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Policing Beyond Law: Local Jurisdiction and Imperial Expansion in British America, 1740-1765

This paper is a condensed version of a chapter in my dissertation, "Conduits of Justice: Magistrates and the British Imperial State, 1732-1834." The project as a whole explores the legal and political culture of justices of the peace and equivalent magistrates in England and its colonies, arguing that this form of local government fuelled the jurisdictional expansion of the empire. This is work in progress. Please do not cite, quote, or circulate.

In December 1763, the magistrates of Lancaster, Pennsylvania, dealt with a series of difficult decisions neither anticipated in colonial statutes nor addressed directly in the vast body of unwritten English and colonial legal precedent. On the sixth of that month, 57 settlers-turned-vigilantes, often referred to as Paxton Boys, brutally murdered six Conestoga Indians before burning the small settlement where the group had lived for decades in close vicinity with European neighbors. Such a violent outburst invited public response from those invested with the authority to keep the king's peace. In his capacity as magistrate, Edward Shippen Sr. wondered how best to reinstate order: "surely such a riotous behavior," he wrote, "of flying in the Face of the Government is most impolitic, and unjustifiable." Shippen promised that the massacre would "be very strictly inquired into, and resented according to the heinousness of the offence."¹

But bringing the guilty men to justice was not the only dilemma facing the justices of the peace of Lancaster. In the days following the attack, fourteen Conestoga Indians asked these local magistrates for protection. The Native American men, women, and children justifiably feared further violence. Without time to consult colonial officials in Philadelphia, Shippen and his fellow JPs decided to lock their charges in the local workhouse, an exceptional response to an unprecedented situation. These actions, however, failed to stop local settlers intent on violent reprisal. On 27 December 1763, dozens of Paxton

¹ Edward Shippen to John Elder, 16 December 1763. Correspondence of Edward and Joseph Shippen, 1750-1778, Mss.B.Sh62, American Philosophical Society (hereafter APS).

Boys, including many involved in the previous massacre, broke into the workhouse. In the ensuing fray, the vigilantes violently murdered fourteen people, including eight children.

Usually addressed within historiographies of cross-cultural violence and North American borderlands, this incident is indicative of a wider strategy of magisterial improvisation that shaped the development of imperial law.² In the decades before the revolution, Pennsylvania magistrates often exercised authority in cases touching the persons or property of non-subjects over whom they had limited jurisdiction, including Native Americans, foreign nationals, and un-free laborers. A series of crises and disruptions forced Shippen and his colleagues to negotiate extra-jurisdictional encounters, articulating through practice a broad set of powers and responsibilities that realized novel definitions of subjecthood and authority. For the purposes of this paper, I will discuss the massacre of the Conestoga in Lancaster within an imperial context, using Shippen's correspondence to illustrate the role of improvisation in an eighteenth-century politics of jurisdictional expansion encompassing Britain and its many colonies. Roughly contemporaneously, justices of the peace in New England developed mechanisms to create and communicate policies for both protecting and disciplining persons with limited access to law, including black, Native, and mixed-race slaves. In both contexts, magistrates creatively applied a broad mandate to keep the king's peace to project their own summary jurisdiction onto non-white and foreign bodies. With its adaptable approach to exceptional situations, I contend, magistracy provided both motive and means for asserting legal authority over non-English lands and peoples.

² Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (New York: W. W. Norton & Company, 2008). For a recent survey of the relevant historiography, see Daniel P. Barr, "Did Pennsylvania Have a Middle Ground? Examining Indian-White Relations on the Eighteenth-Century Pennsylvania Frontier," *The Pennsylvania Magazine of History and Biography* 136, no. 4 (2012): 337–363. Notable recent works include James H. Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: W. W. Norton & Company, 2000); Jane T. Merritt, *At the Crossroads: Indians and Empires on a Mid-Atlantic Frontier, 1700-1763* (Chapel Hill: University of North Carolina Press, 2003); Kevin Kenny, *Peaceable Kingdom Lost: The Paxton Boys and the Destruction of William Penn's Holy Experiment* (New York: Oxford University Press, 2009).

“Most Impolitic, and Unjustifiable”—Magistracy and Legal Crisis

In recent decades, a series of books have debated the causes and consequences of anti-Indian violence in Pennsylvania after the outbreak of the Seven Years War in 1756. In the failure of “Penn’s Holy Experiment”—a policy of relatively peaceful negotiation with indigenous populations—historians of Native America have hoped to identify the exact moment in which duplicity, violence, and racism came to dictate the Indian policy of the future United States. Did the example of Pennsylvania hint at a more peaceful trajectory crushed under the weight of colonists’ voracious hunger for land? Was the apparent “middle ground” that allowed a few decades of peace any more than an illusion of hopeful scholars seeking solace in colonial propaganda? In both views, Pennsylvania during this critical period has become synonymous with legal chaos. Rapid expansion and the limited power of civil institutions resulted in the near total collapse of the justice system and an absence (or complicity) of local governing authority, returning the colony to a legal state of nature.³

Historians of Native America have shown that widespread fear of Indian violence, often groundless, reflects the very real power of indigenous people along colonial frontiers.⁴ At the close of the Seven Years’ War, many white settlers in backwoods Pennsylvania felt abandoned by an empire neither invested in their protection nor tolerant of westward expansion.⁵ Those that styled themselves “Paxton boys” could legitimately claim that a proprietary faction then in power had more interest in the legal rights of Native populations than in protecting the property, liberty, or safety of Pennsylvanians.

³ Jack D. Marietta and Gail Stuart Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* (Philadelphia: University of Pennsylvania Press, 2006), chap. 5; Kenny, *Peaceable Kingdom Lost*.

⁴ Merrell, *Into the American Woods*; Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 1991); Kathleen DuVal, *The Native Ground: Indians and Colonists in the Heart of the Continent* (Philadelphia: University of Pennsylvania Press, 2006); Pekka Hämäläinen, *The Comanche Empire* (New Haven: Yale University Press, 2009); Christina Snyder, *Slavery in Indian Country: The Changing Face of Captivity in Early America* (Cambridge, MA: Harvard University Press, 2010).

⁵ The experience of war and the conditions laid out in the Treaty of Paris, signed in 1763, have long been interpreted as a turning point in the relations of colonists and empire. Silver, *Our Savage Neighbors*, chap. 4; Fred Anderson, *Crucible of War: The Seven Years’ War and the Fate of Empire in British North America, 1754-1766* (New York: Knopf, 2007). For native perspectives and Pontiac’s War, see Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2009), chap. 6.

Since the murder of Sawantaeny, a Seneca man, in 1722, the colonial government had endeavored to bring those accused of violence against Natives to Philadelphia for trial, far away from sympathetic local juries and a policy with little grounding in law.⁶ The perspective of those charged with policing this tense environment amidst has been overlooked political drama and cross-cultural trauma. For Shippen and his colleagues, as with magistrates throughout the empire, the threat of violence allowed, and sometimes forced, decisions that established broad precedent for later action.

