

2014-08-29

# Captain Cupit's Boy: Slavery, Crime, and Courts in the 18th Century British Atlantic

Wood, Madeline

---

Wood, M. (2014). Captain Cupit's Boy: Slavery, Crime, and Courts in the 18th Century British Atlantic (Doctoral thesis, University of Calgary, Calgary, Canada). Retrieved from <https://prism.ucalgary.ca>. doi:10.11575/PRISM/25207

<http://hdl.handle.net/11023/1705>

*Downloaded from PRISM Repository, University of Calgary*

UNIVERSITY OF CALGARY

Captain Cupit's Boy: Slavery, Crime, and Courts in the 18<sup>th</sup> Century British Atlantic

by

Madeline Joy Wood

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
DEGREE OF DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN HISTORY

CALGARY, ALBERTA

AUGUST, 2014

© Madeline Joy Wood 2014

## **Abstract**

This dissertation uses the genre of microhistory to understand the issues of slavery and crime in the British Atlantic by focusing on a criminal trial in the Boston Vice-Admiralty Court in 1736. John Barnes, the captain of a slave ship voyaging from Rhode Island to the Guinea coast of Africa and on to the West Indies, in a violent rage, killed a young slave boy on the high seas. After the voyage, he was charged and tried for murder in Boston. The Court found Barnes guilty of murder and sentenced him to death, the only sentence it could impose for such a verdict. The nine Commissioners who sat with the judge in the trial recommended a respite of sentence for one year to allow Barnes time to apply to the King for a pardon, should he wish to do so.

The story of the voyage and the trial is used to elucidate connections between England and Massachusetts through the focus of law relating to the slave trade and slavery in the 1730s. Themes of centre and periphery, the ethics of the slave trade, and the development of admiralty law regarding crime are explored by way of the people and processes involved in this overlooked event in British imperial and Massachusetts history. The Boston Court by indicting Barnes for murder treated the boy as a subject of the king for purposes of the trial in the Vice-Admiralty Court drawing on legal traditions based in natural law and Biblical authority rather than the newer Lockean Enlightenment idea of constant warfare between master and slave.

## **Acknowledgements**

I have accumulated many debts in writing this dissertation. My grateful thanks are due to the University of Calgary History Department for providing financial assistance during my research and writing process. The University Research Grants Council provided funds to enable me to conduct research in London, U.K. at the National Archives, the British Library, the London Metropolitan Archives, Library of Society of Friends, and the Royal Society Library in London. My thanks are due as well to the staff in each of these places who answered my questions as best they could and directed me to resources I would have taken much longer to find on my own.

Portions of this dissertation were presented at the 2012 Conference of American Historical Association, 2012 Western Conference of British Studies, and University of Calgary Department of History Graduate Colloquium. I am grateful for the thoughtful comments received at each of these presentations.

My family has been wonderfully supportive as I have followed my muse in researching and writing this dissertation and they have picked up the slack when they were sure I was living in another century. Thank you, Neil, Meredith, and Anne for all of the extra miles you each have gone, both literally and figuratively, to support my dream.

I have been blessed to have Dr. Jewel Spangler from the History Department and Dr. Jon Kertzer from the English Department as members of my supervisory committee. Their patience and enthusiasm has been encouraging along the way. My heartfelt gratitude goes to my advisor, Dr. Ken MacMillan, first for agreeing to supervise my program and then for his enthusiastic and expert guidance as the dissertation unfolded in sometimes unexpected directions. I have benefited immeasurably from his wisdom and patience in this process.

## **Dedication**

For Neil, Meredith, and Anne; they were beside me all the way.

## Abbreviations

<i>AHR</i>	<i>American Historical Review</i>
<i>AJLH</i>	<i>American Journal of Legal History</i>
<i>CSP</i>	<i>Calendar of State Papers, Colonial Series, America and West Indies, 1574-1739</i> . CD-ROM. Eds. Karen Ordahl Kupperman, John C. Appleby and Mandy Banton. London: Routledge, published in association with the Public Record Office, 2000
CO	Colonial Office series, TNA
<i>NEWJ</i>	<i>The New England Weekly Journal</i> , Boston, Massachusetts
SP	State Papers series, TNA
TNA	The National Archives, Kew, Richmond, Surrey, UK
<i>WMQ</i>	<i>William and Mary Quarterly</i>

## Table of Contents

Abstract .....	ii
Acknowledgements .....	iii
Dedication .....	iv
Abbreviations .....	v
Table of Contents .....	vi
Frontispiece .....	ix
<b>Chapter One .....</b>	<b>1</b>
<b>“At a Court of Admiralty for the Trial of Piracies, Felonies and Robberies”: Introduction</b>	<b>1</b>
The Blackamoor Sundial .....	1
The Death of Captain Cupit’s Boy .....	5
Argument and Structure .....	11
<b>Chapter Two.....</b>	<b>22</b>
<b>“On Board a Certain Brigantine”: British Atlantic Sailors .....</b>	<b>22</b>
Introduction .....	22
British Sailors and the Atlantic World .....	27
The Atlantic Voyage .....	39
Rhode Island Slave Trade .....	52
Conclusion.....	69

<b>Chapter Three .....</b>	<b>71</b>
<b>“Civil Law, the Rule in the Present Case”: Law, Legislation and Courts in the British Atlantic.....</b>	<b>71</b>
Introduction.....	71
Formation of the British Admiralty Courts.....	75
Vice-Admiralty Courts in Massachusetts.....	85
Repugnancy and Divergence.....	94
Massachusetts Laws, Lawyers, and Courts.....	109
Conclusion.....	112
<b>Chapter Four .....</b>	<b>114</b>
<b>“One of a Large Number on Board”: Slavery in the British Atlantic .....</b>	<b>114</b>
Introduction.....	114
The Idea of Slavery in Colonial Massachusetts .....	124
Colonial Slave Laws.....	155
Slavery in Britain and the Atlantic.....	162
<b>Chapter Five .....</b>	<b>168</b>
<b>“At the Request of our Commissioners”: Boston Vice-Admiralty Court Officers.....</b>	<b>168</b>
Introduction.....	168
Boston Through British Eyes .....	170
Thomas Pelham-Holles, the Duke of Newcastle.....	177
Officers of the Boston Vice-Admiralty Court.....	179

Advocate General and Defence Counsel.....	191
The Commissioners.....	200
Conclusion.....	206
<b>Chapter Six.....</b>	<b>210</b>
<b>We “extend our Grace and Mercy unto Him”: Trial and Pardon.....</b>	<b>210</b>
Introduction.....	210
The Trial – Law and Procedure.....	211
Pardon – Application and Grant.....	229
Conclusion.....	245
<b>Chapter Seven .....</b>	<b>246</b>
<b>“The Court adjudged the Prisoner Guilty”: Conclusion .....</b>	<b>246</b>
<b>Appendix.....</b>	<b>255</b>
<b>Transcript of a summary of the trial of John Barnes from a manuscript in The National Archives, London, UK catalogued as SP 36/39, fols. 236-250 and SP 36/40, fols. 258-259</b>	<b>256</b>
<b>Bibliography .....</b>	<b>285</b>
Primary Sources .....	285
Secondary Sources .....	293



Figure 1: The Blackamoor Sundial in the gardens of the Inner Temple, London, U.K.

Photo by Madeline Wood

## Chapter One

### “At a Court of Admiralty for the Trial of Piracies, Felonies and Robberies”<sup>1</sup>:

#### Introduction

##### The Blackamoor Sundial

In a quiet corner of the gardens of the Inner Temple in London stands a statue of an African man holding a sundial on his head. The statue is made of cast lead, a common material considered useful only for garden ornaments in the eighteenth century.<sup>2</sup> The subject of this statue was not unusual as a garden ornament in the early eighteenth century; the Van Ost family foundry in London made many of these and this was only one of several patterns of supported sundials manufactured by that firm. The first of the African statues were made at the same time that European powers were beginning to compete in the transatlantic slave trade. There was some speculation that matching statues were to be made representing each continent but only two are known to have been completed.

While it is intriguing to see this statue tucked away in a peaceful garden setting in a historical bastion of English law, there is no longer a plaque explaining its significance.

---

<sup>1</sup> SP 36/39, f. 236.

<sup>2</sup> W. R. Lethaby, *Leadwork, old and ornamental, and for the most part English* (London: Macmillan & Co., 1893), 99-109. Lethaby wrote about the use of lead for making statues in the eighteenth century in Britain and specifically referred to the Blackamoor statue and the legends surrounding its origins. He included a drawing of the statue and also made the observation that the kneeling African with the sundial was one of the most popular of the sundial garden ornaments made by the Van Ost foundry in London.

However, a bit more light was shed on the statue in an article in the *New England Weekly Journal*. On June 19, 1739, the *Journal* included the following poetic verse, which carries significant emotional impact regardless of its poor literary quality:

In vain, poor sable Son of Woe,  
Thou seekest a tender Ear:  
In vain thine Eyes with Anguish flow:  
For Pity dwells not here  
From Cannibals you fly in vain  
Lawyers less Quarters give:  
They eat you up, 'tis true, when slain;  
But these devour alive.<sup>3</sup>

The *Journal* noted that the verse constituted an inscription on a stone statue of a “blackamoor” seen in the garden of Clements Inn in London, the same statue which now stands in the Inner Temple Gardens. The Blackamoor statue, its removal to the Inns of Court garden, and the sentiment in the verses formerly found on the pedestal, neatly unite several of the themes to be discussed in this thesis. These themes include legal relations between Britain and its colonies; the economy and ethics of the transatlantic slave trade; and maritime life and law in the British Atlantic world.

---

<sup>3</sup> *NEWJ*, June 19, 1739.

These themes will be pursued through a micro-historical analysis of the legal proceedings against the mariner John Barnes in Boston's Court of Vice-Admiralty in 1736. Microhistory is a genre of history that focusses on an individual, small group, or event, and places this narrow topic within its wider historical context as a means of exploring answers to larger questions about history.<sup>4</sup> This technique has been used effectively in several recent works by historians, such as those of Keith Wrightson, James Sharpe, and John Ruston Pagan.<sup>5</sup> Wrightson defined microhistory as "a way of observing and trying to comprehend the network of relationships and the webs of meaning in which [the chosen individuals or groups] lived their lives."<sup>6</sup> Specifically, Wrightson used the microhistory genre to reveal everyday life in Newcastle-on-Tyne in 1636, the year a devastating plague swept through the town. He used information from wills written by the scrivener, Ralph Tailor, to consider the relationships between the people with whom he came into contact and details of their lives as revealed by descriptions of the worldly goods they had accumulated. James Sharpe used a case involving the alleged bewitching of a young girl, Anne Gunter, to describe life in the small town of North Moreton near Oxford in the early seventeenth

---

<sup>4</sup> Lara Putnam, "To Study the Fragments/Whole: Microhistory and the Atlantic World," *Journal of Social History* 39 (2006): 615-30. Putnam discussed the kinds of microhistory that lend themselves to Atlantic history.

<sup>5</sup> James Sharpe, *The Bewitching of Anne Gunter* (New York: Routledge, 2001); Keith Wrightson, *Ralph Tailor's Summer: A Scrivener, his City and the Plague* (New Haven: Yale University Press, 2011); John Rushton Pagan, *Anne Orthwood's Bastard: Sex and Law in Early Virginia* (Oxford: Oxford University Press, 2003). To a lesser extent, John Andrew, *The Hanging of Arthur Hodge* (Xlibris Publishing, 2000) also fits into this genre even though it has little analysis of the events and people introduced in the narrative. Lauren Benton, "This Melancholy Labyrinth: The Trial of Arthur Hodge And The Boundaries of Imperial Law," *Alabama Law Review* Vol. 64, 1(2012): 91-122.

<sup>6</sup> Wrightson, *Ralph Tailor*, xi.

century. Sharpe used information from the Court of Star Chamber proceedings, which comprised several hundred pages of documentation, as a focal point for his discussion of the circumstances comprising local community politics, and allegations both of witchcraft and fraud.<sup>7</sup> John Ruston Pagan, in his *Anne Orthwood's Bastard*, used microhistory to show how law was practised in early colonial Virginia. He concluded that although Virginia's law was fundamentally founded on that of England, it also changed based on the unique society it served. Each of these important works of microhistory take as their topic a single story – a *punctilio* in time – and expand upon the evidence in order to explain much wider historical phenomena.

Similarly, as this dissertation will demonstrate, John Barnes's story is a significant one that reveals many themes of considerable interest to historians of the British Atlantic World.<sup>8</sup> Yet the story has been given no significant attention by historians, beyond a couple of mere mentions of the case scattered throughout the literature none of which referred to official records.<sup>9</sup> The extensive summary of the Vice-Admiralty criminal trial evidence and arguments provided to the Privy Council in Barnes's application for a pardon following his conviction shows not only the ways in which Massachusetts law and practice diverged from English law in other colonial jurisdictions but also the deference colonial courts gave to the Crown in a major

---

<sup>7</sup> Sharpe, *Bewitching of Anne Gunter*, xxii-xxiii.

<sup>8</sup> The work of these historians is discussed in detail in subsequent thematic chapters.

<sup>9</sup> Alan Rogers, *Murder and the Death Penalty in Massachusetts* (Boston: University of Massachusetts Press, 2008), 23. Rogers, the only historian who has referred to the Barnes trial in any significant way, used as his source the journal of Benjamin Lynde, one of the Commissioners on the trial. The extent of his reference was one paragraph.

criminal proceeding. The core themes that are investigated in this study include life for mariners at sea, the status of slaves and slavery in Massachusetts and the functioning of the transatlantic slave trade particularly that part of the trade originating from New England; the development of admiralty law regarding criminal activity on the high seas and British criminal law transplanted in the colony and province of Massachusetts; and issues regarding centre and periphery as they pertained to Britain and New England. Before beginning this detailed investigation, however, it is necessary to acquaint the reader with the death of Captain Cupit's boy, caused by John Barnes, mariner, on the brigantine *Defiance*, during a transatlantic slave voyage in September 1735.

### **The Death of Captain Cupit's Boy**

John Barnes lived and worked among men who derived their livelihood from sea-going voyages along the American coast and across the Atlantic. The town of Newport, Rhode Island, from which the *Defiance's* voyage originated, produced rum for home consumption as well as for trade to West Africa. Captain Cupit, initially the *Defiance's* captain, was in the vanguard of sailors beginning the lucrative triangular trade from America to Africa and back via the West Indies.<sup>10</sup> John Barnes could well have lived out his life working as a sailor and merchant in the rum-for-slaves trade as did many other Rhode Island residents, but for his violent temper and the death of the slave boy, Bawow, on the *Defiance* after it came under his command. On the 12<sup>th</sup> of October, 1736, Barnes appeared before a Court of Admiralty for the hearing and determining of

---

<sup>10</sup> Jay Coughtry, *The Notorious Triangle: Rhode Island and the African Slave Trade, 1700-1807* (Philadelphia: Temple University Press, 1981). Coughtry's study of the Rhode Island trade dated the beginning of the continuous prosecution of that trade at the mid-1730s. Trading voyages had been undertaken earlier both from Rhode Island and other New England ports.

“Piracy, Robberies and Felonies Committed upon the High Sea.” The Court was convened in Boston to try Barnes for murder committed on a vessel at sea. The trial for murder before an Admiralty Court was not unusual in itself even though murder trials more often arose from piracy actions, but that was virtually the only aspect of the process that was not unusual. John Barnes ended up in the court by way of a circuitous and distinctly odd set of circumstances.<sup>11</sup>

The story began in the spring of 1735 when Captain John Cupit of Newport, Rhode Island was outfitting his brigantine, *Defiance*, in preparation for a slaving voyage to the coast of Guinea where he intended to take on a cargo of slaves to be sold in the West Indies. Captain Cupit hired Barnes as first mate for the voyage, but regretted his decision not long after his brigantine embarked on the voyage. Barnes began to exhibit a violence of temper that disturbed the crew of the *Defiance* so much that they complained to Captain Cupit, who threatened to have Barnes put in irons if he did not “moderate his behaviour.”<sup>12</sup> Captain Cupit also declared that it was only his compassion for Barnes’s wife and family that prevented him from putting Barnes ashore at the first opportunity. After the captain’s warning, Barnes restrained his violent behaviour somewhat and the *Defiance* arrived at the coast of Guinea in due course.

Captain Cupit proceeded to acquire his slave cargo but, in the process, he must have offended his African suppliers, because it appears that he and several of the crew were poisoned by the natives before the *Defiance* left the coast. Captain Cupit succumbed to the poison and died

---

<sup>11</sup> SP 36/39, fols. 236-42. A transcription of the trial summary is included in the Appendix. The summary was attached to Barnes’s application for pardon to the King.

<sup>12</sup> SP 36/39, f. 238.

at Anamabo in what is today western Ghana.<sup>13</sup> The mastery of the vessel fell to the second in command – none other than John Barnes. Without the moderating effect of Captain Cupit’s presence, Barnes’s temper again let loose with fatal consequences.

The *Defiance*’s cargo of Africans stowed below deck included a young boy of about 10 years of age named Bawow. The young man was understandably troubled by nightmares and often cried out in his sleep, disturbing the men and woman around him.<sup>14</sup> He was moved to the deck at night and put to sleep in one of the longboats used to transport slaves from the shore to the brigantine. Bawow continued to have nightmares after he was transferred to sleep on the deck, which so angered Barnes that he ordered crew members on night watch to “correct” the boy when he cried out. On the night of May 16, 1735, Barnes commanded crew members twice to correct Bawow for making noise and each time as soon as he went back to sleep the nightmares returned and he cried out in his sleep. Barnes flew into a rage, descended upon Bawow in the longboat swearing that he would “stop the boy’s mouth,” and began beating him with a rope and his bare hands.<sup>15</sup> Barnes’s fury was not assuaged by just beating Bawow. Still enraged, the captain picked the boy up by one arm and one leg, and threw him over the side of the longboat and the adjacent barricade, causing him to land on the quarterdeck six feet below.

Barnes followed the boy onto the deck and kicked him several times. Bawow, terribly bruised and beaten, raised himself up on his hands and knees and looked up at Barnes. Overcome

---

<sup>13</sup> SP 36/39, f. 239.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

with another wave of frenzy, Barnes roared, “Damn you, you dog. Do you look up at me?”<sup>16</sup> Grabbing the boy’s head with both hands, Barnes smashed his head against the deck until blood streamed out of his mouth and he lost consciousness. Barnes aimed a mighty kick at the boy’s body which propelled him about four feet along the deck. Finally, he ordered the crew to douse the boy’s body with about twenty pails of cold water, perhaps a further punishment for crying out for water in his sleep as some of the witnesses had testified, and afterwards to return him to his bed in the longboat.<sup>17</sup> Barnes made no effort to provide any kind of care or medical treatment for Bawow but left him in the longboat to die. His dead body was thrown overboard the next day.

We do not know who initially brought this information to the attention of the authorities in Boston. A story in the *New England Weekly Journal* for September 6, 1736 reported that John Barnes was accused of beating one of the sailors on the vessel, a William Marshall of Boston, to death. The *Journal* reported that,

The same Day also, John Barnes of this Town, mariner, was committed to Prison on Suspicion of murdering a young Man of this Town named William Marshall, the Circumstances whereof are said to be as follow, viz. That the said Barnes being Mate of a Vessel of which Capt. Cupit was Master, bound from Rhode Island to Guinea, and the said Cupit dying, the said Barnes became Master, soon after which he beat and abused the said Marshall in so barbarous and inhuman a Manner, that he died of his Wounds. Mr. Marshall, Father of the deceased young

---

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 242.

Man, hearing of the Arrival of the Vessel at Rhode Island and of his Son's Death, went up to take care of his Interest in the Vessel, where he was told by the Men the melancholy Circumstances of the young Man's Death. Upon this Information, Mr. Marshall had the Deposition of seven of the Sailors relating to the unhappy Affair taken before Authority, which he brought to Town last Week, and upon which the said Barnes was committed. We hear there is a man in Prison at Newport for a crime of the like Nature with that charged on Mr. Barnes, and tis thought they will both be tried by a Special Court of Vice-Admiralty.<sup>18</sup>

The *Journal* proved to be correct. Barnes's trial was held in the Special Court of Vice-Admiralty in Boston on October 15 and 16, 1736, presided over by Lieutenant Governor Spencer Phips as President of the Court.<sup>19</sup> The other officers of the court were William Shirley, Advocate General and prosecutor; William Bolland, counsel for Barnes; Benjamin Rolfe, register; and Charles Taston, marshal. Instead of a jury, the court included a commission of nine members of the General Council assisting the judge. On Friday, October 15, Barnes was tried for the death of the sailor whose name was given as William Milward of Boston in the October 19 version of the newspaper story; all other details were the same so it is clear that the reporter was describing the

---

<sup>18</sup> *NEWJ*, September 7, 1736. The *Journal* did not report the other case mentioned in the article leaving one to assume that it did not go to court or, if it did, it was of little interest to the newspaper's readers.

<sup>19</sup> SP 36/39, f. 236.

same charge.<sup>20</sup> Barnes was acquitted of the charge of murder of William Milward on Friday, October 15; he was then tried for the murder of Bawow on Saturday, October 16.

At the conclusion of the arguments, the court found John Barnes guilty of murder and sentenced him to death. The Commissioners requested the Governor to grant Barnes a reprieve or respite of sentence for twelve months to allow him time to petition King George II for a pardon if he wished to do so; Governor Belcher acceded to their request. Barnes took advantage of the respite and petitioned the king for a pardon in April 1737. A copy of the warrant for pardon is included in the National Archives of Great Britain State Papers (Domestic) for 1737, but it is undated and no other documents are attached to it. There is no indication that Barnes received the pardon and we know that he was still in prison in Boston at the beginning of September 1737. An article in the *New England Weekly Journal* at that time reported that he had broken out of jail for a second time; his first escape was in March 1737 when he was at large for two weeks before he was recaptured. There was no report that he had been recaptured in

---

<sup>20</sup> *NEWJ*, October 19, 1736. "On Friday last came on before a Special Court of Admiralty, His Excellency our Governour being President of the same, the Trial of John Barnes, Mariner, upon two Indictments exhibited against him by the King's Advocate General, for Murder upon the High Seas, the one for murder of Wm. Milward, a young Man, whose Parents are living among us, the other for the Murder of a Negro boy, a slave on board the Vessel; of the first Indictment he was not found guilty; but on the second day being tried on the Second Indictment he was found guilty, and received a Sentence of Death: But upon application to His Excellency the President etc. we hear that he has obtained a reprieve for a year that the Prisoner if he thinks fit, may apply to His Majesty for a Pardon." Normally, the governor would have presided over the trial, but Jonathan Belcher's wife had died the preceding week and her funeral had been held on the Tuesday before the trial. The newspaper report contradicted the State Papers summary which named Lieutenant Governor Spencer Phips as acting President of the Court.

September; thus John Barnes, mariner, captain, and murderer, disappeared from the historical record.

### Argument and Structure

By looking deeply into the trial of John Barnes, the events on board the *Defiance* that led up to the trial, the beliefs and actions of the men in London, Boston, and Newport involved in the voyage and the trial, and the law upon which the case hinged, it is possible to gain a clearer understanding of many topics of considerable interest to historians of the Atlantic World. This thesis is organized in a series of thematic chapters, which position various aspects of the Barnes case into the wider historical context in which it took place. Chapter Two deals with British Atlantic sailors and the conditions under which they worked.<sup>21</sup> Atlantic voyages varied greatly in purpose and place; sailors participated in fishing voyages, whaling excursions, coasting journeys or trading trips between colonies in British North America, and transatlantic voyages between Britain and the colonies. Sailing ships required skilled manpower for successful expeditions and

---

<sup>21</sup> A number of works have dealt with aspects of life on the high seas in the early modern Atlantic world. N.A.M. Rodger, *The Wooden World; An Anatomy of the Georgian Navy* (New York: Fontana Press, 1988); Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* (Cambridge: Cambridge University Press, 1987); Daniel Vickers with Vince Walsh, *Young Men and the Sea: Yankee Seafarers in the Age of Sail* (New Haven: Yale University Press, 2005); Emma Christopher, *Slave Ship Sailors and Their Captive Cargoes, 1730-1807* (Cambridge: Cambridge University Press, 2006); Marcus Rediker, *The Slave Ship: A Human History* (New York: Viking Press, 2007). Sailors' accounts of their life on board ship can be found in Basil Lubbock, ed., *Barlow's Journal Of His Life At Sea In King's Ships, East And West Indiamen & Other Merchantmen From 1659 To 1703* (London: Hurst & Blackett, Ltd., 1934) and Silas Told, *An account of the life, and dealings of God with Silas Told: ... Written by himself* (London: printed and sold by Gilbert and Plummer; and by T. Scollick, 1785) from Eighteenth Century Collections Online at <http://name.umdl.umich.edu/004814025.0001.000>.

much of this manpower tended to be young, adventurous, and transient. Sailing was a dangerous career and sailors endured perils from weather, disease, pirates or enemy ships, and shipboard accidents. The greatest hazards and the most onerous work was found on slave voyages; sailors not only had to cope with normal sailing perils, but they also had to look after and guard against revolt by the cargo of slaves both on the coast of Africa during the collection process and in the transatlantic crossing.

Relationships on board ship between sailors and officers and among the sailors themselves were complex, as might be expected for a crew that spent long periods of time in close quarters involved in difficult and frequently dangerous endeavours. This chapter uses the details from the Barnes case to reflect on these relationships both on board the ship and later at the trial where the crew testified against the captain. Captain Cupit was apparently liked and respected by the sailors under his command in stark contrast to their opinion of Barnes as an unreasonable violent man. The crew members were used to a certain degree of violence as the captain asserted his authority over them but Barnes exceeded the level that the sailors believed to be acceptable. Thereby, he lost their loyalty so that they could justify testifying against him as a superior officer at the trial. The most successful voyages were ones on which there was a balance between the social stability of accepted shipboard hierarchy – every crew member competently and willingly performing his daily tasks – and cooperation among the officers and crew for the good of the endeavour. On slaving voyages, the crew interacted with the slaves as well; crews looked after the slaves, fed them, allowed them on deck for exercise, treated their illnesses, cleaned their quarters, and, at times, brutalized them. The trial documents provided glimpses of

both caretaking and brutality between crew and slaves on the *Defiance*. In the Barnes case, the Vice-Admiralty courts attempted to redress injustices occurring on the high seas.

Chapter Three traces the development of the Admiralty Courts, firstly in England and then their spread to the overseas colonies.<sup>22</sup> Admiralty law grew out of Roman law and was therefore one of the bodies of British law based on civil law rather than common law. The courts were prerogative courts and even in the colonies, they followed more closely the procedure of civil law, which among other differences did not require a jury of peers for a trial. While Vice-Admiralty courts were established in each region in the colonies and were expected to operate under the same law and procedure in every colony, there were of necessity differences grounded in local circumstances and court officers who differed in their knowledge of the more esoteric civil law and procedure. Local conditions dictated to what extent colonial practice would diverge from practice in London. In 1736, the Boston Vice-Admiralty Court was a respected dispenser of justice in Massachusetts. The legal conflict in the Barnes case took place between the original

---

<sup>22</sup> Much of the literature regarding Vice-Admiralty law and the courts which administered it was written in the earlier twentieth century, but some recent scholarship includes Lauren Benton, "Oceans of Law: The Legal Geography of the Seventeenth-Century Seas" [http://webdoc.sub.gwdg.de/ebook/p/2005/history\\_cooperative/www.historycooperative.org/proceedings/seascapes/benton.html](http://webdoc.sub.gwdg.de/ebook/p/2005/history_cooperative/www.historycooperative.org/proceedings/seascapes/benton.html) and Kelly A. De Luca, "Beyond the sea: Extraterritorial jurisdiction and English law, c. 1575—1640" (PhD dissertation, Columbia University, 2008). Earlier material can be found in Erwin C. Surrency, "Courts in the American Colonies," *AJLH* 11 (1967): 353-360; Helen J. Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London: Longmans, 1931); Charles M. Andrews, "Introduction" in Dorothy S. Towle, *Records of the Vice-Admiralty Court of Rhode Island, 1716-1752* (Philadelphia: American Historical Association, 1937); L. Kinvin Wroth, "The Massachusetts Vice-Admiralty Court," in *Law and Authority in Colonial America*, ed. George Athan Billias (Barre, Massachusetts: Barre Publishers, 1965), 45.

law of nature which can be traced through Puritan emphasis on Biblical principles with its stress on every man's right to life, and some of the new Enlightenment ideas, especially John Locke's theory of slavery as a form of war between slave and master.<sup>23</sup> How far could Locke's argument be stretched before it became absurd? Could a ten year old slave boy suffering from nightmares pose a threat to a ship's captain and crew? The Court saw Bawow first as an innocent little boy and then as a slave.

Chapter Four will discuss slavery in the British Atlantic and the status accorded to slaves as attitudes developed from medieval Britain were passed down to early modern British societies on both sides of the Atlantic.<sup>24</sup> The focus will be on the thread of what might be termed antislavery or the innate moral revulsion many Britons felt when confronted with the inhumanity of slavery even if they did nothing substantial to end the practice. There was no unequivocal slave law in England prior to the issuing of colonial charters so colonies were free to develop their own laws without concern that those laws would be repugnant to English law and therefore in violation of colonial charters.<sup>25</sup> Colonial slave codes were formed or adopted by individual colonies depending largely on the numbers of slaves within the colony and the perceived dangers

---

<sup>23</sup> John Locke, *The Second Treatise of Government and A Letter Concerning Toleration*, ed. Tom Crawford (Mineola, NY: Dover Publications Inc., 2002).

<sup>24</sup> David A. E. Pelteret, *Slavery in Early Mediaeval England: From the Reign of Alfred Until the Twelfth Century* (Woodbridge, Suffolk: Boydell Press, 1995).

<sup>25</sup> William M. Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World" *University of Chicago Law Review* 42 (1974): 86-146. The first colonial slave code was compiled in Barbados and specifically noted in the preamble that the laws of England gave no direction to the colony regarding regulating slaves. CO 30/2 f. 16.

they posed.<sup>26</sup> Massachusetts's laws were repressive in the 1730s but not nearly as onerous as laws in the southern colonies.

The trial documents implied that Captain Cupit may have been a caring master who was concerned with the welfare of both the crew and cargo but Barnes was a violent, brutal man who “not having the fear of God before his eyes” abused his power over those under his authority.<sup>27</sup> His actions were so far beyond what his society believed tolerable that he was condemned by the crew when they decided to testify against him and by the court in finding him guilty of murder. The King and his council in London were not a part of the New England society and did not share the values which condemned Barnes's brutality such that he deserved capital punishment. By the 1730s in England, convicted felons were able to avoid capital punishment by agreeing to conditional pardons allowing them to be transported from Britain to the colonies at the recommendation of the sentencing judge. A list of offenders was provided to the king at the end of every assizes and pardons were granted perfunctorily as a means of alleviating the harshness of the Bloody Code.<sup>28</sup> Massachusetts had no similar need to grant wholesale pardons since fewer criminal sentences resulted in capital punishment. When the application for Barnes's pardon was sent to the king and his officials in London, the scales tipped more towards mercy than justice.

---

<sup>26</sup> Alan Watson, *Slave Law in the Americas* (Athens, GA: The University of Georgia Press, 1989), chapter 4; A. Leon Higgenbotham, Jr., *In The Matter of Color: Race and the American Legal Process, The Colonial Period* (New York: Oxford University Press, 1978).

<sup>27</sup> SP 36/39, f. 237.

<sup>28</sup> J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986) 431.

Chapter Five will focus on the relations between officials and bureaucrats in London and the court officers in Boston who controlled the machinery of the Vice-Admiralty Court and who were involved in the trial of John Barnes. These men were not just involved in the Vice-Admiralty Court, but held influential positions in society as well, helping to shape the attitudes and actions of those around them. They in turn were shaped by the society they led. Particularly in the small city of Boston, the commissioners who served on the court were prominent members of society and reflected the values and concerns of the wider New England culture. They were not all averse to slavery and some were slave owners; others were engaged in aspects of the slave trade or industries that supported it along with other kinds of maritime trade and commerce. Their agreement with the Advocate General's arguments against Barnes's brutality toward Bawow indicated that they viewed slaves as human beings, possibly on the same level as the sailors on board the slave ship. At the same time, they maintained a strong connection to Britain and the king which prompted them to seek the king's decision on the matter of Barnes's capital punishment.<sup>29</sup> A prosopographical study of who they were provides insight into their decisions both to find John Barnes guilty of murder and to recommend a respite of his sentence, leaving the final decision to the King.

---

<sup>29</sup> Richard L. Bushman, *King and People in Provincial Massachusetts* (Raleigh, NC: University of North Carolina Press, 1985), chapter 1. Bushman argued that the colonists' loyalty to the king was predicated on his duty to protect them and that they were less loyal to Britain and Parliament with which they had no such contractual relationship. Agents of the king were in the difficult position of trying to serve their British masters and govern a people who insisted on governing themselves.

Chapter Six concentrates on the trial itself, its crucial elements, and why it proceeded the way it did. The arguments raised and the evidence elicited were all essential components in the outcome of the judge's decision. In Boston, criminal trials in the Vice-Admiralty Court operated with a unique combination of British Admiralty civil procedure and legal principles drawn from New England social mores and Christian religious doctrines. Criminal law likewise was based on natural law and Biblical commandments. While Boston was becoming more cosmopolitan in its makeup by the 1730s, in the Barnes trial the founders' morality still outweighed newer Enlightenment thought gaining currency in Europe.

The chapter also deals with the vitally important aspect of Barnes's application for pardon and the place of pardons in the British criminal justice system in the eighteenth century. Fewer crimes in Massachusetts were capital felonies and therefore the number of trials which resulted in a sentence of capital punishment was much lower than in England. Applications for pardon were also fewer than in England where the Bloody Code was creating an increasing number of felons in need of the king's mercy. Pardons, both conditional and unconditional, had become common with British judges providing lists of recommendations for pardons to be presented to the king at the end of each assizes. Pardons so recommended were almost always granted without further information. The difference in the Barnes case was that the Court did not explicitly recommend a pardon – it was left to the king to make up his own mind with the trial summary before him. The form of the application was more like an appeal than a request for pardon. Nevertheless, the warrant for pardon was issued using the formulaic language of other

warrants from the time. Did Barnes receive the king's pardon simply for asking or was the decision to grant a pardon based on some other consideration?

Collectively, the chapters demonstrate that slavery and other forms of subordination in the 1730s were more related to issues of patriarchy, deference, and social order in New England than might have been expected in the British Atlantic at that time. The legal atmosphere in the Vice-Admiralty Court of Boston drew on the values of New England culture reflecting the personalities involved, their positions within the community, and the strength of their ties to Britain. Even though some people in Massachusetts evidenced distaste over the Atlantic slave trade, their feelings were not strong enough to create any momentum toward ending the slave trade in 1736, even if Massachusetts had had the authority to do so. The revulsion that these New Englanders felt when confronted with the inhumanity of slavery and their reliance on natural law springing from antiquity and the early Christian era informed the court's interpretation of justice in this case. At first reading the Court decision may seem anachronistic since it was well before the beginning of significant antislavery activity in England and the colonies; the actors in the drama from the sailors on the *Defiance* to the Commissioners in Boston acted in character as products of their time and place. Seldom did the death of a slave in the transatlantic trade raise questions about the propriety of the captain's or crew's violence and even less often did such violence result in a criminal charge leading to a death sentence.<sup>30</sup>

---

<sup>30</sup> The other case mentioned in the newspaper report seemed to be a similar situation and we are left wondering what became of that case. See above note 15.

The men involved in the trial may have had a sense of breaking new ground as the trial proceeded but if they did, the authorities on which they based their decision were centuries old. They more likely viewed themselves as returning to a more primitive Christianity supported by the word of God found in the Bible. William Shirley, the Advocate General, understood the Puritan values that permeated Massachusetts and used strong Biblical authorities to bolster his arguments for Barnes's guilt. William Bolan, the up and coming young defence lawyer, referred to Enlightenment ideas as authority for his defence of Barnes, but his arguments as they applied to Bawow and Barnes had an air of irrelevance; he seemed to be stretching to find a justification for Barnes's behaviour. The Commissioners, most of whom were established legal practitioners and also held important colonial offices, accepted Shirley's arguments. Perhaps they also knew that Barnes could escape execution by applying for a pardon, which Barnes would likely receive simply by applying for it. However, the Commissioners appeared to be showing more deference to the king than compassion for Barnes when they recommended a respite of sentence to allow him to apply for a pardon. They were not sympathetic enough with him to recommend him explicitly as a fit object of the King's mercy. Perhaps it is appropriate that the final outcome remains wrapped in mystery: the warrant for pardon was issued by the king but the record leaves Barnes an escapee from prison without having received confirmation of his pardon.

The world in which John Barnes's trial took place was complex and often contradictory, evolving from old patterns of trade and settlement to new ones that took people from the familiar context of European communities in which their ancestors had lived for generations to new lands requiring great efforts to build communities similar to those from which they had come and in

which they could feel at home. Europe and European ways of life still denoted civilization to colonial settlers with the American wilderness at their backs. But their lives had changed in many ways and for most, there was no going back; America was their present and their future. They developed new ways of life that, while they approximated metropole society, were particularly suited to their new surroundings.

The Massachusetts Bay colony was founded on a desire to break free from the religious restrictions of the Church of England and live in a community organized in accordance with Puritan theology and values – “a city set on a hill” – which would be an example of godliness to the world. The founders of the Massachusetts Bay colony were of the opinion that their charter gave them the authority to govern the new settlement as they saw fit as long as the laws promulgated were not repugnant to those of Britain; even then, repugnancy was given a very narrow definition.<sup>31</sup> The laws of England had limited application to the overseas colonies but the colonists, as subjects of the English king owed their allegiance to him and retained the right to appeal to the king as their sovereign.<sup>32</sup> When the founders of Massachusetts Bay colony began to

---

<sup>31</sup> “[Yale Avalon Project: Documents in Law, History, and Diplomacy](http://avalon.law.yale.edu/subject_menus/statech.asp)” [http://avalon.law.yale.edu/subject\\_menus/statech.asp](http://avalon.law.yale.edu/subject_menus/statech.asp) is a website that includes most of the texts of the colonial American charters including the several versions of the Massachusetts’ charters.

<sup>32</sup> Ken MacMillan, *Sovereignty and Possession in the English New World* (Cambridge: Cambridge University Press, 2006), 32-41. MacMillan argued that “In the specific context of the New World, this meant that the common law and its institutions had limited efficacy. While it could provide historical guidance and continuity regarding the establishment and operationalization of legal institutions, land tenure, and the rights and lives of subjects, it could not have been the dominant system that established the legal foundations of empire in America. Instead, the crown derived its authority from absolute prerogatives, which were attuned to Roman laws and the laws of nature and nations.” (48).

develop criminal law, they looked not to the definitions of felony that existed within the laws of England, but used divine law from the Bible to define what behaviours were wrong and deserving of punishment, and natural law derived from Roman and other civil law. These laws found their way into the 1648 Body of Liberties and continued to guide Massachusetts lawmakers and judges up to and beyond the 1730s.

