



COLONIAL CRIMINAL LAW AND PROCEDURE:
THE ROYAL COLONY OF NEW JERSEY 1749-57

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The criminal law and procedure of the colonial courts is largely shrouded in mystery. New Jersey is one of the most mysterious colonies. Princeton historian Douglas Greenberg has remarked: “We know very little about the pattern of criminal justice in eighteenth-century New Jersey.”¹ What research exists about “patterns of criminal justice” in other colonies has focused largely on substantive criminal law—e.g., showing the number of indictments, convictions, and acquittals of various criminal offenses.² We know very little about the trial process. Were the trials like those in the Old Bailey in England? Did most defendants have counsel? Was the king usually represented by counsel? Were juries used? Always, often, never? What kind of evidence was offered? Did the pre-trial proceedings include, as in England, questioning by a magistrate? If so, were the answers given by defendants admissible in evidence or was there already a recognition that being questioned by a magistrate carried too great a risk of compulsion? What other rules of evidence governed the proceedings?

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¹ Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, in 1 THE COLONIES AND EARLY REPUBLIC 231, 245 (Eric H. Monkkonen, ed.) (1991).

² See, e.g., David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, in 1 THE COLONIES AND EARLY REPUBLIC 105 (Eric H. Monkkonen, ed.) (1991); See also Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740*, in 2 THE COLONIES AND EARLY REPUBLIC 677 (Eric H. Monkkonen, ed.) (1991).

About four years ago I discovered, by way of an invaluable research assistant,³ the records of the New Jersey Court of Oyer and Terminer from 1749-62.⁴ The records, located in the Princeton University Library, are handwritten in a beautiful cursive that is sometimes difficult to decipher. Thus I was glad to discover that the New Jersey Genealogical Society has been for several years gradually printing these records in the *Genealogical Magazine of New Jersey*.⁵

When I began my research, the Society had printed 296 of 474 total pages, which included the years 1749-57. I used those pages for my sample of cases.⁶ The records often use abbreviations and non-modern spelling. When I quote from the records, I will reproduce the records as they are written, without use of the annoying "sic." I will, however, "translate" any abbreviations that may be unclear.

From here, I proceed in the following manner. First I will provide some general background about the court of Oyer and Terminer. Next, I will describe in detail two of these cases in full and will note what hard evidence we can draw from these records, as well as some reasonable inferences and one or two rank speculations. I will draw on a few other cases to fill out the discussion. Then I will summarize what these records tell us about the state of criminal law and procedure in New Jersey in the middle of the eighteenth century, comparing this picture with Goebel and Naughton's survey of the New York colonial courts⁷ and with John Langbein's study of the Old Bailey records of 1754-56.⁸ Finally, I will discuss the inferences we can draw about the criminal law and procedure from the cases in my sample.

I. Background

The Court of Oyer and Terminer dates back to the rule of Henry II, great-grandson of William the Conqueror. Itinerant justices heard the pleas of the Crown in the various counties in England, largely for the purpose of emptying the jail of persons being held for trial.⁹ The official name of the court, even as late as the eighteenth century in New Jersey, was the Court of Oyer and Terminer and General Gaol Delivery.¹⁰ The first Oyer and Terminer court in New Jersey was established

³ I asked Marie Borzo, my research assistant at the time, to find out whether juries were routinely used in colonial New Jersey trials and whether defense counsel appeared very often. She set off to find evidence and returned with 474 pages of copies of original eighteenth century trial records!

⁴ RECORDS OF THE NEW JERSEY COURT OF OYER AND TERMINER, 1749 -1762 , Manuscript No. MS. 1174 674 Q in Princeton University Library. I will cite to this collection as "OYER AND TERMINER" throughout the paper.

⁵ I will cite to the printed version of the records by volume and page of the *Genealogical Magazine of New Jersey* as GMNJ

⁶ If a case was set for trial in the printed pages, I followed it to its conclusion in the handwritten records.

⁷ See JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* (1970).

⁸ John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983).

⁹ See, e.g., 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 134 (2d ed. 1898).

¹⁰ See OYER AND TERMINER 36, 70 GMNJ 44 (1995).

by order of the governor on February 27, 1671.¹¹ From my examination of the records, it is clear that the Court of Oyer and Terminer functioned as the court of general jurisdiction in serious criminal cases—i.e., those which required an indictment or presentment for the Crown to proceed. Less serious cases were heard in New Jersey by justices of the peace.¹² A 1677 statute provided that “any one who should draw strong drink for the Indians was to be brought before some justice of the peace and fined by him.”¹³ Other examples of offenses that, by statute, justices of the peace could punish included “profane swearing, Sabbath breaking, drunkenness and the like.”¹⁴

The New Jersey Supreme Court also had jurisdiction in criminal cases during the eighteenth century.¹⁵ But a random sample of fifty New Jersey Supreme Court cases from 1749-62 revealed no criminal cases.¹⁶ To be sure, an action to recover property taken during a trespass, and there were several of those, describes conduct that could be charged as larceny. Yet in all these cases, the issue was recovery and not punishment. Moreover, in the Oyer and Terminer records, cases of this kind are labeled “larceny” rather than “trespass.” Thus, it seems relatively clear that while the Supreme Court had criminal jurisdiction during this period, criminal charges of the time were routinely brought in the Court of Oyer and Terminer.

My sample of Oyer and Terminer cases from November 1749 to May 1757 includes forty-nine trials, with the description of the trial proceeding missing in one case.¹⁷ These trials comprised fifty offenses; in one case, the jury convicted of a lesser offense and acquitted of the greater.¹⁸ In one trial, the indictment specifies “aiding” as an alternate theory of liability for the substantive offense of counterfeiting, with which the defendant was also charged, but I counted this only as counterfeiting.¹⁹

As my sample covers seven and one-half years, forty-nine criminal trials may not sound like very many, an average of six and a half trials per year. But remember that the colonies were sparsely populated. In 1745, the total number of inhabitants in New Jersey was 61,403, including 4,606 slaves.²⁰ During this period

¹¹ 2 EDWARD QUINTON KEASBEY, *THE COURTS AND LAWYERS OF NEW JERSEY, 1661-1912*, at 475 (1912).

¹² *Id.* at 573.

¹³ *Id.* at 567.

¹⁴ *Id.*

¹⁵ 1 KEASBEY, *supra* note 11, at 444.

¹⁶ See 68 GMNJ 34-42; 67-74 (1993); 67 GMNJ 137-144 (1992).

¹⁷ I am assuming that a trial occurred in *King v. John Daughterty and John Chester*, May 13, 1754, OYER AND TERMINER 176, 75 GMNJ 79 (2000). No mention is made of an indictment being returned, the defendants being arraigned, a trial, or a verdict. The only record that appears is the sentencing. It is possible, of course, that the sentencing followed a guilty plea. I chose to assume it was a trial because it resulted in a death penalty without benefit of clergy. While a defendant could decide to plead guilty to a capital crime knowing a death penalty was going to follow, it strikes me as unlikely.

¹⁸ See *King v. Robert Whitehead*, May 23, 1752, OYER AND TERMINER 61, 71 GMNJ 88 (1996).

¹⁹ See *King v. David Brant*, July 11, 1750, OYER AND TERMINER 19, 69 GMNJ 94 (1994).

²⁰ THOMAS L. PURVIS, *COLONIAL AMERICA TO 1763*, at 151, tbl.5.28 (1999).

London alone had a population of 600,000 to 700,000.²¹ One would thus expect the crime rate, all other things being equal, to be roughly one-tenth that of London. Indeed, the colonial crime rate should be even lower than that, as far greater opportunities to pick pockets and commit larceny would exist in a metropolis like London than in a rural, agrarian society like eighteenth century New Jersey.

Of course, all things were probably not equal. To begin, we know little about attitudes of the colonists toward prosecuting crime as compared to attitudes of Londoners. Moreover, in the early to mid seventeenth century, “[t]ransportation [to America] replaced death as the sanction for grand larceny” and other serious felonies.²² As larceny was rampant in London at the time, presumably a lot of larcenous types were shipped to America. As for those who came voluntarily, the prospect of life in an alien and dangerous land might appeal disproportionately to those who were maladjusted or mentally ill. Even the trip was an ordeal. John Adams’s trip from England to Boston in 1788, described as a “rough crossing,” took 58 days.²³ At a minimum, those who crossed the rugged seas of the North Atlantic in a wooden ship were likely to be non-conformists and adventuresome. Thus, we can draw no solid conclusions from the fact that the Oyer and Terminer records contain but forty-nine trials in seven and one-half years.

John Langbein drew a sample from criminal trials in the Old Bailey during four terms from October 1754 to April 1756.²⁴ Langbein’s sample included 171 trials or 85 per year. While too many variables affect the rate of trial to draw any supportable conclusions, it is nonetheless interesting that the rate of trial of serious offenses in London was about thirteen times that in New Jersey, which is pretty close to the difference in the two populations—London had roughly ten times the population of New Jersey. I will draw comparisons with Langbein’s study throughout the paper. Langbein’s records include testimony from witnesses, sometimes in “compressed summaries” but by the 1730s “some reports begin to narrate questions and answers in a fashion that resembles modern stenographic trial transcripts.”²⁵ The New Jersey Oyer and Terminer records, in contrast, list only the names of witnesses who testified.

A key figure in the New Jersey Oyer and Terminer records is Samuel Nevill, Justice of the New Jersey Supreme Court, who presided over almost all of the Oyer and Terminer sessions. By statute, the Supreme Court justices were commissioned to sit as judges of Oyer and Terminer. Why Justice Nevill was the judge who performed this duty almost exclusively during the period 1749-62 is not known although one writer noted that he was the “second Judge of the Supreme

²¹ <http://www.demographia.com/db-lonuza1680.htm> (last visited [DATE]).

²² Langbein, *supra* note 8, at 39.

²³ DAVID McCULLOUGH, JOHN ADAMS 389 (2001).

²⁴ Langbein, *supra* note 8, at 8, 41-42.

²⁵ John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 270 (1978). This Langbein study drew from Old Bailey records from the mid-1670s to the mid-1730s. *Id.* at 267.

Court” after the Chief Justice.²⁶ Perhaps the “second judge” was charged with Oyer and Terminer duties. Justice Nevill “had received a liberal education” in England; “and previous to his coming to America, had been editor of the London Morning Post.”²⁷ He “inherited large tracts of land from his sister” and “came to New Jersey in May, 1736.”²⁸

After presiding over more than twenty-five terms of Oyer and Terminer between 1749 and 1762, Judge Nevill was absent from the court during May and June 1762, “presumably due to failing health Mr. Nevill returned to Court for the October Term 1762 held in Morris County, the last session recorded in this 474 page manuscript.”²⁹ He died in 1764, in the words of a nineteenth century writer “leaving behind him a name, unsullied by the slightest stain, and which deserves to be held in grateful remembrance.”³⁰

II. Illustrative Cases

As I noted earlier, the records I found are merely minutes of the case that contain no testimony, no record of counsel’s arguments, and no record of the judge’s instructions.³¹ I reproduce below a case in its entirety.

Morris County - September Term 1752

The Grand Jury came into Court and being called over gave in the two following indictments and presentment and then withdrew:

ELISABETH GOBLE. Indictment for murdering a bastard child. Defendant being charged with her indictment pleaded not guilty and put herself upon God and her country. Ordered that the trial come on in the afternoon. . . .

ELISABETH GOBLE. On an indictment for murdering a bastard child at issue. Jury appeared and were qualified as follows: Gershom Mott, Joseph Hinds, Peter Cun-dit, John Brookfield, Walter Brown, David Brown, Joseph Potter, Nathaniel Carter, Robert Johnston, John Stiles, Joseph Stiles and John Biglow. Attorney General in behalf of the Crown; Mess’rs Ogden & Kearney for the defendant. Evidences for the Crown: Mary Rogers, Jemima Stay, Phebe Cole, Robert Arnold and Elisabeth Arnold; evidences for the defendant, Doctor Elijah Gillett. After the charge the Jury withdrew to consider of their verdict with a constable sworn to keep them. In about an hour's time the Jury came into Court and said they had found

²⁶ RICHARD S. FIELD, *THE PROVINCIAL COURTS OF NEW JERSEY: WITH SKETCHES OF THE BENCH AND BAR* 155 (Jos. M Mitchell Law Books, 1962) (1849).

²⁷ *Id.*

²⁸ 1 KEASBEY, *supra* note 11, at 301.

²⁹ Phyllis B. d’Autrechy, *Records of the New Jersey Court of Oyer and Terminer, 1749-1762*, 68 GMNJ 97, 98 (1993).

³⁰ FIELD, *supra* note 26, at 158.