Chaotic situations confronted magistrates with unfamiliar challenges. Justices of the peace undeniably felt their authority defied, constrained, and occasionally overwhelmed, and numerous instances of cross-cultural violence went unpunished. To cite just one of Shippen's many peers, Timothy Horsfield, a justice of the peace for Northampton County, Pennsylvania, struggled with duties that threatened to overstretch and distort his authority. In November 1755, Horsfield worried that the threat of Indian raids undermined his ability to govern. "I hardly know what to say," he wrote to the governor, to convey "the utmost Confusion imaginable one flying here & the other there for Safety." Such a situation could not be found in any JP handbook and struck at core principles of local legal government predicated on deference, obedience, and a relatively static social order.⁷ "I see nothing but the inevitable Ruin of our Country," Horsfield lamented, "as 40 or 50 of these Banditi or Robbers, for I look upon them in no other sight are able in their skulking way manner to disturb the Peace of a whole Province." The perceived atrocities committed by enemy Indians mimicked crimes that fell within

⁶ John Smolenski, "The Death of Sawantaeny and the Problem of Justice on the Frontier," in *Friends and Enemies in Penn's Woods: Indians, Colonists, and the Racial Construction of Pennsylvania*, ed. William A. Pencak and Daniel K. Richter (University Park, PA: Pennsylvania State University Press, 2004), 104–28; James Kirby Martin, "The Return of the Paxton Boys and the Historical State of the Pennsylvania Frontier, 1764-1774," *Pennsylvania History* 38, no. 2 (April 1, 1971): 117–33; Silver, *Our Savage Neighbors*, chap. 5.

⁷ The most popular JP handbook of the second half of the eighteenth century was Richard Burn, *The Justice of the Peace, and Parish Officer*, 2 vols. (London: Henry Lintot, 1755). For the social status and politics of English justices of the peace, see Norma Landau, *The Justices of the Peace, 1670-1760* (Berkeley: University of California Press, 1984); and Paul Langford, *Public Life and the Propertied Englishman, 1689-1798* (New York: Oxford University Press, 1991), esp. chap. 6. The practices of imperial magistrates in several colonies are addressed in the essays included in Douglas Hay and Paul Craven, *Masters, Servants, and Magistrates in Britain and the Empire: 1562-1955* (Chapel Hill: University of North Carolina Press, 2004).

magisterial jurisdiction, yet without proper military direction, the civil power was helpless to reinstate order. Horsfield pleaded with the Governor “[to] favour me with your Directions how to conduct myself at this critical Juncture & to order in what manner the People are to be supplied with arms & ammunition as they mostly [are] addressing themselves to me.” The chaos attending the outbreak of war left a justice of the peace filling in as a lieutenant and failing in both capacities.⁸ Deeply unsettled by the experience, Horsfield found his authority simultaneously inflated and on the verge of total disintegration.

One week after the workhouse massacre, Edward Shippen wrote a full account of his involvement in the events leading up to the murders in a letter to his son Joseph. He hoped to dispel rumors circulating in Philadelphia that the Lancaster magistrates had known in advance of plans to “destroy the Indians in the Workhouse” yet had failed to intervene. By all accounts, Shippen was a punctilious, powerful, and well-educated man. He came from an established Philadelphia family and in 1744 was elected mayor of the colonial capital. In 1752, he moved to Lancaster County to facilitate his dealings in the fur trade, before branching out into wines and other goods as he amassed one of Pennsylvania’s largest fortunes. He is remembered today for founding the not coincidentally named Shippensburg, Pennsylvania, and for his role in helping to establish the College of New Jersey, the Pennsylvania Hospital, and the American Philosophical Society.⁹

To defend himself from what he called “this hoary Charge,” Shippen emphasized the lengths to which he and five other justices and burgesses had gone to keep the peace. On vague reports from “two Dutch Men” that dozens of angry settlers were assembling at a tavern outside of town, Shippen gathered the local magistrates (except “Justice Jeven, [whom] we imagined might be gone to bed”) and

⁸ Timothy Horsfield to Governor John Penn, 27 Nov. 1755, Timothy Horsfield Papers, Mss.974.8.H78, I ff. 67-8, APS.

⁹ For a representative biographical sketch, see Jerome H. Wood, *Conestoga Crossroads, Lancaster, Pennsylvania, 1730-1790* (Harrisburg: Commonwealth of Pennsylvania, Pennsylvania Historical and Museum Commission, 1979), 175-6.

sent two constables as “Spies.” As a measure of their dedication, the magistrates, he wrote, “stay’d together till one o’Clock in the morning, when the Constables returned, almost perished with the Cold” and having found no evidence of any attack.¹⁰ The Paxton Boys struck a few days later in broad daylight.

Throughout, Shippen emphasized the limits of his authority over a non-cooperative population. To this end, he literally and figuratively distanced himself from the crime. The Paxton Boys, he assured Governor John Penn, “rode very fast into Town” and “[proceeding] with greatest Precipitation, stove open the door and killed all the Indians.” In this account, in fact, “all their business was done, and they were returning to their horses before I could get half way down to the Work house.”¹¹ Shippen assured his son that the rioters acted with such speed and secrecy that “I never heard one word of it till it was just over.”¹² Such rogue actions threatened to unhinge government. Despite these protestations, many then and since have accused local authorities of complicity in the killings.¹³

Keeping the Peace

The massacre of the Conestoga undoubtedly contributed to a transformative period in the histories of colonial violence and anti-Indian racism. Within a context of crime and punishment in British domains, the idea of Indians in the workhouse also evokes an image of harsh and unfeeling exploitation with attendant sympathy for its helpless and abandoned inhabitants. Murder, hardhearted magistrates, innocent victims unprotected: the events in Lancaster might have inspired proto-Dickensian social criticism with an imperial twist. In 1750s Pennsylvania, of course, as in England before nineteenth-century poor law reform, workhouses remained as multifarious as the communities that built them, and

¹⁰ Edward Shippen to Joseph Shippen, 4 January 1764, Mss.B.Sh62, APS.

¹¹ Samuel Hazard, ed., *Minutes of the Provincial Council of Pennsylvania*, vol. 9 (Harrisburg: Theo. Fenn and Co., 1852), 100. Hereafter MPCP.

¹² Edward Shippen to Joseph Shippen, 4 January 1764, Mss.B.Sh62, APS.

¹³ Marietta and Rowe, *Troubled Experiment*, 173–4; Barr, “Did Pennsylvania Have a Middle Ground?,” 337–363.

the name could refer to a variety of alternatives to traditional out-relief.¹⁴ In Lancaster, at the frontier of a rapidly expanding empire, local officials used the term interchangeably with jail. On Christmas Day in 1764, for example, Shippen committed servant Ann Flood to the workhouse on the complaint of her master for “disorderly conduct.”¹⁵ Workhouse or prison, this was a place of sanctuary violated and a symbolic space of government authority unrecognized.

