

ARTICLES

THE LAW-FINDING FUNCTION OF THE AMERICAN JURY

MATTHEW P. HARRINGTON*

It has become something of an article of faith in the legal community that it is “the duty of the court to expound the law and that of the jury to apply the law as thus declared.”¹ In practice, this is often interpreted to mean that the judge alone has the power to determine the law and the jury is limited to applying the law to the facts. The standard allocation of power between judge and jury is thought to be as old as the common law itself.²

In truth, however, this division of labor is of relatively recent origin. Until the early years of this century, many American lawyers and judges believed that juries had the power to declare both the law and the fact. The jury thus had the ability to take upon itself the right to determine the entire controversy. As late as 1895, Supreme Court Justice Shiras asserted:

The jury . . . are intrusted with the decision of both the law and the facts involved in [the] issue. To assist them in the decision of the facts, they hear the testimony of witnesses; but they are

* Associate Professor of Law, Roger Williams University. LL.M., University of Pennsylvania; J.D., Boston University; B.Th., McGill University.

1. *Sparf v. United States*, 156 U.S. 51, 106 (1895).

2. *See, e.g.*, SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND, OR, A COMMENTARY UPON LITTLETON 155b* (4th ed. 1639) [hereinafter *COKE'S INST.*] (“To a question of fact, the judges do not answer; to a question of law, the jurors do not answer.”); *see also* JOHN PROFFATT, *A TREATISE ON TRIAL BY JURY* 374, 426 (1876):

[T]he duties of the judge presiding at the trial are threefold:

1. To decide upon the admissibility of evidence.
2. To declare the rules of law affecting this evidence
3. To expound the general rules of law applicable to the point at

issue.

. . . .

It is the acknowledged duty of the jury to determine the facts involved, as an inference from the evidence produced before them—this is peculiarly their province; to judge of the credibility of witnesses; and as a necessary consequence of these powers, to judge of the sufficiency and weight of the evidence.

not bound to believe the testimony. To assist them in the decision of the law, they receive the instructions of the judge; but they are not obliged to follow his instructions.³

This ability to determine the law was something more than the power to bring in a general verdict, however. American judges actually asserted an almost plenary power in the jury to decide the law as it saw fit. Most recognized that juries might ignore their instructions, and bring in a verdict contrary to the law stated in the charge. For many years, therefore, courts were reluctant to order new trials on the grounds that the verdict was against the law. "It doth not vitiate a verdict," the Connecticut Supreme Court once declared, "that the jury have mistaken the law or the evidence; for . . . they are judges of both."⁴

The jury's power over law has its origins in the struggle against the royal prerogative. In seventeenth-century England, the jury's ability to bring in a general verdict of acquittal was celebrated as a bulwark of liberty. In several notable cases, juries stood up for individual rights against oppressive or unjust prosecutions. This characteristic of jury practice became especially valuable in the colonists' own struggle against the Crown. Colonial juries often refused to convict in cases brought under the navigation acts and sedition laws. Royal officials saw the coercive power of parliamentary legislation hampered by the inability to obtain convictions. The jury's power to nullify unpopular laws made it an important vehicle for the expression of the popular will.

Judges were not alone in their adherence to the jury's law-finding function. Lawyers, too, recognized the jury's power over law, and relied on it in presenting their case. Eighteenth-century lawyers did not hesitate to argue the law to juries, often citing cases and pointing to eminent legal authorities, such as Blackstone, to convince the jury to adopt their own view of the law. This privilege was so jealously guarded that it became the source of a great deal of controversy when judges later attempted to restrict the practice.

The jury's power over law was aided by the fact that few judges in the colonial period had formal legal training; many were simply administrative or legislative officers whose position gave them the right to adjudicate disputes, or prominent members of the community. Knowledge of the law was not a prerequisite to being a judge.⁵ As a

3. *Sparf*, 156 U.S. at 171 (Shiras, J., dissenting).

4. *Wittner v. Brewster*, Kirby 422, 423 (Conn. 1788).

5. Rhode Island's charter, for example, provided that the governor, deputy governor and assistants would exercise judicial as well as administrative functions. Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 153 (1904).

result, the judge who presided at the trial did not look all that much different from the jury. "In background, experiences, and outlook [juries] were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them."⁶ They were neighbors from nearby towns, who shared the same common beliefs and assumptions as the parties before them.⁷ Their lack of formal training meant that colonial judges did not usually instruct the jury on the law. Even when they did, judges were quick to advise the jury that they were not bound by the judge's view of the law as stated in the charge.

The relationship between judge and jury did not change much in the years immediately following the Revolution. Although the business of judging was becoming more professionalized, many judges still refused to instruct the jury that it was bound by the charge. This was certainly true in criminal cases, mainly because judges still revered the jury's role as a check on oppressive prosecutions. Nonetheless, many judges refused to instruct the jury on the law in civil suits as well. The jury's power over law in the first decade of the Republic did not, therefore, look very much different than in the colonial era.

In time, however, members of the bench and bar gradually came to the conclusion that the jury's power over law must be restrained. In civil cases, judges and lawyers joined with merchant interests to limit the jury's law-finding function as a means of promoting a stable commercial environment. Such stability was thought necessary to the Republic as a means of putting the new nation on a firm economic footing, allowing it to provide for the welfare of its citizens and assume a place of prominence in the family of nations. This instrumentalist view of the law made judges increasingly willing to devise some means to force juries to adhere to the law as stated in the court's charge. It was not long before American judges resorted to the English doctrine of new trials to reverse verdicts where juries had brought in a verdict contrary to their instructions. This program was so successful that by the 1820, the jury's power over law had all but disappeared.

The jury's law-finding function in criminal cases was to survive much longer, however. Adherence to the view of the jury as a bulwark of liberty meant that many judges were more reluctant to intrude upon the jury's power to bring in a general verdict in criminal trials. Constitutional prohibitions on double jeopardy also meant that the power to grant new trials in criminal cases was severely limited. The inability to order a new trial in cases where the jury brought in a verdict of

6. BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 71 (1987).

7. *See id.*

acquittal made it difficult to enforce complete compliance with the court's instructions. The jury's power to acquit "in the teeth of both law and facts" meant that it would always retain some variant of its earlier law-finding function.⁸ Nonetheless, by the end of the nineteenth century, judges shed their earlier hesitance and took upon themselves the power to grant new trials in cases of conviction. More importantly, judges also began to instruct juries that they were bound by the law as stated in the charge. They increasingly sought to prevent counsel from advising the jury of its right to nullify and prohibit lawyers from making any sort of legal argument to the jury. In so doing, judges eventually succeeded in burying the jury's law-finding function in the dusts of time. The judges were so successful that few lawyers, and almost no juror, ever has but the faintest inkling of the enormous prerogative that once belonged to the jury.

What is especially striking about the decline of the jury's power over law is the way in which it was carried out. The drive to limit the law-finding function was entirely a judge-led exercise, carried out without legislative warrant and sometimes in the face of legislative enactments to the contrary. Three factors played a role in this effort: Foremost among these was the growing desire for stability in the law. Both judges and lawyers were concerned about the need to provide a stable legal regime. This was so not only to ensure stability in the commercial law, but also to ensure that the criminal law might be fixed and uniform. The increasing diversity of juries was also a factor. The "men of the neighborhood" who adjudicated disputes in the town and county courts were no more. As the nation became diverse and jury service was opened to a wider segment of the population, juries could no longer be counted on to speak from a common set of beliefs and experiences. The way was cleared for inconsistent and contradictory verdicts. Perhaps worse, from the judges' point of view, was the increasing tendency of juries to bring in verdicts at odds with the judges' own views and experiences. Finally, the movement was also fueled by the increasing professionalization of the bench and bar. As legal education became more sophisticated, judges became more convinced that the bench was the proper place in which to lodge the law-finding function.

In the end, the American judiciary succeeded in delegitimizing the jury's power over law by means of a careful and creative reinterpretation of the common law governing the allocation of power between judge and jury. The transformation was long and arduous, marked by a great deal of hesitancy and many missteps; but, the results have been long lasting. This Article will outline that struggle, tracing the jury's power over law

8. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

in the colonial period, through its gradual transformation during the Civil War, and finally to its eventual decline at the beginning of the current century.

I. THE "VERY ESSENCE OF LIBERTY"

The English jury is as old as the English state itself.⁹ The earliest juries performed an administrative function; they were "bodies of citizens summoned by royal command to testify about property arrangements, local customs, and taxable resources in each neighborhood of the realm."¹⁰ The jury functioned as an informational tool, with jurors themselves giving evidence about the nature of their community. Using this evidence, one product of which was the Domesday Book of 1085-1086, the Crown was able to assess accurately property available for taxation as well as establish more efficient schemes for local governance.¹¹

In time, the jury was transformed from a purely administrative body to a dispute resolution mechanism. Beginning in the twelfth century, trial by jury began to supplant older forms of trial, such as trial by battle and

9. For many years, the traditional scholarly view held that the jury was brought to England by the Norman conquerors after 1066. See 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 74 (2d ed. 1959). Recent scholarship has cast doubt on this theory, and demonstrated that there were a number of precursors to the Norman invention. See JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 119-20 (1960). Some have found elements of jury procedure in the role of the doomsmen in the Anglo-Saxon communal courts, while others see the jury's origins in the 12 thegns discussed in King Ethelred's Law of Wantage (A.D. 997). Care must be taken in drawing too close a connection between these ancient institutions and that which we call the jury, however. After all, "[t]he appearance of a principle or institution in one age, followed by the appearance of the same or similar institution at a considerably later age, must not lead one to suppose that the later is derived from the earlier." THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 109 (5th ed. 1956).

10. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 582-83 (1993).

11. Government officials were instructed to:
enquire by the oath of the sheriff and of all the barons and of the Frenchmen, and of all the hundred, of the priest, of the reeve, and of six villeins of every vill, what is the name of the manor, who held it in the time of King Edward, who now, how many hides, how many ploughs,—how many men, how many villeins . . . how much it was worth and how much now; and all this at three times, the time of King Edward, the time when King William gave it, and now.

WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY* 101 (1913).

the ordeal.¹² Unlike modern juries, however, the medieval jury retained a witness function. The jury of the assizes—like that used in the preparation of the Domesday Book—was expected to render a verdict based upon its own knowledge of the facts. Jurors were expected to be knowledgeable about the parties and events involved. They did not, therefore, merely sit in judgment of facts presented by others. Rather, the jurors' "chief qualification was that they were supposed to know somewhat of the truth before they came to court."¹³

There remains some doubt as to how long the early petit jury retained this witness function, however.¹⁴ As a representative of the community in which the wrong was alleged to have occurred, it appears some knowledge on the part of the jurymen would have been desirable. But it is also clear that jurors did not necessarily need to have first-hand information. In many cases, that would have been impossible. As a result, where a jury did not have direct knowledge of the events at issue, judges frequently added witnesses who did.¹⁵ Nevertheless, by the

12. This was accomplished by a series of assizes, which gradually opened up the right of trial by inquisition to the common man depending on the nature of the case. Thus, one wrongly dispossessed of his lands was entitled to submit his case to a jury to determine rightful ownership through the assize of *novel disseisin*. The original writ issuing in a case of *novel disseisin* directed the sheriff of the county to summon twelve jurors who should then go and view the lands in dispute. The jury would then testify before the king's justices whether the plaintiff had been dispossessed of his lands. The assize of *mort d'ancestor* (1176) required the assize of twelve men to determine whether the plaintiff's ancestor died seised of his tenements and whether the plaintiff was the heir. The assize of *darrein presentment* required the jury to say whether the plaintiff was the last patron of a church and thus had the right to present the next parson. The assize of *utrum* settled the question of whether lands were held by the church or Crown. See PLUCKNETT, *supra* note 9, at 360.

13. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88 (3d ed. 1990). This reliance on a familiarity with events made it important that jurors come from the vicinity where the alleged wrong took place. The inquisitorial function of the early jury allowed for a further development. The jury's knowledge of local events and persons made it useful as a means of identifying lawbreakers and other evil-doers. The Assize of Clarendon (1166) provided impetus for the development of what we now call the "grand jury."

14. Cf. BAKER, *supra* note 13, at 88; PLUCKNETT, *supra* note 9, at 128.

15. Bracton describes the ways in which a judge might assist a jury uncertain about the proper verdict: "If the jurors are altogether ignorant about the fact and know nothing concerning the truth, let there be associated with them others who do know the truth. But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least." Bracton ON THE LAWS AND CUSTOMS OF ENGLAND, fol. 186. *translated in* PLUCKNETT, *supra* note 9, at 129.

Stephan Landsman gives further evidence in support of the witness function. He argues that the process of attain along with a statute requiring the sheriff to transmit the names of the jury to the parties so that the jury might be informed of the facts make sense

middle of the fifteenth century, the jury had jettisoned whatever witness function it might have had, and was regarded as “a body of impartial men who come into court with an open mind.”¹⁶ The jury now no longer found a verdict based on its own knowledge of events. Rather, the parties themselves examined witnesses in open court.¹⁷

While the use of the petit jury no doubt made for a more efficient judicial system, it had—from the Crown’s perspective, at least—the unsalutary effect of teaching Englishmen to rule themselves.¹⁸ The jury’s transformation from a purely administrative to an adjudicative body meant that the king was provided with an efficient vehicle for administering the realm. At the same time, however, the average Englishman was given an education in self-government. The middle class were destined to be the backbone of the jury system as the wealthy increasingly sought to avoid jury service.¹⁹ As a result, extensive experience on juries ensured that by the seventeenth century, men of modest property holdings were well-prepared to challenge the Crown, leaving Blackstone able to argue that juries of the “middle rank” were “the best investigators of truth and the surest guardians of public justice.”²⁰

The several attempts by the later Stuarts to assert the prerogative led some to describe the latter part of the seventeenth century as “the heroic

only if the jury were to serve a witnessing function. See Landsman, *supra* note 10, at 584-85.

16. PLUCKNETT, *supra* note 9, at 129.

17. See SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* chs. 25, 26 (1471); see also THOMAS SMITH, *DE REPUBLICA ANGLORUM* 94-103 (L. Alston ed., 1906).

18. See Landsman, *supra* note 10, at 587-88.

19. See Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-1670*, in *TWELVE GOOD MEN AND TRUE* 182 (J.S. Cockburn & Thomas A. Green eds., 1988) [hereinafter *TWELVE GOOD MEN AND TRUE*]; see also P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, in *TWELVE GOOD MEN AND TRUE*, *supra*, 117, 133 (describing jurors as having modest property holdings).

20. 3 WILLIAM BLACKSTONE, *COMMENTARIES* *379. Blackstone further argued that:

[T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share, which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

Id. at *379-80.

age of the English jury."²¹ This claim was well-founded, for in a series of cases, the jury became the first line of defense against the abuses of royal officials. Among the most important of the era was *Bushell's Case*, in which jurors in a criminal case were imprisoned on a writ of attain²² for failing to follow the judge's instructions.²³ Chief Justice Vaughan discharged the writ and freed the jurors. In so doing, Vaughan struck a blow for the independence of the jury. He asserted that jurors must be free to render a decision on the basis of their own independent knowledge of the relevant facts and witnesses without penalty. It would be "absurd," he said, to permit a judge to fine a jury for going against the evidence, when "the better and greater part of the evidence may be wholly unknown to him."²⁴ A few years later, another jury stood against the Crown in the *Seven Bishops' Case*,²⁵ refusing to convict a group of Anglican

21. J.M. Beattie, *London Juries in the 1690s*, in TWELVE GOOD MEN AND TRUE, *supra* note 19, at 214.

22. In the early days of the petit jury, a verdict was reviewed by the process of attain. The writ of attain caused a rehearing of the evidence by a second jury of 24. If the second concluded that the first had brought in a "wrong verdict" then the original was overturned and the first jury severely punished. The process of attain thus lends further support to the witness function of a jury, since "a wrong verdict almost necessarily implied perjury in the jurors. They were witnesses who deposed to facts within their own knowledge, about which there could hardly be the possibility of error." WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 152 (2d ed. 1878).

23. See *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1760). The case arose after William Penn and William Mead were prosecuted for disturbing the peace by holding an unlawful assembly. Penn and Mead had, in fact, preached a sermon to several hundred Quakers in the middle of a public street. The only question before the jury, therefore, was whether a meeting of this kind was a disturbance of the peace. The judge in the case ordered the jury to find that it was. The jury refused to do so, and brought in an acquittal in spite of repeated threats from the judge. An enraged court then imprisoned the jurors for several months on a writ of attain until most paid a fine. Four jurors refused to pay, however, until one of them finally obtained a writ of habeas corpus in the Court of Common Pleas.

24. *Id.* at 1013. Vaughan also argued that the verdict in a criminal case is a general verdict, and thus one could never really know how the jurors had applied the law to the facts in their own minds. At least one author has noted the inconsistency of Vaughan's claim that a jury verdict could not be declared contrary to the evidence because jurors know of evidence not presented in court. The "self-informing" character of the jury had, after all, disappeared long before 1670. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298-99 n.105 (1978). *Bushnell's case* was also a repudiation in many respects of the rulings in *Sir Nicholas Throckmorton's Case*. Here, a jury acquitted Throckmorton of a charge of high treason, even though there was ample evidence that he was a leader in Wyatt's rebellion, a protestant uprising against Mary I. Throckmorton went free, but the jury was fined and imprisoned on a writ of attain.

25. The *Seven Bishops' Case* is said to be "the most memorable state trial recorded in the British annals." In April 1687, James II promulgated his now-famous

bishops on a charge of seditious libel. Together, these two cases were instrumental in freeing the jury from judicial coercion.

