BEFORE 1690 AMERICAN COLONISTS ENJOYED a large degree of autonomy within the English empire. In that context of relative freedom, they achieved a significant reform of felony law and criminal procedure. That the colonists achieved statutory guarantees of procedural rights was the realization of a reform then being advocated in England. Evidence of this legislative reform of common law practice is found primarily in the Puritan and Quaker colonies. Beginning in the 1680s and proceeding with greater force after 1695, the English government made a sustained effort to enforce its mercantile policy in America. Because the procedural rights of colonists interfered with the agencies of law enforcement, Privy Council repealed the statutes guaranteeing those rights. Thus Anglicized, the procedural rights of colonists necessarily shifted back onto the common law base. After 1760 a new British attempt at law enforce-

An earlier version of this essay was read at the 1987 meeting of the American Historical Association. Professor Marilyn Salmon read the paper for me, and I thank her for her kindness.

ment revived the issue of rights, and in time independence restored legal autonomy. By statute and constitution, citizens of many of the new states moved procedural rights back onto the base of written law. Whether or not memory of the old ancestral laws helped further that work becomes the concluding question examined in this essay.

During the first century of American settlement, English law contained few statutory guarantees of rights of persons accused of crime. Imbedded in the common law, the rules of criminal procedure were weighted heavily in favor of the Crown. The explication of procedure by the commentators set out rules directed to sheriffs, prosecutors, justices, and judges. The concept of duty, not rights, dominates the texts of Coke, Hale, and Hawkins under this head of the law. Persistent seventeenth-century demands that procedures be stated explicitly as rights made little progress. Indeed, gains make up only a short list: the abolition of Star Chamber and High Commission checked the growing use of civil and canon law procedure; *Bushell's Case* held that jurors could not be penalized for their verdict; together, the Habeas Corpus Act and Bill of Rights promised access to reasonable bail; the Trial of Treasons Act extended important guarantees to those accused of that high crime.²

The first comprehensive guarantees of procedural rights in modern English jurisdictions are found in New England and the colonies of the Delaware Valley. The relationship of these laws to Puritan or Quaker concepts and experience is apparent in Massachusetts, East and West New Jersey, and Pennsylvania. The relevant laws are the Massachusetts Body of Liberties (1641), Laws and Liberties (1649), and subsequent statutes through the Act Setting Forth General Privileges (1692); the West New Jersey Concessions and Agreements (1676), the statutes there to 1703, and the East Jersey laws after 1683; William Penn's Frame of Government and Laws Agreed Upon (1682) and the Pennsylvania statutes from the Great Law (1682) through those enacted in the sessions of 1715.

Puritans and Quakers left an England agitated by advocates of constitutional and legal change. The demand for law reform ran back

² 16 Charles I c.10; 16 Charles I c.11; Thomas B. Howell, ed., *A Complete Collection of State Trials* . . . (34 vols., London, 1809-1828), 6:999-1010; 31 Charles II c.2; 1 William & Mary st.2 c.2; 7-8 William III c.3.
into Tudor times and peaked in a flood of pamphlets and petitions in the two decades after 1640. Although precise proof that Puritan and Quaker leaders read and acted upon the proposals of law reformers is not extant, the striking and numerous parallels between English demands and colonial legislation strongly suggest more than mere coincidence. Among the men who drafted the colonial codes were several university graduates and a few who had studied at the Inns of Court. That they would have been unaware of the massive literature of law reform seems most unlikely. There is evidence of a two-way transatlantic flow of reform ideas. In 1641 Massachusetts sent the Reverend Hugh Peter to England to further the Puritan cause there. Peter served as chaplain in the New Model Army and later as a member of commission for the revision of English law chaired by Matthew Hale. Author of two important pamphlets, Peter has been described as the “most famous law reformer of them all.” Quakers involved themselves directly in the law reform movement. George Fox wrote two pamphlets advocating legal change. Quaker Edward Byllynge, a founder of West New Jersey, wrote *A Mite of Affection*, an important reform pamphlet.

How far William Penn may have been influenced by the mid-century law reformers is problematic. Caroline Robbins has written that Penn “never betrayed the slightest acquaintance with the many

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3 George Thomason collected over 21,000 pamphlets during those years. A normal press run would have been about 1,500 copies. Donald Veall, *The Popular Movement for Law Reform, 1640-1660* (Oxford, 1970), 73.

4 G.B. Warden, “Law Reform in England and New England, 1620-1660,” *William and Mary Quarterly* 35 (1978), 668-90, concludes: “Whatever social continuities or environmental influences there may have been on a local level, at a higher level of public organization and public law it is patently difficult to dismiss as merely coincidental the close congruence of social, economic, political, and legal reforms advocated by revolutionary writers in England and actually adopted in New England.”

5 Stuart E. Prall, *The Agitation for Law Reform During the Puritan Revolution, 1640-1660* (The Hague, 1966), 65-67. Prall's description should be read that Peter was “most famous” and that he was a law reformer. Raymond P. Stearns, *The Strenuous Puritan: Hugh Peter, 1598-1660* (Urbana, 1954), 370-71, 375-87. For reasons unknown to me, this Puritan is always Peters in English histories, but Peter in American texts.

proposals for law reform appearing in the polemical outpourings of mid-seventeenth-century England.\textsuperscript{7} If one demands direct citation by Penn of law reform pamphlets, this is true. Young Penn returned from Ireland in 1660 and entered Christ Church, Oxford. In 1665 he entered Lincoln’s Inn but was in residence only a few months. These years would most likely have been his first opportunity to be exposed to the reform polemics. Although the flood of these materials had abated dramatically with the Restoration, much of it still must have been available. Penn may have read some of these pamphlets. At the least, it seems safe to say that Quakers would have been aware of Leveller positions and the career of John Lilburne, the most famous man in England, who in his last years became a Friend. The Levellers reduced legal concepts to aphorisms or slogans that reappear without attribution in Penn’s writings and other Quaker documents. Considering Penn’s interests and cause, it would have been unwise to raise the ghost of Lilburne. But the obvious parallels between the agenda of the reformers and some Quaker legal concepts suggest at least that the agenda had passed into the public domain.