With this context in mind, the magistrates’ decision to protect the Conestoga in the workhouse emerges as part of a broader pattern of legal improvisation to address the often chaotic realities of governing at an imperial frontier. In its justifiable focus on violence, the expansive secondary literature discussing these notorious events has overlooked their implications for the histories of imperial law and local government. English and colonial magistrates had long used the practice of issuing open-ended recognizances to guarantee order, exacting promises to keep the peace or forfeit a specified sum. Those too poor to offer sufficient surety could be remanded to jail.¹⁶ Placing individuals in protective custody, however, had little or no foundation in eighteenth-century English law.

To further complicate matters, any claim that the rights and privileges of English law applied to the Conestoga remained ambiguous, resting on ill-defined promises in decades-old treaties.¹⁷ In a letter to the Reverend John Elder, a proponent of anti-Indian violence, Shippen asserted that “Every body must have known” that the Conestoga Indians “were under the Protection of the Government, and Supported by the Province.” What exactly Shippen meant, however, is unclear. For centuries, language

¹⁴ The literature on the English poor law is immense. For a recent contribution, Samantha Williams, *Poverty, Gender and Life-Cycle Under the English Poor Law, 1760-1834* (Rochester, NY: Boydell & Brewer, 2011). The architecture of workhouses is surveyed in Kathryn Morrison, *The Workhouse: A Study of Poor-Law Buildings in England* (London: Royal Commission on the Historical Monuments of England, 1999).

¹⁵ Entry for 25 December 1764, Edward Shippen’s Docket, Mss. 973.2 H91r, APS.

¹⁶ Robert Brink Shoemaker, *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, C. 1660-1725* (New York: Cambridge University Press, 1991), chap. 5; Landau, esp. 23–7.

¹⁷ The treaty of April 23, 1701, forbade any acts of violence and promised the Conestoga “full & free privileges & Immunities of all the said Laws as any other Inhabitants,” but what this guarantee entailed remained unclear. Native diplomats consistently resisted the suggestion that they should be subject to English jurisdiction. Smolenski, “The Death of Sawantaeny and the Problem of Justice on the Frontier,” esp. 113; Kenny, *Peaceable Kingdom Lost*, chap. 1.

of protection had been used to negotiate unequal relations between polities in Europe and beyond.¹⁸ In North America, Native and colonial diplomats disagreed about which side protected the other and in what ways.¹⁹ On a handful of occasions the colonial government in Philadelphia had punished white settlers for infractions against Indians, but few precedents clarified this questionable legal status.²⁰ Nor did existing legal treatises provide substantive guidance. The first handbook for justices of the peace of Pennsylvania printed in Philadelphia did little other than strip away English statutes from William Nelson's *Office and Authority of a Justice of Peace*.²¹

In fact, few works of Eighteenth-century legal scholarship offered any counsel for magistrates at imperial frontiers. The jurist William Blackstone, for example, would later suggest that "our more distant plantations in America, and elsewhere are also in some respect subject to the English laws," but with many qualifications depending on how they had been acquired. Of the British possessions in North America, including Pennsylvania, he declared, "the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but, distinct (though dependent) dominions." According to long-standing precedent, the protections encoded in English law remained the "birth-right" of the king's subjects, and thus did not apply to foreign aliens—born abroad—even when traveling or residing within Britain. Nevertheless, Blackstone assumed, without citing clear authority,

¹⁸ Lauren Benton and Adam Clulow, "Legal Encounters and the Origins of Global Law," in *Cambridge History of the World*, ed. Merry Wiesner-Hanks and Sanjay Subrahmanyam, vol. 6 (New York: Cambridge University Press, forthcoming).

¹⁹ Jenny Hale Pulsipher, *Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2005); Craig Yirush, "Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743," *Law and History Review* 29, no. 02 (May 2011): 333–73; Craig Yirush, "'Chief Princes and Owners of All': Native American Appeals to the Crown in the Early Modern British Atlantic," in *Native Claims: Indigenous Law Against Empire, 1500–1920*, ed. Saliha Belmessous (New York: Oxford University Press, 2012), 129–51.

²⁰ The Paxton Boys complained that the removal of trials for those accused of anti-Indian violence to Philadelphia violated legal rights of British subjects, and attempts to punish Friedrich Stump for the murder and mutilation of ten Indians in 1768 provoked armed resistance, Silver, 154–9; James Kirby Martin, "The Return of the Paxton Boys and the Historical State of the Pennsylvania Frontier, 1764–1774," *Pennsylvania History* 38, no. 2 (1971): 117–33.

²¹ *Conductor Generalis: or, The Office, Duty and Authority of Justices of the Peace...*, 2d ed. (Philadelphia: B. Franklin and D. Hall, 1750).

that “To kill an alien, a Jew, or an outlaw, who are all under the king's peace or protection, is as much murder as to kill the most regular born Englishman.”²² Whether positive or common, laws applied within narrow territorial bounds; for Blackstone, the king’s peace protected anyone in his domains. Presumably, this would have applied to the Conestoga in Lancaster County, but Shippen and his peers could have cited little precedent for this argument.

In contrast to codified law, the injunction to keep the peace offered magistrates a powerful justification for intervention. In each jurisdiction throughout the empire, the commission by which the king delegated judicial authority to justices of the peace included two essential mandates. One compelled magistrates to execute legal duties spelled out in parliamentary statutes, and another broader dictate required justices to keep the peace and punish breaches of local order. This second provision explicitly applied to riots, as well as most crimes and moral infractions.²³ In New England, as in Pennsylvania, summonses to appear before a justice of the peace described many illicit behaviors, ranging from working on the Sabbath to rape and other violent felonies, as breaches of the peace. On August 26, 1762, for example, two justices of the peace for Essex County Massachusetts found Lidia Bartlet guilty of throwing stones at another woman’s door and threatening to assault her, “all which is against the Peace of Our Lord the King.” The brief record of her trial declared Bartlet “a person of ill Fame living disorderly” as well as “a common disturber of the Peace.” The assessment that her actions amounted to an “unpeaceable” lifestyle allowed the two justices to declare her of “unsound Mind” and confine her to the workhouse indefinitely.²⁴ The expansive authority to keep the peace empowered

²² William Blackstone, *Commentaries on the Laws of England*. 4 vols. (Oxford, 1765-9), I, 106; IV, 198.

²³ Many English JP handbooks include the full text of the commission of the peace, for example, William Nelson, *The Office and Authority of a Justice of Peace* (London, 1704). For an imperial example, see *Rules, Ordinances, Laws and Regulations Made by the East India Company for the Good Order and Civil Government of... Bengal* (Calcutta: Bengal Military Orphan Press, 1823), i–ii.