## Chapter Two

### “On Board a Certain Brigantine”<sup>1</sup>: British Atlantic Sailors

#### Introduction

When Captain Cupit fitted out the *Defiance* for the voyage to Guinea in 1735, he was following a tradition of transatlantic trade that England had carried on for almost a century. England, on the edge of the Atlantic, was well placed to become a maritime power with trading networks stretching not only along the western shores of Europe but, by the seventeenth century, into the Baltic, around Africa to India, into the Mediterranean, and across the Atlantic to Newfoundland. English merchants had set up several trading companies including the East India Company, the Muscovy Company, the Hudson’s Bay Company, and the Levant Company. The Massachusetts Bay Company was founded in 1627/28 and received a grant of land from King Charles I on Massachusetts Bay between the Charles and Merrimac Rivers.<sup>2</sup> All of these companies were ostensibly set up as trading companies and some later became a vehicle for overseas settlement and colonization. Even then, trade remained an important part of the life of these colonies in the early modern period. New England sailors had not been as involved in the slave trade as England

---

<sup>1</sup> SP 36/36, f. 237.

<sup>2</sup> Yale Avalon Project: Documents in Law, History, and Diplomacy, [http://avalon.law.yale.edu/subject\\_menus/statech.asp](http://avalon.law.yale.edu/subject_menus/statech.asp) is a website that includes most of the texts of the colonial American charters including the several versions of the Massachusetts charters.

had, but Rhode Island was entering an era which would see it become the major American port from which the triangular trade from America originated.

As an insular nation with a strong commercial focus<sup>3</sup>, England not only needed ships, dockyards, and harbours to support its maritime endeavours, but it needed skilled workers to build the ships, outfit them for voyages, maintain the harbours and dockyards, and thousands of sailors of every rank to man the ships. On the sea as on land, seamen became skilled at various trades by contracting as apprentices to masters during which time they gained expertise and become masters themselves. In the absence of formal apprenticeship, pauper boys were sometimes indentured by their home parishes to master seamen to learn the skills of seamanship for a contracted number of years; most apprentices and indentured sailors finished their terms in their early twenties regardless of when they started their training. While seamen in the sixteenth and early seventeenth centuries did not have guilds by which standards were set, Trinity Houses at Deptford, Newcastle, and Hull acted as a kind of overseer of some maritime matters.<sup>4</sup> The mariners Captain Cupit hired to crew his ship worked in a milieu that had seen little change in the history of Atlantic sailing ships. They would have had the skills needed to sail the vessel, maintain it on the sea and in port, and care for the cargo at all stages of the voyage.

---

<sup>3</sup> Paul Langford, *A Polite and Commercial People: England, 1727-1783* (Oxford: Oxford University Press, 1992), 2-4. Langford focused on the eighteenth century and the preoccupation of the expanding middling ranks of merchants and tradesmen with commerce and consumption.

<sup>4</sup> Cheryl Fury, *Tides in the Affairs of Men: The Social History of Elizabethan Seamen, 1580–1603* (Westport, CT: Greenwood Press, 2002), 4-5. Fury's chapter on the training of seamen in the sixteenth century provides a wealth of resources regarding who the apprentices were and how they were trained to the sea.

Historians have disagreed as to the kind of existence English sailors lived while at sea. Opinions vary as to whether crews lived a hierarchical but cooperative life in which all ranks worked for the success of the voyage, or whether ordinary sailors carried on a sort of inchoate revolt against their masters and against capitalism generally.<sup>5</sup> Daniel Vickers and Vince Walsh argued that the documentary evidence can support both opinions depending on the archives consulted. Nevertheless, English and British American seamen on board ships lived a tightly structured existence often cut off from life on land for long periods of time if the voyage was a transoceanic one. Other coasting contracts involved shorter journeys and smaller crews. The ship was a close-knit community for the duration of the voyage, governed by the captain who had broad powers to safeguard the ship and crew. But merchant seamen retained their freedom to leave the ship at the end of the journey; they valued the independence to sign on with any master who had a position for them on his ship.<sup>6</sup> However, having contracted with a captain, the seaman was obliged to complete the contract to the end of the voyage whereafter he could continue on with that master or sign on with another master. The master, likewise, was obliged to retain the services of the seaman until the end of the journey and only in exceptional circumstances could he remove a seaman from the ship during the contract period. Captain Cupit's threat to remove

---

<sup>5</sup> Daniel Vickers and Vince Walsh, "Young Men and the Sea: The Sociology of Seafaring in Eighteenth-Century Salem, Massachusetts," *Social History* 24 (1999): 17-19. Walsh and Vickers concentrated on the young male sailors of Salem, Massachusetts and argued that the evidence shows that life under sail for these youths was one economic step on the occupational path taken before they settled down to jobs on land.

<sup>6</sup> Fury, *Tides in the Affairs of Men*, 85-86.

Barnes from the ship at the earliest opportunity indicated that he was an unusually disruptive influence among the crew and that he could be removed for the seriousness of his actions.

Seamen in the American colonies, as well as the West Country in Britain, tended to be young men brought up in seaside communities and used to the constant presence of ships and seamen in their daily lives. In parts of the Thirteen Colonies, maritime endeavours were common occupations at least part of the year when work on the land was scarce. Local youth gained experience in navigation and the technical skills needed in sailing from family and friends and from simply spending a good deal of time on the water. In the absence of reliably passable roads, boats of all sizes were used to move people and goods from one colony to another or from one area of a colony to another. Fishing was also a common activity which produced food for the fisherman's table as well as a saleable commodity to Europeans and colonials alike; sons followed fathers or other relatives into the business or into related supply and maintenance occupations such as boat-building, warehousemen, and merchants. All seamen in the merchant marine were subject to impressment during wartime to defend both Britain and the colonies against depredations by enemy forces. They also acted as privateers to weaken Spanish, French or Dutch shipping in the British war effort.

The merchant marine carried all manner of goods between Britain, the American colonies, and Africa in the seventeenth and eighteenth centuries.<sup>7</sup> Every port had its exportable commodities and while the transatlantic slave trade has received the greatest attention from

---

<sup>7</sup> Alan Taylor, *American Colonies: The Settling of North America* (New York: Penguin Books, 2002), 304-7.

historians, many other kinds of trade were actively pursued in this time period; for example, merchant ships carried sugar in its many forms, tobacco, indigo, rice, rum, fish, iron bars, and manufactured goods. New England colonies supplied Caribbean colonies with meat and timber; Caribbean colonies delivered sugar and sugar byproducts to Rhode Island to make rum for resale to West Africa. Newfoundland continued to ship fish to Britain and Europe, and Massachusetts supplied massive white pine logs for British ships' masts.<sup>8</sup> In return for these American commodities, Britain supplied the colonies with manufactured staples and luxury goods. Control of trade became very important to the metropolis in the late seventeenth century and resulted in Parliament issuing the Navigation Acts starting in 1651, adopting a more stringent regulatory regime against the Dutch, Spanish, and French after the Restoration, and leading to the unenforceable Molasses Act of 1733 and the infamous Sugar Act of 1764.

Historians researching the transatlantic slave trade have focused on the state of not only the slaves aboard slave ships, but the crews who manned them.<sup>9</sup> A good deal of information can be gleaned from ships' musters concerning the number of crew members, the ages of seamen, the

---

<sup>8</sup> The reservation of white pines in Massachusetts and New Hampshire by the British government for naval use was a major issue in the early eighteenth century. The value of the timber was such a temptation to New England woodsmen that they frequently stole the trees and sold them to the highest bidder or most convenient purchaser.

<sup>9</sup> Some of the most useful histories include Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, And The Hidden History Of The Revolutionary Atlantic* (Boston: Beacon Press, 2000); Marcus Rediker, *The Slave Ship : A Human History* (New York: Viking, 2007); Emma Christopher, *Slave Ship Sailors and Their Captive Cargoes, 1730-1807* (Cambridge: Cambridge University Press, 2006); Stephanie Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (Cambridge: Harvard University Press, 2007).

names of captains and the ships they commanded, and the amount of money they owed to the sailor's insurance funds. A few sailors, such as Silas Told from Bristol and Edward Barlow of Prestwich, Lancashire, were educated enough to keep a journal of their lives aboard merchant ships and the conditions under which they served. Those who were able to do so and whose descriptions of life under sail in the early eighteenth century have provided historians with a window to observe the daily life of men who were, while at sea, on the fringes of British society. British seamen in the seventeenth and eighteenth centuries were drawn from all ranks of society, black as well as white, and slave as well as free. Some took to the sea as a life-long occupation and others found marine labour a source of funds to move on to the next step on their occupational journey. For others, work on a merchant vessel was a necessary means of getting out of debt, or providing the necessities of life for wife and children or parents and siblings.

### **British Sailors and the Atlantic World**

In the American colonies, much of the population lived near the water, whether it was the Atlantic, one of the numerous bays and harbours, or a navigable river. Young men grew up from childhood with a sense of the water as a source of food, a means of transportation, or a place for leisure activities. If they lived in one of the many seaside towns or villages, they saw family members and neighbours go to sea from time to time and earn money to supplement their on land income; they, in turn, looked to the sea as a source of income when they became of an age to serve on merchant ships or fishing boats and expand the seamanship skills they learned as children. These young men served on ships with other men they knew, were related to, or knew about from friends or family. A ship's crew was often made up of men from the same town who

would have known each other and likely had been neighbours for many years.<sup>10</sup> They knew each other's families, social status, and probably even financial situation; they could trade gossip about the people back home in Newport, Boston, or Providence. Likewise, a man's reputation on shipboard would follow him both on and off the ship for good or evil.

The mariners on the *Defiance* came from a centuries-long tradition of seafaring in England and the colonies. As Europeans moved further from home ports to trade, to explore, or to conquer new lands, young men were drawn into life on board ship either by their own inclination to see the world or by the necessity to make a living. Until the Glorious Revolution in 1688 and the growth of specialized British naval forces thereafter, a seaman would likely experience both service on a warship and a merchant ship during his career, if he lived long enough and was not disabled.<sup>11</sup> Even on a merchant ship, all sailors had to be ready to defend the ship from enemies and pirates throughout the voyage. Most of the ships built for ocean voyages were equipped with some kind of firepower beyond the individual officer's muskets. Therefore, in times of war, merchant vessels could be pressed into service to defend coastal areas, transport supplies for fighting forces, or as part of naval squadrons engaging with the enemy.<sup>12</sup> The journal of Edward Barlow in the seventeenth century and the autobiography of Silas Told in the

---

<sup>10</sup> Many of the men on board the *Defiance* who testified against John Barnes were listed as being from Newport, RI, and Captain Cupit seemed to know how important Barnes's wages were to his family.

<sup>11</sup> Fury, *Tides in the Affairs of Men*, 2-4.

<sup>12</sup> Basil Lubbock, ed., *Barlow's Journal Of His Life At Sea In King's Ships, East And West Indiamen & Other Merchantmen From 1659 To 1703* (London: Hurst & Blackett, Ltd., 1934),

eighteenth century both portrayed their service in the mercantile marine and on navy ships during the course of their time at sea.<sup>13</sup>

Not all sailors chose a life on the sea, especially those who served as ordinary seamen. For some, like Silas Told, who was apprenticed to Captain Moses Lilly at the age of fourteen in 1725, it was a necessity as his family was “in low circumstances” and he was forced to make his own way in the world; these circumstances kept him at sea until he was twenty-five.<sup>14</sup> Told suffered from abuse at the hands of violent captains and suppressed his Christian lifestyle in order to fit in with the rest of the crew on board the ships that became his home for the next eleven years. He also met some good masters who cared for their men, treating them like sons. Several times he travelled from England to Africa on slaving voyages and then on to the West Indies. Told faced shipwreck, storms, and pirates and on one occasion spent four months in Boston on his way back to England. Told abandoned the seaman’s life when he got married and never went back. Later in life, he wrote a memoir about some of the events connected with his life in the merchant marine between 1725 and 1736. It appears that it was meant for private circulation but an admirer had it published several years after his death.

Edward Barlow, another sailor who wrote and illustrated his memoirs, however, chose to go to sea after having tried several other apprenticeships and found none of them were to his

---

103-105. Barlow lists the ships engaged in the Battle of Lowestoft with the Dutch Squadron in 1665 and designated which ones were merchantmen and what ordinance they carried.

<sup>13</sup> Silas Told, *An account of the life, and dealings of God with Silas Told: ... Written by himself.* (London: printed and sold by Gilbert and Plummer; and by T. Scollick, 1785) *Eighteenth Century Collections Online* at <http://name.umdl.umich.edu/004814025.0001.000>.

<sup>14</sup> Told, *An account of the life*, 58

liking. He wanted to travel and see the world, and once he saw the ships coming and going on the Thames, he knew he had found his profession. Even though he often lamented the conditions under which he lived on board ship and compared his life on shore, especially the quality of the food and drink, to that which he endured on the sea, he remained with the sailing life for forty-four years – long after his apprenticeship expired.

A young man could learn the skills needed to become a sailor in one of two ways; he could be apprenticed to a captain for a stated number of years and learn from the expertise of the crew on the ship, or he could become a servant to the captain or one of the ranking officers and look after his daily needs, learning the ways of the sea by observation and experience.

Apprentices were supposed to be at least fourteen years old before boarding a ship, although many had not reached their fourteenth birthday by the time they shipped out. Servant boys were often younger when they went to sea, attached to an officer who may have been a family friend, a relative or an acquaintance. In order to become an apprentice, the young man's family contracted with the master that their son would work and learn the "misteries" of the master's craft. They also paid a fee to the master for the apprentice's education. In exchange for the fee and the apprentice's labour, the master, in addition to training in the craft, provided shelter, food, and clothing as specified in the contract.<sup>15</sup> Local parishes sometimes sponsored young paupers to help them get started towards earning their own living.

---

<sup>15</sup> "Introduction – Apprenticeship," *Calendar of the plea and memoranda rolls of the city of London 2* (1929), pp. XXX-XLVII. URL: <http://www.british-history.ac.uk/report.aspx?compid=36671>. Accessed: 28 July 2013.

Young men or boys who wanted to go to sea and whose parents could not afford the apprenticeship fee could become a servant to an officer on a ship. In exchange for serving his master, the servant received food and clothing, and if he was so inclined, he could learn some of the skills required for sailing the ship. He would be referred to as his master's "boy". This may have been the function that Bawow, the young slave boy, served for Captain Cupit on the *Defiance* as he was referred to by the sailors as "Captain Cupit's boy" in their depositions.

While most journeymen progressed in their education to the level of master which meant that they could become a member of a guild, sailors did not have a formal guild to which they could belong. Trinity House, established under a Royal Charter given by Henry VIII in 1514, was the closest organization to a mariners' guild that existed in England; it had the right to license pilots in the River Thames and also established an almshouse for disabled sailors and for sailors' widows and orphans. Masters of ships determined when apprentices had progressed enough to become mariners themselves and to move further to the status of a second or first mate on a voyage. Sailing was a complicated matter that required knowledge of weather patterns and the manipulation of the sails to take advantage of currents and winds as well as understanding when and how to furl sails to protect the ship in stormy seas. It was thought that four years was the minimum time it would take for a boy to become an able-bodied seaman and a useful part of a crew.<sup>16</sup> As mariners moved from ship to ship and voyage to voyage, they could accept a higher or lower status at any particular time in order to obtain employment or to travel to a desired port.

---

<sup>16</sup> Daniel Vickers, Vince Walsh, *Young Men and the Sea: Yankee Seafarers in the Age of Sail* (New Haven: Yale University Press, 2005), 88.

Ship's crew other than sailors may or may not have had experience at sea. Simon Told's father, a Bristol physician who fell on hard times, shipped out on a Guineaman<sup>17</sup> to earn some quick money to support his family.<sup>18</sup> Told also continued as a sailor for three years after his apprenticeship expired in order to support himself and it was only after he married that he made the decision to change careers and to seek employment on land.<sup>19</sup> His claim that he left "the unsuitable state of life" of a sailor because it was "attended with all manner of sufferings and wickedness in the highest degree" was recorded long after the fact, was published several years after his death, and was circulated partially for the purpose of the abolition campaign.<sup>20</sup>

John Barnes was the kind of captain that Marcus Rediker argued was too often found in charge of merchant ships – power-hungry, violent, and vicious towards both the crew and the slaves under his command.<sup>21</sup> John Barnes as first mate exhibited his violent temper early on in the voyage to the Guinea coast. While the trial documents do not describe Barnes's actions towards the crew on the outward-bound journey, the crew found that "the Effects of [his] violent Temper were so Intolerable to the Ship's Company and such heavy complaints were made of him on that Account to Captain Cupit that he threatened to lay the Prisoner in irons if he did not

---

<sup>17</sup> A Guineaman was a ship that traded in slaves on the west coast or Guinea coast of Africa.

<sup>18</sup> Told, *An account of the life*, 3. Unfortunately, he became sick and died at Jamaica leaving his widow with five children to raise by herself.

<sup>19</sup> *Ibid.*, 68.

<sup>20</sup> *Ibid.*, 69.

<sup>21</sup> Marcus Rediker, *The Slave Ship: A Human History* (London: Viking Penguin, 2007), 202-6. Rediker described the life of the captain of a slaver in Chapter 5 of his book.

moderate his behaviour.”<sup>22</sup> After Captain Cupit’s death when Barnes took control of the ship his violent temper was unrestrained. According to the trial documents, William Shirley, the advocate general, described Barnes’s temper thus:

And upon his [Cupit’s] decease the Prisoner at the Barr to the great misfortune of himself and the rest of the Ship’s Company, by right of his Post Succeeded to the Command of the Vessel, whereby he was invested with a Despotic Power of Exercising his outrageous Temper without Control and it was not long before he gave a loose to it. Among other Instances of its Cruel Effects this Negro boy was a fatal one.<sup>23</sup>

The September 7, 1736 edition of the *New England Weekly Journal* gave a one line insight into the “other Instances of its Cruel Effects” by stating that Barnes beat one of the sailors “in so barbarous and inhuman a manner that he died of his wounds”.<sup>24</sup>

The account of life at sea given by Simon Told, the Bristol apprentice seaman, included the cruel treatment he received at the hands of a Captain Tucker to whom he was consigned by his master. Tucker accused Told of taking too much bread from the cask in the gunroom for the crew’s meal:

---

<sup>22</sup> SP36/39 Pt. 2, f. 238. Peter Earle argued that conflict on the ship was more often between the captain and the first mate than between the ship’s officers and the ordinary seamen. Peter Earle, *Sailors: English Merchant Seamen, 1660-1776* (London: Methuen, 1999) 161.

<sup>23</sup> SP36/39 Pt. 2, f. 239.

<sup>24</sup> *NEWJ*, September 7, 1736.

[Tucker] immediately went to the cabin, and brought out with him his large horse-whip, and exercised it about my body in so unmerciful a manner, that, not only the cloaths on my back were cut to pieces, but every sailor on board declared they could see my bones, and that very visibly; yet this act of barbarism did not give him sufficient satisfaction, for he threw me all along the deck, and jumped many times upon the pit of my stomach, in order to endanger my life; and had not the people laid hold of my two legs, and thrown me under the windlass (after the manner they threw dead cats or dogs) he would have ended his despotic cruelty in murder. Repeated instances of this behaviour were committed by Capt. Tucker to the principal part of his seamen in the course of the voyage to Bonny.<sup>25</sup>

Told also was abused by his master, Moses Lilly, and when he became ill from a “pestilential sickness” that followed a violent hurricane while they were in harbour at Kingston, Jamaica, Captain Lilly turned him out expecting he would die. A London captain saw Told lying on a dunghill and returned him to Captain Lilly, no doubt reminding him of his duty to his young apprentice.<sup>26</sup> Captain Lilly thereafter found a nurse for Told and paid for his care; he left Told to convalesce in Jamaica while he continued his voyage but not before he made arrangements for Told’s return to England on another ship – if he should happen to recover from his illness.<sup>27</sup>

---

<sup>25</sup> Told, *An account of the life*, 19-20.

<sup>26</sup> *Ibid.*, 16.

<sup>27</sup> *Ibid.*, 15-16.

Not all masters and captains were abusive and violent. The *Defiance* provided examples of two kinds of captains who commanded merchant ships in the British Atlantic in the early eighteenth century. The record does not show that Captain John Cupit was violent or abusive to his men and in fact he reacted to protect the crew against Barnes's abuse early on in the voyage. In Benjamin Lynde's journal, he was called "dearest master Cupid" which appears to be a quote from the trial testimony.<sup>28</sup> By curbing Barnes's abusive interaction with the sailors, he undermined Barnes's authority over the men but he understood that the voyage's success depended on an efficiently functioning ship and crew. There were enough dangers on the high seas for a slaving ship without adding a fearful and mutinous crew to the mix. In addition, some of the sailors were likely his neighbours or sons of his neighbours back in Newport and he would have to answer to them for any mistreatment the crew endured from Barnes. Finally, Cupit would need at least some of these men for future voyages so he would not want to jeopardize his chances of being able to recruit them or their friends later.

Silas Told met with several captains who treated him well during his career at sea. After being left behind in Jamaica by his master, Moses Lilly, to recuperate from illness and starvation, he took passage with Captain David Jones on the *Montserrat* to return to Bristol. Told described Captain Jones as "a very fatherly tender-hearted man" who had included his own son as part of his crew and of a "free and affable temper" towards the crew.<sup>29</sup> Jones made provision for Told to

---

<sup>28</sup> Benjamin Lynde, *The Diaries of Benjamin Lynde and of Benjamin Lynde, Jr.* Private printing (Cambridge: Riverside Press, 1880) 89.

<sup>29</sup> Told, *An account of the life*, 15-16.

be nursed back to health and promised him anything the ship afforded to alleviate his illness. On the way back to England, Jones sailed close to Bermuda so the sailors could see the island and satisfy their curiosity about it.<sup>30</sup> Later, Told sailed with Captain Roach of the *Scipio* and described him as “much of a seaman, a pleasant tempered gentleman, and exceedingly free and liberal with all his ship’s company.”<sup>31</sup> Told served on several merchant ships whose captains seem to have been fair and reasonable in dealing with their crews. At one point he was pressed into service on a naval man of war, the *Phoenix* under Captain Trivil Caley, who he pronounced as “the complete gentleman and Christian, and one whose conduct was guided by the fear of God”. Caley encouraged religious discipline on board and visited with the ship’s invalid sailors every day, making sure they were being well cared for, physically and spiritually. Told found that Caley’s “mildness, sapience and fortitude greatly surpassed those characters I had ever admired before in my life” and that Caley’s character was an antidote to the “hell of uncommon curses and blasphemous oaths accompanied by an habitual course of cruel and barbarous behaviour, on the part of two lieutenants” he met with on the man of war.<sup>32</sup>

Captain Thomas Phillips, commander of the *Hannibal*, in his account of a journey from England to Barbados via Guinea, opined that if a commander would not shortchange his men on their rations and would give them some free time during the day to have their little jests and songs, and give them “a good word now and then ... they will run through fire and water for

---

<sup>30</sup> Ibid., 17.

<sup>31</sup> Ibid., 26-27.

<sup>32</sup> Ibid., 64.

their commander, and do their work with the utmost satisfaction and alacrity.”<sup>33</sup> On the other hand, he recorded, “I am far from approving the morose and cynick temper of some commanders, who hate to see a poor sailor have a minute’s time of quiet, to enjoy himself, and indulge his humour with a song or an old tale, but will keep them doing out of perfect ill nature, and rather than let them be the least at ease, will put them at work to the ship and owners prejudice.” He strongly advocated treating the sailors well in order to gain their loyalty so they would work in the best interests of the captain, the ship, and its owners.

Recruitment of crews for ships, either merchantmen or naval men of war, was always problematic. While there were men ready to leave the relative safety of life on shore for the hard but exciting life of a deep sea sailor, the numbers needed were seldom enough. Some regions of Britain, namely the port cities, sent more recruits than other regions; the same was true of the American colonies.<sup>34</sup> Sailors either volunteered for the navy or were pressed into service. Volunteers came from counties close to seaports all over Britain and joined ships not only in their home areas but also at ports far from home. Rodgers argued that this probably indicated that

---

<sup>33</sup> Thomas Phillips, *A Journal of a Voyage made in the Hannibal of London, Ann. 1693, 1694 from England, to Cape Monseradoe, in Africa, And thence along the Coast of Guiney to Whidaw, the island of St. Thomas, And so forward to Barbadoes*, Walthoe, 1732, Digitized on March 4, 2010, Google eBooks, 174

<sup>34</sup> N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (Glasgow: Fontana Press, 1988), 157. Rodger’s Chapter 5 – “Manning” provides a comprehensive view of the manning of the Royal Navy ships in the mid eighteenth century – who the sailors were, where they lived, and how they were recruited. His appendices are also useful for aspects of the naval service at this time.

they were recruited by friends, relatives, or landed gentry who were already on board a particular ship which was in the process of completing its complement before going to sea.<sup>35</sup>

In the American colonies, the largest population centres in the seventeenth century were ports or sites on major rivers with some inland expansion occurring in the early eighteenth century. Early Americans were truly a maritime people, spending time on the water as well as on land for much of their lives. Before the construction of adequate roads, people and goods moved from place to place by water, both short distances within a colony and longer distances from colony to colony or between the colonies and Britain. Young boys gained familiarity with the skills needed to sail in coastal waters early on from their family and friends and from experience, not always without incident. The *New England Weekly Journal* carried local news about shipping events in every issue in the eighteenth century. As well as lists of ships entering and clearing the port of Boston, the news often consisted of reports of ships lost due to storms, poor maintenance, and running aground on shoals and rocks. Newspapers reported stories of smaller boats which foundered in the waters off the New England coast with loss of life or passengers and crews barely saved from drowning. Youths grew up aware of the dangers on the water both inshore and on the high seas. Drowning was a not uncommon fate for adults, youth, or children.<sup>36</sup>

---

<sup>35</sup> Ibid., 157.

<sup>36</sup> *NEWJ*, August 4, 1735; August 12, 1735. These are but two examples of death by drowning of an adult – a husband and father – and a young child. There are many more reports such as the four youths who set off in a canoe and were presumed drowned when they did not return. Two bodies were found after several days.

A study of the mariners of the town of Salem in the eighteenth century provided many examples of the links between crew members. In a town of a few thousand people, many crews assembled by the captains were drawn from extended family and neighbours. “It was not so much that owners and masters sought out their kin when trying to assemble crews; rather, the network of family relationships in and around Salem was so dense that they could scarcely avoid it.”<sup>37</sup> Newport, in the 1730s, had a population of about five thousand, so it is likely that the sailors on the *Defiance* from Newport would have known or known of each before the voyage commenced; some were likely to have been related by birth or by marriage. From his comments, Captain Cupit knew John Barnes’s family and their circumstances; he likely knew Barnes reputation as well since he seemed to be ready to believe the complaints the crew made against Barnes and also threatened to take the drastic step of putting him in irons to control Barnes’s violent behaviour. Captain Cupit may have chosen Barnes as a first mate reluctantly in the absence of anyone else of sufficient skill and experience to fill the post.

### **The Atlantic Voyage**

The process of readying a ship for sea took a period of several weeks or even months. The ship owners must first hire a master who would be jointly responsible with the owners for making essential repairs to the ship, outfitting the vessel for the voyage, hiring necessary crew members, loading provisions and cargo to be sold or traded, obtaining materials to maintain the ship during

---

<sup>37</sup> Vickers and Walsh, *Young Men and the Sea*, 78.

the voyage, and stowing everything safely and conveniently in its place above and below deck.<sup>38</sup> The master in the case of the *Defiance* was also the owner of the ship. He was assisted by a myriad of artisans and labourers in the town and on the docks, including “shipwrights, sailmakers, riggers, carters, and blacksmiths” as well as merchants who provided food and supplies needed by the crew for the voyage.<sup>39</sup> Some of the crew would have been hired well before the planned date of departure and would have helped to shuttle the provisions and cargo from the dock to the ship and to properly stow all the articles in their proper places on the ship. It was to the master’s advantage to hire men as soon as possible in colonial ports in order to have the best crew available. Even more so than in Britain, experienced and skilled seamen were chronically in short supply; the population was smaller from which to choose so the astute master wasted no time in securing the best men.

These men were paid separately for their pre-voyage work along with the other dock and shore workers who participated in the preliminary work; their actual wages as mariners for the journey accrued from the date of departure. The wages the mariner received for the preparatory work of outfitting the ship as well as the advance of one month’s wages paid by the ship owner served to both fund the seaman’s kit for the voyage and feed his family while he was away. The remainder of his wages was paid in cash when the voyage terminated back in the ship’s home

---

<sup>38</sup> Vickers’s chapter entitled “Sailors at Sea” details the complexity of pre-voyage preparations with the numbers of people and kinds of artisans who participated in the work of planning and readying the ship for its journey.

<sup>39</sup> *Ibid.*, 79.

port.<sup>40</sup> The enterprising sailor could supplement his wages by taking some goods along with him to sell for his own account on the voyage or to trade for more valuable goods in a foreign port that could be sold for a handsome profit at home. Younger men may not have had the financial ability to assemble this “portage” without help from other family members; fathers and uncles could, and sometimes did, help the young sailor by giving him trading goods or the money to acquire portage. If he traded wisely, he could build on his profits in succeeding voyages and begin acquiring his own fortune by buying portage on credit and paying off his debt from the profits he made.<sup>41</sup> William Milward, the sailor who Barnes beat to death, may have had an interest in the profits of the voyage; the newspaper report stated that Milward’s father went to Newport to “take care of his interest in the vessel.”<sup>42</sup> It is not clear whether Milward or his father had the interest in the voyage.

Once at sea, the daily life of sailors was more or less predictable. “Life at sea involved an irregular sequence of steady sailing and shipboard maintenance, as well as sleep and recreation, all of which were punctuated by occasional emergencies and the consequent efforts to repair damages. This work environment, though administered through a structure of authority governed in the last analysis by a captain who was master of his trade, operated on a daily basis through a

---

<sup>40</sup> If the sailor was lucky, he was not paid off before the voyage ended and left to find his way home from a foreign port; as well as losing the wages for the remainder of the voyage, the sailor had to dip into the wages he earned to pay his way home and lose the time in the return voyage when he could have been working.

<sup>41</sup> Vickers and Walsh, *Young Men and the Sea*, 83-86.

<sup>42</sup> NEWJ, September 7, 1736.

customary understanding of what had to be done.”<sup>43</sup> Seamen lived a life on board ship of daily monotonous duties interrupted at unpredictable times by heart-stopping crises of sudden storms, enemy encounters, and emergencies in unfamiliar waters. They all had to be ready, as a crew, to face and deal with each event as it occurred, acting quickly and co-operatively to save the ship and their own lives.

In the close quarters of the ship, young sailors learned not only the technical skills of maintaining and sailing a vessel, but they also learned the cultural mores of being part of a crew. “Aboard an open ocean vessel for an extended period and forced to labor among the same few men, braving the elements and an authoritarian quarterdeck, the typical sailor could not afford to engage directly in display or speech that might lead to faction and divisiveness. Circumstances compelled the common seaman both to emphasize teamwork and to categorically reject behavior that posed a threat to this solidarity.”<sup>44</sup> Sailors developed their own dialect, scarcely intelligible to one outside their sailing community. They were known for their profane speech and irreligious lives on board ship and even more so in port. However, the professional seaman had a belief system that embraced the supernatural and included explanations of natural phenomenon encountered in their daily lives.

Crews tended to be multinational, multiracial, of various religions or no religion. The culture of the ship provided an amalgam that those of different backgrounds could adopt and

---

<sup>43</sup> Vickers, *Young Men and the Sea*, 87-88.

<sup>44</sup> Brian J. Rouleau, “Dead Men Do Tell Tales: Folklore, Fraternity, and the Forecastle,” *Early American Studies* 5 (2007), 32.

become part of a neutral community in which, with time, they could feel at home. In fact, they must fit into the culture of the ship or suffer the consequences of ostracism. Young sailors were chivvied by more senior mariners as they learned the processes of the ship; they were subjected to harsh words and cuffs to encourage deference and discourage “sauciness.” Simon Told received his first lesson in deference and understanding the culture of the ship on his first day on board:

Also my unacquaintance with the various mysteries on ship board, made me very untoward in the duty I was engaged in. The first reception I met with on board, when the ship lay in King-road, was to this effect: The chief mate called for the cabin-boy, but he not being on board, he sent me to the cook to get him a plate of victuals, which I really imagined was meant for myself, and accordingly got a plate full, carried it down into the cabin, and, having a keen appetite, made a very comfortable dinner. When the chief mate had done his business, he sent for me, in order to bring his victuals: I told him, that I understood it was for myself, and that I had eat it up; upon which he knocked me down, and began cursing and damning me at a horrible rate. This language I was never acquainted with, therefore thought I should have broke my heart with grief; and having no friend, to whom I could apply for redress, I was forced to suffer all the repeated acts of barbarity that might follow, which continued for eleven years.<sup>45</sup>

---

<sup>45</sup> Told, *An account of the life*, 10-11.

Simon Told learned his lesson that day and later rose to the office of gunner before he retired from the sea to make his living in London. The culture of commonality on the *Defiance* probably made it possible, perhaps even necessary, for so many of the crew to testify against Barnes at his trial.

Sailors were notorious for “spinning yarns” about events that they had seen or heard about at sea. Younger mariners learned sea lore from these stories and became part of the culture as they participated by listening and passing the stories on with their own colourful spins.<sup>46</sup> Part of the culture of the mariner’s life was a belief in omens which was assisted by the yarns told by senior seamen in moments of leisure. Omens could signify changes in the weather; phosphorescence or St. Elmo’s fire in the rigging signaled fair weather and a circle around the moon portended rain.<sup>47</sup> Shark sightings were always a bad omen. Simon Told related how a “devil fish” followed the ship for about eighteen hundred miles during the whole time the captain was sick but disappeared and was not seen again after the captain’s death.<sup>48</sup> It is not clear what kind of sea creature this was but its appearance and the sailors’ inability to catch it portended some evil event which was fulfilled by the captain’s death. The sailors’ reputation for living an irreligious life can also be interpreted as the exchange of outward traditional religiosity for a more practical folkloric explanations of the universe in which they worked and lived – a universe

---

<sup>46</sup> Sailors did not feel constrained to tell the strict truth of events in narrating their yarns; they did not hesitate to embroider the facts to make them more interesting.

<sup>47</sup> Rouleau, “Dead Men Do Tell Tales,” 37, 45.

<sup>48</sup> Told, *An account of the life*, 31.

inhabited by many different belief and unbelief backgrounds but able to cohere around a semi-religious shared folklore expressed in story, song, and maxim.<sup>49</sup>

Sailors who absorbed the shipboard culture tended to behave like kin to each other over the long ocean voyages. They looked out at the world from a similar viewpoint, held similar values, and co-operated with each other to complete tasks that needed to be done. Of the seven depositions taken from the sailors on the *Defiance*, six told essentially the same story. The one mariner, James Nichols, who claimed not to have heard or seen anything, could indicate a man who was reluctant to become involved for any number of reasons. He was listed as a Newport resident and could have been related to or a neighbour of John Barnes; testifying against him may have been dangerous given his violent character. He may not have been confident that Barnes would be convicted at trial and therefore he would be putting himself in jeopardy when Barnes was once again at large. These men were more than likely to be young men in their early twenties and Nichols may have been even younger. The surgeon, Allan Mullins, of New London in Connecticut, although he did not observe the beating of Bawow, testified to the state of the boy's bruises when he saw him in the morning and gave some background about the boy's previous health and his status as Captain Cupit's personal slave. The remainder of the depositions provided gruesome details of the beating and two even indicate that Barnes's admitted he believed he may have caused the death of the slave; he no doubt believed that he had done nothing that would cause him to incur any more than a fine or a requirement to pay

---

<sup>49</sup> Rouleau, "Dead Men Do Tell Tales," 40.

compensation for the slave as property. He would not have expected that the crew would unite against him in testifying at a murder trial, nor would he have expected that he would be convicted of murdering the slave boy.

There were significant minority groups of men from which seamen were drawn both for the navy and for merchantmen. One group of men which provided labour for the navy was the Old Bailey prisoners such as John Pullen, John Coates, and John Slater, who were convicted of grand larceny for stealing and selling an anchor, and who were granted a respite from branding by their free consent to enter “Their Majesties Service by Sea or Land.”<sup>50</sup> Masters were reluctant to hire most kinds of criminals because of their penchant for disrupting the ship’s community and the officers’ and crew’s suspicion that would follow them throughout the voyage. However, debtor’s prisons were a good source of seamen; between 1739 and 1748, the Admiralty solicitor paid the legal expenses of 487 men so they could be released from jail to join the naval service.<sup>51</sup> It seems the advantages of life at sea with all its hardships and dangers outweighed the comparative safety of the London debtors’ prisons.

Another group of men who served on both naval ships and merchantmen were Africans, both slave and free. Some became proficient seamen and remained at sea most of their lives. There seems to have been little concern about the seaman’s race on Royal Navy ships if he was a

---

<sup>50</sup> *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.0, 08 August 2013), January 1693 (s16930116-1).

<sup>51</sup> Rodger, *The Wooden World*, 158-9.

skilled and ready worker.<sup>52</sup> The Navy protected black seamen from those who would re-enslave them in colonial ports of the Caribbean or America, making naval duty with its better working conditions and better food a preferred option for many black sailors.<sup>53</sup> Perhaps the perennial shortage of experienced sailors made captains somewhat colour-blind when they found loyal and capable crew members. Even ordinary seamen often treated their black colleagues as equals while engaged in the daily round of ship's duties, for example, subjecting them to the same rituals when crossing the equator as other novice seamen on board.<sup>54</sup> "Seamen's rolling gait, tarred trousers, and tattoos set them apart from landmen, as did sailorly skill. All those elements contributed to a specific occupational identity that transcended race"<sup>55</sup>

Black seamen were drawn from populations of both free blacks and slaves in the Atlantic world; indeed the boundary between free and slave at times was blurred by the mariner, the master, and the ship captain. Slaves were sent to work on ships by their masters at times of low demand for labour on the land; the master not only avoided feeding an unproductive slave but he also gleaned the slave's wages from the shipboard work. Other slaves were purchased by the ship's captain for his own use and stayed on the ship instead of following the remaining slaves to the auction block. Bawow may have been destined to remain with Captain Cupit as his personal

---

<sup>52</sup> Ibid., 159.

<sup>53</sup> Jeffrey Bolster, *Black Jacks: African American Seamen in the Age of Sail* (Cambridge, MA: Harvard University Press, 1997), 30-32.

<sup>54</sup> Emma Christopher, *Slave Ships, Sailors, and their Captive Cargoes, 1730-1807* (Cambridge: Cambridge University Press, 2006), xiv-xv.

<sup>55</sup> W. Jeffrey Bolster, "An Inner Diaspora: Black Sailors Making Selves" in *Through a Glass Darkly: Reflections on Personal Identity in Early America*, eds. Ronald Hoffman, Mechal Sobel, and Fredrika J. Teute (Chapell Hill: University of North Carolina Press Books, 1997), 433.

slave had the captain survived the voyage. The Royal African Company made arrangements that every one of its ships would receive a slave boy of between sixteen and twenty years of age to work on the ship. Known as “privilege slaves,” these young men did not always stay on the ship but could be given as gifts to ships’ officers or crew members. Some jumped ship in a British port and melted into the local population.<sup>56</sup> Ship captains also purchased slaves to serve with them on board.<sup>57</sup> Two of the depositions of the sailors on the *Defiance* refer to a Negro who assisted John Barnes in dousing Bawow with water after Barnes beat him. He was probably a slave acquired on the Guinea coast and put to work on the ship for the return journey to the West Indies. He may have been another slave purchased by Captain Cupit for his own use.