In time, the jury came to be regarded as a defender of liberty through its ability to bring in a "general verdict"; that is, a verdict in which juries "take upon themselves to determine . . . the complicated question of fact and law" and "find a verdict absolutely either for the plaintiff or defendant."²⁶ In a criminal case, law and fact are thus compounded into a single verdict of guilty or not guilty. The ability of the jury to bring in a general verdict made its decisions essentially unreviewable. The decisions in *Entick v. Carrington*²⁷ and *Wilkes v. Wood*²⁸ made it clear that "[j]uries had something resembling a power

Declaration of Indulgence, in which he announced an intent to guarantee free exercise of religion to Protestant Dissenters and Roman Catholics. James then proceeded to annul a series of statutes which impinged on the freedom to worship publicly or which required a religious test for public office. Although controversial, James reissued the Declaration in April 1688, and ordered that it be read in all churches throughout the realm. The Archbishop of Canterbury along with six other Anglican bishops drafted a petition in which they urged the king to reconsider. The bishops argued that the king was not constitutionally empowered to unilaterally dispense with the statutes of the realm. The petition excited passions throughout England, and the bishops were eventually tried in the King's Bench for publishing a seditious libel. The jury brought in a verdict of not guilty, setting off a chaotic round of celebration among the populace that lasted through the night. A full account of the trial may be found in 3 A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS UPON INDICTMENTS FOR HIGH TREASON, ETC. 729 (1719). A popular account of the entire controversy is found in THOMAS BABINGTON MACAULAY, 4 HISTORY OF ENGLAND: FROM THE ACCESSION OF JAMES II 138-75 (J.M. Dent & Sons Ltd. 1959).

26. 3 BLACKSTONE, *supra* note 20, at *378.

27. 95 Eng. Rep. 807 (K.B. 1765). John Entick authored a series of pamphlets that members of the government thought libelous. Lord Halifax, Secretary of State, issued a warrant authorizing Entick's arrest and the seizure of his papers. Entick sued the "messengers" of the Crown in trespass. The jury awarded £300 in damages. In upholding the verdict, Lord Camden (then Chief Justice Pratt) asserted that the seizure of papers was impermissible even with a valid warrant:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of these goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

19 S.T. at 1066. The case is often cited as one of the sources of the Fourth Amendment. See, e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-97 (1995).

28. 98 Eng. Rep. 489 (K.B. 1763). John Wilkes was a member of Parliament who authored a series of pamphlets under the pseudonym, "The North Briton." In Number 45 of the series, Wilkes sharply criticized a speech made by the king. A warrant issued for the author of the pamphlets, and Wilkes and his papers were seized. Wilkes

of substantive review.”²⁹ In criminal cases, this meant that juries might ignore the law as stated by the judges and acquit based on their own collective sense of justice. In civil cases, “they were free to impose liability based in part on the nature of the offense,” creating legal obligations on the basis of community norms.³⁰ Immunizing the jury from sanctions for failing to bring in a desired verdict had the effect of making it a bulwark against arbitrary government. The jury became “irresponsib[le],” as it were, completely free to render a verdict guided only by its collective conscience.³¹

II. THE JURY IN THE COLONIES

Every American colony provided a right to jury trial in the supreme or superior court.³² Unlike most modern courts, however, colonial courts often exercised a wide array of executive as well as judicial functions. County courts in many colonies had broad powers of supervision over town government. They set tax rates, administered the poor laws, regulated the prisons, and even supervised the building of roads.³³ The undifferentiated nature of judicial proceedings in the colonies often meant that juries performed a variety of administrative as

sued the messengers, and recovered a verdict against them in the amount of £1000, a startling sum for the times. A separate suit against Lord Halifax resulted in an award of £4000. The case is thought to be the first instance wherein a jury was permitted to award punitive damages. Lord Camden asserted that the jury had the power to:

[G]ive damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id. at 498-99.

29. Stuntz, *supra* note 27, at 410.

30. *Id.*

31. PLUCKNETT, *supra* note 9, at 134.

32. James I's charter to the Virginia colony (1606) may be read as incorporating a right to trial by jury, and by 1624, it appears that jury trials were readily available in Virginia for both civil and criminal actions. The Massachusetts Body of Liberties guaranteed the same right in 1641. Massachusetts Body of Liberties § 29 (1641). Jury trials came to the middle colonies via the Duke of York's Laws, which provided for panels of six or seven in most cases, and a majority vote was sufficient to bring in a verdict. Where a crime was punishable by death, the jury was to be composed of twelve and the verdict was to be unanimous. Charter and Laws of Pennsylvania 33. William Penn's Laws Agreed Upon in England provided that all trials in Pennsylvania should be by a jury of twelve. Charter to William Penn, and Laws of the Province of Pennsylvania 100, 117, 154 (Staughton George et al. eds., 1879).

33. See WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 15 (1994); see also *Township of Fallowfield v. Township of Marlborough*, 1 Dall. 28 (Pa. 1776) (appeal of sessions court order removing a pauper from town limits).

well as adjudicatory functions. As in England, however, the jury's power over both law and fact made them "the chief assessors of legal claims and the primary enforcers of legal rights for their communities."³⁴ The jury brought a shared consensus about right and wrong that was not always in accord with traditional common law principles. Its power over fact and law meant that it was instrumental in maintaining the moral and economic structure of the community. This is so because mid-eighteenth century judges "had power only to guide, not to command."³⁵ The balance of judicial power favored juries with the result that judges often labored unsuccessfully to reign them in. Judges could not, after all, enter a judgment or impose a penalty without a jury verdict.³⁶

In many ways, the colonial jury was vested with a law-finding function greater than that possessed by its English counterpart. This is because courts in the mother country gradually developed a number of non-coercive devices for controlling jury verdicts.³⁷ In civil cases, judges possessed the power to "suspend" or "arrest" a judgment. Judgments were suspended, and new trials ordered, for reasons wholly extrinsic to the record. Thus, a second trial might be ordered where a party did not receive notice of the trial or where there was some "gross misbehaviour" of the jury.³⁸ New trials were also ordered when a jury brought in a verdict against the evidence and when they had given exorbitant damages.³⁹ Perhaps most significant was the power to grant a new trial when the judge had misdirected the jury. Arrest of judgment was available for some defect appearing on the face of the record, usually where the pleadings differed from the cause of action stated in the original writ.⁴⁰ The practice of granting new trials had become so widely accepted that by the middle of the seventeenth century a second trial

34. Landsman, *supra* note 10, at 592.

35. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978).

36. Judges were not completely powerless, however. In some colonies, judges were permitted to reject a verdict and send the case back to the jury with instructions to reconsider its verdict. Some states even allowed judges to dismiss an obstinate jury and impanel a second one to rehear the case. Although these powers appeared considerable, "judges generally left juries to their own devices." MANN, *supra* note 6, at 70.

37. See 4 BLACKSTONE, *supra* note 20, at *361 ("The practice, heretofore in use of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal.").

38. 3 BLACKSTONE, *supra* note 20, at *387.

39. See *id.*

40. Thus, where the original writ stated a cause of action in debt or detinue, but the declaration states a cause of action in assumpsit, a new trial will be ordered. 3 BLACKSTONE, *supra* note 20, at *393-94.

might be had merely on the judge's certification that the jury's verdict was contrary to his own opinion.⁴¹

In the colonies, however, a judge intent on forcing a jury to find a verdict in accordance with his particular view of the law was apt to be disappointed. A judge could not simply instruct a jury on the law and expect that it would go along. Jury instructions were of limited effect in controlling the jury's decision-making process. In the first place, such instructions were often rudimentary. Thus, a South Carolina jury was instructed "to give what they thought reasonable" in damages,⁴² while another was told to "find a general verdict or a special one . . . as they thought proper."⁴³ This was no doubt, in part, because many colonial judges lacked formal legal training, at least in the early years. Far more important, however, was the fact that many lawyers and judges were themselves convinced that juries possessed ultimate power to say what the law was. For example, Zephaniah Swift of Connecticut wrote that the jury were "the proper judges, not only of the fact but of the law that was necessarily involved."⁴⁴ Thomas Jefferson viewed the law-finding power of the jury as a bulwark of liberty. In *Notes on Virginia*, Jefferson wrote:

It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.⁴⁵

An entry in his diary reveals that John Adams also believed strongly in the jury's law-finding function:

[W]henever a general Verdict is found, it assuredly determines both the Fact and the Law.

41. In criminal cases, English practice permitted a new trial on the motion of the defendant for error in the course of the proceedings or where the verdict was contrary to the evidence. See *Rex v. Smith*, T. Jones 163, 84 Eng. Rep. 1197 (K.B. 1680); *Rex v. Read*, 1 Lev. 9, 83 Eng. Rep. 271 (1660). A new trial could not be had where the defendant was acquitted, however. See *Rex v. The Inhabitants of Wandsworth*, 1 B. & Ald. 63, 106 Eng. Rep. 23 (K.B. 1817); *Rex v. Wyndham*, 4 M. & S. 337, 105 Eng. Rep. 858 (K.B. 1815); *Rex v. Reynell*, 6 East 315, 102 Eng. Rep. 1307 (K.B. 1805).

42. *Eveleigh v. Administrators*, 1 S.C.L. (1 Bay) 92 (S.C. 1789).

43. *Pledger v. Wade*, 1 S.C.L. (1 Bay) 35, 36 (S.C. 1786).

44. ZEPHANIAH SWIFT, *A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* 410 (1795).

45. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 140 (J. Randolph ed., 1853).

. . . Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment and Conscience?

. . . .

. . . It is not only his right but his Duty in that Case to find the Verdict according to his best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.⁴⁶

Reported cases from the period are replete with entries indicating a general belief in the jury's law-finding function. A good example is the case of *Crawford v. Willing*,⁴⁷ an action in the Pennsylvania Supreme Court for debt and in which the plaintiff demanded substantial interest. The court asserted that the defendant was liable for the interest "[u]nless, upon the whole, the jury can discover some ground of excuse, which we have not been able to trace." The jury rejected the court's suggestion and refused to award interest.⁴⁸ In *Wharton v. Morris*,⁴⁹ on the other hand, the jury "adopted" the chief justice's opinion; while in *Boehm v. Engle*,⁵⁰ the verdict of the jury was said to be "conformable to [the court's] opinion." In a 1773 case, counsel "agreed" that the opinion of the court "should be conclusive to the jury."⁵¹ The clear implication is that such instructions might not have been binding without the agreement.

A remarkable example of the jury's power to declare the law may be found in *Lessee of Albertson v. Robeson*,⁵² an ejectment case from Pennsylvania. Here, the defendant attempted to support his title to land by a decree of Pennsylvania's court of chancery. This court was established by an act of the Assembly in 1721. The decree at issue in the case was rendered two months after the act creating the court was disallowed by the Privy Council, but six weeks before notice of the disallowance reached Pennsylvania. The court, therefore, "gave it in charge to the Jury, that the Act was not repealed, till Notification here;

46. 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

47. 4 Dall. 286 (Pa. 1803).

48. See *id.* Similarly, in *Hoare v. Allen*, the jury "adopted the principles of the charge; but struck off 8 1/2 years' interest." 2 Dall. 101 (Pa. 1789).

49. 1 Dall. 124 (Pa. 1785).

50. 1 Dall. 15 (Pa. 1767).

51. Anonymous, 1 Dall. 20 (Pa. 1773).

52. 1 Dall. 9 (Pa. 1764).

and the Jury were of the same opinion.”⁵³ Further evidence comes from another Pennsylvania ejectment case. In *Hurst v. Dippo*,⁵⁴ the plaintiff attempted to show title in himself through an ancestor whose name appeared on a warrant signed by William Penn directing his Surveyor General to survey lands in the province. The defendant demurred to this “list of First Purchasers” being offered in place of a deed. The court allowed the jury to determine the legal construction to be placed on the list based “on the custom of the Province in like cases.”⁵⁵

Colonial procedure favored the jury’s power over law, even if a judge wanted to limit the jury’s law-finding function. Most colonial courts required more than one judge on the bench, and every judge was given the right to deliver a charge to the jury.⁵⁶ The practice of giving opinions seriatim made it impossible to insist that juries follow judges’ instructions because those instructions were sometimes contradictory.⁵⁷ Added to this was the fact that lawyers were permitted to argue the law before the jury, a practice which no doubt had the effect of further diluting the judges’ influence.⁵⁸ At the close of the evidence, then, jurors might have heard statements on the law from two or three lawyers and an equal number of judges. The jury was thus left to select the interpretation that most accorded with its own view.⁵⁹

It was still difficult to compel juries to follow instructions even when the judges were unanimous in their opinions. Although a practice of setting aside jury verdicts had developed in England by the middle of the eighteenth century,⁶⁰ American courts were more reluctant in this

53. *Id.* at 9.

54. 1 Dall. 20 (Pa. 1774).

55. *Id.*; see also *Proprietor v. Keith*, Pa. Col. Cases 117 (Pa. 1892).

56. See, e.g., 5 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 238-40 (C. Hoadley ed., 1870); 5 THE COLONIAL LAWS OF NEW YORK 304, 360 (R. Cummings ed., 1984); 22 ARCHIVES OF MARYLAND 494 (B. Steiner ed., 1902-1910); 3 THE STATUTES AT LARGE OF PENNSYLVANIA 246 (J. Mitchell & H. Flanders eds., 1896-1902); 3 THE STATUTES AT LARGE: BEING A COLLECTION OF THE LAWS OF VIRGINIA 143 (W. Henning ed., 1810-1823); 7 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 43-45, 57 (A. Chandler ed., 1904-1916).

57. See, e.g., *Pateshall v. Aphthorp*, Quincy 179 (Mass. 1765); *Cooke v. Rhine*, 1 S.C.L. (1 Bay) 16 (S.C. 1784).

58. See NELSON, *supra* note 33, at 18-30.

59. Maryland seems to be an exception. A practice of allowing counsel to object to jury instructions suggests that judges were required to deliver “a single, correct set of instructions or face the prospect of reversal for error.” Nelson, *supra* note 35, at 912.

60. See *Appleton v. Sweetapple*, 99 Eng. Rep. 579 (1782); *Bright v. Enyon*, 96 Eng. Rep. 1104 (K.B. 1757); see also *supra* text accompanying notes 37-41. A full discussion of the English practice in this regard may be found in Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 311-12 (1966).

regard. Most New England judges explicitly refused to overturn a verdict on the grounds that the jury had ignored the court's instructions.⁶¹ Indeed, the Connecticut Supreme Court declared that "[i]t does not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both."⁶² The same rule appears to have been followed in Maryland and Virginia as well.⁶³ Certainly, there were some in the colonies who argued that judges might set aside a verdict as contrary to law,⁶⁴ but several states explicitly barred judges from trampling upon the jury's power to find both law and fact.⁶⁵ The generally accepted view that juries had a law-finding function made it difficult to argue later that their verdicts were contrary to law.⁶⁶

The jury was not omnipotent, however. As in England, a number of devices were available to limit the jury's law-finding function. The most obvious of these was the use of special pleading, which involved pleading the case to a single factual issue.⁶⁷ The jury would thus be prevented from venturing too far afield, since it would have only a single factual question before it. There is little evidence that special pleading was used extensively in America, however.⁶⁸ Evidentiary rules were

61. *Erving v. Cradock*, Quincy 553 (Mass. 1761) is perhaps the most significant example of this phenomenon. Here, a shipowner sued a customs official in trespass in the common law courts. The official argued that the admiralty court's condemnation of the vessel was *res judicata* and a complete defense against a claim of wrongful interference. Nonetheless, the jury returned a verdict for the shipowner, which the judges refused to set aside.

62. *Wittner v. Brewster*, 1 Kirby 422, 423 (Conn. 1788).

63. See *Smith's Lessee v. Broughton*, 1 H. & McH. 33 (Md. Prov. Ct. 1714) (refusing to set aside verdict where jury had ignored instructions given by court and agreed to by both counsel); *Waddill v. Chamberlayne*, Jeff. 10 (Va. 1735).

64. The case of *Forsey v. Cunningham* is notable in this regard, as several New York Supreme Court justices argued that courts had this power. See *Report of the Case Between Forsey and Cunningham*, N.Y. GAZETTE, Jan. 31, 1765; see also *Wilkie v. Roosevelt*, 3 Johns Cas. 66 (N.Y. Sup. Ct. 1802).

65. See GA. CONST. of 1777 art. XLI; An Act for Regulating and Shortening the Proceedings in the Courts of Law, ch. 32, § 14, 1784 N.J. ACTS 80.

66. See Nelson, *supra* note 35, at 913-14; see also Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939).

67. 3 BLACKSTONE, *supra* note 20, at *377-78:

Sometimes, if there arises in the case any difficult matter of law, the jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant.

68. See Nelson, *supra* note 35, at 905. But see *Swift v. Hawkins*, 1 Dall. 17 (Pa. 1768) (plea of payment to bond).

also used to limit the jury. Although these might more properly be regarded as attempts to limit the jury's fact-finding function, they had the effect of confining the jury's ability to draw unwelcome conclusions.⁶⁹ On occasion, a jury might be instructed to bring in a special verdict. This was a procedure by which a jury was asked to set forth the facts without expressing any legal conclusions. The judges then applied the law to the facts as found by the jury.⁷⁰ It appears, however, that the special verdict was rarely used in the colonies because both parties had to agree. More importantly, there is some evidence that juries had the power to refuse to bring in special verdicts even when requested to do so by the parties.⁷¹ Finally, in what must be regarded as the rarest of cases, parties could demur to the evidence in an effort to obtain a nonsuit, and avoid a jury verdict. However, there is little reason to believe that such a maneuver achieved much in the end because the jury was usually permitted to determine the law applicable to the case.⁷²

At bottom, however, these devices were merely stopgap measures and were successful in limiting the jury's power only indirectly. They were of value merely insofar as certain factual or evidentiary issues were kept from the jury. The limited use of special pleading and the need to

69. See NELSON, *supra* note 33, at 24-26. Thus, certain witnesses, such as those interested in the matter in question were incompetent to testify, as were those convicted of serious crimes. See *Rex v. Pourksdorff*, Quincy 104, 105 (Mass. 1764); *Wrentham Proprietors v. Metcalf*, Quincy 36, 37 (Mass. 1763). The hearsay rule also operated to keep some evidence from the jury, but in a way that would seem alien to modern courts. Out of court statements were suspect, not simply because they were made out of court, but because they were not given under oath. It was thought that "truth would emerge not from a weighing of credibilities and probabilities, but from the sanctity of an oath—[and] looked backward to earlier times, in which God-fearing men had attached enormous importance to a solemn oath." NELSON, *supra* note 33, at 24-25. Colonial juries did not weigh the credibility of witnesses; rather, they were told to presume that all sworn witnesses had told the truth. Their job was thus to reconcile conflicting testimony. Inferences and presumptions were suspect precisely because they lacked the sanctification provided by an oath. See *id.*

70. See 3 BLACKSTONE, *supra* note 20, at *377.

71. See *Smith's Lessee v. Broughton*, 1 H. & McH. 33 (Md. 1714). English authorities were split on whether a jury could return a general verdict after being asked to provide a special verdict. Compare *Gay v. Cross*, 87 Eng. Rep. 1078 (Q.B. 1702), with *Rex v. Poole*, 95 Eng. Rep. 15 (K.B. 1734); *Pocklington v. Hatton*, 88 Eng. Rep. 158 (1724). See also *Henderson*, *supra* note 60, at 307-10.