³¹ See, e.g., GOEBEL & NAUGHTON, *supra* note 7, at 653-59.

the defendant not guilty. On motion of David Ogden ordered that she be discharged. The Court adjourned to meet at nine o'clock tomorrow morning.³²

Though this is a pretty sparse “transcript” by modern standards, notice the various facts we can obtain from these short paragraphs. Women were obviously prosecuted for capital crimes in the colonies. By comparison, John Langbein’s Old Bailey sample of 171 trials from 1754-56 included twenty death sentences, none of which were given to a woman.³³ The charge against Goble was brought in the form of an indictment (the other option, we will see, is a “presentment”). She entered a plea of not guilty. The plea included the phrase “put herself upon God and her country.” We know from English law that being tried by a jury was how an accused put herself “on her country.”³⁴ The plea is thus an acknowledgment that her guilt will be determined by the jury. It would be wrong, I think, to view what she said as a request for a jury. At that time, trials to the judge (at least in the Oyer and Terminer records) seem to have been unknown. Guilty pleas could be made to the judge but a plea of not guilty, in the records I read, was always resolved by a jury of twelve men. As for the selection of jurors, Goebel and Naughton found evidence of challenges in colonial New York,³⁵ but no evidence of challenges to jurors appears in the New Jersey Oyer and Terminer records.

Goble’s indictment was returned in the morning. She was arraigned that morning, along with six other unrelated defendants,³⁶ and her trial was scheduled for that afternoon. She was tried before a jury of twelve men. The State was represented by the Attorney General. Goble had counsel representing her. Indeed, it appears she had two lawyers in court with her: “Ogden & Kearney.” The State presented the testimony of five witnesses. The defendant put only one witness on the stand, a doctor. The jury deliberated about an hour. The jury acquitted Goble. Her lawyer moved Justice Nevill to “discharge” the defendant and he did so.

We know the trial ended that day because court adjourned after she was discharged and the next entry is the following day, September 29, 1752. We know the jury deliberated an hour because the reporter tells us. Thus, if “trial came on in the afternoon” meant around one o’clock, and if court adjourned at five o’clock, it means that the swearing of the jury, the presentation of the evidence, and the summing up by counsel took somewhere from two to three hours.

But the trial could have taken much less time than that because we do not know when the court adjourned or when the afternoon session opened. Langbein

³² King v. Elisabeth Goble, September 28, 1752, OYER AND TERMINER 71-72, 71 GMNJ 93 (1996).

³³ Langbein, *supra* note 8, at 43.

³⁴ See WILLIAM BLACKSTONE, 4 COMMENTARIES *344.

³⁵ GOEBEL & NAUGHTON, *supra* note 7, at 618 (noting challenges to nine jurors by the defendant in a murder case).

³⁶ See OYER AND TERMINER 71, 71 GMNJ 93 (1996).

reports that a single courtroom in the Old Bailey in the late seventeenth and early eighteenth centuries could process twelve to twenty jury trials per day.³⁷ As late as the early nineteenth century, one observer noted that jury deliberations “typically lasted two or three minutes,” thus permitting ten to twelve trials in a single morning’s session of the Old Bailey.³⁸ One way the Old Bailey achieved greater efficiency, in the early part of this period, was to use a single jury and to have the jury deliberate on all cases at the end of the session.³⁹ By 1738, the Old Bailey began to take verdicts at the close of each trial but continued to use a single jury. I found only one instance in the New Jersey Oyer and Terminer records where a single jury was used and it involved co-defendants charged with the same crime.⁴⁰

Goebel and Naughton report that felony trials in New York typically began the day after the indictment was returned.⁴¹ Justice was thus swift in both England and the colonies in those days. There was no problem with speedy trials in the mid eighteenth century, at least when measured from the announcement of the indictment. This suggests that the concern underlying the speedy trial right in the Sixth Amendment was with delay in bringing the case to the grand jury, a problem that had plagued English defendants during the reign of the Stuarts and Tudors.

So that is a start at least in understanding colonial criminal procedure in New Jersey. Moreover, there is an inference here that the key evidence was whether the child was born alive. One suspects that was the issue for the doctor and if he testified the child was stillborn that would explain the acquittal. That inference becomes stronger when compared to another case where a woman is charged with murder for killing a child. I reproduce that case below.

Gloucester County June Term 1754

ANNE Buzard. Indictment for murdering her bastard child. The defendant being brought to the bar and arraigned upon her indictment pleaded not guilty. Joseph Warrell, Attorney General Sequiter for. Dom: Rege. The sheriff of the County of Gloucester returns a Jury. [Names of jurors omitted.] The Jury aforesaid being duly sworn and qualified, the Attorney Gen^l proceeded to support the indictment. Evidences for Dom. Reg.: Mary Cole Sr. (affirmed), Mary Cole Jr. (affirmed), Kesiah Roberts (affirmed), Isaac Hinchman (sworn) and George Weeds (sworn). Evidences for the defendant: George Wheist (sworn) and Samuel Cole (affirmed). Mr. Ross appointed council for the prisoner at the bar and Mr. Warrell, Attorney General, having concluded, charge was given to the Jury by Judge Nevill and constables sworn to attend them.

³⁷ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 17 (2003).

³⁸ *Id.* at 18 (citing CHARLES COTTU, *ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND* 75 (1822)).

³⁹ *Id.* at 21.

⁴⁰ *King v. Captain John Anderson & Deborah, his wife, May 1, 1753, OYER AND TERMINER* 98, 72 GMNJ 131 (1997).

⁴¹ GOEBEL & NAUGHTON, *supra* note 7, at 611.

Proclamation made and Court adjourned for half an hour. Procl'n made and court opened according to adjournment.

ANNE BUZARD. The Jury came into Court and say they find Anne Buzard guilty of the murder whereof she stands indicted. Sheriff ordered to take care of the prisoner.⁴²

I begin with some rank speculation. Mary Cole, Sr. and Mary Cole, Jr. testified for the prosecution, and Samuel Cole testified for the defense. We have no way to know if they were related but one wonders if Samuel Cole was the husband of Mary Cole, Sr., the father of Mary Cole, Jr., or perhaps the father of the bastard child. In passing, it is interesting that women were named "Jr." in this period.

Now for some things that we do know. Buzard did not have a doctor give evidence, and she was convicted. Some other inferences are possible. Buzard seems to have been poorer than Goble. The judge appointed "council" for her while Goble had two lawyers represent her. Then, as now, money surely bought a better defense. In any event, we know that Goble walked free and Buzard was sentenced to die. Here is the report on the penalty phase of Buzard's trial:

ANNE Buzard. The defendant being brought up to receive sentence on the verdict of Jury and being called upon for reasons why sentence of death should not pass against her according to law and the prisoner having no reasons to offer the Court proceed to give judgment viz't that Anne Buzard, the prisoner at the bar, be taken to the place from whence she came and thence to the place of execution and there to be hanged by the neck till she be dead and further ordered by the Court that the High Sheriff of the County of Gloucester caused the above sentence to be performed and put in execution on Saturday the thirteenth day of July next between the hours of eleven and four o'clock in the forenoon of the same day.⁴³

No solicitude for women appears here! Whether she was executed is unknown. In England at the time, pardons were frequently given to defendants facing execution. No reference to Anne Buzard's execution appears in the New Jersey Colonial Documents, which draw on Philadelphia and New York newspapers. There was no newspaper in New Jersey during this era. It seems likely that the hanging of a woman in New Jersey would have attracted attention in the papers from the adjoining states. The hanging of two men in 1757 was considered newsworthy by the *New York Gazette*.⁴⁴

⁴² King v. Anne Buzard, June 11, 1754, OYER AND TERMINER 147-48, 74 GMNJ 38 (1999).

⁴³ See OYER AND TERMINER 149, 74 GMNJ 125 (1999).

⁴⁴ See *infra* note 150 and accompanying text.

There are other differences between Goble's and Buzard's cases. I will continue to explore their cases in the next Part where I discuss more generally what the Oyer and Terminer records tell us about New Jersey criminal procedure in the mid-eighteenth century.

III. A Window into Criminal Trials in New Jersey in 1749-1756

I will discuss what we can learn from these records by topics, beginning with the initial stages of prosecution and then following the process through the trial, the verdict, and the sentence.

A. Prosecution of Crime

So what did criminal procedure look like in New Jersey in the years 1749-1756? There were no police in those days. Law enforcement was left principally in the hands of citizens. Citizens acted as police by means of the "hue and cry" by which felons were caught "red-handed." As noted in Part I, the venue for criminal cases in New Jersey was the Court of Oyer and Terminer. The mechanism for bringing the charges to the Court of Oyer and Terminer was the grand jury.

A Precept was issued in the name of the Commissioners, to the Sheriff dated fifteen days before Oyer and Terminer Sessions, that he, the Sheriff, return twenty-four persons for a Grand Jury ad Inquirendem on the date of Session. . . . The privilege of serving on a jury was dependent upon the prospective juror being a freeholder. A freehold estate, the land or tenement which a man held in fee-simple, of specified value was required by statute to qualify an individual as a juror.⁴⁵

Citizens also acted as prosecutor by bringing criminal prosecutions for most crimes. In one case in my sample, the court ordered the defendant convicted of larceny to make restitution to the victim, who is referred to as the "prosecutor."⁴⁶ That suggests what we know from other sources, such as treatises and commentaries, that while the king was represented in court by counsel, charges could be, and often were, laid by private citizens. Blackstone noted that indictments are "preferred" to the grand jury "in the name of the king," but allowed at the suit of any private prosecutor.⁴⁷

Sometimes the grand jury functioned as an inquest. The inquest was to decide whether the death was caused by natural causes, by accident, or by culpable human conduct. Here is an example:

⁴⁵ OYER AND TERMINER 149, 74 GMNJ 125 (1999).

⁴⁶ King v. Robert Whitehead, May 20, 1752, OYER AND TERMINER 61, 71 GMNJ 88 (1996).

⁴⁷ WILLIAM BLACKSTONE, 4 COMMENTARIES *300.

Jonathan Sarjeant Coroner of the County of Essex delivered into Court the following inquisitions, to wit, on the body of George, a negro, decl'd dead by misadventure [accident], on the body of Joseph Randal by misadventure, on the body of Titus, a negro, by misadventure, on the body of Josiah Ward, a natural death, on the body of Samuel Canfield, an infant, by misadventure, on the body of Maricah Post, Felodese [suicide], on the body of Rachel Pennington, an infant, by misadventure, on the body of Andrese Vangeson, Felodese, on the body of Ary Sipp by misadventure, ordered that they be filed.⁴⁸

It appears from these records that when an inquest was used, the grand jury itself simply sat as the inquest jury. At one point, the records indicate: "The following were qualified in the Grand Jury inquest."⁴⁹

Three outcomes were possible once the case reached the grand jury. First, it might fail to find evidence supporting the charge. According to Blackstone,

[w]hen the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "ignoramus;" or, we know nothing of it; intimating, that, though the facts might possibly be true, that truth did not appear to them: but now they assert in English, more absolutely, "not a true bill"; and then the party is discharged without further answer.⁵⁰

I found some indictments rejected without stating either "ignoramus" or "not a true bill."⁵¹ I also found three cases where the old "ignoramus" usage lingered.⁵²

⁴⁸ OYER AND TERMINER 193, 76 GMNJ 39 (2001).

⁴⁹ OYER AND TERMINER 277, 78 GMNJ 109 (2003).

⁵⁰ WILLIAM BLACKSTONE, 4 COMMENTARIES *301 (1769).

⁵¹ See, e.g., *King v. Nathaniel Heard*, October 18, 1751, OYER AND TERMINER 55, 70 GMNJ 135 (1995) ("On recognizance for a misdemeanor. The Grand Jury not finding anything against the defendant ordered that he be discharged on paying his fees";).

⁵² See *King v. Phillip Fitzgerald*, April 25, 1752, OYER AND TERMINER 94, 72 GMNJ 128 (1997) ("The Grand Jury brought in a bill of indictment which was preferred by the Attorney General against the sd. Phillip Fitzgerald for murder which was indors'd Ignormus [sic] by the said Grand Jury. On motion of Mr. Mestayer for the defendant ordered that he be discharged by proclamation which was done accordingly."); *King v. Marcus Gran(will)*, May 4, 1753, OYER AND TERMINER 101, 72 GMNJ 132 (1997) ("Indictment for a lebel on Ralph Smith Esq'r. (Found ignoramus). Ordered that the same be filed."); *King v. Mary Allen*, October 17, 1751, OYER AND TERMINER 54, 70 GMNJ 135 (1995) ("The Grand Jury came into Court and delivered to the Court an indictment preferred to them by the King's attorney against Mary

If the evidence was sufficient, the grand jury would return an indictment or a presentment. A “presentment” was “the notice taken by a grand jury of any offence from their own knowledge or observation without a bill of indictment laid before them at the suit of the king.”⁵³ It seems likely that the New Jersey Court of Oyer and Terminer was following a similar usage. Sometimes the same grand jury was described as returning both kinds of documents. If they were synonymous, why use both terms? Here’s an example:

The Grand Jury came into Court and being called over gave the following indictments and one presentment and then withdrew:

Elizabeth Albertson and Deborah Rogers. Indictment for a felony. Process ordered.

Jeremiah Schenck. Indictment for fornication. Process ordered.

