Jefferson supported the *viva voce* requirement, but his 1776 bill would have limited depositions to instances where witnesses were unavailable.

261. The sheriff was to summon bystanders "or others found within half a mile of the courthouse." *The Statutes at Large*, *supra* note 153, at 9: 394.

262. The revisors also provided that juries should decide the validity of contested wills. 2 PTJ, *supra* note 38, at 396 (Bill No. 20, "A Bill Directing the Course of Descents").

263. This discussion relies on FLEMING JAMES, JR., CIVIL PROCEDURE 341-46 (Little Brown 1965).

264. *Id.* at 344.

265. *Id.* James explained the procedural differences between the two "packages":

In equity the procedures were epistolary, included the statements of both parties, might provide for specific relief and handle multiple parties and suits, and involved no jury. At law the procedures involved oral testimony and cross-examination at the jury trial, relief in rem, and the unavailability of the testimony of either party. * * * To put it colloquially, a jury trial (or court trial) was often merely the tail of the dog under a system where you had to take the whole dog.

Id. at 345. The courts were not, however, blind to the reality that dry, technical actions such as an accounting, for example, were ill-suited to jurors who "might be too ready to upset, on uncritical emotional grounds, the stability which written instruments ought to represent." *Id.* at 346.

The Virginia reforms, then, swept away the ancient procedural distinction between law and equity. A party could file in equity and seek the benefits of that court's richly flexible remedies yet use the common-law form of trial: viva voce testimony before a jury.

The Assembly also assured that the Commonwealth's highest common-law court, the General Court, would be hospitable toward juries. All issues and damages were to be tried by jury. Even in the event of default judgments, a jury was to decide damages unless the debt was "founded on any specialty, bill, or note." To assure a readily available venire panel, the sheriff was to summon sufficient bystanders each day of the session.

The Committee of Revisors, led by Jefferson, was the prime mover behind the equity reform. First, the October 1777 act mirrored Jefferson's proposed constitutional mandate that jury trials be used in all courts, most notably equity and admiralty.²⁶⁶ Second, Jefferson himself drafted the 1776 bill that formed the basis for the 1777 chancery act, including its preference for juries.²⁶⁷ Third, the revisors' report of June 1779 both retained the use of juries and mandated the use of viva voce trial procedure in equity.²⁶⁸

The Assembly never enacted the revisors' proposed bill during its deliberations in 1785 and 1786, but it did eliminate the right to jury in equity proceedings in October 1787, ostensibly because of its procedural inconvenience.²⁶⁹ Yet the decade-long experiment with juries in equity, like their use in determining public policy and in admiralty cases, was an innovative attempt to involve the people in legal decision-making. Equally significant, the innovation in equity, while short lived, further solidified the identity of trial by jury—and trials generally—with viva voce procedure.

Criminal Juries

The common law had long venerated the historic right of Englishmen to trial by jury in criminal cases. Revolutionary ideology

266. 1 PTJ, *supra* note 27, at 605.

267. *Id.* at 619. Boyd recounts a curious disagreement between Jefferson and Pendleton over the use of juries in equity. When the bill proposing the High Court of Chancery was first proposed in 1776, Pendleton supported an amendment permitting trial by jury "if either party choose." Jefferson condemned the amendment because it would have eviscerated the use of juries by requiring a party to stand before the court and say, in effect, "Sir, I distrust you, give me a jury." The amendment was defeated in 1777, yet decades later, in his autobiography, Jefferson mistakenly thought that it had been accepted. 2 PTJ, *supra* note 38, at 598-99, n. 1.

268. *Id.* at 594. The revisors' bill provided that matters of fact would be tried "by a jury, in like manner as such issue ought to be tried in a court of common law, and upon like evidence as is there admissible, and not otherwise[.]" *Id.*

269. *See id.* at 598 (the Assembly eliminated the jury and viva voce procedures "because justice is greatly delayed by the tedious forms of proceedings suitors are therefore obliged to waste much time and expence, to the impoverishment of themselves and the state, and decrees when obtained are with difficulty carried into execution"), quoting *The Statutes at Large*, *supra* note 153, at 12: 464-7.

trumpeted the jury's manifold blessings, identifying it as a fundamental liberty almost as natural as breathing. Revolutionary Virginia built upon this consensus and extended the criminal jury's responsibility beyond the adjudication of guilt or innocence to the sentencing decision itself. Yet one senses hesitation and some misgivings about the experiment's promise. Jefferson exemplified the ambiguity early on. His first draft of a Virginia constitution carved out a unique role for juries in criminal cases: All fines and amercements would be "fixed by juries."²⁷⁰ Jefferson's later drafts included the same provisions and, ever so cautiously, extended the jury's sentencing power to imprisonment in cases of contempts and misdemeanors, but not felonies.²⁷¹

Thus, within this constitutional moment Virginia's lawmakers keenly sensed that core Enlightenment values were at war with one another. Juries were a democratic mechanism that permitted people a direct hand in government. Yet juries were at the same time undisciplined often emotional, and occasionally irrational decision-makers. Hence, popular participation sometimes sacrificed rationality, objectivity, and consistency.

The Virginia Assembly's experience reflects an initially tentative embrace of the jury's new found role as punisher followed by a more far reaching adoption of the practice. As we have seen, a 1776 act punished persons who defended British authority or incited others to "resist the government of this commonwealth" with fines of up to twenty thousand pounds or imprisonment for not more than five years.²⁷² The act also authorized juries to fix the fine and term of imprisonment, an innovative yet expedient measure that drew upon republican rhetoric, the experience with committees of safety, and the Revolutionary precedent of using juries in admiralty cases. Most important, it helped establish the courts' legitimacy to punish dissenters.²⁷³

The 1778 statute on forestaller, regraters, and engrossers, discussed earlier, ultimately featured a graduated set of penalties and a more guarded role for juries, yet its drafting history reflects considerable oscillations on these points. Jefferson was assigned to the committee that drafted the original legislation, which was first introduced in late November 1777.²⁷⁴ Several drafts prescribed that first and second offenders should be subject to amercement or imprisonment or both, as the jury's discretion.²⁷⁵ Third

270. 1 PTJ, *supra* note 27, at 343. An "amercement" is a monetary fine.

271. *Id.* at 352 (second draft constitution) Jefferson's third and final draft reflected the same rule. *Id.* at 362.

272. *The Statutes at Large*, *supra* note 153, at 9:170.

273. See J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* (Oxford 1986), 429. At common law juries in criminal cases could affect the sentence only indirectly by convicting on lesser included offenses. The Virginia act authorized the jury to determine the actual sentence. See King, *supra* note 8, at 938 (King begins her assessment of jury sentencing in the 1790s).

274. 2 PTJ, *supra* note 38, at 564 (recounting Jefferson's role the bill's legislative history throughout the 1770s and 1780s).