²⁴ Trial record for 26 August 1762, Justice Book (1762-1764), Essex County (Mass.) records, 1762-1808, MS Am 770, Houghton Library, Harvard University. Similar examples can be found in the papers of many justices of the peace in New England and the Atlantic world. See, for example, records of Benjamin and Jonas Prescott, Groton Papers, 1646-1909, Ms. N-1340, Massachusetts Historical Society; Lebanon, Conn, Town Records, 1710-1864, Box 2, Ms.

magistrates to intervene in almost any situation to which they thought it might apply. At stake was the stability and moral health of the community as opposed to any specific point of law. Throwing stones at a neighbor's door could become a pretext for excluding a woman from any social participation.

In letters public and private, Shippen repeatedly insisted that the Conestoga ought to be defended. Nevertheless, he often suspected their motives and at times labeled all Indians "savages." During Pontiac's War, he frequently and vigorously advocated a scalp bounty to reward the killing of any Indian man who could be passed off as a warrior.²⁵ Conestoga Town sat near the cusp of British governance. The lives of its inhabitants straddled the distinction between subject and alien. Only through subsequent vindication did the governor and the provincial council confirm and validate the decision to protect them in the workhouse. After receiving Shippen's account of the initial incident, Governor John Penn decried "the cruelty & barbarity" displayed in Lancaster, but his statement hesitates when asserting the legal status of the murdered people. Only after "apprehending" that the Conestoga benefited from "the protection of this Government and its Laws," Penn suggested, did he conclude "that consequently the killing them without Cause or provocation, amounted in Law to the Crime of Murder."²⁶ In an address to the Colonial Assembly on 21 December, the governor repeated his cautious assessment, offering grounds for the claim but with little to suggest conviction in his legal reasoning. The colony had "seated" these Indians in the town, but it was only after they "had lived there peaceably & inoffensively during our late Troubles," he conceded, that "I conceived they were as much under the Protection of the Government, & its Laws, as any others amongst us." In both cases, the governor's words focused on process.

Stack, Connecticut Historical Society; or Henry Allyn, Record of court cases: Windsor, Connecticut, Gen. MSS File 270, Beinecke Library, Yale University.

²⁵ Silver, *Our Savage Neighbors*, 165–8.

²⁶ Hazard, *MPCP*, vol. 9, 90.

In fact, he had little reason to speak confidently about this issue. During negotiations addressing specific instances of cross-cultural violence, native diplomats representing the Iroquois, Seneca, and Conestoga consistently resisted assertions of legal jurisdiction over native peoples, even when such refusals required letting malefactors escape unpunished.²⁷ When the Conestoga appealed to the magistrates of Lancaster, they hoped to save their lives. This did not mean that they submitted to Shippen's authority. The Indians' access to legal protections required elaboration and depended on a paternalistic assessment of their innocence. Even after reiterating the legal subjecthood of the Conestoga to the provincial council, in public correspondence, and before the assembly, the governor still thought it necessary to "forbid" any and all of his subjects "to molest or injure any of the said Indians" or face dire consequences. No wonder, then, that the Indians in the workhouse, he noted, "do not apprehend themselves to be safe where they are." Despite promises of "the protection of the Magistracy at Lancaster," the Conestoga asked for a transfer to the capital.²⁸

Shippen's surviving correspondence suggests that the decision to confine the Indians balanced uncertainty with assertiveness. In a letter to the governor, he accentuated consensus. He and his fellow magistrates had "advised" four of the Conestoga who had been away from their village during the attack "to put themselves under our Protection." John Smith, his wife Peggy, and two young boys "readily agreed to" this proposition, "And they are now in Our Work House by themselves, where they are well provided with every necessary."²⁹ But this was Shippen's public narrative. In a more candid letter to his son Joseph, the elder Shippen detailed more complicated motives for confining the Conestoga. The Indians sought shelter, he claimed, "by their own consent, because they know it was for their preservation." Even so, these long-pacific neighbors could not be trusted. It was best to have them under constant supervision.

²⁷ Smolenski, "The Death of Sawantaeny and the Problem of Justice on the Frontier."

²⁸ *Ibid.*, 95-6.

²⁹ Hazard, *MPCP*, vol. 9, 89.

I am of Opinion that had it not been for the great Snow... harmless as they might have been before, it would not have been in our Power to have put them under any Confinement, but they would immediately have sought revenge and as their Custom is (on such occasions) killed some of their next neighbours, and then made off... in order to join their blood thirsty brothers the Delawares, and Shawanese our most inveterate and implacable Enemys.

Shippen's role in the initial decision to confine the Conestoga in the workhouse remains unclear, but he evidently embraced this step as part of a broader strategy for separating unruly local inhabitants from a people in whom he had little trust. With these fears in mind, Shippen hoped that the Conestoga would be ordered to Philadelphia as soon as possible, where, "were my Judgment required in the affair," he concluded, "I should be for locking them up very safe in your Workhouse, in rooms by themselves, where they should remain until a Peace should be made with the Indians in General."³⁰ Shippen possessed the authority to lock up those he deemed chronic disturbers of the peace. With such power waiting to be imagined and activated, the Native population of central Pennsylvania balanced precariously along a legal precipice between victims and outcasts. Through murder or exclusion, these men, women, and children faced removal from human society.

At a moment of crisis, Shippen implemented a policy of racial segregation, using his authority to both confine and protect Indians in a space where his jurisdiction was most potent. In this, he envisioned a solution applicable elsewhere in the colony. Not all of his colleagues agreed. Shippen repeatedly sought the council of James Wright, a Quaker JP who frequently dealt with the Conestoga. Asserting their peaceful intentions, Wright argued that the Indians should be treated as innocent victims. At Shippen's prodding, even the staunchest local ally of the Conestoga, however, "being a man of more discernment" would not "be bound for their future conduct."³¹ At a local level, the exceptional legal crisis posed by the massacre of six Conestoga Indians and the subsequent requests of their friends

³⁰ Edward Shippen to Joseph Shippen, 19 December 1763, Mss.B.Sh62, APS.

³¹ Ibid.

and neighbors for protection, allowed a powerful local magistrate to apply a new model for cross-cultural relations during wartime.

Chaos as Catalyst? Magistracy and Imperial Jurisdiction

Jurisdiction signifies access to various bodies of law as well as the power to administer them over people and territory. By each of these definitions, the jurisdiction of British magistrates—whether in England or its empire—expanded rapidly in the early and middle decades of the eighteenth century. As part of a broader surge in legislative activity following the Glorious Revolution, parliament repeatedly dictated that magistrates acting alone or in small groups should address social and administrative problems outside of formal courts of quarter sessions.³² Colonial governments followed suit. Legislative bodies throughout the empire multiplied the powers and responsibilities of justices of the peace, endorsing a magisterial ideal of discretionary authority. By midcentury, JPs and other equivalent magistrates could try over two hundred minor crimes summarily or in petty sessions with limited recourse for appeal.³³ These measures addressed everything from enforcing highway maintenance and licensing alehouses to seizing the goods of gypsies, compelling those fit to work during harvest time, seeking out the fathers of bastard children, and determining the settlement of paupers and vagrants.³⁴

The increasing volume of legislation contributed to a broader politics of jurisdictional expansion, touching many aspects of magisterial practice. In the wake of the Jacobite uprising of 1745, for example, the lord chancellor took steps to reimpose and expand long-dormant commissions of the peace in the

³² Julian Hoppit, “Patterns of Parliamentary Legislation, 1660-1800,” *The Historical Journal* 39, no. 1 (1996): 109–131; Sheila Lambert, *Bills and Acts: Legislative Procedure in Eighteenth-Century England* (New York: Cambridge University Press, 1971); David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (New York: Cambridge University Press, 2002).