John Stevens and Cornelius Smock. Presentment for horse racing.⁵⁴

While the offense of “felony” is opaque, we can usefully distinguish fornication from horse racing in terms of the public nature of the offenses. The grand jury was much more likely to have personal knowledge of a defendant racing horses than committing fornication. Thus, here the New Jersey grand jury seems to be following Blackstone’s usage by returning a presentment for horse racing and an indictment fornication.

B. The Plea

Once the indictment or presentment had been returned, the procedure was to open court. “Three Commissioners constituted a quorum, of which, during the Session Minutes abstracted herein, one was Judge Samuel Nevill, and the others were Judges of the Court of Common Pleas for the County in which the Session was convened.”⁵⁵ Also in court would be the justices of the peace of that county. Usually present was the attorney representing the crown, and often counsel for the accused. The defendant would be called upon to plead to the indictment or presentment. If the defendant pleaded not guilty, the case was set for trial, usually the next morning or that very afternoon.

Numerous examples exist of a defendant pleading not guilty initially and then changing his plea later to guilty, throwing himself on the mercy of the court.

Allen for the murder of a bastard child, which they found (Ignamus?). On motion of Phillip Kearny for the defendant's discharge, it was ordered that she be discharged accordingly.”)

⁵³ WILLIAM BLACKSTONE, 4 COMMENTARIES *298.

⁵⁴ OYER AND TERMINER 260, November 11, 1756, 77 GMNJ 95 (2002). Presentments tended to be for less serious crimes. I found none for felonies. But the less serious crimes tended to be crimes committed in public (compare horse racing versus fornication).

⁵⁵ D’Autrechy, *supra* note 29, at 98.

Whether any concession was given for the change in plea is unknown. Here is an example:

Josiah Prichett and Jeremiah Wright. Indictment for assisting in counterfeiting money. The defendant, Jeremiah Wright, at first pleaded not guilty but then changed his plea to guilty and threw himself on the mercy of the Court. He was fined 10 pounds and ordered bound in the sum of 50 pounds with two sureties each in the sum of 25 pounds for his good behavior for 7 years and that he stand committed until his fine and fees be paid and till he complied with the sentence.⁵⁶

This would be a useful case study in whether plea bargaining was occurring if we could find what happened to the co-defendant Prichett. But the records contain no disposition of his case on the merits.⁵⁷ When we compare Wright to two defendants who put the crown to its burden of proof and were convicted of conspiracy, all three punishments are essentially the same.⁵⁸

Still in search of evidence of plea bargaining, I looked at the following change in plea in a petty larceny case:

[illegible] JURALIMAN. Indictment for pet. Larceny. Deft, appeared and being charg'd with her indictment pleads not guilty. Afterwards retracted her plea and pleaded guilty and threw herself on the mercy of the Bench. On motion of the Attorney General for judgment, the Court took time to consider.⁵⁹

If a concession was made, it is not evident. Her sentence was pretty severe:

that the defend't be carried to the publick whipping post on Tuesday the twenty fourth day of this instant and there receive twenty nine lashes on the bare back for

⁵⁶ King v. Josiah Prichett & Jeremiah Wright, July 20, 1750, OYER AND TERMINER 20, 69 GMNJ 66 (1994).

⁵⁷ It is possible, though not certain, that his case was disposed of by a special Act of the Assembly that gave some unspecified benefit to those who "inlisted and went on the late intended expedition against Canada under Capt. Nath'l Ware in one of the company raised in the province." OYER AND TERMINER 21, 69 GMNJ 66 (1994).

⁵⁸ See King v. Richard Matchet, October 31, 1755, OYER AND TERMINER 226, 76 GMNJ 138 (2001) (fine of ten pounds); King v. John Pipes, May 9, 1751, OYER AND TERMINER 33, 70 GMNJ 43 (1995) (fine of five pounds plus shaming). David Brant was also convicted of counterfeiting. See King v. David Brant, July 11, 1750, OYER AND TERMINER 16, 69 GMNJ 65 (1994) but his sentence does not appear in the records.

⁵⁹ King v. Juraliman, June 18, 1755, OYER & TERMINER 195, 76 GMNJ 41 (2001).

the first crime set forth in her indictment. That on the Monday following she be carried to the pulick whipping post and there receive nineteen lashes on her bare back for the second crime set forth in her indictment⁶⁰

This case, in isolation, cannot tell us anything of course. What was the difference between it and one where a defendant was found guilty of petty larceny after a trial? I found only one of those: George Orsland was convicted by a jury of petty larceny and sentenced to a total of 117 lashes⁶¹ to be administered 39 lashes per day on three days, each roughly a week apart.⁶² Juraliman's sentence was less severe, a total of 48 lashes six days apart. She was convicted of two counts while it is unclear how many larcenies were the subject of Orsland's conviction. The indictment provides no detail beyond "petty larceny." I first assumed it was but one count. But the sentence suggests three larcenies. I reproduce the sentence below:

The prisoner being set to the Bar, the Court proceeded to the following sentence that he be carried from hence to Broad Street in this town opposite to the house of Thomas Brown on tomorrow between the hours of eleven and three o'clock of the same day and there be tied to a carts tail and from thence to this gaol he receive thirty nine lashes on his bare back and then he be committed to the gaol and from thence carried to the borrough of Elizabeth on Tuesday next between the hours of eleven and three of the same day and there be tied to a carts tail opposite to the house of Mrs. Cratwood and from thence to house of John Herry-man he receive thirty nine lashes more on his bare back that then he be committed to gaol and that on Monday [Sen'night] between the hours of eleven and three of the same day he be tied to a carts tail opposite to the house of Thomas Brown in Broad Street aforesaid and from thence to the Courthouse aforesaid to receive thirty nine lashes more on his bare back and that he then be committed till his fees are paid that the sheriff of Essex see this sentence put in execution.⁶³

I was puzzled when I first read the sentence as to why the whippings were administered in front of particular homes. One explanation, of course, is that Orsland stole from different people. It is also possible, indeed I think likely, that whippings on different days resulted from different thefts. This supposition is consistent with Juraliman being whipped on two separate occasions for what we know were separate counts in her case.

⁶⁰ OYER AND TERMINER 201, 76 GMNJ 45.

⁶¹ Whipping was the sentence for petty larceny in England at this time. See WILLIAM BLACKSTONE, 4 COMMENTARIES at *238.

⁶² King v. George Orsland, October 2, 1755, OYER AND TERMINER 215-16, 76 GMNJ 133-34 (2001). No mention was made of multiple counts in the indictment, trial, or sentencing.

⁶³ *Id.*

Assuming I am right about three larcenies in the Orsland case, his sentence is still quite a bit more severe than Juraliman's. There were three other cases of a guilty plea to petty larceny, though none of them involved a change in plea from not guilty to guilty as did the Juraliman case. These defendants pleaded guilty when first "called upon" their indictment. Thomas Ford's judgment was 50 lashes total in two separate whippings,⁶⁴ while the other judgments were for 31 (Conaway) and 21 lashes (Welch and Daton) in one whipping.⁶⁵ If different whippings represent different larcenies, it appears that on a per count basis Orsland got 39 lashes, Conaway 31, Ford 25, Juraliman 24, and Welch and Daton 21. Nothing in these data suggests that Juraliaman received a sentence concession for pleading guilty.

One case of conviction for petty larceny could not be classified. There was no evidence of a guilty plea and no evidence of a trial.⁶⁶ It carried the most severe penalty of all the petty larceny judgments: 120 lashes at four separate whippings, each a week apart. But if my operating assumption that different whippings were for different larcenies, this fits neatly with the prior sentences, 30 per theft, falling just under Conaway and ahead of Ford.

The amounts stolen were not given in any of the petty larceny cases. Perhaps the distinction in punishment turned on that fact. Notice, in that regard, that Jurliaman was given 29 lashes on one count and 19 on the other, which suggests a distinction in the gravity of the thefts. A range from 19 lashes to 39 per larceny would be a plausible range based on the amount stolen and without regard to any "discount" for pleading guilty. One factor usually offered to explain variation in modern punishments cannot be used here. All these larceny defendants were sentenced by Justice Nevill. It is interesting to note, again, that there seemed to be little concession to women who were convicted of serious crimes. Jurliaman received 29 lashes on one count, a sentence right in the middle of what the men got.

I conclude that the disparity in the lashes per larceny is more likely to have resulted from varying amounts stolen than from any concession to plead guilty. One factor supporting that judgment is that going to trial in New Jersey in 1750 was not a very difficult enterprise. As we will see, it usually took an hour or two. Why offer a concession for a guilty plea when it is so easy to let the jury decide? I imagine the Attorney General was quite unmoved by his "conviction rate." Indeed, as we will also see later, the Attorney General during most of my sample period was perturbed at his low salary and ultimately resigned, partly on those grounds. Thus, we do not have, it seems to me the right "mix" of factors that would have produced a plea bargaining process.

⁶⁴ King v. Thomas Ford, October 26, 1757, OYER AND TERMINER 285-86, 78 GMNJ 114 (2003).

C. Competency to Stand Trial

I was surprised to find a case where the judge in effect ruled that the defendant was not competent to stand trial. Moreover, the judge apparently made the ruling *sua sponte*.

Elizabeth Post. Indictment for arson. The prisoner being set to the bar and it being doubtful to the Court whether she was not an idiot or lunatic at the time of the felony committed or now it's ordered by the Court that the sheriff inquire by the oaths of twelve good and lawful men of his bailiwick whether the s'd Elizabeth Post was lunatic or idiot at the time of the felony committed at this time and that the inquisition he shall thereof make be returned immediately to the Court.

Elizabeth Post. Sur indictment for felony etc. The sheriff of Essex having returned the inquisition taken in this cause pursuant to a rule of this Court whereby it is found that the said Elizabeth Post was lunatic as well at the time of the felony committed as at the time of taking s'd inquisition. It's ordered by the Court that the s'd inquisition be filed and that the said Elizabeth Post be discharged . . .⁶⁷

Then, as now, defendants who avoided criminal convictions on account of mental incompetency could be made subject to civil commitment. After ordering Post discharged, Justice Neville further ordered "that the Overseers of the Poor of the Township of Aquakanunck take charge of the said lunatic and do not suffer her to go at large."⁶⁸

Another competency defense was that of infancy. Here is an entire case report: "BOYCE PRUDEN. Indictment for 'Chance Medley.'⁶⁹ Defendant being called appeared and was discharged as being an infant under the age of discretion."⁷⁰ The report does not indicate the age below which one could not be prosecuted. In England, for capital crimes, a child under the age of seven could not be convicted. Between seven and fourteen, a rebuttable presumption existed that the child was incapable of committing a felony.⁷¹

⁶⁵ King v. And'w Conaway, June 5, 1754, OYER AND TERMINER 141-42, 74 GMNJ 36 (1999) (31 lashes); King v. Solomon Welch and James Daton, April 17, 1751, OYER AND TERMINER 91, 72 GMNJ 128 (1997) (21 lashes each defendant).

⁶⁶ King v. James Walling, October 20, 1753, OYER AND TERMINER 118, 73 GMNJ 86 (1998).

⁶⁷ King v. Elizabeth Post, December 14, 1757, OYER AND TERMINER 289, 79 GMNJ 92 (2004) (non-relevant material deleted). It appears that the inquisition was returned the same day the court ordered it to be conducted.

⁶⁸ Id.

⁶⁹ "Chance medley" was a type of homicide. See *infra* notes 176-77 & accompanying text.

⁷⁰ King v. Boyce Pruden, September 21, 1751, OYER AND TERMINER 40, 70 LAWS OF THE ROYAL COLONY OF NEW JERSEY 47 (1995).

⁷¹ WILLIAM BLACKSTONE, 4 COMMENTARIES *23.

D. The Jury

Every jury in the 48 trials consisted of twelve men. The record in Buzard's case, but not Goble's, indicates that the judge charged the jury. The record in Buzard's case, but not Goble's, indicates that it was the sheriff's duty to "return" a jury to the court. The jury in Goble's case was "qualified." In Buzard's case it was "sworn and qualified." I suspect that all these differences were merely a matter of record-keeping. The recorder in Goble's case may simply have omitted a reference to the sheriff returning the jury or to the jury being sworn. It seems likely that the procedure was fairly standard across the counties in New Jersey and that it included the sheriff having the duty to return the jury, the jury being sworn, and the judge charging the jury.⁷²

I found no trials that lasted beyond adjournment of court for the day the trial began. At the end of the trial, the judge charged the jury, and the jury usually retired to deliberate. In the Old Bailey of this period, the jury always deliberated in open court but that was not true in the New Jersey Court of Oyer and Terminer. Most case reports contain something like what appears in the Goble case: "After the charge the Jury withdrew to consider of their verdict with a constable sworn to keep them."⁷³ To be sure, sometimes the jury did not "go from the bar" while announcing a not guilty verdict. Here is an example: "The Council as well on behalf of the Crown as on behalf of the defendant being heard and the charge being given by Mr. Nevill, the Jury without going from the Bar say they have agreed on their verdict and find the defendant not guilty."⁷⁴ For every guilty verdict, though, the jury appears to have withdrawn to deliberate with a "constable sworn to keep them." This makes it appear that the jury did not "go from the bar" only when the lack of guilt was clear.