The slave working on the ship was introduced into a very different community in which the hierarchy was less based on skin colour than on ability and skill. He used the same skills of sailing as the white sailors and some black mariners also added to these skills the ability to land on surf-pounded beaches where there was no friendly harbour to shelter the vessel. The west coast of Africa was largely devoid of harbours so any landing had to be accomplished by the use of small landing craft, known as longboats, directly onto the beach.<sup>58</sup> These longboats were

---

<sup>56</sup> Ray Costello, *Black Salt: Seafarers of African Descent on British Ships* (Liverpool: Liverpool University Press, 2012) 10-11.

<sup>57</sup> At a later period, Olaudah Equiano served several sea captains while he was a slave. Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano*, ed. Angelo Constanzo, (Peterborough, ON: Broadview Press, 2001).

<sup>58</sup> Christopher, *Slave Ship Sailors*, 146. Canoemen were also hired on the African coast and appear to have been held in high respect by many captains and sailors.

stowed on deck ready for launching when needed. Barnes chose the *Defiance's* longboat as the place for Bawow to be out of the way after his beating; indeed, it became his deathbed.

Sporadically the courts also exhibited a degree of colour-blindness. In 1725, the courts in Bermuda tried the ship, *William*, for “having clandestinely put on shoar tobacco by negro slaves, with which she was navigated.”<sup>59</sup> Lieutenant Governor Hope reported to the Duke of Newcastle that “The Collector by my advice and direction, libell'd the sloop for being navigated contrary to law, having had but one sailor, and all the rest negro slaves.” The judges acquitted the ship, much to the chagrin of Lieutenant Governor Hope, who reminded the Duke of Newcastle that “the Laws of Trade do declare all by-laws, usages and customs in the Plantations, which are anyways contrary or repugnant to the Laws of Great Britain, null and void. It must indeed be own'd, that in one manner of acceptation, it has been the custom of these Islands to navigate their vessels with more negro's than the laws do allow of, but that is only in the same manner as pyracys and illegal trade has been the custom of these Islands.”<sup>60</sup> The defense had argued “that negroes were H.M. subjects, and that it had been the usual custom for many years past to clear out negroes as sailors.”<sup>61</sup> The judges, who were local men decided that “the sentence of the Court is that the vessel has been duly and lawfully cleared and navigated according to law and

---

<sup>59</sup> Cecil Headlam (editor) and Arthur Percival Newton (introduction), “America and West Indies: September 1725, 16-30,” Calendar of State Papers Colonial, America and West Indies, Volume 34: 1724-1725, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=72415&strquery=negro> Date accessed: 24 August 2013. It is interesting to note the defence argument that acknowledged black slaves were subjects of the king and that the judges accepted that argument.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

the usual customs of these Islands for many years past.”<sup>62</sup> The argument used in this trial concerning the status of Africans as subjects of His Majesty and therefore able to be employed as sailors is obliquely echoed in the Barnes case. Barnes was tried for murder which presupposed that the slave boy was a subject of His Majesty and therefore a person with as much right to protection of British criminal law as the defendant. Advocate General Shirley gave a peculiarly New England spin on the case and raised the bar even higher by quoting from the Mosaic Law which commanded that “whoso sheddeth man’s blood by man shall his blood be shed.”<sup>63</sup> It very likely that news of the judgment regarding the case of the *William* had made its way not only to England but also to other American colonies in the eight years preceding the Barnes trial.

Life for sailors in colonial America was much the same as sailors’ life elsewhere in the British Atlantic, but there were some differences. The numbers of potential sailors in America was smaller and they lived in a more geographically compact area along the Atlantic coast. In New England, work at sea provided employment for young men when they were not helping in the family business, be it trade or farming, or even when they were waiting to take over the family business from an aging patriarch. Going to sea meant not only trading ventures to Britain, Europe, Africa, or the Caribbean, but also included fishing trips for cod off the coast of Maine and Nova Scotia and hunting whales in the north Atlantic. New England ships and boats participated in the coasting business, moving goods from one port to another, transporting supplies from centres such as Boston to other communities along the New England coast, and

---

<sup>62</sup> Ibid.

<sup>63</sup> TNA, SP36/39 Pt. 2, f. 98.

bringing farm produce and other local goods to market in Boston. Coasters also conveyed northern goods to the southern colonies and the Caribbean, exchanging their commodities for products from those ports in demand in New England. Coasting boats tended to be smaller than blue water ships but these boats were not confined to short hauls.<sup>64</sup> The business was seasonal in nature with ships laden with local cargoes of cod, farm produce, and logs leaving New England in the late fall or early winter for Pennsylvania and the Caribbean, and returning in the spring carrying goods such as meat and grain from Pennsylvania and sugar products and salt from the Caribbean.<sup>65</sup> Depending on how fast the outbound cargo could be sold or traded for goods to be taken back to New England, these trips took between two and five months; smaller ships of about sixty tons carrying smaller cargoes could turn around faster.

Sailors in New England were more than likely to have known each other and even the families of their crew mates.<sup>66</sup> Most of the communities were no larger than a few thousand people who had lived in the same area for several generations by the early eighteenth century. They worked together, socialized with each other, worshipped in the same church if not the same congregation, intermarried, and conducted business with each other. Therefore, when a master was assembling a crew for his next shipping venture, he knew who had the skills he needed, who was available, and who would be a good fit with the rest of the crew. While not all of the crew

---

<sup>64</sup> Vickers, *Young Men and the Sea*, 72-73. Vickers's study focused on shipping at Salem, a relatively small centre, which may or may not have been illustrative of other centres along the New England coast.

<sup>65</sup> *Ibid.*, 72.

<sup>66</sup> *Ibid.*, 76.

might be recruited from the local area, a core group probably would have come from family, friends, and neighbours, and the gaps would be filled in by going further afield. The names of the crew of the *Defiance* who testified in John Barnes's trial included John Wood, Benjamin Ricketts, James Nichols, Thomas Davis, and Stephen Langworthy who were all from Newport, the home port of the ship. Peter Vroom, another deponent, did not have a home port associated with his name, and Alan Mullins, the surgeon on board, was from New London in Connecticut. John Barnes was from Boston, a veritable outsider on the voyage.<sup>67</sup>

### **Rhode Island Slave Trade**

Captain Cupit, in 1735, was in the vanguard of what became a burgeoning trade from Rhode Island in the eighteenth century.<sup>68</sup> Newport became the centre of slave trading from British North America; it developed its own triangular trade from North America to Africa and on to the West Indies. Rhode Island was settled by religious dissidents from Massachusetts in 1635 led by Roger Williams after his banishment from Massachusetts for too strongly advocating religious tolerance. The geographical area of Rhode Island was small and not particularly conducive to agriculture beyond small family farms. By the early eighteenth century, most of the land had been taken up; as families continued to grow and new sources of employment were necessary, sons looked to the sea to make a living principally in the coasting business delivering

---

<sup>67</sup> TNA, SP 36/39 Pt. 2, fols. 90-92.

<sup>68</sup> Kenneth Morgan, *Slavery and the British Empire: From Africa to America* (Oxford: Oxford University Press, 2007), 66.

homegrown products to other colonies in exchange for manufactured goods and commodities they could not obtain locally. Rhode Island vessels ranged as far as the West Indies in search of sugar and molasses for local consumption.

Not until 1725 did the incipient slave trade from Newport send three ships to the coast of Africa.<sup>69</sup> During the next decade, the largest annual number of ships that cleared Newport for the Guinea coast was six but after 1736, numbers increased greatly with some lulls in years that Britain was at war with France or Spain and Rhode Island slave traders were leery of attacks by privateers. The ships used by Newport merchants were generally smaller vessels of about one hundred tons which could be filled relatively quickly with seventy-five to one hundred and fifty slaves for the run back to the West Indies. Like all slave traders, they wished to spend as little time as possible on the African coast where disease and death were constant dangers to both slaves and slaver crews.<sup>70</sup>

Slave trading was a complex business which took some time to master; captains had to gain experience in dealing with suppliers of slaves on the African coast, learning where to obtain

---

<sup>69</sup> Jay Coughtry, *The Notorious Triangle: Rhode Island and the African Slave Trade, 1700-1807* (Philadelphia: Temple University Press, 1981), 10. Coughtry's study of Rhode Island's activity in the slave trade has a wealth of information which I have used extensively. He documented the ships leaving and returning to Newport in his Appendix. While he did not show the *Defiance* clearing out of Newport, in 1735, he documented a brig called *Tyger* under the command of John Cupitt.

<sup>70</sup> *Ibid.*, 7. See also Donnan, Elizabeth Donnan, *Documents Illustrative of the History of the Slave Trade to America, Vol. III* (Washington: Carnegie Institution of Washington, 1932), 46-48. Captain Samuel Rhodes's letter to the ship's owner, Samuel Waldo, justified the length of time he had to stay on the Guinea coast in order to complete his trading venture by comparing his sojourn there with those of a number of other ships in the mid-1730s. The average time on the coast from the records he mentioned was about eight months.

the best price for trade goods and the most desirable slaves as quickly as possible. Owners of vessels and captains planned trips to avoid the African summer and its fierce storms, and while losses happened, good planning could mitigate the dangers, both financial and physical that a ship and its crew always faced in the transatlantic trade. A group of slave captains from Newport formed a society called the Friendship Club of Newport. The Club set up a sort of insurance provision whereby captains paid 6 pence into the Club for each month of a successful voyage and were given aid from the fund in the event of an unsuccessful venture. Membership in the club prohibited a captain from “gaming, drunkenness, quarrelling and all oaths.”<sup>71</sup>

Seldom did one merchant or captain set out on his own on a slave trading venture from Newport; most voyages were joint ventures financed by a number of investors in the maritime community.<sup>72</sup> Later in the eighteenth century, some families accumulated sufficient wealth that single members were able to finance a portion of the voyages to the African coast.<sup>73</sup> The majority of the voyages were assembled by groups of merchants or mariners who contracted for shares in the profits of the trip thus spreading the risk as well as the reward among the partners.

---

<sup>71</sup> Donnan, *Documents*, n. 99, 130.

<sup>72</sup> Rachel Chernos Lin, “The Rhode Island Slave-Traders: Butchers, Bakers and Candlestick-Makers,” *Slavery and Abolition* 23 (2002): 21-38. Lin used information from *The Transatlantic Slave Trade: A Database on CD-Rom* to determine who was involved in the Rhode Island slave trade. She found that at the height of the Rhode Island slave trade in the late eighteenth century, there was a broad spectrum of the wealthier merchants and manufacturers in the colony who held shares in most slave voyages, not just the very wealthy elites. Perhaps the trade in the early years was more dominated by elites, but Lin did not provide that data – possibly because it is not available.

<sup>73</sup> *Ibid.*, 48. The D’Wolf family of Bristol was involved in the most slave trading ventures by far. Members of the family took part in every aspect of the trade from distilling rum to production of sugar in Cuba to commanding ships in the trade.

Partners were also drawn from outside Rhode Island as evidenced by the involvement of the father of William Milward, the sailor beaten to death by John Barnes. Mr. Milward was a resident of Boston; it is unclear how he came to have an interest in the venture or whether the interest was his son's interest as a sailor on the voyage.<sup>74</sup>

The Rhode Island slave trade was based on the manufacture and export of specially distilled "Guinea rum" destined for the African coast. Rhode Island Guinea rum was distinguished by its potency which was greater than the more refined Jamaican variety or the weaker New England rum. Merchants stored and shipped their product in larger casks or hogsheads than the standard sizes used by other distributors. The larger hogsheads and the stronger proof made Rhode Island rum more costly on the African coast but traders there could recoup their costs and make a profit by diluting the shipped product. African purchasers preferred the flavour of Rhode Island rum, giving it an advantage over not only other imported rum, but other spirits imported from Europe and America for sale on the Guinea coast.<sup>75</sup> Rum distillation became an established business in Newport in the seventeenth century and had developed into one of the products exported from Rhode Island by the 1720s. The number of Newport distilleries rose from two in 1720 to between ten and twenty by 1768 depending on demand.<sup>76</sup> Some distilleries operated on a continuous schedule while others only produced rum

---

<sup>74</sup> *Boston Weekly Newsletter*, September 2-9, 1736; *NEWJ*, September 7, 1736. Both newspapers carried an identical story regarding the arrest and incarceration of John Barnes and his brutal beating of William Marshall.

<sup>75</sup> Coughtry, *The Notorious Triangle*, 85-86.

<sup>76</sup> *Ibid.*, 81.

when the permanent ones could not meet the demand. Throughout the 1720s and early 1730s, Rhode Island rum distillers perfected their product and traders shipped it to West Africa as part of their cargo in the embryonic slave trade from Newport. By 1736, rum formed a major part of Rhode Island's exports and Africa was the second largest customer behind North America for the product. The success of the rum-for-slaves trade can be seen in the proliferation in slave trading voyages from Newport beginning in 1733 and the increase in annual quantities of rum shipped to Africa from 1732.<sup>77</sup> Newport rum became not only a commodity on the African coast, but like gold, it rose to the status of a currency so that slaves were valued in gallons or hogsheads of Rhode Island rum.<sup>78</sup>

In this early stage of slave trading, Rhode Island slavers sold their cargoes of slaves mostly in the West Indies at a variety of ports while some were sold in South America and some in North America in South Carolina or at their home port of Newport. Slaves sold in the West Indies – often in Barbados – provided traders with the opportunity to purchase sugar, sugar by-products, and molasses destined for the Newport distilleries. The output of rum from these distilleries chronicles the success of traders in obtaining the necessary supplies from the

---

<sup>77</sup> Ibid., 27-28, 82-83. These two tables show the correlation between the number of slaving trips out of Newport, rising from one or two in the 1720s to eight and thirteen in 1735 and 1736 respectively, and the quantity of rum exported, increasing from 20,000 gallons in 1731 to over 60,000 gallons in 1732 and over 133,000 gallons by 1736.

<sup>78</sup> Ibid., 111; Alison Jones in her article "The Rhode Island Slave Trade: A Trading Advantage in Africa" *Slavery and Abolition* 2 (1981): 227-44, argued that because of the way Rhode Island rum was valued in West Africa, traders purchased slaves at a cheaper price than traders from Britain. She acknowledged, however, that she only took into consideration the purchase price and not the cost of other factors which may have leveled the playing field somewhat.

Caribbean sugar plantations. Thus the triangular trade could continue and prosper making Newport the major North American port in the non-European trade. There is little doubt that Captain Cupit's cargo contained some of the 82,000 gallons of rum shipped out of Newport for the Guinea coast in 1735.

The charge of the murder of Bawow against John Barnes stated that the boy died as the result of the beating on May 16, 1735. The *Defiance* had left the coast of Africa apparently having made up its complement of slaves. Bawow had been on board the ship about three months by May 16 so even if he was one of the first slaves purchased, the vessel could not have arrived on the coast much after the middle of February. The ship would have cleared Newport early in January if the facts of the trial are accurate in stating that Captain Cupit hired Barnes in 1735 for the voyage to Africa.<sup>79</sup> A slaving voyage from Newport to Africa to the West Indies and back to Newport could take up to a year or more, depending on the weather, the availability of slaves on the coast, and the markets for slaves in the West Indies.<sup>80</sup> Slave ship captains tried to avoid the summer months on the Guinea coast when the heat and storms rendered life miserable and outright dangerous for American sailors. The climate of West Africa posed danger of disease for the sailors at any time of the year, but the summer rainy season was especially treacherous,

---

<sup>79</sup> SP 36/39 Pt. 2, f. 88.

<sup>80</sup> Amelia Ford, ed., "A Sea Captain To His Owner" in *New England Quarterly* 3 (1930): 136. Sometimes captains were detained for much longer on the coast. Earlier in the eighteenth century, they did not know the best places to obtain slaves or to market the goods they took with them to trade, so disposing of trade goods and obtaining a full complement of slaves could take many months.

both for the sailors and for the slaves crammed into the coastal barracoons or the holds of the ships.

The astute captain tried to arrange his voyage from Newport so as to complete his trade on the coast before the summer rains set in; it appears that Captain Cupit was successful in quitting the coast before the summer of 1735. If he had completed the African leg of his trading voyage by early May, Captain Cupit had been fortunate in finding the number of slaves he needed readily available. It was expected that three months would be the minimum length of time needed for a ship to reach its complement, and if suitable numbers and quality of slaves were scarce, it could take as much as an extra three to five months to fill the hold. The longer time on the African coast detracted from the profits of the trip as the crew and the slaves stowed on the ship had to be fed. Food which consisted of grain, beans, and rice for the most part was purchased on the Grain Coast to the north and west of the areas where most of the slaves were obtained.<sup>81</sup> If the ship's departure was delayed and more food had to be purchased on the Slave Coast, the prices for food there were higher and competition for available supplies was greater. Slaves and crew shared much the same diet of rice and beans and were subject to the same kinds of diseases that could deplete both crew and cargo.

As long as the ship lay at anchor on the coast, the captain and crew faced dangers other than disease, death, and summer storms. Slaves in sight of shore often tried to escape back to the shore, African traders expected frequent gifts or bribes before trading could commence or

---

<sup>81</sup> Coughtry, *Notorious Triangle*, 105-106.

continue, ships became targets of coastal villagers looking to raid or capture the ship and its cargo.<sup>82</sup> Captains who traded with black traders were at their mercy and could find themselves in considerable physical danger if they intentionally or unintentionally flouted local custom. Simon Told recounted how the captain of one of the ships on which he served earned the enmity of a black trader by attacking him for showing too great familiarity with one of his female slaves when the trader was on his ship. The trader, Tom Ancora, hosted Captain Roach at his home in the village and at dinner, Captain Roach tried to mend the breach with the trader. Tom poisoned the Captain's food at the dinner in revenge for the earlier attack; the captain suffered horribly in the ensuing days, always denying that he had been poisoned until it was too late to administer an antidote. He died before the ship reached Jamaica.<sup>83</sup> This account makes the report that Captain Cupit was poisoned more credible. The 1730s were early days in the Rhode Island trade and slaver captains were still building relationships and learning how to conduct trade with the African coastal traders. Their many mistakes sprang from ignorance and arrogance, but they learned from those mistakes and forged a thriving trade for over seventy years.

A merchant ship built for transporting slaves had to be differently constructed from one used for other kinds of merchandise. Regular merchantmen could be adapted to hold slaves and they often were; modifications were made to the hold as well as to the upper deck. Most ships were fitted with a hold containing space for the merchandise to be sold or traded, and supplies of food, water, and other consumables for the voyage. Some space was reserved for arms to defend

---

<sup>82</sup> Ibid., 118-125.

<sup>83</sup> Told, *An account of the life*, 26-32.

the ship against enemies, pirates, and privateers, which arms could be stationary guns or muskets, swords, knives wielded by individual sailors. Slave ships were fitted with an extra deck in the hold on which the slaves were stowed, either sitting or lying, packed closely together to maximize the numbers of slaves that could be shipped. Partitions separated males from females and children and other partitions separated slaves from crew members. On the upper deck, a partition also separated the space in which slaves were fed, washed, and examined by the ship's surgeon and the space used by the crew. Guns were placed strategically to fire into the slave areas should there be danger of an insurrection on board and sailors manned the guns constantly while the slaves were on the upper deck.

The second leg of the trading triangle known as the middle passage commenced when the ship, loaded with its cargo mostly made up of slaves along with some other African goods such as ivory or "elephants' teeth" and gold, began its voyage to the West Indies, South America, or the American colonies. Sailors' duties changed and expanded on this section of the voyage. While they were responsible for looking after the cargoes on the entire voyage, it was very different taking care of hogsheads of rum on the way to the Guinea coast from looking after a cargo of human beings between Africa and the new world. Sailors were in charge of feeding and watering the slaves and making sure they had some exercise on deck; these activities were forced on slaves who failed to participate willingly. They kept watch at least during the day over the slaves on board the ship; on some slavers, a night watch was also in place to prevent slave insurrections from beginning. Sailors on all ships cleaned the decks during voyages but on slave ships, this duty was much more onerous as the cargo itself made the ship filthy. Slaves were

removed to the main deck during the day so that their deck could be scrubbed and fumigated with vinegar and tobacco smoke, a job the sailors loathed.<sup>84</sup> While on deck, the slaves were washed, fed, and examined by the ship's surgeon for any signs of disease or injury; they were given exercise in the form of "dancing" which could mean they were allowed to perform native dances or they were forced to simply move to the sound of clanking chains.

Some historians focus on the brutality acted out on the slaves by the sailors. Rediker's argument was that violence flowed from captain to sailors to slaves, with those lower in the hierarchy practicing violence on those below them, having experienced mistreatment from those above them.<sup>85</sup> It is not clear whether he is referring to all sailors or just to those who became professional sailors and lived their lives on the fringes of society. Other historians stressed the sailors' role in the commodification of African captives during the middle passage, transforming them from human beings to salable goods, so that they could be sold as slaves in the Americas.<sup>86</sup> Occurrences of these kinds of events undoubtedly transpired, but it is ill-advised to simplify the entire trade based on examples of a certain portion of the trade. Not all sailors were professionals; some contracted themselves to a captain or a ship for short periods of time to supplement their onshore employment. Their connections to life on shore and the communities from which they came were strong; they identified more with the land than the sea, always

---

<sup>84</sup>Rediker, *Slave Ship*, 235-9. Rediker described the daily routine of the slave ship in detail. He stressed the violence perpetrated against the slaves by captain and crew but did not balance that story with the captain's need to preserve the lives of the slaves so as not to lose profits when they were sold in American markets.

<sup>85</sup> *Ibid.*, 239-244.

<sup>86</sup> Smallwood, *Saltwater Slavery*, chapter 2.

intending to return to wives and children when their stint at sea was finished. Not all were violent, vindictive brawlers awaiting opportunities to visit the oppression they endured on the next persons down the hierarchical chain. An abundance of reports of life on slave ships circulated in the late eighteenth century, many of which were written to support the activities of the abolitionists on both sides of the Atlantic.<sup>87</sup> These selected accounts of brutality to bolster the strength of their cause.

Slave ships carried a larger crew per ton than regular merchant ships because crew members had a much greater scope of duties in looking after the slaves on the transatlantic leg of the voyage. Captains, especially those who had an interest in the profits of the venture, were concerned to deliver their cargo to the West Indies in as good condition as possible and with as low a rate of mortality as they could. Rhode Island slavers did not usually employ a surgeon to look after the health of the slaves as did European slave ships; that was the captain's responsibility.<sup>88</sup> However, there is record of a doctor aboard the *Little George* out of Newport in 1730, as well as a Harvard-educated doctor on the *Santiago* in 1733, and the *Defiance* had Alan

---

<sup>87</sup> Equiano, *The Interesting Narrative*; Told, *An account of the life*; John Newton, *Thoughts upon the African slave trade* (London: Printed for J. Buckland, in Pater-Noster-Row; and J. Johnson, in St. Paul's Church-yard, 1788), Samuel J. May Anti-Slavery Collection, Ithaca, New York: Cornell University Library, , <http://ebooks.library.cornell.edu/cgi/t/text/text-idx?c=mayantislavery;idno=21874801>. This is just a sample of the writings that appeared and were circulated for the abolition cause.

<sup>88</sup> Coughtry, *The Notorious Triangle*, 146-7.

Mullins, surgeon, on board in 1735.<sup>89</sup> Smallpox, dysentery or “the bloody flux,” and fevers were common among the slaves and the crew alike and caused much of the mortality which plagued the slave trade throughout its existence. Medical practices in the eighteenth century were crude at best and at worst served to hasten death rather than to prolong life.

Slaver captains knew the danger of lingering too long on the West African coast where disease could carry off the majority of a crew not immune to the new fevers they met with there. A popular jingle among sailors was, “Beware and take care of the Bight of Benin. There’s one comes out for forty goes in.” Not only did the seamen not know how to treat the various fevers and gastro-intestinal diseases they contracted, they did not understand whence they arose. Malaria was not connected with the bites of the clouds of mosquitoes they encountered on the coast, nor did they associate the bloody flux with dirty water and contaminated food. They did understand the importance of keeping the ship clean but understanding did not always lead to action. Often contagion was thought to arise from bad air, so the enclosed portions of ship containing those suffering from an epidemic would be fumigated or scrubbed with vinegar and water. One of the few effective measures taken by captains or doctors on board was to quarantine sick slaves and crew from those who were well.

The slave trade, in comparison to other seaborne trade and occupations, claimed the lives of sailors at an alarming rate. Peter Earle calculated that “an astonishing one in four or five of

---

<sup>89</sup> Donnan, *Documents Illustrative of the Slave Trade*, 119, mentioned in Coughtry, n.6, 316. Mullins was not directed to provide medical care to Bawow at any time after his beating which may have indicated that Barnes was in charge of who received care and who did not.

those who crewed slave ships” died, or were killed or drowned. He agreed with John Newton and Thomas Clarkson who said in the late eighteenth century “the slave trade, far from being a nursery for seamen as its supporters claimed, was in fact their grave.”<sup>90</sup> Sailors died from diseases more frequently on the West African coast and even more frequently if they sailed up the rivers on trading ventures; malaria was always a danger when they attempted to go ashore. On the high seas, they contracted dysentery, typhus, and scurvy, and in the West Indies, yellow fever lurked to carry off the unseasoned sailor. Sailors also were killed by falling from the rigging during storms, falling into the sea and drowning since many sailors could not swim, sustaining wounds during engagements against enemy ships and pirates, and meeting with accidental death while intoxicated.

While ship captains and surgeons could diagnose diseases and wounds fairly accurately, treatment of wounds was often more successful than treatment of disease. Removal of a bullet, setting a broken arm or leg, even amputation of a limb could be performed often without killing the patient. But recovery from disease was more problematic. Because doctors did not know the cause of many diseases, their methods of treatment relied much on bleeding, especially in the hot tropics. Some seamen self-diagnosed and then treated themselves, with some interesting results. Simon Told undertook to cure himself of debilitating rheumatism by drinking spring water until he had sweated it out. Apparently his treatment which consisted of drinking copious amounts of water, inducing sweating, and being rubbed dry with warm cloths was effective and he claimed

---

<sup>90</sup> Peter Earle, *Sailors: English Merchant Seamen, 1660-1776* (London: Methuen, 1999), 130.

to have been cured.<sup>91</sup> Sailors were also wounded as a result of disciplinary action by captains and mates; younger men suffered a disproportionately higher rate of beatings than more seasoned sailors, partially because they were smaller and easier to beat, or they were lower down the crew hierarchy. Once again, Simon Told described a beating he received at the hands of the brutal Captain Tucker in his first voyage with him; Tucker almost beat him to death for allegedly taking too much bread from the stores for the men's meal. However, when the ship disembarked the slaves at Jamaica and began the return trip to Bristol, Tucker, whose violence was not abated against the other crew members, treated Told with less severity than he had on the outbound journey.<sup>92</sup>

The possibility of slave revolts was an ever-present danger on slave ships and one which officers and crew feared more than disease. Revolts most often took place when the slave ship was within sight of shore and when a number of the crew was off the ship for various reasons. Captain George Scott, commanding the *Little George*, a sloop from Rhode Island, experienced a slave insurrection shortly after leaving the Guinea coast in June 1730. The slaves slipped their shackles and thirty-five men escaped to over-run the ship at four o'clock in the morning. They killed the three men on watch and threw their bodies overboard; the captain, three remaining crewmen, and a boy were left to try to suppress the revolt. The crew was confined to the cabin for the next nine days as the slaves sailed back to the coast and were helped to disembark by the Africans on shore. The remaining crew members escaped in the longboat to a nearby British

---

<sup>91</sup> Told, *An account of the life*, 54-55.

<sup>92</sup> *Ibid.*, 20-21, 24.

sloop where they were fed and revived.<sup>93</sup> Such slave insurrections did not go unobserved in the American colonies; a notice in the *New England Weekly Newsletter* in April 1731, reported the incident and added that the three crew members died subsequently leaving only Captain Scott and the boy alive from the crew of eight. It also stated that the slaves once onshore were not freed but were re-enslaved “by those of another nation.”<sup>94</sup>

Revolts on Rhode Island slavers were not common occurrences but New Englanders did know about them via newspaper reports, at least, and probably by way of stories told by returning sailors. Coughtry listed only two shipboard revolts in the 1730s for slavers out of Newport. Joshua Coffin in 1860 included a mention of an insurrection on a New Hampshire slave ship: “In 1732, Capt. John Major, of Portsmouth, N. H., was murdered, with all his crew, and the schooner and cargo seized by the slaves.”<sup>95</sup> There are also reports of unsuccessful attempts by slaves to take over ships.<sup>96</sup> The defense counsel for John Barnes used the universal fear of slave insurrection to argue that the punishment he meted out to Bawow for making noise was fair and reasonable. He stated that on some occasions slaves would make a clamor in order

---

<sup>93</sup> Donnan, *Documents Illustrative of the Slave Trade*, 118-121.

<sup>94</sup> *NEWJ*, April 26, 1731.

<sup>95</sup> Joshua Coffin, *An account of some of the principal slave insurrections, and others, which have occurred, or been attempted, in the United States and elsewhere, during the last two centuries. With various remarks. Collected from various sources* (New York: American Anti-Slavery Society, 1860), 14; *NEWJ*, September 4, 1732, spelling of the captain’s name was corrected from Moor to Major in *NEWJ*, September 11, 1732. Admittedly, this pamphlet was written to expose the evils of slave-holding and urge Americans to abolish slavery but the reports of insurrections he included can be verified from other sources.

<sup>96</sup> Told, *An account of the life*, 27-8. This event happened when the captain was ill and the crew was at a disadvantage thereby.

to mask the noise of other slaves removing their shackles. The court was not swayed by such a specious argument considering that Bawow was so young and the noise he made was obviously more annoying to Barnes than dangerous to the safety of the ship. It is also important to remember that his argument was more than likely weakened by the evidence of Barnes's brutality about which the court had heard the previous day when he was on trial for the murder of William Milward, the sailor who had died after being beaten by Barnes.

The record of the *Defiance's* voyage did not include mention of its destination in the West Indies but it can be inferred from trial argument that the ship discharged its slaves at one or all of Antigua, St. Christophers, or Surrinam. The defence counsel argued that had the trial taken place as it should have in one of these venues, Barnes would not have faced the death penalty. The record also did not indicate the number of slaves transported from Africa to the West Indies, however, the crew was made up of at least nine individuals that were named and there may have been one black sailor as well, since two of the witnesses made mention in their depositions of a black who assisted in throwing buckets of water on Bawow after he was beaten by Barnes.<sup>97</sup> Larger crews were needed on ships that could carry greater cargoes of slaves. Not only was the crew responsible for gathering, stowing, and looking after the slaves on the voyage, but they were also needed to prepare the slaves for market once the ship reached the West Indies or the Americas. Slaves were cleaned up, given better food allowances for several days, and efforts

---

<sup>97</sup> SP 36/39, fols. 241-2.

were made to hide any injuries or defects so that each slave could be sold for the best price available.

A number of factors increased the prices paid for Rhode Island slaves not the least of which was the smaller numbers of slaves carried by the smaller ships used by these slavers. The *Defiance*, as was the case with most Rhode Island ships, probably carried between seventy-five and one hundred and fifty slaves, a number the factors or middlemen at the ports found easier to sell to local plantation owners than the larger cargoes that most European slavers carried.<sup>98</sup>

Because the shipments were smaller, the planters assumed slaves were scarce and therefore were prepared to pay higher prices for individual slaves; a larger shipment could not command the prices that these smaller cargoes did. Factors acted as agents for the ship captains and received a commission for the slaves sold, sometimes sweetening the pot by guaranteeing the planters' bills of exchange in order to secure the right to sell all or part of a ship's cargo. Depending on the time of year and the local demand for newly imported slaves, captains may have to visit several ports in order to dispose of the slaves they had shipped. Once again, time was an important factor in profits. Newly imported slaves experienced a process of seasoning in which some died; the faster the cargo could be sold, the smaller the risk of losing slaves to the new world port diseases.

After the captain had disposed of his cargo of slaves, he then had to acquire a new cargo of goods to return to Rhode Island. The rum men from Newport concentrated on loading their ships with molasses to take back to the distilleries awaiting the raw materials for a new batch of

---

<sup>98</sup> Coughtry, *Notorious Triangle*, 191.

rum destined not only for the Guinea trade but for local consumption. While the Africans preferred the more concentrated rum produced by Rhode Island distilleries, American colonists found lower proof rum from the West Indies more their taste. Captains therefore brought rum and sugar from the West Indies, and picked up other commodities in demand from southern colonies, including rice and tobacco, to sell in New England.<sup>99</sup> Not all the profits from the sale of slaves were used in purchasing commodities for the New England market; some captains undertook the dangerous practice of transporting profits in specie of silver and gold. It was necessary to camouflage the cargo so as not to attract the attention of pirates or other enemies. Not all ships were returned to the home port; sometimes captains sold their ships as well as the slave cargo in the West Indies, leaving the crew to find its way home to New England as best it could, usually by signing onto another Rhode Island ship or taking passage on one headed for New England. Crew members could also be discharged in the West Indies after the slaves were sold and their services were no longer needed on the final leg of the voyage. Thus would end a long and potentially dangerous voyage for captain and crew who were no doubt happy to be reunited with family and friends in New England.

### **Conclusion**

Young New England sailors seldom made more than three or four voyages on slave ships to the African coast. While some looked to make a career of sailing, they would only do so if they had some chance of rising beyond the status of a mariner. If they did stay at sea, they worked on a

---

<sup>99</sup> Ibid., 197.

variety of vessels, including whaling vessels, fishing boats, coasting ships, and between voyages, other harbour and waterfront jobs. Many left the sea and took up employment on land, and the lucky few were able to use the profits they made from astute trading for themselves on slaving voyages to set themselves up as merchants in their own right. The most unlucky were those who succumbed to tropical diseases or died by accident on board the ship or in a distant port. Many are the reports in early eighteenth century newspapers of sailors accidentally falling into the water and drowning; there are reports of young sailors trying to retrieve articles that fell into the water and being drowned when they in turn fell in. Shipwrecks also accounted for sailors' deaths; storms at sea were an ever-present danger and unfamiliar waters presented risks to ship and crew. The *Defiance* apparently avoided many of the dangers that life on the Atlantic presented for American crews but it was visited by the disaster of Captain Cupit's death, the death of William Milward, the murder of Bawow, and the conviction for murder of John Barnes. There were likely deaths of other slaves which were not recorded in the extant documents and there is no record of disease or injury that may have occurred aboard the ship during the voyage. For the owners and joint venturers in this one enterprise, the voyage was more than likely successful.

## Chapter Three

### “Civil Law, the Rule in the Present Case”<sup>1</sup>: Law, Legislation and Courts in the British Atlantic

#### Introduction

John Barnes was tried before “a Court of Admiralty for the Hearing and Determining of Piracies, Robberies, and Felonies committed on the high seas,” the criminal division of the Boston Vice-Admiralty Court. When William Shirley argued that if John Barnes had been tried in the West Indies for the death of Bawow, he would have been subject to the same laws by which he was tried in Boston, he was technically right because Admiralty law was the law of England as it applied to the high seas.<sup>2</sup> But in practice each of the colonies had adapted its Admiralty law to local circumstances to some extent. In London, criminal cases within Admiralty purview were tried in the Old Bailey under essentially the same process as Court of King’s Bench criminal trials before judge and jury in accordance with Magna Carta. In the colonies, Vice-Admiralty Courts followed the older Roman law procedure, in which decisions were made by judge alone.

“The Common Law of England is the Common Law of the Plantations, and all Statutes in affirmance of the Common Law passed in England antecedent to the settlement of any Colony

---

<sup>1</sup> SP 36/39, f. 243.

<sup>2</sup> Lionel H. Laing, “Historic Origins of Admiralty Jurisdiction in England,” *Michigan Law Review* 45 (1946): 163-82.

are in force in that Colony unlesse there is some private Act to the contrary, tho' no Statutes made since those settlements are there in force unlesse the Colonies are particularly mention'd."<sup>3</sup>

This statement by Richard West, counsel to the Council for Trade and Plantations, formed part of a report on questions regarding the jurisdiction of colonial governors over piracy and goods condemned from pirate ships. His statement concerning the place of the common law in the English colonies is breathtaking in its sweeping generality. But just how much of the common law were the colonies prepared to accept and enforce in a new world and under quite different circumstances from those they had experienced in England? While some colonies were prepared to institute English law and procedure, others such as the Puritan colonies were not about to voluntarily submit to a legal system that they had tried to reform unsuccessfully in England. They had the opportunity to remake their community into a utopia that did not include the corruption and oppression they endured in England; they aspired to forge a community that took only the best aspects of what they had left behind and replaced the worst with godly laws and institutions.

For all the resistance put up by the Puritan colonies to maintain their distance from England in the seventeenth and eighteenth centuries, they were reminded often that they were a part of a wider empire and that their duty to England did not stop at the high tide mark of the sea

---

<sup>3</sup> Richard West to the Council of Trade and Plantations. Report upon the Admiralty Jurisdiction and Piracies in the Plantations. Cecil Headlam, ed., "America and West Indies: June 1720," Calendar of State Papers Colonial, America and West Indies, Volume 32: 1720-1721, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=74101&strquery=&quot;commonlaw&quot;>.

shore. The presence of the governor and his retinue was one reminder and another was the Vice-Admiralty court operating under the prerogative power of the king. Even the Charter which established the colony and protected it from European predators such as France and Spain was a link in the chain that bound New England to the homeland.<sup>4</sup> As the American colonies increased in population and prospered, and as England found itself reaping the rewards of the overseas empire, the bonds tightened. The navigation and trade acts of the late seventeenth century formed more links in the imperial chain that was only as strong as the king's ability to enforce the provisions of the legislation. Enforcement required courts upon which the king could rely and which did not have a loyalty divided between the interests of the king and those of the colonists; thus the acknowledgement of the jurisdiction and formal establishment of Vice-Admiralty courts in the late seventeenth century in Massachusetts.

Law in England had many different origins and once in England it mutated as occasion required and society changed. Conquerors brought their laws, customs, and procedures with them and either imposed them on the native populations or adapted their laws to fit the new society in which they found themselves. Romans, Danes, and Normans alike imported their customs into England adding to the patchwork of property law, canon or ecclesiastical law, estate law, trade and commerce law, criminal law, and international law. In the largely rural agricultural society of medieval England, land was of paramount importance as a measure of wealth and power, so property law based on custom and precedent became what the English

---

<sup>4</sup> Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (New York: Palgrave MacMillan), ch. 1.

viewed as one of their defining national characteristics. Property law primarily was categorized as common law and disputes concerning property were adjudicated and administered by the local manorial courts in early medieval times and later by the county courts. These courts jealously guarded their jurisdiction even as the administration of law became increasingly centralized under the Tudor and Stuart monarchies. It was inevitable that common law courts and the monarch's prerogative courts would come into conflict. The admiralty court system, which by this time included the High Court of Admiralty in London and a number of Vice-Admiralty courts in the coastal regions, was a good example of the ongoing struggle for power.