275. *Id.* at 565 n. 11.

offenders, according to the original draft, were to be “set on the Pillory,” to forfeit all goods and chattels, and to be imprisoned at the jury’s discretion.²⁷⁶ As enacted, however, the statute clearly shielded offenders from a jury’s wrath. First offenders forfeited their goods and faced one month’s incarceration; second offenders faced twice that same punishment. Juries played no role in the sentencing for either type of offender. Third and subsequent offenders faced the pillory, forfeitures, and imprisonment but here too the jury’s sentencing role was limited. The statute set the amount of forfeiture at treble the value of the goods involved and capped the time spent in the pillory at two hours, “as the court [not the jury] shall direct[.]”²⁷⁷ Imprisonment, however, was left to the jury’s discretion, although the term could not exceed three months, a cap that stands in stark contrast to earlier proposals that carried no limit on the amount of incarceration. One discerns, then, the tension between a preference for enlightened certitude in punishment and a democratic desire to involve the people in sentencing, especially for an offense that directly harmed the larger public. The 1779 revisors’ report adopted the penalty scheme as enacted by the Assembly. With the end of the fighting, however, the original act lapsed after 1782.²⁷⁸

Other criminal offenses, mostly drafted by Jefferson, also illustrated the tension inherent in jury-sentencing procedures that traded consistency and certainty for popular participation and legitimacy.²⁷⁹ For example, in the spirit of Virginia’s struggle to separate church from state while respecting diverse religious views, Bill No. 84 prohibited the arrest of patriot-ministers while “publicly preaching or performing religious worship in any church, chapel, or meeting-house” and also sanctioned those who “disturb[ed]” contemptuously or maliciously any assembled congregation. Although juries had (apparently) unlimited discretion to determine the amercement and length of imprisonment under this statute, Sabbath breakers faced only a ten shilling forfeiture for each offense.²⁸⁰

Other bills related more closely to wartime hardships, turmoil, and the need to stifle dissent. Each included some role for the jury in prescribing punishment. Bill No. 71 punished riots, “routs,” and unlawful assemblies by permitting juries to set the amount of amercement and term of imprisonment.²⁸¹ Another proposal, Bill No. 72, punished “affrays,” defined as armed men “so hardy to come before the justices of any court” or who

276. *Id.* at 565-66 n. 12.

277. *The Statutes at Large*, *supra* note 153, at 9: 383.

278. *Id.* at 10: 425. *See also* 2 PTJ 565.

279. For a listing of bills chiefly prepared by Jefferson, *see* 2 PTJ, *supra* note 38, at 320.

280. *Id.* at 555. The Assembly later enacted this bill. *The Statutes at Large*, *supra* note 153, at 12: 336-37.

281. 2 PTJ, *supra* note 38, at 517. It was later adopted by the Assembly. *The Statutes at Large*, *supra* note 153, at 12: 331-33. *See also* Bill No. 37 (A Bill to Prevent Losses by Pirates, Enemies, and Others on the High Seas), which left imprisonment to a jury’s discretion where a ship’s master “surrenders” or fails to defend his ship and cargo. 2 PTJ, *supra* note 38, at 437.

spread "terror" by riding armed in fairs, markets, or other public places. Offenders forfeited their armor and faced imprisonment at the jury's discretion, but for a term not to exceed one month.²⁸² A third bill, No. 73, punished conspirators who abused the legal process by plotting to move falsely and maliciously an indictment or information against another. Here too the jury was given total discretion to determine imprisonment and amercement.²⁸³ The fourth bill, No. 75, punished named public officers (e.g., the treasurer, the attorney general, judges, clerks, sheriffs) who accepted any "gift, brocade, or reward" other than that permitted by law. Those accepting illegal gifts were barred from office for life, forfeited the bribe's treble value, and faced amercement and imprisonment at the jury's discretion.²⁸⁴

Although Jefferson and the revisors innovated with jury sentencing schemes, they were cautiously selective in their use. Proposed Bill No. 76 punished butchers, bakers, brewers, or distillers who sold "unwholesome" meat, bread, or drink.²⁸⁵ Unlike other crimes, however, the jury played no obvious role in sentencing. In light of wartime shortages, it was probably not unusual to find butchers who sold the meat of animals that had died "otherwise than by slaughter." Selling rotten food created obvious health risks that had to be curbed. One might also assume that such offenses invited the venting of public outrage through jury sentencing, yet the cryptic bill set forth the following penalty scheme:

First offense: amercement

Second offense: "judgment of the pillory."

Third offense: imprisonment and a fine.

Fourth and subsequent offense: six months hard labor in the public works.²⁸⁶

As proposed by Jefferson, the bill contained no references to juries or their roles in sentencing, perhaps because the nature of the offense (e.g., selling bad meat) likely guaranteed a visceral, emotional reaction by a vindictive jury, yet wartime conditions perhaps made such offenses all but inevitable and merited the surprisingly mild penalties for first and second offenses.²⁸⁷

282. *Id.* at 519. The Assembly enacted this bill in 1786, as drafted by Jefferson. *The Statutes at Large*, *supra* note 153, at 12: 334.

283. 2 PTJ, *supra* note 38, at 520. The Assembly enacted this bill in 1786, as drafted by Jefferson. *The Statutes at Large*, *supra* note 153, at 12:334.

284. 2 PTJ, *supra* note 38, at 521. The Assembly enacted this bill in 1786 with amendments which extended its penalties to attorneys who accepted bribes. *Id.* For the bill as enacted, see *The Statutes at Large*, *supra* note 153, at 12: 335-36. In another proposal relating to judicial functions, the revisors proposed that justices who violated the complex rules governing bail should be punished by "imprisonment and amercement at the discretion of a jury." 2 PTJ, *supra* note 38, at 481 (No. 58, A Bill Directing What Prisoners Shall Be Let to Bail). As later adopted by the Assembly, the act provided only for amercement at a jury's discretion. *Id.* See *The Statutes at Large*, *supra* note 153, at 12: 185-86.

285. 2 PTJ, *supra* note 38, at 521.

286. *Id.* at 521-22.

287. The telling phrase "judgment of the pillory," the punishment for second offenders, undoubtedly contemplated a vent for public outrage, verbal and physical. Boyd expresses

In sum, the revisors cautiously approached jury sentencing in criminal cases; they did not throw open the courthouse doors and permit juries to determine punishment in all cases. At first glance the “unwholesome” food act, which omitted any mention of jury sentencing, appears to be an aberration in the trend toward jury sentencing and greater public participation in legal proceedings.²⁸⁸ Yet it reflects something more than ambivalence about the public’s role. Rather, the revisors in general, and Jefferson in particular, greatly valued reason, objectivity, and certainty in the law. And these values sometimes outweighed those of public participation, as best seen in Jefferson’s key role in the attainder of Josiah Philips and his proposed capital code for Virginia.

JEFFERSON AND THE JURY’S LIMITS

While enthusiastic about the people’s democratic participation in many respects, Jefferson also maintained a calculated wariness, especially concerning juries. The innovative interposition of juries in public administration, admiralty actions, and equity proceedings was a high-water mark. In the criminal law, where juries retained their traditional role in determining guilt and innocence, Jefferson cautiously experimented by selectively bestowing upon them the additional power to determine punishment.