72. See *Hurst v. Dippo*, 1 Dall. 20 (Pa. 1774); *Lessee of the Proprietary v. Ralston*, 1 Dall. 18 (Pa. 1773). Indeed, William Nelson asserts that "[p]rior to 1800, published reports include no case in which the compulsory nonsuit was used to prevent a jury from determining an issue of law otherwise before it." Nelson, *supra* note 35, at 908. A minor exception to this rule may be seen in Pennsylvania, where a party might have been permitted to have a nonsuit entered against him in order to avoid a verdict. See *Lessee of Richardson v. Campbell*, 1 Dall. 10 (Pa. 1764).

allow most cases to proceed to a general verdict meant that jury power over both law and fact remained relatively unrestricted.

III. "THE INHERENT AND INVALUABLE RIGHT OF EVERY BRITISH SUBJECT"

By the time of the Revolution, the jury had assumed a paramount position in the judicial structure. As in England, the jury's law-finding function was regarded as an essential protection against government abuse. In a series of well-publicized cases before the Revolution, the jury was hailed as a fundamental check on the abuses of the Crown. The most celebrated of these was the sedition trial of John Peter Zenger in 1734. While the Zenger trial is more frequently associated with the principle of freedom of the press, it is perhaps more significant for its impact on the colonial belief in the jury's law-finding function.

Zenger accused New York's governor, William Cosby, of corruption and misfeasance in office. After three separate grand juries refused to indict, New York's attorney general commenced a prosecution for libel by information.⁷³ Alexander Hamilton took up Zenger's defense. During the trial, Hamilton sought to introduce evidence that Zenger's article was true, and thus not actionable under the law. The court rejected Hamilton's proffered defense. Chief Justice De Lancey insisted that "the jury may find that Zenger printed and published those papers, and leave it to the Court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict, where the jury leave the matter of law to the Court."⁷⁴ Hamilton, of course, opposed to the idea of leaving the legal question to the judge. Instead, he insisted upon the jury's right to bring in a general verdict:

I know . . . the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and fact, and where they do not doubt of the law, they ought to do so [L]eaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless. . . .⁷⁵

In any event, the jury was allowed to bring in a general verdict, and Zenger was acquitted. An account of the trial was produced in pamphlet

73. See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1963).

74. *Id.* at 78 (endnote omitted).

75. *Id.*

form, and widely circulated throughout the colonies, and “became the American primer on the role and duties of jurors.”⁷⁶ Zenger’s trial is credited with virtually ending common law seditious prosecutions in the colonies.⁷⁷

The jury’s protective function was further solidified in the series of cases brought by customs officials under the various navigation acts. After the creation of the system of vice-admiralty courts in 1696,⁷⁸ customs officers bypassed the common law courts in order to avoid trying trade cases to a jury. Royal officials had long complained of the difficulty of obtaining convictions of customs violators in the colonial courts, and while earlier navigation acts had allowed trial of trade cases before juries, the customs service rarely won.⁷⁹ One Massachusetts governor complained that “[a] Custom house officer has no chance with a jury,”⁸⁰ while another despaired that “a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”⁸¹

Several statutes altering the mode of trials for certain criminal offenses added to the controversy. The Administration of Justice Act (1774) permitted English officials charged with crimes to be tried in England rather than the colonies.⁸² Parliament also declared that colonists charged with treason might be transported to England for trial. Edmund Burke protested that trial of a colonist at such a distance from his home would effectively deny him the right to a jury trial: “[B]rought hither in the dungeon of a ship’s hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence.”⁸³

76. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 873-74 (1994).

77. See Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America*, 39 AM. J. LEGAL HIST. 337, 357-58 (1995). After *Zenger*, there appear to have been less than one-half dozen seditious trials, and only two convictions. Grand juries were, it seems, reluctant to indict, while petit juries refused to convict. Alschuler & Deiss, *supra* note 76, at 874; see also LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 17 (1985); Harold L. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEG. HIST. 169 (1959).

78. 7 & 8 Will. 3, ch. 22 (1696) (Eng.).

79. See Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 332 (1996).

80. Governor Francis Bernard to the Lords of Trade (Aug. 2, 1761), *reprinted in* 1 Quincy App. II, 556 n.4.

81. Governor William Shirley, *quoted in* STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* (1983).

82. See 14 Geo. 3, ch. 39, § 1 (1774).

83. Letter to the Sheriffs of Bristol, *in* 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 189, 192 (9th ed. 1889).

The Stamp Act increased tensions further by extending the jurisdiction of the vice-admiralty courts.⁸⁴

Th[e] act, which had little to do with . . . maritime commerce, required that revenue stamps be affixed to all sorts of legal papers. Revenue officials . . . were given [the] choice of trying violations of the act in either the common law or . . . vice-admiralty courts. The Stamp Act [was] thus . . . a completely new extension of the traditional [admiralty] jurisdiction of the vice-admiralty courts, because it essentially gave vice-admiralty judges . . . power to hear cases involving violations of the revenue laws. Such cases had not previously been thought to be within the scope of the navigation acts and had [always] been tried [before juries] in the Exchequer Court in England.⁸⁵

The Stamp Act Congress of 1765 reacted by declaring that “trial by jury is the inherent and invaluable right of every British subject in these colonies,”⁸⁶ and that “the said Act, and several other Acts, by extending the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.”⁸⁷

The denial of jury trials became a major source of friction between the colonists and the English government in the years leading to the Revolution. In 1774, the First Continental Congress declared that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.”⁸⁸ The Second Continental Congress’s Declaration of the Causes and Necessity of Taking Up Arms (1775) asserted that Parliament had deprived the colonists “of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property.”⁸⁹ Prominent in the “history of repeated injuries and usurpations” recited by the Declaration of Independence was that George III had “combined with others” to deprive

84. See 5 Geo. 3, ch. 12 (1765).

85. Harrington, *supra* note 79, at 334.

86. Resolutions of the Stamp Act Congress art. VII, reprinted in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 32, 33 (Samuel Eliot Morison, ed., 1965).

87. *Id.* at art. VIII.

88. Resolutions of Oct. 14, 1774, § 5, reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 63, 69 (Worthington Chauncey Ford ed., 1904).

89. Resolutions of July 6, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 140, 145 (Worthington Chauncey Ford ed., 1904).

the colonists “in many cases of the benefits of Trial by Jury” and transported them “beyond Seas to be tried for pretended offences.”⁹⁰

By the time of the Revolution, therefore, the jury had become a symbol of the colonists’ struggle for self-government. Its law-finding function made it ground zero in the battle between the king’s ministers and colonial leaders. For the colonists, the jury had become an important weapon in combating royal oppression. Unable to fight unpopular laws in Parliament, Americans used the jury to nullify legislation. “Victimless” crimes, like sedition and smuggling, were essentially unenforceable because they lacked public support. In the case of the trade laws, this meant that the entire system of customs and revenue verged on collapse. The Crown was forced to devise means to bypass the common law courts in an attempt to avoid having to prosecute such cases before juries. The result was an inexorable downward spiral: unpopular legislation went unenforced by juries, which meant that more unpopular legislation was enacted to remedy the problems created by the former. The colonists’ grievances were thus compounded, until a break with the mother country was inevitable.

IV. JURIES IN THE NEW NATION

A. State Court Juries

The jury emerged from the 1770s as a symbol of the struggle for independence. Its reputation as a bulwark of liberty meant that it was destined to occupy a prominent place in the creation of the new state governments. Indeed, the attachment to the jury was such that every state constitution guaranteed the right to trial by jury in criminal cases.⁹¹ The majority provided a similar guarantee for civil cases as well.⁹²

Nonetheless, the esteem in which the jury was held appeared to wane somewhat during the confederation period, at least where men of property or substance were concerned. The jury’s power to find law as well as fact seemed less attractive to those who also worried about the power increasingly held by populist elements in state governments. When an economic depression hit the new nation in late 1784, creditors flooded the courts seeking repayment of debts owed by farmers and merchants.⁹³

90. Declaration of Independence, 1 Stat. 1, 2 (1776).

91. See, e.g., MASS. CONST. of 1780, Declaration of Rights art. XII; PA. CONST. of 1776, Declaration of Rights art. IX; VA. DECLARATION OF RIGHTS of 1776 art. VIII.

92. See, e.g., MASS. CONST. of 1780, Declaration of Rights art. XV; PA. CONST. of 1776, Declaration of Rights art. XI; VA. DECLARATION OF RIGHTS of 1776 art. XI.

93. Between August 1784 and August 1786, Massachusetts saw a dramatic increase in debt suits involving a “huge percentage” of the male rural population. A total

Many states quickly passed legislation designed to frustrate debt actions,⁹⁴ and courts frequently refused to entertain certain debt cases without statutory authority.⁹⁵ Even when the courts were open, juries exercising their power to find law as well as fact severely limited the ability of loyalists and British creditors to collect debts incurred before the Revolution.⁹⁶ In other cases, juries routinely deducted interest accrued during the war even where no statute authorized them to do so.⁹⁷

A suspicion of the jury's law-finding function gradually took hold during the period, at least among the commercial classes. The desire to escape the vagaries of state court juries and secure an impartial forum for the adjudication of creditor claims led many merchants and traders to worry about the damage done to the commercial climate by what they saw as arbitrary jury verdicts. At the same time, political leaders fretted over the jury's power to embarrass the nation in the realm of foreign affairs. Many were concerned that unrestrained juries would have the potential over time to damage the reputation and credit of the United States abroad. A number of those who participated in the ratification debates pointed to the ill-fated attempt to use juries to determine prize cases in the state admiralty courts as evidence of the jury's potential to draw the United States into war with other nations. The commercial classes thus joined with strong federalists in their desire to provide for a more powerful

of 6000 actions for debt were instituted in Connecticut involving almost 20% of the state's taxpayers. Vermont and New Hampshire saw similar increases in debt actions. See DAVID P. SZATMARY, *SHAY'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* 29-30 (1980). There were "thousands of insolvencies" in New York, while six county courts in Virginia handled more than 18,500 cases, most of which were for debt. PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900*, at 115, 200-01 (1974).

94. Massachusetts and Connecticut allowed courts to deduct wartime interest. See An Act relative to debts due to persons who have been and remained within the Enemies power or lines during the late war, 1784 Conn. Sess. Laws 283-84; An Act for the Relief of [Debtors], 1783-1789 Mass. Sess. Laws 252-53.

95. See Wythe Holt, "To Establish Justice": *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1441-42.

96. Among the most famous of these cases was *Bayard v. Singleton*. In 1785, the North Carolina legislature sought to protect purchasers of confiscated loyalist estates by directing courts to dismiss actions for damages or ejectment brought by those whose lands were forfeited. Bayard obtained title to an estate from a loyalist who had shipped for England in 1775, and brought an action of ejectment against Singleton in 1786. After an opinion in which the Supreme Court declared the statute unconstitutional, a jury rejected Bayard's suit and rendered a verdict in favor of the defendant. The jury's decision rendered the Supreme Court's opinion a nullity since its verdict was essentially unreviewable. See *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787).

97. See, e.g., *Hoare v. Allen*, 2 Dall. 102 (Pa. 1789) (jury strikes 8 1/2 years' interest).

national government, all of which led to a corresponding effort to diminish the role of the jury in the constitutional scheme.

B. Juries and the Constitution

The structure of the legislative and executive branches naturally consumed the bulk of the debates at the Philadelphia convention. The judiciary “ran a poor third” and the civil jury was mentioned only twice on the floor of the convention.⁹⁸ It was not until September 12, 1789, almost four months after the convention began, that Hugh Williamson of North Carolina “observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.”⁹⁹ The question was briefly considered, but no action taken on the suggestion; it was thought that “[t]here are many cases where juries are proper which cannot be discriminated,” and that the national “Legislature may be safely trusted” to provide for them.¹⁰⁰ Elbridge Gerry and Charles Pinckney made another attempt to insert a jury trial right into the final text of the Constitution three days later, on September 15. They moved that Article III be amended to provide that “a trial by jury shall be preserved as usual in civil cases.”¹⁰¹ The convention rejected this proposal as well. Nathaniel Gorham despaired that the “constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States” thus making it impossible to provide a general rule.¹⁰² Charles Coatesworth Pinckney urged the same objection. He thought such a clause in the Constitution would be “pregnant with embarrassments.”¹⁰³

The Constitution thus went to the states without explicit mention of the right to jury trial in civil cases. Although it contained a provision for jury trials in criminal cases, Article III did not guarantee a jury of the vicinage.¹⁰⁴ Anti-federalists seized on these omissions in an attempt to show that the Framers were embarked upon a plan to subvert popular government. Richard Henry Lee, for example, warned that the right to trial by jury “even in criminal cases may be greatly impaired, and in civil causes the inference is strong, that it may be altogether omitted.”¹⁰⁵

98. Henderson, *supra* note 60, at 292.

99. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1966).

100. *Id.* at 588.

101. *Id.* at 628.

102. *Id.*

103. *Id.*

104. See U.S. CONST. art. III, § 2, cl. 3.

105. Richard Henry Lee, *Letter to Governor Edmund Randolph*, VA. GAZETTE (Petersburg), Dec. 6, 1787.

While there is no evidence that the Framers intended to entirely eliminate the right to trial by jury, it is clear that the majority of the delegates to the Philadelphia convention had become wary of the jury's power. There was, in effect, a "profound shift in the way an exceedingly powerful segment of society had come to view the institution."¹⁰⁶ That this is the case seems apparent from the rather disingenuous arguments used by the Framers to defend the omission. The assertion that it was "too difficult" to draft a provision for jury trials was easily answered.¹⁰⁷ An anti-Federalist writer, known only as "A Democratic Federalist," noted that jury trials might be preserved simply by making reference to the common law.¹⁰⁸ This was, after all, precisely the solution adopted by the First Congress in drafting the Seventh Amendment.¹⁰⁹

At least three factors influenced the Framers' decision to curtail the jury's influence in the new national government. First, there was the belief that the jury was no longer integral to protecting the populace against the arbitrary actions of royal judges. The Revolution ensured that judges were responsible to the people through election by the people themselves or their legislatures. Judges were, after all, subject to recall by the voters in many states or might be impeached by the legislature. Second, the jury's power to review and nullify oppressive legislation was thought to be less important than before. The Revolution guaranteed that statutes would be enacted by democratically-elected legislatures. The people's voice would be heard in their elected assemblies, rather than in the voice of twelve petit jurors. Finally, the ad hoc nature of jury verdicts made strong federalists wary of the jury's influence on the development of the legal environment. Most recognized that a stable legal regime was a prerequisite to the growth of American commerce. They feared that foreigners would be reluctant to subject themselves to a legal system where the law-finding power of juries was unrestrained.¹¹⁰

The relatively low esteem in which many strong federalists held the jury is represented by the rather incendiary comments of Noah Webster:

106. Landsman, *supra* note 10, at 598.

107. James Wilson, *Speech at a Public Meeting*, PA. HERALD (Phila.), Oct. 9, 1787.

108. *A Democratic Federalist*, PA. HERALD (Phila.), Oct. 17, 1787.

109. U.S. CONST. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

110. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 41, 290-91 (1985).

I have no doubt, that when causes were tried, in periods prior to the Christian era, before twelve men, seated upon twelve stones, arranged in a circular form, under a huge oak, there was great propriety in submitting causes to men *in the vicinity*. The difficulty of collecting evidence, in those rude times, rendered it necessary that juries should judge mostly from their own knowledge of facts or from information obtained out of court. But in these polished ages, when juries depend almost wholly on the testimony of witnesses; and when a complication of interests, introduced by commerce and other causes, renders it almost impossible to collect men, in the vicinity of the parties, who are wholly disinterested, it is to no disadvantage to have a cause tried by a jury of strangers. Indeed the latter is generally the most eligible.¹¹¹

Webster wrote a subsequent letter to a group of Pennsylvania dissenters asking why the right to trial by jury might not to be trusted with our rulers. After all, he argued, “[i]f it is such a darling privilege, will not Congress be as fond of it, as their constituents?”¹¹²

Although federalists repeatedly argued that Congress could be trusted to preserve the right to jury trial, most anti-Federalists urged rejection of the Constitution until the right was preserved in the document itself. The anti-Federalist opposition was so strong that ultimately at least seven state ratifying conventions called for amendments to the Constitution guaranteeing the right to trial by jury in civil cases.¹¹³ The anti-Federalists were thus the “generative force behind the seventh amendment,”¹¹⁴ and their arguments were instrumental in forcing the Senate Judiciary Committee to incorporate a right to civil jury trial in the First Judiciary Act.¹¹⁵

111. A Citizen of America (Noah Webster) (Phila. Oct. 17, 1787).

112. “America” (Noah Webster), To the Dissenting Members of the Late Convention of Pennsylvania, DAILY ADVERTISER (N.Y.), Dec. 31, 1787.

113. See JONATHAN ELLIOT, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 323, 326, 328, 334 (1888) (Mass., N.H., N.Y., R.I.); 3 *id.* at 658 (Va.); 4 *id.* at 244 (N.C.).

114. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 673 (1973).

115. The First Judiciary Act provided for a jury trial of “all issues in fact” in all cases arising in both the district and circuit courts, except cases of admiralty and maritime jurisdiction. See Judiciary Act of 1789, ch. 20, §§ 9, 12, 1 Stat. 73, 77, 80 (1789).