Similar experiences and common ideas help explain Puritan and Quaker commitment to statutory criminal law. Neither leaders nor members belonged to social groups prone to commit crime. Except for their religious dissent, they were law-abiding subjects. Faith, not crime, brought them into the prerogative and common law courts, where they experienced the indignities and rigor imposed by prosecutors and judges. Persecution and penalties created an awareness of the need to limit judicial discretion by clearly stated law.\textsuperscript{8} Such a mode of law-making served another shared purpose. Since both groups valued education and assumed general literacy, they thought of written law as a didactic instrument, another weapon in the arsenal of moral instruc-

\textsuperscript{7} Caroline Robbins, “William Penn, Edward Byllynge and the Concessions of 1677,” in \textit{The West Jersey Concessions and Agreements of 1676/77: A Round Table of Historians} (Trenton, 1979), 19.

\textsuperscript{8} There has been an extended debate as to whether or not the Puritans were persecuted. For a modern conclusion that they were and references to the debate, see Carl Bridenbaugh, \textit{Vexed and Troubled Englishmen, 1590-1642} (New York, 1968), 452-57. There never has been any question about the persecution of Quakers. The standard work has been William C. Braithwaite, \textit{The Second Period of Quakerism} (Cambridge, 1961), 21-114; and Craig W. Horle, \textit{The Quakers and the English Legal System, 1660-1688} (Philadelphia, 1988) is the best account.
tion. This purpose led them automatically to a reform then being demanded in England—namely, that the law be clearly stated in English. The Puritan codes are a fair example of the plain style. As befit their basic tenets, Quakers attempted to state their law in the plainest fashion possible. The Laws Agreed Upon in England required pleadings and process to "be short, and in english, and in an ordinary and plain character that they may be understood." The Great Law provided that the published laws "be one of the Books taught in the Schooles."9

Puritans and Quakers looked to the Bible as a source of law. In sermon, pamphlet, and code, Puritans showed their commitment to the Old Testament and its "Ancient platforme of God's lawe."10 Unlike Puritans, Quakers did not find a law model in the Pentateuch. They looked to the New Testament for guidance. Although neither Christ nor the Apostles left a "written rule," Christ fulfilled the prophecy of Isaiah and Joel by promising to "write my law in their hearts." Even so, biblical texts contained "subordinate, secondary, and declaratory" rules that illuminated the rule which was "the eternal precepts of the spirit." The Quakers committed themselves to definite written law, because statutes acted as guides to the consciences of witnesses and jurors by illuminating Christian equity.11

Puritan and Quaker recognition of God's sovereignty did not preclude a respect for that pervasive, but imprecise, concept of "fundamental law" rooted in the "ancient constitution" of England. A Puritan could write that "The Lawes of England . . . were not first framed and fashioned after the Lawes of the Romans & other Heathens . . . but after the pure & undefiled Lawes of God; & are at this day more agreeable to the Law of God than . . . any other Lawes in the

10 The phrase is not from a Puritan document, but the Plymouth code of 1661. It is in the preamble, which is an eloquent testimony to the value of Old Testament texts as a guide to "morall equitie." Nathaniel B. Shurtleff and David Pulsifer, eds., Records of the Colony of New Plymouth in New England (12 vols., Boston, 1855-1861), 11:72.
Experience and study combined to establish the value of written law for William Penn. In 1670 the Mayor and Recorder of London chose not to prosecute Penn and William Mead on the statutes normally used against Quakers. For participating in a meeting, Penn and Mead were indicted for unlawful assembly, a lesser species of the common law crime of riot. Penn challenged the legality of the indictment and demanded to know upon what law he was prosecuted. The Recorder answered, “Upon the common law,” and when Penn demanded its citation, he was told, “It is lex non scripta.” Having noted that a law that was common ought not to be difficult to produce, Penn then quoted Lilburne’s aphorism: “For where there is no law, there is no transgression; and that law which is not in being, is so far from being common that it is no law at all.”

William Penn was familiar with the kaleidoscopic writings of then contemporary legal commentators and historians. The ideas of immemorial law and an ancient constitution were commonplace in the rich, varied literature of and about the law. Although Penn knew and quoted Sir Henry Spelman’s revisionist work, he chose to follow Sir Edward Coke’s inaccurate historical trail back into the pre-Norman mists. Penn undertook the project to prove the antiquity and continuity of Parliament and jury, the institutional bulwarks of English liberty. In the process he necessarily discovered the ancient constitution—that amalgam of fictitious and genuine texts of Anglo-Saxon laws, William Lambarde’s Archaionomia. The simple directness of those old laws, real or apocryphal, appealed to Penn.


14 Penn, Works, 2:279-87, 293, 319. England’s Present Interest Considered (1675), Penn’s historical route back to the “golden age,” differed radically from that of the Levellers. He accepted the continuum of the common lawyers that had the Normans accepting Anglo-Saxon
In Boston, the Puritan magistrates, "Gods upon earthe," proceeded to create and control a judicial system with no positive law standard other than the Bible. Trying persons across the gamut of crime from murder to "light behavior" without statutory definition of substance or procedure, the Assistants created the political issue of arbitrary justice. John Winthrop's able defense of the Assistants' policy made two major points. The novelty of their situation urged adoption of the common law principle; let the law "arise pro re nata" out of experience. His second point, that statutory law would be found repugnant to English law and thus endanger the charter, proved to be prophecy. But the people, Winthrop remarked, yearned for a document "in resemblance of a Magna Carta," and Roger Williams noted that "the face of Magistracy" did not suit the people. Thoroughly orthodox Thomas Hooker warned that the people were insecure under such a system of justice. In 1641 the magistrates agreed to the passage of the Body of Liberties, and seven years later the General Court enacted the General Laws and Liberties, the first American codes containing a reasonably comprehensive statement of procedural guarantees. Both the Body of Liberties and the Laws and Liberties began with an emphatic affirmation of written law. In language borrowed from the Magna Carta, the codes barred criminal penalties except those authorized by "some expresse law of the Country warranting the same established by a General Court & sufficiently published."

Quaker proprietors committed themselves to explicit written law before beginning the process of settlement. They followed Byllynge's advice in *A Mite of Affection*: "Let the law be printed that everyone may know that law which he is subject to, to the intent that no man may be condemned by a law which he neither knows nor ever heard of." The West New Jersey Concessions set up the "primitive antient

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and Fundamentall Lawes of the nation of England” as a primary law standard. In an explanation of the merits of the Concessions, Penn emphasized its guarantees of rights. Penn’s Frame of Government went through ten drafts, and the Laws Agreed Upon in England provided guarantees of specific rights. Through the first years of settlement the West New Jersey and Pennsylvania legislatures enacted comprehensive codes of substantive and procedural criminal law. The final chapter of the laws passed by the first Pennsylvania Assembly at Chester in 1682 provided for publication “Because where there is no Law, there is no Transgression.”