Why the caution? No doubt, it arose in large part from a conservative reluctance to depart from the well-worn ruts of the common law. After independence Virginia’s patriots moved expeditiously to reopen the “courts”; no thought was given to replacing them with the revolutionary “committees” (or “councils”) on a permanent basis. Jefferson had learned law as a “form of history,”²⁸⁹ and history’s shroud was not always easily shrugged off. More tellingly, Jefferson’s own experiences in the courts provided countless examples of irrational, emotional, and occasionally capricious verdicts. He knew well that skilled trial lawyers—those “Homers of the spoken word” such as Henry—could artfully persuade jurors to cast aside the facts, the law, and reason itself. Where, however, reason, deliberation, and enlightened certitude charted the “correct” answer, Jefferson saw little need to risk the arbitrary currents of popular decision-making.

In this section we will examine two instances in which Jefferson discarded jury decision-making. Jefferson’s proposed code of capital punishment illustrates Jefferson’s mind at work as an Enlightened philosopher

some surprise that the Assembly permitted the penalty of “hard labor in the public works” in light of its rejection in other proposals. *See id.* at 522. Apparently the Assembly had no qualms about eliminating any role for juries in sentencing. Although it amended the bill to specify that convictions must be based on a jury’s verdict, no other jury amendments were proposed. *Id.*

288. *See King, supra* note 8, at 938.

289. *PETERSON, supra* note 11, at 57.

and Revolutionary reformer. The attainder of Josiah Philips, which occurred while Jefferson wrote his proposed code, embodies those same principles in practice during the early, uncertain days of the Revolution.

**“Let mercy be the character of the lawgiver,
but let the judge be a mere machine”:
Enlightened Certitude and Jefferson’s Capital Code**

In the spring of 1778 Jefferson worked on a comprehensive revision of Virginia’s capital offenses. No other provision occupied as much of his time or talent. Adorned with extensive, learned annotations drawn from classical sources, obscure Anglo-Saxon authorities, and common law precedent, the proposed capital code is also suffused with enlightened thinking about criminal punishment.²⁹⁰

The bill’s preamble revealed the enormous influence of Cesare Beccaria and other enlightened thinkers on Jefferson.²⁹¹ An Italian legal reformer whose own ideas were shaped by the French *philosophes*, Beccaria published his masterpiece *On Crimes and Punishments* in 1764. Beccaria harshly criticized the savage barbarity of eighteenth-century criminal law, which inflicted death and gross physical torture for seemingly trivial offenses and without concern that such grisly punishment might further degrade an already debased populace.²⁹²

Drawing from Beccaria, Jefferson described the key principles that animated his proposal. “[W]icked and dissolute men” sometimes succumb to their “inordinate passions” and harm the “lives, liberties, and properties of others.” Governments must protect their citizens by inflicting “due punishment” that is nonetheless “in proportion to his offense.” A legislature must “arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments.” The overall goal (or “object worthy”) should be “reformation of offenders.” Capital punishment, while necessary in certain narrowly-defined cases, was an instrument of “exterminat[ion]” not reformation. Moreover, numerous, needless death sentences weakened society in two ways. First, unnecessary capital sentences killed “many who, if reformed,

290. 2 PTJ, *supra* note 38, at 504. The proposed capital code became Bill No. 64 in the revisors’ report of 1779. Jefferson painstakingly produced several beautifully handwritten versions of the proposed code in which the “notes” appear in columns parallel to the text, in the manner of the medieval glossators. Boyd gently chides Jefferson for indulging in “pedantic ostentation” *Id.* at 505. See also PETERSON, *supra* note 11, at 124 (“No other draft of legislation reveals so much of the mind and style of its author.”).

In some ways, the capital code is a hodgepodge. For the most part its focus is to identify capital offenses in Virginia—for which offenses a person faced forfeit of his or her life. Yet it also includes procedural rules (e.g., jury challenges, standing mute), definitions of offenses (e.g., treason, maiming), and punishments for offenses formerly treated as capital crimes (e.g., the imposition of hard labor at public works or loss of limb).

291. Jefferson reportedly read Beccaria in Italian. PETERSON, *supra* note 11, at 124.

292. On Beccaria, see PETER GAY, *THE ENLIGHTENMENT: THE SCIENCE OF FREEDOM* 437-47 (Norton 1969).

might be restored sound members to society.” Alternative punishments, such as public labor, reformed criminals while making them “useful in various labors for the public . . . and long continued spectacles to deter others from committing the like offenses.” Second, overly harsh criminal laws defeated their own purposes by inviting neglect, perjury, and “bias” against them.²⁹³ In short, the certainty of some punishment was more important than its severity.²⁹⁴

Jefferson’s “enlightened” criminal code purported to mitigate the brutality of the English common law, yet its “progress” was decidedly marginal.²⁹⁵ No offense was to be punishable by “deprivation of life or limb” except those set forth in the code. In one of his many learned footnotes, Jefferson highlighted the code’s beneficent elimination of the punishment of “cutting off the hand of a person striking another, or drawing his sword in one of the Superior courts of justice.”²⁹⁶ Robbery and burglary no longer carried the death sentence, rather, such offenders were “condemned to hard labor four years in the public works” and obliged to make double reparations to the victim.²⁹⁷ Murder, of course, carried a mandatory death sentence (hanging).²⁹⁸ Overall, however, the code retained a core of brutality which suggests that Jefferson had great difficulty shaking off the dead hand of history, or at least the common law. The following examples will suffice:

Treason: death by hanging and forfeiture of lands and goods to the Commonwealth.²⁹⁹

Petty treason: death by hanging followed by delivery of the body to “Anatomists to be dissected.”³⁰⁰

293. 2 PTJ, *supra* note 38, at 492-93. Boyd concurs that the preamble reveals Beccaria’s influence on Jefferson. *Id.* at 505.

294. See PETERSON, *supra* note 11, at 126.

295. Boyd contends that Jefferson’s proposal was never intended to reform or to drastically change Virginia law, rather, “the law that [Jefferson] proposed did little more than restate generally accepted practices concerning capital offenses. 2 PTJ, *supra* note 38, at 505. It seems odd, however, that Jefferson would devote so much time, effort, and pride to a “restatement” of existing practices. Thus, the proposed capital code is, I think, better viewed as a flawed effort to effect substantial reforms in the criminal law. See PETERSON, *supra* note 11, at 124-29.

296. 2 PTJ, *supra* note 38, at 493. Without explication, Jefferson noted that the punishment had been death in an “earlier stage of the Common Law.”

297. *Id.* at 499-500.

298. Peterson concludes that Jefferson and his fellow revisors agreed early on that capital punishment should be eliminated except for murder and treason. PETERSON, *supra* note 11, at 124. Treason also carried the death sentence as did a second conviction for manslaughter. The first conviction for manslaughter carried a mandatory seven-year sentence at hard labor in the “public works.” See PTJ, *supra* note 38, at 493 (treason), 495 (murder and manslaughter).

299. *Id.* at 493-94. The capital code defined treason as waging war against the Commonwealth or adhering (assisting) its enemies. Jefferson also set forth rigid proof requirements: treason must be manifested by “open deed” as testified to by at least two witnesses or the defendant’s voluntary confession.