³³ Landau, *The Justices of the Peace*, 346.

³⁴ This list draws on *Conductor Generalis, or, The Office, Duty and Authority of Justices of the Peace* (Philadelphia: Andrew Bradford, 1722), v.

Highlands of Scotland.³⁵ In Pennsylvania, too, the colonial government created a number of counties, each with newly minted magistrates. Lancaster County, for which Shippen served, was formed from portions of Chester County in 1729. The colony added York County in 1749, Cumberland in 1750, and Berks and Northampton counties in 1752 to accommodate the massive influx of new settlers.³⁶ Legal emergencies accelerated and diversified this process. The notorious English Riot Act of 1715, creating a mechanism for local authorities to order the dispersal of any group of twelve or more individuals, did not apply to Pennsylvania. Only in the wake of the Paxton Boys' march on Philadelphia in February 1763 did the provincial assembly pass a hasty measure to extend the provision to the colony.³⁷

Placing the Indians in the workhouse, the magistrates of Lancaster established a broad interpretation of what it meant to be a non-European subject under the protection of the government. The access of any Native Americans to the protections of the law remained subject to debate so strenuous that it could break out into armed conflict. In the following weeks, as the Paxton Boys threatened to march on Philadelphia to perpetrate further anti-Indian violence, Shippen persisted in defending his actions in Lancaster. In another letter to his son, he observed that "every Member of the Governors Council are Magistrates" and wondered, with more than a little bitter irony, why these most powerful JPs had not convened the local bench and "Command[ed] People of all Denominations to go with us with their Arms and Accoutrements" to fight off the rioters. Only then, he preached, "if they had actually gone & came off Conquerors (such a mighty Army) they might then have said that they were very sorry the Dutch Town of Lancaster had not attempted to save the Conestogo Indians and in that Case they could not with any good face have said more."³⁸ As Shippen suggests, perhaps only a magistrate possessed the authority and legal means to resolve such a crisis.

³⁵ See, Correspondence of Philip Yorke, 1st Lord Hardwicke, on Scotch Affairs, Add. Ms. 35446-9, British Library.

³⁶ Marietta and Rowe, *Troubled Experiment*, chap. 5, esp. 164-5.

³⁷ Kenny, *Peaceable Kingdom Lost*, 150-1. See also Hazard, MPCP, vol. ix, 128-9, 131-2.

³⁸ Edward Shippen to Joseph Shippen, 11 January 1763, Mss.B.Sh62, APS.

Bodies before the Court: Slaves in New England

In addition to Native Americans, many other groups straddled frontiers of legal subjecthood and identity. Applying law to individuals whose place within local communities remained poorly defined created legal crises as transformative as the events in Lancaster. Sometime before 1775, Theophilus Parsons dutifully prepared a precedent book, copying writs used to resolve particularly difficult situations that might be brought before a Massachusetts magistrate. After the Revolution, Parsons would serve as a justice of the peace for Essex County, Massachusetts, but this volume appears to have recorded the legal studies necessary to serve as a clerk or attorney responsible for producing the reams of formal legal documents that organized the administration of law.³⁹ With the names of plaintiff and defendant removed, many of these forms reveal details of the cases for which their originals were produced, including some matters either heard or collected by prominent barrister and JP Richard Dana.

The precedents that Parsons copied illustrate the mutable and conflicted legal status of slaves, as well as all non-white individuals, in colonial New England. In one form, plaintiff B, "possessed of a negro woman servant named Rose," a slave, sued defendant A for the costs resulting from his impregnating her. This magisterial precedent addressed a particular gap in the law of Massachusetts. In New England, colonial statutes addressing slavery, while extensive, remained far less comprehensive than the slave codes developed to sustain plantation economies in the Caribbean and the southern half of British North America.⁴⁰ In 1693, the Massachusetts legislature empowered justices of the peace to

³⁹ Many clerk's learned how to produce documents by studying forms or precedents. These circulated widely in the colonies, both in print and manuscript. Between 1692 and 1719, Pennsylvania polymath Daniel Francis Pastorius prepared a commonplace book with examples of such documents. Francis Daniel Pastorius, "The Young Country Clerk's Collection of the Best Presidents of Bills, Bonds, Conditions, Acquittances, Releases, Indentures, Deeds of Sale, Letters of Attorney, Last Wills [and] Testaments, [etc.]: With Many Other Necessary and Useful Forms of Such Writings as Are Vulgarly in Use between Man and Man," Ms. Codex 89, Rare Book & Manuscript Library University of Pennsylvania; *The Young Clerk's Vade Mecum: Or, Compleat Law-Tutor. Being a Useful Collection of a Great Variety of the Most Approved Precedents in the Law...* (New York: H. Gaine, 1776).

⁴⁰ Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1999); Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705-1865* (Baton Rouge: Louisiana State University Press, 1988); Mindie Lazarus-Black, "Slaves, Masters, and Magistrates: Law and the Politics of Resistance in the British Caribbean, 1736-1834," in *Contested States: Law, Hegemony, and Resistance*,

punish men accused of fathering illegitimate children, while a measure passed in 1759 allowed magistrates to force the mother of a bastard child into service for up to five years to cover the costs of supporting her child.⁴¹ Neither law accounted for Rose and her child.

Following the precise generic conceits required by the traditions of common law procedure, the order in Parson's book accused A of having "made an assault upon the body of said Rose & her carnally knew & begot on her body a female bastard child," fully aware that she was a servant and "intending wickedly to deprive" B of "all profit & advantage arising" from her "service & labor."⁴² Figured as such, the defendant had trespassed on the plaintiff's property, preventing him from reaping its rewards, and thus stood liable for damages. Another order copied by Parsons, however, records a mechanism for "B a negroman" to bring "a plea of trespass" against A for having "with force & arms assaulted the said B. & him took & imprisoned & restrained him of his liberty & held him in servitude." Here, a magistrate recognized the legal right of a free subject not to be forced into the service of another. As a site of magisterial jurisdiction, then, a non-white body could be classified as property (a thing owned) or person (his or her own thing) under different circumstances.