V. THE LAW-FINDING FUNCTION IN THE EARLY FEDERAL COURT

The federalist jury still possessed wide latitude in its ability to find both law and fact, even though the right to a jury trial was somewhat more limited. In the circuit court,¹¹⁶ the tradition of rendering seriatim opinions continued. Judges usually attempted to present a uniform front, although they often cited different authorities or assigned different reasons for their opinions.¹¹⁷ In some cases, however, the judges actually disagreed on the application of a particular rule, leaving the jury to select the opinion most conformable to its own view of fairness or justice.¹¹⁸ Nonetheless, most Federalist judges clearly evinced a desire to allow juries to decide both fact and law. In charging the jury in *Georgia v. Brailsford*,¹¹⁹ Chief Justice Jay declared:

[O]n questions of fact it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law which recognizes this reasonable distribution of the jurisdiction, [the jury has] nevertheless a right to take upon [itself] to judge of both, and to determine the law as well as the fact in controversy.¹²⁰

116. The Judiciary Act of 1789 created two different inferior courts. A district court was established in each state (as well as Kentucky and Maine), which was presided over by a single judge. The district court convened four times each year at stated intervals. It was presided over by a single district judge and had jurisdiction over minor crimes and offenses, admiralty cases, and suits at common law brought by the United States where the amount in controversy was over \$100. *See id.* §§ 3, 9, 1 Stat. 73-74, 76-77.

The Act also divided the United States into three circuits over which was placed a circuit court. Each circuit court convened twice each year and was presided over by two justices of the Supreme Court (the number was later reduced to one) and the district judge of the state in which the circuit court was sitting at the time. The circuit court had original jurisdiction over "all crimes and offences cognizable under the authority of the United States," and diversity cases where the amount in controversy was over \$500. It had appellate jurisdiction over admiralty cases brought in the district court and appeals from the civil side of the district court where the sum in controversy exceeded fifty dollars. *See id.* §§ 4, 5, 11, 21, 1 Stat. 74-75, 78-79, 83-84.

117. *See, e.g., Trial of the Northampton Insurgents*, in FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 458, 584, 587 (1849) [hereinafter WHAR. ST. TR.].

118. Judges delivered opinions seriatim even where no jury was impaneled, which often left room for doubt later as to the grounds for a particular decision. *See, e.g., Hulsecamp v. Teel*, 2 U.S. (2 Dall.) 358 (C.C.D. Pa. 1796).

119. 3 U.S. (3 Dall.) 1 (1794). This was the first of only three jury trials ever held in the Supreme Court of the United States.

120. *Id.* at 4.

This view was repeated numerous times throughout the first decade of the Republic. Justice Iredell asserted “though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.”¹²¹ Justice Patterson noted “[i]n general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts.” The judge’s role in commenting upon the law, Patterson said, was merely to “aid” the jury in forming a verdict.¹²² In a rather ironic twist of fate, many Federalist judges came to look upon the jury as a moderator of popular passion. This was mainly because the marshal was responsible for selecting the panels from which federal juries were seated. This often led to charges that the marshal had “packed” the jury with supporters of the Federalist party.¹²³ As a result, the Federalists’ desire to safeguard the rights of private property made them look to the jury—rather than the state legislatures—to protect the rights of property owners. Justice Patterson celebrated the jury as a bulwark of liberty in *Van Horne’s Lessee*:

The interposition of a jury is . . . a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislative and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public danger.¹²⁴

That federal court juries were still vested with power over law is also illustrated by the fact that lawyers were permitted to argue the law as well as the facts at the close of a case. William Rawle, arguing for the prosecution in *Henfield’s Case*, advanced the theory that an offense against the law of nations is punishable by the federal courts, even without specific statutory authorization.¹²⁵ Similarly, lawyers for both sides in the cases arising from the Whiskey Rebellion debated before the

121. *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 33 (1795).

122. *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 306 (C.C.D. Pa. 1795).

123. The First Judiciary Act provided that federal court jurors be chosen “by lot or otherwise in each State respectively according to the mode of forming juries therein now practised.” Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (1789). Depending on the state, the marshal had a great deal of discretion in deciding whom to call as jurors. Thomas Cooper, prosecuted for seditious libel in Pennsylvania in 1800, attacked the system by asking: “Who nominates the judges who are to preside? The jurors who are to judge of the evidence? The marshal who has the summoning of the jury? The President?” *WHAR. ST. TR.*, *supra* note 117, at 664.

124. 2 U.S. (2 Dall.) at 315.

125. *Henfield’s Case*, 11 F. Cas. 1099, 1116-19 (C.C.D. Pa. 1793).

jury the question of whether armed resistance to enforcement of the Excise Act constituted treason.¹²⁶ The judges were then left to state their views of the law, and the jury was permitted to decide among the various statements in reaching their verdict.¹²⁷

The fact that Federalist judges recognized the right of the jury to find both law and fact did not mean that they were shy about trying to reign in juries when necessary. One way in which judges attempted to assert control over the law-finding function was by delivering a single charge. This was frequently the case in the trial of particularly serious crimes, such as prosecutions for treason, or claims having potentially serious international complications. Often it seems that the judges of the circuit court would settle on a single charge to the jury in the hope that a uniform statement of the law would lead the jury to the proper verdict. Thus in *Henfield's Case*, Justice Wilson delivered "the joint and unanimous opinion of the court" on behalf of Justice Iredell, Judge Peters and himself. The case was, after all, "one of the first importance" upon which "the interests of four millions" of the nation's citizens depended. Wilson tried to steer the jury by noting that "it is the duty of the court to explain the law to the jury, and give it to them in direction."¹²⁸

Unlike colonial judges, whose charges to the jury were often very brief and cursory, federal court judges were decidedly not "automatons who mechanically applied immutable rules of law to the facts of each case."¹²⁹ Instead, they were prone to deliver long and detailed summations of both law and fact. Federal judges were keenly aware of the unique role they would play in establishing a uniform system of law in the new Republic. Although they were certainly well versed in common law precedent and pleading, they were equally cognizant of the fact that, in many respects, they worked on a clean slate. The virtual absence of any uniform federal system of law meant that the first judges were responsible for laying the legal foundations of the new order. Adding to this tendency was the fact that unlike many colonial judges, who had no formal legal training, the vast majority of federal court judges were distinguished members of the legal profession at the time of their

126. See *United States v. Mitchell*, 2 U.S. (2 Dall.) 348 (C.C.D. Pa. 1795).

127. See *id.* On somewhat rare occasions, however, the lawyers would forego argument where the law seemed clear and leave the court to deliver a single charge on the law and evidence. See *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795). Even when judges gave a unanimous opinion in their view of the law, they often assigned different reasons for their opinion. See *Hulsecamp v. Teel*, 2 U.S. (2 Dall.) 358 (C.C.D. Pa. 1796).

128. *Henfield's Case*, 11 F. Cas. at 1119.

129. NELSON, *supra* note 33, at 19.

appointment. They were, therefore, less inhibited in stating their views of what the law ought to be.

Nonetheless, most federal judges seemed to agree that juries still had the ultimate power to declare both law and fact, even as they attempted to use the charge to influence the jury. As a result, the court's determination to provide a united front in *Henfield's Case* was moderated by Justice Wilson's admission that "the jury, in a general verdict, must decide both law and fact." But, lest there be any doubt as to which way the jury ought to go, Wilson cautioned that "this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both."¹³⁰

Acceding to the law-finding power of juries was bound to have its drawbacks; and as the decade wore on, Federalist judges sought ways to limit the jury's ability to bring in a verdict contrary to the judges' view of the law. By the early 1800s, many Federalist judges attempted to exert more control over the jury's law-finding function. There was, in fact, a relatively rapid transformation in the view of the jury's law-finding function in little more than a single decade. This transformation was not all that surprising in retrospect, however. After all, limiting the potential for populist elements to declare the law would seem to be completely consistent with the Federalist view of the popular sovereignty.¹³¹ It is, rather, the speed of the transformation that is striking. The law-finding function of juries—a characteristic of government the revolutionary generation thought indispensable to a free people—was whittled away in a very short time.

There were at least three causes for this transformation. Foremost among them seems clearly to be the growing fear of populist elements on juries. As the decade wore on, Federalist judges appear to have become wary of creeping Republicanism in the juries of the period. These tendencies were fortified by the affinity many of the common people felt

130. 11 F. Cas. at 1121. The report has here paraphrased Wilson's words.

131. One scholar described the Federalist view of popular sovereignty thusly: Being men of wealth and high social position, the Federalist leaders fell easily into the assumption that there was a close connection between the ownership of property and the possession of the talents necessary to the efficient administration of government. The men who had made good in trade, speculation, and the professions were the proper custodians of the national welfare; they alone possessed the ability, wisdom, sobriety, public spirit, and love of good order upon which the success of all government, and especially republican government, depended. It was plain at least to the Federalists that the people of the United States could ensure their happiness and prosperity only by accepting the principle that "those who have more strength and excellence, shall bear rule over those who have less."

JOHN C. MILLER, *THE FEDERALIST ERA 108-09* (1960) (footnote omitted).

for the French revolutionary cause. These Republican sentiments were further strengthened by the passage of the Sedition Act, to the point that by the end of the 1790s Federalist judges often seemed to be at war with Republican juries. There is little wonder, therefore, that the widening gulf between Federalist judges and the increasing Republican populace caused the judges to seek ways of limiting the power of juries wherever possible. The increasing professionalization of the legal community also played a part. Unlike colonial judges, who often had limited practical legal experience and even less formal legal training, Federalist judges were men at the top of their profession. Most were distinguished members of the bar in their home states, while others had served as state court judges. They naturally assumed that long years of practice at the bar made them better suited to determine what the law ought to be. Finally, there was a growing realization that a stable legal regime was essential to the new nation's continued commercial development. The potential for inconsistent jury verdicts in commercial cases was thought dangerous to this development and thus convinced many early federal judges that the jury's law-finding function needed to be curtailed.

VI. CRACKS IN THE FACADE

A. Henfield's Case

Signs of discomfort with the jury's power began to appear after the verdict in *Henfield's Case*.¹³² Gideon Henfield was charged with being a member of the crew of a French privateer which had captured a British merchantman off the coast of Cape Henry in the Delaware Bay.¹³³ He was indicted for violating President Washington's Neutrality Proclamation by a special grand jury in July 1793. Lawyers for the United States argued that Henfield's conduct violated the law of nations because it had the potential to bring the United States into war with Britain without their consent.¹³⁴ The jury voted to acquit Henfield in spite of the fact that there was little doubt he had committed the acts with which he was charged. The Republican press immediately hailed the verdict as a triumph against oppressive government. The *National Gazette* compared *Henfield* with the *Seven Bishops' Case*, asserting that "the people then as the people now exulted in the verdict of acquittal; and our posterity will . . . venerate this as we venerate that jury, for adding to the security of

132. 11 F. Cas. 1099 (C.C.D. Pa. 1793).

133. The captured vessel, the *William*, was libeled and became the subject of another suit in the district court. See *Findlay v. The William*, 1 Pet. Adm. 12 (D. Pa. 1793).

134. *Henfield's Case*, 11 F. Cas. at 1116.

the rights and liberties of mankind.”¹³⁵ Arguing that the verdict of a jury had precedential value, the same paper declared that:

By this verdict which according to the charge of the court indicates a decision on the law as well as the facts, it is now established that a citizen of the United States may by law enter on board a French Privateer and it is presumable that no other prosecution for this same cause can be sustained.¹³⁶

The *Henfield* verdict exposed the first cracks in the unity of purpose that allowed Americans to join together to win independence and form a stable government. Until this decision, the uneasy truce existing between Republicans and strong Federalists remained. *Henfield's Case* provided the first warning signs of the growing rift between Federalists, “who generally viewed law as a reflection of fixed and transcendent principles,” and Republicans, “who considered it the embodiment of popular will.”¹³⁷

B. *The Trials of the Northampton Insurgents: Fries's Case*

The two trials of John Fries in 1799 and 1800 provided further evidence of the growing Federalist desire to limit the jury's law-finding function. “Fries's Rebellion” was one of those curious events of popular feeling directed against the agents of the federal government. The cause of the revolt was the imposition of a tax on houses designed to defray the cost of putting down the Whiskey Rebellion of 1794.¹³⁸ Fries was taken

135. NAT'L GAZETTE (Phila.), Aug. 3, 1793.

136. *Id.* The *General Advertiser* asserted that “it would be contrary to the principles of natural justice that any man should in future be convicted and punished for doing what in Gideon Henfield was no crime, and incurred no penalty.” GEN. ADVERTISER (Phila.), Aug. 3, 1793.

Whether the jury really gave much thought to the federal court's jurisdiction over common law crimes is rather doubtful. Instead, there is some evidence that the jury was more impressed with Henfield's personal predicament. Thomas Jefferson later wrote that Henfield was acquitted because the jury had taken pity on him. After all, “it appeared at the trial that the crime was not knowingly and wilfully committed; that Henfield was ignorant of the unlawfulness of his undertaking; that . . . he showed real contrition; [and] that he had rendered meritorious services during the late war.” Letter from Thomas Jefferson to Robert Morris, in WHAR. ST. TR., *supra* note 117, at 89.

137. Nelson, *supra* note 35, at 929.

138. Congress provided that assessors be appointed to ascertain the value of dwellings in each of the states. The value of each dwelling was to be determined by the number and size of its windows, and the tax assessed on that value. See Act of July 9, 1798, 1 Stat. 580 (1798) (providing for appointment of assessors to value dwellings and slaves); Act of July 14, 1798, 1 Stat. 597 (1798) (imposing tax on property so valued).

into custody by troops dispatched to quell the revolt, and brought to trial in April 1799.¹³⁹ The question raised by the “Northampton Insurgency” was whether a revolt against the implementation of a federal statute might be considered “treason.” The Constitution provided that treason consisted only in “levying War” against the United States “or in adhering to their Enemies, giving them Aid and Comfort.”¹⁴⁰ The question thus came down to whether Fries and his allies were guilty of “levying war” as that term was defined in Article III. Fries contended that preventing the execution of a law was a mere “riot” and did not amount to levying war against the United States. In the Sedition Act, after all, Congress had specifically provided that persons who conspired “to oppose any measure or measures of the government” would be guilty of a “high misdemeanor” and punished by a fine and imprisonment.¹⁴¹

The expectation that the jury would determine the law is reflected in the fact that lawyers for both sides all read and cited a variety of legal precedents to the jury. William Rawle read excerpts from Justice Patterson’s opinions in several of the Whiskey Rebellion cases. He also quoted Blackstone and Hale.¹⁴² Fries’s counsel also cited Blackstone, along with Foster, Hale, and Lord Mansfield.¹⁴³ Both parties made extensive references to the long history of treason prosecutions in England.

For their part, the judges left the final decision in the jury’s hands. Their instructions on the law read more like a modern day brief; and each judge took a stab at convincing the jury to adopt his particular view. Judge Peters, who had earlier assisted Justice Patterson during the trials

Opposition to the new tax was especially strong in Pennsylvania’s rural areas; and residents of Bucks and Northampton counties attempted to intimidate the assessors throughout the early spring of 1799. The *Aurora* reported that “while a person was in the act of measuring the windows of a house, a woman poured a shower of hot water over his head; in other places [the assessors] were hooted at, and every expression of odium was used.” *AURORA* (Phila.), Mar. 12, 1799.

139. Warrants were eventually issued for the arrest of those involved in harassing the assessors, and the marshal was able to arrest some of the rebels in Bethlehem. Fries led a body of armed men to Bethlehem and rescued the rebels from the marshal’s hands. President Adams then ordered the militia to march against the rebels. Troops from Philadelphia, Bucks, Chester, Montgomery, and Lancaster counties were called into readiness for the purpose. Presidential Proclamation of Mar. 12, 1799, reprinted in *WHAR. ST. TR.*, *supra* note 117, at 458; Letter from James McHenry to Thomas Mifflin, Governor (Mar. 20, 1799), in *WHAR. ST. TR.*, *supra* note 117, at 459.

140. U.S. CONST. art. III, § 3, cl. 1.

141. Act of July 14, 1798, ch. LXXIV, § 1, 1 Stat. 596 (1798).

142. See *WHAR. ST. TR.*, *supra* note 117, at 537-38 (citing *United States v. Mitchell*, 2 U.S. (2 Dall.) 348 (C.C.D. Pa. 1795) and *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795)).

143. See *WHAR. ST. TR.*, *supra* note 117, at 565-77.

of the Whiskey Rebels, agreed with the prosecution that armed resistance to the execution of the law constitutes a levying of war against the government. Peters admitted, however, that he could not command the jury's acquiescence to the same opinion:

Whether the prisoner is or is not guilty of the treason laid in the indictment, in the manner and form therein set forth, it is your province to determine. It is the duty of the court to declare the law; though both facts and law, which, I fear, are too plain to admit a reasonable doubt, are subjects for your consideration.¹⁴⁴

Justice Iredell followed with a lengthy review of the law and evidence. He, too, reviewed the English treason cases, but Iredell asserted that the jury's law-finding function was limited by the principle of stare decisis: Iredell argued that the law relating to treason had been settled in the Whiskey Rebellion cases, and that both the judges and the present jury ought to consider themselves bound by those precedents. He thus subtly introduced a new mechanism of control on the jury's law-finding function. By insisting that the jury should rely on earlier precedents, Iredell attempted to channel the law-finding function to a particular purpose:

If a case is new altogether, and no precedent can be found, it ought to be much in favour of the prisoner, but if a solemn declaration has once been made that such and such facts constitute a certain crime, that declaration ought to be abode by, and for this plain reason; every man ought to have an opportunity to know the laws of his country . . . lest he should involve himself ignorantly. If, therefore, a point has been settled in a certain way, it is enough to direct any court to settle a future case of a similar kind in the same way, because nothing can be more unfortunate than when courts of justice deviate in decisions on the same evidence.¹⁴⁵

In essence, Iredell's charge was an attempt to get indirectly what he would not dare demand directly. Apparently reluctant to instruct the jury to adopt his own view of the law, he urged upon them an obligation to follow that stated by judges some years before. The judges might thus win out after all.

144. *Id.* at 587.

145. *Id.* at 590-91.