300. *Id.* at 494. Petty treason included a husband’s murder of his wife, the parents’ murder of a child, or a child’s murder of his parents. Undoubtedly, the threat of dissection was

Murder by poisoning: death by poison.³⁰¹

Murder by dueling: death by hanging, and if the survivor was the challenger, "his body, after death, shall be gibbeted."³⁰²

Rape, polygamy, and sodomy: for males, castration; for females, the offender was to have a hole of a half-inch diameter bored through the cartilage of her nose.³⁰³

Maiming: similar disfigurement.³⁰⁴

Paradoxically, Jefferson defended the code's harshness by underscoring that one of his primary purposes had been to limit the *lex talionis*, which he restricted to mayhem.³⁰⁵ Ultimately, however, the Assembly rejected Jefferson's proposal when it was finally considered in late 1786.³⁰⁶

If one looks beyond the brutality of hanging, poisoning, gibbeting, castration, and the like, one is struck by the fixed, determinate nature of the punishments. The jury played no sentencing role in any of the examples above, except in cases of mayhem where the jury determined what constituted similar disfigurement in those infrequent cases where the offender lacked the "same part" that he (or she) had deliberately disfigured. (The jury's role was to identify "some other part" of "equal value.")³⁰⁷ Put another way, strikingly absent in Jefferson's code is the general principle of letting the jury determine the punishment—death, imprisonment, or amercement—which loomed so large in the revisors' other criminal proposals. Murder was punishable by hanging. Robbers and burglars were sentenced to fixed terms of hard labor in public works

thought to be an effective deterrent given the widespread disgust with such techniques. While serving the cause of science in some sense, mandatory dissection had triggered large, violent riots in Britain. See Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, in *ALBION'S FATAL TREE* 65 (Douglas Hay, et al. eds., Pantheon 1975).

301. 2 PTJ, *supra* note 38, at 494.

302. *Id.* at 494-95. The gibbet involved the public display of the offender's body, which literally rotted before the public's eye (and nose). Obviously, it was hoped that the thought of a loved one or a friend left to rot would serve as an effective deterrent. For the families and friends of those not so intimidated, it was a misdemeanor to remove the body (which was to be replaced).

303. *Id.* at 497.

304. *Id.* at 498. Jefferson limited maiming to those disfigurements performed purposefully or with "malice forethought."

305. See *id.* at 505.

306. *Id.* at 506 (recounting James Madison's efforts to enact the bill). Although some have speculated that the harshness and brutality of Jefferson's original code may have repulsed some, ultimately it appears that it was not sufficiently brutal to satiate the Assembly. Madison speculated that the "rage against Horse stealers" may have contributed to the code's defeat, as apparently it was not sufficiently tough enough on such offenders. *Id.* Jefferson proposed that horse stealers be punished by three years hard labor at public works plus restitution. His notes reflected almost an acceptance of the inevitability of horse stealing—"the temptation is so great and frequent, and the facility of commission so remarkable." *Id.* at 500.

307. The offender was to be maimed or disfigured "in like sort." And "if that cannot be for want of the same part, then as nearly as may be in some other part of at least equal value and estimation in the opinion of the jury." *Id.* at 498.

(4 years) and double restitution. Jefferson did, however, allow the jury to play a limited role in sentencing one type of offender:

All attempts to delude the people, or to abuse their understanding by exercise of the pretended arts of witchcraft, conjuration, enchantment or sorcery or by pretended prophecies, shall be punished by ducking and whipping at the discretion of a jury, not exceeding 15 stripes.^{307a}

It is difficult to know why Jefferson thought juries could usefully assist in sentencing would-be witches or sorcerers but not burglars or robbers. Undoubtedly such cases would be rare, exotic, and controversial leaving the jury's role as chimerical as the crime itself. Moreover, the offense called for a delicate determination of the erstwhile witch's state of mind and the likely effect of such pretenses on the public, a doubly subjective finding best left to a jury.

Whatever his rationale, this single exception underscores the extent to which Jefferson rejected any role for the jury in deciding how to punish numerous offenders convicted of far more typical felonies. A clue revealing his attitude is found in Jefferson's proposed reforms for suicide, which at common law was punishable by forfeiture of chattels. Jefferson's code eliminated all forfeitures for suicide because the penalty failed (obviously) as a deterrent and resulted only in hardships to the suicide's family. Most important, perhaps, the public "disapprove[d] of this severity" as evidenced by "the constant practice of juries finding the suicide in a state of insanity" in order to "save" the forfeiture.³⁰⁸ Put differently, juries nullified an unpopular law, which invited the very "neglect," "perjury," and "bias" that Jefferson inveighed against in the code's preamble. In keeping with this reasoning, Jefferson wrote to Edmund Pendleton that "mercy may be the character of the lawgiver, but let the judge be a mere machine."³⁰⁹

Thus, Jefferson's capital code prized core Enlightenment values of certainty, objectivity, and reason. Harsh as it was, Jefferson's proposal revealed a cold social calculus. In its preamble he had bemoaned the caprice and emotion that characterized the present law, where crimes often went unpunished because the seemingly trivial nature of the offense did not warrant the common law's brutal sanctions. Jefferson hoped that his proportionate scheme would result in strict enforcement of laws. The jury would continue to play its ancient role of determining guilt, but the question of punishment was beyond its ken. Learned experts had already calibrated the necessary sanction to reform the offender or deter others; thus, all due "mercy" had been shown. Upon conviction, the judge's task was to apply the prescribed sanction. The people's voice had nothing further to contribute; the people had only to listen, to watch, and to heed the lesson.

307a. *Id.* at 502.

308. *Id.* at 496 (see Jefferson's gloss on "suicide").

309. PETERSON, *supra* note 11, at 126.

**“But what institution is insusceptible of abuse, in wicked hands?”:
The Attainder of Josiah Philips**

One provision in Jefferson's proposed capital code is somewhat anomalous: “No attainder shall work corruption of blood in any case.”³¹⁰ Alien to modern criminal law, a bill of attainder represented a legislature's—not a court's—judgment of guilt. Jefferson's attainder provision sought to eliminate one of attainder's “worst” features at common law: the judgment condemned not only the accused, it attainted his bloodline as well.³¹¹ Yet, whatever its purported innovation, the provision's wording also implicitly recognized the legitimacy of attainder, at least under some circumstances. And as Jefferson lavished attention on his capital code he undoubtedly reflected on his own recent role in the Commonwealth's attainder of the notorious loyalist brigand, Josiah Philips.

Philips' gang terrorized the area of Norfolk and Princess Anne counties from 1775 to 1778. Governor Dunmore initially recruited Philips, who pillaged the region in support of the loyalist cause in 1775. After Dunmore departed, Philips continued to plunder and murder less for political than personal motives, yet most often selecting “patriot sympathizers as victims.”³¹² In June 1777 Governor Patrick Henry offered a reward of 150 dollars for Philips' capture. The reward went unclaimed as the “desperadoes continued their depredations,” launching forays from their safe harbor in the Dismal Swamp.³¹³ Six months later it appeared that the problem was resolved when Philips was arrested, but he soon broke jail and continued to ransack and steal.³¹⁴

Philips' success in eluding capture depended as much on his strong local support among friends and relatives who sympathized with (and perhaps profited from) his crimes as it did on geography. The swampy region around Norfolk provided abundant shelter and made it extremely difficult to find him, especially when local residents refused to cooperate with the Commonwealth's efforts.³¹⁵

Governor Henry and his council eventually authorized 100 militia to hunt Philips and his gang. As added incentive, the council also raised the reward to 500 dollars for Philips' capture or death and permitted the captors to split any booty.³¹⁶ Apparently, this was not enough. In late May 1778, Governor Henry received a disturbing letter from Colonel John

310. 2 PTJ, *supra* note 38, at 503.