Although no seventeenth-century colonial statute regulating search and seizure has been found, Puritan and Quaker legislators did put right to bail on a firm statutory base. In England, bail had been made conditional by over 150 statutes regulating the right. The New England codes had dispelled the confusion with a straightforward rule that admitted to bail all except those accused of capital crimes. Quakers extended the right further by making bail available even in capital cases except where “the proof is evident or the presumption great.”

At common law the writ of habeas corpus ad subjiciendum was the normal means of testing right to bail. Arrest and detention by the king’s councilors made the right to bail and the writ protecting it a great constitutional issue under both the early and later Stuarts. Royal evasion of the writ caused Parliament to guarantee it by statute in the Habeas Corpus Act of 1679. The history of the habeas corpus in the colonies remains elusive. William Penn cited the statute and his

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18 Penn Papers, 1:405, 416-17; 2:135-238.
19 Aaron Learning and Jacob Spicer, eds., The Grants, Concessions, and Original Constitutions of the Province of New Jersey (Philadelphia, 1752), 332-505; Pa. Laws to 1700, 102-78.
21 Julius Goebel, Jr. and T. Raymond Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776) (New York, 1944), 502-6, remark that the paucity of habeas corpus records there “conveys an impression of furtiveness which leads one to wonder whether or not an issue was deliberately avoided.” My research in the records of nine colonial jurisdictions shows sporadic use of the writ to test bail. Whatever its other merits, the most recent work on the subject, William F. Duker, A Constitutional History of Habeas Corpus (Westport, 1980), 95-125, is confusing on the subject of colonial statutory enactment of habeas corpus. Duker does cite examples in most jurisdictions showing the availability of the
intention to extend it to his province in his first proposal for govern-
ment, The Fundamental Constitutions, but there is no reference to
the writ in the published Frame of Government and Laws Agreed
Upon. The first attempt to install the writ by positive law in a
colonial jurisdiction came when the first Massachusetts assembly under
the royal charter of 1692 substantially enacted its provisions, but for
reasons explained below, Privy Council repealed the law.

A casual reading of later Pennsylvania statutes might lead to the
conclusion that Quaker assemblies also attempted to put the great writ
on a positive law base, only to be rebuffed by London. Authorization
for the writ appears in general acts of 1701 and 1710 which attempted
to put the court system on a satisfactory footing. Careful considera-
tion of context suggests that the Assembly intended the writ *habeas corpus
ad faciendum et recipiendum* (commonly *cum causa*), a writ used to
remove a civil case and the defendant into a higher court. In Pennsyl-
vania, prisoners seeking to test the right to bail usually resorted to an
ordinary petition rather than habeas corpus, a method employed in
other jurisdictions. The conclusion seems warranted that, except for
the unusual case of South Carolina, clear-cut statutory antecedents for
habeas corpus do not exist in the colonial period.

writ as an example of common law reception. See also Milton Cantor, "The Writ of Habeas
Corpus: Early American Origins and Development," in Harold M. Hyman and Leonard
W. Levy, eds., Freedom and Reform: Essays in Honor of Henry Steele Commager (Barre, 1965),
55-77; A.H. Carpenter, "Habeas Corpus in the Colonies," American Historical Review 7
(1902), 18-27.

22 Penn Papers, 2:151; Benjamin Furly, one of Penn's advisers, noted the omission, but
did not mention it in his later, more extended criticism of the Frame. A conjecture would be
that Penn and Furly and surely Thomas Rudyard had come to realize that 31 Charles II c.2
did not extend to the colonies and that to claim its privileges explicitly would invite trouble.


24 Pa. Laws to 1700, 314, 324-27. The South Carolina Assembly passed a habeas corpus
act in 1692. The proprietors nullified it as unnecessary because by their charter all English
statutes extended to the colony. Edward McCrady, The History of South Carolina under the
Proprietary Government (New York, 1897), 247-48. In 1712 the Assembly passed an omnibus
reception act incorporating 166 English statutes by reference to their titles. Although several
statutes confirming rights were included, the Habeas Corpus Act was not. In the same session,
the Assembly did pass a separate habeas corpus act. Why they did not simply incorporate it
in the long list of received statutes is something of a puzzle. The act of 1712 explicitly
repealed the act of 1692, suggesting that the legislators were rejecting the validity of the
earlier proprietary disallowance. Nicholas Trott, The Laws of the Province of South Carolina (2
vols., Charleston, 1736), 1:234-57. The question why Privy Council did not repeal the act
of 1712 has not been answered. See James W. Ely, "A New Look at an Old Writ," Reviews
in American History 9 (1981), 319-23, a review of Duker's book. The answer can be found
Prosecutions by information had been a much-abused device. Star Chamber had prosecuted by information, and after its demise the attorney general had taken up the slack and used the information especially in crimes of a political nature, such as seditious libel. The first colonial statutory statements of the principle in Quaker law and a later Massachusetts act guaranteed indictment, but only in capital cases.\textsuperscript{25} Since treasons and felonies were invariably prosecuted by indictment, the colonial guarantees appear not as remedies of existing abuses, but reaffirmations of fixed practice.

Puritan and Quaker law echoed the fortieth chapter of the Magna Carta with requirements that trials be speedy and public.\textsuperscript{26} As to right to counsel, most early colonial laws concerning attorneys addressed the question whether they should be permitted at all. The Massachusetts Body of Liberties barred paid attorneys, as did East New Jersey. Wholesale prosecutions had taught Quakers the value of skilled legal defense. They were tried under ensnaring laws, old ones dredged up and refitted for the occasion and new ones designed to trap them. Friends' efforts to blunt the persecution have the ring of modernity. Beginning in 1676, the Quakers' Meeting for Sufferings provides an early, perhaps first, example of an organization deliberately employing expert counsel to defend rights and lobby for legislative change. The Meeting announced that it aimed "to endeavour by the Law of the Land to stop the destroyer." Friends from any part of the realm could write to Solicitor Thomas Rudyard about a legal defense. As standing counsel, Thomas Corbet defended many Friends and convinced Lord Chief Justice Hale to quash George Fox's indictment on a praemunire. He also played a part in the passage of the statute abolishing the writ *de heretico comburendo* and the death penalty in any ecclesiastical case.