After the jury returned a verdict, the judge always discharged the defendant, if the verdict was not guilty, or recessed for a time to consider judgment in the guilty verdict cases.⁷⁵ When the court came back into session in guilty verdict cases, the judge would announce the sanction. I will provide some examples of sanctions later in this Part.

E. Counsel

The judge appointed Mr. Ross to represent Buzard. Whether he was a trained lawyer is unknown. In the late seventeenth century, "justices of the peace,

⁷² In 29 of the 48 recorded trials, there was explicit mention of the judge charging the jury. As this had been the practice in England for centuries, there is no reason to think that the omission in 20 of the trials reflects anything other than a failure of the reporter to include the fact of the judge charging the jury.

⁷³ King v. Elisabeth Goble, September 28, 1752, OYER AND TERMINER 71-72, 71 GMNJ 93 (1996).

⁷⁴ King v. John Hacket, May 17, 1755, OYER AND TERMINER 184, 75 GMNJ 82 (2000).

⁷⁵ I found one exception where the judge essentially ordered the defendant to be on probation even though the jury found him not guilty. See *infra* notes 153-54 & accompanying text.

sheriffs, and clerks, acted as attorneys in New Jersey.”⁷⁶ During this period, a few lawyers in East New Jersey had been trained in England.⁷⁷ “The first ‘commissioned’ lawyer in West New Jersey . . . was Thomas Clark, who in 1700 was officially referred to [in court records] as “the Lawyer.”” Things did not change much in the first half of the eighteenth century, except for the establishment of the office of Chief Justice of the New Jersey Supreme Court in 1704. “Of the first nine chief justices no less than four were trained lawyers, a remarkable record for any American colony. But prior to the Revolution, only a few of the other judges had adequate legal training.”⁷⁸ Indeed, the biographical material about Samuel Nevill does not mention any legal training. Perhaps the man who served as the presiding judge for almost all Oyer and Terminer cases had never received formal legal training.

Thus, the colonial distrust of English-trained lawyers, with their “special privileges and principles,” coupled with a total lack of schools in the colonies that could train lawyers,⁷⁹ led to an amateur and semiprofessional practice of law in New Jersey at least through the middle of the eighteenth century: “[f]ew men among those who practiced law in the courts or sat on the bench during the early days of New Jersey made any pretense to legal learning.”⁸⁰

The appointment of counsel in Buzard’s case is itself striking. In 22 of the 48 reported trials, the defendant showed up without counsel (or at least no mention was made by the reporter). Other than Buzard’s case, only two mentioned the appointment of counsel: the murder trial of Captain John Anderson and his wife Deborah.⁸¹ It is possible, though this too is speculation, that men were considered capable of making their own defense but not women. Goble showed up with counsel. When Buzard did not appear with counsel, the judge appointed counsel. The Andersons were, however, tried separately – albeit by the very same jurors,⁸² as was done routinely in the Old Bailey – so the judge could have appointed counsel just for Deborah Anderson. But he appointed counsel for both. Perhaps it is reading too much into these records to conclude that women who could not afford counsel were routinely appointed counsel.

The timing of the appointment in Buzard’s case might look odd to modern eyes. If the minutes accurately recount the minute-by-minute progress of this 1754 trial, the lawyer was not appointed for Buzard until after the testimony of all the witnesses. The function of the lawyer seemed to be summing up the case. One

⁷⁶ Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *YALE J.L. & HUMAN.* 47, 48 (1999).

⁷⁷ 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 198 (1965).

⁷⁸ *Id.* at 196.

⁷⁹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 97 (2d ed. 1985).

⁸⁰ CHROUST, *supra* note 77, at 199.

⁸¹ *King v. Captain John Anderson & Deborah, his wife*, May 1, 1753, OYER AND TERMINER 98, 72 GMNJ 131 (1997) (counsel appointed “on motion of Mr. Kearny”).

⁸² OYER AND TERMINER 98, 72 GMNJ 131.

imagines, then, that Mr. Ross was simply a spectator at the trial and the judge appointed him to sum up Buzard's case when the time came for that part of the trial.

This suggests that the colonies were following the practice described by Blackstone a few years later. The common law view was that, in capital cases in England, "no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated."⁸³ As almost all felonies were capital crimes in the eighteenth century,⁸⁴ both in England and the colonies, the defense lawyer would not under this rule have conducted the examination of the witnesses.

The Oyer and Terminer records bear out this practice. The defense evidence was presented by the defendant, obviously, in cases where he represented himself. In Orsland's case, "the Attorney Gen'l having summed up, the prisoner was called upon to make his defense"⁸⁵ Defendants likely presented a defense by calling witnesses who took the witness stand, swore or affirmed to tell the truth, and then narrated a story. In his defense against a murder charge, Benjamin Springer presented a single witness, and the reporter remarks, "The prisoner at the bar having made his defense, the charge was given to the jury"⁸⁶ Cross-examination was known at the time, but it was apparently the defendant's job to do that. I found nothing to suggest that this was any different when counsel represented the defendant. Goebel and Naughton reach the same conclusion for New York colonial practice, noting that "there is no evidence that the colonial judges indulged prisoners beyond this limit [arguing points of law] as sometimes occurred in England."⁸⁷

I found records of 48 trials in the Oyer and Terminer manuscript. The king was represented by the Attorney General in 29 cases, by a named attorney who was not the Attorney General in seven cases, and by an unnamed "king's attorney" in six cases. Thus, in 42 of 48 cases, or 88%, the crown was represented by counsel. In all likelihood, the "king's attorney" was the Attorney General, meaning that the Attorney General represented the king in 35 of the 48 cases where we have a record of the trial

⁸³ WILLIAM BLACKSTONE, 4 COMMENTARIES *349 (citing 2 HAWKIN'S PLEAS OF THE CROWN 400).

⁸⁴ See *id.* at *97 (noting exceptions for "self-murder, excusable homicide, and petit larciny"); GOEBEL & NAUGHTON, *supra* note 7, at 702.

⁸⁵ OYER AND TERMINER 214, 76 GMNJ 133 (2001).

⁸⁶ King v. Benjamin Springer, October 26, 1757, OYER AND TERMINER 285, 78 GMNJ 114 (2003).

⁸⁷ GOEBEL & NAUGHTON, *supra* note 7, at 574. Blackstone noted that judges in England found this rule a "defect in our modern practice," and thus would allow the "counsel to stand by [the prisoner] at the bar, and instruct him what questions to ask, or even to ask questions for him." *Id.* at 349-50. Whether this practice occurred in colonial New Jersey cannot be determined from the Oyer and Terminer records I examined, but the Buzard case at least suggests, in agreement with Goebel and Naughton, that it did not occur.

By comparison, in the Langbein's Old Bailey sample, the records reflect prosecution counsel in only six of 171 cases.⁸⁸ The king was represented by counsel, then, in only 4% of the cases in London but in 88% of the Oyer and Terminer trials. Langbein notes that the records might have omitted counsel in some cases⁸⁹ but that, of course, is also true in the Oyer and Terminer records that I read.

The difference between colonial New Jersey and England is equally striking on the defense side. Defense counsel were noted in Langbein's sample in eight of 171 cases.⁹⁰ In my sample, counsel appeared for defendants in 26 of the 48 cases. Thus, the ratios are 5% defense counsel in London and 54% in colonial New Jersey. Langbein speculates that one reason for the scarcity of lawyers representing defendants in the Old Bailey is that "so many of the accused were paupers caught red-handed."⁹¹ This means they had insufficient funds in the first place and in the second place their guilt was obvious. Perhaps this is another example of the rural, agrarian nature of colonial New Jersey having an effect. Presumably, a smaller percentage of the New Jersey larcenies involved picking pockets and stealing from street vendors. Moreover, the fact that many counsel in colonial New Jersey were amateurs also could have played a role. Some of these counsel might have been the defendant's friends or relatives, who either charged no fee or a small fee.

Yet roughly three-quarters of the cases with defense counsel featured "repeat" counsel, individuals who had represented other defendants, often in different counties. Repeat counsel who traveled by horseback to a different county were unlikely to be a relative or friend of the defendant. Indeed, two of the lawyers appeared in a total of thirteen cases in six different counties. One of them, David Ogden, is referred to in historical documents as a "distinguished practitioner at Newark." He appeared for six defendants, four in Morris County and two in Essex County,⁹² where Newark is located.⁹³ The county seats of Morris and Somerset are about 22 and 35 miles, respectively, from Newark.

Perhaps the much greater frequency of appearances by defense counsel can be explained by the frequency of the king having counsel. Perhaps since the king was represented so infrequently in the Old Bailey of this time, the practice was for defendants to represent themselves. But that of course just shifts the question back one level: why was the king represented so often in colonial New Jersey and so infrequently in the Old Bailey? One would have assumed that it was more important to the king to maintain peace and order in London in 1755 than in New Jersey. And

⁸⁸ Langbein, *supra* note 8, at 124.

⁸⁹ *Id.* at 126.

⁹⁰ *Id.* at 124.

⁹¹ *Id.* at 126.

⁹² 9 WILLIAM A. WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 449 n.1 (Frederick W. Ricord & William Nelson, eds., 1885).

⁹³ I measured from the largest town in Morris County (Morristown) to the largest town in Essex County (Newark). JOHN P. SNYDER, THE STORY OF NEW JERSEY'S CIVIL BOUNDARIES, 1606-1968 (1969).

one would have thought, therefore, that the king would be willing to spend more resources prosecuting in the Old Bailey.

But it turns out that no one spent much in the way of resources on prosecution in New Jersey. Joseph Warrell was the Attorney General during most of the period covered by my study. He was appointed Attorney General by the royal governor of New Jersey in 1733 and resigned the position in 1754. No record exists that he was admitted to the New Jersey bar.⁹⁴ We know that during most of the period in my study he was paid thirty or forty pounds per year.⁹⁵ This was a trivial salary, \$1500 to \$2,000 per year in today's dollars,⁹⁶ and probably no great drain on the public fisc. Indeed, in his letter of resignation, Warrell complained of "the Disadvantage of too small a Support from the Assembly (& no likely hood of its increasing."⁹⁷ He apparently supplemented his income as a part owner of 22,000 acres in two New York counties, surveyed to Warrell and his partners in 1734.⁹⁸

Warrell was replaced as the king's Attorney General by Cortland Skinner, who had trained in the law in the office of defense counsel David Ogden in Newark. Skinner was the son-in-law of Kearney, defense counsel in seven of the cases in my study. But law-trained or not, well-placed or not, Skinner was paid the same thirty pounds a year from 1754 to 1757, when my study ends, and, indeed, until at least 1763.⁹⁹ Like his predecessor, Skinner had other jobs. He was a member of the New Jersey General Assembly for fourteen years and vice president of the board of proprietors for fifteen years.¹⁰⁰

Abraham Cottnam represented the king in three cases and defendants in two cases. It thus appears that, as in England, trained lawyers (barristers in England) were available to represent either side at trial. When the Attorney General did not take the king's case, another lawyer would be chosen from the pool of lawyers who attended court. Like Skinner and Warrell, Cottnam had another job, as a magistrate in Trenton.¹⁰¹

⁹⁴ Frederick W. Gnichtel, *The Courts, Judges and Lawyers; Medicine and Doctors*, in TRENTON HISTORICAL SOCIETY, A HISTORY OF TRENTON, 1679-1929. See <http://trentonhistory.org/His/Courts.htm> (last visited [DATE]).

⁹⁵ See 3 NEW JERSEY, LAWS OF THE ROYAL COLONY OF NEW JERSEY 169, 195, 243 (Bernard Bush ed., 1977) (forty pounds in 1749, thirty pounds in 1752 & 1753).

⁹⁶ See *infra* note 145 for a comparison of pounds in that era to dollars today.

⁹⁷ 8 WILLIAM A. WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 294 (Frederick W. Ricord & William Nelson eds., 1885).

⁹⁸ 20 WILLIAM A. WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 248 n.1 (William Nelson ed., 1898).

⁹⁹ See 3 NEW JERSEY, LAWS OF THE ROYAL COLONY OF NEW JERSEY 269, 327, 393, 472, 581, 640 (Bernard Bush ed., 1977) (years 1753-1759); 4 NEW JERSEY, LAWS OF THE ROYAL COLONY OF NEW JERSEY 5, 107, 191 (Bernard Bush ed., 1977) (years 1760, 1762, 1763).

¹⁰⁰ ENCYCLOPEDIA OF NEW JERSEY 747 (Maxine N. Lurie & Marc Mappen eds., 2004) (Skinner, Cortland).

¹⁰¹ 20 WILLIAM WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 248 n.1 (William Nelson ed., 1898). Incidentally, Cottnam married Joseph Warrell's daughter and their son was licensed as a lawyer in 1780.