311. *See id.* at 506, n. 21. For Jefferson's definition of attainder, *see infra* note 357 and accompanying text.

312. ADELE HAST, *LOYALISM IN REVOLUTIONARY VIRGINIA: THE NORFOLK AREA AND THE EASTERN SHORE* 96 (UMI Research Press 1979). Hast spells “Philips” as “Phillips,” yet contemporary documents and other historians style it as the former.

313. WILLIAM WIRT, *PATRICK HENRY* 610-11 (Burt Franklin 1969) (1891). *See also* HAST, *supra* note 312, at 96-97.

314. *See* 2 PTJ, *supra* note 38, at 192.

315. HAST, *supra* note 312, at 97.

316. 2 PTJ, *supra* note 38, at 192.

Wilson of the Norfolk militia, who wrote that Philips' gang had ambushed and killed a militia captain less than a mile from his own home. Earlier, the slain captain had unsuccessfully tried to capture Philips but turned back because of the "cowardly disposition" of his troops.³¹⁷ A similar "fate awaited "others," Wilson warned, unless the Commonwealth "remov[ed] . . . the relations and friends of those villains."³¹⁸ In closing, Wilson concluded that there remained only one "means by which we can root these wretches from us": namely, the Commonwealth must "distress [Philips'] supporters."³¹⁹

The distressing letter propelled the government into action and Thomas Jefferson, who most likely "instigated" Wilson's letter as a necessary catalyst, assumed a leading role. The governor's council instructed Henry to send regular troops against Philips and forward Wilson's letter to the legislature.³²⁰ On May 28 the Assembly met as a committee of the whole to discuss Wilson's letter. The committee issued a resolution, in Jefferson's hand, recommending that if Philips failed to surrender by a specific date in June he should be "attainted of high treason." Jefferson was then named to chair a committee of three persons charged with drafting a bill of attainder. Ever efficient, Jefferson submitted a draft that same day.³²¹ The bill was read a second time on May 29 and passed by the lower house on May 30. Jefferson immediately carried it to the Senate, which also approved the bill of attainder later that day.³²²

The bill of attainder is a remarkably subtle work.³²³ The first paragraph a long "whereas" clause, represents the Assembly's findings of Philips' guilt and its justification for an attainder. Philips and his "confederates" "had levied war against this commonwealth . . . , committing murders, burning houses, wasting farms, and doing other acts of hostility[.]"³²⁴ Unable to bring him to justice since 1775, the Assembly also found that Philips could not be "outlaw[ed]" according to the "usual

317. Letter by Colonel John Wilson to Gov. Patrick Henry (20 May 1778), in WILLIAM WIRT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 217-19 (James Webster 1818).

318. *Id.* at 218.

319. *Id.* at 218-19.

320. Boyd concurs with historians that Jefferson probably "instigated" Colonel Wilson's letter, quoted above. 2 PTJ, *supra* note 38, at 192. Wilson's suggestion that families sympathetic to Philips be removed was both expensive, since the families were entitled to compensation, and bloody, as military force would probably be necessary.

321. *Id.* at 189-91 (Jefferson's draft).

322. *Id.* at 193. Boyd relies on W. P. Trent, *The Case of Josiah Philips*, 1 AMER. HIST. REV. 444, 447 (1896) (recounting the legislative history).

323. *The Statutes at Large*, *supra* note 153, at 9: 463-64.

324. The bill of attainder also contains a provision, discussed below, that permitted those accused of being Philips' "associates" to prove their innocence by showing that they were not in league with him after July 1, 1777, the date on which the "murders" and "devastations" began. It seems most likely that the July 1 date represented a statute of limitations of sorts rather than a finding of fact. Philips had been active since 1775. Moreover, Jefferson's draft left the dates blank; the Assembly later inserted the date. See 2 PTJ, *supra* note 38, at 190 (draft), 193.

forms and procedures of the courts of law.” The attainder provided that Philips, as well as his “associates and confederates,” had until the last day of June 1778 to surrender before any one of a number of Commonwealth officials so that they might stand trial “for the treasons, murders, and other felonies by them committed.” After July 1, 1778 the attainder carried harsh consequences:

[T]he said Josiah Philips, his associates and confederates, as shall not so render him or themselves, shall stand and be convicted and attainted of high treason, and shall suffer the pains of death, and incur all forfeitures, penalties and disabilities, prescribed by the law against those convicted and attainted of high treason; and that execution of this sentence of attainder shall be done by order of the general court, to be entered so soon as may be conveniently after notice that any of the said offenders are in custody of the keeper of the publick jail.³²⁵

In the interest of domestic self-preservation, the attainder authorized the “good people of this commonwealth” to pursue and to slay Philips and his gang members or, alternatively, “deliver them to justice.” Almost as an afterthought borne perhaps of fears of indiscriminate killings, the act provided that those “so slain be in arms at the time, or endeavoring to escape being taken.”³²⁶

Some months later, Philips and several accomplices were arrested and held for trial. They were hanged in late November 1778, but the death sentence was not based on the attainder. Rather, a grand jury had indicted Philips for highway robbery. According to the indictment, on May 9, 1778 Philips and his “associates,” while acting “with force of arms,” stole 28 men’s felt hats (worth 20 shillings each) and a ball of twine (valued at 5 shillings) from James Hargrove. The indictment named six witnesses to the crime, including Hargrove. Later that very day, Philips pleaded not guilty before the General Court, which immediately impaneled a trial jury that heard the evidence and found him guilty of robbery as charged. In short, Philips was indicted by a grand jury and tried by a petit jury on the same day. One week later the court sentenced Philips to death for the crime of robbery. On November 23, 1778, Philips and some of his accomplices were hanged to death near Williamsburg.³²⁷ In some ways, Philips’ demise is truly anticlimactic. The almost hysterical tone of Colonel Wilson’s letter and the Assembly’s rapid response with an attainder that recounted Philips’ treason, murders, and rapine is seemingly difficult to reconcile with his death sentence for robbing felt hats.

Yet the Philips attainder is significant for several reasons. Obviously, the attainder starkly conflicted with Revolutionary Virginia’s enthrallment with juries and the rights of the accused. It is not quite good enough to point out, as some have, that Virginia’s Declaration of Rights contained no prohibition against attainders: those attainted clearly had a constitutional

325. *The Statutes at Large*, *supra* note 153, at 9: 464.

326. *Id.* at 9: 464.