The jury deliberated a mere three hours before finding Fries guilty of treason. Yet, a controversy immediately erupted over the allegation that one of the jurors had “declared a prejudice against the prisoner after he was summoned by the marshal.”¹⁴⁶ The court ordered a new trial over the strenuous objections of the prosecution and, indeed, of Judge Peters himself.¹⁴⁷ The court then adjourned and the case was held over for trial at the next term.¹⁴⁸

Fries’s second trial was every bit as controversial as the first.¹⁴⁹ While the evidence presented at both trials was the same, the second trial involved a far more explosive issue than whether Fries’s acts fit within the constitutional definition of treason. Indeed, the second trial disintegrated into chaos as a result of Justice Samuel Chase’s attempt to limit the jury’s law-finding function. He did so by constraining the ability of Fries’s counsel to argue the law. In the first trial, Justice Iredell urged

146. Fries’s counsel alleged that the juror, John Rhoad, declared prior to the trial his belief that Fries “ought to be hung.” No doubt expressing the fears of many in Northampton at the time, Rhoad was also alleged to have asserted “that it would not be safe at home unless we hung them all.” Fries’s counsel moved for a new trial on the grounds that the prisoner had been tried by a jury of eleven, one of the juryman having prejudged the case. Fries’s counsel also argued that the venire was improper because more than the statutory number of jurors had been summoned by the marshal. This part of the motion was rejected by the court. *See id.* at 601.

147. Judge Peters thought Rhoad’s assertions amounted to nothing more than comment on public affairs, and were not made “with special or particular malice” against the defendant. He nonetheless acquiesced in Justice Iredell’s decision to grant a new trial because he feared a division of the court would lessen the impact of the final judgment. *See id.* at 609.

148. The jury’s verdict is thought by some to be somewhat surprising in light of the fact that Fries’s counsel were given the opportunity to argue a lesser charge of sedition to the jury. Stephen Presser surmises that the jury might have been “packed” by a marshal who “was careful to choose members sensitive to the need for peace and good order.” STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 107 (1991). It may be, however, that many people in Philadelphia and the surrounding counties were terrified of the revolt. After all, the Philadelphia papers contained detailed accounts of the activities of the insurgents, and the juror Rhoad’s comments certainly go some way to support that view.

149. Philadelphia was in the grip of yellow fever in the summer of 1799, forcing the circuit court to abandon the city for Norristown. A jury could not be impaneled when the court met again in October of that year because the marshal’s commission had expired before he was able to summon the venire. The case was thus held over until the April 1800 term. *See Fries’s Case*, 9 F. Cas. 924, 936 (C.C.D. Pa. 1800). The original indictment was quashed due to the failure to proceed to trial in November 1799, but the proceedings were revived by an act of Congress. A new indictment was handed up by the April, 1800 grand jury. *See id.* at 941; *see also* An Act for Reviving and Continuing Suits and Proceedings in the Circuit Court for the District of Pennsylvania, Act of Dec. 24, 1799, 2 Stat. 3 (1799).

the jury to adhere to rules of law set forth in the Whiskey Rebellion cases, but he allowed counsel free reign to argue an alternative view of the law to the jury. Chase, on the other hand, sought to force the jury to adopt the earlier precedents, by preventing Fries's lawyers from bringing conflicting English cases to the jury's attention.

Chase had apparently decided that the first trial had taken too long, and so he sought some means by which the second might be shortened. According to Judge Peters, Chase was concerned to "get through all the business which had accumulated on the civil side" as a result of the delays caused by the treason trials last term. Chase also seemed to be of the opinion that Justice Iredell had given counsel in the first trial too much latitude. He was determined, therefore, to prevent the lawyers from wasting time with "irrelevant authorities & unnecessary discussions." Chase prepared an opinion on the law in advance of the trial and showed it to Judge Peters, who gave it his approval. Nevertheless, Peters, who was more attuned to the political climate, warned Chase against "a premature Declaration."¹⁵⁰

Fries's second trial opened on April 22, 1800. Shortly after Judge Peters and Justice Chase took their places on the bench, a juror approached Peters and began "to make excuses for nonattendance." While his attention was thus engaged, Peters noticed that Chase had begun to distribute copies of his opinion to counsel.¹⁵¹ Peters's worst fears were realized: On receiving a copy of the opinion, Fries's counsel commenced an animated conversation. When the court asked whether the defense were ready to proceed, William Lewis, who acted for Fries with A.J. Dallas, answered that since "there were no doubts as to the facts, and [as] the court ha[d] made up their opinion as to the law," he would withdraw.¹⁵² Chase tried to reassure Lewis that his purpose in drawing up the opinion was to prevent any misunderstanding as to his own view of the law and to save time later.¹⁵³

The release of the opinion occasioned no little consternation among the members of the bar. The court adjourned early, and the judges met with William Rawle at his home in Philadelphia. Rawle and Peters attempted to explain the problems caused by the release of the opinion, and urged Chase to withdraw it. Rawle argued that "the gentlemen of the bar of Philadelphia were very independent" and that counsel for Fries would likely persist in refusing to act for the defense unless "they were

150. Letter from Richard Peters to Timothy Pickering Jan. 24, 1804, in 10 Peters Papers 91 (HSP).

151. *Id.*

152. *Fries's Case*, 9 F. Cas. at 941.

153. *See id.* at 941-42. The opinion in question may be found at 9 F. Cas. at 943-44.

permitted to go on in their usual way.”¹⁵⁴ Chase finally succumbed, and Rawle was dispatched that evening to collect the remaining copies.

Meanwhile, Dallas and Lewis met with Fries in his prison cell. They were convinced that Chase’s restrictions would ensure a conviction. After all, Lewis had already admitted that the facts were not in doubt. They therefore advised Fries to let them withdraw. He was also to refuse the appointment of substitute counsel if offered by the court. Fries’s lawyers apparently thought that the sight of Fries being tried without counsel would elicit a degree of sympathy from the jury, and might even result in an acquittal. In the event he were convicted, their plan would aid Fries in applying for a pardon.¹⁵⁵

Fries’s counsel refused to proceed with the case when the court convened on April 23. Justice Chase urged them to continue and insisted that his opinion of the day before had been withdrawn. William Lewis countered that since the court had “made up their minds as to the law,” and as the prisoner’s counsel had “a right to address the jury both on the law and the fact,” it would place him in “too degrading a situation to argue the case after what had passed.” Lewis also complained that the withdrawal of the opinion would not erase the impression it made on the jury’s mind.¹⁵⁶ At this point, Chase became irritated and insisted that Lewis was “at liberty to proceed as [he] thought proper.” Yet, Chase still insisted on his right to limit the right of the lawyers to address the jury on points of law. He contended that “[n]o opinion has been given as to the facts of the case,” and as to the law, “I know that the trial before took a considerable time, and that cases at common law, and decisions in England before the revolution on the law of treason” were cited by counsel for the defense. Chase contended that “[t]hese cases ought not, and shall not go to the jury.” Indeed, he asked, “would you cite decisions in Rome, in Turkey, or in France?”¹⁵⁷ Lewis and Dallas persisted in their refusal to act for Fries, and the trial was again adjourned. The following day, the court asked Fries if he wanted new counsel to be appointed for him. He declined, stating that he “look[ed] to the court to be his counsel.”¹⁵⁸ Rawle presented the government’s evidence and argument to the jury; Fries did not present any defense.¹⁵⁹

In charging the jury, Chase paid lip service to the jury’s power to find both fact and law. “It is the duty of the court,” he said, “to state to

154. *Id.* at 942.

155. *See id.* at 940.

156. There is some confusion in the record as to whether the jury ever had been given a copy of Chase’s opinion. Dallas asserted it had; Rawle thought it had not.

157. *Fries’s Case*, 9 F. Cas. at 942.

158. *Id.*

159. *See id.* at 930.

the jury their opinion of the law arising on the facts; but the jury are to decide . . . both the law and the facts, on their consideration of the whole case.”¹⁶⁰ As expected, Chase went on to assert that if a body of people conspire to resist the execution of any statute of the United States by force, they are guilty of “levying war.” He cited the opinions of the court in the Whiskey Rebellion cases as support for his view.¹⁶¹ The jury took but two hours to convict Fries of treason.

The story did not end there, however. In 1805, Chase became the first federal judge to be impeached by the House of Representatives. Among the charges laid by the House was that he had deprived John Fries of the right to trial by jury:

[i]n debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.¹⁶²

Chase responded to the allegation by repeating his belief in the jury’s law-finding function. “[I]t was the duty of the court,” he said, “to state to the petit jury their opinion of the law arising on the facts; but the jury . . . were to decide both the law and the facts, on a consideration of the whole case.” His purpose in limiting argument was not to injure Fries, but to save counsel “from the danger of making an improper attempt, to mislead the jury in a matter of law, and the jury from having their minds pre-occupied by erroneous impressions.”¹⁶³

Chase’s answer indicates the strength of his belief that the jury’s law-finding function must be limited by the principle of *stare decisis*. The need to provide for a stable legal environment was of paramount importance, however, and must be regarded as a restriction on both judge and jury:

160. *Id.*

161. *See id.*; *see also* United States v. Mitchell, 2 Dall. 348 (C.C.D. Pa. 1795); United States v. Vigol, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795).

162. 1 TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS BEFORE THE SENATE OF THE UNITED STATES 5 (Samuel H. Smith & Thomas Lloyd eds., 1805).

163. *Id.* at 35. Chase was also concerned, he said, to save time as there were over one hundred civil cases pending on the court’s docket that term. *See id.* at 33-35.

[S]urely we need not urge . . . the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions of courts of competent jurisdiction. A contrary principle would unsettle the basis of our whole system of jurisprudence, hitherto our safeguard and our boast; would reduce the law of the land, and subject the rights of the citizen, to the arbitrary will, the passions, or the caprice of the judge in each particular case; and would substitute the varying opinions of various men, instead of that fixed, permanent rule in which the very essence of the law consists.¹⁶⁴

Because the principles at issue in Fries's case had been "decided twice in the same court," Chase "deemed himself bound, even had he regarded the question as doubtful in itself."¹⁶⁵

This answer, delivered just a few years after *Fries's Case*, points out the extent to which judicial acceptance of the jury's law-finding function had declined. By the end of the decade, many Federalist judges had obviously come to the conclusion that the jury could not be completely irresponsible if the nation were to develop a stable legal regime. The development of such a regime was, of course, a prerequisite to the growth of domestic and international commerce. The judges, therefore, sought a way to place limits on the jury without directly challenging the popular view that juries were a necessary safeguard against government oppression. They found a solution in the principles of stare decisis. By confining both judge and jury to those "principles of law once established," Federalist judges elevated the level of debate. The principle of the "rule of law," as established in Magna Carta and so beloved by Americans since the Revolution, could only be upheld if both judge and jury were subject to its precepts. Thus, the jury's power to "find" law was limited by those principles that had already been settled "after repeated and solemn decisions."¹⁶⁶ Restricting the jury in this way would ensure that citizens would not be subject to decisions based on passion or caprice. The judges' role in this scheme was to instruct the jury on the principles of law already established and guide it in bringing forth a verdict consistent with them. The jury's power to find a general verdict, then, was to be exercised in a manner that does not contradict well-settled rules of law:

164. *Id.* at 32.

165. *Id.* at 31-32.

166. *Id.* at 32.

[I]t is the duty of every court of this country . . . to guard the jury against erroneous impressions respecting the laws of the land [I]t is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries to decide on the laws as well as on the facts, in all criminal cases [B]ut in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from our court all the assistance which it can give, for rightly understanding the law. To withhold this assistance, in any manner whatever; to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake, would be an abandonment or forgetfulness of duty, which no judge could justify to his conscience or to the laws.¹⁶⁷

For Chase, and others like him, the jury's law-finding power extended to nothing more than the application of a particular judge-made rule to the facts at issue. The jury might apply the legal standard, "but it could not determine the legal rule to be applied, as that task was to be reserved for the judge."¹⁶⁸

VII. INSTRUMENTALIST LIMITATIONS AND THE LAW-FINDING FUNCTION IN CIVIL CASES

Justice Chase represents the most extreme example of Federalist attempts to restrict the jury's law-finding function; yet, by the early part of the nineteenth century, there was a growing consensus that the jury's power to find both law and fact had to be restrained. Increasingly, many lawyers and judges came to view the jury as a drag upon stability in the law.¹⁶⁹

In many ways, however, the assault on the jury's law-finding function was an assault on the substantive law of the period itself. Many merchants and lawyers had come to believe that the existing legal regime significantly impeded economic progress. Jury verdicts in commercial cases often tended to promote the interests of the community at the expense of speculative transactions and bargains at less than fair market value. Wealth acquisition was inhibited by the inability of the law to

167. *Id.* at 34-35.

168. PRESSER, *supra* note 148, at 111.

169. See KERMIT L. HALL, THE MAGIC MIRROR 107-08 (1989).

provide reliable rules for the enforcement of commercial agreements.¹⁷⁰ Contract law, in particular, was “essentially antagonistic to the interests of commercial classes.”¹⁷¹ Contracts were not enforced according to the expectation of the parties; rather, they were supervised on the basis of their inherent fairness. Bargained-for exchanges were often set aside on the grounds that the consideration was inadequate, or that one party had taken advantage of the inexperience or weakness of another. It was said in Pennsylvania, therefore, that “[c]ourts of Justice cannot alter or destroy the contract of the parties, [but] they may interpose to render it conformable to reason, justice, and conscience.”¹⁷² As a result, judges looked to juries to provide “an equitable and conscientious interpretation of the agreement of the parties.”¹⁷³

The establishment of inferior federal courts under the new Constitution was designed, in part at least, to ameliorate the difficulties many merchants encountered in the state courts.¹⁷⁴ Nonetheless, a continued reliance on the jury’s law-finding function only served to increase the anxieties of the commercial classes. Among the more prominent examples in this regard was the case of *Searight v. Calbraith*,¹⁷⁵ an action for breach of contract on a bill of exchange brought in the Pennsylvania circuit court. The case is significant for the fact that it appears to be the first instance where the rule of expectation damages is adopted by a federal judge. The court, however, immediately diluted the import of its holding by advising the jury that it might ignore the traditional rule and assess damages as it saw fit:

[T]hough it is true that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and interest; yet, in a case like the present, they may modify the demand, and find such damages as they think adequate to the injury actually sustained.¹⁷⁶

The court’s charge indicates a residual belief in the power of the jury to find the law based on “the community’s sense of ‘fairness,’ even if this differed from what might have been intended by the parties making the

170. See NELSON, *supra* note 33, at 54-63.

171. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 167 (1977).

172. *Hollingsworth v. Ogle*, 1 Dall. 257, 260 (Pa. 1788).

173. *Wharton v. Morris*, 1 Dall. 125, 126 (Pa. 1788).

174. See *supra* text accompanying notes 93-97.

175. 4 U.S. (4 Dall.) 325 (C.C.D. Pa. 1796).

176. *Id.* at 327-28.

contract.”¹⁷⁷ Adding to merchants’ anxiety was the fact that many federal judges simply refused to state clear rules for assessing damages, with the result that jury verdicts in contract cases might often have the appearance of decrees in equity. For example, though he was unhappy with a jury’s assessment of damages in another commercial case, Justice Bushrod Washington still refused to entertain a motion to set aside the verdict. “The question of damages, or of interest in the nature of damages,” he said, “belonged so peculiarly to the jury, that he could not allow himself to invade their province.”¹⁷⁸

In time, however, there was a gradual transformation in the underlying assumptions about common law rules. As the eighteenth century drew to a close, judges and lawyers were “found with some regularity to reason about the social consequences of particular legal rules.”¹⁷⁹ Courts began to wonder about the effect a particular rule would have on “the commercial character of our country”¹⁸⁰ or whether the adoption of another would assist in “the improvement in our commercial code.”¹⁸¹ There was also an increasing emphasis on using the law as an instrument of social change. Judges sought ways to use the law to effect an improvement in social and commercial conditions, with the attendant result that all rules of law were subject to scrutiny on the basis of their apparent utility to the new nation’s developing commercial climate.¹⁸²

This instrumentalism was reflected in the desire of judges to limit the jury’s law-finding power. Judges began to take seriously the maxim, *ad questionem facti non respondent iudices; ad questionem iur non respondent juratores*.¹⁸³ Some asserted that the jurors’ power over law was necessary in the colonial period as a protection against a judiciary wholly dependent on the Crown.¹⁸⁴ In a free nation, however, the law-finding power might more safely be entrusted to judges amenable to control by the people. This was particularly the case in a nation sorely in need of fostering the growth of commercial trade and commerce. The need for certainty in the law necessitated that judges, rather than juries, take upon themselves the power to determine the law in any particular

177. PRESSER, *supra* note 148, at 65.

178. Walker v. Smith, 4 U.S. (4 Dall.) 389, 391 (C.C.D. Pa. 1804).

179. HORWITZ, *supra* note 171, at 2.

180. Liebart v. The Emperor, 15 Fed. Cas. 508, 509 (Adm. Ct. Pa. 1785).

181. Silva v. Low, 1 Johns. Cas. 184, 190 (N.Y. 1799).

182. See HORWITZ, *supra* note 171, at 1-4.

183. “To a question of fact, the judges do not answer; to a question of law, the jurors do not answer.” COKE’S INST., *supra* note 2, at 155.

184. See ALEXANDER ADDISON, CHARGES TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT IN THE STATE OF PENNSYLVANIA 53, 59 (1883).

case. The instrumentalist view was represented by Pennsylvania's Alexander Addison:

From the nature of juries composed of the people, taken indiscriminately from all ranks, professions, and trades, by turns, and for a short service, it is impossible that they should be qualified to decide nice questions And it is not to be supposed that any judicial constitution would vest the interpretation of declaring of laws, in bodies so constituted, without the permanence, or previous means of information, and thus render laws, which ought to be an uniform rule of conduct, uncertain, fluctuating with every changing passion and opinion of jurors, and impossible to be known until pronounced.¹⁸⁵

For Addison, the jury's power to decide law existed merely in its ability to bring in a general verdict "under the control of the court" and subject to the doctrine of "new trials." "It is incumbent on courts to yield all possible deference to the opinion of juries in matters of fact," Addison argued, "and it is incumbent on juries to yield all possible deference to the opinion of courts in matters of law." Otherwise:

[T]here no longer remains any restraint on the extravagance of opinion; the constitutional balance of this branch of government is destroyed; the destruction of the balance in the branch destroys the balance in the whole system of government, and thus a way is laid open for the destruction of the government itself."¹⁸⁶

Judge Addison was as controversial a figure as Samuel Chase. His views did not command universal acceptance at the time; and the way he went about putting them into practice subjected him to a great deal of criticism.¹⁸⁷ In time, however, his conception of the proper allocation of power between judge and jury began to gain wider acceptance.¹⁸⁸

185. *Id.* at 59.