Admiralty courts in England had their beginnings in the age-old conflict between England and France in the fourteenth century. Unregulated seas and an increase in maritime trade provided the impetus among all sea-faring nations which desired to take advantage of opportunities to make quick profits from piracy. When one nation's merchants suffered depredations, its marine attempted to right the wrong by privateering or outright piracy. The masters of privateers were not always careful to restrict their actions against pirate ships or even ships of those nations that had plundered its merchant marine.<sup>5</sup> All shipping was at risk and rifts developed between nations who were formerly friends and allies. England needed assistance from its allies in the Mediterranean in the ongoing struggles against France, leading Edward III to recognize the necessity of dealing effectively with English pirates and privateers. When he

---

<sup>5</sup> Helen J. Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London: Longmans, 1931), 4.

was unable to use legal action in existing English courts to discourage English piracy against his allies and he was forced to pay reparations out of his own treasury, further steps had to be taken.

During Edward III's reign, the Lord High Admiral was already responsible for the royal navy, but sometime between 1340 and 1360, Edward expanded the role of the admiral to adjudicate claims for piracy as well as all other disputes on the coasts and the high seas. The admiral was charged with setting up courts to protect the coasts and shipping within the seas controlled by England, which, after the Battle of Sluys when the English destroyed the French fleet, was expanded considerably. The admiral was not only given authority to set up courts but he could appoint deputies to act in his place if necessary; the effectiveness of the new court was thus increased.<sup>6</sup> This court not only had responsibility for matters on the coasts and the high seas, but it also dealt with marine causes of action on the tidal rivers and creeks below the first bridges, geographical areas that had been formerly within the purview of the manorial and county courts. The scene was set for jurisdictional conflict that would last for the next five centuries.

### **Formation of the British Admiralty Courts**

In England, the High Court of Admiralty, a court primarily concerned with trade and commerce, initially grew out of the need to regulate international trade issues that the common law could not handle efficiently and to deal with piracy, both foreign and domestic. Maritime law was unique in that it developed as an international body of custom used by mariners in seas not under the

---

<sup>6</sup> Ibid., 4.

control of any king or chieftain. Northern European custom evolved into law from the time of the northern European invasions into the Roman Empire.<sup>7</sup> Conquerors frequently left the laws of subjugated peoples in place so that the local economies would not be disrupted and they could more easily collect fees and tariffs from the indigenous populations. Thus merchants trading internationally became familiar with the laws of the ports into which they brought their goods and over time the body of customary law grew to incorporate both positive law and procedure from the many trading areas merchants frequented. A certain uniformity of law and custom developed within the merchant community that was understood and followed throughout Europe and later was extended to the European colonies in the Americas and the West Indies; Captain Cupit would have been well aware of the fundamentals of international law. Local variations existed but overall a common practice was in place that helped to keep commercial costs as low as possible. Then as now, markets thrived on certainty.

As time passed, the *lex maritima* was codified in various collections; the collection known as the Laws of Rhodes was probably the first codification in Mediterranean Europe and it formed the template for many of the later collections of international laws of the sea. The most important codification for England was that known as the Laws of Oleron which dated from about the thirteenth century with several later amended editions. These laws were reputed to have been compiled and written by Eleanor of Aquitaine after she returned from the Crusades;

---

<sup>7</sup> Steven L. Snell, *Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction* (Durham, North Carolina: Carolina Academic Press, 2007), 56-59, 66-69.

she was impressed by the codified laws of the sea she had observed in the Levant and instituted a similar code in France. Her son, Richard I, on his return from the Crusades, purportedly brought a copy of the laws he received from his mother to England and published them there. Whether this is simply a legend or a version of the truth, the laws appeared in England originally written in French and translated into English in the mid-sixteenth century. Other codes which contributed to the *lex maritima* were the Laws or Waterrecht of Wisby and the Laws of the Hanseatic Towns. These compilations were eventually included in the *Black Book of the Admiralty*, the highest authority on admiralty matters and the instruction manual for the Lord High Admiral. The Laws of Oleron with comments on the other codes appeared in *The Laws, ordinances, and institutions of the Admiralty of Great Britain, civil and military*, published in 1746 in London and dedicated to the Duke of Bedford, the First Lord of the Admiralty. This publication was meant as a manual “for the use of the officers of the navy, masters of ships, mariners, merchants, insurers, and the trading part of the nation.”<sup>8</sup>

Early on both admiralty and common law courts shared authority over some of the same subject matter; the Admiralty Court, answering only to the king, sought to expand its influence by encroaching on the common law jurisdiction with predictable consequences. The common law courts, restricted as they were within the geographical boundaries of England, jealously

---

<sup>8</sup> Great Britain, *The Laws, ordinances, and institutions of the Admiralty of Great Britain, civil and military* (London: A. Miller, 1746).

guarded their territory against all comers.<sup>9</sup> They complained vigorously when the Admiralty courts attempted to claim jurisdiction over matters within the geographical boundaries of England. King Richard II cited “great and common clamour and complaint” as reason for promulgating legislation during his reign which restricted the jurisdiction of the Admiralty Court to the high seas:

[F]orasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice to our lord the King, and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people; it is accorded and assented, That the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, as it has been used in the time of the noble prince King Edward, grandfather of our lord the King that now is.<sup>10</sup>

However, King Henry VIII allowed an expansion of the Admiralty jurisdiction and specifically passed legislation against piracy that gave criminal jurisdiction to the Admiralty for “traytors,

---

<sup>9</sup> Kelly A. De Luca, “Beyond the sea: Extraterritorial jurisdiction and English law, c. 1575—1640” (PhD dissertation, Columbia University, 2008), 32-33. De Luca reviewed the jurisdiction of the common law in England, showing that the commissions of the common law judges were for specific counties and juries had to be from the county in which the action arose in order to be able to inform the judge as to local conditions.

<sup>10</sup> 13 Ric. 2, c. 5 as quoted in Laing, “Historic Origins of Admiralty Jurisdiction,” 170.

pirates, thieves, robbers, murderers and confederates upon the sea” but waived the civil law requirements that conviction could only result from a confession from the accused or from eyewitness accounts by disinterested parties; criminal cases were to be judged using the same kind of evidence as that which could be adduced in common law courts. He passed legislation entitled “An Act concerning Pirates and Robbers of the Sea” to remedy the constraints caused by the civil law:

WHERE Pirates, Thieves, Robbers, and Murderers upon the Sea, many Times escape unpunished, because the Trial of their Offences hath heretofore been ordered before the Admiral, or his Lieutenant, or Commissary after the Course of the Civil Laws, the Nature whereof is, that before any Judgment of Death can be given against the Offenders, either they must plainly confess their Offence (which they will never do without Torture or Pains), or else their Offences be so plainly and directly proved by Witnesses indifferent, such as saw their Offences committed, which cannot be gotten but by chance at few Times, because such Offenders commit their Offences upon the Sea, and at many Times murder and kill such Persons being in the Ship or Boat where they commit their Offences, which should bear witness against them in that Behalf; and also such as should bear witness be commonly Mariners and Shipmen, which for the most Part cannot be gotten, nor had always ready to testify such Offences, because of their often Voyages and Passages in the Seas, without long tarrying and Protraction of Time, and great Costs and Charges, as well of the King's Highness as such as would

pursue such Offenders: For Reformation whereof, be it enacted by Authority of this present Parliament, That all such offences done in or upon the Sea, or in any other Haven, River or Creek, where the Admiral or Admirals pretend to have Jurisdiction, shall be inquired, tried, heard, and determined in such Shires and Places in this realm as shall be limited by the King's Commission to be directed for the same, in like Form and Condition as if such Offences had been done upon the Land...; and such as shall be convict of any such Offence by Verdict, Confession, or Process, by Authority of any such Commission shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been convict of any Felonies or Murders done upon the Lands.<sup>11</sup>

Thus King Henry delivered a compromise between English criminal procedures based on Magna Charta provisions and European civil law process. The Boston Vice-Admiralty Court which tried Barnes in 1736 was subject to the most of the same legislative provisions except for the requirement of a jury and the number and status of the commissioners.

However, the Henrician legislation was not the last word on the subject, because the conflict over jurisdiction continued until the common law courts effectively gained the upper hand after the Restoration, and the Admiralty was left with a much circumscribed jurisdiction.

---

<sup>11</sup> John Raithby. *The statutes relating to the admiralty, Navy, shipping, and navigation of the United Kingdom, from 9 Hen. III to 3 Geo. IV inclusive. [1225-1822] With notes, referring in each case to the subsequent statutes, and to the decisions in the Courts of Admiralty, Common Law, and Equity, in England, and to the Scotch law. Collected and arranged, under the authority of the Lords Commissioners of the Admiralty* (1823).

Sir Edward Coke, the renowned jurist of the seventeenth century, championed the common law against the civil law in such subject areas as the jurisdiction of Admiralty Courts. His *Fourth Part of the Institutes of the Lawes of England* dealt with the Admiralty's objections to the common law courts' curtailment of its jurisdiction to matters arising only on the high seas. He used the strict words of the Ricardian and Henrician legislation to deny admiralty authority over any matter other than "the death of any man and of mayhem ... done in great ships being and hovering in the maine streame onely beneath the points of the same rivers nigh to the sea, and no other place of the same rivers, nor in other causes, but in those two onely."<sup>12</sup> He gave to the common law courts jurisdiction over all causes on land including contracts and actions arising in any foreign land. Coke believed that the only cases which should come under the jurisdiction of the Admiralty Court were those which could not be dealt with in the common law courts. Sir Richard Zouch's *Jurisdiction of the Admiralty of England Asserted*, published posthumously in 1663, reviewed the historical antecedents of the European law of the seas and made nine assertions regarding these laws which he then discussed at length.

1. That in all places where Navigation and Trade by Sea have been in Use and Esteem, and particularly in *England*, Special Laws have been provided, for regulating the same.

---

<sup>12</sup> Some historians believe that Coke erred in translating the Latin "ponts" as "points" instead of "bridges" which placed the boundaries of admiralty jurisdiction at the seaward mouth of the rivers, far downstream from most bridges. Thus the jurisdiction of the Admiralty Court was further curtailed. See Matthew P. Harrington, "The Legacy of the Colonial Vice-Admiralty Courts" (Part I), *Journal of Maritime Law & Commerce* 26 (1995), 587, n. 23.

2. That in all places where Laws have been provided for businesses concerning the Sea, as also in *England*, special Judges have been appointed, to determine differences, and to redresse offences concerning the same.
3. That in all places where special Judges have been appointed, for Sea affairs, as also in *England*, certain Causes, *viz.* all such as have relation to Navigation, and Negotiation by Sea, have been held proper for their Conusance.<sup>13</sup>
4. That the Jurisdiction of the Lord High Admiral of *England*, as it is granted by the King, and usually exercised in the Court of Admiralty, may consist with the Laws and Statutes of the Realm.
5. That the Lord Admiral of *England* may hold Conusance of Contracts, and Writings made at Land, touching businesses of Navigation, and Trade by Sea.
6. That the Admiral of *England* may hold Conusance of things done in Ports, and Navigable Rivers, as touching damage done to Persons, Ships, and Goods, Annoyances of free Passage, and unlawfull Fishing.
7. That the Lord Admiral of England may hold Pleas of Contracts, and other things done beyond the Sea, relating to Navigation, and Trade by Sea.
8. That the Courts and Judges of the Common-Law do intermeddle with, and interrupt the Court of Admiralty in Causes properly belonging to that Court.

---

<sup>13</sup> Cognizance.

9. That the Tryal of Causes concerning Navigation, and Trade, in the Court of Admiralty, is more commodious for the Kingdome, and the Subjects thereof, than in the Courts of Common-Law.<sup>14</sup>

The most telling point Zouch made was assertion number eight, “That the Courts and Judges of the Common-Law do intermeddle with, and interrupt the Court of Admiralty in Causes properly belonging to that Court.” Relations also became strained for financial and political reasons between common law courts which functioned within the English counties and the monarch’s prerogative courts which had specialized areas of jurisdiction and operated under different procedural regimes. In early Stuart England, disputes arose between common law courts and civil law courts over jurisdiction issues partially related to which court had the right to collect the fees payable to the court upon adjudication of cases and partially to the growing tensions between the monarchy and parliament.<sup>15</sup> County courts which operated under common law were able to collect fees for those cases heard before their judges and juries, whereas in cases heard in admiralty courts, using civil law procedures, fees and goods expropriated from unsuccessful defendants were divided among the admiral, the informer, and the king. Common law court officials resented the loss of income they saw as rightfully theirs. Sir Edward Coke, the

---

<sup>14</sup> Sir Richard Zouch was a Judge of the High Court of Admiralty in the early seventeenth century but lost his position in 1641. *The jurisdiction of the admiralty of England asserted against Sr. Edward Coke's Articuli admiralitatis*, in XXII chapter of his jurisdiction of courts by Richard Zouch (London: Printed for Francis Tyton and Thomas Dring, 1663).

[http://gateway.proquest.com/openurl?ctx\\_ver=Z39.88-2003&res\\_id=xri:eebo&res\\_dat=xri:pqi:res\\_ver=0.2&rft\\_id=xri:eebo:citation:12484343](http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&res_dat=xri:pqi:res_ver=0.2&rft_id=xri:eebo:citation:12484343).

<sup>15</sup> Crump, *Colonial admiralty jurisdiction in the seventeenth century*, 20.

proponent of the power of Parliament and defendant of the authority of the common law courts, argued in *The fourth part of the institutes of the laws of England. Concerning the jurisdiction of courts* that the Admiralty Court had encroached on the jurisdiction of the courts of common pleas, “lest they should sit idle and reap no profit.”<sup>16</sup> Admiralty courts had maintained their ties to the monarch and the use of civil law; James I, with his long association with the civil law in Scotland, identified so closely with the Admiralty Court that he even sat on the bench.<sup>17</sup> After Coke and with the increasing power of Parliament after the Civil War, common law courts in England were successful in expanding their own powers and restricting the jurisdiction of the Admiralty Courts to the high seas, to trade and navigation matters, to prosecution of piracy, and to prize determinations during the frequent wars at home and in the colonies. The Boston Vice-Admiralty Court which tried Barnes did not suffer from as many constrictions as the British Admiralty Courts. Furthermore many of the same people were involved in both the Vice-Admiralty court and in the county courts so there was not as much reason for conflict.

This tension between the court systems continued through the seventeenth century as the common law courts became more closely identified with Parliament, and the civil law courts

---

<sup>16</sup> Sir Edward Coke. *The fourth part of the institutes of the laws of England. Concerning the jurisdiction of courts. Authore Edwardo Coke, Milite, J. C. Haec ego grandaevus posui tibi, candide lector.* (London, M.DCC.XCVII. [1797]). *Eighteenth Century Collections Online*. Gale. UNIV OF CALGARY. 2 Aug. 2012, 136  
<<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=ucalgary&tabID=T001&docId=CW125187193&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>>. Coke was an outspoken advocate for the expansion of jurisdiction of common law courts and thus curtailment of the Admiralty Courts to only those things done on the high seas.

<sup>17</sup> Crump, *Colonial admiralty jurisdiction in the seventeenth century*, 20.

including Admiralty Courts were perceived correctly as functioning extensions of the king's prerogative. The Admiralty Court with its European continental antecedents was assumed to be tainted with foreign or non-English roots, presided over by civil lawyers and the Doctors' Commons who operated according to Roman law imported by the Normans in the eleventh century. So though admiralty law was useful to merchants trading internationally, its civil procedure was still suspect as capable of detracting from the ancient rights of liberty accorded to all Englishmen.<sup>18</sup>

### **Vice-Admiralty Courts in Massachusetts**

At the end of the seventeenth century, legislation was promulgated which specifically extended Admiralty jurisdiction to the English overseas colonies and provinces. Previous legislation establishing Vice-Admiralty courts related only to regional courts within England, but as the colonial empire grew in numbers, population, and volume of trade, admiralty law relating to the needs of the colonies became crucial, both as to jurisdiction and substantive law.

In 1696, An Act for Preventing Frauds, and Regulating Abuses in the Plantation Trade, passed by the British Parliament, clarified the language of previous Navigation Acts; it assumed that Vice-Admiralty courts already existed and had jurisdiction to enforce the provisions of all Navigation Acts in the British colonies without specifically giving them the authority.<sup>19</sup> A

---

<sup>18</sup> Charles S. Cumming, "The English High Court of Admiralty," *Tulane Maritime Law Journal* 17 (1992-1993): 216.

<sup>19</sup> "Shippes onely as are or shall bee taken Prize and Condemnation thereof made in one of the Courts of Admiralty in England Ireland or the said Colonies or Plantations," From: "William III, 1695-6: An Act for preventing Frauds and regulating Abuses in the Plantation Trade [Chapter

second act of the British Parliament was passed in 1700 entitled An Act for the more Effectual Suppression of Piracy. It provided that:

All Pyracies, Felonies, and Robberies, committed in, or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, enquired of, tried, heard, determined, and adjudged, [according to the directions of this act,] and in any Place at sea, or upon the Land, in any of his Majestys Islands, Plantations, Colonies, Dominions, Forts or Factories to be appointed for that Purpose by the K's Commission &c. under the great seal of England, or the Seal of the Admiralty of England, directed to all or any of the Admirals, Vice Admirals, Reer Admirals, Judges of Vice Admiralties, or Commanders of any of his Majestys Ships of War, and also to all or any such Person or Persons as his Majesty shall think fit to appoint; which said Commissioners shall have full Power jointly or severally, by Warrant under the Hand and seal of them or anyone of them to commit to Safe Custody, any Person vs. whom Information of Pyracy, Robbery or Felony upon the Sea shall be given upon oath (which oath they or any one of them shall have full power, and are hereby required to administer) and to call and assemble a

---

XXII. Rot. Parl. 7 & 8 Gul. III. pt.5.nu.8.],” Statutes of the Realm: volume 7: 1695-1701 (1820), pp. 103-107. <http://www.british-history.ac.uk/report.aspx?compid=46829>.

Date accessed: 25 September 2012. Also see the article by Michael G. Hall, “The House of Lords, Edward Randolph, and the Navigation Act of 1696” *WMQ* , Third Series, 14 (1957): 494-515. Hall’s argument points out the role of Edward Randolph and the House of Lords in making the Vice-Admiralty Courts the regulator for the Navigation Acts

Court of Admiralty on shipboard, or upon the Land &c. when and as often as occasion shall require; which court shall consist of seven persons at the least and such Persons so assembled, shall have full Authority, according to the Course of the Admiralty, to issue Warrants for bringing any Person accused of Piracy or Robbery before them, to be tried heard, and adjudged and to summon witnesses, and to take informations and examinations of witnesses upon their oath and to do all Things necessary for the Hearing and final Determination of any Case of Piracy, Robbery, and Felony; and to give Sentence and Judgment of Death, and to award Execution [of the offenders convicted and attainted as aforesaid], according to the civil Law, and the Methods and Rules of the Admiralty.<sup>20</sup>

This was the legislation which gave the Court at Boston the authority to indict and try Barnes for the crime of murder. It specifically gave to the governors of the corporate and proprietary colonies the authority over maritime affairs and effectively prevented local juries from obstructing the enforcement of trade regulations; it stated unequivocally that the civil law was the proper law for admiralty criminal trials, thus departing from the hybrid form of admiralty criminal procedure mandated by Henry VIII for England.

---

<sup>20</sup> “An act for prosecuting frauds, and regulating abuses in the plantation trade,” 7 & 8 Wm. III, c. 22 (1696); “An act for the more effectual suppression of piracy,” 11 & 12 Wm. III, c. 7 (1700); “An act to punish governors of plantations in this kingdom for crimes by them committed in the plantations,” 11 & 12 Wm. III, c. 12 (1700). The 1700 act summarized the powers of the Admiralty Courts regarding their jurisdiction as well as the procedure they would use.

The legislation did not establish Vice-Admiralty courts since these were prerogative courts authorized by the monarch himself as extensions of the High Court of Admiralty. However, because the Navigation Acts had not been adequately enforced by either governors of the colonies or local officials and courts, the outcome of the legislation and the formation of the new Board of Trade resulted in Parliament, especially the House of Lords, taking a greater interest in activities in the American colonies and how they were governed.<sup>21</sup> Vice-Admiralty courts, in the absence of Exchequer courts in Massachusetts, subsumed the powers of both Exchequer courts and Admiralty courts in England. While the main business of colonial Admiralty courts focused on maritime commercial disputes, they also had to deal with criminal and tort matters which could not be brought in the county courts because the locus of the cause of action fell outside these courts' geographical jurisdiction – the high seas, as in the Barnes case.

In England and in the colonies, proponents of common law courts used a device called the Writ of Prohibition to remove actions from the Admiralty Courts. More often in commercial actions, the respondent in an action in Admiralty court applied for a writ of prohibition to the Court of King's Bench to stop the trial in the Admiralty Court and move it to the common law court. In England, the common law courts seem to have welcomed such applications and regularly used prohibition to remove cases from the lower courts including ecclesiastical and

---

<sup>21</sup> The Board of Trade was the successor to previous committees whose function was to supervise, to advise, and eventually to have general responsibility for the American colonies in London.

admiralty jurisdiction; the same tactic while not unknown was used less frequently in the American colonies. The writ, if granted, served to move the case at bar out of the lower court to the common law court on the grounds that the lower court lacked either territorial or substantive jurisdiction to adjudicate the matter. The process was the same in the colonies as in England and can be summed up in the words of one Samuel Northey in North Carolina:

Your petitioner ... begs leave further to observe that though there be often disputes concerning the jurisdiction of the Admiralty court, the same is always determin'd by the common law judges, and when a writ of prohibition is granted ... the Admiral's court stays all proceedings thereon and if the proponent is not satisfied then the matter is argued before the judges where the writ of prohibition was granted and if the matter appear to them to be not in the Admiral's jurisdiction the prohibition abides, but if it be judged to lye in the said Admiral's court then a Writ of Consultation is granted and the court of admiralty proceeds.<sup>22</sup>

Application was usually made to a judge of a superior court either in England or in the colonies who decided the proper venue based on where the cause of action arose – on land or at sea; he might also issue a grant of Writ of Prohibition if he was persuaded that the case was being dealt with in an improper manner. A respondent, dissatisfied with a denial of his application for prohibition, could appeal to the judges of the superior court on notice to the Admiralty Court and have a full hearing with arguments from both parties. Once a Writ of

---

<sup>22</sup> William L. Saunders, ed., *The Colonial Records Of North Carolina* (Raleigh: P.M. Hale, 1886), II, 759.

Prohibition was granted, no further appeal as to the proper jurisdiction of the court was possible. Barnes did not make application for a Writ of Prohibition and there is no indication that Barnes would have fared any better in the Boston county court even if he could have had his case moved out of the Vice-Admiralty Court.

In the seventeenth and eighteenth centuries, as England expanded its overseas empire, the charters by which individuals and companies established the colonies authorized the founders to institute legislative and judicial systems for those colonies. The initial systems were simple and, as populations were small, often the same people held office as legislators and adjudicators. For example, in Massachusetts, the General Court held executive, legislative, and judicial offices simultaneously in the early years of the colony. Other colonies followed roughly the same procedure until the volume of trade or the problems of piracy and privateering demanded a more specialized court to deal with these more complex problems. The charters authorized the governor of each colony to set up all necessary courts to adjudicate actions within the colony, and in some cases in the coastal waters and islands adjoining the mainland. Not all the colonies with extensive coastlines had need of admiralty courts to adjudicate maritime causes, and even those which did have disputes arising from fishing and trade did not always feel the need of a venue beyond the county courts or the adjudicative powers of the colonial council to settle marine actions.

When colonies were first established, governors of colonies were generally appointed as vice-admirals but they seldom established admiralty courts in the first few decades; the county courts or general councils were able to dispense justice as and when required. But as the colonies

grew and prospered, attracting shipping, producing goods for trade and demand for supplies from abroad, and attracting pirates and privateers who preyed on legitimate merchant shipping, the need to deal with extra-colonial maritime affairs demanded the creation of courts to handle admiralty issues. “Wherever colonies were established, Vice Admiralty Courts almost invariably followed, to fulfil the necessary functions of trying pirates, adjudicating prizes and settling ordinary maritime disputes. While deriving their authority from the Governors' Admiralty Commissions, they appeared to arise spontaneously to satisfy local needs, and were shaped more by local conditions than by a servile imitation of metropolitan forms.”<sup>23</sup> But as England stabilized into a constitutional monarchy after the Interregnum and throughout the Restoration, the task of binding the disparate colonies into an empire with greater centralized control began. This undertaking, with respect to Vice-Admiralty courts, was assisted by merchants in the colonies who desired a more specialized judicial regime to handle the maritime trade which made up the bulk of their business and which could not be regulated effectively by the local county courts.<sup>24</sup> In the eighteenth century, while merchants appreciated the admiralty courts

---

<sup>23</sup> Michael Craton, “The Role of the Caribbean Vice Admiralty Courts in British Imperialism,” *Caribbean Studies* 11 (1971): 6.

<sup>24</sup> Helen Crump made the point that the founders of the colonies were either members of the aristocracy or successful, experienced merchant traders in their own right, so they would be familiar with Admiralty Courts and their workings in England. “The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as individuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the plantation... Many of the vice-admirals were drawn from the nobility and gentry, while the

involvement with prosecuting pirates and privateers, they were not so gratified by the courts' enforcement of the navigation and trade acts.

The original charter given to the Council of Massachusetts Bay in 1629 provided for the governor and Council to “make Lawes and Ordinnces for the Good and Welfare of the saide Company, and for the Government and ordering of the saide Landes and Plantacon, and the People inhabiting and to inhabite the same, as to them from tyme to tyme shal be thought meete, soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Statuts of this our Realme of England” and by implication to establish courts, the first of which was to be the General Court, to enforce the laws so made. The granting clause included not only the mainland but the islands and the seas around the mainland, so the power to make and enforce laws concerning maritime matters was also included in the grant under the first charter. In 1664, the council took advantage of this provision to prepare extensive legislation governing shipping and navigation, so that:

whereas, through the blessing of God upon this jurisdiction, the navigation & maritime affaires thereof is growne to be a considerable interest, the well management whereof is of great concernment to the publick weale, for the better ordering the same for the future, & that there may be knowne lawes & rules for all sorts of persons imployed therein, according to their several stations and

---

merchants and sailors had professional experience of the usefulness of admiralty courts.” Crump, *Colonial admiralty jurisdiction in the seventeenth century*, 25-26.

capacities, & that there may be one rule for the guidance of all Courts in their proceedings in distribution of justice.<sup>25</sup>

In 1673, the Court of Assistants took the further step of ordering that it would hear all admiralty causes, sitting without a jury unless it believed a jury was necessary.<sup>26</sup>

The first Massachusetts charter was vacated in 1684 and the Dominion of New England was formed in 1686 with Governor Andros in charge of all the New England colonies. His tenure was a short one; the residents of Boston revolted and threw him in jail in 1689 before shipping him back to England. The new Charter of Massachusetts Bay of 1692 included the same wording as to geographical jurisdiction but clarified the powers and procedures of the Vice-Admiralty Court and specifically dealt with the issue of authority over traditional admiralty jurisdiction. The king retained the prerogative power to establish admiralty courts and equip such courts as necessary:

Provided alwaies and it is hereby declared that nothing herein shall extend or be taken to Erect or grant or allow the Exercise of any Admirall Court Jurisdicon Power or Authority but that the same shall be and is hereby reserved to Us and Our Successors and shall from time to time be Erected Granted and exercised by vertue of Commissions to be issued under the Great Seale of England or under the

---

<sup>25</sup> Nathaniel Shurtleff, ed., *Records of the governor and company of the Massachusetts Bay in New England* (Boston: W. White, 1854), IV, pt. 29, 388-93.

<http://archive.org/details/recordsofgoverno42mass>.

<sup>26</sup> *Ibid*, 575.

Seale of the High Admirall or the Comissioners for executing the Office of High Admirall of England.<sup>27</sup>

Thus, William III repeated the habendum clause of the first charter in the 1691 charter but specifically reserved the power to set up and administer Vice-Admiralty Courts to himself and his appointees. The Piracy Act of 1700 further provided for the procedure of the court to be “according to the civil Law, and the Methods and Rules of the Admiralty”. The Court of Assistants no longer had the authority to decide if a jury was necessary.

### **Repugnancy and Divergence**

Throughout the second half of the seventeenth century there was a continuous struggle for power between the colony of Massachusetts and the various bodies in London charged with supervision of the overseas colonies.<sup>28</sup> In 1676, Edward Randolph was commissioned by the king to go to Massachusetts and prepare a report concerning “an account of the state of that country and more perticularly how farr the Act of Parlm’t relating to Trade and Navigation be respected or executed there.”<sup>29</sup> Randolph was assiduous in carrying out the king’s commission despite the

---

<sup>27</sup> *The Charter of Massachusetts Bay (1691)* Avalon Project, Yale Law School, Lillian Goldman Law Library, 2008 at [http://avalon.law.yale.edu/17th\\_century/mass07.asp](http://avalon.law.yale.edu/17th_century/mass07.asp)

<sup>28</sup> J.M. Sosin, *English America and the Revolution of 1688: Royal Administration and the Structure of Provincial Government* (Lincoln: University of Nebraska Press, 1982).

<sup>29</sup> Robert Toppan and Alfred Goodrick, eds., *Edward Randolph: including his letters and official papers from the New England, middle, and southern colonies in America, with other documents relating chiefly to the vacating of the royal charter of the colony of Massachusetts Bay, 1676-1703* (1898) (Boston: Prince Society, 1909), 73.

enemies he acquired even before he left London. The report he returned to the king was scathing in its condemnation of the residents of Boston and their open flouting of trade legislation:

[T]he Bostoners did soe farr preferr the unbounded liberty of Trade (which they had soe long practiced to the unspeakable detriment of this nation and other English colonyes in America) before their naturall Duty and allegiance to his Majesty that they did persist without any restraint whatsoever to violate every perticuler clause of the Acts of Parlm't which did any way interfere with their private interest and thereby have enticed and encouraged other Colonyes of his Majesties subjects to drive that unlawfull trade all which the messengers of the said Bostoners could not denye.<sup>30</sup>

He further alleged that “Bostoners” felt that no legislation was effective unless and until it had been passed by their own local council. He castigated the colonial government for their disobedience to the king’s commands and their disloyalty to His Majesty.<sup>31</sup>

Edward Randolph was appointed collector of customs for New England in 1678 with his headquarters in Boston. He became the driving force in attempting to reorganize the Vice-Admiralty court system in the late seventeenth century. Randolph’s role as surveyor general of customs expanded to include all of the American colonies in the 1690s which gave him firsthand

---

<sup>30</sup> Ibid., 74. The messengers to whom he refers are the colonial agents in London who represent the colonial government.

<sup>31</sup> J. M. Sosin, *English America and the Restoration Monarchy of Charles II: Transatlantic Politics, Commerce, and Kinship* (Lincoln: University of Nebraska Press, 1980), 278.

experience of the disarray of customs collection systems virtually everywhere in the colonies.<sup>32</sup> He made it his life's work to organize and rationalize the system of customs enforcement and collection in the American colonies, going above and beyond the parameters of his official role in not only making suggestions, but persistently advocating for his recommendations in spite of reluctance by English authorities to act on his more radical suggestions. For example, Randolph promoted the consolidation of colonial governments so that the colonies from the Bahamas to Halifax would be reduced to six regions based on geography; colonies would be clustered around the great east coast bays.<sup>33</sup> While his plan was never implemented or even seriously considered, Randolph remained preoccupied with other administrative revisions as well as carrying out supervisory functions which brought American colonial governments in closer contact with both the Crown and Parliament in England, not the least of which revision was the regulating and strengthening of the Vice-Admiralty courts. He recommended the location of each court and even provided a list of names of men he believed would be appropriate officials to populate the courts from judges and advocates general to marshals and registrars. It was important that, since these were prerogative courts, the court personnel show loyalty to the king rather than pander to the local political and economic elite as the county court officials were wont to do.

Randolph was very unpopular in Boston for his tireless prosecution of the navigation acts and his denunciation of merchants who were involved in illegal trade. He drafted a proposal to the Lords of Trade and Plantations in 1681 that all New England charters be revoked and the

---

<sup>32</sup> Hall, "The House of Lords, Edward Randolph, and the Navigation Act of 1696," 495.

<sup>33</sup> Ibid, 498.

several colonies be combined into one as a means of better controlling them politically and economically, as well as making them easier to protect from Spanish and French depredations.<sup>34</sup> Bostonians equated the loss of their charter with the loss of liberty and hated all those who were involved with establishing the new Dominion of New England in 1684. Randolph was incarcerated in the common jail for several months at the time of Governor Andros's arrest in 1689 and sent to England with Andros and his party as one of the conspirators. From jail, he wrote a long report to The Lords of Trade and Plantations detailing how the people of Boston rebelled against the appointed governor and attempted to reinstate the 1629 Charter.<sup>35</sup> In London, the entire party was released because no one could be found to subscribe to the charges against them that had been sent to the Lords of Trade. Randolph was promoted as Surveyor-General of Customs for all of the North American colonies, which role he carried out enthusiastically until his death in 1703. The entire course of events in the 1680s and early 1690s revealed a renewed determination by the Lords of Trade that London would do what was necessary to control the New England colonies despite the efforts of various factions to operate independently. However, Massachusetts was not ready to succumb yet and the conflict continued.

---

<sup>34</sup> Alfred Goodrick, ed., *Edward Randolph; Including His Letters and Official Papers From The New England, Middle, and Southern Colonies in America, and the West Indies. 1678-1700* (Boston: Prince Society, 1909), VI, 89.

<sup>35</sup> CSP, Colonial, Item 152, Edward Randolph to the Lords of Trade and Plantations, May 29, 1689.

The procedure in felony trials in Massachusetts followed that of English criminal courts, evolving from the early days when trials were heard by the governor and Court of Assistants to later years when the court system was formalized into local county courts in the growing towns outside Boston. Assistants in their role as magistrates continued to preside over the county courts until that workload became too onerous and magistrates who were not members of the Court of Assistants were chosen by the General Court to handle the greater number of cases coming before the courts.<sup>36</sup> Massachusetts's law and practice was required to conform the laws of England to the extent that they were not repugnant to those laws, but was also expected, as were the other English colonies, to diverge as necessary to deal effectively with local concerns and conditions.<sup>37</sup> Each colony's concerns were different given the purpose for founding the colony, the demographic composition of the colony, and the evolution of the colonial society as it grew and prospered.<sup>38</sup> Massachusetts, with its vision of itself as "a city set on a hill" to be a utopia of righteous living in a corrupt world, was concerned with establishing a well-ordered society,

---

<sup>36</sup> The General Court was comprised of the members of the upper and lower assemblies and had the authority to sit as a court of appeal as well as the statutory power to hear cases at first instance. The governor and the members of the Court of Assistants were justices of the peace and magistrates. Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), 81.

<sup>37</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004), 2-3.

<sup>38</sup> Ken MacMillan, "To punish and correct: the rise of criminal courts in Bermuda, 1615-1622" *Atlantic Studies: Global Currents*, 10, 3, (2013) 302-322. MacMillan traced the growth of criminal courts in Bermuda and the degree to which they both conformed to and diverged from English practice.

maintained by balance and restraint at every level of that society.<sup>39</sup> Residents of Massachusetts lived in towns and villages centred on the local church and school; all members of the colony were expected to be part of a family and participate in their community no matter what their rank in society.

It has been argued that the Puritan founders of Massachusetts Bay departed intentionally from the criminal law of England because, as dissenters, they had suffered under that law and were disgusted with the many capital crimes in England. So though they were unsuccessful in attempting law reform in England, when they came to America, they believed they were founding a new society in accordance with Biblical principles.<sup>40</sup> Therefore, the Bible became the standard for criminal law and only the crimes or sins that were deemed worthy of death were those so ordered in the Scriptures; the 1641 Body of Liberties listed those capital crimes for which the Bible required a death sentence.<sup>41</sup> Only twelve capital crimes are listed under that heading in the Body of Liberties and the Biblical references are given for each one. By this time England had hundreds of capital crimes on the books. Furthermore, even capital sentences could not be carried out without the testimony of two or three witnesses, a difficult requirement in the case of moral crimes for which most times the only witnesses would be the offenders. Property crimes did not carry a death sentence in early Massachusetts Bay as they did in England. Benefit

---

<sup>39</sup> William E. Nelson, "The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686," *AJLH* 47 (2005): 185-87.

<sup>40</sup> Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *AJLH* 26 (1982): 332-3.

<sup>41</sup> *The Massachusetts Body of Liberties, (1641)*, part of the *Hanover Historical Texts Project*, accessed April 22, 2013 at <http://history.hanover.edu/texts/masslib.html>.

of clergy, a popular ameliorating device for capital crimes in England and some of the other American colonies was not available in early eighteenth century Massachusetts; those privileged with an education that enabled them to read were held to higher standard of moral behaviour.<sup>42</sup> Not until 1732 was a convicted murderer granted benefit of clergy and though the Council immediately tried to legislate against the doctrine, the House would not pass the legislation. Benefit of clergy thereafter became part of the defense lawyer's arsenal against the death penalty.<sup>43</sup> Even though the population of Massachusetts increased and religious focus in society changed over the succeeding decades, the Biblical foundations of criminal law remained in the judicial memory; so lawyers arguing for both sides in court cases could reference the Bible and what was expected of subjects in a Christian nation as William Shirley did in the Barnes trial.

---

<sup>42</sup> Not all residents of Massachusetts agreed with the terms of the Body of Liberties. Dr. Robert Child and the other Remonstrants presented the General Council with the Declaration of 1646 which demanded reforms to the laws as enunciated in the Body of Liberties. The major reforms can be summarized as "(1) that the fundamental laws of England and 'such others as are no ways repugnant to them' should be forthwith established in Massachusetts; (2) that the rights of freemen should be extended to 'all truly English' (whether church-members or not); and (3) that all well-conducted members of the Church of England should be received without further tests or covenants into the New England churches, or else be allowed 'to settle [themselves] here in a church way, according to the best reformations of England and Scotland'." See George Lyman Kittredge, "Dr. Robert Child the Remonstrant," *Publications of the Colonial Society of Massachusetts*, XXI. 18. <http://archive.org/stream/doctorrobertchil00kitt#page/n9/mode/2up> Also see Richard B. Morris, "Massachusetts and the Common Law: The Declaration of 1646," *AHR* 31 (1926): 443-53. Kittredge provided a detailed narrative of the events surrounding the presentation of the Declaration and its aftermath.

<sup>43</sup> Alan Rogers, *Murder and the Death Penalty in Massachusetts* (Amherst: University of Massachusetts Press, 2008), 22.

Because crime and immorality were synonymous in Massachusetts in the seventeenth century, the punishments for crime were different from those in England.<sup>44</sup> Theft of property above 12 pence was a capital offense in England but the penalty could be alleviated by a plea for benefit of clergy. In Massachusetts, the penalty for minor theft was usually whipping followed by restitution to the victim of two or three times the amount stolen.<sup>45</sup> According to the Code of 1648, capital crimes in Massachusetts included immoral behaviour evidenced in such actions as “Treason, murther, witchcraft, sodomie, and other notorious crimes,” but not crimes against property or high treason against the sovereign as in England.<sup>46</sup> Later in the seventeenth century and in the early eighteenth century, more capital crimes were added to the criminal law and felons were given less leeway to avoid harsh punishment for recidivism.<sup>47</sup>

---

<sup>44</sup> Jules Zanger, “Crime and Punishment in Early Massachusetts,” *WMQ* 22, 3 (1965): 471-477. Zanger argued that Massachusetts society with its lack of manpower and hard currency necessitated different kinds of punishment from sentences levied in England and even then, many punishments in the early days of the colony were remitted if the offender showed remorse.