It appears that a small cadre of counsel followed the Oyer and Terminer court from county to county in the hopes of picking up clients the day of trial. This is suggested by the fact that the same lawyer could represent the king and defendants and by the appearance by counsel in different counties. In this way, eighteenth century New Jersey counsel were very much like barristers in England .

And how effective were defense counsel? Though the sample is awfully small, the results are stunning and in the direction one would predict. I counted trials where I found a record (48 data points), rather than offenses, to avoid the distortion of multiple counts. Presumably, the value of having a lawyer is the same whether there is one or more than one defendant. Of the 26 trials where a defendant was represented by counsel, 19 ended in acquittal and one produced an indictment dismissed before the jury returned. If we count that one as an acquittal, (it has the same effect), 20 of 26 defendants represented by lawyers were acquitted, an acquittal rate of 77%. The remaining 22 trials produced only four acquittals,¹⁰² a rate of 18%. In colonial New Jersey in the middle of the eighteenth century, a defendant was roughly four times more likely to be acquitted if he had counsel. Small sample or not, I think that a pretty robust finding that counsel, whether trained in the law or not, were worth whatever fees they charged.

This is not surprising. The level of education in the colonies was probably not very high generally. More particularly, individuals suspected of larceny, burglary, forgery, counterfeiting, or public order offenses (25 of the 50 offenses) were not likely to be from the educated classes. And I suspect that then, as now, homicides tended to be disproportionately from the less-educated class. To a poorly educated colonist facing the death penalty, having a lawyer highlight weaknesses in the crown's case when summing up before the jury must have been worth almost as much as having a lawyer is worth in today's world of complex crimes and procedure.

F. Evidence

The record in Buzard's case shows that the witnesses were sworn or, alternatively, affirmed that they would tell the truth (4 affirmed; 3 were sworn). Typically, three or four witnesses would testify for the crown and two or three for the defendant. Sometimes the crown offered two or three kinds of evidence. In Springer's case, the crown presented eight witnesses, the pre-trial examination of

¹⁰² I did not count the case where the defendant presented his case and was acquitted of burglary but convicted of larceny. See *King v. Robert Whitehead*, May 20, 1752, OYER AND TERMINER 61, 71 GMNJ 88 (1996). Whitehead was sentenced to die, not a favorable sentence, but did receive benefit of clergy, a decent outcome. One could, I realize, count this as package deal as a successful outcome and thus could count it as an acquittal. It makes little difference in the rate. With Whitehead added as a *pro se* acquittal, the rate becomes 23%

Springer by the magistrate, and an “affidavit” by Springer.¹⁰³ The nature of the “affidavit” is not disclosed. Perhaps it was some sort of written confession.

Fisher notes from the Old Bailey cases that very few witnesses testified for the defense on any issue other than the defendant’s character.¹⁰⁴ He does not provide a percentage of cases in which character witnesses testified for the defense. The Oyer and Terminer records do not permit one to know the nature of the testimony. In a few cases, it would seem that the testimony was other than character evidence. I mentioned the doctor as the only witness for defendant Goble. Two doctors testified in another murder case. Again, they were the other evidence offered for the defense and, as in Goble’s case, the jury acquitted.¹⁰⁵ It seems highly unlikely that doctors were providing character testimony.

In a case involving the charge of altering and uttering bills of credit, the crown produced eleven witnesses and the defense six.¹⁰⁶ One piece of evidence for the defendant was a letter written to one of the prosecution witnesses. The letter was almost certainly being offered for some purpose other than to prove good character and one wonders whether some or all of the other witnesses were testifying to the question of whether the defendant altered or uttered bills of credit

In Orsland’s petty larceny case, “the Attorney Gen’l having summed up, the prisoner was called upon to make his defense and called several people to speak of his character.” That is the end of the description of the defense. The witnesses were not named, as they were in all the other cases. In no other case did I find the defense witnesses characterized as being character witnesses. The different way of describing Orsland’s defense witnesses might suggest that named witnesses in other cases were testifying to the merits of the charge. But my evidence here remains slight.

The largest number of witnesses in one case testified in a buggery case: ten for the crown and eight for the defendant.¹⁰⁷ One wonders about the nature of the testimony if it went to some point other than the defendant’s character. Was the defendant discovered in the act or was the testimony hearsay about what he or the victim had said about the sex act? No mention was made of a hearsay or confrontation objection but this is not surprising. As John Langbein has shown, the rules of evidence during this period were in flux and not recognized as a doctrine that had internal coherence.¹⁰⁸ The judges “had little appreciation of what they were creating. As late as . . . 1787, they appear not to have recognized the commonality of the

¹⁰³ King v. Benjamin Springer, October 26, 1757, OYER AND TERMINER 285, 78 GMNJ 114 (2003).

¹⁰⁴ George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 649 (1997) (noting a rate of 7% in 1715, increasing to 18% by 1780).

¹⁰⁵ King v. Daniel Roberts, September 27, 1752, OYER AND TERMINER 72-73, 71 GMNJ 93-94 (1996).

¹⁰⁶ King v. John Pitney, October 26, 1757, OYER AND TERMINER 284, 79 GMNJ 113 (2004).

¹⁰⁷ King v. Charles Conaway, Jr., April 20, 1757, OYER AND TERMINER 294-95, 79 GMNJ 95 (2004).

¹⁰⁸ Langbein, *supra* note 25, at 203-51.

rules, that is, they seem not to have understood that the corroboration rule was part of a larger doctrinal enterprise, including the character, confession, and hearsay rules."¹⁰⁹

But the common law of the time did recognize an objection for relevance or pertinence. If the objection was sustained, the jury apparently did not consider the evidence. The following account of a misdemeanor case is illuminating:

Defendant's counsel objected to the evidence on which the Court ruled that the evidence was improper and in no ways pertinent to the issue whereupon the counsel for the King informed the Court that he had no other evidence. The Jury without going from the Barr found the defendant not guilty.¹¹⁰

Returning to the Goble and Buzard murder cases, notice that neither Elisabeth Goble nor Anne Buzard testified in her own behalf. Indeed, no defendant in any of the printed records testified in his behalf. This was no strategic decision as it would be today. Defendants were not permitted to give sworn testimony at trial in England or the colonies in the eighteenth century. Maine "led the common law world when it gave accused felons the right to the oath in 1864."¹¹¹ England did not fully abolish the rule against criminal defendants testifying until 1898.¹¹²

Given that the accused was disqualified from giving sworn testimony at trial in the pre-Revolutionary period, how was the voice of the defendant heard? In the cases where the accused represented himself, of course, he would present his defense and presumably sum up to the jury.

Defendants were heard in another way during this period. The Marian Committal Statute of 1555, named after Queen Mary, required magistrates to "take the examination of such Prisoner, and information of those that bring him [before the magistrate]" and to make a written record of "as much thereof as shall be material to prove the felony . . ."¹¹³ Colonial magistrates followed the Marian statutes. Alschuler has concluded: "Until the nineteenth century was well underway, magistrates and judges in both England and America expected and encouraged suspects and defendants to speak during pretrial interrogation and again at trial."¹¹⁴ Moglen

¹⁰⁹ Id. at 217.

¹¹⁰ King v. John Kenny, July 13, 1750, OYER AND TERMINER 22, 69 GMNJ 66 (1994).

¹¹¹ Fisher, *supra* note 104, at 658.

¹¹² Id. at 662.

¹¹³ 2 & 3 Phil. & M., ch. 10 (1555) (Eng.).

¹¹⁴ Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, 94 MICH. L. REV. 2625, 2631 (1996).

agrees.¹¹⁵ But these works cite but one authority for this proposition, and it only provides indirect support.¹¹⁶ I found direct evidence that magistrates in New Jersey questioned suspects prior to trial and that their answers were admitted into evidence, though I have no way of estimating the frequency of the questioning.

In five cases in my sample, a pre-trial examination before a magistrate was introduced into evidence at trial.¹¹⁷ In Robert Willson's manslaughter case, for example, the "[e]vidences pro Rege" included "Examination of Willson read."¹¹⁸ In a murder trial of Benjamin Springer, it appears that the justice of the peace who conducted the pre-trial examination also testified at trial. The crown's proof in that case included "Justice Rosegrant sw."¹¹⁹ I assume that Justice Rosegrant is the same justice whose examination was introduced.

Finding five New Jersey Oyer and Terminer cases admitting pre-trial examinations into evidence at trial is solid support for the proposition that this kind of evidence was generally admissible. Goebel and Naughton found similar, scattered colonial New York cases in which the minutes indicate that the evidence at trial included an examination by a magistrate.¹²⁰ Whether a common law right not to be compelled to be a witness existed is, to my mind, unclear. It is true, as Leonard Levy has shown, that John Lilburne's refusal to take the oath before the Star Chamber had led others, both here and in England, to begin to claim a right not to be compelled to take an oath to provide evidence.¹²¹ I am not persuaded by Levy's evidence that this right was part of the common law of evidence. Rather, I think it was a claim that sounded more in freedom of religion and expression. In any event, whatever is the best description of that right or claim, it did not bar pre-trial questioning of defendants and the admission of the testimony into evidence in New Jersey in the period 1749-57.

Eben Moglen writes, "Without exception, administrators of criminal justice in British North America made use of the process [by which magistrates questioned defendants]."¹²² He later concluded, "Colonial American criminal justice depended upon self-incrimination in practice precisely because the basic design of the system

¹¹⁵ Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1098 (1994).

¹¹⁶ Alschuler and Moglen, like many others, rely on justice of the peace manuals as well as discussions in 1641-42 among Plymouth Rock's ministers and magistrates about "how far a magistrate may extract a confession from a delinquent to accuse himself of a capital crime seeing *nemo tenetur prodere seipsum*." See Alschuler, *supra* note 114, at 2649; Moglen, *supra* note 115, at 1096-99.

¹¹⁷ See *King v. Benjamin Springer*, October 26, 1757, OYER AND TERMINER 286, 78 GMNJ 114 (2003); *King v. Robert Willson*, April 21, 1757, OYER AND TERMINER 296, 79 GMNJ 96 (2004); *King v. James Lacey*, OYER AND TERMINER 264, May 4, 1757, 78 GMNJ 36 (2003); *King v. John Pipes*, May 9, 1751, OYER AND TERMINER 32, 70 GMNJ 42 (1995); *King v. William Tuttle and Abraham Gibbons*, May 4, 1750, OYER AND TERMINER 10, 68 GMNJ 103 (1993).

¹¹⁸ Willson, OYER AND TERMINER 297, 79 GMNJ 96.

¹¹⁹ "Sw" is an abbreviation for "sworn."

¹²⁰ See GOEBEL & NAUGHTON, *supra* note 7, at 653-59.

¹²¹ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 271-404 (1968).

assumed it would.”¹²³ If Moglen means that justices of the peace were authorized to question defendants prior to the trial, without requiring an oath, and that the answers were admissible in court, then the Oyer and Terminer records support the claim.

But the infrequency of this evidence in my data base (and apparently in that of Goebel and Naughton as well) suggests that Moglen may have overstated the case when he concluded that colonial criminal justice “depended upon self-incrimination.” Five examples out of a total of 48 reported trials looks more like a system that is not offended by self-incrimination than one that depends on it. Yet even five examples moves one to ask, with Moglen and Alschuler, a fundamental question: Why would a legal culture that permitted magistrates to require defendants to answer questions, and then used those answers in evidence, bother with a provision in the Fifth Amendment that no person “shall be compelled in any criminal case to be a witness against himself”?¹²⁴

Moreover, recall that criminal defendants could not testify in court under oath. Why then bother with forbidding the act of compelling people to testify in criminal cases? It is not an easy question. As Albert Alschuler has concluded, “What the Fifth Amendment privilege did not prohibit is in fact clearer than what it did.”¹²⁵ It might be, of course, that the privilege was intended for witnesses other than defendants but this seems quite unlikely, particularly if much of the testimony of witnesses went to the character of the defendant. It might be that the privilege was intended to forbid pre-trial questioning by magistrates and thus to make clear that magistrates should no longer follow the Marian Statute. This, too, seems unlikely because the questioning continued for quite some time after compelled self-incrimination was forbidden in state and federal constitutions.¹²⁶ Moreover, the arguments ultimately arrayed against pre-trial questioning by magistrates did not draw from any constitutional privilege.¹²⁷

It is tempting to see the Fifth Amendment privilege springing from an ancient and well-recognized Anglo-American evidentiary rule that affected criminal trials. This notion is simply false, as the New Jersey Oyer and Terminer records demonstrate. I leave for another day, or another scholar, solving the riddle of what

¹²² Moglen, *supra* note 115, at 1095.

¹²³ *Id.* at 1104.

¹²⁴ U.S. CONST. amend. V.

¹²⁵ Alschuler, *supra* note 114, at 2653.

¹²⁶ See Moglen, *supra* note 115, at 1124.