186. *Id.* at 62-63.

187. Indeed, in 1803, he was impeached by the Pennsylvania House of Representatives and removed from office by the Senate. TRIAL OF ALEXANDER ADDISON (1803).

188. See *Pennsylvania v. Bell*, Addison 155, 159-60 (Pa., Washington C.P. 1793): I . . . know of no argument less proper or more dangerous or to which juries ought to listen with greater suspicion and aversion, than that which must derive its force from confounding the authority of a court and a jury, instilling into the one a prejudice against the opinion of the other, and persuading jurors

Both state and federal judges gradually offered more complete statements of the law to the jury. In 1807, the Connecticut legislature gave the state supreme court rule-making power, which the court immediately used to establish a rule that “[t]he presiding judge, in charging the jury, shall state to them the several points of law which may arise, and declare to them the opinion of the court thereon.”¹⁸⁹ A year later, the Massachusetts Supreme Judicial Court asserted that a judge “was officially obliged to declare to the jury his opinion of the law.”¹⁹⁰ The declaration of law by a judge was meant to be more than exhortation, however; a judge was expected to do more than merely express his personal opinion or impressions. He was, in fact, to deliver a “sound construction” of the law, and his failure to do so would require the verdict to be set aside and a new trial had with “another jury, uninfluenced by an erroneous opinion.”¹⁹¹ Thus, there developed a belief that a body of substantive law existed apart from earlier jury pronouncements by which judge and jury were bound, with the attendant result that the jury ceased to have plenary authority to reject the law as stated in earlier cases.

Increasing acceptance of the instrumentalist view impelled many judges to become more aggressive in their efforts to control juries. Both state and federal courts granted motions for new trials in civil cases with greater frequency, overturning verdicts the judges thought contrary to the law or evidence. This was accomplished by the use of post-trial motions. Of these, there were three types: verdicts against the law, verdicts against the evidence, and verdicts against the weight of the evidence. The first was simply an assertion that the jury had returned a verdict contrary to

that they are at liberty to apply to facts a rule of their own, different from that which the law applies. The court is the mouth of the law [The jury] cannot, but at the peril of violation of duty, believing the facts, say that they are not what the law declares them to be, for this would be taking upon [it] to make the law, which is the province of the legislature, or to construe the law, which is the province of the court.

See also Pennsylvania v. McFall, Addison 254, 256-57 (Pa., Fayette C.P. 1794) (“What facts constitute one kind of homicide or another, is a question of law purely. Whether the facts exist, or whether they proceeded from such a purpose, is to be ascertained by the jury. When ascertained, nothing remains but a question of law to be decided by the court.”).

189. RULES OF PRACTICE ADOPTED IN THE SUPREME COURT (May 26, 1807), 3 Day 28 (Conn. 1811). This rule was codified in 1812. The legislature asserted it to be the duty of the judges of any court “in committing any cause, whether civil or criminal to the jury, to state to them their opinion as to the law arising in the case.” 1812 Conn. Pub. Acts 106.

190. Coffin v. Coffin, 4 Mass. (1 Tyng) 1, 25 (1808). The court admitted, however, that “the jury must decide [both] the law and the fact.” *Id.*

191. *Id.* at 25-26.

the court's instructions. The second was a claim that the verdict had no support whatever in the evidence presented at trial. The third argued that the jury returned a verdict in favor of the party with the weaker evidence in cases where conflicting evidence was presented.¹⁹² Most colonial courts seem never to have granted motions for new trials on the grounds that a verdict was against the evidence, although some allowed for the possibility.¹⁹³ Overturning a verdict as against the weight of the evidence would have been equally rare since it would have effectively allowed the court to substitute its own judgment for that of the jury on questions of fact and credibility. A new trial on the grounds that the jury ignored the court's instructions on the law was unheard of.¹⁹⁴ Nonetheless, in the early days of the Republic, courts slowly began to order new trials where the jury returned a verdict contrary to the judges' instructions on the law or where the verdict was against the evidence.¹⁹⁵

The nineteenth century saw an increasing willingness on the part of both state and federal judges to order new trials in cases where juries ignored their instructions.¹⁹⁶ The growing tendency of judges to provide specific and sometimes lengthy instructions to juries gave rise to conflict in instances where the jury refused to return a verdict consistent with the judge's view of the law. This was particularly true where a judge directed a verdict for a particular party.¹⁹⁷ Even more significant was the rising frequency by which courts ordered new trials in cases where the verdict was against the evidence. Courts usually limited new trials in these instances to cases where juries completely ignored the

192. See NELSON, *supra* note 33, at 27.

193. See *Angier v. Jackson*, Quincy 84, 85 (Mass. 1763).

194. See *id.*; see also *Goodspeed v. Gay*, Quincy 558 (Mass. 1763); *Erving v. Cradock*, Quincy 553 (Mass. 1763) (refusing new trials where jury ignored instructions).

195. New trials on the grounds that a verdict was against the weight of the evidence were also ordered on occasion, but only where it was thought that the result was unduly harsh or where excessive damages were awarded.

196. See *United States v. Duval*, 25 F. Cas. 953 (E.D. Pa. 1833); *Van Rensselaer v. Dole*, 1 Johns. Cas. 279 (N.Y. Sup. Ct. 1800) (verdict set aside where the finding of the jury was "contrary to law"); *Silva v. Low*, 1 Johns. Cas. 336 (N.Y. Sup. Ct. 1800) (granting a third trial on grounds that jury disregarded instructions of the court); *Emmet v. Robinson*, 2 Yeates 514 (Pa. 1799) (new trial ordered where verdict against charge of court and weight of evidence); *Vaughan's Lessees v. Eason*, 1 Yeates 14, 15 (Pa. 1791) (same); see also *Smith & Pearce v. Odlin*, 4 Yeates 468, 475 (Pa. 1807) (admitting that new trial available when the verdict was against the charge).

197. In one Massachusetts case, for example, the court ordered a new trial after a jury brought in a verdict for the plaintiff. The judge instructed the jury after the close of plaintiff's case that the evidence was insufficient for a verdict in plaintiff's favor. See *Dunham v. Baxter*, 4 Mass. (1 Tyng) 78 (1808). Similarly, a Vermont court held that new trials were available in cases "where the Jury in the opinion of the Court *mis[took] the law.*" *Hubbard v. M'Withy*, 1 Tyl. 142 (Vt. 1801).

evidence or brought in a verdict where no evidence was produced in support of a party's case. Otherwise, it was thought that "[t]he granting of a new trial, merely because in the opinion of the court, the verdict is rather against the weight of evidence, would reduce the trial by jury to an expensive and useless form."¹⁹⁸ New trials were available only where the verdict was "manifestly and palpably against the weight of the evidence."¹⁹⁹

One of the more bizarre cases in this line occurred in Pennsylvania in 1794. William M'Causland made a motion for a new trial after a verdict for the plaintiff in an ejectment case. M'Causland made several arguments in support of his motion. He showed that the jury had engaged in a rather spectacular course of misconduct before and during their deliberations. One juror, for example, had laid bets with several onlookers as to how the jury would find. Five of the jurors ate and drank during the course of the trial at the expense of one of the parties. Three jurors declared their opinion in favor of the plaintiff after being sworn but before hearing any evidence. Finally, three of the jurors "threatened to throw three others of the jury, who dissented from them in opinion, out of the window of the second story of the Court House . . . unless they would agree to find a verdict for the plaintiff." Rather surprisingly, the court denied the motion. The court held that while the jury's conduct was inappropriate, "the proof [was] defective as to any of the jurors prejudging the cause."²⁰⁰ The court also rejected M'Causland's claim that the verdict was against the evidence because the judges who tried the cause did not sum up the evidence in their charge to the jury. The trial lasted several days and a great number of witnesses testified for both sides. The supreme court considered itself "precluded from giving [its] sentiments on the weight of the evidence either way" because the trial court "under a few general remarks, left the matter of fact solely to the decision of the jury."²⁰¹

The seriousness with which courts regarded their power to grant new trials is evidenced by several Connecticut cases where new trials were granted even after the same jury had already considered the case three times. A statute of that state permitted a judge to order a jury to

198. *Palmer v. Hyde*, 4 Conn. 426, 427 (1822).

199. *Id.* See also *Ludlow v. Union Ins. Co.*, 2 Serg. & Rawle 119, 133 (Pa. 1815) ("Clear and decisive preponderance" needed to overturn the verdict of a jury); *Eason*, 1 Yeates at 14 ("Where the weight of the evidence is against the verdict, if there is a contrariety of testimony, the Court will not grant a new trial."); *Campbell v. Sproat*, 1 Yeates 327, 329 (Pa. 1794); *M'Intyre v. Cunningham*, 1 Yeates 363, 365 (Pa. 1794); *Leach v. Armitage*, 1 Yeates 104, 107 (Pa. 1792).

200. *Goodnight v. M'Causland*, 1 Yeates 372, 378 (Pa. 1794).

201. *Id.* at 377-78.

reconsider its verdict twice after the original verdict was brought in. The court might then order a new trial if the jury persisted in a verdict that was contrary to the evidence.²⁰² Connecticut's Chief Justice Zephaniah Swift expressed the view that the power of granting new trials in such cases was necessary to the development of a coherent body of law. Swift admitted that such devices were of recent origin, but argued that courts "ought to adopt every improvement calculated to promote the causes of truth and justice." If courts did not have the power to insist that a jury follow its instructions on the law or order new trials, he argued, the "science of the law would become stationary."²⁰³ Swift expressed his instrumentalism:

It is essential to the due administration of justice that such power be lodged in courts. What can be more preposterous than to say, that the verdict of a jury, often composed of men unaccustomed to weigh testimony, and peculiarly liable to local and personal prejudices and partialities, should never be re-examined and corrected, though opposed to the clearest evidence?²⁰⁴

Lawyers were complicit in judicial attempts to reign in the power of civil juries. Between 1790 and 1820, the legal profession developed a new relationship with the commercial classes such that the latter was able to discard its earlier hostility toward the legal community.²⁰⁵ As a result, lawyers became active in advancing the cause of commerce and made an unspoken alliance with merchant interests to overthrow what they regarded as antiquated legal rules.²⁰⁶ The business of the law was

202. See *Palmer*, 4 Conn. at 427; *Bartholomew v. Clark*, 1 Conn. 472, 482 (1816).

203. *Bartholomew*, 1 Conn. at 482.

204. *Id.* A federal judge in Pennsylvania expressed the prevailing instrumentalist view by asserting that "[a] court must never suffer its controlling power over a verdict to be prostrated, nor the particular circumstances or even the justice of any case, to overthrow the general principles established for the administration of the law, and the security of the rights of all." *United States v. Duval*, 25 F. Cas. 953, 965 (E.D. Pa. 1833).

205. Popular irritation with the legal profession through much of the eighteenth century was animated in part by a perception that lawyers used the law to inhibit popular freedom in favor of preserving the status quo. "The intricacies and technicalities of the English law were looked upon as diabolical machinations designed by lawyers in order to given them an iron grip on the legal affairs of people, and to perpetuate a monopolistic profession." ANTON-HERMANN CHROUST, 2 *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 282 (1965). Beginning around the time of the Revolution, a number of schemes were developed to limit the effect of the English common law. See *id.*

206. See CHROUST, *supra* note 205, at 283; HORWITZ, *supra* note 171, at 141.

gradually transformed from a heavy reliance on debt collection and land conveyancing to commercial litigation. The fortunes of lawyers now hinged on the ability of the law to promote a stable commercial environment.²⁰⁷

One way lawyers helped to limit the jury's law-finding function was by expanding the use of the "special case" or the "case reserved." This was a procedural device by which counsel would submit an agreed statement of facts to the court for decision on the law. In New York, the practice had become so widespread by the end of the eighteenth century as to "nearly . . . supplant traditional practice."²⁰⁸ In Massachusetts, "virtually all cases submitted to the Supreme Judicial Court during the last two decades of the of the eighteenth century proceeded from an agreed statement of facts."²⁰⁹ The Pennsylvania Supreme Court heard a number of cases on "reserved points" beginning at the same time. The usual procedure was for the parties to file the declaration and plea in the trial court, and then leave the case to the jury without any argument by counsel or charge by the judge. An appeal was then taken to the supreme court after the jury rendered a verdict on the facts. In this way, parties obtained a decision on points of law from the court completely bypassing the jury.²¹⁰

The decline of the jury's law-finding function was further aided by legislative enactments. By the early part of the nineteenth century, many legislatures, (which were themselves largely composed of lawyers), enacted a number of laws designed to streamline the judiciary. These often had the effect of curtailing the jury's power over law as well.²¹¹ In Massachusetts, for example, the practice of allowing trials de novo on appeal was sharply curtailed. Such legislation ensured that juries would receive a consistent statement of the law from the judge instead of a series of potentially contradictory opinions from the bench.²¹²

The bench and bar thus effected a dramatic transformation in the relations between judge and jury. The desire of both merchants and the

207. To his apparent surprise, Justice Story found that his opinion in *DeLovio v. Boit*, 7 Fed. Cas. 418 (C.C.D. Mass. 1815), which held that marine insurance cases fell within the federal court's admiralty jurisdiction (and thus might be tried without juries), was quite popular with the merchant classes. "They declare," he said, "that in mercantile causes, they are not fond of juries; and, in particular, the underwriters in Boston have expressed great satisfaction with the decision." 1 LIFE AND LETTERS OF JOSEPH STORY 270 (William W. Story ed., 1851).

208. HORWITZ, *supra* note 171, at 142.

209. *Id.*

210. *See, e.g., Snyder v. Castor*, 4 Yeates 353 (Pa. 1807) (using special case to decide question of special assumpsit).

211. *See NELSON, supra* note 33, at 166.

212. *See id.* at 167.

legal profession to promote a stable substantive legal regime encouraged the development of the means by which jury power over law was curtailed. This phenomenon was, in the beginning at least, limited to commercial cases, but soon spread to other civil cases as well. Judges gradually followed their English predecessors in their attempts to confine the jury's determination to matters of fact. Through the aggressive use of the doctrine of new trials, the judges were able to effectively abolish the jury's power over law in civil cases.

VIII. FINDERS OF THE CRIMINAL LAW

The jury retained its law-finding function in criminal trials long after it had ceased to exercise it in civil cases. Criminal juries in both the colonial and federalist eras were instructed that they had the power to disregard the court's instructions and determine the law for themselves. Such a power was thought perfectly consistent with the notion of popular sovereignty. The people should, it was argued, have the power to express their views on the law through the time-honored medium of the jury. The first signs of disenchantment with the jury's power over law in criminal cases appeared in the early years of the federalist era. As the 1790s wore on, there were many who argued that a democratic society did not require juries to judge the law; the power to determine law might be safely entrusted to judges chosen by the people. There were others, however, who continued to insist that the jury's power to find law in criminal cases was a necessary component of popular sovereignty and a safeguard for the rights of the accused.²¹³

This difference of opinion was reflected in the debates over the passage of the Sedition Act of 1798.²¹⁴ When the Act was first proposed, William Clairborne of Tennessee offered an amendment providing that "the jury who shall try the cause, shall be judges of the law as well as the fact." Such a provision was necessary, Clairborne argued, in order to prevent the court from determining the ultimate question of guilt or innocence.²¹⁵ Robert Goodloe Harper of South

213. See WILLIAM DUANE, *SAMPSON AGAINST THE PHILISTINES, OR THE REFORMATION OF LAWSUITS* 93 (2d ed. 1805).

214. Sedition Act, ch. 74, 1 Stat. 596 (1798). The Sedition Act was passed in response to rising tensions with France during the latter part of the 1790s. It was "a war measure designed to supplement the acts for strengthening the armed forces of the country." MILLER, *supra* note 131, at 231. The Act sought to punish seditious or defamatory publications and speeches. A total of fifteen indictments were brought under the Sedition Act, of which ten resulted in conviction.

215. See 8 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 2135 (Joseph Gales ed., 1834) [hereinafter ANNALS OF CONGR.].

Carolina, thought the amendment unnecessary because “[i]t was well known that, in this country, the jury were always judges of the law as well as the fact, in libels, as well as in every other case.”²¹⁶ Others, however, opposed the amendment on the grounds that it vested too broad a power in the jury. Nathaniel Smith of Connecticut asserted that Clairborne’s proposal would “give the juries a strange power indeed, viz: to be complete judges of law and fact, so that in case of any doubt as to the *legality of testimony*, it would seem as if the jury were to be judges of the matter in dispute.” James Bayard of Delaware went even further and argued that “the effect of the amendment would be, to put it into the power of a jury to declare that this is an unconstitutional law, instead of leaving this to be determined, where it ought to be determined; by the Judiciary.”²¹⁷

Pennsylvania’s Albert Gallatin offered a solution. Relying on language in Pennsylvania’s Constitution of 1790, he proposed an amendment in which the jury would be given “the right to determine the law and the fact, under the direction of the court, as in other cases.”²¹⁸ Gallatin’s purpose was to ensure that juries in trials under the Sedition Act would have the same power as those in other criminal cases. In this way, he said, difficulties over whether juries possessed the power to decide constitutional or evidentiary questions might be avoided.²¹⁹ Nevertheless, although his proposal was adopted,²²⁰ Gallatin’s amendment did not provide a solution to the question of whether juries were entitled to be finders of the law. The amendment’s language might be interpreted to mean that the jury’s law-finding function was limited to its ability to bring in a general verdict, but the judge’s instructions were binding. Gallatin’s amendment also left open the possibility that the English doctrine of new trials in criminal cases might be adopted in the federal courts. Accordingly, the most that could be said for the wording of the amendment was that it preserved the judges’ power over matters of constitutionality and evidence, while still leaving jurors free to determine the content of the substantive criminal law.²²¹

216. *Id.*

217. *Id.* at 2136.