<sup>45</sup> Morris, “Massachusetts and the Common Law,” 449.

<sup>46</sup> *Ibid.*, 448.

<sup>47</sup> Hamilton B. Staples, *The Province Laws of Massachusetts* (Worcester, Mass.: The Press of Chas. Hamilton, 1884), 10-11. Staples listed the enlarged capital punishment code along with the date each legislative provision was introduced:

1692-93. Breaking into a dwelling-house, ware-house, shop, mill, malt-house, barn, out-house, or any ship or vessel; a third conviction.

1692-93. Robbery in the field or highway; a third conviction.

1694. Polygamy.

1696. Treason, concealment of the death of a bastard child, piracy and robbing upon the sea.

1697. Murder, rape, and the sin against nature.

1700. Escape from prison of Romish priests adjudged to suffer perpetual imprisonment for coming into, or remaining in, the Province after September 10, 1700.

As the colony grew in the seventeenth century, its leaders continued to focus on the themes of balance and restraint. English law carried to Massachusetts evolved to conform to these themes and by the late 1670s, colonial leaders considered themselves a self-governing colony, free from the corrupt influence of England and its laws.<sup>48</sup> If English law did not apply to Massachusetts, the colony needed to have printed laws that did apply even though, as John Winthrop clearly foresaw, “the Puritan laws, if fixed in a printed book of statutes, would show up at once as repugnant to English law and hence violations of the charter.”<sup>49</sup> He was right; the violations of the charter led to the revocation of that charter in 1684 and a curbing of the independent spirit the Massachusetts colony saw as its right. Edward Randolph had been critical of the laxity of government enforcement regarding navigation matters in the American colonies and advocated frequently for the revocation of the charters of several of the colonies. In 1677, Randolph took it upon himself to urge that the printed laws be forwarded to England for review

---

1705. Burning a dwelling-house, a public building, a barn having corn, hay or grain therein, a mill, malt-house, store-house, shop, or ship.

1706. Correspondence with the French, or Indian enemy, removing to or residing in the enemy’s territory, and sending supplies to the enemy.

1711. Robbery on the highway; a second conviction.

1714. Altering the bills of credit of the Province.

1715. Breaking into a dwelling-house in the night time with intent to commit felony.

1728. Killing a person in a duel.

1735. Counterfeiting the bills of credit of the Province.

1736. Larceny of property of the value of three pounds; a third offence ; the second being larceny of property of the value of forty shillings.”

<sup>48</sup> Bilder, *Transatlantic Constitution*, 55

<sup>49</sup> Bilder, *Transatlantic Constitution*, 55

with his opinion that much of the legislation was repugnant to English law.<sup>50</sup> Indeed, when an abstract of the laws was sent to the Attorney General, his review found that many of the laws as described in the abstract were repugnant. The Attorney General responded by opining that:

The Patent confirms the right of soil and erects a corporation; the common privileges of corporation are granted with the reserving clause that the laws, & c. be not repugnant to the laws of England. The Company have not jura regalia, but by virtue of their patent have erected courts and digested the laws into a volumn in 1650-51. These laws are (1) defective (a) in making no provision for High Treason, (b) in not requiring the oaths of allegiance and supremacy as the laws of England direct; (2) objectionable (a) in the charterstyle, the word commonwealth being used, (b) in comprising under heresy several punishments disproportionate to the offences as by banishment and death, the pecuniary penalty for keeping Christmas day ought to be struck out; (c) in appointing civil marriage; (d) in the law that none shall be put to death without the oath of two or three witnesses, which may be a means of encouraging murder and other great offences. These instances are put as a guide that the Massachusetts may proceed according to their patent that they must act according to the laws of England.<sup>51</sup>

---

<sup>50</sup> Massachusetts compiled its laws into the Body of Liberties of 1641 and amended the compilation for clarification in the Code of 1648.

<sup>51</sup> CO 1/41, No. 51, August 2, 1677; CO 391/2, 101-104; Signed by Sir Fra. Winnington, Solicitor-General, 1 August 1677. Underwritten, [141] "Read 22 Aug. '77." 2 pp. *CSP*.

The Massachusetts Assembly was not prepared to be dictated to by English officials and the ensuing conflict in which the colony's Assembly remained intractable to directions from London eventually resulted in London's withdrawal of the Massachusetts Charter in 1684, and the appointment of a new governor, and a council which replaced the elected Assembly. The inhabitants of Boston were enraged at what they deemed the loss of their liberty and sent representations to King James pleading for reinstatement of those liberties they had formerly enjoyed.<sup>52</sup> King James, embroiled in his own troubles, promised his assistance but was unable to deliver. After they received news of the accession of William of Orange and Mary to the English throne, the inhabitants of Massachusetts staged a rather inglorious revolution; they seized Governor Andros, and imprisoned him and his guard in Castle William. When he refused to command the guard at the fort to surrender to the mob, Edward Randolph was forced at gunpoint

---

<sup>52</sup> The plea was in the form of a letter sent to the king detailing their objections. "April 18, 1669. 1. More than ten years have passed since the discovery of the Popish plot, a matter in which New England of all countries could not be unconcerned. 2. To get us into reach of the desolation prepared for us, our charter was vacated, the accomplishment thereof being hastened by the undesired solicitations and slanderous accusations of a man who for his malice and falsehood is well known to us. The [p.94] charter was proceeded against in hardly a pretense of law, and condemned before we had time to appear in our defence. Then a President and Council were set over us, without any liberty for an Assembly as in other Colonies, by a Commission from the King. 3. This Commission was illegal in form, but we made no resistance thereto, for we were assured of the King's kindly intentions, in hindrance of which measures were immediately taken to spoil our trade. 4. Then came Sir Edmund Andros with a still more arbitrary commission, and several companies of redcoats to enforce it. 5. Thus every trouble was taken to load preferment on men who were strangers to and haters of the government. We were squeezed by a crew of abject persons from New York, the tools of the adversary at our right hand, who extorted extravagant fees without any rule. 6. It was now plainly affirmed by some in open Council and others in private that the people of New England were all slaves." July 16, 1689 [Item 261, Vol. 13 (1689-1692) 92-95] Narrative of the Proceedings at Boston upon the Inhabitants seizing the Government. *CSP*. CO 5/905, fols. 85-106.

to tell the guards that the governor ordered them to surrender the fort to the rebels. The guards complied and the rebels gained control of the fort and the castle, and imprisoned Andros, Randolph, and their supporters. Once the revolutionaries had quelled all the opposition and incarcerated the appointed officials, the new council, under the influence of the Puritan minister, Increase Mather and others, appealed to the new king and queen for the reinstatement of the previous charter.

The people of New England hope to be restored to the former charter-privileges taken from them in the last year of King Charles II, and, notwithstanding the great expense to which they have been already subjected, are willing to make another attack on the French in Canada with such supply as the Government of Massachusetts has already begged for. Nothing could be greater encouragement to the prosecution of this war than restoration of the ancient liberties and privileges for which our fathers transported themselves to the wilderness, and have since defended it against all enemies, with considerable advantage to England. Signed. Hen. Ashurst, Elisha Cooke, Increase Mather, Thomas Oakes Endorsed. Read 21 April, 1691.<sup>53</sup>

King William did not agree to reinstate the original charter but issued a new charter which, after a good deal of negotiation between the Lords of Trade and Plantations and the

---

<sup>53</sup> “America and West Indies: April 1691, 17-30,” Calendar of State Papers Colonial, America and West Indies, Volume 13: 1689-1692 (1901), 411-25. URL: <http://www.british-history.ac.uk/report.aspx?compid=70701>.

Agents of Massachusetts colony, was passed and received the royal seal on October 7, 1691. It was a compromise between the Massachusetts council's demands for a totally independent government and the king's determination to retain ultimate control over the administration of the colony by appointing the governor and the judges, and his retention of the right to veto laws made by the Council. The new charter reiterated that laws should not be repugnant to those of England. However, after seventy years of virtual independence it was unlikely that Massachusetts would willingly conform to English law.

In 1733, the Board of Trade, at the request of the House of Lords, prepared and presented a report relating to the trade, laws, and manufactures of the American plantations.<sup>54</sup> The report summarized the status of each of the plantations and their responsibilities to the King. However, the Board complained that, even though the colonies were required to submit their laws to the King in a timely manner through the Board for inspection and ratification, the governors were sometimes "negligent of their Duty in this Particular" and did not send the laws to the Board when they had passed the Council. In other cases, the laws were of temporary effect and notice was not sent to the Board until the laws' effect had expired. Another practice by the colonial governments was to pass laws in which the majority of the provisions were obviously necessary for the good of the colony but some portions thereof were repugnant to the laws of England. The Board would not require repeal of the entire act but directed the governor to amend the legislation to remove the offensive portions under threat that the whole law would be repealed.

---

<sup>54</sup> *Representation of The Board of Trade to the House of Lords*, January 23, 1733-34, London, CO 5/5, fols. 31-47 especially f. 34.

The Board deplored these actions and actually did repeal objectionable legislation. However, colonial governors were in a difficult position, appointed by the Crown and retaining their position at the pleasure of the King, but dependant on the local assemblies for their salaries.

In the seventeenth century, Massachusetts courts were peopled almost entirely by non-professionals from the judges or magistrates to the justices of the peace. There were some officials who had legal training but even Nathaniel Ward, the author of the Body of Liberties of 1641 who had some legal education, was not a practicing lawyer. He was admitted to the bar in England after graduating from Cambridge, but he became a clergyman in 1618 in which vocation he remained for the rest of his life. His version of the Body of Liberties showed his understanding of the common law and his bias towards natural law based on the Bible.<sup>55</sup> The Body of Liberties resembled more a bill of rights than a complete law code and may have been titled “liberties” rather than “laws” in an attempt to get around the repugnancy requirement in the charter.<sup>56</sup> However, by 1648, when the Code of Laws and Liberties was compiled, New Englanders were more ready to acknowledge the code as the law of their communities even if it did depart from the common law of England in a number of ways, not the least of which was that it was a written code and not a tangle of intersecting and overlapping bodies of law as found in England. The administrators and enforcers of Massachusetts laws in the seventeenth century

---

<sup>55</sup> K. Grudzien Baston, “Ward, Nathaniel (1578–1652),” *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), online edn, Oct 2006 <http://www.oxforddnb.com.ezproxy.lib.ucalgary.ca/view/article/28700>.

<sup>56</sup> Thorp L. Wolford, “The Laws and Liberties of 1648 - The First Code of Laws Enacted and Printed in English America,” *Boston University Law Review* 28 (1948), 428, n. 14.

were magistrates elected by the freemen of the colony, most of whom were not learned in the law but were often more educated than the majority of the population. These men were able to apply the Code of Laws and Liberties in a relatively even-handed manner; they were not expected to exercise their own discretion. New Englanders deplored the way that magistrates had arbitrarily exercised discretion in English courts in a way that it was difficult to predict the outcome of any court action, civil or criminal.

With the revocation of the 1629 Charter and its replacement by the 1691 Charter, Britain was signalling to Massachusetts and the other American colonies which had their charters revoked at this time that the bonds of empire were being drawn tighter. Population growth in Massachusetts at the beginning of the eighteenth century required that colonial government institutions be more organized with officials holding responsibility for specific matters. Colonial government offices provided opportunity for patronage appointments for those for whom positions could not be found at home. The king appointed governors, deputy governors, judges, attorneys, customs officials, and in New England, officials who looked after the forests, especially conservators of white pine trees suitable for ships' masts. All of these positions were eagerly sought after by men who looked to the new world for opportunities they failed to find in England. More of these men ready to move to the colonies were trained in the law and contributed to a justice system more in line with that in practice in England even though New England still retained a simpler procedural format than the court system at home.

### **Massachusetts Laws, Lawyers, and Courts**

Rather than the myriad of English courts enumerated by Sir Edward Coke, Massachusetts operated under a more or less unified system with two levels of court - the Court of Common Pleas and the Superior Court of Judicature.<sup>57</sup> The General Court heard appeals from the Superior Court. There was no Chancery Court in Massachusetts though the county courts did apply equity principles when they felt the case demanded it. The judicial climate of Massachusetts was more concerned with legal certainty and uniformity than with magistrates' discretion; in fact, magisterial discretion in England had been deleterious to the Puritans and their way of life. They had suffered marginalization and oppression from the established church as they attempted to reform the church to a simpler, less Romanized form of worship, and society to greater personal piety with the help of the Scottish Presbyterians. In seventeenth century Massachusetts, trained lawyers were looked upon with suspicion and actively discouraged from becoming involved in the workings of the court. They spoke a language that the average community member did not understand and therefore did not trust, and added a layer of complexity to the justice system that did not accord with the aim of simplicity in Puritan society. Furthermore, among a godly people, authority was not found in the decisions of men but in the natural law or law of God that applied equally to all men. Education was encouraged in Puritan communities so that all members could read the Bible and understand the standard of behaviour that was expected of them. Only as New

---

<sup>57</sup> Hamilton B. Staples, *The Province Laws of Massachusetts*, 7

England populations increased into the eighteenth century and institutions became more complex were lawyers looked upon as a necessary evil.

“Every man that findeth himselfe unfit to plead his owne cause in any Court, shall have Libertie to imploy any man against whom the Court doeth not except, to helpe him, provided he give him noe fee or reward for his paines.”<sup>58</sup> Thus the Body of Liberties of 1641 evidenced the desire to exclude lawyers from the Massachusetts Courts. Even in England at this time, accused persons were not allowed to have attorneys speak for them, though they could call for their assistance regarding questions of law, if they wished. By the commencement of the eighteenth century, barristers were being allowed to prosecute in the Old Bailey and, as a matter of equality, defendants were also being allowed to retain counsel to a limited degree. It has been argued that barristers’ increased interest evinced in practising in the Old Bailey and in the colonial courts arose from the declining volume of business available in the higher courts, and what work existed in the higher courts remained in the hands of the elites.<sup>59</sup> Junior lawyers had to look further afield for work in their chosen profession.

The few lawyers who crossed the Atlantic armed with membership in the Inns of Court became part of the colonial elite and often moved from representing clients in court to official positions within the court system. Two prominent Massachusetts names in this aspect are Robert Auchmuty and William Shirley. There was no formal legal training in New England in the

---

<sup>58</sup> *The Massachusetts Body of Liberties, (1641), Hanover Historical Texts Project.*

<sup>59</sup> David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000), 205-6.

seventeenth and early eighteenth century, so those who aspired to pursue a legal career had to go to England to study law; Jonathan Belcher sent his son to London to be educated as a lawyer. For those not able to go to England, they attached themselves to a practising lawyer and learned from him substantive law and legal procedure in a sort of apprenticeship program. If the lawyer under whom the pupil studied was conscientious, he could look forward to a practical and thorough education, but often the student was treated as a scrivener, producing forms and documents as the lawyer needed them without much understanding as to what they were doing or to what end. Not until 1701 did Massachusetts standardize the practice of law by requiring lawyers to swear an oath before they were allowed to appear in court; this legislated prerequisite prevented the part-time and semi-learned attorneys from representing clients in court and was an attempt to recognize the practice of law as a profession.<sup>60</sup> It took another twenty years and more for the courts to adopt rules for judicial procedure and standardized forms.

Not only were the attorneys who appeared in court not always adequately trained in the law; most of the judges in both the superior and inferior courts were not legally trained. In the seventeenth century, judges were drawn from the clergy and from the wealthy merchants in Massachusetts since these men were the elites of the community and often the most educated individuals in the colony. Furthermore, it was agreed that natural law or the Law of God was supreme so there was little need for men learned in the laws of England beyond the most general legal precepts. As Massachusetts and the other American colonies became wealthier, increased

---

<sup>60</sup> Charles Warren, *A History of the American Bar* (Boston: Little, Brown & Company, 1911), 77-78.

commerce both inside and between the colonies stimulated the need for legislation and lawyers, courts and judges. While institutions of higher learning were being established and educating local men, there was no course of legal education until much later in the eighteenth century. Even then, a young man seeking to follow the profession of the law in Massachusetts in the eighteenth century must learn all aspects of substantive law and practice since the paucity of lawyers meant that members of the legal professional were expected to be able to practice in all levels of court including the Vice-Admiralty court, advise clients, train aspiring lawyers, and even prepare their own documents if they had no one to assist them.<sup>61</sup> There was a small group of trained lawyers in Massachusetts skilled in all of these matters which was able to raise the legal profession from community disdain to a place of respect, honour, and leadership later in the century, but more about these men later.

### **Conclusion**

While few records exist of the actions carried on in the Vice-Admiralty court at Boston for the 1730s, it is clear from 1720s' court records that by 1736, the court was well established and had gained a measure of credibility in Massachusetts such that it was used by parties in a whole range of cases that could come before the admiralty jurisdiction.<sup>62</sup> These included actions for

---

<sup>61</sup> Ibid. 83

<sup>62</sup> L. Kinvin Wroth, "The Massachusetts Vice-Admiralty Court," *Law and Authority in Colonial America*, ed. George Athan Billias (Barre, Massachusetts: Barre Publishers, 1965): 45. Charles M. Andrews gave an excellent history of the work of vice-admiralty courts in his extensive

seamen's wages, actions by both seamen and masters against each other, actions for possession of ships, torts, contracts, actions for violations of trade and navigation legislation, prize actions during periods of war, and trials as to possession of drift whales. While felonies could not be prosecuted in the regular Vice-Admiralty courts, capital felonies occurring at sea were heard by means of "special commissions of piracies robberies and felonies committed on the high seas" conducted in the Vice-Admiralty courts as occasion demanded and according to the procedure in the Vice-Admiralty court. The procedures in the Vice-Admiralty court, like the procedures in the county courts and the General Court, were much simpler than procedures used in English courts and the language used in Massachusetts' courts was English rather than Latin making the court more accessible to the parties, many of whom may have been only marginally literate. While Massachusetts had assembled its own "common law," which was an amalgam of English liberties and local customs that had grown to the status of traditional colonial law over the century the colony had existed, the law of the Admiralty with its civil roots purported to be the substantive law by which the Vice-Admiralty court was bound. In theory, the same law should have been applied to felonious acts no matter where they occurred on the high seas, but the hearings held before commissioners drawn from the Court of Assistants in Boston almost certainly had a local flavour that the same case heard in Antigua would not have had.

---

introduction to Dorothy S. Towle's *Records of the Vice-Admiralty Court of Rhode Island, 1716-1752* (Philadelphia: American Historical Association, 1937).

## **Chapter Four**

### **“One of a Large Number on Board”<sup>1</sup>: Slavery in the British Atlantic**

#### **Introduction**

By the early eighteenth century, Britain was heavily involved in the transatlantic slave trade. British chartered companies obtained a foothold in West Africa on the Gold Coast by the mid-seventeenth century and were in a favourable position to dominate trade from Guinea to Europe and North America. The chartered companies were unable to maintain their monopoly on the trade, eventually losing much of it to private individuals from Britain and other European countries in the early eighteenth century. By the 1720s, Rhode Island traders had become involved in the slave trade from colonial North America to Africa and home by way of West Indian slave markets. From this context came the story of Captain John Cupit, Bawow, and first mate John Barnes – a story that was firmly rooted in the Atlantic world of centre and periphery; traders, suppliers, and consumers; masters and slaves; captains and ordinary seamen; and men and women crisscrossing the Atlantic looking to better their opportunities in new surroundings and among new people.

This chapter illuminates the world in which Captain Cupit and his crew lived and worked in the age of sail. The regular merchant marine was a difficult and dangerous place to work but the transatlantic slave trade posed its own unique hazards. Captain Cupit’s death, whether it was

---

<sup>1</sup> SP 36/39, f. 244

due to the maliciousness of African traders or the normal perils of disease encountered on the African coast, provided an example of the kinds of risks all slave traders faced. Many young men from New England took to the sea for a part of their working lives, often to start accumulating the capital needed to enter their chosen career on land. Some stayed, some made the transition to life on land, and some, like Milward, did not survive their time on the sea.

The subject of the British Atlantic slave trade has been approached by historians from many different angles, each of which has provided a means of understanding a commercial and social system disturbing to some contemporaries and most modern historians. Historians have discussed the transatlantic slave trade using the quantitative method; they have studied the numbers of slaves shipped from Africa, the coastal areas from which they came, the nationalities of the flags under which the ships voyaged, and the ports where slaves were disembarked and sold. Early estimates set the number of Africans taken from Africa across the Atlantic at fifteen to twenty million. In 1969, Philip Curtin approached the issue by perusing existing records of ships, ports, and international supply contracts to compile more reliable data as to the size of the Atlantic slave trade and the mortality rates. He revised the numbers down to a range of eight to ten million slaves embarked from the African coast, but emphasized that his estimates needed more work by scholars to ensure their accuracy.<sup>2</sup>

---

<sup>2</sup> Philip Curtin, *The Atlantic Slave Trade: A Census* (Madison: University of Wisconsin, 1969), 3-6.

In 1999, a project team headed by David Eltis and Martin Halbert produced a CD-Rom incorporating the existing computer data bases and hard copy data collections.<sup>3</sup> The database was subsequently published on-line and more data has been added as it became available.<sup>4</sup> The almost 35,000 voyages documented in the data base is the largest and most complete listing of slaves transported, mortality rates, numbers and kinds of ships, flags flown, names of ships captains, and other information ever published. Numbers of slaves transported as generated by the Eltis data base is within the twenty percent margin of the numbers Curtin predicted thirty years earlier, thus confirming his method of computing and his data sources, and fulfilling his hope that his book would be a starting point for new, more accurate statistical research.<sup>5</sup> Not all voyages have been included in the database and even those which have been tabulated do not always have complete information regarding the crew, cargo, and voyage. The 1735 voyage of the *Defiance* has not been listed, however, Captain Cupit has been shown as the captain of the *Tyger* embarking from Rhode Island in 1735 and acquiring a cargo of 118 slaves of which 103

---

<sup>3</sup> David Eltis, David Richardson, Stephen Behrendt, Herbert Klein, eds. *The Trans-Atlantic slave trade: a database on CD-ROM*, (Cambridge: Cambridge University Press, 1999). The database is now online at *Voyages: The Trans-Atlantic Slave Trade Database*, <http://www.slavevoyages.org/tast/database/index.faces>.

<sup>4</sup> David Eltis and David Richardson have since published an *Atlas of the Transatlantic Slave Trade* (New Haven: Yale University Press, 2010) and dedicated the work to Philip Curtin. The atlas is a valuable resource for scholars attempting to get at the enormity of the subject.

<sup>5</sup> Curtin, *Atlantic Slave Trade*, xviii.

were eventually disembarked at some unknown destination. At this point it is not known if this voyage can be related to the case under discussion.<sup>6</sup>

Turning from the quantitative study of the slave trade to the conditions of life on the slave ships, Stephanie Smallwood has provided a detailed narrative of the life of the slave and how the market forces turned free Africans from human beings into salable commodities in the new world through the use of physical and social violence.<sup>7</sup> Smallwood used the records of the Royal African Company, principally the correspondence among traders, agents, government officials, and merchants in London and the West Indies to construct her story of the slaves' journey from the interior of West Africa to markets in the Americas. Marcus Rediker also painted the reader a horrifying picture of life on eighteenth century slave ships in the middle passage.<sup>8</sup> He chronicled the violence acted out by captains against sailors, captains against slaves, sailors against slaves, sailors against each other, and slaves each other and against the crew if they were able to escape their shackles. While his book seems to be geared more to a popular audience, Rediker has provided much new information on a very disturbing subject.

---

<sup>6</sup> David Eltis and Paul F. Lachance. 2009. Estimates of the size and direction of the trans-Atlantic slave trade. *Voyages: The Trans-Atlantic Slave Trade Database*. <http://www.slavevoyages.org/tast/database/search.faces>. The voyage is also referenced in Jay Coughtry, *The Notorious Triangle: Rhode Island and the African Slave Trade, 1700-1807*(Philadelphia: Temple University Press, 1981), 242.

<sup>7</sup> Stephanie Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (Cambridge: Harvard University Press, 2007), 35.

<sup>8</sup> Marcus Rediker, *The Slave Ship: A Human History* (New York: Viking Penguin, 2007).

Emma Christopher rounded out the subject of life on board the slave ship with her monograph, *Slave Ship Sailors and their Captive Cargoes, 1730-1807*.<sup>9</sup> Christopher described the lives of common sailors working on slave ships who suffered not only the ordinary dangers of the marine life all sailors endured but added to that were the dangers from disease on the Guinea coast and the West Indies, and the constant danger of slave revolt especially as the ship lay near shore making up its cargo. She described sailors' lives on slave ships as being closely aligned to the lives of slaves and African crew members with whom their days were occupied. Because of the dearth of sailors' journals, Christopher used material from the later part of her period which was decades after the journey of the *Defiance*; there may have been some differences in the sailors' experiences on later voyages but probably no substantial variations in day to day duties. In any case, there is little description of the conditions on board the *Defiance*, which probably indicated that it was a typical slave ship on a typical voyage but with additional details concerning the death of Cupit and the brutality of Barnes.

Meanwhile, on the other side of the Atlantic, maritime life was developing in ways that met the particular needs of the colonial settlers. Daniel Vickers reviewed the early New Englanders' relationship to the sea from the time the new colonies were founded in *Young Men and the Sea: Yankee Seafarers in the Age of Sail*.<sup>10</sup> Vickers emphasized the youth of New

---

<sup>9</sup> Emma Christopher, *Slave Ship Sailors and their Captive Cargoes, 1730-1807* (Cambridge: Cambridge University Press, 2006).

<sup>10</sup> Daniel Vickers, Vince Walsh, *Young Men and the Sea: Yankee Seafarers in the Age of Sail* (New Haven: Yale University Press, 2005) and "Young Men and the Sea: The Sociology of

England sailors and the variety of vessels and voyages in which they engaged from fishing and whaling to short distance coasting and long distance commerce to Europe, Africa, and the West Indies. He characterized a time at sea as both a normal progression for a young man raised on the coast and equally at home on the water or on land, and a stage in that young man's life on the way to finding his place in the New England community. A valuable discussion of the slave trade from Rhode Island by Jay Coughtry covered the period from 1700 to 1807.<sup>11</sup> By the late 1720s, the slave trade from the American colonies was centred in Rhode Island with its high grade rum distilleries providing sought-after goods for the triangular trade to Guinea and the West Indies. Coughtry's book drew on primary sources on both sides of the Atlantic; he delved into Admiralty and Colonial Office records as well as collections of private papers and newspapers to put together a fascinating and useful discussion about the Rhode Island slave trade. Coughtry's book is the most important work dealing with the early years of the Rhode Island slave trade; others document the later years as the trade grew and families such as the De Wolfs and Browns became heavily involved in the triangular trade.<sup>12</sup> Elizabeth Donnan's

---

Seafaring in Eighteenth-Century Salem, Massachusetts," *Social History*, Vol. 24, No. 1 (Jan., 1999): 17-38.

<sup>11</sup> Jay Coughtry, *The Notorious Triangle: Rhode Island and the African Slave Trade, 1700-1807* (Philadelphia: Temple University Press, 1981). Coughtry's book is organized around a typical slave voyage from the planning to accumulating slaves and other trade goods on the Guinea coast to the middle passage, disposal of the slaves in the West Indies, and finally, acquiring sugar and molasses for the Newport rum distilleries back home.

<sup>12</sup> Hedges, James B. *The Browns of Providence Plantations* (Cambridge, Massachusetts: Harvard University Press, 1952); Thompson, Mack. *Moses Brown, Reluctant Reformer* (Chapel Hill, North Carolina: University of North Carolina Press, 1962). See also Virginia Bever Platt, "'And

compilation of primary sources regarding the slave trade is a valuable resource in four volumes of primary documents relating to all aspects of the slave trade to America.<sup>13</sup> Even though this collection is not by any means complete, the documents assembled here touched on many important aspects of the trade.

David Brion Davis has written extensively about Western slavery; his 2006 book, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* provided both a summary and a broadening of his earlier studies of slavery in the American context.<sup>14</sup> He followed Orlando Patterson's definition of slavery as social death for the slave but disagreed with him concerning the centrality of slaves as chattels. He looked to antiquity for the roots of slavery in the writings of Aristotle, the Roman philosophers, and even to the writers of the Old and New Testaments. Davis focused on the precariousness of the slave's daily life, whether in the suburbs of Babylon or on the South Carolina plantations. Barnes's trial provides some indication that slaves in Massachusetts were not universally viewed as simply chattels, but were humans entitled to the protection of law.

---

Don't Forget the Guinea Voyage': The Slave Trade of Aaron Lopez of Newport," *WMQ*, Third Series, 32: 601-18.

<sup>13</sup> Elizabeth Donnan, *Documents Illustrative of the History of the Slave Trade to America, Volume III, New England and the Middle Colonies* (Washington: Carnegie Institution of Washington, 1932).

<sup>14</sup> David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006), 30-2. Davis's work functions as a summary of some of his earlier works, especially *The Problem of Slavery in Western Culture* (New York: Oxford University Press, 1988) and *The Problem of Slavery in the Age of Revolution* (New York: Oxford University Press, 1999). See also Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982).

Despite the ubiquitous nature of slavery, there were those through the centuries who spoke out against the practice of treating human beings as possessions and subjecting slaves to terror in order to elicit obedience. Davis mentioned Gregory of Nyssa as a lone voice against slavery in the early Christian era.<sup>15</sup> Christopher Leslie Brown described antislavery sentiment before the mid eighteenth century as “dormant, inert, and ineffective in the Anglo-American world” and “the history of antislavery sentiment before the 1760s is the history of isolated moralists, often clergy from the various Protestant denominations, first reacting to the inhumanities they witnessed, then laboring (often unassisted) to denounce institutions in which the vast majority of their contemporaries had acquiesced.”<sup>16</sup> Brown made the important distinction between antislavery and abolition, two concepts which can be too easily conflated by modern historians. Humanitarian clergy, in the late seventeenth and early eighteenth centuries, recognized slaves as human beings for whom the gospel was intended as much as it was for white slaveholders, and prominent clergymen on both sides of the Atlantic “regarded enslaved men and women as equal before God, not simply beasts of burden.”<sup>17</sup> It was more important that slave souls be redeemed than that their bodies be liberated although both were significant issues. “For the ills of colonial society, they prescribed a Christian moral economy centered on reciprocal duties and obligations rather than on a liberal political economy organized around

---

<sup>15</sup> Ibid., 34

<sup>16</sup> Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Williamsburg: University of North Carolina Press, 2006), 40, 41.

<sup>17</sup> Ibid., 57

individual rights and liberties.”<sup>18</sup> While modern humanitarians may find such an attitude towards slaves risible, for a society in which many staunchly believed in eternal life after death with its rewards and punishments, the eternal eclipsed the importance of the temporal. It was not only the clergy who believed murder was murder no matter who the victim was. William Shirley’s argument before the Vice-Admiralty court implied that all men were equal before God and should be treated as such before the law.<sup>19</sup>

John Barnes was tried on two counts of murder in 1735, firstly for the murder of the sailor, William Milward, and secondly for the murder of the slave, Bawow. The question arises as to why these two deaths were treated in the same way when the victims were far apart in legal and social status. The sailor was a free man and the son of a freeman earning a wage pursuant to a contract; the slave was an unfree commodity on his way from his own country to a foreign land where his labour, his body, and his offspring were destined to be owned by others. The sailor was more than likely working at a temporary job, earning money in order to establish himself in a trade so that he could afford to marry and raise a family as his father had done before him. The slave would have been fortunate to ever have anything he could call his own and would likely never have been allowed to marry and raise a family. It is not clear what social status the sailor, Milward, enjoyed but in Massachusetts there was the possibility of social and economic advancement for the enterprising youth with a little luck and assistance from friends and family. The slave would always be a slave unless a kindly owner manumitted him and even then,

---

<sup>18</sup> Ibid., 57

<sup>19</sup> SP 36/39, f. 247

depending on the turn of fate, he might be arrested and re-enslaved. If he were sold in the West Indies and destined to life on a sugar plantation, his life would likely be brutally short; if he were kept on the ship as a slave or taken to Rhode Island, his working conditions could have been marginally better. There was a vast legal and social difference between slave and free in early eighteenth century colonial America. The social conditions in which both slave and master found themselves in New England had a long and diverse history reaching back in time to eras before recorded history.

In the story of Bawow, Captain Cupit, and John Barnes, the gradations in attitudes towards slaves and the slave trade can be perceived. Captain Cupit was one of the early slave traders from Newport, Rhode Island; even though he probably viewed the slaves as a commodity that New Englanders could carry from a supply depot in Africa to markets in the West Indies where they were needed does not mean that he was not concerned to take good care of a valuable cargo. There is evidence that he valued both his sailors and his slaves, or at least Bawow. He defended the sailors against Barnes's cruelty and the sailors called Bawow the "Captain's boy" suggesting some sort of personal connection between the captain and the little boy. John Barnes had less concern for the care of both sailors and slaves and treated Bawow with barbarous cruelty; his defence at trial indicated that slaves were less than human and killing one did not constitute the crime of murder, a capital offence. At trial, the arguments covered the gamut from the defence counsel describing Bawow as a commodity whose death should only attract a fine to the Advocate General giving him legal standing as a full subject of the king and therefore, a human being equal to the king's other subjects. Killing a subject of the king was a crime against

the king and the offender deserved death. All of these attitudes can be found in British history and would have been familiar to the personnel of the court at Boston.

### **The Idea of Slavery in Colonial Massachusetts**

Massachusetts was not cavalier about an institution in which slaves served masters for life; in the 1641 Body of Liberties the question of servitude stated that:

There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.<sup>20</sup>

The Council which adopted the Body of Liberties could look back a few years to what they no doubt regarded as a just war against the Pequot Indians, a war in which hundreds of Pequots were killed or captured and sent to the West Indies to be sold as slaves. While there is evidence of black slaves in Boston prior to 1638, John Winthrop noted in his journal that Pequot Indians had been traded in the English Caribbean colonies for black slaves.<sup>21</sup> However, in 1646, The General Court of Massachusetts Bay ordered two slaves to be returned to Africa; they had

---

<sup>20</sup> *The Massachusetts Body of Liberties (1641)* part of the Hanover Historical Texts Project, accessed October 2, 2013 at <http://history.hanover.edu/texts/masslib.html>

<sup>21</sup> Winthrop D. Jordan, "The Influence of the West Indies on the Origins of New England Slavery," *WMQ*, Third Series, 18 (1961), 246, n. 11.

been captured on the Guinea coast and were the survivors of a murderous attack on a village by Captain James Smith and his mate Keyser.<sup>22</sup> Elizabeth Donnan noted that the violence with which the slaves were captured was more than likely the motivating factor for the Court in setting the slaves free.

Massachusetts became ever more accustomed to the fact of slavery over the seventeenth and early eighteenth centuries. While the numbers of slaves in New England never reached the levels of those in the West Indies or the southern mainland colonies, merchants from New England became wealthy carrying on the slave trade from West Africa to the West Indies. The Isaac Royall family made its fortune in Antigua before moving to Massachusetts and purchasing Ten Hills Farm and 500 acres at Medford in 1736, a farm founded in the seventeenth century by John Winthrop.<sup>23</sup> They brought many of their slaves with them from Antigua and were among the largest slaveholders in Massachusetts until 1776. Slaves in New England had much more intimate relationships with their masters whether they lived and worked in the household or on the farm, or worked as artisans or labourers in the towns.<sup>24</sup> The smaller numbers and closer

---

<sup>22</sup> Donnan, *Documents*, 6-9.

<sup>23</sup> Janet Halley, "My Isaac Royall Legacy," in *Harvard Blackletter Law Journal*, Vol. 24, 117-132 being the text of a speech made by Halley at her appointment to the Royall Chair of Law at Harvard University, September 17, 2006 accessed at <http://www.law.harvard.edu/students/orgs/blj/vol24/Halley.pdf>

<sup>24</sup> Steven Deyle, "'By farr the most profitable trade': Slave trading in British colonial North America," *Slavery and Abolition, A Journal of Slave and Post-Slave Studies* 10, 114. Deyle explained that "Since most slaves sent to the northern colonies worked on small farms or as house servants, buyers wanted their slaves young and seasoned. They valued such traits as honesty, sobriety, and diligence, and numerous advertisements stressed these qualities which

working conditions may have sensitized New Englanders to the anomaly of human beings owning other human beings. Or, as argued by Leon Higginbotham, they may have “viewed the international slave trade as their English counterparts did – merely as another form of commercial activity”.<sup>25</sup> It is certain that many merchants from Boston and other coastal towns participated in the slave trade on both the east and west coasts of Africa and there were hundreds of slaves in Massachusetts by the early eighteenth century.<sup>26</sup>

But some New Englanders were concerned about the slave trade which was bringing wealth to the region. In 1700, Samuel Sewall confided to his journal that he had been “long and much dissatisfied with the Trade of fetching Negroes from Guinea; at last I had a strong Inclination to Write something about it; but it wore off. At last reading Bayne, Ephes. about servants, who mentions Blackamoors; I began to be uneasy that I had so long neglected doing any thing.”<sup>27</sup> If he had procrastinated previously, he made up for his neglect at this time and his pamphlet, “The Selling of Joseph” was printed five days later. The tract contained arguments

---

greatly added to a slave's worth. The ability to speak the native language also improved an individual's value.”

<sup>25</sup> A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* (New York: Oxford University Press, 1978), 63.

<sup>26</sup> Ira Berlin, *Many thousands gone: the first two centuries of slavery in North America* (Cambridge, MA: Harvard University Press, 1998), especially chapters 2 and 9. Slaves made up a much smaller percentage of the population of Massachusetts and other New England colonies than in the southern colonies; see Higginbotham, *In the Matter of Color*, 71.