The laws of slavery in British colonies around the Atlantic world relied on a number of elisions, fictions, and apparent contradictions to enforce racial distinctions. The laws of property and inheritance imagined slaves as things, even as other statutes, precedents, and legal practices could simultaneously treat slaves as persons subject to criminal and civil jurisdiction.⁴³ Particularly in regions such as New

ed. Mindie Lazarus-Black and Susan F. Hirsch (New York: Routledge, 1994), 252–81; Diana Paton, "Punishment, Crime, and the Bodies of Slaves in Eighteenth-Century Jamaica," *Journal of Social History* 34, no. 4 (July 1, 2001): 923–54.

⁴¹ "An Act for the Punishment of Criminal Offenders," 1692-3 chap. 18; "An Act in Further Addition to an Act Intituled 'An Act for Explanation of and Supplement to an Act Referring to the Poor,'" 1758-9 chap. 17.

⁴² Theophilus Parsons, "Precedents Book of Massachusetts Law, 1775.," ff. 38–9, HLS MS 1091, Harvard Law School Library, Historical & Special Collections.

⁴³ Literatures on the history of race and slavery in law are far too broad to summarize here. Useful historiographical overviews are provided in Morris, *Southern Slavery and the Law*; Paul Finkelman, *Slavery & the Law* (New York: Rowman & Littlefield, 2002). Anglo-American common law frequently relied on self-conscious falsehoods in the organization of civil and criminal proceedings. For a standard account of such "fictions," see Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967).

England, where slavery never became the dominant mode of economic organization, justices of the peace clarified the often ambiguous legal status of slaves through practice, collecting or discarding unplanned decisions as these articulated legal power over individuals. As is particularly evident in the second writ cited above, magistrates applied law creatively to project jurisdiction onto the bodies of free and enslaved blacks. To defend the right of a free man not to be enslaved, the JP who originally produced this writ could only invoke abstract principles, declaring the defendant's actions "against the law of the land" as being "against the will" of his victim, "against our peace & to the damage" of the plaintiff.⁴⁴ Without clear statutory mandate, a magistrate could invent a solution to a clear wrong and communicate it to peers and colleagues as a form or precedent, a model for future conduct.

While many explanations for the creation of race in the Atlantic world privilege local decisions, most scholarship on slavery and the law has focused on judges, jurists, and legislators.⁴⁵ Historians disagree about the extent to which lawmakers in the Americas drew upon English principles in crafting slave codes, or if these systems owed more to inventive readings of Roman civil law.⁴⁶ For justices of the peace, however, questions regarding enslaved bodies brought before the court and potentially answerable to the law left little opportunity for jurisprudential reflection. Instead, these officers consistently turned to powers and practices associated with other aspects of their governance. In

⁴⁴ Parsons, HLS MS 1091, f. 63.

⁴⁵ The scholarly literature on race is far too vast to summarize here. For a good overview, see Joyce E. Chaplin, "Race," in *The British Atlantic World, 1500-1800*, ed. David Armitage and Michael J. Braddick (New York: Palgrave Macmillan, 2002), 154–72. Many works cite the growing pressure to distinguish between white servants and non-white labor described in Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975). Another scholarship focuses on the creation and enforcement of racial distinctions in domestic contexts, Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996).

⁴⁶ Atlantic borrowings from the classical world are explored in Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989); David Eltis, *The Rise of African Slavery in the Americas* (New York: Cambridge University Press, 2000). For a paradigmatic statement of the opposing view, see Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," *The American Journal of Legal History* 38, no. 1 (January 1, 1994): 38–54.

particular, local agents repurposed English mechanisms for suppressing vagrancy that had created a special category of summary punishment for individuals deemed to lack a fixed settlement.⁴⁷

With territorially fixed jurisdictions, English justices of the peace had long found issues related to a mobile population troubling. Many statutes and much of the business of local administration focused on enforcing laws of settlement, which presumed that each individual (especially those of limited means) belonged in the parish where they lived or worked. The eighteenth-century system of poor relief made each locality responsible for those too poor to support themselves, and local officials tasked with overseeing poor law worked to remove or expel any individuals who might add to the financial burden of local ratepayers.⁴⁸ Those who travelled, whether displaced by the significant socio-economic changes transforming local communities or for other reasons, risked being labelled deviants, generating calls for vigorous enforcement of statutes designed to punish “rogues” and “vagabonds.”

When such individuals moved beyond the boundaries of their parish, they became a new category of legal subjects devoid of certain rights. Anyone deemed a vagrant fell out of the regular course of law and could be confined in a house of correction and subjected to a regime of corporal punishments.⁴⁹ A statute of 1743 demanded that English JPs order every vagrant publicly whipped, whether or not they would be removed to the parish from which they had come.⁵⁰ The notoriously brutal laws of eighteenth-century England created a range of corporal penalties for those convicted of

⁴⁷ The influence of sixteenth-century English police law addressing vagrancy on the earliest American slave codes is discussed in Nicholson, “Legal Borrowing and the Origins of Slave Law in the British Colonies.”

⁴⁸ The notebooks of local justices provide invaluable insight to patterns of practice. See, for example, William Hunt, *The Justicing Notebook of William Hunt, 1744-1749*, ed. Elizabeth Crittall (Devizes: Wiltshire Record Society, 1982). A vast scholarly literature touches on issues related to the poor law, vagrancy, and the politics of settlement decisions, including Steven King, *Poverty and Welfare in England, 1700-1850* (Manchester: Manchester University Press, 2000); Nicholas Rogers, *The Press Gang: Naval Impressment and Its Opponents in Georgian Britain* (New York: Continuum, 2008); Samantha Williams, *Poverty, Gender and Life-Cycle Under the English Poor Law, 1760-1834* (Rochester, NY: Boydell & Brewer, 2011); Peter King, “The Rights of the Poor and the Role of the Law: The Impact of Pauper Appeals to the Summary Courts 1750-1834,” in *Poverty and Relief in England, 1500-1880*, ed. Steven King (Manchester: Manchester University Press, forthcoming).

⁴⁹ Most of those committed to the house of correction in early eighteenth-century Middlesex had been labelled “idle and disorderly persons,” Shoemaker, *Prosecution and Punishment*, chap. 7.