218. *Id.* See also PA. CONST. of 1790, art. IX, § 7.

219. See 8 ANNALS OF CONG. 2136-37.

220. See Sedition Act, ch. 2, § 3, 1 Stat. 596 (1798).

221. This debate took place in the context of Fox’s Libel Act, passed by Parliament in 1792. See Fox’s Libel Act, 1792, 32 Geo. 3, ch. 60 (Eng.). That Act provided that the jury “may give a general verdict of guilty or not guilty upon the whole matter put in issue,” but the court might “give their or his directions to the jury on the matter in issue . . . in like manner as in other criminal cases.” *Id.* The quoted language gave ample ammunition to both supporters and opponents of the jury’s law-finding function, although English courts soon determined that the jury had a duty to follow the

The instrumentalist pressures behind efforts to limit the jury's law-finding function in civil cases were not immediately apparent in criminal proceedings. This was no doubt a result of the fact that commercial interests had no direct interest in criminal prosecutions. It is also clear, however, that many in the new nation still treasured a sense of the frontier justice that allowed juries to stand as a bulwark against government oppression. The controversial prosecutions brought under the Sedition Act between 1798 and 1800 would certainly have engendered continued support for the law-finding function in criminal cases. As a result, early federal judges repeatedly instructed juries that they were "judges of both the law and the fact in a criminal case, and are not bound by the opinion of the court."²²² This practice came to a dramatic halt in federal criminal cases sometime around 1835. Justice Story's opinion in *United States v. Battiste*,²²³ sounded the call for the judiciary's assertion of the power to control the law-finding function in criminal as well as civil cases. "It is the duty of the court to instruct the jury as to the law," Story declared, "and it is the duty of the jury to follow the law, as it is laid down by the court."²²⁴ Other federal courts took up the admonition and in a series of opinions, judges denied that the Constitution's guarantee of the right to trial by jury required that the jury be empowered to determine the law as well as the fact.²²⁵

State court judges were more reluctant to challenge the jury's law-finding function, however. Here and there, trial court judges attempted to limit the jury's power over the substantive criminal law, but such attempts were isolated and often unsuccessful. For example, in 1886, the Pennsylvania Supreme Court still declared that "[t]he jury are not only judges of the facts . . . but also of the law."²²⁶ The Tennessee Supreme Court asserted that the jury must accept the judge's view of the law

court's instructions. See *Rex v. Burdett*, 4 B. and Ald. 95, 131, 106 Eng. Rep. 873, 887 (K.B. 1820); *Parmiter v. Coupland*, 6 M. & W. 105, 151 Eng. Rep. 340 (Ex. 1840).

222. *United States v. Wilson*, 28 F. Cas. 699, 708 (C.C.D. Pa. 1830). See also *United States v. Lynch*, 26 F. Cas. 1033 (C.C.D.N.Y. 1843); *United States v. Hodges*, 26 F. Cas. 332 (C.C.D. Md. 1815); *United States v. Poyllon*, 27 F. Cas. 609 (D.C.N.Y. 1812); *United States v. Smith*, 27 F. Cas. 1233 (C.C.D.N.Y. 1806); *Virginia v. Zimmerman*, 28 F. Cas. 1227 (C.C.D.D.C. 1802); *Fries's Case*, 9 F. Cas. 826 (C.C.D. Pa. 1799); *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793).

223. 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835).

224. *Id.*

225. See *United States v. Riley*, 27 F. Cas. 810 (C.C.D.N.Y. 1864); *United States v. Greathouse*, 26 F. Cas. 18 (C.C.D. Cal. 1863); *United States v. Morris*, 24 F. Cas. 1323 (C.C.D. Mass. 1851); *United States v. Stettinius*, 22 F. Cas. 1322 (C.C.D.D.C. 1839); *United States v. Shive*, 27 F. Cas. 1065 (C.C.D.E.D. Pa. 1832).

226. *Hilands v. Commonwealth*, 111 Pa. 1, 5 (1886). See also *Commonwealth v. Harman*, 4 Pa. 269 (1846); *Commonwealth v. Van Sickle*, Brightly 69, 73 (1845).

“unless in their conscience they believed him to be wrong.”²²⁷ The very next year, a Tennessee trial judge delivered a charge in which he stated that “the jury are the judges of the law as it applies to the fact . . . but the court is the proper source from which they are to get the law, in other words, they are the judges of the law as well as the facts, under the direction of the court.”²²⁸ In a Vermont case, the judge allowed as how he thought the jury’s power to determine the law to be “a most nonsensical and absurd theory.” Nevertheless, he was forced to admit that “for purposes of this trial . . . such is the law of this State.”²²⁹ Thus, while Justice Story’s opinion in the *Battiste* case might not have commanded universal approbation, there were many who believed Story was on the right track.

Traditional common law and constitutional limitations on new trials in criminal cases²³⁰ required that some other means of restraining the jury be found. Judges thus attempted to restrict the law-finding function by insisting that the jury was bound to accept the law as stated to it by the court. Admittedly the jury’s power to bring in a general verdict made such an insistence somewhat ineffective in producing an absolute uniformity; but such methods would have to do, since no sane jurist could reasonably argue for a repeal of the Fifth Amendment. The desire to protect against oppression while providing for a more stable legal regime also meant that many judges were themselves divided about what to do. As a result, the various state supreme courts confronted with the question gave inconsistent and contradictory directions.²³¹ The period before the

227. *McGowan v. State*, 9 Tenn. (1 Yer.) 184, 195 (1863). This was in spite of a provision in the Tennessee constitution declaring that “in all prosecutions for libel, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases.” *Id.* The case was reversed on other grounds.

228. *Dale v. State*, 7 Tenn. (Bax.) 35, 36 (1837).

229. *State v. McDowell*, 32 Vt. 490, 522 (1860).

230. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb” U.S. CONST. amend V.

231. In Pennsylvania, for example, the supreme court changed its mind repeatedly. In 1879, the court declared that “[t]he power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights.” *Kane v. Commonwealth*, 89 Pa. 522, 527 (1879). Later that year, however, the same court upheld an instruction advising a jury that their “only safe course” was to accept the court’s interpretation of the law. *Nicholson v. Commonwealth*, 91 Pa. 390 (1879). In 1885, the court retreated again, asserting that in a capital case, the jurors “are not only the judges of the facts . . . but also of the law.” *Hilands v. Commonwealth*, 111 Pa. 1, 5 (1885). The end of the jury’s power to determine the law in Pennsylvania was signaled in *Commonwealth v. McManus*, 143 Pa. 64 (1891). The trial judge in this case charged the jury that while it still retained the power to decide the law, it should take the judge’s

Civil War is marked by a great deal of ambivalence toward the jury's law-finding function; and state courts reaffirmed the jury's power over law in a long series of cases.²³² The Vermont Supreme Court expressed the general feeling of most when it observed that the jury's power over law in criminal cases "is one of those great exceptional rules intended for the security of the citizen against any impracticable refinements in the law, or any supposable or possible tyranny or oppression of the courts."²³³ The law-finding function was:

[O]ne of those great landmarks . . . which . . . will always be likely to be characterized as an absurdity by the mere advocates of logical symmetry in the law, [yet] which will nevertheless be sure in the long run to constantly gain ground, and become more and more firmly fixed in the hearts and sympathies of those with whom liberty and law are almost synonymous.²³⁴

The nineteenth century saw two main criticisms of the jury's law-finding function. The first recalled the complaint of Chief Justice DeLancey in the *Zenger* trial: To allow a jury to retain the power over law meant that it had the ability to "nullify" validly enacted legislation. In an era where parliamentary legislation was often considered violative of colonial rights, such a power in the jury was thought to be a boon. However, the same argument seemed less attractive once the royal yoke was overthrown. To allow juries to nullify the law after the Revolution meant that they had the power to overturn the enactments of a democratically elected legislature. Perhaps more important was the growing desire of the professional judiciary for stability in the law. In

statement of the law as the best evidence of what the law was. This charge was upheld by the Pennsylvania Supreme Court. It was not until well into the twentieth century, however, that the Pennsylvania Supreme Court was comfortable in declaring that the jury must "take the law from the court to the same extent in a criminal case as in any other." *Commonwealth v. Bryson*, 276 Pa. 566 (1923); *see also Commonwealth v. Castellana*, 277 Pa. 117 (1923).

232. *See, e.g., State v. Snow*, 18 Me. 346 (1841) (holding that jury might disregard the court's instructions on matters of law); *People v. Thayers*, 1 Parker Cr. 595 (N.Y. 1825) (same); *People v. Videto*, 1 Parker Cr. 603 (N.Y. 1825) (approving instruction to jury that courts are the source with which juries obtain law); *Nelson v. State*, 32 Tenn. (2 Swan) 482 (1852) (holding that judge is to be considered a witness as to what the law is, but jury may disregard judge's evidence if they did not believe his statement of the law to be accurate); *Dale v. State*, 18 Tenn. (10 Yer.) 551, 555 (1837) (approving instruction to jury that "the court is the proper source from which they are to get the law"); *Baker v. Preston*, 21 Va. (Gilmer) 235, 303 (1821) (same); *State v. Croteau*, 23 Vt. 14 (1849); *State v. Wilkinson*, 2 Vt. 480, 488-89 (1829) (same).

233. *State v. McDonnell*, 32 Vt. 491, 531-32 (1860).

234. *Id.* at 531-32.

civil cases, of course, this desire was expressed as the search for stability in the commercial law. In criminal cases, on the other hand, the search was for predictability as a form of due process. Leaving the interpretation of the criminal law to juries allowed for the possibility that innocent defendants might be convicted on the basis of passion or caprice. As Justice Story was to argue, “[e]very person accused as a criminal has a right to be tried according to . . . the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.”²³⁵ Thus, the same desire for consistency that lay behind efforts to curtail the jury’s power over the civil law was at work in the criminal law as well. While constitutional considerations and the desire to protect the rights of the accused limited the extent to which judges might go in restricting the jury, these same concerns provided ammunition for the assault.

The jury’s power over criminal law certainly meant that it might serve as a bulwark of liberty by acquitting defendants who were the subject of a malicious or oppressive prosecution. Juries might also acquit in the face of uncontroverted evidence, thus “nullifying” a particular statute. It was this very power that was utilized by colonial juries in the *Zenger* trial and the various prosecutions under the Navigation Acts. Oppressive or unjust laws were nullified simply because no jury would convict. At the same time, however, the jury’s power over criminal law gave rise to an altogether different type of oppression. In cases of serious or heinous crimes, a jury might simply convict on the basis of passion or wantonness.

It was this second aspect of the law-finding function that many judges sought to curtail by pleading for a means to ensure that the law would be applied in a uniform fashion. To these judges, the constitutional guarantee of the right to trial by jury demanded no less than a fixed and certain criminal law. The entire last half of the nineteenth century is thus marked by the search for a way to limit the law-finding function while still preserving the jury’s role as a bulwark of liberty. The solution was found in requiring juries to follow the instructions on the law given by the court. While this could only ever be partially successful, it would have to do. Change was made difficult by the fact that long years of colonial

235. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835). See also *Wiley v. Maryland*, 372 F.2d 742 (4th Cir. 1967) (arguing that a state court jury had been given license to convict the defendant because it had been instructed that the judge’s charge was not binding on them and that they might “accept or reject” it as they pleased); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 223-24 (1855) (“Another leading idea which pervades the whole system [of government] . . . is the absolute necessity to the peace, harmony and tranquility of the citizens of a free government that the laws under which they live be fixed and settled.”).

and republican practice had trained many to believe in the jury's power over law. The trick, therefore, was to introduce English jury practice well after the fact. This was accomplished through a novel interpretation of the process of reception in the common law. A number of courts successfully restricted the jury's power over law by reading into their state constitutions a requirement that jury trials be conducted according to the usages of the common law of England. This meant, of course, that the devices created by English judges to control juries in the eighteenth century were made applicable to state court trials in the nineteenth century. English common law jury practice was found to be a dormant characteristic of American law merely waiting to be resurrected by nineteenth-century judges.

For example, in *State v. Burpee*,²³⁶ the Vermont Supreme Court held that the English rule requiring juries in criminal cases to abide by the law stated in the charge was incorporated into the laws of Vermont. The basis for the court's opinion was found in the provisions of the Vermont statutes that declared that "so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws, shall be law in this state."²³⁷ A Vermont jury could, therefore, only have such powers as were exercised by juries in England. Since the English jury's law-finding function was limited to its power to bring in a general verdict, a Vermont jury must also be so limited. A power in the jury to declare the law as well as the fact was "contrary to the uniform practice and decisions of the courts of Great Britain, where our jury system had its beginning and where it matured." In order to establish that juries have such a right, "it must appear that it existed at common law, and that it is not repugnant to our constitution and laws."²³⁸ The court passed over the question of whether the "local situation and circumstances" effected a change in the English rule and thus avoided having to deal with the argument that the law-finding function was a check on "any supposable or possible tyranny or oppression of the courts."²³⁹

In several states, legislative enactments complicated judicial efforts to limit the law-finding function. Judges were able to restrain juries only by engaging in a creative course of statutory construction. In Connecticut, for example, two provisions addressed the proper allocation of authority between judge and jury. In 1821, the legislature had declared that in civil cases, the court was "to decide all questions of law arising in

236. 65 Vt. 1, 34-35 (1892).

237. VT. REV. LAWS § 689 (1881).

238. *Burpee*, 65 Vt. at 34-35.

239. *State v. McDonnell*, 32 Vt. 491, 532 (1860).

the trial of a cause, and in committing the cause to the jury, to direct the finding accordingly."²⁴⁰ In criminal cases, however, the court was merely "to state [its] opinion to the jury, upon all questions of law, arising in the trial . . . and to submit to their consideration both the law and the facts, without any direction how to find their verdict."²⁴¹ This statute had the effect of limiting debate on the jury's role in criminal cases until 1894,²⁴² when the supreme court was forced to consider a trial judge's charge to a jury that it must find a defendant guilty if it found the facts set forth in the indictment to be true.²⁴³ The court approved the instruction, arguing that a similar charge had been sustained by the supreme court in 1811. The justices took the view that the 1821 statute did nothing more than to codify already-existing Connecticut practice.²⁴⁴ The court entirely rejected the jury's power to find the law three years later in *State v. Main*,²⁴⁵ when it dismissed the assertion that the 1821 statute was meant to protect the jury's power over law. The statute, it said, "was not intended to narrow the functions of the court, but rather to enlarge them." This view was not approved by the Connecticut legislature until 1918, in a statute providing that "the court shall decide all issues of law and questions of law arising on the trial of criminal causes."²⁴⁶

Most Massachusetts courts assumed that juries had the power to find law,²⁴⁷ and some even hinted at a power to decide upon the constitutionality of a statute.²⁴⁸ The first cracks in this relative unanimity appeared in *Commonwealth v. Porter*.²⁴⁹ Here, the Massachusetts Supreme Judicial Court held that the trial judge erred in not allowing a defendant's lawyer to present argument to the jury on the question of whether a liquor licensing statute was actually in force. The

240. REV. LAWS OF CONN., tit. 2, § 54 (1821).

241. *Id.* § 112.

242. The statute was re-enacted in 1888 as CONN. GEN. STAT., §§ 1101, 1630 (1888).

243. *See State v. Fetterer*, 65 Conn. 287 (1894).

244. In so doing, the court seems to have ignored the possibility that the 1821 statute was a rejection of the 1811 decision.

245. 69 Conn. 123 (1897).

246. CONN. GEN. STAT. § 6486 (1930).

247. *See, e.g., Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477 (1830) (rejecting assertion that jury might judge admissibility of evidence, but acknowledging power to ignore judge's instructions on the law); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 305 (1825) (approving a charge that "unless [the jury] knew the law to be otherwise, they ought to receive it from the judge").

248. *See Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838) (allowing jury to determine constitutionality of libel statute).

249. 51 Mass. (10 Met.) 263 (1845).

high court echoed the instrumentalist concerns behind the movement to limit the law-finding function of civil juries, asserting that the state constitution guaranteed its citizens “an impartial interpretation of the laws and administration of justice.”²⁵⁰ Nonetheless, to allow a jury to ignore the law as stated in the charge would violate this principle because no jury could ever be bound by the decision of another or of the court. The judges thought the power to decide constitutional questions should reside in the judiciary alone. In any event, however, the *Porter* court noted that in a criminal trial, “it is obvious that the whole matter of law as well as of fact must be stated and explained to the jury” and for this purpose, “it seems to be necessary . . . for the parties respectively, by their counsel, to state the law to the jury, in the presence, and subject to the ultimate direction of the judge.”²⁵¹

The General Court entered the debate in 1855, and passed a statute providing that “in all trials for criminal offenses, it shall be the duty of the jury . . . to decide at their discretion, by a general verdict, both the fact and the law involved in the issue.”²⁵² The Massachusetts Supreme Judicial Court quickly rendered the statute a nullity, however. In *Commonwealth v. Anthes*,²⁵³ the court declared that it would be error for a trial judge to permit any question of law to go to a jury. In the court’s view, the 1855 statute was not designed to effect any substantive change in the “relative powers and functions of judges and jur[ies] in criminal trials.”²⁵⁴ Rather, its purpose was to give “full effect to the great fundamental principle of the common law, vesting in judges the authority to adjudicate on all questions of law, and giving the jury the power to adjudicate on all questions of fact, and sanctioning the usual form of doing this by a general verdict.”²⁵⁵

Perhaps the most aggressive example of this reinterpretation is found in the Illinois Supreme Court’s decision in *People v. Bruner*.²⁵⁶ Relying on a provision in the state Constitution of 1870, guaranteeing the right to trial by jury “as heretofore enjoyed,” the court asserted that the people of Illinois were entitled to trial by jury as contained in the common law

250. MASS. CONST. art. 10.

251. *Porter*, 51 Mass. (10 Met.) at 283-84. See also *Commonwealth v. Austin*, 73 Mass. (7 Gray) 51 (1856) (allowing counsel to argue questions of law to the jury).