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\textsuperscript{25} Penn Papers, 2:222; Mass. \textit{A\&R}, 1:40-41.
\textsuperscript{26} Laws and Liberties, 16, 32; Mass. \textit{A\&R}, 1:40-41; Pa. \textit{Laws to 1700}, 100, 120; Leaming and Spicer, eds., \textit{Grants, Concessions}, 163-64.
\end{flushleft}
Penn regularly appeared before the great officers of state and the houses of Parliament to argue the illegality of the prosecutions. Penn may also have written *English Liberties: or, The Freeborn Subject's Inheritance* (1782). Having set out the texts of major documents from the Magna Carta to the Habeas Corpus Act, the pamphlet offered specific advice to dissenters about how to mount a legal defense. As to attorneys, a West New Jersey statute implied that fees would be acceptable. The Pennsylvania Assembly defeated at its first reading a “Bill excluding Attorneys from Pleading for Reward.” Penn’s Charter of Privileges of 1701 was the second colonial enactment to establish a right to counsel in criminal cases.

Penn’s Charter of Privileges was also the only colonial law extending the privilege of compulsory process to enable the accused to call friendly witnesses. Trial records show that judges demanded that accusers and hostile witnesses testify in court, thus assuring the right of the defendant to confront them. The only statutory regulation of the matter is the provision in the Laws and Liberties that rejected depositions in capital cases.

The right against compulsory self-incrimination had been a major issue of the agitation for law reform. Lilburne was its most vocal advocate, and the right became the most frequent demand in the Leveller tracts. Considering the prominence of the issue, it seems

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28 Trial records in all colonial jurisdictions show that counsel was the exception rather than the rule. It should be understood that “right to counsel” as used then did not necessarily mean that the attorneys stood by and spoke for defendants at every stage as is true now. In the colonial records, counsel appears most often to make motions in arrest of judgment. Although full right to counsel in England was not granted until 6, 7 William IV c.114 (1837), judges long before then had permitted counsel to do everything except address the jury in felony trials. *State of Pennsylvania, Pennsylvania Colonial Records* (16 vols., Harrisburg, 1851-1853), 2:59 (hereafter, *Pa. Col. Rec.*). *Sketch of the Laws*, 16; Learning and Spicer, eds., *Grants, Concessions*, 163-64, 398; *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania* (Pennsylvania Archives, 8th series, Philadelphia, 1931), 1:62 (hereafter, *Pa. Votes*); John R. Bartlett, ed., *Records of the Colony of Rhode Island and Providence Plantations in New England* (10 vols., Providence, 1856-1865), 2:238-39 was the first enactment.

29 *Pa. Col. Rec.*, 2:59; *Laws and Liberties*, 54. The law admitted depositions in non-capital cases if the witness was disabled or lived more than ten miles from the courthouse.
strange that no colony raised an unequivocal positive law barrier to the practice. The Body of Liberties barred the use of torture to extort a confession from defendants in capital cases. In 1677 the Virginia assembly passed an order clarifying an inquiry about the matter: “[N]o law can compell a man to sweare against himselfe in any matter wherein he is lyable to corporall punishment.”

In fact, in a criminal case a defendant could not be a witness because judges sitting on the Crown side had applied the rule from private law that interested parties could not testify. In one important particular, the old codes went beyond the common law. Following the biblical rule, Puritans demanded at least two witnesses in capital cases, and Quakers applied that rule to all criminal trials.

A wide range of mid-century English law reformers focused attention on the jury, the chief concerns being the qualifications of jurors and the proper function of the jury. The most frequently held view about qualifications was that monetary inflation had so far lowered the ancient 40 shilling freehold requirement for service as to admit unfit persons. Virtually everyone who addressed the issue understood the equation between property qualifications and class bias. A major colonial reform came in selection procedure, a process tainted at its English source by royal control of the sheriffs who returned the panel of jurors. Puritans removed the stain by having the freemen of the towns elect the jurors. Quakers avoided influence by installing, per-

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30 Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (New York, 1968), is by far the most satisfactory and comprehensive treatment extant of the antecedents of any specific procedural guarantee in the federal Bill of Rights; for Lilburne, see pp. 266-300. Levy treats the Massachusetts statute on pp. 344-45. He describes the Virginia order as a “statute” (p. 358), which it was not, surely a minor error. For the order, see William W. Hening, ed., The Statutes at Large . . . (13 vols., Richmond, 1819-1823), 2:422; for Puritan hostility to self-incrimination, see George L. Haskins, Law and Authority in Early Massachusetts, A Study in Tradition and Design (New York, 1960), 200-2; see also Jon Kukla, “Putting Silence Beyond the Reach of Government: The Fifth Amendment and Freedom from Torture,” in Kukla, ed., The Bill of Rights, 99-106.

31 Pa. Laws to 1700, 116; Leaming and Spicer, eds., Grants, Concessions, 397 (East New Jersey); Laws and Liberties, 54. John Cotton’s code, “Moses His Judicials,” required two witnesses in “all causes”: Collections of the Massachusetts Historical Society, series 1 (Boston, 1798), 5:185; on competency and evidence, see Chapin, Criminal Justice, 42-45.

32 Veall, Law Reform, 156-59.

haps inventing, the jury lottery. Although William Penn regarded the jury as a critically important institution, he apparently did not favor the lottery. Benjamin Furly, an associate of Penn's and critic of the shift toward conservatism in the successive drafts of the Frame of Government, proposed the lottery. In a comprehensive critique of the published Frame, under the head “CONCERNING JURIES,” Furly wrote: “Let God, rather then [sic] men be intrusted with that affaire in the first place, that all corruption in packing of Juries to hurry men out of the world without just cause be prevented.” Bias in selection of the panel would be avoided by drawing the names of jurors from a hat or box containing the names of all freemen. The constituent documents of West New Jersey and Pennsylvania used the traditional method of selection by the sheriff, but in 1683, for reasons not now apparent, the Pennsylvania and East New Jersey assemblies adopted the jury lottery. Another main barrier to biased jurors, the right to challenge, had been given its modern definition by Coke in the First Institute. It is nice learning, subsumed under a series of Latin titles barring aliens, bondsmen, women, those failing to meet property qualifications, biased persons, and infamous men. These challenges for cause and the peremptory challenges had been embroidered by Parliament into complex rules. Puritan and Quaker codes ignored the distinctions and simply admitted “just and reasonable challenges.”