<sup>27</sup> Samuel Sewall, *The Diary of Samuel Sewall: 1674-1729*, Vol. I, M. Halsey Thomas, ed. (Farrar, Straus and Giroux, New York, 1973): 432-433. Sewall referred to the Puritan divine Paul Bayne's *An Entire Commentary upon the Whole Epistle of St Paul to the Ephesians* a copy of which is available at <http://www.digitalpuritan.net/Digital%20Puritan%20Resources/Baynes,%20Paul/Commentary%20on%20Ephesians.pdf>.

against both the slave trade and the institution of slavery itself. Sewall commenced the tract with the assertion that “Forasmuch as Liberty is in real value next unto Life: None ought to part with it themselves, or deprive others of it, but upon most mature Consideration.” Some historians have seen this dictum as a sign of the ambivalence of New Englanders towards slavery.<sup>28</sup> It was not abhorrent and in the right circumstances, could be justified. He concluded with the observation “These Ethiopians, as black as they are; seeing they are the Sons and Daughters of the First Adam, the Brethren and Sister of the Last Adam, and the Offspring of GOD; They ought to be treated with a Respect agreeable.”<sup>29</sup>

While Sewall distributed his tract privately, it gained wide enough circulation that his opponents obtained copies and his sentiments were not welcomed by some of his contemporaries. One of his most vocal critics was a fellow judge, John Saffin, who was castigated by Sewall for failing to live up to his promise to free his slave, Adam. Sewall’s friend, a Mr. Belknap, brought a petition to the General Court requesting that Saffin be held to his promise; this is the petition to which Sewall’s journal referred on June 19, 1700.<sup>30</sup> Saffin had long been a prominent resident of Boston, serving as deputy to the General Court, speaker of the House, and a member of the Governor’s Council. He was a wealthy man who traded in slaves from Guinea and was well informed regarding the market in Virginia from having lived there as

---

<sup>28</sup> Higginbotham, Jr., *In the Matter of Color*, 61

<sup>29</sup> Samuel Sewall, “The Selling of Joseph,” DigitalCommons@UniversityofNebraska, Lincoln, accessed October 4, 2013

<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1026&context=etas>

<sup>30</sup> Samuel Sewall, *The Diary of Samuel Sewall*, Vol.1, 433

a young man.<sup>31</sup> Von Frank argued that there is little evidence that Saffin was a slave owner but it is clear that he traded in slaves. He surmised that Saffin, along with numerous other New England merchants, took advantage of the demise of the Royal African Company's monopoly on trade from West Africa to import slaves into Massachusetts through the port of Boston. Increasing the number of slaves and free blacks in the colony caused anxiety about possible slave revolts that residents had heard about in West Indian colonies.

In 1701, Saffin, an inveterate writer of poems, composed a nasty little poem entitled "The Negroes Character" in response to Sewall's "The Selling of Joseph".

Cowardly and cruel are those Blacks Innate,  
Prone to Revenge, Imp of inveterate hate,  
He that exasperates them, soon espies  
Mischief and Murder in their very eyes.  
Libidinous, Deceitful, False and Rude,  
The spume Issue of Ingratitude.  
The Premises consider'd, all may tell,  
How near good Joseph they are parallel.<sup>32</sup>

---

<sup>31</sup> Albert J. Von Frank, "John Saffin: Slavery and Racism in Colonial Massachusetts," *Early American Literature*, 29 (1994), 255-257. Much of the following information about Saffin as well as quotations from his writings are from Von Frank's article unless otherwise indicated.

<sup>32</sup> Lawrence W. Towner, "The Sewall-Saffin Dialogue on Slavery," *WMQ*, Third Series, 21 (1964), 48.

Von Frank suggested that Saffin's racist sentiments were grounded both in his exclusivist view of his Puritan religious community – the “city set on a hill” – and in his desire to maintain a hierarchical society in the colony in which he would obviously remain among the powerful elite. By 1701, he was 75 years old and nearing the end of his influential years in political, judicial, and social circles. He appears to have been a disillusioned and sour man, who could write “Friendship & Munificence are Strangers in this world; Interest and proffitt are the Principles by which all are Sway'd and he that Expects anything otherwise will find himself but fairly Deceived.”<sup>33</sup> Prior to Saffin's overt categorization of African character as “libidinous, deceitful, false and rude,” there was no similar writing that denigrated Africans on a racial basis in New England. The conflict between Sewall and Saffin, conducted as it was in public print as well as in Boston courtrooms over a period of four years, may have provoked a hardening of sentiment for those who were on one side or the other. Colonists who owned slaves or were involved in the business of the slave trade necessarily were forced into opposition against those who, like Sewall, were uncomfortable with the practice of dealing in slaves. After the case of Adam had been decided in his favour, Sewall, who was familiar with the London authors of *The Athenian Oracle*, reprinted an article regarding the slave trade in 1705 in Boston.<sup>34</sup> Interestingly, the

---

<sup>33</sup> Ibid., 261-262

<sup>34</sup> Towner, “The Sewall-Saffin Dialogue on Slavery,” 50. *The Athenian Oracle* was a newsletter that invited its readers to pose questions that would then be answered in subsequent issues by a panel of experts. The question posed for the article Sewall copied was “Whether Trading for Negros i.e. carrying them out of their own Country into perpetual Slavery, be in it self Unlawful, and especially contrary to the great Law of CHRISTIANITY?” The experts agreed that it was contrary to the law of Christianity and likely also unlawful.

article was reprinted again in two sequential issues of the *New England Weekly Journal* in June 1737, some thirty years later, indicating that the issue was still being debated at the time the Barnes case was heard. Perhaps the trial revived interest in the debate considering that Barnes was still in jail in Boston when the article was republished.

The question about the moral rightness or wrongness of the slave trade and slavery itself was the subject of ongoing debate into the 1730s and 1740s in New England. A draft of a letter by Jonathan Edwards, the evangelical minister involved in the beginnings of the First Great Awakening, referred to a controversy between some members of a church who accused their minister of sin because he owned slaves.<sup>35</sup> Edwards defended the minister against his parishioners and pointed out their hypocrisy in enjoying the fruits of slave labour at second hand by using goods produced by slaves. His defence evidenced his own discomfort with the inequality of slave ownership and his ambivalence as to whether or not it was allowed by Scripture. He certainly believed in and practiced spiritual equality by welcoming slaves into membership in his church in Northampton in western Massachusetts. The motives of the church members who argued for an end to slaveholding cannot be deduced from the evidence available. They may have been genuine antislavery advocates, or they may have belonged to a local faction fomenting disunion within a particular congregation, or they may have been opposed to the trappings of wealthier members of the community and the church.

---

<sup>35</sup> Kenneth P. Minkema, "Jonathan Edwards on Slavery and the Slave Trade," *WMQ*, Third Series, 54 (1997): 825.

While many Quakers were slaveholders, others spoke out emphatically against slavery and the slave trade. One of the Quaker voices from the 1730s was Elihu Coleman of Nantucket who wrote and printed a tract entitled “A Testimony against That Anti-Christian Practice of Making Slaves of Men”.<sup>36</sup> The reprinted version contained a preface referring to two other tracts published previously by William Burling of Long Island in 1718 and Ralph Sandiford of Philadelphia in 1729, both of whom were Quakers.

Anti-slavery sentiment was probably not widely espoused in New England as owning one or two slaves in New England had come to be a sign of upward mobility. New Englanders who were not part of the local social elites may have resented their ministers who were and who could afford to own slaves to assist with daily chores. Ministers who owned slaves could also rent them out so that the slaves’ wages could supplement the minister’s salary which was sometimes late in arriving.<sup>37</sup> Little is known about most of the clergy’s views regarding slavery and the slave trade but some may have shared Edwards’ distaste for the trade while still participating in slaveholding as a social status symbol. Edwards opposed the slave trade except for captives in war, debtors, and children of slaves. He believed that in the imminent millennium there would be no slaves; all would be free and equal.<sup>38</sup> In the meantime, the sin of slavery would continue.

---

<sup>36</sup> Elihu Coleman, “A Testimony against That Anti-Christian Practice of Making Slaves of Men Wherein it is Shewed to be Contrary to the Dispensation of the Law and Time of the Gospel, and Very Opposite Both to Grace and Nature.” (Reprinted for Abraham Shearman, Jr., 1825).

<sup>37</sup> Minkema, “Jonathan Edwards,” 826.

<sup>38</sup> *Ibid*, 829.

Anti-slavery viewed as a continuum between absolute chattel slavery and total freedom, whatever that may mean, took many forms through the early modern period in the Atlantic world as it had in antiquity and in medieval England. In Rome and Greece it was a private system providing masters wide discretion as to how they treated their slaves; some were treated as thinking cattle and others were given a great degree of responsibility. Stoics and early Christians emphasized the freedom of the spirit which was available to all without regard to their personal or legal status. In northwestern Europe, slavery gave way to serfdom and villeinage in the early middle ages. After the Black Death, serfs gained more freedom as they became tenant farmers. Short-lived experiments with slavery as criminal punishment in Tudor times proved unpalatable and quickly disappeared.

Slavery was already established in the West Indies by the time English trading companies arrived there. English planters found, as had the Spanish and Portuguese before them, that native Indians and English indentured servants were not suitable workers for the plantations either in the Caribbean or on the North American mainland, so they followed the lead of other European countries in bringing African labour to their colonies. As slaves, Africans were subjected to treatment which ran the gamut between that given to brute beasts, driven until they dropped, and valued members of the colonists' families.<sup>39</sup> Most of the slave societies of the colonies starting

---

<sup>39</sup> Trevor Burnard, *Mastery, Tyranny, and Desire: Thomas Thistlewood and His Slaves in the Anglo-Jamaican World*. (Chapel Hill: University of North Carolina Press, 2004). Burnard used Thistlewood's journal to describe the almost casual brutality a slave-owner inflicted on his slaves. Other writings from the period exhort masters to educate their slaves in Christianity and

with Barbados developed slave codes which regulated not only the lives of slaves but the relations between slaves and free.<sup>40</sup> Under the slave codes which were often ostensibly passed to maintain order in the colony, slaves were accorded no rights in most colonies and the duty of ordering the lives of slaves devolved on the masters. Slaves in New England were generally treated less harshly than in other American colonies, probably because there were fewer of them and they worked more closely with their masters. In Massachusetts, slaves who were justly acquired were to have “all the liberties and Christian usages which the law of God established in Isreall concerning such persons doth morally require” according to the Body of Liberties.<sup>41</sup> Masters in Massachusetts were to look to the Bible for guidance on how their slaves were to be treated in the seventeenth century, but as the numbers of slaves increased, the legislative council began to restrict the masters’ discretion and the slaves’ freedom. In Rhode Island the law against slavery passed in 1652 was never enforced.<sup>42</sup> By the 1730s, the slave trade became an important source of income for the economy of Rhode Island as Rhode Island slavers like Captain John Cupit exchanged locally produced rum for human cargo to sell in the West Indies.

---

thereby lead them to salvation. Simon Webb, *George Fox in Barbados*. (Durham: Simon Webb, 006);

<sup>40</sup> "Act for the better ordering and governing of Negroes," Sept. 27, 1661, Barbados MSS Laws, 1645-1682, CO 30/2/16-26.

<sup>41</sup> *The Massachusetts Body of Liberties (1641)* quoted in Lorenzo Johnston Greene, *The Negro In Colonial New England: 1620-1776* (New York: Columbia University Press, 1942), 63.

<sup>42</sup> William M. Wiecek, “The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America”, *WMQ*, 34, 2 (1977): 260.

Some New Englanders, such as Samuel Sewall and Elihu Coleman, spoke out strongly against the slave trade and slavery; there are indications that others were opposed to slavery but did not leave any written record of their opposition. Many members of the elite in New England made their fortunes from dealing in the slave trade directly, or by indirectly supplying goods and services to slave traders. Many more owned slaves themselves and employed them in their homes or on their farms. Jonathan Edwards' view of slave owning may have been typical of Puritan attitudes towards slaves. Slavery was not morally right but until the Christian millennium, God would allow it to exist; in the meantime, masters were duty-bound to treat their slaves well and teach them to become good Christians.

### **The Classical Theory of Slavery**

The ambivalent attitude towards slaves and slavery evidenced in the arguments from the Barnes case in Massachusetts was not a new phenomenon; it can be traced from antiquity in a variety of outlooks and practices. Over the centuries, slavery had existed in many forms and there were as many social and intellectual justifications for one human being owned by another as there were communities and eras in which slavery could be found. But in different ages and geographical locations, slaves performed roles distinctive to the society in which they lived; in some places, slaves were valued only for the labour they could accomplish each day, in others, they were estate assets like animals, real estate, and agricultural implements. Some slaves were indications of the status of the owner and some were valued household servants; others rose to high office within the state and commercial institutions. But all were owned by a master who could decide the fate of even the most highly placed slave.

England, along with all of Europe, received its attitudes towards slaves and slavery from the evolution of its own history rooted at least partially in antiquity; education beyond basic literacy in early modern England contained a considerable classical component so educated boys would have been able to read Greek and Latin texts and the ideas they espoused. The classical curriculum was transplanted to Massachusetts at Harvard College, an institution initially established to train ministers for the colonial churches. By the early eighteenth century, Harvard College was expanding to include more secular subjects but it retained the classical languages as an important part of its curriculum. Five of the nine commissioners who heard the arguments in the Barnes case had attended Harvard College and one had attended Yale College. They would have studied classics at these institutions at an impressionable age.

Historians describe slavery in classical Greek and Roman times as ubiquitous, and its legitimacy as an institution largely unquestioned. However, there were changes and, indeed, variations in the form and ideology of slavery during the classical period that suggested a level of disquiet over the practice of reducing human beings to the level of chattels to be used, or bought and sold at will. Solon, the father of Greek democracy, forbade the sale of poor Greeks into slavery to satisfy outstanding debts; Plato's and Aristotle's arguments justified the legitimacy of subjugating barbarians for their own good; the Stoics and the Cynics argued for a freedom of the mind which was available to free and unfree alike; St. Paul pointed slaves to ultimate, eternal freedom in the afterlife and earthly spiritual equality of all human beings, masters and slaves, under God's dominion. Later Church fathers including Augustine preached that slavery along with all other ills and injustices in society was God's punishment for the sins of men. That all of

these philosophical and religious writers were moved to deal with the question of enslavement and the institution of slavery within society points to some degree of disquiet over the treatment of man as chattel, whether a discomfort recognized by the writers themselves or one that required a justification of slavery to those who argued against it.

Within slave societies, voices were raised from time to time admonishing slave-owners against unnecessarily harsh treatment of slaves, reminding them of the common humanity of masters and slaves. Greeks and Romans often manumitted favoured slaves, giving hope to those still in slavery that they could attain freedom even though most slaves were never freed. Aristotle recommended holding out the hope of freedom to slaves but he does not fulfill his stated intention to elaborate on why slaves should be promised freedom.<sup>43</sup> The New Testament writers referred often to slaves and slavery but made it clear that, while Christianity taught that all persons were equal in the eyes of God, the new religion was not about changing the social and political world systems so much as it was about changing the spiritual lives of individuals with the ultimate goal of changing their attitudes towards others. Followers of Christianity were enjoined to model their lives on the life of Jesus who did not seek honour for himself but for God and lived the life of a servant or slave on earth to redeem man from slavery to sin. St. Paul advised Christian slaves to obey their masters and work for them as they would work for God.<sup>44</sup> His letter to the Christian slave-owner, Philemon, contained a plea to the master to receive the

---

<sup>43</sup> Guiseppi Cambiano, "Aristotle and the Anonymous Opponents of Slavery," in *Classical Slavery*, ed. M.I. Finley (London: Frank Cass & Co. Ltd., 1987), 26.

<sup>44</sup> Ephesians 6:5, 6 (New American Standard Version).

return of his runaway slave, Onesimus, as a brother and not a slave. Paul called Onesimus his son and described him as profitable to both Paul himself and to Philemon.<sup>45</sup> Early church fathers, such as Augustine, felt the necessity to explain the existence of slavery in a religion that taught the equality of all men under God. Augustine's justification for slavery was that slavery, along with all other injustice and ills in the world, was occasioned by man's sinfulness, but he did not provide an antidote to the problem of physical and legal slavery as such.

At the same time that Augustine was Bishop of Hippo and writing about slavery in the Christian Mediterranean, St. Patrick, as Bishop of Ireland, was evangelizing the Irish. While St. Patrick may be a popular mythical figure of whom little is known with any certainty, historians generally agree that he personally produced two writings entitled *Confessions*, in which he recounts his conversion while a slave in Ireland, and *A Letter to the Soldiers of Coroticus*.<sup>46</sup> The latter writing contains some autobiographical details of Patrick's life including references to his freeborn birth to British parents, his abduction by Irish raiders at the age of sixteen, and his call to return to Ireland to preach the gospel to the pagans there. The *Letter*, while addressed to the companions of Coroticus was meant for a wider audience and constituted a strongly worded protest against actions of Coroticus in which he and his soldiers raided an Irish Christian settlement where St. Patrick had recently baptized a number of new believers. Some of the believers were killed during the raid and the remainder was carried off to be sold into slavery.

---

<sup>45</sup> Philemon 1:16 (New American Standard Version).

<sup>46</sup> St. Patrick, *A Letter to the Soldiers of Coroticus*, <http://www.yale.edu/glc/index.htm>; St. Patrick, *Confessions of St. Patrick*, <http://www.ccel.org/ccel/patrick/confession.ii.html>

The language of the letter ranges from furious anger with Coroticus for selling the new Christians into pagan lands to dire warnings for those who would keep company with these “ravening wolves that ‘eat the people of the Lord as they eat bread!’”<sup>47</sup> St. Patrick also mourned the death of those killed as he agonized over the fate of those men and women sold into slavery in non-Christian lands by people who purported to be Christians.

St. Patrick implied that the Irish were thought to be suitable subjects for slavery: “We have been made, as it were, strangers. Perhaps they do not believe that we have received one and the same baptism, or have one and the same God as Father. For them it is a disgrace that we are Irish. Have ye not, as is written, one God?”<sup>48</sup> His words are a reminder of Aristotle’s argument that barbarians were natural slaves; however there is little evidence that the Picts and Scotti as the Irish were known held this opinion. Like Augustine, St. Patrick attributed his capture by the Irish raiders and that of other community members to God’s punishment for their unbelief and failure to listen to the admonitions of their priests.

I did not, indeed, know the true God; and I was taken into captivity in Ireland with many thousands of people, according to our desserts, for quite drawn away from God, we did not keep his precepts, nor were we obedient to our priests who used to remind us of our salvation. And the Lord brought down on us the fury of his

---

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

being and scattered us among many nations, even to the ends of the earth, where I, in my smallness, am now to be found among foreigners.<sup>49</sup>

St Patrick's time in slavery was reformatory as well as retributive; he recounted his experience of herding flocks alone in the mountains and praying continuously.

But after I reached Ireland I used to pasture the flock each day and I used to pray many times a day. More and more did the love of God, and my fear of him and faith increase, and my spirit was moved so that in a day [I said] from one up to a hundred prayers, and in the night a like number; besides I used to stay out in the forests and on the mountain and I would wake up before daylight to pray in the snow, in icy coldness, in rain, and I used to feel neither ill nor any slothfulness, because, as I now see, the Spirit was burning in me at that time.<sup>50</sup>

While St. Patrick saw slavery and slave trading as odious practices when used against baptized Christian believers and he had harsh words not only for those who participated in it, but also for those who condoned their actions, he accepted his own six years in captivity as the major turning point in his life and his preparation for ministering to the Irish.

St. Patrick was not alone in condemning the sale of Christian slaves out of their native lands. Balthild, queen of the seventh century Frankish king, Clovis II, when she ruled as regent for her son, Clothar, after the death of Clovis,

---

<sup>49</sup> St. Patrick, *Confessions*.

<sup>50</sup> *Ibid.*

forbade Christian men to become captives, and issued precepts throughout each region [ordering] that absolutely no one ought to transfer a captive Christian in the kingdom of the Neustrians. And in addition she paid the price and ordered many captives to be bought back and she released them as free. Others of them, especially from her own race, men and also many girls, she sent into the monasteries as her own charges. However many she was able to attract, these she entrusted to the holy monasteries, and she ordered them to pray for her.<sup>51</sup>

Balthild had been a slave in the household of Erchinoald I, king of the Franks, as a young girl and, according to her biography, *Vita Sanctae Balthildis*, narrowly escaped becoming his second wife after his queen died. She was apparently very beautiful and when the king came looking for her, the story is that she hid under a pile of rags. Balthild was English.

In medieval England, slaves were well represented in the Domesday Book and the literary record provides evidence of slaves at least back to the ninth century, but the existence of slavery in England can be assumed throughout the early medieval period from references to slaves in extant literature. These records consisted of poetry, hagiographies, homilies, and penitentials, as well as portions of the Bible which were translated into Old English dialects before the Norman Conquest.<sup>52</sup> References to slavery can be found in all of these works and in some, slavery was denounced and slaves were recognized as human; this was especially so in the

---

<sup>51</sup> “Balthild I,” *Prosopography of Anglo-Saxon England*, <http://www.pase.ac.uk>, accessed 29 March 2011.

<sup>52</sup> The Anglo-Saxon Bible website at <http://wordhord.org/nasb/> provides digital copies of most of the known translations, glosses, and commentaries in Old English.

homiletics of Ælfric, abbot of Eynsham, and the penitentials of Wulfstan, archbishop of York. The legal position of the slave in Anglo-Saxon society improved during the early medieval period in England as changes occurring in the Norman period caused slavery to disappear into the rank of villeins and serfs. In villeinage and serfdom, the lords had rights over the labour of the lowest in society but no property in the bodies of these persons.

In seventeenth and eighteenth century Britain and in eighteenth century Boston, the works of the Greek and Roman philosophers were well known and formed an integral part of a good classics education. Students learned Latin and Greek and were able to read the classics in the original languages so they would have been aware of the writings concerning slavery. They also studied the early church fathers' theological works which dealt with causes of slavery and duties of masters and slaves toward each other. In British America, educational curricula followed the model set in England and included additional subject matter arising from the Enlightenment in Scotland and France. Deference and paternalism founded on the essential social inequality arising from a person's birth, size of estate, and other intangibles added to the understanding of slavery in colonial New England. Nascent ideas of a new kind of hierarchy in America was often based more on seventeenth century elites who arrived early in the colonies and took their places in the establishment of administrative and commercial processes in New England. Social equality was not expected nor espoused at any level at this time.

William Linn Westerman described the concept of freedom in Greek society by listing the "four elements of liberty" which were possessed by freemen but not by slaves. The four elements were "To be one's own master ... To be protected against seizure (except by due

process of law). To have freedom of action. To have freedom of movement.”<sup>53</sup> He further defined slaves as those who, even if they were not their own masters, could have any or all of the other three elements of freedom or could have a part of an element such as freedom or restriction on freedom for a term of years. For example, a slave could have freedom of action but be restricted to a particular geographical location for a term of years. Freedom for the Greeks was not a sharply drawn, defined state, but was divisible in many ways.

In the sixth century B.C., Athens was sharply divided between rich and poor, and poor Athenians could become slaves by contracting debts they could not pay. Poor farmers were prevented by law from selling or mortgaging their lands as security for loans, so as they became indebted to the rich, and their bodies and those of their families became the security for such loans. Even slavery of this kind did not extinguish the responsibility of society to protect the weak and those not able to claim the protection of the law. Plato enjoined masters to not only keep slaves in subjection, but also to “nurture them properly, not only for their sakes, but even more for the sake of ourselves,” principles which Plato drew from ancient moral law restricting citizens from acting with *hybris* (*ὕβρις*) and inflicting bodily injury unjustly or with intent to dishonour or degrade those weaker than themselves.<sup>54</sup> By avoiding *hybris*, masters showed self-control, another virtue expected of Greek citizens in a free society. Laws against premeditated

---

<sup>53</sup> William Linn Westerman, “Slavery and the Elements of Freedom in Ancient Greece,” *Slavery in Classical Antiquity: Views and Controversies*, ed. M.I. Finley (Cambridge: W. Heffer & Sons Ltd., 1960), 11.

<sup>54</sup> Glenn R. Morrow, *Plato’s Law of Slavery in its Relation to Greek Law* (New York: Arno Press, 1976), 33, 38.

murder of a slave and laws against a master's murder of a slave to prevent him from exposing the master's misdeeds subjected the offender to punishment but prosecution procedures were problematic in that it was unlikely that an interested party would be found to bring suit to avenge the slave's death. So while laws to protect a slave from his master were on the books, their use was fraught with procedural problems in a society in which murder was a private wrong.<sup>55</sup>

Enslavement for debt led to the practice of *hektemorage*, a kind of personal contract in which the poor man gave his labour to the wealthy man of the area, forfeiting a sixth of the goods he produced and symbolically recognizing this subordination by accepting the installation of a *horos*, or stone monument on his land. Solon the Lawgiver abolished the practice of debt-bondage in 594 B.C., under a proclamation called *Seisacthea* or "disencumbering" when it became clear that a majority of Greeks bitterly resented this practice and threatened social disruption. Solon's outlawing of *hektemorage* redressed the law of creditor and debtor thereby reinstating law and order among the people but his laws, while initiating a rudimentary form of democracy, had unintended consequences of allowing Athenians to regard menial work as beneath the dignity of even poor Athenians; a new rank of labourers was required to do this kind of work. These new labourers came from captives of the many wars fought both between Greek city states and between the Greeks and the barbarians of the surrounding territories. By the time of Aristotle in the fourth century B.C., ancient Athens was replete with slaves, and has been described as one of the slave societies of the ancient world, a society in which slaves played a

---

<sup>55</sup> *Ibid.*, 54.

crucial role in the production of essential goods. Moses Finley estimated that the city state of Athens had as many slaves as the American south. Custom in the classical world dictated that the victor in war took title to the enemy's property and to his body; he could dispose of either as he wished.<sup>56</sup> Or he could put the property and the body of the vanquished to his own use or as William Bollen argued "the rights and Powers which thereby result from Capture in Warr and those on whom his rights are devolved" meant that the captor's rights to the body of the slave could be sold and the buyer received the same rights to the life of the captive as the seller held.<sup>57</sup>

In *The Politics*, Aristotle both described and prescribed the characteristic associations of society and it was not always clear which he was doing in any particular passage. Aristotle, unlike Plato, argued that the natural state of any person or thing was the highest and best state he or it could attain. An acorn's highest and best state was a mature oak tree and a child's highest and best state was a man living the good life. Aristotle's teleological reasoning led him from simple associations of the household to the more complex and perfect association of the state, which he defined as clusters of villages made up of interdependent households. In Greece as in eighteenth century Massachusetts, because the household was the basic unit of association, Aristotle spent more time describing it, as a unit consisting of the husband as the head of the household, the wife as necessary for procreation and the slave or ox to "draw the plough." It is, however, notable that a significant portion of this first chapter on the natural components of the state is devoted to a discussion of slaves and slavery. Aristotle provided one definition of a slave

---

<sup>56</sup>Aristotle, *Politics*, 1255a5-7, 71.

<sup>57</sup> SP 36/39, f. 244.

thus: “A slave by nature is an individual who, being a man, is by his nature not his own but belongs to another; and a man is said to belong to another if, being a man, he is a thing possessed.”<sup>58</sup> The circularity of this definition is unsatisfactory; Aristotle said that ownership by a master makes a man a slave and the fact that the master can use him as an instrument justified his being so used. The key for Aristotle was that a man “by nature” belonged to another, by which Aristotle did not mean that slavishness was the original condition of the natural slave but that possession by another was the highest and best state of that man. In other words, slavery was the best such a man could attain, the best for him, for his master, and for society. Aristotle differentiated between natural slavery and slavery by *nomos* or custom; natural slavery, being natural, was not only good but expedient both for the slave and for the master who ruled him. Slavery by custom was not necessarily good because not only the natural slaves were caught in customary or legal slavery but all those who had succumbed to the brute force of the enslaver.

As in eighteenth century Massachusetts, in Greece not everyone agreed with the practice of slavery. Aristotle argued against those who said “it is contrary to nature to rule as master over slave, because the distinction between slave and free is one of convention only, and in nature there is no difference, so that this form of rule is based on force and is therefore not just.”<sup>59</sup> His justification of slavery was based on the assumption that those who were slaves were somehow fit only for slavery in temperament and intelligence, therefore the best and highest purpose for their lives was to be ruled by a master. He was unable to state with any degree of specificity how

---

<sup>58</sup> Aristotle, *Politics*, 1254ax5-18, 62-9.

<sup>59</sup> Aristotle, *Politics*, 1253b14, 63.

to determine whether an individual was a natural slave though he attempted to find the slavish temperament in mental attributes or deficiencies, physical stature and strength, and even geographical origin outside Greece, of course. Malcolm Heath, in an attempt to make sense of Aristotle's attribution of mental deficiencies to slaves says, "Practical wisdom involves unqualified deliberation, the ability 'to deliberate well about what is good and beneficial for [one]self, not in particular respects... but about what sorts of thing conduce to living a good life in general'."<sup>60</sup> Slaves may be able to deliberate as to the virtuous means to a specific virtuous end, but are unable to attain the good life overall because their ability to balance a number of such deliberations at the same time to an unqualified virtuous life is deficient.

Aristotle was unable to answer the question as to how one could correctly recognize a naturally slavish person. He accepted that slavery could be divided into natural slavery and legal slavery; legal slavery was that kind of slavery which custom recognized and had little to do with the individual's characteristics other than he had a master who was able to command his services. These slaves were more likely to be non-Greeks or barbarians captured in one of the many wars constantly waged between the Greeks and neighbouring peoples; conventional law allowed the victor in war to claim all of the property of the vanquished including his body. While slaves were more likely to be barbarians, Aristotle admitted that the practice of enslaving persons captured in an unjust war was itself unjust.

---

<sup>60</sup> Malcolm Heath, "Aristotle on Natural Slavery," *Phronesis: A Journal for Ancient Philosophy*, 53 (2008): 251.

A natural slave not only benefited the master but was essential to the master's ability to live the good life. The slave was one of the tools the master needed to carry out the mundane tasks of daily life and as such had no common ground with the master just as a hammer had nothing in common with a carpenter. But Aristotle could not ignore the essential humanity of the slave especially in Greek democracy though in the *Nicomachean Ethics* he struggled to qualify the relationship between master and slave by considering the possibility of friendship between ruler and ruled in a tyranny.

[M]aster and slave have nothing in common, since a slave is a tool with a soul, while a tool is a slave without one. In so far as he is a slave, then, there cannot be friendship with him. But there can be friendship in so far as he is a human being, since there does seem to be justice of some kind between any human and any other capable of community in law and agreement. So there can also be friendship, in as much as he is a human being.<sup>61</sup>

Aristotle was only one of many who struggled to equate the civil law of slavery with the natural law of the equality of man. Peter Garnsey quoted Florentinus and Ulpian from the second century and early third century AD who both made a distinction between civil and natural law,

---

<sup>61</sup> Aristotle. *Aristotle : Nicomachean Ethics* (Port Chester, NY, USA: Cambridge University Press, 2000), 158. <http://site.ebrary.com/lib/ucalgary/Doc?id=2000816&ppg=200>.

and in contrast to Aristotle believed that under the law of nature all men were naturally free and equal.<sup>62</sup>

Little mention of natural slavery can be found in the written record after Aristotle's death and the defeat of the Athenian state by Philip of Macedonia, but it seems that the concept of natural slavery did not survive Aristotle for long. The Stoa philosophical school was founded by Zeno in 300 BC and emphasized personal morality rather than the communal morality of the polis. Garnsey pointed out that later Hellenistic philosophic schools after Aristotle ignored his natural slavery theory and by the time of Cicero, Stoics generally taught that slavery was a moral issue and the proposition "Every good man is free, every bad man a slave" while propounded by Cicero had been gaining currency since shortly after the time of Aristotle and Plato.<sup>63</sup>

The whole discussion about freedom and slavery began to take on a more theoretical tone in which the concept of slavery gained many layers of meaning and came to be equated with subjugation to diverse kinds of "masters." Freedom related to autonomy of action not only for the weaker against the stronger individual but also for the mind or soul over the physical desires and appetites. In the later Stoic period, external circumstances and factors outside their control were of limited importance and did not feature large in their philosophy; therefore legal or bodily slavery was less important than the attitude of the mind in assessing the degree of an individual's

---

<sup>62</sup> Peter Garnsey, *Ideas of Slavery from Aristotle to Augustine* (Cambridge: Cambridge University Press, 1996), 64.

<sup>63</sup> Garnsey, *Ideas of Slavery*, 129. Garnsey's study deals with the ideology of slavery in the classic period and is valuable for the source quotes he provides from a wide range of theorists in classic pagan, Jewish and Christian environments.

freedom or bondage. By controlling his responses to the inevitabilities of life and detaching himself from dependence on the external environment the individual could live virtuously in a world that had fallen from a prior Golden Age and contained imperfections such as sin, slavery and even death.<sup>64</sup> Among the Stoics, we find the seeds of arguments used later by abolitionists.

Cicero declared that slaveholders were greedy and ignorant but did not go so far as to say that slaveholding made them so. Epictetus believed that slaveholding made a man into a slave himself. Seneca alleged that the soul of a man could not be held in bondage and slaveholders should treat their slaves as they wished to be treated by their superiors since all men were equally at the mercy of Fortune.<sup>65</sup> In an attempt to define slavery, David Brion Davis found that Hellenistic Stoics Philo and Dio Chrysostom taught that “slavery of the body is the result of mere chance and convention” and therefore not true slavery in that it dealt only with externals. Chrysostom argued further that slaves held by force, such as prisoners of war, had every right to revolt against their masters if they had the opportunity to do so, and the descendants of such slaves were held without legal right.<sup>66</sup> Philo eulogized the Essenes, an ascetic Jewish sect, that lived communally detached from surrounding society in Syria and did not have slaves or servants since all members contributed their property and labour to the benefit of the community as a whole, but even he acknowledged that this was a model that the wider community could only

---

<sup>64</sup> David Brion Davis, *The Problem of Slavery in Western Culture* (Ithaca, NY: Cornell University Press, 1966), 76. Davis’s discussion of slavery in antiquity and the middle ages in chapters three and four provides a good survey of the intellectual environment of these periods.

<sup>65</sup> Davis, *Problem of Slavery*, 77.

<sup>66</sup> Davis, *Problem of Slavery*, 79, 80.

aspire to emulate. Philo and Chrysostom were by no means abolitionists but sought for the meaning of freedom in less concrete or physical terms than had Aristotle. Over all, Stoicism was a conservative philosophy that urged all men to be content with their social and legal status not to seek to change the society in which they lived. Moral refinement must be attained within the individual's mind and soul.

New Englanders would have been more conversant with the Biblical teachings regarding slavery and servanthood. While the existence of slavery was acknowledged by Jesus, he turned the status of slaves on its head by commanding his disciples that, unlike the rulers of the Gentiles who lorded it over the less powerful, they should seek to be of service if they wanted to be great and the first among them should be slave to the others just as Jesus was.<sup>67</sup> Jesus did not condemn slavery but neither did he condemn many other social institutions in the Roman Empire; however he did condemn oppression and greed wherever he saw it. He was concerned more that human motivations be right so that the words and actions springing from those motivations would be right no matter who the person was. Jesus's teachings recorded by the apostles often referred to slaves and slave owners as He drew lessons from everyday life to explain spiritual concepts to his disciples and the crowds who followed him. For example, his story about the slaves entrusted to invest the master's money while he was gone exemplified the principle that believers are expected to work to the best of their ability for the kingdom of God. Many of Jesus' parables included references to slaves or *δοῦλος*, which the King James Version and other later versions

---

<sup>67</sup> Matthew 20:25-27 (New International Version, 2011).

and translations of the Bible rendered as servants.<sup>68</sup> Slaves' lives are portrayed realistically in terms of the work they did, expectations masters had of them, rewards they received for work well done, and punishments for misdeeds or failure to perform. Jesus did not denounce the social system of slaves and masters just as he did not denounce the prevailing political system. He referred to himself in terms of a slave of his Father, God by declaring "For I have come down from heaven not to do my will but to do the will of him who sent me."<sup>69</sup> Jesus accurately described slaves' bodily punishments and torture which later Christian writers saw as a foreshadowing of his own torture and death by King Herod and the Romans. Even physical punishment and torture which signified the humble position of the slave was used by Jesus to emphasize the paradox of humility and greatness; he warned his disciples that they should not be surprised when called upon to face persecution just as he had since the servant is not above the master. His body bore the marks of torture in the same way that slave bodies often were disfigured.<sup>70</sup>

Early Christians were surrounded by a largely hostile environment both by the Jewish communities in Israel, the leaders of which feared that this upstart sect would be another source

---

<sup>68</sup> The King James Version of the Bible published in 1611 only used the term "slave" or variations thereof four times.

<sup>69</sup> John 6:38 (New International Version, 2011).

<sup>70</sup> David Brion Davis, while he noted that the Biblical writers equated slavery with original sin, did not mention that Jesus taught his disciples to be humble like slaves to God. David Brion Davis. *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006), 35-6. He did state that man's freedom from his sinful nature could only be gained by accepting servitude to "a higher and more righteous bondage." David Brion Davis. *The Problem of Slavery in the Age of Revolution, 1770-1823*. 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1999), 42.

of trouble bringing the wrath of Rome down on them, and by the Roman government in the larger Empire, which expected conformity to the cult of the divine Emperor. Even though Christianity grew throughout the Empire, the new community of believers fought for physical and social survival for three centuries. Early Christians knew what oppression was from firsthand experience, as they tried to live out the teachings of Jesus. They were reviled, hunted out, tortured and killed by the Romans who wished to stamp out an unpopular sect whom they saw as a source of conflict in an already troublesome province. As Christianity began to spread throughout the Empire, it faced opposition wherever it went from the local religious leaders and from the Roman governors. In Rome itself, Christians literally lived underground in the Catacombs to protect themselves from persecution and death. Christians' earliest form of social organization was a type of communal living in which goods were shared and individual members' needs were met by the community. As numbers of converts grew, the communal way of life was abandoned and Christians began to blend into the society of which they formed a small but irksome part, possibly in a continuing effort to protect themselves from persecution. Since Christians could be found in all ranks of Jewish and Roman society from nobles to slaves, their lives echoed the lifestyles of those around them, including social practices such as slave owning. Perhaps borrowing from Stoic philosophy or in a further protective effort to blend in, St. Paul exhorted new converts to remain in the legal state they held before their conversion:

Each person should remain in the situation they were in when God called them.

Were you a slave when you were called? Don't let it trouble you—although if you can gain your freedom, do so. For the one who was a slave when called to faith in

the Lord is the Lord's freed person; similarly, the one who was free when called is Christ's slave. You were bought at a price; do not become slaves of human beings. Brothers and sisters, each person, as responsible to God, should remain in the situation they were in when God called them.<sup>71</sup>

Also during this time, slavery was used as a theological metaphor to describe the Christian believer's relationship with God and with sin. Jesus portrayed himself as a servant ministering to the needs of his followers even to the extent of performing the office of a servant in washing their feet at the Last Supper, a task which would have been done by the lowliest of the low in the household.<sup>72</sup> He also told his disciples that he had come to do the will of his Father on earth, to live his life in subjection to God's will, and even to die according to the will of God. These were the actions of an obedient slave; He then exhorted his disciples to do the same. Paul described himself often as the slave of Jesus Christ in his letters to the new churches. Christian writers used slavery as a metaphor for the relationship of the believer to God. Man was born an involuntary slave to sin and remained in that state until he voluntarily accepted the salvation offered by God through the redemptive death and resurrection of Jesus Christ, a type of spiritual manumission. He then became free from sin and entered into a covenant relationship in which he was subject to God. This metaphor encompassed the experience of both the state of involuntary, oppressive slavery known by many throughout the Mediterranean world and the voluntary act of

---

<sup>71</sup> I Corinthians 7:20-24 (New International Version, 2011).

<sup>72</sup> Jennifer A. Glancey, *Slavery in Early Christianity* (Oxford: Oxford University Press, 2002), 106.

a person giving his service to a master in exchange for payment of his debt, also a well understood relationship in the early Christian world. The slavery of the Christian therefore was a choice; he accepted the redemptive act of Christ's death and resurrection as payment for his sin and thereby was freed from slavery to sin in order to become a child of God and serve Him.