252. LAWS of 1855, ch. 152. The origin of the statute is unclear. On its face, the provision has a populist look, but it has been argued that the statute was actually put forward by those opposed to liquor licensing laws. Apparently it was thought that juries would be amenable to striking down such laws. See *Howe*, *supra* note 66, at 609.

253. 71 Mass. (5 Gray) 185, 187 (1855).

254. *Id.* at 221.

255. *Id.* at 220.

256. 343 Ill. 146 (1931).

of England, and not as practiced in Illinois' recent past. This was in spite of the fact that Illinois had two earlier constitutions (1818 and 1848), neither of which contained a similar provision. The court, in other words, read into the modern constitution a requirement to incorporate the practices of England's remote past. As a result, a statute of 1827, which directed that juries in criminal cases "shall be judges of the law and fact" was void.²⁵⁷

Taken together, these decisions reveal the growing judicial consensus that the development of the law could not be left to the vagaries of jury verdicts, and that the power to find law more properly resided in the increasingly professionalized bench.²⁵⁸ The judges were united in their effort to restrain the jury's law-finding function, even going so far as to ignore legislation obviously designed to put a stop to these very attempts.²⁵⁹ By the end of the nineteenth century, therefore, most courts had come to the conclusion that the jury's power over law must be curtailed and that juries were bound by the law stated in the court's charge.²⁶⁰

257. The court also rejected the 1827 statute on separation of powers grounds: If the legislative department may take from the courts and vest in juries the power to declare the law in a criminal case, then likewise the legislature may deprive the courts of the power to pass upon the sufficiency of an indictment, to determine the admissibility of evidence and to review of a judgment of conviction. It will not be contended that such changes are within the competency of the legislative power.

Id. at 158-59.

258. See *Anthes*, 71 Mass. (5 Gray) at 250. The court reasoned that the verdict in a criminal case "settles nothing but the particular case. Its whole force is spent in the case. It does nothing beyond it, and the same question is to be raised anew at each future trial." *Id.*

259. Other courts eschewed the niceties of constitutional or statutory interpretation and simply reconsidered the efficacy of the American practice. Thus, in Tennessee, where courts had long struggled with the question of whether a jury was bound by the court's charge, the state supreme court reversed decades of adherence to the jury's law-finding function merely by asserting that language in earlier opinions seeming to sustain such a power "were inadvertently uttered." *Harris v. State*, 75 Tenn. 538, 544 (1881). See also *Ford v. State*, 47 S.W. 703, 704 (Tenn. 1898) (holding that the state constitution "has been uniformly held to make the Court not the judge of the law").

260. See *State v. Burpee*, 65 Vt. 1, 34-35 (1892). See also *State v. Vinson*, 37 La. Ann. 792 (1885) (denying jury's right to ignore court's instructions); *Brown v. State*, 40 Ga. 689 (1870) (same); *State v. Wright*, 53 Me. 328 (1865); *Pierce v. State*, 13 N.H. 536 (1843) (same); *Duffy v. People*, 26 N.Y. 588 (1863) (same); *Safford v. People*, 1 Parker Cr. 474 (N.Y. 1854) (same); *People v. Finnegan*, 1 Parker Cr. 147 (N.Y. 1848) (same); *Dejarnett v. Commonwealth*, 75 Va. 867 (1881).

The struggle was a long and arduous one, however; for it was not until 1923 that the Pennsylvania Supreme Court finally declared an end to the practice of allowing the jury to find law. See *Commonwealth v. Castellana*, 277 Pa. 117 (1923); *Commonwealth*

To be sure, winning the battle to make judges' instructions binding on the jury was only a partial victory. The jury's power over the criminal law survived in its ability to bring in a general verdict. The inability of judges to reverse a verdict of acquittal allows the jury to say, in effect, whether a particular law applies and if so, whether the defendant's conduct violates it. This power to nullify the law is precisely that which was at stake in *Bushell's Case* and the *Zenger* trial,²⁶¹ and juries continued to practice nullification long after judges began to restrict their law-finding function.²⁶² The jury's right to nullify the law was effectively rejected for cases brought in the federal courts by the Supreme Court's decision in *Sparf v. United States*.²⁶³ The Court asserted that an unfettered power in the jury to declare the law would essentially render the court mere surplusage:

[I]f a jury may rightfully disregard the direction of the court in [a] matter of law, and determine for themselves what the law is in a particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against the law. If it be the function of the jury to decide the law as well as the facts,—if the function of the court be only advisory as to the law,—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?²⁶⁴

v. Bryson, 276 Pa. 566 (1923). Illinois held out until 1931. See *People v. Brunner*, 343 Ill. 146 (1931). Indeed, the Georgia, Indiana, and Maryland constitutions still provide that jurors shall judge questions of law and fact. See GA. CONST. art I, § 1, cl. 11; IND. CONST. art I, § 19; MD. CONST. art XXIII. In all these states, however, judicial opinions have rendered these provisions a nullity. See *Conklin v. State*, 331 S.E.2d 532, 543 (Ga. 1985); *Carman v. State*, 396 N.E.2d 344, 346 (Ind. 1979); *Sparks v. State*, 603 A.2d 1258, 1277 (Md. 1992) (calling jury's law-finding power a "curious constitutional relic"). In all other states, the jury is required to take its law from the court.

261. See *supra* text accompanying notes 22-25, 73-77.

262. A wave of nullification cases hit the courts after the passage of the Fugitive Slave Act in 1850, and many Northern juries looked on nullification as a "moral obligation," refusing to convict those who assisted escaped slaves. See David Farnham, *Jury Nullification*, 11 CRIM. JUST. 4, 9-10 (1997). While sitting on circuit in one of these cases, Justice Curtis rejected a lawyer's attempt to argue the question of the constitutionality of the Fugitive Slave Act to the jury. Juries in criminal cases, he said, "have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given them by the court." *United States v. Morris*, 26 F. Cas. 1323, 1336 (C.C.D. Mass. 1851).

263. 156 U.S. 51 (1895).

264. *Id.* at 101.

The Supreme Court went even further and rejected the view expressed by Chief Justice Shaw in *Porter* that counsel had the right to argue the law to the jury in an effort to “clarify” it for them:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men.²⁶⁵

Nonetheless, allowing juries to bring in a general verdict still puts courts in a difficult position. The only way to really prevent a jury from taking upon itself the power to declare law is to require it to bring in a special verdict. Otherwise, as Justice Story was forced to admit in *Battiste*, the jury would always retain a residual—and essentially unreviewable—power over law. A general verdict is, after all, “necessarily compounded of law and of fact; and includes both.”²⁶⁶ Therefore, a verdict of acquittal always raises the possibility that the jury has completely ignored the charge and nullified the law. The Constitution’s protection against double jeopardy means that a verdict of acquittal is unassailable. The law thus recognizes in the jury a power to declare the law while, at the same time, denying that it has the right to exercise it.²⁶⁷ To some degree, therefore, instructing juries that they must follow the law as stated in the charge is of symbolic effect, to the extent a criminal jury might still bring in a verdict of acquittal against its instructions. The principle of non-coercion combined with the power to bring in a general verdict makes complete supervision of the jury impossible.

In any event, it is clear that by the early part of the twentieth century most state and federal courts had rejected the jury’s power to declare the

265. *Id.* at 102-03.

266. *United States v. Battise*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835).

267. *Cf. Sparf*, 156 U.S. at 106 (denying jury’s power to nullify), *with* *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (“[T]he jury has the power to bring in a verdict in the teeth of both law and facts.”).

law as well as the fact in criminal cases.²⁶⁸ The fact that the jury was able to retain its law-finding power in criminal cases for as long as it did is clearly due to the reluctance of many lawyers and judges to abandon a principle of popular sovereignty with a long pedigree in the American judicial system. There were no doubt many who thought that a continued adherence to the jury's law-finding function a naive and romantic hope, but in the end, most attempts to limit the jury's power over the criminal law were motivated by the same concerns underlying attempts to limit the civil power: As time progressed, many judges and lawyers simply came to believe that allowing juries to be the ultimate arbiters of the law invited inconsistent and often arbitrary results.

IX. CONCLUSION

It seems only natural that in a world where judges were hardly better trained than the jurors that juries would take upon themselves the power to resolve the whole case. Most often this meant that juries would decide a case on the basis of their understanding of the law in a formal sense as well as on their sense of what the law ought to have been.²⁶⁹ The primitive nature of legal practice in the colonial period left juries a great deal of latitude in deciding how the law should be applied to the facts. Nonetheless, the homogenous nature of most colonial communities meant that the jury truly was the voice of the people:

In background, experiences, and outlook they were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them. They applied the same standards in their deliberations that the litigants themselves would apply in similar cases involving others, which is to say standards shaped by a template of common beliefs and expectations as to how neighbors should treat one another. It was this commonality that gave substance and meaning to the traditional description of jurors as "men of the neighborhood."²⁷⁰

The increasingly pluralist nature of the new American Republic made it less likely that the jury would apply "standards shaped by a template of common beliefs." By the 1790s, many feared that juries were becoming

268. Maryland appears to have held out longest for the jury's power over law.

269. BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 73 (G. Edward White ed., 1987).

270. *Id.* at 71.

less representative of the community standards, at least as Federalist judges understood them. Judge Addison's fears that the law would fluctuate "with every changing passion and opinion of jurors" were shared by a large enough segment of the bench and bar to serve as the impetus for change. The drive to limit the jury's law-finding function in civil cases was hastened by the rapid changes in America's economic environment. The rapid rise of trade and commerce increased pressure for the development of a stable legal regime. It was thought that allowing the jury to retain its power over law would only lead to confusion. In the end, the instrumentalists prevailed, and the jury's law-finding function in civil cases was all but extinct long before the Civil War. Although the jury's power over the criminal law survived much longer, it, too, eventually went into decline. The surprising aspect of this part of the saga is that the power endured as long as it did. This was no doubt a result of the lingering adherence to the idea that the jury system served as a bulwark against oppression. Nevertheless, this "great landmark of liberty" succumbed in the face of a judiciary concerned about both its constitutional prerogatives as well as the need to provide consistency in the application of the criminal law. In the end, therefore, the jury's power over law was done in by the desire for stability. The fears of the merchant classes eventually prodded lawyers and judges to sacrifice the jury's law-finding function in civil cases in favor of a predictable legal regime. The professional judiciary's desire for symmetry in the criminal law eventually diminished the jury's role as a bulwark against oppression.

America thus remained ambivalent about the jury's law-finding function for most of its early history as a nation. Few argued against the principle that judges ought not to be permitted to coerce a jury to bring in a particular verdict.²⁷¹ All agreed that jurors should have the ability to bring a verdict according to conscience without fear of recrimination or reprisal. Everyone also agreed that judges should not possess the power to direct a conviction or reverse a verdict of acquittal.²⁷² Most also agreed that courts should not be able to force juries to bring in a special rather than general verdict.²⁷³ The difficulty arose in

271. See, e.g., *Bushell's Case*, 124 Eng. Rep. 1006 (1671).

272. See *Kepner v. United States*, 195 U.S. 100, 129-30 (1904) (upholding verdict of acquittal under the terms of the double jeopardy clause); *United States v. Ball*, 163 U.S. 662, 669-71 (1896) (same).

273. The *Zenger* trial is notable for Hamilton's defense of the jury's right to bring in a general verdict. See *supra* text accompanying notes 73-77. The jury alone has the power to determine whether it will bring in a special verdict in a civil case. See *Commonwealth v. Porter*, 10 Metcalf 263, 282 (1845); see also *United States v. Spock*, 416 F.2d 165, 183 (1st Cir. 1969) (reversing district court's insistence that jury bring in a special verdict). Cf. *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir. 1976)

determining the extent to which judges might channel the jury's law-finding function toward a particular result without violating these basic principles. Instructing juries that they were bound by the law stated in the charge, and granting a new trial when juries ignored those instructions, was the most effective means by which the jury might be controlled.

Ultimately, the controversy surrounding the jury's law-finding function was less about who should undertake the task than it was about how the law should be declared. Leaving juries to declare the law did not seem out of place when most judges lacked formal legal training. It made sense to allow "men of the neighborhood" to determine the law according to the dictates of their conscience. Both judge and jury might be equally adept at "intuiting" what the law should be. John Adams expressed something of the prevailing eighteenth-century view when he noted that the "general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors."²⁷⁴ In this more rustic era, it simply did not matter very much who determined the law as long as the process was fair and impartial. As the bench and bar became more professionalized, however, the process of judging became more formalized. Law-trained judges eschewed intuition and went to their books to "find" the law. There thus arose a dispute as to how one should go about declaring the law. Judges naturally thought that the determination of the law should be left to those who were steeped in its traditions and development. The growing complexity of societal and legal relations made resort to the opinion and conscience of jurors more risky. The increasingly pluralist nature of American society and the expansion of jury service to a wider range of citizens added to the controversy. As the nineteenth century progressed, juries were no longer a cohesive representation of a homogenous culture. As their membership varied, so also might their approach to the law. From the standpoint of the judges, therefore, it was imperative that the power to declare the law be vested in those best able to abide by stable and predictable rules.²⁷⁵

The jury's law-finding function disappeared much earlier in the civil context because it was seen to be a drag on the development of predictable legal rules. The desire of the commercial classes for

(permitting special verdict in a criminal case where there is absence of judicial pressure). English courts followed the same rule. Fox's Libel Act contained a provision specifically granting juries the right to bring in general verdicts in libel cases. See Fox's Libel Act, 1792, 32 Geo. 3, ch. 60, § 1 (1792).

274. 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

275. See Alschuler & Deiss, *supra* note 76, at 914-16.

predictability was nothing more than a demand to know the nature of the laws that would govern their economic relations. The unpredictability of jury verdicts and the inability to discern any formal rules from a general verdict made juries wholly inadequate as law-finders. Given a choice between the vagaries of the jury system and the anti-majoritarian judiciary, most of those who resorted to the legal system preferred the stability provided by judges to the ad hoc nature of community opinion.²⁷⁶

The search for stability in the civil context was mirrored to some extent in attempts to limit the jury's power over the criminal law. While it is true that the jury retained its law-finding function much longer in criminal trials, many judges expressed a belief in the idea that the criminal laws be fixed and determinable. Justice Story made the point in *Battiste*, asserting that every criminal has a right to be tried according to the "fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it."²⁷⁷ The lag between the decline of the jury's law-finding function in civil cases and its limitation in the criminal context was simply a function of the reluctance of many judges to retreat from the romantic notions of the jury left over from its years as a weapon against royal oppression. For many, however, the notion that the jury was a necessary bulwark of liberty was eventually supplanted by a belief that such a role was less appropriate now that the people ruled themselves. Nullifying laws promulgated by a distant sovereign was one thing; declaring the acts of a popular legislature to be void was a different matter. The populist rationale for the jury's law-finding function simply disappeared.²⁷⁸

In the final analysis, however, the displacement of the jury's law-finding function is simply a part of the "recurring cycle of rejection and return to law."²⁷⁹ Roscoe Pound once argued that there are times when "more or less reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions."²⁸⁰ Thereafter, ideas introduced in these periods of reversion, which are themselves periods of growth, result in a new body of fixed legal rules. There is, therefore, a cycle in which the body politic reject the existing legal regime in favor of what is thought to be a more rustic and "natural" judicial process. In time, however, these rudimentary forms are themselves supplanted by a return

276. See *id.* at 917.

277. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835).

278. See MCDONALD, *supra* note 110, at 41.

279. Alschuler & Deiss, *supra* note 76, at 918.

280. Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 676, 699 (1913).

to a more uniform course of judicial action, which is itself marked by "an extreme of detailed rule."²⁸¹

The early history of the American jury is marked by this reversion to law. In the colonial period, the "American colonists, who from bitter experience knew the relation of hard and fast legal rules to liberty, were wont to pursue an ideal of a rude natural justice dispensed without rule by a jury or by a plain man."²⁸² More than mere efficiency was at stake here, however. There were many who believed that any man was competent to administer justice. John Adams argued that the "great Principles of the Constitution, are intimately known" by every sensible person. Indeed, "they are drawn in and imbibed with the Nurse's Milk and first Air."²⁸³ There was also a belief that ordinary common sense was as good a tool as any professional legal education. In this, of course, is revealed a hint of the suspicion that the common man often harbors against the professional classes.²⁸⁴ Yet, there is also a strong sense that popular control of the law-finding process is most perfectly consistent with a nation devoted to the principle of popular sovereignty.²⁸⁵

The reversion to rigid rules of justice was reflected in the conferral of law-making power on the jury. The oppressive features of English law were discarded and the new nation placed on a fresh legal footing. As in all such cases, however, when "some reversion to justice without law has been necessary, as a means of liberalizing an over-rigid body of rules, an evolution of new rules has always followed hard upon its heels."²⁸⁶

281. *Id.*

282. *Id.* at 701.

283. 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 274, at 230.

284. See ROBERT CORAM, POLITICAL INQUIRIES, TO WHICH IS ADDED A PLAN FOR THE ESTABLISHMENT OF SCHOOLS THROUGHOUT THE UNITED STATES 85 (1791):

If we would give ourselves time to consider, we would find an ideal of natural intellectual equality everywhere predominant but more particularly in free countries. The trial by jury is a strong proof of this idea in that nation; otherwise would they have suffered the unlettered peasant to decide against lawyers and judges? It is not here taken for granted that the generality of men, although they are ignorant of the phrases and technical terms of the law, have notwithstanding sufficient mother wit to distinguish between right and wrong, which is all the lawyer with his long string of cases and reports is able to do? From whence also arises our notion of common sense? Is it not from an idea that the bulk of mankind possesses common understanding?

285. See THE FEDERALIST NO. 83 (Alexander Hamilton):

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

286. Pound, *supra* note 280, at 706.

There was, then, a movement toward greater certainty and precision in the definition of legal standards and rules for decision.²⁸⁷ The increasing complexity of the American social and economic environment thus demanded an abandonment of ruder forms of dispensing justice and the adoption of a more formalized law-making process. It was only natural, therefore, that the jury's earlier law-making function became a casualty to the march of time.

287. *See id.*