¹²⁷ The arguments were founded in the common law rather than constitutional provisions. See *id.* at 1126-29. It is, of course, possible that the drafters of the state and federal self-incrimination prohibitions intended them to eliminate pre-trial examination but that lawyers and judges far from the drafting debates failed to appreciate the drafters’ intent. Nelson notes that in Massachusetts the practice of magistrates interrogating defendants continued past the Revolution but ended some time in the 1790s. See William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, in 2 THE COLONIES AND EARLY REPUBLIC 429, 457-58 (Eric H. Monkmonen ed., 1991). Nelson does not speculate as to any role for the Fifth Amendment in ending this practice.

the Framers were thinking when they proposed the Fifth Amendment privilege against compelled self-incrimination.

G. Benefit of Clergy

A lingering residue from the struggle between Henry II and Saint Thomas Becket over whether the Crown could punish clerics,¹²⁸ the plea of benefit of clergy was originally available only to those who wore clerical garb. Later it was available to anyone who could read (on the theory that only clerics could read), and by the mid-seventeenth century, to any first offender who asked as long as Parliament had not made the offense non-clergyable.¹²⁹ The plea of benefit of clergy operated as a shield against the death penalty. It could not be invoked to prevent the trial, verdict, and sentence. And to limit it to first offenders, the defendant was branded on the thumb in open court. Here is an example:

Friday May 4th 1750

William Tuttle and Abraham Gibbons. On indictment for felony. The defendants brought to the Barr; the King's attorney mov'd for judgment. The prisoners were asked what either of them had to say why sentence of death should not pass on them according to the verdict found against them. They prayed the benefit of the clergy which was allowed. Their judgment was that each of them be branded in the brawn of their left thumb with the letter "T" immediately in the face of the court which sentence was executed. They were to be recommitted until their fees were paid and each of them entered into recognizance of one hundred pounds.¹³⁰

By the eighteenth century, the concern that a dangerous felon could escape punishment by pleading clergy had led to two innovations. Parliament had withdrawn benefit of clergy from many offenses: murder, rape, robbery, buggery, burglary, larceny above the value of 12 pence, and larceny from the person.¹³¹ I found no obvious departures from those rules.¹³² Goebel and Naughton note that New York colonial courts "carefully observed" English rules "respecting what were and were not clergyable offenses,"¹³³ and it appears that New Jersey courts did as well.

¹²⁸ For a brief discussion of this struggle, which Becket won (though he was murdered by Henry's knights in 1170), see George C. Thomas III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 74-76 (1998).

¹²⁹ WILLIAM BLACKSTONE, 4 COMMENTARIES *365-67.

¹³⁰ *King v. William Tuttle & Abraham Gibbons*, May 4, 1750, OYER AND TERMINER 10, 68 GMNJ 103 (1993).

¹³¹ See WILLIAM BLACKSTONE, 4 COMMENTARIES *202 (murder); *id.* at * 212 (rape); *id.* at * 243 (robbery); *id.* at *216 (buggery); *id.* at *228 (burglary); *id.* at *240 (larceny above the value of 12 pence); *id.* at *241 (larceny from the person).

¹³² I did find two clergy pleas in larceny cases but assume the amount was less than 12 pence. See *King v. Jonathan Parker*, May 13, 1754, OYER AND TERMINER 176-77, 75 GMNJ 79 (2000); *King v. Robert Whitehead*, May 23, 1752, OYER AND TERMINER 63, 71 GMNJ 88 (1996). The amount was not given in any of the larceny indictments.

¹³³ GOEBEL & NAUGHTON, *supra* note 7, at 755.

The second innovation in England could not be applied in the colonies. “A statute of 1717 provided that the trial court would have the power to sentence a convict who was allowed clergy to seven years’ transportation [to a colony], rather than release him outright with a branded thumb.”¹³⁴ This method of ameliorating (or outsourcing) the harmful effects of a plea of clergy proved quite popular with English judges. In Langbein’s Old Bailey sample of 171 trials and 179 offenses, he found 120 convictions with 85 defendants, or 71%, sentenced to transportation.¹³⁵

In my sample, I found seven likely pleas of benefit of clergy—four defendants where I am certain that it was pled,¹³⁶ two others where the minutes imply that it was allowed,¹³⁷ and one conviction for manslaughter, for which clergy seemed to be automatic.¹³⁸ I found no cases where a defendant requested it and the judge refused. I found twelve cases where the defendant was sentenced to die and did not request benefit of clergy. Nine were convictions of non-clergyable offenses (murder, grand larceny, and burglary). The other three death penalty cases without benefit of clergy were likely either non-clergyable offenses contained in the opaque category of “felony” or a clergyable felony where the defendant had been branded on his thumb.

Defendants who qualified for clergy in the New Jersey Oyer and Terminer court typically had to do three things, as the Tuttle and Gibbon record demonstrates. First, they had to be “branded in the brawn of their left thumb with the letter ‘T’ immediately in the face of the court which sentence was executed.”¹³⁹

¹³⁴ Langbein, *supra* note 8, at 39.

¹³⁵ *Id.* at 43.

¹³⁶ See King v. William Tuttle & Abraham Gibbons, May 4, 1750, OYER AND TERMINER 10, 68 GMNJ 103 (1993); King v. Jonathan Parker, May 13, 1754, OYER AND TERMINER 176-77, 75 GMNJ 79 (2000); King v. Robert Whitehead, May 23, 1752, OYER AND TERMINER 63, 71 GMNJ 88 (1996). I actually found eight pleas for clergy but as one involved a guilty plea, it is outside my sample of trials. See King v. David Anderson, October 17, 1757, OYER & TERMINER 279, 78 GMNJ 110 (2003) (clergy granted after plea of guilty to grand larceny; plea styled as “benefit of the Crown.”).

¹³⁷ The two where the minutes imply granting benefit of clergy follow the court granting it to Jonathan Parker, who was burnt on the thumb. King v. Jonathan Parker, May 13, 1754, OYER AND TERMINER 176-77, 75 GMNJ 79 (2000). See *infra* note 138 & accompanying text. The next cases for sentencing are King v. Samuel Huff, May 13, 1754, OYER AND TERMINER 177, 75 GMNJ 79 (2000) and King v. Charles Perry, May 13, 1754, OYER AND TERMINER 177, 75 GMNJ 79 (2000). The entire report of the sentencing phase of each case is “On indictment for felony. The Like in all things.” Moreover, Parker entered into “recognizance in the sum of fifty pounds to be of good behaviour for one year.” The next entry, in the same paragraph, is: “Samuel Huff and Charles Perry each entered into a like recognizance for their good behaviour for one year.” I take the “Like in all things” then to be a shorthand way to say that Huff and Perry were granted benefit of clergy.

¹³⁸ See King v. Robert Willson, April 21, 1757, OYER AND TERMINER 297 [not yet reprinted in GMNJ]. See also Langbein, *supra* note 8, at 44 (noting that manslaughter “at the time was punished by branding the convict on the thumb before releasing him”). Blackstone notes that manslaughter is “within the benefit of clergy” but then writes that “the offender shall be burnt in the hand.” WILLIAM BLACKSTONE, 4 COMMENTARIES *193. When discussing benefit of clergy generally, Blackstone says that benefit of clergy “is prayed by the convict before judgment is passed upon him.” *Id.* at *327.

¹³⁹ King v. William Tuttle & Abraham Gibbons, May 4, 1750, OYER AND TERMINER 10, 68 GMNJ 103 (1993). In this case, the indictment was for “felony,” without specifying the felony. That they were branded with a “T” suggests that it was larceny. That they received clergy suggests that the amount stolen was twelve pence or less. Langbein reports “partial verdicts” in the Old Bailey, where the jury

Second, the defendants “were to be recommitted until their fees were paid and [third] each of them entered into recognizance of one hundred pounds.”¹⁴⁰ As the branding was apparently carried out in open court, it suggests easy access to a fire hot enough to brand human flesh. Could it have been in the courtroom? Perhaps. I assume the court room was heated in winter by a fireplace and it would have been easy enough to have a small fire in summer during court days.

A word about “recognizances.” Recognizance was used with great frequency in the Oyer and Terminer records I studied, as it was in the New York records Goebel and Naughton read.¹⁴¹ It was an acknowledgment of a debt owed the king with the debt “to be void on performance of the thing stipulated.”¹⁴² Three basic uses can be discerned in the Oyer and Terminer records. First, recognizance was used as a form of bail prior to the trial. Second, convicted defendants who received non-capital sentences were often put on recognizance as a promise not to commit a crime. Indeed, other individuals would be put on recognizance so that they, along with the defendant, would owe the king in case further crimes were committed. Third, recognizance was used often to get witnesses to come to court: “LEONARD COLE. On recognizance to give evidence.”¹⁴³

The use of recognizance as bail is spelled out in one case in my sample:

Indictment for misdemeanor. Order that the defendant enter into recognizance himself in the sum of one hundred pounds to our Sovereign Lord the King . . . which recognizances the defendant enters in open Court as follows, vizt. John Hacket acknowledges himself indebted to our Sovereign Lord the King his heirs or sureties in the sum of one hundred pounds to be levied etc.,¹⁴⁴

would “downvalue” the stolen goods to allow the defendant to qualify for clergy. Langbein, *supra* note 8, at 52-56. I have no way to tell whether that was occurring in the Oyer and Terminer cases.

¹⁴⁰ King v. William Tuttle & Abraham Gibbons, May 4, 1750, OYER AND TERMINER 10, 68 GMNJ 103 (1993).

¹⁴¹ GOEBEL & NAUGHTON, *supra* note 7.

¹⁴² WILLIAM BLACKSTONE, 2 COMMENTARIES *341.

¹⁴³ King v. John Gould, September 19, 1753, OYER AND TERMINER 104, 72 GMNJ 133 (1997).

¹⁴⁴ King v. John Hacket, May 17, 1755, OYER AND TERMINER 179, 75 GMNJ 80 (2000). A recognizance of one hundred pounds was a goodly sum in those days. Indeed, it was three times more money than the King’s Attorney General made as his annual salary during most of this period. See *infra* note 105 & accompanying text. One hundred pounds in that era was worth roughly \$5,000 in 2004 money. THOMAS L. PURVIS, COLONIAL AMERICA TO 1763, at 117 tbl.4.194 (1999). In the period 1766-1772, one pound Pennsylvania currency was equivalent in value to \$45.99 in US dollars of 1991. *Id.* That table doesn’t include either New Jersey or the year 1754, but Table 4.195 (*Id.* at 118). makes plain that Pennsylvania and New Jersey currency values were close to each other in 1754 and that the values did not vary much between 1754 and the 1766-1772 period.

In clergy cases where larceny was the offense, restitution was sometimes ordered as part of the sanction, as we see in the next clergy case:

Hunterdon County May Term 1754

JONATHAN PARKER. On indictment for felony. The prisoner being brought to the Bar and it being demanded what he had to say why sentence of death should not be passed on him, he prayed the benefit of the clergy. Whereupon it is order[ed] that he be burnt on the [unreadable] of his left thumb which was done immediately in the presence of the Court and it is further ordered that restitution be made to the Prosecutor of the money mentioned in the indictment and proved to have been stolen by the prisoner and then discharg'd on his paying fees.¹⁴⁵

No recognizance is included in Parker's sentence for theft, perhaps because it was more important to force the thief to disgorge the profits of his thieving.

H. Penalties

An unscientific sample of 56 cases in the Old Bailey from the period covered by my New Jersey Oyer and Terminer records reflected the following types of punishments: death, branding (these were clergy cases), transportations to America, whipping, fine, pillory, and imprisonment.¹⁴⁶ Unsurprisingly, I found the same basic punishments, with the obvious exception of transportation to America. The one pillory case I found had an interesting twist. For passing counterfeit money, the defendant was sentenced to a

fine of £5 to the King, that he stand two hours in the common pillory this day between the hours of one and six in the afternoon, that he find security for his good behavior for three years, himself in £100 and one surety in £50 and then to be carted along the publick road which leads from Trenton to the house of Barant Simoson where the fact was committed and to the border or confines of this county (with Morris with a rope about his neck"¹⁴⁷

Twenty defendants in my sample, out of thirty-two convictions, were sentenced to hang. This 63% ratio of death sentences to all sentences is lower than Langbein apparently found in the Old Bailey sample. I compute his ratio to be

¹⁴⁵ King v. Jonathan Parker, May 13, 1754, OYER AND TERMINER 176-77, 75 GMNJ 79 (2000).

¹⁴⁶ Data collected by Tonia Patterson, one of my research assistants, and on file with the journal.

¹⁴⁷ King v. John Pipes, May 9, 1751, OYER AND TERMINER 33, 70 GMNJ 43 (1995).

91%.¹⁴⁸ When we subtract the seven uses of benefit of clergy to save the New Jersey defendant from the death penalty, we are left with thirteen judgments of death. We do not know, of course, whether all thirteen death sentences were executed. It was common practice in England for pardons to be given freely to defendants who had been sentenced to death.