327. See 2 PTJ, *supra* note 38, at 193. The grand jury proceedings, the indictments, and the trial “record” are reprinted in WIRT, SKETCHES, *supra* note 317, at Appendix, Note C, xi-xii.

right to jury trial.³²⁸ Moreover, if, as Jefferson claimed, the attaint was intended primarily to effect Philips' arrest³²⁹—a trial always being contemplated—then why not simply indict Philips and issue an arrest warrant?³³⁰

The answer, however, may not relate to Philips himself, because authorities could not have doubted the ease with which he could be convicted once caught. Rather, the challenge was to suppress the strong local support that had protected the Philips' gang for three years. Or, as Colonel Wilson had pointedly put the matter, the Commonwealth must "distress" Philips' supporters. On its face, the attainder did just that. It provided a literal license to kill anyone in arms with Philips or who otherwise assisted his "escape" after the 30-day "safe harbor" expired on July 1. Moreover, after July 1 local authorities could imprison his "associates and confederates" who then stood attainted (i.e., convicted) of treason and faced execution. Either as a safety valve to guard against abuses or perhaps as a vent to exercise mercy, the attainder permitted those condemned to death to prove that they were not, in fact, Philips' associates and confederates after July 1, 1777 (a statute of limitations of sorts). A petit (trial) jury was to determine this issue of fact, "according to the forms of the law." The accused bore the burden of proof; if the jury "found against the defendant," execution was to follow. The attainder thus outlawed anyone with the temerity to assist, to protect, or to shelter Philips or his marauders.

Jefferson never repudiated, much less apologized for, the Philips attainder, although the episode periodically flared up in later decades.³³¹ Jefferson, Patrick Henry, and Edmund Randolph once traded broadsides about the propriety of Philips' attainder, a debate impeded by their own selective memories of what had occurred and their roles in it.³³² From the vantage point of 1803, St. George Tucker, an influential judge and legal authority, excoriated the attaint because it patently violated the principle

328. 2 PTJ *supra* note 38, at 192. Boyd noted that Virginia did not specifically proscribe attainders, but that leading legal authorities had roundly condemned them. *But see* ROBERT P. SUTTON, *REVOLUTION TO SECESSION* 32 (University Press of Virginia 1989) (asserting that leading Virginians were "sympathetic" to attainders and that Philips' raids played a role in omitting their mention from the state's bill of rights). Merrill Peterson is also forgiving, of Jefferson asserting that the attainder "never actually took effect" and that Virginia used the ancient device only once, compared to nearly 60 attainders in New York and the 490 passed in Pennsylvania. PETERSON, *supra* note 11, at 131-32.

329. *See* Jefferson's correspondence with William Wirt which is reproduced in WIRT, *SKETCHES*, *supra* note 317, at Appendix C, ix-x.

330. Jefferson was well aware of this standard technique. Indeed, the Committee of Revisors had incorporated it into Bill No. 103, "A Bill Directing the Method of Proceeding against, and Trying Free Persons Charged with Certain Crimes." 2 PTJ, *supra* note 38, at 614.

331. *See* PETERSON, *supra* note 11, at 131. *See also* Jefferson's comments later in life to Wirt, reproduced at WIRT, *SKETCHES*, *supra* note 317, at Note C, ix-x.

332. 2 PTJ, *supra* note 38, at 191. Ten years later Randolph attacked Jefferson for the attainder in what Boyd describes as an "amalgam of errors," which seems surprising since Randolph was the attorney general who prosecuted Philips in 1778. Since Jefferson did not respond to Randolph until 1815, it appears that no one else took the incident very seriously either. Boyd also relates Henry's misty recollections and correspondence between Jefferson and William Wirt. Wirt was writing Henry's biography at about this time.

of separation of powers. Tucker also hailed Philips' eventual trial as a triumph of judicial independence, revealing no concerns about the rapidity of the proceedings.³³³ Finally, a distinguished historian concluded that the attainer was, to say the least, [a] "surprising" entry in Jefferson's record of achievements.³³⁴

The attaint must be judged, however, on its own terms.³³⁵ Philips had murdered and pillaged in the tidewater for over three years. Drafted by Jefferson, the attainer sailed through both the council and legislature with Henry's approval. Philips' guilt and the appropriate punishment were clear to all. No evidence was necessary beyond Wilson's letter and common knowledge.³³⁶ In some ways, then, the attainer reflects Jefferson's approach to his proposed criminal codes: Courts and juries should be granted discretion unless reason points to a clear sensible resolution. Philips was guilty and the times demanded immediate action. Neither the courts nor juries had any useful role to play beyond those set forth in the attainer. Years later, Jefferson saw the attainer as a useful instrument in very limited circumstances:

The occasion and proper office of a bill of attainder is this; when a person charged with a crime, withdraws from justice, or resists it by force, either in his own or a foreign country, no other means of bringing him to trial or punishment being practicable, a special act is passed by the legislature, adapted to the particular case; this prescribes to him a sufficient term to appear and submit to a trial by his peers, declares that his refusal to appear shall be taken as a confession of guilt, as in the ordinary case of an offender at the bar refusing to plead, and pronounces the sentence which would have been rendered on his confession or conviction in a court of law. No doubt that these acts of attainder have been abused in England as instruments of vengeance by a successful over a defeated party. But what institution is insusceptible of abuse, in wicked hands?³³⁷

Jefferson's harshest critics berated him for traducing the separation of powers and proceeding on "vague reports," but no one suggested he was wrong or that a jury could have arrived at a better solution.³³⁸ Philips' guilt was common knowledge. His refusal to face trial merely confirmed this fact.³³⁹

333. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 293 (1803; reprint, Paul Finkelman and David Cobin, eds., The Lawbook Exchange 1996).

334. This is Boyd's reaction to the Philips affair. 2 PTJ, *supra* note 38, at 192.

335. Peterson is surprisingly defensive regarding the Philips' attainer, concluding that it "never actually took effect" and contrasting the single instance of an attainer in Virginia with its extensive use elsewhere. PETERSON, *supra* note 11, at 131.

336. It is not clear, however, just how much Jefferson or the Assembly knew about the details of Philips' activities. Jefferson left blanks in the draft bill for Philips' given name (Josiah), which were later filled in by Attorney General Edmund Randolph. 2 PTJ, *supra* note 38, at 193 n. 1.

337. WIRT, SKETCHES, *supra* note 317, at C, ix-x.

338. 2 PTJ, *supra* note 38, at 191. In 1788 Randolph blasted Jefferson and Henry for hastily pushing the attainer through the legislature based only on "vague reports." Randolph never suggested they were wrong. Tucker's criticisms related entirely to judicial independence and separation of powers.

339. In the passage quoted at *infra* note 337, Jefferson spoke of a refusal to appear as a "confession of guilt," yet in his Plan for the revisal of Virginia's law Jefferson equated "standing mute" with a plea of not guilty. 2 PTJ, *supra* note 38, at 325.

Indeed, Tucker's cavil about the violation of separation of powers seems almost trite when one considers that Philips was indicted by a grand jury, tried by a petite jury, and convicted all on the same day—for "high-way robbery."

"CROSS AND PILE" AND THE SPIRIT OF '98: JEFFERSON'S PROPOSAL TO ELECT JURORS

One revealing motif recurs in Jefferson's later writings about juries: in what sense is a jury's verdict superior to a coin flip? He clearly preferred the jury's homespun common sense to warped decisions by biased judges, yet Jefferson ultimately valued science and reason over the chance of the coin or a jury's homely wisdom. In 1798, however, Jefferson wrestled with a novel idea that harmonized democratic principles and the political cast which law and the courts had assumed since the Revolution: jurors should be held accountable through elections.