Quakers understood that class bias in jurors could work injustice. In his first, most liberal plan of government for Pennsylvania, Penn would have required jurors to be as “neer as may be of the same degree, that they may be equalls” to the litigants or defendant. “Poorer [jurors might] be aw’d with fear or drawn by rewards to a Corrupt Judgement, or by being richer and greater, be careless of their Verdict upon an Inferior Person, whos low Condition are not or is not able to call them to Question.” The Laws Agreed Upon and the Great Law contained this principle. The absence of evidence of any attempt to implement it and the practical difficulty of doing so perhaps furnish

35 Sir Edward Coke, The First Part of the Institutes of the Laws of England (London, 1797), 156. For colonial statutes regulating challenges, see the previous footnote.
another example of what has been called Penn’s “Ideas in Conflict with Reality.”

Questions concerning the function and power of the jury raised the critical issue of the relationship between judge and jury. Traditionally, jurors had been witnesses who would have knowledge of the character and deeds of the accused because they were “neighbours.” By the early seventeenth century they had become triers of fact. Practice left the determination of the law with the judges. Such a division nourished abuse, especially in the category of crimes against the state in which judges holding at the king’s pleasure ruled within the ample, amorphous boundaries of seditious libel and the constructive treasons. At two of his trials, charismatic John Lilburne urged the jurors to come to judgment on the basis of both law and fact. Large crowds cheered the acquittals, and in 1649 his supporters caused a medal to be struck bearing the words: “John Lilburne saved by the power of the Lord and the integrity of his jury who are judges of law and fact.”

The coincidence and continuity between Leveller and Quaker views of the jury are striking. William Penn furnishes the obvious and familiar example. His general view of the jury appears in The People’s Ancient and Just Liberties Asserted, a record of his trial at the Old Bailey in 1670, and in England’s Present Interest Considered, published five years later. Following Coke, Penn traced the continuous existence of the jury back to the Saxon constitution, “that antient Garland.” He accepted Coke’s reading of the twenty-ninth chapter of the Magna Carta that the phrases “by lawful judgment of his peers or by the law of the land” both referred to the jury. The twenty-ninth chapter should “be written in Letters of Gold.” As guarantor of liberty and property, Penn raised the jury to the same level as representation in Parliament, the “two grand Pillars of English Liberties.” The jury gave the people “a real share” in the judicial power that ultimately brought the law to

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37 Sir John Fortesque, De Laudibus Legum Angliae (London, 1583), CXXI, CXXVI.

execution.\textsuperscript{39} The acquittal of Penn and Mead on their trial for unlawful assembly produced as a sequel \textit{Bushell's Case}, the greatest judicial affirmation of a common law right of the seventeenth century. Its ruling, that a jury could not be punished for its verdict, in effect wrote the Leveller position concerning jury function into the law. \textit{Bushell's Case} freed jurors to apply their conscience and reason to the amalgam of law and fact in reaching their verdict.\textsuperscript{40} In open court, Lilburne had called his judges "Norman intruders," mere "cyphers" to pronounce the jury's verdict. In gentler, but emphatic words, Quakers installed the principle in the law of their three American jurisdictions. The Fundamentals of West New Jersey put it:

That there shall be in every Court three Justices or Commissioners who shall sitt with the twelve men of the Neighbourhood with them to heare all causes and to assist the said twelve men of the neighbourhood in case of Law and that they the said Justices shall pronounce such Judgment as they shall receive from the said twelve men in whom only the Judgment resides and not otherwise.

Penn also assigned "the final Judgment" to the jury.\textsuperscript{41} Although Massachusetts did not give statutory recognition to such extensive jury power, in practice the power of juries to "find law was virtually unlimited."\textsuperscript{42}

Puritans and Quakers also gave positive law definition to important parts of final proceedings. Reflecting the twentieth chapter of the Magna Carta, statutes required that fines be moderate and, as the Massachusetts law put it, not reach items necessary for "upholding

\textsuperscript{39} \textit{Penn Papers}, 2:222.


\textsuperscript{41} \textit{Laws and Liberties}, 34, 46; \textit{Pa. Laws to 1700}, 101, 118; Leaming and Spicer, eds., \textit{Grants, Concessions}, 236.

life.” The original Puritan codes had barred bodily punishments that were “inhumane, barbarous or cruel.” Without doubt the greatest Puritan-Quaker practical reform was the reduction of the huge number of crimes punishable by death. Prior to the second decade of the eighteenth century, Quaker laws had limited the death penalty to treason and murder, a position Pennsylvania would reassume a century later as its legislature laid the base of modern American criminology. English felony law extended its penalties beyond the grave by forfeiting the property and corrupting the blood of the convict. The earliest Puritan codes explicitly barred forfeiture, and, of course, corruption of the blood necessarily went out with forfeiture. Quaker laws made a redistribution of the estates of persons sentenced to death, two-thirds to the kin of the convict and the balance to relatives of the victim as restitution. In the revision of 1700, perhaps because of his strained finances, Penn retained one-half of the estate of a convicted murderer for his own use. The next year the Charter of Privileges exempted the property of suicides and perpetrators of accidental homicides from forfeiture.

Unstable English politics gave seventeenth-century colonists the chance to establish their polities with little outside interference. Informed by their piety and English experience, Puritans and Quakers chose to ground their substantive and procedural criminal law in statutes. Much of their basic law reflected demands then being made in England by the law reformers. Viewed collectively, Puritan and Quaker procedural guarantees made up a substantial bill of rights. In the latter part of the century, London officials breached the autonomy of the colonial governments and, motivated by prerogative considerations and imperial policy, destroyed the hopeful experiment.

Beginning in 1660, English agencies began reviewing colonial legislation. At first, the main inquiry centered on Massachusetts, whose leaders pursued a policy of obstinate procrastination until the quo warranto of 1685 destroyed the charter. Crown officers subjected Penn-

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sylvania law to a desultory review during the late 1680s without result. After 1692 London’s scrutiny of the laws of the two colonies became increasingly strict. In that year Massachusetts received a royal government under the new charter, and in 1693 the Crown appointed a royal governor in Pennsylvania. These changes erased the laws of the two colonies and created the necessity of enacting new legislation. The Massachusetts legislature gathered its scattered statutory guarantees into a bill of rights, “An Act Setting Forth General Privileges,” and in a separate law enacted the major provisions of the Habeas Corpus Act. After skirmishing with Benjamin Fletcher, their new governor, the Pennsylvania Assembly passed a revenue bill that Fletcher accepted and proceeded to reenact the old statutory guarantees. With the restoration of the proprietary in the person of Governor William Markham, the Assembly reenacted them again.