From other sources, I have been able to ascertain that two of the New Jersey defendants sentenced to die were hung while one got a reprieve. The New York Gazette reported that “two of the three Men lately convicted [in Somerset County, New Jersey] for Burglary and Horse Stealing, were executed; but the other was reprieved.”¹⁴⁹ Comparing the date of the hangings and reprieve with the Oyer and Terminer date set for execution in Somerset County makes it fairly certain that these are the three defendants who appear in the records.¹⁵⁰

One defendant, ultimately sentenced to hang in Sussex County on November 4, 1757, merited his own legislative act. Due to the “Distresses and Calamities” occasioned by the French and Indian War in Sussex County, the General Assembly passed an act authorizing prosecution in Morris County.¹⁵¹ Whether he, or any of the remaining unaccounted for nine defendants sentenced to death, were executed or pardoned is unknown.

In one murder case, the judge obviously did not agree with the jury’s acquittal:

Connolly: The Court thinking it not consistent with the publick safety that the prisoner be [permitted] to go at large do order that the two (indifferent?) Persons within this County do enter into recognisance in 40 pounds each conditioned that the s'd prisoner be of good behaviour for a year and a day and that the said recognisance be taken by Benjamin Thomson Esq'r one of the Commissioners of Oyer and Terminer and that the s'd prisoner remain in custody until such security be given whereupon William Colvill and John Falkener entered into recognisance before Jus-

¹⁴⁸ Langbein states that 20 convicted defendants were sentenced to death, four to branding, and 85 to transportation. Langbein, *supra* note 8, at 43. As branding and transportation were sanctions that permitted a defendant to avoid the death penalty, I assume that the sentence in these branding and transportation categories was death that was mitigated by branding or transportation. That would make 109 death sentences out of 120 convictions or 91%.

¹⁴⁹ 19 WILLIAM A. WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 445 (William Nelson ed., 1897) (quoting December 9, 1754 issue of The N.Y. Gazette).

¹⁵⁰ The newspaper is dated December 9, 1754. *See id.* The defendants were all sentenced to hang on December 6, 1754 by the Court of Oyer and Terminer sitting in Somerset County. *See King v. John Brown, alias Murphy*, November 20, 1754, OYER AND TERMINER 125-26, 73 GMNJ 89 (1998) (convicted of grand larceny); *King v. Benjamin Knight, alias “Old England,”* November 20, 1754, OYER AND TERMINER 127-28, 74 GMNJ 31-32 (1999) (convicted of horse stealing); *King v. Thomas Salter*, November 20, 1754, OYER AND TERMINER 123-25, 73 GMNJ 88 (1998) (convicted of horse stealing).

¹⁵¹ 3 NEW JERSEY, LAWS OF THE ROYAL COLONY OF NEW JERSEY 533-35 (Bernard Bush ed., 1977). The case was *King v. Benjamin Springer*, October 26, 1757, OYER AND TERMINER 286, 78 GMNJ 114 (2003).

tice Nevill in the sum of one hundred pounds each for the good behaviour of John Connolly for a year and a day.¹⁵²

Judge Neville took a creative approach that let the verdict stand and still sought to motivate the defendant not to kill again. This is similar to modern laws permitting civil commitment of individuals who are dangerous to self or others.

No evidence indicates that Nevill sought to compel, or even to persuade, the jury to change its mind as did the judge in William Penn's case in 1670 in England. The Connolly case thus suggests that the colonists viewed jury verdicts as unimpeachable, as did English judges by the middle of the eighteenth century. If anything, the colonists held jury verdicts in higher esteem than their counterparts in England. Three decades later, the right to a jury trial was front and center in the debate about whether to ratify the federal Constitution. Although the Framers included it in Article III, the anti-Federalists rejected that formulation as inadequate because it did not require a sufficiently local venue. After the Sixth Amendment was ratified to silence these critics, we have the odd (and unique) spectacle of a right specified in the body of the Constitution only to be repeated, with a slight modification, in the Bill of Rights. Article III guarantees a right to a jury trial in the State where the crime occurred and the Sixth Amendment a right in the district where it occurred.¹⁵³

Part of a conviction for felony in England was that the defendant's personal property, and his life estate in real property, was forfeited to the king.¹⁵⁴ That this practice was at least formally and fitfully followed in the colonies seems evident from the way some of the juries spelled out its guilty verdict. The following, or some variation, was found in eight cases:

The jury came into Court and being called over appeared and say they are agreed on their verdict and find the def't guilty of the felony and murder whereof he stands indicted and that he had no lands, tenements, goods or chattles to their knowledge at the time of committing the same and so they say all..¹⁵⁵

¹⁵² King v. John Connolly, July 7, 1756, OYER AND TERMINER 246-47, 77 GMNJ 91 (2002).

¹⁵³ See U.S. CONST. art. III, § 2, cl. 3 ("Trial shall be held in the State where the said Crimes shall have been committed"); U.S. CONST. amend. VI (right to trial "by an impartial jury of the State and district wherein the crime shall have been committed").

¹⁵⁴ WILLIAM BLACKSTONE, 4 COMMENTARIES *378. The king would also have the right to the use of the real property for a year and a day after the defendant's death. *Id.*

¹⁵⁵ King v. Benjamin Springer, October 26, 1757, OYER AND TERMINER 286, 78 GMNJ 114 (2003).

Before a forfeiture could occur, the jury had to find that the defendant had forfeitable assets. I found no cases in which the jury made that finding. Goebel and Naughton concluded that in New York “this incident of felony judgment had virtually disappeared by 1766.¹⁵⁶ In part this was because most defendants convicted of felony “were so meanly circumstanced that there was nothing to forfeit.”¹⁵⁷ Also, the colonies at this time suffered from under-population, and crown officers had no incentive to deprive the defendant’s heirs of a freehold estate because this would encourage them to leave the colony.¹⁵⁸ As to personal property, “[n]o jury of freeholders on whom the burden of proof rested was likely to find chattels and thus cast upon the county the support of a convict’s wife and family.”¹⁵⁹ That I found no jury finding of assets is consistent with Goebel and Naughton’s conclusion that forfeiture was no longer part of the sanction for felony in the colonies by the middle of the eighteenth century. Indeed, that most juries made no finding one way or the other in felony cases might have been a way to avoid forfeiture without the jury perjuring itself.

In addition to death and shaming, other sanctions included fines, whipping, and short terms of imprisonment in the county jail. The next case includes both a fine and a term in prison. For the offense of “aiding and assisting in passing counterfeit bills,” the court in *King v. Brant*

fined the defendant twenty five pounds, three months imprisonment without bail or (mainprison) [a form of bail] and that he give security in the sum of 50 pounds for his good behavior for seven years and two surety’s in the amount of 25 pounds and that he stand committed till his fines and cost be paid and till he complied with this sentence.¹⁶⁰

I have already described the gruesome whipping to which Orsland was sentenced, 117 lashes to be administered on three different days. An interesting distinction between clergyable felonies and misdemeanors can be noted here. Robert Willson was convicted of the felony of manslaughter and he was branded on his left hand with the letter “M.”¹⁶¹ Misdemeanors did not qualify for benefit of clergy. Thus, George Orsland was convicted of the misdemeanor of petty larceny and received 117 lashes. The branding sounds like a lighter penalty to me. To be sure, Willson, but not Orsland, had lost his “get out of jail card.” If both were sub-

¹⁵⁶ GOEBEL & NAUGHTON, *supra* note 7, at 715.

¹⁵⁷ *Id.* at 716.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 717.

¹⁶⁰ *King v. David Brant*, July 11, 1750, Oyer and Terminer 19, 69 GMNJ 65 (1994).

¹⁶¹ *King v. Robert Willson*, April 21, 1757, OYER AND TERMINER 297 [not yet reprinted in GMNJ].

sequently convicted of a clergyable felony, Orsland, but not Willson, could avoid the death penalty.

In the next Part, I provide summaries of the information contained in these records by category.

IV. Summarizing the Colonial Data

Table 1 summarizes the offenses that were tried, the outcome, and the sentence. Though I found 49 trials, there were 50 offenses tried because one defendant (Whitehead) was acquitted of burglary but convicted of larceny. Guilty verdicts were returned in 25 cases but because three of those cases involved more than one defendant the total number of convictions was 32. Three not guilty cases involved multiple defendants but each involved the offense of riot. Since riot by definition requires more than one actor, I decided to count these as a single instance of riot. Thus, the total number of verdicts in my trial database was 57.

Table 1
Outcomes by Verdict

Offense	Total	Guilty	Not Guilty	Sentence
Homicide	13	5	8	5 death penalties; 1 with-clergy (manslaughter conviction)
Public order	5	0	5	
Larceny	9	8	1	7 death; 3 with clergy; 1 whipping (petty larceny)
Burglary	3	1	2	1 death penalty

Counterfeit- ing	3	3	0	1 fines; 1 fine & shaming; 1 missing sentence.
Forgery	5	1	4 ¹⁶²	1 fine
Buggery	1	1	0	1 death penalty
Felony	6	6	0	6 death, 3 with clergy
Misdemeanor	9	6	3	5 fine; 1 whipping
Perjury	2	0	2	
Assault	1	1	0	1 fine
Total	57	32	25 ¹⁶³	20 death, 7 with clergy; 2 whippings; 1 shaming; 9 fines

Table 2 backs out the multiple defendants in the guilty verdicts to provide a per prosecution comparison. There we see that the acquittal rate per prosecution in the New Jersey Court of Oyer and Terminer of 1749 to 1757 was precisely that of flipping a coin (perhaps a Spanish piece of eight). Twenty-five trials resulted in convictions; twenty-five in acquittals. This compares to Langbein's acquittal rate in his Old Bailey cases of one-third, a rate that is similar to Beattie's rate for the Surrey assizes during the years 1736-1753.¹⁶⁴

¹⁶² One indictment was dismissed, while the jury was deliberating, on the ground that it was insufficient to sustain a conviction: "The Court having maturely considered the same are of opinion that from the reasons offered and the many errors upon the face of the indictment that no judgment on the verdict found by the Jury etc. can be rendered." *King v. Thomas Nevill*, June 1754 [day of month not given], OYER AND TERMINER 141, 74 GMNJ 36 (1999). I counted this as a "not guilty" verdict rendered by the judge.

¹⁶³ See *supra* notes 17-19 and accompanying text.

¹⁶⁴ Langbein, *supra* note 8, at 43, giving the Beattie results (citing Beattie, *Crime and the Courts in Surrey: 1736-1753*, in *CRIME IN ENGLAND* 155, 175 (J.S. Cockburn ed., 1977)).

Table 2
Outcomes by Trial

Offense	Total	Guilty	Not Guilty	Sentence
Homicide	13	5	8	4 death penalties; 1 branding (manslaughter conviction)
Public order	5	0	5	
Larceny	9	8	1	7 death; 3 with clergy; 1 whipping (petty larceny)
Burglary	3	1	2	1 death penalty
Counterfeiting	3	3	0	2 fines; 1 shaming
Forgery	5	1	4 ¹⁶⁵	1 fine
Buggery	1	1	0	1 death penalty
Felony	4	4	0	4 death, 2 with clergy
Misdemeanor	4	1	3	1 fine
Perjury	2	0	2	

¹⁶⁵ See *supra* notes 17-19 and accompanying text..

Assault	1	1	0	1 fine
	50	25	25 ¹⁶⁶	17 death, 5 with clergy; 2 whippings; 1 shaming; 4 fines

A sample of 57 offenses and 49 trials is small and when one starts breaking it up into smaller units, it becomes too small to support statistical inferences. Yet some things about Table 1 are striking. First, there were no robbery trials. Indeed, the word "robbery" or "rob" did not appear in the Oyer and Terminer records I read. Moreover, Table 1 contains no entry for rape. I did find two rape indictments. In one, the prosecutor/complaining party did not appear at trial: "On an indictment for a rape. The prisoner being set to the barr, proclamation made to proceed to his trial. Proclamation was thrice made that the prisoner stand upon his deliverance and no person appearing he was delivered."¹⁶⁷ No evidence exists of what happened to the other indictment.¹⁶⁸

To be sure, the six felony offenses could contain robbery and rape cases. That six offenses were charged as "felony" is a mystery. Blackstone does not mention an offense of "felony" and Langbein's Old Bailey cases did not turn up any charges of "felony." From the punishment, it seems as though one of the felony cases was larceny but not over 12 pence. Assuming that the other five felony offenses contain zero or only one or two rape or robbery charges, we need an explanation of why so few charges of rape and robbery. My first attempt was the agrarian and thinly-populated nature of the New Jersey colony. In 1745, New Jersey had 61,403 inhabitants (not including Native Americans) or slightly fewer than 8 per square mile.¹⁶⁹ That explanation may be true enough, but then I noticed that Langbein's Old Bailey sample also has zero rapes and only four robberies.¹⁷⁰ Now we perhaps have a bigger mystery: why rape and robbery were virtually unknown in London. Both were serious crimes in England; both were felonies from which bene-

¹⁶⁶ See *supra* notes 17-19 and accompanying text.