Following his deep involvement in Virginia's Revolutionary law revision, Jefferson had little opportunity or motive to dwell on trials or the role of juries. A tumultuous term as a wartime governor included the vicissitudes of a British invasion, his near capture by Tarleton's dragoons, an impeachment, and ultimate vindication by the legislature.³⁴⁰ In 1784 Congress named Jefferson to serve as a minister plenipotentiary to France.³⁴¹ While in France Jefferson published *Notes on the State of Virginia*, a wide-ranging set of essays intended to familiarize the old world with the new world, especially Virginia.³⁴² Topics included geography, climate, population, agriculture, culture, and government.

In surveying Virginia's legal system, Jefferson recounted the revisors' work with some care and immodestly paid special attention to the "most remarkable alternative proposals," including his plans for capital punishment and for public education.³⁴³ After describing the Virginia court system, he offered several salient observations about the respective roles of judge and jury. It was "usual" for the jury to decide all questions of fact and defer questions of law to the magistrates (judges), yet such deference clearly fell within the jury's "discretion." In cases involving "public liberty" or where the judges may be biased, "the jury under take to decide both law and fact." Acknowledging that the jury was ill-equipped to decide delicate or technical questions of law, Jefferson nonetheless calculated that the damage caused by a jury's "mistake" would be limited to discrete cases whereas biased judges could install a bad rule into a "regular and uniform system." On balance, Jefferson preferred the hazards of "cross and pile" (a coin flip³⁴⁴) to decision by "a

340. PETERSON, *supra* note 11, at 166-240.

341. *Id.* at 286.

342. JEFFERSON, *NOTES ON VIRGINIA*, *supra* note 202.

343. *Id.* at 144-46.

344. *Id.* at 130 n. 2.

judge whose mind is warped by any motive whatever[.]" yet the common sense of "12 honest men" trumped the arbitrariness of a coin.³⁴⁵

The passage has two-fold significance. First, it recognizes the sweeping power of the jury to decide all questions of law and fact, a hallmark of the old-style trial.³⁴⁶ Second, it constituted a half-hearted endorsement—at best—of jury decision-making. Undoubtedly juries would err, but their mistakes were preferable to the mischief wrought by "warped" judges. Yet the cross and pile, while completely arbitrary, was also superior to biased judges—a jury offered only a "better chance of a just decision." Common sense certainly had virtues but also limitations as well. Especially troubling was the extent to which a jury might be waylaid by spellbinders such as Patrick Henry, who played upon its emotional heartstrings and, like Homer's sirens, seduced the jury from the call of reason and duty.

In 1798 Jefferson's abstractions about jury decision-making gave way to urgent rethinking amidst the political crisis wrought by the "quasi-war" with France. The broad outlines of the story are well-known.³⁴⁷ Following the adoption of the Constitution, political difference over the Hamiltonian economic system deepened and hardened when the French Revolution precipitated war between France and Britain. By 1798 the differences had congealed into the First American Party System. The Federalists championed close ties with Britain, both military and commercial, and endorsed Hamilton's designs for a strong federal government dedicated to a thriving national economy. The Democratic Republicans led by Jefferson and James Madison, leaned more toward the French, opposed dependence on Britain, and vigorously criticized Hamilton's economic system. The political winds strongly favored the Federalists in the spring of 1798. News of the XYZ Affair and France's arrogant demand for bribes as a condition for negotiating treaties triggered a costly, bloody naval conflict between the United States and France that teetered on the brink of a full-fledged war.³⁴⁸ Feeding off the war fever, the Federalist Congress passed legislation that authorized the expansion of the army and navy as well as taxes to fund them. To ensure wartime unity on the home front, the Federalists also enacted the now-infamous Alien and Sedition Acts.³⁴⁹

345. *Id.* at 130. The complete quote reads: "In truth, it is better to toss up cross and pile in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decisions, than the hazards of cross and pile."

346. See *supra* note 44 and accompanying text.

347. See ELKINS AND MCKITRICK, *supra* note 125, at ch. 2 (the economic differences between the Hamiltonians and the Jeffersonians), ch. 7 (the origins of political Partisanship at the federal level), and 513-28 (the presence of identifiable parties in 1796). See also JAMES R. SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* (Yale University Press 1993).

348. See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801* (Scribners 1966).

349. The acts are described at SHARP, *supra* note 347, at 177.

The Democratic-Republican Party, guided by Jefferson, opposed both the push toward war and the misguided Federalist legislation. Their response was hampered, however, by Jefferson's status as vice president under a Federalist president, John Adams. Working with Madison and other conduits, Jefferson nonetheless helped push the Kentucky (November 1798) and Virginia (December 1798) Resolutions which protested Federalist policy, especially the Sedition Act. Although he fervently believed that in the longer run the war fever would run its course,³⁵⁰ other measures had to be taken in the meantime to blunt the Federalist attack. Federal prosecutors used both the common law and the Sedition Act to suppress opponents of Federalist policies, including politicians and newspaper publishers. Grand juries returned indictments against Democratic-Republican editors in New York and Philadelphia.³⁵¹ In early November Jefferson reported to Madison that their political ally, the colorful Mathew Lyon of Vermont, had been indicted, convicted, and sentenced to four months imprisonment under the Sedition Act for uttering words that amounted to "only general censures of the proceedings of Congress and of the President."³⁵²

Recognizing that political battles would continue to be fought in courts, Jefferson suggested legislation that explicitly and overtly acknowledged the political character of courts and legal proceedings since the 1760s: namely, he proposed that jurors be elected by voters.³⁵³ Jefferson enclosed the draft of his "petition" from the citizens of the commonwealth in a letter of late October to Madison.³⁵⁴ The details of the proposal need not detain us. Suffice to say, Jefferson suggested that jurors be elected from districts that coincided with his still-born plan for public education. Grand jurors and federal juries were to be selected by lot.³⁵⁵

Of greater interest are Jefferson's justifications for his radical suggestion. History taught the "mortifying truth" that those in power are prone to "pervert" their authority for "the attainment of personal wealth and dominion and to the utter oppression of their fellow-men."³⁵⁶ The new republic was founded upon the principle that "the people themselves are the safest deposit of power, and that none therefore should be trusted

350. 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, 1068 (James Morton Smith, ed., Norton 1995).

351. *Id.* at 1068 (indictments of Benjamin Franklin Bache of Philadelphia and John D. Burk of New York).

352. Letter by Jefferson to James Madison (3 November 1798) *in id.* at 1079.

353. The petition is reproduced at *id.* at 1076-78 and at 7 THE WRITINGS OF THOMAS JEFFERSON, 284-87 (Paul L. Ford, ed., Putnam 1896). There are slight variations in wording. For convenience, I have relied upon Smith.

354. Letter by Jefferson to Madison (26 October 1798) *in* 2 REPUBLIC OF LETTERS, *supra* note 350, at 1075-76.

355. *Id.* at 1077-78. The proposal, while novel to Virginia, was probably based on the practice followed in parts of New England. *See supra* note 14.