In exercising its power to review colonial statutes, Privy Council relied on the advice of the Lords of Trade (after 1696, the Board of Trade) and the law officers (the attorney and solicitor general). When the validity of statutes turned essentially on legal interpretation, the Board referred them to the law officers, who showed no great enthusiasm for the added task. They expected substantial fees from the colony involved and were notoriously slow in giving their advice. The lawyers approached the provincial statutory guarantees very negatively. Because their prerogative view of the imperial constitution held that the subjects’ rights in the dominions were within the gift of the Crown, they viewed such laws as unnecessary and presumptuous. The Board of Trade conducted its own review to ferret out any conflict between colonial statutes guaranteeing rights and English interests.

In 1695 the Privy Council nullified the Massachusetts acts for privileges and habeas corpus. There remains in the files of the Colonial Office an unsigned document, entitled “Observations Upon the Laws of Massachusetts.” Since this memorandum is dated October 1692

47 The standard works on reviews and appeals are Elmer B. Russell, The Review of American Colonial Legislation by the King in Council (New York, 1915); and Joseph Smith, Jr., Appeals to the Privy Council from the American Plantations (New York, 1950). By far the best legal analysis of review of colonial statutes is in Smith’s work, pp. 523-637.
and Governor William Phips did not transmit the laws to London until February 1693, its author had to have been a Bostonian, most likely Joseph Dudley. He had recently returned from New York and renewed his friendship with William Stoughton, who may well have collaborated in the paper. It seems most likely that Dudley carried the document with him when he returned to London and used it in his campaign to replace Phips as governor. The "Observations" offered detailed examples of the repugnancy of the new acts to English law. Although they might not have needed the prompt, the memorandum showed privy councilors the rationale for nullification. Dudley attacked the original premise of Puritan legislation: that no law could operate without local enactment. He argued that this showed either ignorance or distrust of royal government. The reiteration of rights and recital of the Magna Carta was "needless" because the king had given the dominion subjects their rights as an act of grace.\textsuperscript{48} The Privy Council formalized this prerogative theory of the source of colonial rights and nullified the two acts because "His Majesty had not as yet seen fit to extend those privileges to the plantations."\textsuperscript{49} From then until the American Revolution, the rights of those accused of crime in Massachusetts remained based in the common law as applied by provincial judges.

The precise state of Pennsylvania law during any of the years between 1692 and 1715 is difficult to determine. Regardless of the confusion, the record does make it evident that legislators there persisted in attempts to maintain procedural rights on a statutory base.

\textsuperscript{48} Dudley made himself the major agent in the business of replacing Puritan law with English law. As President of the Council for New England, he held his first court in May 1686. The records of his courts are the only ones surviving from the period that Massachusetts's historians long called "the Usurpation." Acting as if he held commissions of oyer and terminer and general gaol delivery on an assize in an English county, Dudley admitted Peleg Heath to his clergy and extended the Jacobean statute in favor of women to Charity Williams after convictions for grand larceny. He let Thomas Waters to his clergy after one conviction but sentenced him to death after the jury returned a guilty verdict on a second indictment. Ms. Massachusetts Superior Court of Judicature, Special Courts, 1686-1687, pp. 2-21 (New Suffolk County Court House, Boston). "Observations Upon the Laws of Massachusetts," an unsigned document dated Oct., 1692, Mass. AGR, 1:109-10; Everett Kimball, The Public Life of Joseph Dudley: A Study of the Colonial Policy of the Stuarts in New England 1660-1715 (New York, 1911), 64-67.

The Board of Trade made the colony the center of its efforts to extinguish the private colonies and showed a consistently negative attitude toward local attempts to define common law rights. Governors Fletcher and Markham submitted the laws passed during their administrations for review, but the Privy Council took no action until 1699, when it apparently nullified the whole body of extant Pennsylvania law. Penn returned to his colony and in the spring of 1700 undertook a general revision of the constitution and laws. Through several sessions the Assembly again reenacted most of the old guarantees and added a new law, "An Act of Privileges to a Freeman." A close paraphrase of the thirty-ninth chapter of the Magna Carta, the Act of Privileges barred any form of criminal penalty except those resulting from a jury verdict or "the laws of this province."

Penn returned to England late in 1701 to defend his charter against the Reunification Bill then being debated in Parliament. Sometime later he submitted the new laws to the Board of Trade. In May 1705, Governor John Evans told the Assembly that the laws had been with Attorney General Edward Northey for a long time "for want of a large Fee to obtain his Report." By October, Evans had given the Assembly Northey's opinion and members began preparing another set of laws. Northey recommended the repeal of all of the laws containing procedural guarantees. The laws relative to excessive fines,

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50 "Apparently" because the reach of the Privy Council order of August 31, 1699, is not clear. The Navigation Act of 1696 (7 and 8 William III, c.22), "An Act for preventing Frauds and regulating Abuses in the Plantation Trade," had provided that any colonial law repugnant to it or the earlier Navigation Acts "or to any other law hereafter to be made in this kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void. . . . " The act gave advocates the option to prosecute illegal traders in colonial admiralty courts. In 1698 the Pennsylvania Assembly passed its own statute of frauds and in it guaranteed trial by jury. After being held up by the law officers for over eighteen months, the Board of Trade received their opinion (no longer extant) and proceeded to recommend to the Privy Council that it repeal the Pennsylvania act dealing with frauds "and all other future Acts that shall be made there contrary to the Lawes of England to be void in themselves without any particular repeal and ipso facto null and of no effect." The Lords Justices cast the net even further and declared the frauds statute "and all other acts made . . . contrary to the known laws of England null and void." CSP 1699, 140, 247, 330, 384, 419.


52 The charge that he had withheld from the Assembly the greater part of Northey's objections to the laws became the eighth article in the impeachment of Secretary James Logan. Pa. Col. Rec., 2:346; Pa. Vote, 1:479, 484, 492, 502, 509, 510-11, 514, 516-19, 528, 539, 553.
the requirement of two witnesses in criminal cases, and access to bail went down on technicalities as being repugnant to English law. A jury act and the Act for Privileges failed because they interfered with the Navigation Act of 1696. Privy Council nullified the laws in January 1706. Until 1715 the Assembly persistently reenacted the Act for Privileges. The Board continued to harass the colony on the point. In 1711 the Assembly reenacted the statute with a salvo exempting the admiralty courts. Stating that he feared the act might still interfere with admiralty, Solicitor General Robert Raymond recommended repeal of the act as unnecessary. Referring to Raymond’s opinion, Attorney General Richard West aborted the act for the last time in 1719. As to the salvo, he remarked that if the purpose was not to evade the admiralty courts, “it is very difficult to imagine what other intention they can possibly have.”