⁵⁰ “Justices Commitment Act,” 17 George II c. 5.

crimes, but punishments ranging from branding to the cropping of ears attached to crimes reserved to the jurisdiction of higher courts.⁵¹ For JPs, the power to inflict corporal punishment on “wandring, idle, loose, dissolute, and disorderly persons” became an important focus of efforts to reduce crime.⁵²

In a pamphlet published ca. 1750, Thomas Woodford identified a perceived surge in vagrancy as one of a number of symptoms of widespread failures in local government. While the law left it to the discretion of justices of the peace “whether they should or should not convey the ROGUES to their Settlement,” magistrates had failed to observe language in which “his *Authority*” to whip a rogue or vagabond had been “*changed to a Command.*” To stamp out the problem of a mobile population, Woodford proposed changing the form of conviction stipulated by the act to include language specifying that vagrants were always to be whipped. By circulating new legal forms, like the precedents collected by Parsons, Woodford hoped to ensure universal compliance with the letter of the law. He also urged magistrates themselves to consider a “novel Practice sometimes used” in which intruders “into Parishes” would be tried “as Vagabonds” by a single justice of the peace. To issue a removal order for an individual who had strayed from his or her place of settlement required a petty sessions of at least two magistrates. Merely declaring anyone who has “wandered from his Settlement” a “*true vagabond,*” however, would empower justices to act alone and at their own convenience. This practical solution, apparently inspired by informal local precedent, required reading against the grain of parliamentary statutes. If effected throughout England, Woodford concluded, such simple changes would accomplish much “to get rid of these Vermin” and turn them into “honest Labourers.”⁵³

⁵¹ Greg T. Smith, “Civilized People Don’t Want to See That Kind of Thing: The Decline of Public Physical Punishment in London, 1760-1840,” in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange (Vancouver: UBC Press, 1996), 21–51; Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (New York: Verso, 2003); Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* (New York: Cambridge University Press, 2006), chaps. 7–8.

⁵² Richard Burn, *The History of the Poor Laws: With Observations* (London: A. Millar, 1764), 46.

⁵³ Thomas Woodford, *A Discourse Concerning Some of the Most Important Branches, and Parts, of the Office of the Justices of the Peace* ([England], n.d. [1749]), 30–5.

Massachusetts law reveals a pattern of treating slaves and non-white servants as a category of punishable offenders distinct from the general population. “An act for more effectually to prevent profane cursing and swearing,” entered into law in February 1747, for example, stipulated that justices of the peace should fine Massachusetts subjects between four and eight shillings, at discretion of the court, for a first offence. Those unable or unwilling to pay would be “committed to the common goal or house of correction, there to remain not exceeding ten days, nor less than five days.” The statute specified certain groups to whom different punishments might apply. Neither soldiers nor non-European slaves and servants might have the resources available to satisfy the penalty. Any such soldiers should be placed in the stocks for three hours. Slaves who could not “immediately” pay the fine would be whipped “not exceeding twenty stripes, nor less than ten.” The use of corporal punishment was reserved for repeat offences among soldiers and did not apply to the general public.⁵⁴

In Massachusetts and many other colonies around the Atlantic, much of the business of policing slavery fell to justices of the peace acting alone. These local decisions often anticipated or triangulated ways of treating those of questionable legal status later codified in colonial statutes. At his home in Charlestown, a vibrant suburb of Boston, Richard Dana tried at least twenty four criminal matters involving enslaved or non-white individuals, including two blacks identified as “free” and an “Indian molatto.” A prolific magistrate, his justicing notebooks record many of the cases he heard between 1746 and 1748 and again from 1757 to 1771.⁵⁵ In 1761, the painter John Singleton Copley issued a formal “complaint against Cato a negro servant or slave of James Knight” for housebreaking on several occasions. Dana found the evidence presented by Copley substantial enough to order that Cato be tried

⁵⁴ “An act more effectually to prevent profane cursing and swearing,” 1746-7, chap. 17, section 2. All Massachusetts statutes can be found in *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay*. (Boston: Wright & Potter, 1869).

⁵⁵ Dana or his clerk transcribed proceedings in criminal cases and many property disputes in three notebooks, but writ books that list the fees charged and collected for producing legal documents suggest that he dealt with many civil disputes not recorded in full. Writ books, vols. 3-9; justicing notebooks, vols. 17-19, Dana family papers, Ms. N-1088, Massachusetts Historical Society (hereafter MHS).

at the next court of quarter sessions, issuing a recognizance of twenty pounds to appear in court and “be of good behaviour in ye mean time.” As a criminal, Cato could be treated as a person, who might not appear in court or could potentially violate the law again. As property, however, he could not promise to pay the debt to the king that would be the result of violating a bond of recognizance. As Dana records, Knight did so on behalf of his slave.⁵⁶

In many other colonies, slaveholders pushed legislatures to introduce mechanisms restraining the discretion of justices of the peace when this might interfere with their property rights in enslaved bodies. In Jamaica, for example, planters pushed to codify their authority to try and punish slaves themselves, even upon complaints from others. From 1664 to 1788, separate slave courts, consisting of a panel of magistrates and freeholders, heard cases that might result in punishments of mutilation, transportation, or death. Awarding compensation for slaves killed or transported, these courts allowed those heavily invested in slavery to oversee local decisionmaking and punish enslaved blacks while limiting the financial consequences of such actions.⁵⁷ After the Stono Rebellion in 1739, the South Carolina legislature limited the space for magisterial discretion, ordering JPs to convene a court with two freeholders to adjudicate cases involving slaves.⁵⁸ In North Carolina, similar courts required three magistrates and “Four Freeholders, Owners of Slaves in the County,” to try any enslaved persons accused of capital offences.⁵⁹

As with other justices of the peace throughout the empire, Dana often intervened to prevent those whom he convicted from being subject to the full brunt of the law. In several instances, Dana

⁵⁶ Entry for 27 February 1761, Vol. 18, Ms. N-1088, MHS.

⁵⁷ While Mindie Lazarus-Black has argued that courts provided some limited protections for slaves and became an important venue for a politics of resistance, Diana Paton emphasizes the exemplary brutality of the punishments ordered by these courts; Lazarus-Black, “Slaves, Masters, and Magistrates: Law and the Politics of Resistance in the British Caribbean, 1736-1834”; Paton, “Punishment, Crime, and the Bodies of Slaves in Eighteenth-Century Jamaica.”

⁵⁸ Morris, *Southern Slavery and the Law, 1619-1860*, 212–3; for the protection of property interests in Virginia, see Schwarz, *Twice Condemned*.

⁵⁹ James Davis, *The Office and Authority of a Justice of Peace* (Newbern, NC: James Davis, 1774), 315–317.

privileged the informal resolution of conflicts when this could prevent taking formal legal action.⁶⁰ In other cases, he used common conceits to keep matters within his own jurisdiction. Small thefts could easily be recast as debts, saving time and money for all parties involved. In a dispute involving "John Brown (negro) against Prince (a negro 1/2)," Dana recorded a plea of "Case for converting to his own use ye plaintiffs hatband & buckle." This allowed him to treat an instance of petty theft within the much less punitive sphere of civil law.⁶¹ Of course, bending law to lessen the penalties involved also benefited those who owned enslaved labor.