356. 2 REPUBLIC OF LETTERS, *supra* note 350, at 1076.

to others which they can competently exercise themselves.”³⁵⁷ Where it was deemed necessary to rely on public officials, such “agents” were elected by the people themselves or appointed by those so elected. In the judicial branch, the people shared power with judges. Specifically, the people

sensible that they were inadequate to difficult questions of law, these were generally confided to permanent judges, but reserving to juries the decision both of law and fact where in their opinion bias in the permanent judge might be apprehended, and where honest ignorance would be safer than perverted science: and reserving to themselves also the whole department of facts, which constitutes indeed the great mass of judiciary litigations[.]³⁵⁸

The process, however, had led to a “great inconsistency”: although “competent” to elect their legislatures and even the “highest executive” and to decide all issues of fact in litigation, the people have little authority over those appointed to serve on juries. Rather, jurors were selected by “officers, dependent on the executive or judiciary bodies.”³⁵⁹ Nor had the officers used their powers well. Even in the ordinary cases that dominated the commonwealth’s court calendars, juries were “habitually taken . . . from among accidental bystanders and too often composed of foreigners attending on matters of business, and of idle persons collected for purposes of dissipation[.]” Yet the greater danger resided in “cases interesting to the powers of the public functionaries,” where jurors were “specially selected” such that their “ignorance or dependence renders them pliable to the will and designs of power[.]”³⁶⁰ In short, a “germ of rotteness” threatened to destroy the integrity of trial by jury.³⁶¹ Other states guarded against such abuses by electing “select men” who in turn appointed jurors. Virginia must act to “circumscribe in time the spread of that gangrene, which sooner than many are aware, may reach the vitals of our political existence.”³⁶²

Although the General Assembly never acted on the petition, it nonetheless opens a revealing window into trial practice in the 1790s. Again we see the nature of the old-style trial in which the jury had complete suzerainty over the facts and the power, when it saw fit (or just felt like it), to decide questions of law as well. Jefferson, however, hardly paints a compelling portrait of Virginia’s juries. In ordinary cases, the jury

357. *Id.* at 1076.

358. *Id.* at 1076 n. 2. The quoted language in the first clause was suggested by Madison and inserted by Jefferson in a later draft. Jefferson’s original draft read in pertinent part: “sensible that they were inadequate to difficult questions of law, these were in ordinary cases, confided to penannent judges, but reserving to juries only, extraordinary cases where a bias in the permanent judge might be apprehended. . . .” *Id.* at 1076.

359. *Id.* at 1077.

360. *Id.* at 1077.

361. See 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 353, at 285 (which uses “rotteness”). Smith’s edition of Jefferson’s correspondence reports the word as “rotteness.” 2 REPUBLIC OF LETTERS, *supra* note 350, at 1077.

362. 2 REPUBLIC OF LETTERS, *supra* note 350, at 1077.

is swept together from among “accidental bystanders,” “foreigners,” and the “dissipate[ed].” In politically charged cases (or those otherwise of “interest”), the jury might be specially struck to ensure its “ignorance or dependence” such that the verdict may be more easily manipulated “to the will and designs of power.” In short, Jefferson’s petition caricatured juries far differently than the “twelve honest men” he had extolled in *Notes on Virginia*.

Most important, the petition also reveals Jefferson’s candid reflections about trial by jury. The “great inconsistency” that justified the election of jurors is also a frank recognition that litigation was as suffused with politics as the workings of the executive and legislative branches. Put differently, jury verdicts, legislative acts, and executive action were on the same plain. Curiously, however, Jefferson did not advocate the election of judges. “[D]ifficult questions of law” demanded “permanent judges.” When revising Virginia’s laws, Jefferson preferred clear rules based on reason. Biased judges had to be checked precisely because they “perverted science.” Yet, in the end one almost senses a note of despair in Jefferson’s proposed solution to elect jurors. Decades earlier he had supported a broader use of juries in equity and admiralty and harbored no apparent objection to their sweeping authority over the “facts,” although Jefferson assumed—or perhaps simply hoped—that juries would normally defer questions of law to judges, except where the magistrates might be biased. His preference for a jury’s “honest ignorance” over a biased judge’s “perverted science” is a limited endorsement, at best, of common sense and the common man. In sum, he preferred the democratic solution but only in default of reason.

CONCLUSION

The Virginia experiment marked the apex of trials as political events in American history. Building on the rhetoric and ideology of the resistance movement, the commonwealth’s law reforms institutionalized juries throughout the legal system. The expansion of juries into admiralty and equity as well as their use in public administration and criminal sentencing responded to perceived British abuses yet also served a prime Revolutionary purpose by legitimating official decision-making through popular participation.

The common law jury was the perfect device for encompassing and giving voice to the people’s participation. Unlike “committees or conventions” that smacked of radicalism and expedience, the jury had deep roots and an impeccable pedigree, legally, historically, and politically. Moreover, the free-form nature of the old-style trial surely maximized and emphasized the jury’s power to decide issues as it saw fit, virtually unfettered by formal presentations of evidence or technical legal instructions. Yet this very broad authority inevitably injected caprice, emotion, and other irrational factors into the jury’s decision-making.

Jefferson himself embodies the divided mindset toward juries. His writings eloquently praise the manifold virtues of trial by jury for the "wretched criminal," yet also reflect troubled doubts about the "honest ignorance" of those very jurors. Nor was Jefferson's dilemma limited to abstractions. As a reformer, Jefferson designed much of the Virginia experiment, yet, as we have seen, his proposed criminal code embodies the triumph of reason and certainty over jurors' "honest ignorance." For crimes tied to the cause of independence and the war effort, Jefferson supported juries because they legitimated the dispensing of punishment or mercy. But for ordinary crimes, Jefferson saw no appropriate role for juries in sentencing. And the attainder of Josiah Philips and his "associates," drafted in Jefferson's own hand, chillingly illustrates that juries were not always needed to adjudicate guilt.

Nullification in the twenty-first century, then, is a shadowy vestige of this history. A theory of nullification that explicitly recognizes the jury's political agency rests uncomfortably with the modern conception of the trial and the corresponding role of juries today. The modern trial, conceived as a search for "the truth" conducted under a regime of rules that tightly regulate what the jury may consider is a very different creature than the old-style trial of the eighteenth-century. The Virginia experiment reveals that the founding was not, as Amar suggests, a "missed opportunity." Rather, the commonwealth eagerly embraced the opportunity, took it to its very edge, but then pulled back. The problem then, as now, was one of political (legal?) accountability or, put differently, the difficulty of reconciling democracy with a rank ordered social and legal system.³⁶³ Jefferson's solution of electing jurors had the virtue of explicitly, if not dramatically, underscoring the jury's political capacity, but the suggestion came too late. Rather, the law developed a radically different conception of trial that closely cabined jury decision-making and denied, or, more accurately, publicly disavowed, any political function. In short, the modern trial solved the problem by denying it exists and pretending that nullification plays no role.

When the Supreme Court again considers trial rights, civil and criminal, in light of the founders' understanding,³⁶⁴ it will find a record of soaring creativity, daring imagination, and inscrutable ambiguity. More important, today's Court will confront the implications of a drastically different conception of trial by jury.

363. JOYCE APPLEBY, THOMAS JEFFERSON 3, 39-40 (Henry Holt & Co. 2003).

364. *Crawford v. Washington*, *supra* note 5.