Penn’s memorials to the Board of Trade answered the law officers: “I cannot help it; ’tis the great charter that all Englishmen are entitled to, and we went not so far to loose [sic] a little of it.”

By expunging the statutory guarantees of procedural rights, Privy Council told the American assemblies that such matters lay outside their powers. In the process, Council set out two obnoxious principles: if provincial rights collided with English interests, the rights must yield; provincial rights were a prerogative gift to be given or withheld as the Crown saw fit.

From the wreckage of their procedural guarantees, Massachusetts and Pennsylvania salvaged an important principle. They persisted in their determination to define the substantive nature of crimes and their punishments by statute. On grounds of repugnancy to English law, Privy Council forced Massachusetts to erase the Mosaic element from its code. By 1720 the colony had substantially received English felony law by local statutes. In its comprehensive felony reception statute of 1718, the Pennsylvania Assembly revived several procedural guarantees. Persons accused of capital crimes could challenge jurors, be

53 Statutes of Pa., 2:465, 479, 481, 493, 495.
55 Ibid., 2:467 and similar remarks at 3:447.
represented by counsel, and compel witnesses to testify.\textsuperscript{57} By receiving English felony law, the two colonies abandoned a major reform that had barred the death penalty in all crimes against property. Both colonies did maintain an important part of their early reforms of substantive law by refusing to receive English larceny law. Persons convicted of simple larceny of whatever degree were required to make restitution and suffer a fine or whipping.\textsuperscript{58} Regardless of the greater severity of these statutes, they form links in a continuous line of precedent for known, written law running back to the earliest New England codes and forward into the United States Supreme Court decisions of the early nineteenth century.\textsuperscript{59}

The hostility of Privy Council to colonial declaratory statutes left the business of rights with the judges. Because colonists carried virtually no criminal appeals to London,\textsuperscript{60} indigenous judicial definition of rights went forward with little interference. In fact, once the prerogative had been established as the source of rights, English authorities showed little concern about colonial criminal law practice unless it interfered with the acts of navigation and trade.

A summary of procedural guarantees in colonial practice—a huge, intricate subject—is beyond the scope of this essay, but a few selected generalizations drawn from work in progress are offered. For those who could find sureties, bail was available, occasionally even in instances of murder and felony. Royal instructions to four mainland governors after 1707 guaranteed “free liberty” to petition for the writ of habeas

\textsuperscript{57} Pa. Laws to 1700, 371-82.
\textsuperscript{58} Ibid., 380-81; Mass. A&R, 1:52; 2:838.
\textsuperscript{59} United States v. Worrall, 2 Dallas 384; United States v. Hudson & Goodwin, 7 Cranch 32.


\textsuperscript{60} Smith, Appeals to the Privy Council from the American Plantations, 240-44, 297-309.
corpus and scattered entries indicate its availability in all jurisdictions.\textsuperscript{61} Persons detained for long periods before trial also resorted to ordinary petitions to the governor and council. The relative infrequency of habeas corpus proceedings probably should be taken as evidence of ease of access to bail rather than of nefarious design by prosecutors.

Trial by jury furnishes another example of the survival of rights under judicial administration. The Navigation Act of 1696 gave the vice-admiralty courts jurisdiction in cases involving the laws of trade, but many such cases were tried before juries in common law courts. Colonial superior court judges also issued writs of prohibition to remove such cases out of admiralty.\textsuperscript{62} In addition to the traditional offenses of forcible entry and detainer, riot, and contempts, colonial legislators created a large number of regulatory statutes that bypassed the jury in favor of summary judicial proceedings. Even so, the conclusion is warranted that colonists remained committed to the jury as an essential procedural element in the trial of serious crimes and an available option in most other cases. Counting the frequency of criminal cases tried by jury cannot establish the value of the institution. The jury is seldom used in criminal cases today, but that does not weaken legitimate attachment to the institution. The resolution of most criminal


\textsuperscript{62} Counsel opposing jurisdiction of the vice-admiralty courts commonly did not directly raise the jury issue. Mostly they used the same argument that English lawyers made before Kings Bench that admiralty could not try seizures made in the body of a county according to 13 R.II c.5, 15 R.II c.3, and 2 H.IV c.11 or argued from the language of the Navigation Acts that provided for trial “in any of His Majesty’s Courts” (Navigation Act of 1663, 15 Ch. II c.7) which did not include vice-admiralty courts because they were not courts of record. See L. Kinvin Wroth, “The Massachusetts Vice-Admiralty Courts,” in George A. Billias, ed., \textit{Law and Authority in Colonial America} (Barre, 1965). But, of course, it would have been understood that these arguments meant trial by jury. The libelant in a New York case, \textit{Kennedy q.t. v. Forwiles}, made the obvious point that common law jurors “perhaps are equally concerned in illicit trade and it is hardly to be expected that they will find each other guilty.” Quoted in Goebel and Naughton, \textit{Law Enforcement in Colonial New York}, 237; see also pp. 235-38, 300-3. Pennsylvanians opposed the vice-admiralty court on all fronts. In 1698 the Assembly enacted its own “Act for Preventing Frauds & Regulating Abuses in Trade.” Breaches of the Navigation Acts were to be tried “according to the course of the Com[m]on Law . . . by twelve Lawful men of the neighborhood.” Pa. \textit{Laws} to 1700, 272. See \textit{CSP 1697-1698}, 395, 398, 402-3; \textit{CSP 1699}, 382-84; \textit{CSP 1701}, 734; \textit{CSP 1702-1703}, 16, 570; \textit{CSP 1704-1705}, 55; Historical Manuscripts Commission, \textit{Manuscripts of the House of Lords, 1693-1710} (7 vols., London, 1900-1923), 4:326, 332ff, 483, 578.
cases is obvious. The jury becomes valuable in complex or unclear cases and in cases in which the government has a large political interest. No matter how seldom or often the jury is used day to day, it remains an indispensable right in the context of our political society.