Augustine, Bishop of Hippo in North Africa, one of the early church fathers, followed the exhortations of the apostles in their instructions to masters and slaves, especially those of St. Paul already mentioned. Political and social uncertainty characterized the Mediterranean world in the fifth century after the sack of Rome by the Vandals. Augustine, in *De Civitate Dei*, written towards the end of his life, stressed the need for Christian masters to preside over an orderly, peaceful household which included keeping disobedient slaves in line as part of their Christian duty on earth.<sup>73</sup> The peaceful household, as the building block of the orderly city, echoes the Aristotelian concept of the household as the state in microcosm. Augustine also believed that slavery resulted from Adam's sin of disobedience since there was no slavery in the original peoples captured by Anglo-Saxon conquerors.

The institution of slavery was deeply ingrained in Anglo-Saxon society where early laws treated them as chattels. However, a study of these early compilations of laws reveals changes in attitudes towards slaves and, indeed a less distinct legal boundary between slave and free hired labourer, especially in Alfred's legislation.<sup>74</sup> His laws decreed that slaves could own property, dispose of their property, reclaim stolen property, and be a principal in a legal action. But by the

---

<sup>73</sup> Garnsey, *Ideas of Slavery*, 208-9.

<sup>74</sup> Pelteret, *Slavery in Early Medieval England*, 85.

time of Edward II in the early tenth century, the perceived need for law and order impinged on the evolving freedom of the lower ranks of society. Edward charged the lords with controlling all ranks of labourers on his land and making sure even freemen were transferred to another lord before allowing them to leave the manor. This had the effect of curtailing the freedom of even the *ceorlas* or ordinary members of the tribe, but it ensured order in a changing society.

### **Colonial Slave Laws**

Both defence counsel and the Advocate General in the Barnes trial referred to historical legal precedents to build the case for and against Barnes and the rights of masters and captains of ships to make life and death decisions over slaves. Defence counsel based his arguments on “the Original foundation of Slavery the Law of Arms and ... the rights and Powers which thereby result from Capture in Warr which are altogether Illimited with respect to the Captor and those on whom his rights are devolved ... And in all reason the Original Laws of Slavery ought to take place where no particular provision is made.”<sup>75</sup> In other words, the laws of capture in war applied at all times unless positive law to the contrary had varied the ancient laws. The Advocate General agreed that some nations allowed the master the power of life and death over his slave, but that was not the universal rule and “such legal Right of killing the Slave was ever universally condemned as repugnant and Contrary to moral Right and Equity for which reason it never was Admitted among Christians and was never part of the Law of Slavery in any Christian Nation.”<sup>76</sup>

---

<sup>75</sup> SP 36/39, f. 244.

<sup>76</sup> SP 36/39, f. 246.

He went on to distinguish the right of a master from that of a trustee and the right of the captain of a ship from that of a master.

Where did the colonies get their ideas about how to deal with unruly slaves or even to discourage slaves from becoming unruly? Many historians have claimed that slave laws in the American and West Indian colonies were innovations springing from unique situations that arose in the colonies, separate from any legal concepts that could have been imported from England.<sup>77</sup> Other historians have drawn comparisons between practices in England in the sixteenth and early seventeenth century designed to control masterless men and women and the processes used in the colonies to govern the behaviour of slaves. Bradley Nicholson contended that many details of colonial slave codes actually mirrored provisions of legislation designed to maintain public order and to control servants and vagabonds in Tudor England. Christopher Tomlins focused on the transplantation of vagrancy laws from England amended and supplemented by greater controls in Barbados in the mid seventeenth century; from Barbados the slave laws were further transplanted to Jamaica, Antigua, and South Carolina.<sup>78</sup>

---

<sup>77</sup> Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," *AJLH* 38 (1994), 38-40. Nicholson reviewed some historians' comments on the law of slavery in the New World and found that they stressed the need for legal innovation rather than looking to see where similar processes were borrowed from English practice. He adopted the framework used by Alan Watson as summarized by the statement "Watson's view is that legal systems historically have grown either by borrowing from an esteemed outside system or by borrowing rules within the system, rather than through pure invention." 40.

<sup>78</sup> Christopher Tomlins, "Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery," *Theoretical Inquiries in Law* 10 (2009): 389. Tomlins traced the establishment of the Barbadian code's influence on slave laws and their implementation from that island through the English Caribbean and then north to the mainland colonies. See William

The first slave code was developed in the colony of Barbados and issued in 1661; prior to this time, legislation had been passed as the council deemed necessary to deal with specific circumstances. It seems that previous legislation may have been incorporated into the 1661 code but little evidence of previous provisions remains. The preamble to the act referred to “many good laws and ordinances” which had been made to control the Africans on the island and to provide for punishment for “their misdemeanours, crimes and offences” but the laws had been ineffective because the masters and other inhabitants of the island had failed to enforce the provisions the council had put in place.<sup>79</sup> Furthermore the council had the right to formulate legislation in light of the lack of guidance from English law; there was no concern that the slave laws would be repugnant to English legislation since there was no legislation dealing with slaves in England. The Barbados council saw itself as simply extending the law to cover situations for which England had not provided precedents.<sup>80</sup>

The legislation entitled an “Act for the better ordering and Governing of Negroes” made controlling slaves a public safety issue and gave the state the ultimate authority to govern the lives of slaves in the colony.<sup>81</sup> Unlike laws relating to servants which transplanted the English

---

Wiecek, “The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America,” *WMQ*, Third Series, 34 (1977), 258-80. Wiecek provided a valuable survey of statutory laws concerning, not only slaves, but all blacks in the Thirteen Colonies and even into the English Caribbean Islands.

<sup>79</sup>Act for the better ordering and governing of Negroes, Sept. 27, 1661, Barbados MSS Laws, 1645-1682, CO 30/2/16-26

<sup>80</sup> Susan Dwyer Amussen, *Caribbean Exchanges: Slavery and the Transformation of English Society, 1640-1700* (Chapel Hill: University of North Carolina, 2007), 130-31.

<sup>81</sup> CO 30/2, fols. 16-26

concept of paternalism to Barbados with its reciprocal rights and duties, the slave code envisioned slaves as property and unruly property at that who must be coerced to behave properly in every aspect of their lives. Slaves could not leave their masters' property without written passes; they received harsh punishment for assaulting any white person or for running away from their masters; their homes were searched regularly for weapons and stolen goods.<sup>82</sup> They could not own property and as property themselves, their masters were responsible to pay reparations for any harm they inflicted on other white persons or on island society as a whole. The master was even responsible for criminal actions of his slave, whereas his white servant was responsible for his own criminal activities. Rebellion was the ultimate crime against Barbadian society in which black slaves far outnumbered whites of any status. Not only was a master not criminally responsible for killing his slave for misbehaving or running away, the state compensated a master who executed his rebellious slave.

As the numbers of black slaves continued to increase in Barbados and the fear of rebellion intensified, the slave code was amended regularly to increase the severity of slave punishments and add offences to the list already long in the 1661 legislation. Even offences previously included in English criminal law were reiterated in the slave code making it even more obvious that Africans were a different kind of being, not fit to be covered by the provisions of ordinary English criminal legislation. In the 1688 restatement of the law, the preamble specifically removed slaves from the protection of English law by describing them as "of such

---

<sup>82</sup> Ibid. Amussen, *Caribbean Exchanges*, 131. Amussen contrasted the simultaneously promulgated laws against slaves and servants in Barbados in 1661.

barbarous, wild and savage nature ... as renders them wholly unqualified to be governed by the Laws, customs and Practices of our nation.”<sup>83</sup>

Barbados slave legislation provided a model for other English colonies after 1661, the first of which was Jamaica. Jamaica had already used Barbadian laws as a template for its founding legislation in 1661 – laws relating to both servants and slaves. In 1664, Jamaica virtually copied the 1661 Barbadian legislation regarding both servants and slaves. Later Jamaican versions of slave laws diverged from that original code to fit local conditions. For example, Jamaican laws permitted abandoned plantations to be destroyed so that they would not provide refuge for runaways.<sup>84</sup> Settlers from Barbados were given a grant of land by King Charles II and the new colony of Carolina was named after his father. The Barbadian settlers brought not only their slaves with them in 1669, but they brought the slave society they knew in that colony. In 1690, they too borrowed the legislation recently amended and passed into law to regulate their slaves with its harsh punishments for offences relating only to slave behaviour. As time passed and the colony matured, the code was amended to take cognizance of local conditions but its harsh punishments were not abated.<sup>85</sup> No doubt Barnes had come into contact

---

<sup>83</sup> *Ibid.*, 139.

<sup>84</sup> *Ibid.*, 141.

<sup>85</sup> Alan Watson, *Slave Law in the Americas* (Athens: The University of Georgia Press, 1989), 67-71. Watson contrasted Roman law regarding slaves with English American law and demonstrated that Roman slave law was essentially private law allowing masters to deal with their slaves as they saw fit, but English colonial laws treated slave law as public safety laws and required masters to mete out harsh punishments for infringements of state laws on penalty of fines or loss of the slave to a new master.

with some of the ideas which supported harsh punishment for slaves and believed it was the best way to deal with them.

As with all legislation passed in the colonies, the slave codes were among the laws required be sent to London to be scrutinized for any provisions repugnant to English law; once approved they could be declared valid laws in the colonies. The amended Barbadian slave code of 1678 was approved by the Privy Council even though it was excessively punitive and despite the fact that some provisions departed from English law, such as Africans tried for capital offences without a jury in colonial courts; the Privy Council believed Barbadians were vulnerable because of the dangers posed by large numbers of slaves in the colony.<sup>86</sup> Trial by jury was one of the basic principles of Magna Charta but the slave codes dispensed with that fundamental legal guarantee for all black slaves. Slaves charged with serious offences were tried by two justices of the peace and three freeholders selected by them; these five men would also pass sentence if the slave was found guilty. For any crime less than a felony, the master was responsible for meting out the required punishment and if he refused, the state stepped in and took over. A recalcitrant master could expect to have his slave transferred to the complainant and thus lose both his investment in the slave and the labour the slave would have provided to him.

While Barbadian legislation was the first codification of English colonial slave law, its influence spread widely throughout the American and Caribbean colonies. Winthrop D. Jordan found West Indian influence in New England slave attitudes and laws in the mid-seventeenth

---

<sup>86</sup> Amussen, *Caribbean Exchanges*, 133.

century even though New England did not have the need for large numbers of unfree labourers. New Englanders' belief that Africans were a different kind of human being suitable for enslaving was probably appropriated from early and frequent contact with the West Indian settlers as Bostonians traded with Puritans on Providence Island and other English colonies in the Caribbean.<sup>87</sup> A flourishing trade in provisions and timber developed between Massachusetts and Barbados in the seventeenth century; obstreperous Indians were exchanged for black slaves in the West Indian colonies. During the 1640s, about 1200 settlers migrated from increasingly crowded English Caribbean island colonies to New England bringing with them their attitudes that Africans were destined to be slaves for life.<sup>88</sup> The New World development of attitudes toward unfree labour was in opposition to the trend in medieval and early modern England.

---

<sup>87</sup> Winthrop D. Jordan, *White over Black: American Attitudes Toward the Negro, 150-1812* (New York: W.W. Norton & Company, 1968), 66-71. Vincent Harlow, in his *History of Barbados: 1625-1685* (New York: Negro Universities Press, 1926), 340, recounted the numbers of Barbadians who lost their lands to large landholders and were forced to leave the island for other West Indian and American colonies.

<sup>88</sup> In 1636, the Barbados Council resolved that "Negroes and Indians that came here to be sold, should serve for life, unless a contract was before made to the contrary." The statement was simply inserted without comment into the "Memoirs of the first settlement of the island of Barbados, and other the Carribbee islands, with the succession of the governors and commanders in chief of Barbados to the year 1742. Extracted from ancient records, papers and accounts taken from Mr. William Arnold, Mr. Samuel Bulkly, and Mr. John Summers" by William Arnold, UNIV OF CALGARY. 2 Oct. 2013  
<<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=ucalgary&tabID=T001&docId=CW116318092&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>>.

## Slavery in Britain and the Atlantic

Slavery in medieval Britain was a carry-over from the Roman occupation and, after the Romans left, the Celts continued slave raids on England.<sup>89</sup> Slaves made up a significant portion of the population of medieval Anglo-Saxon England until about the twelfth century. Historians disagree as to how many slaves there were and how to describe their status in this period, but the Domesday Book compiled by William the Conqueror, the major source for population studies in this period, provides clues for researchers; for example, slaves or *seruui* are calculated in a separate category from other agricultural workers even though they may have been employed in the same kinds of labour.<sup>90</sup> As for the slaves' status in English society, David Pelteret, who has written the definitive work on slavery in medieval England, divided Anglo-Saxon chiefdom society into a hierarchy of nobility, *ceorlas* or agriculturalists, and slaves at the bottom; he speculated that this order of society may have been imported from Europe by way of the Germanic invaders.<sup>91</sup>

Social groupings in medieval England changed over time from loosely connected ethnically related tribes to more tightly bound larger chiefdoms made up of groups of tribes in a geographic area. Larger units had a better chance of fending off invaders in the form of

---

<sup>89</sup> Pat Dutchak, "The Church and Slavery in Anglo-Saxon England," *Past Imperfect* 9 (2001-2003): 27.

<sup>90</sup> David A.E. Pelteret, *Slavery in Early Medieval England: From the Reign of Alfred until the Twelfth Century* (Woodbridge: The Boydell Press, 1995), 194-5. Pelteret's chapter on the Domesday Book and slavery provides a wealth of information concerning the numbers of slaves and their place in the economy of medieval England.

<sup>91</sup> Pelteret, *Slavery in Early Medieval England*, 29.

neighbouring chiefdoms as well as foreign invaders, but even then chiefdoms were not always successful and foreign invasions could and did break them apart into tribal groups again. Nobles in the chiefdoms were allocated land by the king as a reward for military success which they then parceled out for the use of the *ceorlas* to work as free members of the chiefdom.<sup>92</sup> Slaves at the bottom of the social hierarchy probably were not actual members of the chiefdom but may have been former community members enslaved for crimes they committed or indigenous Celtic peoples captured by Anglo-Saxon conquerors.

Slaves in England, as elsewhere, entered slavery by way of capture in war or raids, sale for unpaid debt, or punishment for crimes committed. Other slaves were born to enslaved mothers and fathers. Viking raiders and other forms of warfare like Welsh border raids into England produced a supply of slaves from the indigenous peoples. Pelteret suggests that, while Germanic custom was to kill all the fighting men from the conquered side after a battle, other captured men were enslaved or held as hostages until ransomed.<sup>93</sup> Slaves from Anglo-Saxon Britain were sold in continental Europe giving some credence to the story of Pope Gregory seeing the English boys in the Romans slave market. Whether or not he called them angels instead of Angles, he did send missionaries under St. Augustine to bring the Gospel to the British

---

<sup>92</sup> Pelteret, *Slavery in Early Medieval England*, 31-32.

<sup>93</sup> Pelteret, "Slave raiding and slave trading in early England," *Anglo-Saxon England* 9 (1980): 102-3.

in the late sixth century and he commissioned his priest, Candidus, to purchase Anglo-Saxon slave youths and send them to monasteries to be educated.<sup>94</sup>

Between the seventh and tenth centuries, Anglo Saxon society evolved from a land of local rule by chief to the beginnings of manorial society with nobles perpetually holding extensive lands in their own families, and not only temporarily granted for services continually being rendered to the king.<sup>95</sup> As land generated wealth, the nobles' power grew and with it a sense of ethnic commonality and unity which lead eventually to acknowledgement of the pre-national leadership of King Alfred of Wessex in the ninth century. As Anglo-Saxon society became more organized, the complexity and definition of social ranks increased based on status in the form of wergeld.<sup>96</sup> Slaves were at the bottom of the ranks with no land and no membership in the tribe. As the estates or manors of the nobles grew, they absorbed the labourers, landed and landless, already working the lands which they had been granted by charter from the king.<sup>97</sup> Local laws and customs were developed for these manors and administered by the nobles and their agents; these laws, dealing with purely local matters, were separate from that code assembled by Alfred from the laws of previous kings Offa of Mercia and Æthelbert of Kent as well as the even older customs of the chiefdoms.

---

<sup>94</sup> Dutchak, "The Church and Slavery in Anglo-Saxon England," 27.

<sup>95</sup> Pelteret, *Slavery in Early Medieval England*, 35.

<sup>96</sup> Wergeld is literally the value of a man and denotes the payment that must be made for injuring or killing a man. For the categories of rank based on wergeld see Pelteret, *Slavery in Early Medieval England*, 84.

<sup>97</sup> T. H. Aston, "The Origins of the Manor in England," *Transactions of the Royal Historical Society*, Fifth Series, 8 (1958): 59-83 provides a detailed study of the fluidity of manorial land holding and the relation of man to the land in medieval Britain.

Royal law and ecclesiastical law were inextricably intertwined in medieval Britain; the church had a powerful influence over national legal and social life as well as sole authority over affairs on its own extensive lands. In addition to the secular and ecclesiastical laws, churchmen compiled and distributed penitentials which were moral codes of conduct for Christians; these penitentials came to have a quasi-legal authority and addressed expected conduct of all ranks of society including forms of penance for sins. Archbishop Wulfstan of York not only exerted control over ecclesiastical matters in the early eleventh century, his position as Bishop of London from 996 to 1002 and Archbishop of York for twenty-one years from 1002 until his death in 1023 gave him time to influence royal law as well. Wulfstan left voluminous writings and “works in which he had a hand included royal legislation, ecclesiastical regulations, penitential literature and homilies”<sup>98</sup> He held his position as Archbishop under Æthelred who was not an ideal king, because an ideal king would have been expected to exhibit the qualities of justice, openness to wise counsel and a capability to defending his people from foreign invaders.<sup>99</sup> Wulfstan may have been frustrated with Æthelred’s failures to measure up to the ideal that, in his *Institutes of Polity*, “Wulfstan claims for them (the bishops) the direction of all affairs, both lay and ecclesiastical, and states that all laws should be administered according to their counsel.”<sup>100</sup> Wulfstan’s writings frequently reminded the king of his duty to protect the weak and poor. Undoubtedly, slaves at the lowest end of society were part of Wulfstan’s concern; he preached

---

<sup>98</sup> Pelteret, *Slavery in Early Medieval England*, 89.

<sup>99</sup> M. K. Lawson “Archbishop Wulfstan and the Homiletic Element in the Laws of Æthelred II and Cnut,” *The English Historical Review*, CCCCXXIV (1992): 571.

<sup>100</sup> Lawson, “Archbishop Wulfstan,” 572.

that all, rich and poor alike, were equal before God, and all Christians were slaves of God, particularly the clergy. Wulfstan, while he did not advocate the abolition of slavery, believed that all men were entitled to equal protection under secular law, a departure from earlier views of slaves as mere chattels on the same level as animals. The hierarchy of society could not be ignored and judges were to “make due allowance and carefully distinguish between age and youth, wealth and poverty, freemen and slaves, the sound and the sick.”<sup>101</sup>

The model of society on the *Defiance* echoed the English social model. Early modern English society functioned on the concepts of deference and paternalism which necessarily went hand in hand; the elites acted as paternal caretakers of the lower ranks in society and in return, the beneficiaries of the lords’ care showed deference to them. The relationship echoed the English notion of the family in which husbands and fathers had both authority over and duties to wives and children, and wives and children in turn owed deference and duty to the husbands and fathers.<sup>102</sup> Within the wider society, the relationships were very unequal, and at times, violent when expectations were not being met. Riots broke out regularly when harvests were bad and peasants did not have enough to eat, and nobles reacted with sufficient violence to suppress the rioters, fearing the chaos that could be unleashed by the rabble. But seldom was the goal to remove the hierarchy in society; peasants wanted more access to reliable food sources and nobility strove to maintain order in the form of the status quo in society. There was no

---

<sup>101</sup> Pelteret, *Slavery in Early Medieval England*, 90.

<sup>102</sup> Keith Wrightson, *English Society: 1580-1680* (London: Hutchison & Co., 1982), chapters 1 & 4. Wrightson described the structure of English society in chapter 1 and the structure and relationships within the family in chapter 4.

expectation of equality among the ranks or even a desire to remove ranks altogether. At all levels, most people wanted to retain the rights they believed belonged to them at their station in English society.

While there was inequality within English society, slavery was not generally practiced in the years before the establishment of the overseas colonies. Black servants did appear in English society but were more often valued as symbols of exotica thereby signifying the wealth of the master. Despite the absence of slavery as an institution in England, the law regarding the legitimacy of slavery was far from clear until the late eighteenth century; there was no specific legislation and the case law was vague regarding the status of slaves. Even Lord Mansfield's decision in the Somerset case did not definitively deal with the legitimacy of the institution of slavery in Britain but the perception was that it had and perception quickly became reality. As a result of the lack of legal authorities regarding slavery, when the Caribbean and American colonies developed slave societies, they had to look elsewhere than positive English law for precedent on which to model their legislation.

## Chapter Five

### “At the Request of our Commissioners”<sup>1</sup>: Boston Vice-Admiralty Court Officers

#### Introduction

The Vice-Admiralty Court in Boston which tried John Barnes for murder was a good example of legal pluralism at work in the Province of Massachusetts.<sup>2</sup> Admiralty law formed an additional layer of legal jurisdiction in New England beyond the provincial criminal courts which operated outside Massachusetts provincial law but was administered by men intimately involved in the provincial legal system. At this time there was little recorded conflict between the criminal division of the Vice-Admiralty Court and the provincial criminal courts, probably because the criminal matters that came before the Vice-Admiralty Court were very obviously not suitable to be heard in the county courts; they were usually piracy cases.

By the 1730s, Massachusetts was becoming an important part of the economy of the British Empire. Relations with the colonies were supervised by two entities in London - the Board of Trade and the Secretary of State. The Board of Trade not only dealt with colonial issues, but made sure the colonies remained profitable to Britain by absorbing excess manufactured goods and providing raw materials needed at home. Closely connected with the

---

<sup>1</sup> SP 36/39, f. 249

<sup>2</sup> Lauren Benton and Richard Ross, “Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World,” in *Legal Pluralism and Empires, 1500-1850*, eds. Lauren Benton and Richard Ross (New York: New York University Press, 2013): 1-17.

Board of Trade in the 1730s was the young and upcoming southern Secretary of State, Thomas Pelham-Holles, the Duke of Newcastle, who was in charge of colonial administration including many administrative postings. He was charged with selecting colonial governors who would tread the fine line of satisfying both imperial and colonial masters, a complex and difficult task, especially in Massachusetts where the people were staunch believers in local government free of outside interference. In Boston, the Governor represented the king and translated imperial demands into local laws and ordinances.

Power in Boston rested in the hands of the Governor who was in turn advised by the General Council, a body of twenty-eight men drawn from the elected House of Representatives. The Council acted as the upper house in the legislature while the House of Representatives was the lower house. The Council supplied the required number of commissioners for the Vice-Admiralty court in Boston and they advised the judge regarding aspects of the trial. Most of the commissioners in the Barnes's trial had been judges or were currently judges of provincial courts in Massachusetts; the commission was not a jury. The men were a diverse mix of personalities and backgrounds and it is instructive to know their values in order to understand why they came to the decision they did. The other court officers – Advocate General, defence counsel, and Judge of the court were also men of their time and place using their values and experience to do justice for Bawow.

### **Boston Through British Eyes**

Simon Told, the sailor who wrote a memoir of his life at sea as a young man, was impressed with both the products and people he found in Massachusetts when he visited there in the late 1720s on his way back to England from the West Indies. Boston was the most populous city in America at this time and its prosperous inhabitants were proud of their “city set on a hill”. He wrote of Massachusetts and Boston,

Here all the land was strewed with plenty; their orchards was replete with apple-trees and pears. They had cyder presses in the centre of their orchards, and great quantities of neat cyder, and any person might become a partaker thereof for the mere trouble of asking. We soon entered Boston, a commodious beautiful city, with seventeen spired meetings, the Dissenting religion being then established in that part of the world... Nothing was wanting during our continuance there, on the contrary, affluence flowed in on the inhabitants from all parts of the continent... Here I shall only make a few observations touching the nature and disposition of the inhabitants of that city. Their behaviour is altogether amiable as peacemakers and they are naturally blessed with humane inclinations, together with such strict order and œconomy as I never before observed... It was a pleasure to buy and sell among them because I never found an individual among their fraternity guilty of extortion. Would to God I could say this of the inhabitants of Great Britain!<sup>3</sup>

---

<sup>3</sup> Told, *An Account of the life*, 46-7.

His description of the beauty and prosperity of Boston may have been written years after he sojourned there but the delight he took in the place and people he met there made a profound impression on him. He assumed his readers were familiar with the orderly and prosperous character of the city and so left out many details that would have interested historians, but he does indicate that Boston's prosperity was well known in Europe. Boston was founded to be a city apart from the rest of the world, Puritan, moral, industrious, and an example for all to emulate. For a few years after its founding, Boston was relatively homogeneous in its demography and outlook, but its position as a port city soon challenged its isolationist mentality. By the end of the first quarter of the eighteenth century Boston was not only the largest city in colonial America but had become cosmopolitan in its population, economy, and outlook. The colony was more firmly under the authority of British officials than it had been in the seventeenth century; under the new charter of 1695, the Privy Council had retained the prerogative to appoint to the highest offices in the colony, so these colonial officials strove to maintain their political and social connections to London.

Bostonians who aspired to high office in the colonies established agents in London to advocate on their behalf with whoever was in power at the time. The Duke of Newcastle was the major figure in British foreign affairs in the period 1721 to 1762 and an influential member of the Whig government at home. He supported Sir Robert Walpole, who was informally recognized as Britain's first Prime Minister. Newcastle's immense wealth and landed estates made him very useful to the government – he controlled a large number of seats in the House of Commons which he regularly delivered to the Whigs both at election time and when votes were

taken in the House. As Secretary of State from 1724 to 1754 in the Whig government, Newcastle took much of the responsibility for the colonies from the Board of Trade. The Board of Trade had been established in 1696 as a body to care for the colonies but more importantly to make them profitable within the British mercantile system; they were to produce naval supplies and to provide raw goods that Britain had previously had to obtain from other countries at the end of the seventeenth century.<sup>4</sup> The Board's duty was also to prevent the colonies from establishing manufacturing or crops that would compete with British goods.<sup>5</sup>

In the first half of the eighteenth century, Boston was a thriving port city with contacts not only in Britain but all along the North American eastern seaboard and especially into the West Indies. Unlike the southern colonies and the West Indies, Boston did not have one major export that could be exploited; the city's hinterland was suitable for small farming operations and

---

<sup>4</sup> Oliver Morton Dickerson, *American colonial government 1696-1765; a study of the British board of trade in its relation to the American colonies, political, industrial, administrative* (Cleveland, OH: Arthur H. Clark, 1912), 8. Dickerson's study is an exhaustive discussion about the role, personnel, and activity or inactivity of the Board of Trade regarding the American colonies in the eighteenth century. The Board of Trade had responsibility for encouraging and expanding trade in England as well as the colonies, and it was to look after the poor in such a way as to prevent them from becoming a burden on English society. Ian K. Steele in his monograph, *Politics of Colonial Policy: The Board of Trade in Colonial Administration, 1696-1720* (Oxford: Clarendon Press, 1968), discussed the Board of Trade, not as a bureaucratic entity, but as a group of individuals who had influence on the King in council more or less related to the particular individual's knowledge of colonial affairs and his competence in dealing with those affairs.

<sup>5</sup> Alison G. Olson, "The Board of Trade and London-American Interest Groups in the Eighteenth Century," *British Atlantic Empire Before the Revolution*, eds. Peter Marshall and Glyn Williams (London: Frank Cass Publishers, 1980): 33-50. Olson discussed the effectiveness of the Board in representing Anglo-American interest groups in the first half of the eighteenth century; interest groups represented by the Board included religious, mercantile, and non-English migrants.

harvesting of timber. While both of these endeavours yielded some exports, Boston found itself looking to the sea for economic salvation. The ocean became a source of food and other resources, a highway for communication and transportation, and a place of employment for hundreds of young men beginning their adult life.<sup>6</sup> Boston's port facilities were well placed to provide an entrepot for goods brought in from the hinterland and from smaller centres along the New England coast, and for a supply depot for fishing expeditions up the coast to Newfoundland, and trade voyages either along the coast to the southern colonies or the West Indies, or across the Atlantic to Europe or Africa. New England's forests provided tall straight white pines ideal for ships' masts and plenty of timber for the ship building industry.<sup>7</sup>

The commissioners who sat in the Vice-Admiralty court in Boston in 1736 were among the political and commercial leaders of the city as well as members of the General Council, which in the first third of the eighteenth century was formed of a mix of merchants and government officials, English emigrants and a few native born Americans, religious and secular. And not all of these were separate categories as some men fit into more than one role at the same time or at different times during the course of their careers. Merchants were appointed to government office and carried out both functions at the same time; lawyers practiced law

---

<sup>6</sup> Jeffrey Bolster, "Putting the Ocean in Atlantic History: Maritime Communities and Marine Ecology in the Northwest Atlantic, 1500–1800," *AHR*, 113 (2008): 19-47, placed the importance of the ocean to the English in context in the old world and in the new world from medieval era to the end of the eighteenth century.

<sup>7</sup> The British government's reservation of the best of the white pines for the Navy's ships caused much conflict in the New England colonies between officials and poachers, and also between surveyors of the woods and other government officials who were not inclined to assist the surveyors. This is discussed in more detail hereafter.

privately at the same time that they acted as court appointed prosecutors or defence counsel. The members of the Governor's Council and elected members of the Assembly formed the political and administrative elite in the colony; many names appear again and again with some families involved in a number of offices. Connections between families were common as well; elite families intermarried both inside the colony and within other New England elites. These men and women both shaped and were shaped in turn by their British and New England connections.

In January, 1733-34, the Board of Trade made a report to the House of Lords regarding "the Laws made, Manufactures set up, and Trade carried on, in His Majesty's Plantations in America."<sup>8</sup> The report described the various kinds of governments in the colonies and the ways in which laws in the colonies were to be reviewed and approved or disallowed. The report took a somewhat querulous tone in discussing the difficulties that the Board confronted in receiving copies of laws passed by colonial assemblies in a timely manner. Examples of the lists of colonial laws considered by the Board of Trade can be found in the Journals of the Board which provide references to all matters with which the members dealt and how the matters were disposed. A reference from June, 1735 appears to be one day's work and relates to laws submitted by Massachusetts ranging from control of wild cats to payment of government officials and the disposition each of those laws.<sup>9</sup>

---

<sup>8</sup> TNA, CO 5/5, f. 31-47.

<sup>9</sup> Journal, June 1735: Volume 44, *Journals of the Board of Trade and Plantations, Volume 7: January 1735 - December 1741* (1930), 17-33. URL: <http://www.british-history.ac.uk/report.aspx?compid=81649&strquery=Massachusetts>.

The Report also detailed the kinds of manufactures carried on in the colony or such of those manufactures that the colonial officials wish to acknowledge. For the colony of Massachusetts Bay, the Board received information from Governor Shute that indicated that manufacturing of iron satisfied only a portion of local consumption. Governor Belcher's report showed much the same situation for textiles, paper, wool, and iron. However, other reports showed a much greater degree of manufacturing, especially iron and leather for hat making, than the official information revealed. The Board concluded that

we cannot conceal from your Lordships, that it is with the greatest Difficulty we are able to procure true Informations of the Trade and Manufactures of New England; which will not appear extraordinary, when we acquaint your Lordships, that the Assembly of Massachusetts Bay had the Boldness to summon the above-mentioned Mr. Jeremiah Dunbar before them, and pass a severe censure upon him, for having given Evidence at the Bar of the House of Commons of Great Britain, with respect to the Trade and Manufactures of this Province, agreeable to the Tenour of what is above-mentioned under his name.<sup>10</sup>

The Board inferred that Governors Schute and Belcher were not prepared to report merchants and manufacturers who flouted the law.

---

<sup>10</sup> TNA, CO 5/5, f. 44. Dunbar reported that ships were being built and traded to the French and Spanish for rum, molasses, wine, and silk; New Englanders were also sending hats to Spain, Portugal, and the British West Indies, and making iron for shipbuilding, distilling spirits, and refining sugar in the colony. All of these activities had implications for British manufacture and trade.

The Report concluded that the colonies should be encouraged to raise and provide naval stores to Britain in exchange for British manufactured goods. This course would not only afford a favorable balance of trade to Great Britain, but would obviate the need to pay in specie for timber, tar, pitch, and other naval supplies to northern European governments.<sup>11</sup> Attempts to implement a similar scheme had been made previously when the British Whig government settled German Palatine refugees in the frontier areas of what is now upper New York State.<sup>12</sup> The scheme was abandoned when the Whigs lost the 1710 election to the Tories, but the Board of Trade in 1733 had apparently forgotten the lessons it should have learned twenty years earlier.

While the Board of Trade was the body nominally responsible for the care of the colonies, in practice, by the 1730s the Board was little more than a reporting agency to the Privy Council. It had changed from a committee of members fully engaged in the business of looking after colonial affairs on behalf of the King in Council to a bureaucracy consisting of employees whose business it was to collect information, make reports, and review the minutiae of trade policy. In many cases, employment was doled out as patronage by members of the Board who

---

<sup>11</sup> *Ibid.*, f. 48.

<sup>12</sup> Philip Otterness, "The New York Naval Stores Project and the Transformation of the Poor Palatines, 1710-1712," *New York History* 75 (1994): 133. The British government attempted simultaneously to resettle German Palatine refugees and to employ them in producing naval stores in the upper Hudson River Valley. The attempt was spectacular failure because the Germans believed they had been duped by promises of land that would never materialize and they refused to work effectively at the naval stores project; it is surprising to find the Board of Trade recommending a similar kind of project twenty years later.

found it unnecessary to attend regular meetings.<sup>13</sup> Despite its shortcomings, the Board remained a clearing house for information about the colonies well beyond matters of trade and commerce and produced a number of men knowledgeable about the possibilities and problems of the colonies; they were well placed to be of service both to the King with regard to colonial matters and to the colonial administrations. Some even became colonial governors.<sup>14</sup>

### **Thomas Pelham-Holles, the Duke of Newcastle**

While the Board of Trade was established to deal with colonial administration from regulating trade in favour of Great Britain to advising the Privy Council which men should be appointed to offices in the colonies, Thomas Pelham-Holles, the Duke of Newcastle, took on an increasing degree of authority for appointing officials after he became Secretary of State for the South in 1724. Or as one historian claimed, the authority was forced on him and in most cases, when he made the appointment himself he made good decisions from the candidates that were available and willing to take up the governorships for which they were nominated.<sup>15</sup> But Lord Townshend,

---

<sup>13</sup> Mary Patterson Clarke, "The Board of Trade at Work," *AHR*, 17 (1911): 17-43. Clarke's meticulously researched article opened a fascinating window on the day-to-day proceedings of the Board and its employees. She balanced the perceived failure of the Board members to take their work seriously after the first few years of the Board's existence with the value of the information collected and disseminated by employees of the office.

<sup>14</sup> *Ibid.*, 26.

<sup>15</sup> Philip Haffenden, "Colonial Appointments and Patronage under the Duke of Newcastle, 1724-1739," *The English Historical Review*, 78 (1963): 417-35. Haffenden tried to dispel the impression that Newcastle aggressively took over the authority to appoint men to positions in the colonies and made poor choices because he appointed friends or friends of friends to offices for which they were not suited. He attributed many of the appointments to Townshend who was

not Newcastle, was the one responsible for having Jonathan Belcher appointed as governor of Massachusetts in 1731, a decision that may or may not have been an astute move. Newcastle has been maligned by contemporaries as a man greedy for power and reluctant to take responsibility for any unpopular decision.<sup>16</sup> He has been depicted as a buffoon, ignorant of the location and circumstances of the areas for which he had responsibility. However, the fact that he retained the position of Secretary of State for three decades evidenced a degree of competence that his enemies failed to recognize; no doubt, his brother's support from his position as Lord of the Treasury and later as Prime Minister assisted Newcastle in advancing through the ranks. Walpole and the Pelham brothers formed a powerful informal foreign policy committee. Newcastle was shrewd enough to support the Hanoverians against the Jacobites, gaining the favour of Walpole, King George I and his son, King George II. As well, upon the downfall of Walpole, he brokered an alliance between the Whig factions that served to keep him in power. While he was cognizant of the importance of the American colonies, and indeed of the rise in prominence of all of the Americas, his focus remained on the intricacies of European politics with their frequently shifting alliances. The decade of the 1730s was the period in which he attained and began to put into practice his knowledge of foreign affairs, both in Europe and in the Americas. Newcastle was increasingly concerned with maintaining the balance of power in Europe and he believed that Britain's best chance to assist in that endeavour was to court an alliance with Austria.

---

Secretary of State for the North in the 1720s or Colonel Martin Bladen, one of the Commissioners of the Board of Trade from 1717 to 1746.

<sup>16</sup> *Ibid.*, 417.

When he did take cognizance of America, Newcastle focused on the British Caribbean, the new colony of Georgia, and the Spanish naval threat in those waters.<sup>17</sup> The War of Jenkins Ear arose from an incident in 1731 in which a Spanish captain severed the ear of a British captain after accusing him of smuggling; this incident and others festered until 1739 when war between Britain and Spain was declared. Neither Walpole nor Newcastle wanted war with Spain, but in the end they let it happen.<sup>18</sup> Throughout the decade, Newcastle's power increased first over his co-secretary of state and later in his relationship with Robert Walpole. He was *de facto* leader of the government in the House of Lords but he still shared the powers of appointment to posts in colonial America and the West Indies with King George II and Walpole. Newcastle's longevity in British government can be attributed to his ability to organize, his attention to detail, his profligate spending which required a government salary to stave off bankruptcy, and his ability to manoeuvre among opposition interests in political circles.

---

<sup>17</sup> Reed Browning, *The Duke of Newcastle* (New Haven: Yale University Press, 1975), 88-90. Browning's book is the only full biography of Newcastle. Other historians have compiled correspondence or prepared comparative biographies of Thomas and Henry. Still others have focused on certain aspects or periods of Newcastle's life; some are sympathetic, some uncomplimentary. The best study of Britain's interests and activities in America during the Newcastle period is James A. Henretta, "*Salutary Neglect*": *Colonial Administration under the Duke of Newcastle* (Princeton: Princeton University Press, 1972). Henretta quoted J.H. Plumb who opined that "Place was power; patronage was power; and power is what men in politics are after." viii. The West Indian and the American colonies became a theatre where men jockeyed for power both in giving and receiving positions of power and pecuniary advantage in the first half of the eighteenth century.

<sup>18</sup> Browning, *The Duke of Newcastle*, 88-96.