¹⁶⁷ King v. Robert Holeman, OYER AND TERMINER 86, 72 GMNJ 46 (1997).

¹⁶⁸ King v. Dennis [Cormick?], June 1754 [day of month not given], OYER AND TERMINER 140, 74 GMNJ 35 (1999). The defendant's name does not appear again in the records. (I searched for "Dennis" in case the reporter changed the name of the spelling of the last name as well as for "rape.")

¹⁶⁹ THOMAS L. PURVIS, COLONIAL AMERICA TO 1763, at 151, tbl.5.28 (1999).

¹⁷⁰ Langbein, *supra* note 8, at 42.

fit of clergy had been withdrawn.¹⁷¹ Why so few? I leave that mystery for another day.

Other than buggery, there were no trials for morals offenses. The buggery, of course, could have been non-consensual, in which case it would not be accurate to consider it a trial for a morals offense. I wondered if morals offenses were charged at all as crimes and did a word search for “adultery,” “fornication,” and “crime against nature.” I found zero cases of “crime against nature” but four cases, in seven and one-half years, of adultery and fourteen cases of fornication. The typical resolution of these cases was a fine or a forfeiture of the recognizance that was posted when the defendant was arraigned on the indictment. In one case, late in the period covered by my study, the first reference to the indictment is followed by the Attorney General’s remarks, “The King will no further prosecute this suit etc.”¹⁷² As there was no reference to a fine or forfeiture, perhaps the case was a weak one.

The most commonly tried crime in Table 2 was homicide. Ten homicide trials were for murder and three for manslaughter. By comparison, Langbein’s 171 trials involved but three homicide trials.¹⁷³ As a percentage of all trials, the Old Bailey data contained fewer than 2% homicide trials while my New Jersey Oyer and Terminer sample had 27% homicide trials. Based on population, the 1754-56 Old Bailey records show 1.5 homicide trials per 600,000 inhabitants per year. Based on population, the New Jersey records show 1.6 homicide trials per 60,000 inhabitants per year,¹⁷⁴ or a rate ten times as high. I speak here of course not of the rate of homicides in the population, which is unknown, but the rate at which homicides were tried.

In addition to the murder and manslaughter trials, the case reports contain several instances of, but no trials involving, “homicide by misadventure” and “chance medley.” Both offenses are a lesser form of homicide than manslaughter. “Homicide by misadventure” here, as in Blackstone, describes a killing that was accidental; it occurred when someone “doing a lawful act, without any intention of hurt, unfortunately kills another.”¹⁷⁵ “Chance medley” was a more culpable killing, a kind of imperfect self defense where the killer was provoked, the provoker broke off the attack, and the killing occurred upon a “sudden reencounter.”¹⁷⁶ While Blackstone considered homicide by misadventure as non-culpable, the New Jersey Oyer and Terminer court treated these two lesser offenses more or less equivalently, requiring the defendants to give a recognizance. Here is an example of each:

¹⁷¹ See *supra* note 132 & accompanying text.

¹⁷² King v. Mary Simson, May 6, 1757, OYER AND TERMINER 265, 78 GMNJ 37 (2003).

¹⁷³ Langbein, *supra* note 8, at 42.

¹⁷⁴ This is calculated, as is the Old Bailey number, by dividing the number of trials by the number of years included in the study. In the Oyer and Terminer records, thirteen homicide trials divided by seven and one-half years.

¹⁷⁵ WILLIAM BLACKSTONE, 4 COMMENTARIES *182.

¹⁷⁶ *Id.* at 184.

Indeed, given the greater amount of the recognizance, and the additional surety, in the homicide by misadventure, it seems to have been treated on this occasion as a somewhat more culpable killing.

WILLIAM MOUNT. On indictment for homicide by misadventure. The defendant being charged with his indictment pleaded guilty. Mount entered into recognizance in the sum of 50 pounds with George Mount and David Parker his sureties in the amount of 25 pounds each.¹⁷⁷

WILLM ROGERS. On indictment for chance medley. He entered into recognizance in £40 with John Tice his surety in £20 for his good behavior for a year. Ordered that he be discharged on paying his fees and that a certificate be given him by the clerk.¹⁷⁸

Whether culpable or not, defendants who killed had to pledge to pay money if they offended in the future. The notion seems to be that one who kills may be dangerous to others and should be especially careful in the future.

Even though homicide was the most frequently tried, the conviction rate was quite low: 38%. Other offenses with low conviction rates, again in samples too small to give us confidence that they are meaningful, are forgery, offenses against the public order, and perjury. One might think that offenses against the public order (three of which were riot) would be particularly hard to convict if resentment was beginning to build against the king. But that is a weak inference as I found many guilty pleas to riot. And of course twenty-odd years before the Revolution, there is no reason to assume that much resentment was building, particularly in New Jersey, which is generally regarded as the most pro-England colony prior to and during the Revolution.

The highest conviction rate was felony with six convictions out of six verdicts, and larceny with eight convictions out of nine verdicts. As we do not know what felony was involved in the felony cases we cannot even speculate as to why there were no acquittals. In larceny cases, the victim is not the public order or the currency but individual citizens. Perhaps that is why acquittals were rare in larceny cases. When the stolen item is mentioned in these cases, five times, it is a horse. In a thinly-populated, eighteenth century agrarian society, horses were probably just about the most important movable asset one could own.

¹⁷⁷ King v. William Mount, November 20, 1749, OYER AND TERMINER 5-6, 68 GMNJ 101 (1993).

¹⁷⁸ King v. William Rogers, October 18, 1753, OYER AND TERMINER 114-15, 73 GMNJ 84 (1998).

Larceny constituted 16% of the offenses in my sample. By contrast, in Langbein's Old Bailey sample, various iterations of larceny, including receiving stolen property, constituted 89% of the offenses! Here, I can deploy my argument that the New Jersey colony was an agrarian, thinly-populated place. Imagine a state that is mostly forested compared to the teeming metropolis of London. Think Charles Dickens and Pip. Still, that almost 90% of the criminal trials in the Old Bailey in 1756-58 involved larceny is a rather remarkable statistic.

Conclusion

What have we learned about colonial criminal procedure in New Jersey? Eben Moglen has noted that

a broad convergence on traditional English forms had occurred throughout the criminal procedure systems of the British colonies by the end of the seventeenth century, despite diversities of belief, purpose, and the conditions of settlement. The common features included not only the grand and petit juries and other palladia of English liberties, but also the system of preliminary examination, the rules excluding counsel, and the other elements of early modern criminal procedure that had developed from the merger of English traditions of local government and the sweeping effect of the Marian committal statutes [requiring defendants submit to pre-trial questioning by justices of the peace].¹⁷⁹

The New Jersey Oyer and Terminer records largely bear out these observations. They also show similarities to (and a few striking differences from) the records at the Old Bailey. In the Oyer and Terminer courts, juries decided guilt or innocence in every case where a defendant stood on a not guilty verdict. Counsel were permitted to sum up in felony cases but apparently not much else. Counsel did appear far more frequently, both for the king and the defendant, in colonial New Jersey than in the Old Bailey.

Justices of the peace examined at least some defendants prior to trial and their unsworn answers were admitted at trial. Misdemeanors were punished by fines, shaming, whippings, and occasional imprisonment, as was the case in England of that era.¹⁸⁰ Felonies were punishable by death. Benefit of clergy was permitted in felony cases except where Parliament had withdrawn it. The form of execution in the records I read was always hanging, while in England other methods of execution were available (beheading, disemboweling).¹⁸¹ Langbein does not state the type of death penalty in the judgments in the Old Bailey trials, but Blackstone

¹⁷⁹ Moglen, *supra* note 115, at 1103-04.

¹⁸⁰ WILLIAM BLACKSTONE, 4 COMMENTARIES *370-71.

¹⁸¹ *Id.* at *370.

reports that hanging was “generally” the mode of execution. In that, too, the Oyer and Terminer courts were paralleling the criminal law of England.

And why should we expect anything else? The colonial historian Anton-Hermann Chroust wrote that after New Jersey became a royal colony in 1702,¹⁸² it “probably followed more closely the common law of England and English precedents than any other American colony.”¹⁸³ Chroust speculates that this may be explained, in part, because it became a royal colony at a late date and could learn from the experience of other colonies that a stable source of law was needed.¹⁸⁴

The value in the Oyer and Terminer records is that they provide a first hand account of what Blackstone and other commentators describe in second-hand accounts. They provide a basis for comparison with contemporary proceedings in the Old Bailey. Moreover, the Oyer and Terminer records tell us a little about what was happening in one of the colonies of America, painting a picture, however dim, of life in the colonies. The incidence of horse stealing fills in a piece of the picture. The fact that even homicide by misadventure caused the defendant to have to make a recognizance suggests a society in which order was very important. The same inference can be drawn from the offenses against public order, though in this regard it is interesting that all five defendants were acquitted.

We are reminded of the nature of that society when we see cases styled “King v. Indian Amey” and “King v. Negro Edinburgh.” Amey was prosecuted for murder, appeared without counsel, and was acquitted.¹⁸⁵ She¹⁸⁶ was one of only four defendants to win an acquittal without counsel. She was arraigned on a murder indictment on the morning of November 22, 1751, pleaded not guilty, and Justice Nevill set the trial for that afternoon.¹⁸⁷ The venue was Monmouth County, a county that borders the ocean and is south of the heavily-populated Hudson, Essex, and Bergen counties. The king, represented by Attorney General Joseph Warrell, presented seven witnesses while Amey presented but one.¹⁸⁸ Warrell summed to the jury, which after withdrawing to deliberate announced their verdict of not guilty.

I would love to know more about the trial but there is little else in the records and nothing seems to have appeared in the newspapers of the time.¹⁸⁹

¹⁸² Prior to 1702, New Jersey existed as two proprietary colonies, East New Jersey and West New Jersey. See CHROUST, *supra* note 77 at 194.

¹⁸³ *Id.* at 193-94.

¹⁸⁴ *Id.* at 194.

¹⁸⁵ King v. Indian Amey, November 22, 1751, OYER AND TERMINER 25-27, 70 GMNJ 38-39 (1995).

¹⁸⁶ The records refer to the defendant by the female pronoun. OYER AND TERMINER at 27, 70 GMNJ at 38 (1995).

¹⁸⁷ OYER AND TERMINER at 25, 70 GMNJ at 38 (1995).

¹⁸⁸ *Id.* at 27, 70 GMNJ at 39.

¹⁸⁹ I searched the months of November and December, 1751, in 19 WILLIAM A. WHITEHEAD, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 445 (William Nelson ed., 1897).

Amey's witness, Mary Shaw, had been called to give evidence before the grand jury that returned the indictment.¹⁹⁰ One of the king's witnesses at trial was the only other witness called to give evidence to that grand jury. Evidently, they told conflicting stories and the trial jury believed Mary Shaw.

Negro Edinburgh was charged with burglary and represented by two counsel (Phillip Kearney and Williams).¹⁹¹ We do not know whether Edinburgh was a slave or a free black. New Jersey had over 4,500 slaves during this period.¹⁹² The number of free blacks is not known. We do know that two men stood as sureties for Edinburgh, who initially did not appear and his sureties were thus held in default.¹⁹³ One of the sureties was named Richard Williams and could be the same Williams who served as one of Edinburgh's counsel.¹⁹⁴ If so, perhaps his appearance as counsel was to seek an acquittal so he could be released from his obligation as surety.

Edinburgh's failure to appear occurred on October 8, 1751. Four days later, he appeared to plead not guilty to the burglary indictment. The king presented three witnesses in the Edinburgh case. Two were a man and woman with the same last name, presumably the husband and wife living in the home where the burglary was suspected. Edinburgh presented no witnesses and there is no report that either counsel for the defendant summed up. The court adjourned for half an hour and when it re-opened the jury announced its verdict of not guilty.¹⁹⁵

A sample size of two does not of course permit statistically valid inferences, but I offer three observations. First, it was possible in the royal colony of New Jersey in 1751 for a black man to obtain counsel. Second, that one of the counsel was Philip Kearney, who represented six other defendants in these records, suggests that someone paid a fee. Third, it was possible for a black man and a Native American woman to be acquitted, and in the case of the Native American without even having counsel to help her.

These windows into life in the royal colony of New Jersey in the mid-1700s are tantalizing indeed. The evidence amassed by this study about the criminal law and procedure of the era helps clarify the still foggy picture of justice in the colonies before the Revolution.

¹⁹⁰ OYER AND TERMINER at 24, 70 GMNJ at 37.

¹⁹¹ King v. Negro Edinburgh, October 12, 1751, OYER AND TERMINER 47, 70 GMNJ 133 (1995).

¹⁹² See *supra* note 20 and accompanying text.

¹⁹³ OYER AND TERMINER 45, 70 GMNJ 131 (1995).

¹⁹⁴ I searched for "Richard Williams" in the Oyer and Terminer records, hoping to find a helpful reference to him but his name does not appear again.

¹⁹⁵ *Id.* at 48, 70 GMNJ at 133.