On a plea of the general issue, persons accused of homicide or felony invariably stood trial before a jury. Occasionally, those tried for a misdemeanor where the Assembly had not foreclosed the possibility asked for and received trial by jury. As they always have, such defendants ran the risk of higher costs and more severe penalties if convicted. The vicinage principle continued to be respected, and the elaborate and varied provisions for carrying the authority of superior courts into the counties are as much testimony to the principle as to local convenience. The right to challenge biased or incompetent jurors was available in all jurisdictions. Juries showed marked independence by refusing to convict in infanticide and seditious libel cases and by grossly undervaluing goods in larceny cases. Surely there is irony in the fact that what one colonist had called "the crooked cord of judicial discretion" became the process that sustained


64 There were exceptions. South Carolina tried serious crime in all counties before a Charleston jury until a circuit court act became effective in 1773. Edward McCrady, The History of South Carolina Under the Royal Government, 1719-1776 (2 vols., New York, 1901), 2:631-43. In Virginia all capital crimes were tried in the General Court. Six jurors would have been summoned from the county where the crime had been committed. Robert Beverley, The History and Present State of Virginia, ed. Louis B. Wright (Chapel Hill, 1947), 258. Under the definitive judicial act of 1722, Pennsylvania brought capital offenders from the "out parts" to trial before a Philadelphia jury. The certain knowledge that frontier jurors would be biased in homicides involving Indians appears to explain this exception. Pa. Laws to 1700, 387-94.

65 In seven jurisdictions infanticide added up to 23 percent of all homicides. Seventy-five percent of women accused were saved by grand juries returning ignoramus or trial jury verdicts of not guilty or findings of insanity. These figures are consistent with Peter C. Hoffer and N.E.H. Hull, Murdering Mothers: Infanticide in England and New England 1558-1803 (New York, 1981), 65-91. For seditious libel, see Leonard Levy, Emergence of a Free Press (New York, 1985)—trials of William Bradford, pp. 22-26; Thomas Maule, pp. 27-28; and John Peter Zenger, pp. 38-45.

procedural guarantees until independence revived the old indigenous tradition of statutorily defined rights.

In the final imperial crisis, the men who shaped colonial opinion ransacked law, history, and philosophy for principles supportive of their claims of rights. Were they aware of and did they make use of the old, indigenous statutory guarantees?

In what can be regarded as the first national bill of rights, the Declaration and Resolves, the First Continental Congress (October 1774) listed the various American entitlements to rights. Among them, they placed “the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.”67 This encourages the historian in search of continuity. In a standard history of the background of the Bill of Rights, Robert Rutland referred to the old laws as “the first seeds of the bill of rights.”68 Bernard Bailyn has written of the old laws: “In some places surviving intact from the settlement period to the Revolution, well remembered in others where they had been eliminated from the statutes, and everywhere understood to be reasonable and benificent, these documents formed a continuous tradition in colonial American life, and drifted naturally into the thought of the revolutionary generation.”69 Although this organic theory of the growth of American rights is attractive, the evidence will not support it.

The old laws of liberty “surviving intact” make up a short list: Penn’s Charter of Privileges with its limited guarantees and parts of the Laws and Liberties that had been imbedded in Connecticut law. As to laws “well remembered,” the evidence is obscure and raises the question of the availability of the old laws to the founders of the republic. Copies of the published Massachusetts laws were doubtless available. One work of the period did cite the old codes and the administration of law under them in detail. In his History, Thomas Hutchinson emphasized the dark side—the Mosaic capitals, the trial of his ancestor Anne Hutchinson, the judicial murder of the Quakers,

and the Salem witchcraft trials. These glaring examples of severity and injustice must have made the old law unattractive to persons making the case for liberty. In his polemical writing, John Adams frequently called up the ghosts of his ancestors but they are referred to generally as fugitives from civil and ecclesiastical tyranny. The old Quaker laws were readily available. In 1752 Aaron Learning and Jacob Spicer published the laws of proprietary New Jersey, and in 1765 Samuel Smith published them again in his history of New Jersey. Of the old laws Smith remarked that “some tho' in print were in but few hands, some never made publick, and many in danger of being lost.” He had undertaken the work because of a “too general negligence as to particular rights of individuals” which remained “secrets to most of the inhabitants.” In 1752 Benjamin Franklin published the proceedings of the Pennsylvania Assembly and included the Laws Agreed Upon in England. Penn’s works, including The People’s Ancient and Just Liberties Asserted and England’s True Interest, were reprinted in 1726 and again in 1771. Argumentum ad Hominem, a pamphlet published in Philadelphia in 1775, reprinted the sections of England’s True Interest in which Penn extolled the jury. But usually notice of Penn was negative. In An Historical Review of the Constitution and Government of Pennsylvania, Franklin dismissed the Charter of Privileges of 1701 as “a poor foundation” for liberty and hoped that his history would cause the Penns “to rot and stink in the Nostrils of Posterity.” The men who wrote the Pennsylvania constitution of 1776 resolved “to clear away every part of the old rubbish . . . and begin on a clean foundation.” But they did not clear it all away. However radically different and democratic the government they created

71 Samuel Smith, The History of the Colony of Nova-Caesaria, or New-Jersey . . . (Burlington, 1765), xi, xiii.
seemed, the constitution-makers reconstructed criminal procedure on the old foundation of the common law.

The evidence examined in this essay breaks the continuous chain of written guarantees of procedural rights assumed to stretch back in fact or memory from the Bill of Rights of 1791 to the seventeenth-century Puritan and Quaker codes. What does make the authors of the old codes and Bill of Rights tenants in common is the matrix of the common law and a shared fear of arbitrary government. With legal persecution in their immediate memory, Puritans and Quakers had carried over the procedural guarantees of the common law and imbedded them in codes. After the codes fell to Privy Council review, the royal prerogative became the base for colonial rights and the maintenance of procedure came under judicial administration. An increasingly sophisticated bench and bar generally showed respect for due process when dealing with criminal causes. Colonial procedure reflected the practice of English judges who gradually became more inclined to honor defendants' privileges. After 1760 British policy exposed the fragile base of American rights. The attempts to appoint judges by a tenure at pleasure and to circumvent juries by invigorating the vice-admiralty courts appeared especially menacing. Patriot polemists based their claim of the procedural rights in the common law, the great English constitutional muniments from the Magna Carta to the Act of Settlement, and local custom and usage. They used their own history in the familiar mode of "history tells us," to post general warnings against tyranny and persecution. Because they were either unknown to them or tainted by severity and proprietary prerogative, patriots left the old local prescriptions for due process buried in the lost world of early American law.

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