Dana's discretion, however, did not disturb the distinction that corporal punishment drew between slaves subject to it and others to be treated differently. In many cases, Dana ordered slaves to be whipped for infractions carrying penalties of a small fine for most white defendants. In the case of "Hannover a negro man-servant or slave of Benjamin Hallowell," convicted of "stealing 5 silk handkerchiefs," Dana valued these conservatively at 25 shillings so as to keep the crime within his jurisdiction. He order Hannover to pay the owners "treble the value to ye owners" plus the costs of the prosecution and "that he be whip'd twenty stripes on ye naked back at ye public whipping post in Boston."⁶² In contrast, Dana sentenced Nathaniel Simpson, one of many white men found guilty of property crimes, convicted of stealing an ax worth twenty shillings, to pay damages and costs.⁶³

Un-free segments of the white population also fell into a unique category. Dana used the house of correction to discipline servants, such as Lewis LePort "for departing his master's service" and Cornelius Darcy "for being stubborn disorderly &c."⁶⁴ In Massachusetts, unlike in most Southern colonies, a similar situation appears to have applied to slaves accused of running away. In the case of

⁶⁰ For example, entry for October 11, 1764, Vol. 18, *ibid.*

⁶¹ 4 August 1769, Vol. 19, *ibid.*

⁶² March 6, 1760, Vol. 17, *ibid.*

⁶³ 23 November 1761, Vol. 18, *ibid.*

⁶⁴ 23 April 1760 (LePort) and 17 September 1760 (Darcy), Vol. 18, Ms. N-1088, MHS.

“Jans Waldrick a negro slave” found to have “run away from his master,” David Oohterlong, Dana merely noted that he had ordered Waldrick “to ye house of correction, & sent accordingly.”⁶⁵

But such examples of slippage between categories heightens the ad hoc nature of the mechanisms for distinguishing non-white individuals as legal subjects. Jans Waldrick is one of only a handful of individuals whose race is identified and whose surname is recorded in Dana’s justicing records. Uniformly, the proceedings he recorded substitute the skin color thought to differentiate these subjects as well as the name of their master for the occupation and place of settlement used to identify whites as unique individuals with legal rights. The recurrence of common Roman names—notably Caesar and Cato—may or may not refer to separate individuals. And that is perhaps the point. While acknowledging law and justice could apply to slaves, these records offered them no coherent legal identities. As with vagrants in England and in its American colonies, enslaved individuals (even when acknowledged as such) presented a problem for which corporal punishment (or, in the case of vagrants, physical removal) appeared to be the most obvious solution. When Johnathan Trumbull tried Hannah “an Indian Squaw” for allegedly stealing a “Striped Linnen Gown” and a “white Holland Shirt” he described her as “dwelling” in Lebanon, and thus occupying a space of liminal subjecthood, enhanced by her status as a single woman, neither settled nor fully foreign. Trumbull ordered Hannah to be whipped and for her to be “assigned in service” to the plaintiff for a year to pay off the damages.⁶⁶

Without settlement, a community and a role within it, these men and women became bodies to potentially subject to punishment or that might be protected from harm. In a handbook for North Carolina justices of the peace, James Davis made this connection clear, summarizing a statute authorizing magistrates to whip slaves found off of their masters’ property or a main road, along with

⁶⁵ 31 August 1762, Vol. 18, *ibid.*

⁶⁶ 27 Sept. 1765, Box 2, Folder 8, Lebanon Town Records, CHS. For corporal punishment and the gender politics of slavery, see Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs*, chap. 10; Trevor Burnard, *Mastery, Tyranny, and Desire: Thomas Thistlewood and His Slaves in the Anglo-Jamaican World* (Chapel Hill: University of North Carolina Press, 2004), chaps. 5, 7.

“any disorderly, loose, or suspected Person” in their company. By default, then, slaves could not be other than vagrants when they left the domestic spaces where they lived and worked without a written warrant from a white master. “In all Cases of Penal Laws,” Davis summarized, “where free Persons are punishable by Fine, Servants shall be punishable by Whipping, at the Discretion of the Court, or Justices, not exceeding Thirty Nine Lashes, unless they can pay the Fine.”⁶⁷ Preserving an absurd fiction of equity, this final qualification offered white men the opportunity to purchase lenience for their human property. A legal commonplace partially codified in colonial statutes, this strategy had developed through local practice. A regime of discretionary magistracy connected local decisions in the Carolinas to those in New England, where the laws of slavery differed significantly.

The mutable legal status of un-free people before justices of the peace became even more complicated when slaves were involved in prosecuting actions in which they were the alledged victims. Such instances, not surprisingly, are rare, but they nevertheless allowed some enslaved individuals legal redress. In July 1763, Dana found the evidence against Samuel Bly, a minor, “for assaulting one Pompey a negro slave of Henderson Incher,” convincing enough to commit him to trial at the next quarter sessions.⁶⁸ In other cases, however, racial politics seem to have prevented a fair hearing. In the proceedings against Joseph Martin for “kicking [and] beating” Coomber “a female negro servant,” during Dana’s official “examination... she saith that the defendant is not the person who assaulted & abused her.” She received no further redress.⁶⁹ In all of these cases, magistrates such as Dana constructed very real authority over persons on the margins of colonial society. Whether protected or grotesquely harmed, the bodies of slaves represented a pluralistic and contested legal space over which jurisdiction could be asserted, defended, and denied.

⁶⁷ Davis, *The Office and Authority of a Justice of Peace*, 309,312.

⁶⁸ 23 July 1763, Vol. 18, Ms. N-1088, MHS.

⁶⁹ 23 January 1766, Vol. 19, *ibid.*

Conclusions

Recent scholarship has demonstrated the analytical value of legal pluralism at the intersections of early modern empires.⁷⁰ Similarly, a “legal turn” in Atlantic and imperial history has called attention to the complexity, conflict, diversity, multiplicity, and confusion of law and legalities at the frontiers of empires.⁷¹ These literatures have challenged easy assumptions about the transference of English laws and legal norms to its colonies but invite further analysis of the implications of these complex new legal environments for agents of imperial governance tasked with policing them. The articulation of jurisdiction over non-white bodies, often of ambiguous legal status, added to the power of justices of the peace. At the same time, magistrates made important contributions to the elaboration of British and colonial legal authority over Native and enslaved peoples. These practical precedents anticipate later court decisions confirming the right to try violence between indigenous people within these institutions’ territorial jurisdictions, what Lisa Ford has termed “settler sovereignty.”⁷² Justices of the peace consistently exploited legal ambiguity to assert new powers in new places and over new peoples. Examined objectively, local solutions could differ radically from the actions of magistrates elsewhere, as well as the expectations of privy councilors, high court judges, and colonial officials. Yet, cultures of magistracy corralled these discretionary decisions into an imagined community bound by common goals and a shared rhetoric of justice.⁷³ Attending to these incidents permits a more nuanced awareness of the relationship between local administration and global systems of law and government.

⁷⁰ This literature is too extensive to survey here. See, Lauren Benton and Richard J. Ross, eds. *Legal Pluralism and Empires, 1500-1850* (New York: NYU Press, 2013).

⁷¹ Examples include Christopher L. Tomlins and Bruce H. Mann, eds. *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001); Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010); Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010).

⁷² Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010).

⁷³ The imagined community emphasizes the conceptual work necessary for a shared identity among individuals who may not even agree on what such a community entails, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (New York: Verso, 1991).