## Officers of the Boston Vice-Admiralty Court

In the Court of Vice Admiralty in Boston, the governor of the province was normally the President of the Court. Jonathan Belcher, governor of Massachusetts and New Hampshire from 1730 to 1741, was not appointed as governor by the Duke of Newcastle and probably would not have been his choice for the post, but he proved to be a wily politician who was able to hold the office of governor for eleven years.<sup>19</sup> Jonathan was born in 1681 to Andrew Belcher, a wealthy and prominent Massachusetts merchant. Andrew had profited from supplying provisions to the colonial side in King Philip's War and using the profits he made in smaller ventures, he entered the shipping business. By the turn of the century, he had his own wharf and one of the largest shipping concerns in Boston; the House of Representatives acknowledged his status by appointing him to the Council. Andrew increased his wealth by becoming a major supplier of provisions to the British Navy in the opening decade of the eighteenth century.<sup>20</sup> As commissary general in Boston, Andrew held a virtual monopoly on basic food supplies such as grain and bread; he was not above engrossing supplies to sell to the highest bidder in times of scarcity to the detriment of the poor of Massachusetts. The time Andrew devoted to his rise to a position of wealth and power cost him the opportunity to develop a close relationship with his son, Jonathan

---

<sup>19</sup> Michael C. Batinski, "Jonathan Belcher of Massachusetts, 1682-1741," (PhD dissertation, Northwestern University, Illinois, U.S.A., 1969): 63. Batinski argued that Belcher used Newcastle's absence from London as his opportunity to gain the governorship. Belcher's London political connections and his acquaintance with King George II stood him in good stead at this time

<sup>20</sup> Michael C. Batinski, *Jonathan Belcher, Colonial Governor* (Lexington: University of Kentucky, 1996), 17.

and he spent little time with him until after he had graduated from Harvard in 1701. Jonathan was nineteen when he joined his father in the family business and began to learn the intricacies of trade from him.<sup>21</sup> Jonathan made several trips to England to represent the family business and to gain a cosmopolitan polish that would give him advantages in years to follow.<sup>22</sup> Jonathan served his father well in London, concluding lucrative government supply contracts and making influential friends in advantageous positions. Despite his son's successes, Andrew Belcher remained in tight control of all aspects of the business until his death in 1717 and Jonathan acted the part of the dutiful son, assisting his father and doing his bidding even to the point of marrying the wife Andrew had chosen for him.<sup>23</sup> Finally, at age thirty-five after his father's death, he was his own man, but his relationship with his autocratic father had scarred him so that he interpreted any disagreement with his policies as evidence of disloyalty to which he reacted with retribution.<sup>24</sup>

Belcher succeeded his father as a member of the General Council in 1719 only to find himself in the midst of an increasingly factional government with the Dudley family and the

---

<sup>21</sup> Batinski, *Jonathan Belcher, Colonial Governor*, Batinski wrote his PhD dissertation at Northwestern University on Jonathan Belcher's life up to 1741 with emphasis on his political career with its triumphs and defeats. Batinski also wrote "The Two Faces of Jonathan Belcher: An Exercise in Biography as Synthesis," *Biography*, 19 (1996): 178-97.

<sup>22</sup> Mark A. Peterson, "Theopolis Americana: The City-State of Boston, the Republic of Letters, and the Protestant International, 1689-1739," in *Soundings in Atlantic history: latent structures and intellectual currents, 1500-1830*, eds. Bernard Bailyn and Patricia L. Denault (Cambridge: Harvard University Press, 2009): 332-41. Peterson focused on Belcher's travels in continental Europe and his connections with the future Hanoverian royal family which would serve him well in later life.

<sup>23</sup> Batinski, "The Two Faces of Jonathan Belcher," 182.

<sup>24</sup> *Ibid.*, 168.

Cooke family on opposite sides. Each faction claimed that the other was intent on destroying social order for its own benefit. Both factions saw themselves as Massachusetts Nehemiahs – protecting a covenant community in a hostile world and leading a well-ordered society as an example to the rest of the world. In the Puritan community of New England which prided itself on peace and good order, the administration of the province was in chaos with faction fighting faction. Governor Shute was insensitive to the causes of problems within the community and he appeared to have been playing games with the House of Representatives to demonstrate his power over them.<sup>25</sup> He threatened to have the Massachusetts charter revoked and went to London to appeal to the Privy Council for assistance in bringing the recalcitrant province in line. The Privy Council obliged by providing a supplementary amendment to the charter that defined solutions to the major points of contention; the Council and House reluctantly accepted the amendments. The Dudley family had prevailed over the Cooke family and Belcher, who had supported the Dudleys, should have found his fortunes rising with theirs.

The 1720s were difficult times for Belcher; his enmity with Elisha Cooke resulted in his failure to retain his seat on General Council for several years during the decade. He felt left out of the power structure and abandoned by Paul Dudley whom he had supported in the past. Instead of blaming Elisha Cooke who overtly opposed his election to the Council, Belcher looked for veiled antipathy to his success and found it in the Dudley and the Dummer families which he had previously looked upon as friends and supporters. He considered retiring from

---

<sup>25</sup> Batinski, *Jonathan Belcher, Colonial Governor*, 40-2. Much of the information regarding Belcher's life and activities in the 1720s is drawn from Batinski's biography.

public life but could not bring himself to do so. When Governor Shute was replaced by Governor Burnet in 1727, and he immediately strongly pressed the House of Representatives to follow the King's instruction to vote a permanent salary for the governor – an issue the House had refused to follow for several years deeming the King's direction to be an infringement on their liberty and in contravention of their charter. The House again refused and directed its representatives in London, Francis Wilkes and Jonathan Belcher to advocate on its behalf before the Privy Council. Nothing the Massachusetts representatives could say would sway the Privy Council and in Boston, the Council and the House stood firm against Governor Burnet. The stalemate was broken only by the death of the Governor on September 7, 1729.

Belcher had spent enough time in London to know how to manipulate the levers of power and after assuring himself that former governor, Samuel Shute, did not want to reprise his role as governor of Massachusetts and New Hampshire, he volunteered himself as a native of Boston who could mediate between London and Boston to bring the Massachusetts government in line. Belcher was able to appeal directly to King George who remembered him from his visits to Hanover as a young man. Bypassing the Duke of Newcastle and Martin Bladen of the Board of Trade, Belcher received his commission as governor from the King in November, 1729.<sup>26</sup> He did not hurry back to Boston but remained in London until June 2, 1730 enjoying lavish

---

<sup>26</sup> Batinski, "Jonathan Belcher of Massachusetts, 1682-1741," 63-4.

entertainment by merchants and political elites alike.<sup>27</sup> Sailing aboard the *Blanford*, Belcher arrived in Massachusetts on August 10 to a royal welcome by New Englanders of all ranks.

His popularity was quickly put to the test; one of the terms of his instructions from the Privy Council was to convince or coerce the House of Representatives to pass legislation setting a permanent salary for the governor. The House, as before, refused and Belcher was hard pressed to appear to be carrying out the King's commission and, at the same time, preserving the freedom his Massachusetts constituency demanded.<sup>28</sup> After much maneuvering with his friends and supporters in London and Massachusetts, and several sessions of the assembly, Belcher was able to convince the Privy Council to accept an annual vote by the House setting his salary. Other issues he faced and appeared to win at least for a time were the Massachusetts/New Hampshire boundary dispute, the matter of currency and credit in Massachusetts, and the naval reservation of white pines suitable for ships masts. Belcher was able to successfully negotiate the quagmire of Massachusetts' interest groups throughout the 1730s, assuming success was defined by remaining in office.<sup>29</sup>

Belcher's character combined a mix of conflicting attitudes towards life in colonial New England. He had gained a veneer of education at Harvard supplemented by his travels on the continent and spent enough time in London rubbing shoulders with the court and commercial interests to learn how the levers of power worked, but he was still a Puritan at heart, convinced

---

<sup>27</sup> *NEWJ*, May 18, 1730.

<sup>28</sup> Batinski, *Jonathan Belcher, Colonial Governor*, 92-7.

<sup>29</sup> Batinski, *Jonathan Belcher, Colonial Governor*, 104-105.

that his role was to use whatever means necessary to protect the interests of Massachusetts, especially Boston. He was a leader among the Boston merchants, but he could not count among his ancestors the founding families of the seventeenth century colony, a deficiency he felt keenly. Belcher's feelings of vulnerability and inferiority, no doubt instilled by his father's discipline and the Puritan siege mentality, made him almost paranoid. He also grew up in a society in which he was not a member of the inner circle like the Dudleys who had a secure status because of their descent from the second governor of the colony of Massachusetts Bay. Belcher had to work hard for his social and political status and it was never assured.<sup>30</sup> He switched friends and allies, including Paul Dudley, when they came into conflict with his desires and activities; he castigated colleagues in exaggerated terms in letters he wrote to those he trusted but stopped short of open confrontation. His feelings of anxiety and vulnerability were shared by many in the "city set on a hill"; while it was an example for the world to contemplate and emulate, Puritan Massachusetts was also a fortress requiring constant vigilance besieged by the evil forces of outsiders and the evil nature of mankind in general including those within the province. Despite his personality defects, Belcher's skill in maintaining his position as governor of the province for eleven years was remarkable, especially as he had no strong patron in London either in the Board of Trade or in the Privy Council. But he understood the necessity of developing and maintaining support on both sides of the Atlantic; his agents in London were his son, Jonathan, and his brother-in-law, Richard Partridge, who advocated on his behalf there. In Massachusetts, he was able to walk a

---

<sup>30</sup> Batinski, "The Two Faces of Jonathan Belcher," 184.

fine line between the shifting interest groups representing merchants, ecclesiastical factions, royalty supporters, and the country party demanding less interference from London in provincial affairs.

The President of the Vice Admiralty Court for John Barnes's trial on October 15 and 16, 1736 was the Lieutenant Governor of the province, Spencer Phips. Mary Belcher, Jonathan Belcher's wife, died on October 6<sup>th</sup> and her funeral was held on Tuesday, October 12<sup>th</sup>, the day the Barnes's trial was scheduled to begin.<sup>31</sup> The trial was rescheduled for Friday and Saturday of that week and Lieutenant Governor Phips acted as president of the Court in the place of Belcher.

Phips was not a major figure in Massachusetts at this period. His uncle, Sir William Phips, appointed the first governor of the Province of Massachusetts in 1692, had adopted him since he and his wife were childless and made him his heir.<sup>32</sup> He graduated from Harvard University in 1703 and served on the General Council from 1721 to 1732 when he was appointed lieutenant governor of the province. He assumed the role of governor from time to time when Belcher was unavailable but he did not seem to have had much influence, perhaps because he was not Belcher's choice for his second in command. Phips was better known for his attempts to make peace with the native tribes of Maine and Massachusetts, attempts which were not notably successful.

---

<sup>31</sup> *NEWJ*, October 19, 1736.

<sup>32</sup> Emerson W. Baker, and John G. Reid, *The New England knight: Sir William Phips, 1651-1695* (Toronto: University of Toronto Press, 1998), 249-50.

Phips's role as President of the Vice Admiralty Court meant that he presided over the court during the trial of Barnes, declared the verdict of the Court, and pronounced the sentence of death. It is not clear from the copy of the trial whether the motion for respite of Barnes sentence was presented before Phips as President at the end of the trial or if it was later delivered to Belcher. The decision to allow Barnes a one year respite of execution was delivered by Belcher and witnessed by him on October 23, 1736.<sup>33</sup> Phips remained as Lieutenant Governor until his death in 1757.

The Judiciary Court of Admiralty was styled as a Court of Admiralty for the Hearing and Determining of Piracies, Robberies, and Felonies Committed upon the High Seas and it functioned somewhat differently from the Vice-Admiralty Court which dealt with trade matters and sailors' disputes with masters. The Court was generally made up of the Governor (or the Lieutenant Governor, in the absence of the Governor), the Council, the Judge of Vice-Admiralty, the Captain of the naval station, and the Surveyor of Customs and the Collector of Boston. In the Barnes trial, the Captain of the naval station was not listed among those present at the trial and nine members of the Governor's Council are named as well as the Surveyor of Customs. The officers of the Vice-Admiralty Judiciary Court were drawn from the elite of the province and there were many connections between them, connections of kinship, marriage, social status, and educational status. They were representative of the provincial judicature, the imperial administration, the New England merchant community, and, in some cases, all three. There were

---

<sup>33</sup> SP 36/39, Pt. 2, f. 99.

native born New Englanders and immigrants from England drawn to the colonies to better their social and financial standing. All professed and probably felt a sincere loyalty to the king and the monarchy but the best interests of the province and the best interests of the king often clashed.

Robert Auchmuty was the judge of the Boston Vice-Admiralty Court from 1733 to 1747 recommended for appointment by Jonathan Belcher after the death of Nathan Byfield. Auchmuty was born in Ireland in 1687, studied law at the Middle Temple in London, and was called to the bar in 1711. He appeared to have become acquainted with Samuel Shute sometime during his stay in England because he followed Shute to Massachusetts in 1716 when Shute was appointed as governor of the province.<sup>34</sup> Auchmuty practiced as a trial lawyer and soon gained a reputation as one of the most knowledgeable lawyers in early eighteenth century Massachusetts; there were few lawyers who were actually trained as lawyers in British America. He was often found in the company of leaders of Boston society in these early years no doubt because of his connections with Governor Shute.<sup>35</sup> He taught his son, Robert, as well as other lawyers such as William Bollan both of whom became respected professionals in the province.

Auchmuty was known as the leading member of the Massachusetts bar in the 1730s and took his place on the committee which attempted to settle the boundary dispute between

---

<sup>34</sup> L. Kinvin Wroth, "Auchmuty, Robert," *American National Biography Online* (Feb. 2000) Access Date: Wed Nov 27 2013.

<sup>35</sup> Samuel Sewall, *The Diary of Samuel Sewall, Vol. II, 1709-1729*, ed. M. Haley Thomas (New York: Farrer, Straus & Giroux, 1973), 836, 837, 839, 841, 844, 854-856, 884, 902, 915, 916.

Massachusetts and New Hampshire.<sup>36</sup> By 1733, Auchmuty had served as Vice-Admiralty advocate general and assistant advocate general for fifteen years and had also included a short stint as a temporary judge in 1728.<sup>37</sup> The salary for royal appointment was not generous and there were so few trained lawyers that men like Auchmuty took the opportunity to supplement their earnings with work from private clients. However, problems arose when the private clients were charged with offences in the Vice-Admiralty court and the advocate general had to prosecute them. He ran the risk of losing their business in the future but, if he appeared to have failed to prosecute some trade cases vigorously, he could be accused of favouring offenders over serving the king. Wealthy Boston merchants were not always too concerned about conforming to the terms of the Acts of Trade if there was money to be made.

In 1733, Judge Byfield of the Vice-Admiralty court died and the Duke of Newcastle pressed Governor Belcher to appoint William Shirley to that post. Shirley was gratified to have finally received a government office but soon found that it was not as lucrative as he had hoped. The job took too much time away from his burgeoning law practice and did not pay enough money to support his family. Auchmuty and Shirley agreed between them that they would present a request to Governor Belcher that they exchange positions. Belcher willingly applied to

---

<sup>36</sup> Jonathan Belcher was the governor of both provinces at the time and his opponents in New Hampshire accused him of favouring Massachusetts because it was the larger and more powerful province. He may have done so not because of the size of the province but because he believed that the Wentworth family which was the leading family in New Hampshire opposed his appointment as governor and was therefore his enemy.

<sup>37</sup> John A. Schultz, *William Shirley, King's Governor of Massachusetts* (Chapel Hill: University of North Carolina, 1961), 12-3.

London for confirmation of the exchange of commissions. Auchmuty was grateful to Shirley for the chance to advance from advocate general to judge, a position he held for the next fourteen years.<sup>38</sup> Auchmuty with his background in admiralty law and criminal law was an ideal judge to hear the Barnes case. Perhaps the fact that his friend, William Shirley, was the advocate general made a finding of Barnes's guilt easier as well.

While little is known about Auchmuty's personal life, he ran afoul of the law in 1722 when he was charged with living with a woman who was not his wife. Before the case came to court, the couple had formally married and his defense was that they had married privately before living together but in a manner that was outside the Massachusetts law.<sup>39</sup> Later in his career as Vice-Admiralty Judge, Auchmuty was accused by Belcher of not enforcing forfeiture actions under the Acts of Trade stringently enough and Belcher tried to have him removed. He was also on the opposing side of the Land Bank currency issue in 1740 which brought about Belcher's downfall. His position as Vice-Admiralty judge was secured when Belcher was ousted as governor in favour of William Shirley, but in 1747, even Shirley bowed to the political pressure to ask for his removal because of the same non-enforcement concerns.<sup>40</sup> Despite his troubles in later life, Auchmuty was respected for his contributions to the Massachusetts legal system of his time – he was a good speaker.

---

<sup>38</sup> *Ibid.*, 12.

<sup>39</sup> David A. Flaherty, "Criminal Practice in Provincial Massachusetts," *Law in Colonial Massachusetts, 1630-1800* (Boston: The Colonial Society of Massachusetts, 1984), 199.

<sup>40</sup> L. Kinvin Wroth. "Auchmuty, Robert."

### **Advocate General and Defence Counsel**

The advocate general for John Barnes's trial was William Shirley; his role in the court was to act as prosecutor or advocate for the king. Shirley, born into a well-connected Sussex family, was educated at Cambridge and became a member of the Inner Temple in preparation for a profession in law.<sup>41</sup> While he was studying at the Inner Temple, he inherited an estate from his grandfather which allowed him to purchase a clerkship in London; he married Frances Barker about the same time as he was called to the bar. Shirley's wealth and family connections gained him access to influential circles in London and Sussex, but ill-advised investments during the 1721 depression and an expensive lifestyle during the 1720s left him with a growing family and an insufficient income to support them. In 1731, upon the advice of friends and relatives and armed with many letters of introduction among them one from Jonathan Belcher Jr. and one from the increasingly influential Duke of Newcastle, a Sussex neighbour, Shirley went to Boston with his wife, three sons, and five daughters.

In Boston, Shirley presented himself and his letters to Governor Belcher, apparently making a good impression from the beginning of their relationship. It was a mutually beneficial connection; Belcher had many friends and associates to whom he could recommend Shirley and Shirley was quite well connected in London which could promise advantages both to Belcher and to his son, Jonathan, whom his father greatly desired to see established in the London bar.

---

<sup>41</sup> Schultz, *William Shirley*, 3-7. Schultz biography is one of two biographies; the other was written by George Wood entitled *William Shirley, governor of Massachusetts, 1741-1756* (New York: Columbia University, 1920). Much of the information regarding Shirley's first five years in Boston is taken from Schultz's biography, chapter 1.

Belcher also needed new contacts in England because his patron, Lord Townshend, had been pushed out of his Secretary of State position by the Duke of Newcastle, leaving Belcher without substantial influential friends in London. Belcher was only too happy to introduce a potentially useful protégé to Boston residents.

While Shirley was a competent lawyer, he found himself taking on some losing cases. While he was working with Judge Byfield, he prosecuted the captain of a ship who had transported a group of Palatine passengers from England to Boston.<sup>42</sup> The captain treated them so brutally that about two-thirds of them died from disease, starvation, or abuse; the stories witnesses told at the trial were horrendous. Despite Shirley's best efforts, the court did not find the captain guilty of willful negligence and only levied a minor fine against him. Even though Shirley was not successful in prosecuting Captain Lobb for his cruelty towards the Palatines, the House of Representatives agreed to give him a payment of £70 from the public treasury in recognition of his services on behalf of the Palatines.<sup>43</sup> Several years later, Shirley was more successful in prosecuting the brutal Captain Barnes and bringing him to justice.

In 1731, the elderly Nathan Byfield was still judge of the Boston Vice-Admiralty Court but he needed an able assistant and advocate to shield him from the attacks of Boston merchants engaged in smuggling, led by the combative Elisha Cooke. They harassed Byfield by bringing suits against him personally in civil courts. The belligerent Cooke also opposed Belcher at every

---

<sup>42</sup> Schultz, *ibid.* 9-10.

<sup>43</sup> Massachusetts (Colony). General Court. House of Representatives. *Journals of the House of Representatives of Massachusetts* (Boston: Massachusetts Historical Society, 1919) Vol. 11, 368.

opportunity in the General Council. Shirley showed his mettle by taking on Cooke both on behalf of Byfield and eventually Belcher; Shirley acquitted himself well and weakened Cooke's hold on the leadership of the opposition in the House of Representatives. Belcher was eventually able to strip Cooke of all his appointments. When Byfield died in office in 1733, Belcher nominated Shirley to fill the vacancy as judge, a position he accepted on an interim basis. He was much happier in the role of advocate general which he traded with Auchmuty for the judgeship; not only could he continue to represent his private clients, but his compensation in the Vice-Admiralty Court was supplemented by the advocate general's one third share of all condemned ships and cargo which could bring the advocate general an additional several hundred pounds in a single prosecution.<sup>44</sup> The dilemma Shirley faced was that most merchants were involved in some degree of smuggling in almost every voyage so he had to choose carefully which merchants and which voyages he prosecuted to avoid alienating the entire merchant community against him.

Another contentious issue in New England was that of the reservation of the largest white pines for royal navy masts. The reservation had been included in the Massachusetts charter but the terms were vague as to which trees were reserved so enforcement of forest law was controversial at best.<sup>45</sup> The situation was further exacerbated by the appointment of David

---

<sup>44</sup> David Lemmings, *Professors of The Law: Barristers And English Legal Culture In The Eighteenth Century* (New York: Oxford University Press, 2000), 233. Schultz, *William Shirley*, 15.

<sup>45</sup> "And lastly for the better provideing and furnishing of Masts for Our Royall Navy Wee doe hereby reserve to Vs Our Heires and Successors all Trees of the Diameter of Twenty Four Inches

Dunbar as Surveyor General of the King's Woods in addition to his role as lieutenant governor of New Hampshire. Dunbar took his duties seriously and insisted on a very strict interpretation of the words of the charter. Shirley was charged with prosecuting offenders in the Vice-Admiralty Court while Belcher and Dunbar squared off against each other; they were bitter enemies who did not soften their language in any opposition battles. Dunbar was a Scot, mindful of his duty to the king and not prepared to compromise one iota in any dealings he had with New Englanders on whose property the mast-sized trees grew. The property owners resented that the most valuable trees were requisitioned by the surveyor without compensation and that he entered on their property to inspect logging operations without their permission. Dunbar complained to the Duke of Newcastle and the Board of Trade concerning the injustices done to him by Governor Belcher.<sup>46</sup> Belcher was also less than tactful in dealing with men he viewed as enemies; he

---

and upwards of Twelve Inches from the ground growing vpon any soyle or Tract of Land within Our said Province or Territory not heretofore granted to any private persons And Wee doe restrains and forbid all persons whatsoever from felling cutting or destroying any such Trees without the Royall Lycence of Vs Our Heires and Successors first had and obteyned vpon penalty of Forfeiting One Hundred Pounds sterling vnto Ous Our Heires and Successors for every such Tree soe felled cult or destroyed without such Lycence had and obteyned in that behalf," in *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* by Francis Newton Thorpe, Washington, DC : Government Printing Office, 1909.

<sup>46</sup> "I am not the onely man by a great many he uses ill; he never darst offer the least affront to man until now that he lords it over all, for he has formerly been chastized by cane, whip and foot, without resenting it, wch. makes it the more griveous to be ill used by such a man etc., by his carriage and style he seems to think himself King. He does not permit the Lieut. Governour of ye Massachusets, tho' one of his own recommendation, to sitt in Council with him, so that he is quite a stranger to all the busyness of the Province etc. I suppose when he comes here, he will tell me I have no busyness in Council whilst he sitts there, but I will not submit to that etc."

removed all executive authority from Dunbar in New Hampshire out of fear that Dunbar would combine with the powerful Wentworth family and succeed in setting up an opposition to Belcher as governor at best or making New Hampshire independent from Massachusetts with its own governor and administration at worst. Between these two extremes, Shirley found himself attempting to fulfill his duties to the Crown while at the same time avoiding actions that would alienate New England residents and merchants. In the Barnes's case, Shirley showed that he understood the basis of law and culture in Massachusetts by arguing that the Old Testament lawgiver commandment that "whosoever sheddeth man's blood by man shall his blood be shed" superseded that of the defence reference to the enlightenment philosopher, John Locke, who claimed the relationship between master and slave was one of hostility which justified violence.<sup>47</sup>

Shirley was not above using powerful friends to further his ambitions. While he courted the favour of Belcher in order to remain on good terms with the merchants of Massachusetts and New Hampshire, he kept his eyes open for greater advancement than Belcher could offer. His position as advocate general of The Vice-Admiralty Court and his law practice in Boston brought him a comfortable living but not the wealth he had enjoyed and lost in London. Shirley not only advocated on his own behalf for better and additional posts, his wife left her husband and children behind in Boston to move to London in 1736 in order to act as his agent there both to

---

America and West Indies: August 1731, 16-20, Calendar of State Papers Colonial, America and West Indies, Volume 38: 1731 (1938), 226-238. URL: [http://www.british-history.ac.uk/report.aspx?compid=72582&strquery="William Shirley"](http://www.british-history.ac.uk/report.aspx?compid=72582&strquery=).

<sup>47</sup> SP 36/39, Pt. 2, f. 97.

collect and transmit important political information from the capital and to plead with the Duke of Newcastle for a more lucrative position for her husband anywhere in the colonies.<sup>48</sup>

Shirley's advancement campaign was very slow in coming to fruition. He continued to labour as Vice-Admiralty Court advocate-general for eight years; in 1737 he had been in the position for four years and would be there for another four years without a promotion. Shirley's yearning for advancement and his preference to be identified more with England than New England prompted him to seek a better posting anywhere in the British Empire, but to his disappointment nothing came his way. In the meantime he was frustrated with the seeming reluctance of Governor Belcher to prosecute his New England merchant friends for even blatant offences against the Acts of Trade so he took the responsibility for discovering smuggled goods and sloppy paperwork to condemn ships coming into Boston harbour. Not only did he appear to be assiduous in doing his job as advocate-general, but the increased number of prosecutions and condemnations brought Shirley a much higher income because of his share in the proceeds of sale of condemned goods. Incidentally, Belcher also benefited from increased condemnations as he received by legislation one third of the sale proceeds.<sup>49</sup> Shirley did not stop at increasing his

---

<sup>48</sup> Shirley wrote to the Duke of Newcastle directly requesting that he be appointed Naval Officer for Massachusetts in January, 1738. *America and West Indies: January 1738*, 1-15, *Calendar of State Papers Colonial, America and West Indies*, Volume 44: 1738 (1969), 1-4. URL: [http://www.british-history.ac.uk/report.aspx?compid=72940&strquery=william shirley](http://www.british-history.ac.uk/report.aspx?compid=72940&strquery=william+shirley). Schultz, *William Shirley*, 22-3.

<sup>49</sup> "The penalties and forfeitures which were incurred for violation of the second section of the Act [of 1696] were subject to division under the seventh section, to wit: 'third part to the use of his Majesty, ... one third part to the governor of the colony or plantation where the offence shall be committed' and the remaining third part 'to such person or persons as shall sue for the same.'"

income in his position as advocate-general; by 1739, he was scheming with Samuel Waldo, one of his wealthy merchant clients, to oust Belcher from the governor's post and take it for himself.<sup>50</sup> Shirley did not openly confront Belcher but he and his friends continued to work behind the scenes in London, New Hampshire, and Massachusetts to undermine Belcher over the issue of the New Hampshire/Massachusetts boundary negotiations and the raising of troops from New England for the war against Spain in the West Indies. In the spring of 1741, Shirley was successful in his "scheme" to unseat Belcher and take the governorship for himself.

As Advocate General in the Barnes trial, William Shirley had formidable opponents in the defence counsel acting for John Barnes. The court appointed William Bollan, an apprentice of Robert Auchmuty, the judge, as defence counsel at the opening of the trial. Bollan came to Massachusetts as a teenager and learned to practice law when Auchmuty, about twenty years Bollan's senior, took the young lawyer under his wing and taught him until he became one of the leading members of the legal community in Massachusetts in the 1730s. By 1733, he had Harvard University and the Anglican King's Chapel as two of his prominent clients.<sup>51</sup> He worked for William Shirley in his office so that Shirley could travel and carry out his duties as

---

Franklyn C. Setaro, "The Formative Era Of American Admiralty Law," *New York Law Forum*, 5,9, (1959): 11.

<sup>50</sup> Amelia C. Ford, "William Shirley to Samuel Waldo," *AHR*, 36 (1931) 350-360. Shirley left no doubt about his political intentions in his letters to Waldo; "we are engaged so deeply in this Scheme of getting the Governm't, and it will lie in my Power to serve my family and friends by it, and (what is not intirely to be thrown out of the Scale of Consideration) what will be an Honour to me; and that I shall contribute to the turning out of a very great Rascal."

<sup>51</sup> Ronald Lettieri, "Bollan, William"; <http://www.anb.org/articles/01/01-00085.html>; American National Biography Online (Feb. 2000).

Advocate General in centres outside Boston.<sup>52</sup> In 1743, Bollan married Shirley's daughter, Frances, and he continued his political involvement by becoming a very successful Massachusetts agent in London and holding that office for seventeen years. He reported to the legislature and kept its interests before the government and the merchants in London.

The other defence counsel for John Barnes was John Read. It is not clear how he became involved in the case but he brought an unsuccessful motion to the court for an arrest of judgment after the court had rendered its guilty verdict. Read's motion appeared to be a last ditch attempt to spare Barnes's life and perhaps add to the arguments that the less experienced Bollan had advanced. It is unclear as to why his motion was unsuccessful. John Read was born in Fairfield, Connecticut in 1679 and graduated from Harvard in 1697.<sup>53</sup> After a few years in the ministry, he began to study law, probably to be able to represent himself in court in an effort to recover lands which he had purchased from the local Indians but which the General Court gave by patent to a local corporation in 1703. His studies allowed him to be called to the bar in 1708 in Connecticut and he quickly made a name for himself there. In 1722, he moved to Boston where his reputation seemed to have preceded him because the following year he was elected Massachusetts'

---

<sup>52</sup> Schultz, *William Shirley*, 15-16.

<sup>53</sup> George B. Reed, *Sketch of the Life of the Honorable John Read of Boston: 1722-1749* (Boston, Privately Printed, 1903), 1. This little book is the only biographical text dealing only with the life of John Read and specifically with his life as a lawyer. It is accurately called a sketch since the text only included about twenty-five pages of biography.

Attorney General. Read took upon himself to systematize the law in Massachusetts and in doing so he simplified the forms used by the courts so they could be employed as precedents.<sup>54</sup>

John Read was known as a witty person and Knapp suggested that he had left the ministry because he could not “restrain his wit, or keep his gravity at some instance of solemn foolery” and Knapp also described him as unsuitable for political leadership since he “was too independent and enlightened for a lover of prerogative, and too honest for a leader of faction.”<sup>55</sup> Knapp narrated a story about Read, who enjoyed traveling the country incognito and periodically assisting deserving persons at trials, having arrived at a country court found a trial about to begin between a poor plaintiff and a rich defendant. He ascertained that the plaintiff’s cause was just but legally intricate and that the poor man was unrepresented by counsel. While Read was dressed little better than a vagabond, the plaintiff agreed to allow him to act as his counsel. The court was scandalized by Read’s unkempt appearance but the trial proceeded. After his first speech, it became clear that Read was not what he seemed and he went on to win the case for the

---

<sup>54</sup> Samuel L. Knapp, *Biographical Sketches Of Eminent Lawyers, Statesmen, and Men Of Letters* (Boston: Richardson and Lord, 1821), 15, 153. “He reduced the jarring and contradictory forms of practice to a system; taught courts the advantages of precedents and practitioners the value of knowledge... He from his own high responsibility reduced the quaint, redundant and obscure phraseology of the English deeds of conveyance to their present short, clear and simple forms now in common usage among us... His influence and authority must have been great as a lawyer to have brought these retrenched forms into general use... His methods of managing causes, his terse arguments, his cutting irony, his witticisms, and his good nature, too, were well known.” Also quoted in Reed, *Sketch of the Life*, 12-3.

<sup>55</sup> *Ibid*, 153, 157.

plaintiff and the admiration of the bench, bar, and audience for himself. Read continued on his peregrination.<sup>56</sup>

### **The Commissioners**

The Commissioners attending the trial of John Barnes included nine members of the General Council – Benjamin Lynde, Thomas Hutchinson, Paul Dudley, Francis Foxcroft, John Jeffries, Josiah Willard, Jacob Wendell, Anthony Stoddard, and Samuel Welles.<sup>57</sup> This was not a jury and these men were certainly not peers of John Barnes; they were leading men of the community elected by the House of Representatives. The election of Council members was subject to veto by the Governor and some elections were set aside because the proposed member was part of an opposition faction not currently in favour by the Governor and his closest advisors. Some families were regularly represented in the Council, one of which was the Dudley family and others were relative newcomers, such as Josiah Willard, who came to Boston from England in December, 1717 with his commission to be the Secretary of the Province of Massachusetts.<sup>58</sup>

---

<sup>56</sup> Ibid, 160.

<sup>57</sup> SP 36/39, Pt. 2, f. 85.

<sup>58</sup> Thomas Hutchinson, *The History Of Massachusetts, From The First Settlement Thereof In 1628, Until The Year 1750*. 2 vols. 3<sup>rd</sup> ed. With additional notes and corrections [Salem], 1795. *Eighteenth Century Collections Online*. Gale. UNIV OF CALGARY. 14 Dec. 2013, <<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=ucalgary&tabID=T001&docId=CB129016978&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>>. 202n.

Benjamin Lynde, one of the Council, was from a prominent family.<sup>59</sup> His father, Simon Lynde, had come to New England in 1650, proceeded to accumulate a large estate with lands in several New England colonies, and had been appointed an Assistant Justice shortly before his death in 1689. Benjamin had the advantage of an education at Harvard after which he went to London and received a legal education in the Middle Temple. He was admitted to the bar in 1697 and received a commission to be the King's Advocate in the Admiralty Court in New England. Like his father, he became a Judge of the Superior Court and succeeded Justice Samuel Sewall as Chief Justice upon his resignation in 1728. Unlike his father and many of the judges of his generation, he came to the position of judge with education in the law and raised the tone of the court considerably over his thirty years on the bench. He also served as a Councilor from 1713. When Lynde served on the Commission for the trial of John Barnes, he was seventy years old and he would remain as Chief Justice of the Superior Court for another nine years until his death.

The Barnes's trial is one of the few trials to which Lynde referred in his diary. The entry for October 12 states that "Tuesday. Breakfasted with sister Pordage and supped there. About 10 a. m. the special Commission, for the tryal for Piracy and Felony of Barns, met in the Council Chamber and Court of Tryal, and adjourned by Governor's advice (at this sorrowful time) till Fryday, the 15th, at 10 A. M."<sup>60</sup> Thereafter, the Friday entry related that

---

<sup>59</sup> Benjamin Lynde, *The Diaries of Benjamin Lynde and of Benjamin Lynde, Jr.* (Cambridge: Riverside Press, 1880), vi-x. The diaries show Benjamin worked and travelled tirelessly even into his seventies and he always found time to record his activities.

<sup>60</sup> "This sorrowful time" referred to the funeral of Mary Belcher, the Governor's wife; Lynde was a pallbearer at the funeral.

The tryal of Jn<sup>o</sup> Barns in the special Court of admiralty held this day by the Commissioners, as by the Statute of William the 3<sup>d</sup>, 11<sup>th</sup> and 12<sup>th</sup>, for the Tryal of Piracy, Robbery and Felonys upon the high seas, by information of Shirley, Advocate General, on Informations or Indictments for murder committed on the body of Milard (sic); of this he was acquitted by the voice of the majority of the Commissioners. 2. Of the murder of a negro boy Bawman (sic). Two points his counsel, Bolen, pleaded for him, viz: That as he was on a Guinea voyage for negroes, the water must be on allowance, and the person said to be murdered was apt to call out in his dreams or sleep, watro, and, so, apt to set those that heard him and the other slaves to do the like, so no malice; but an extraordinary care for the whole voyage ; but the 2<sup>nd</sup> point was that the negro boy was a slave, and, as master of the cargo, the said Barns might do what he would with him, even to the taking away his life, and this, tho' he were the dearest master Cupid's boy; of this he was declared guilty by the Governor President, acco. to 12 voters, all but one.<sup>61</sup>

Lynde did not name the one person who did not vote for a guilty verdict.

Colonel Thomas Hutchinson, the father of the last Governor of Massachusetts and historian of Massachusetts, was a prosperous merchant in Boston and descended from a long line of merchants. He was well connected to the merchant community and taught his son from a young age how to carry on a successful business in trade even while ensuring that he received an

---

<sup>61</sup> Ibid., 89. It is interesting to note that Lynde had just purchased a Negro boy of about 12 years of age on August 31, 1736, six weeks before the Barnes trial.

education at Harvard. Hutchinson's business success allowed him the freedom to serve on the Council for twenty years until his death in 1739. Bernard Bailyn described him as "industrious, ... charitable, unaffected, unworldly, and clannish."<sup>62</sup> Hutchinson's later years were marked by the sad deaths of three of his children and ill health relating to intestinal maladies and a kind of nervous disorder. It was said of him that "Regardless of the frowns of a Governor, or the threats of the people, he spoke and voted according to his judgment."<sup>63</sup>

Paul Dudley, son of Governor Joseph Dudley (1702-1715), was a prominent member of Boston society. He graduated from Harvard and in 1703, was appointed to the office of Attorney General of Massachusetts while his father was governor. The Dudleys were royalists and disliked by the country faction, but Paul Dudley remained influential partially because he was descended from one of the founders of the colony. In 1718, Dudley commenced his judicial career, becoming an Associate Justice of the Superior Court of Judicature and in 1745, the Chief Justice of the Superior Court.<sup>64</sup> The extant writings of Dudley have little to do with his judicial life; he was a member of the Royal Society and wrote a number of articles for their publications including one concerning the making of maple syrup. He also interested himself in theology and

---

<sup>62</sup> Bernard Bailyn, *Faces of Revolution: Personalities & Themes in the Struggle for American Independence* (New York: Knopf Doubleday Publishing Group, 1990), 47-48.

<sup>63</sup> John Schultz, *Legislators of the Massachusetts General Court, 1691-1780* (Boston: Northeastern University Press, 1997) 259.

<sup>64</sup> There does not seem to be any biography of Paul Dudley despite his long tenure in public office. The few references to him by historians show him to be, like his father, a supporter of the court faction and heartily disliked by men like Elisha Cooke, Jr. Batinski, *Jonathan Belcher*, 45; Thomas Hutchinson, *The history of Massachusetts: from the first settlement thereof in 1628, until the year 1750. By Thomas Hutchinson, Esq. late governor of Massachusetts. In two volumes, 3<sup>rd</sup> Edition* Vol. II (Boston: Thomas and Andrews Publishers, 1795), 140.

wrote a tract in defense of Protestantism opposing Roman Catholicism using the language of slavery.<sup>65</sup>

Francis Foxcroft was born in Cambridge, Massachusetts in 1694, educated at Harvard graduating in 1712, and held many positions both elected and appointed before his death in 1768.<sup>66</sup> He was a member of the Council for twenty-six years, Register of Probate, Register of Deeds, and Clerk of the House of Representatives. His career on the bench included thirty years as a Judge of the Superior Court. He was said to have a quick temper probably attributable to gout from which he suffered greatly for many years.

John Jeffries was a prominent merchant of Boston; he was born there in 1688 and lived in Boston all his life. Jeffries was elected as one of the selectmen of Boston in 1733 and held the position until 1744. Selectmen were charged with regulating the affairs of the city in every matter from repair of the streets to arranging for isolation of victims of epidemics.

Josiah Willard was another American-born council member who lived all his life in Boston. Born in 1681, he graduated from Harvard in 1698 and took his place in the merchant community. He held several public offices in Boston including Secretary of the colony from

---

<sup>65</sup> Paul Dudley, An essay on the merchandise of slaves and souls of men; Revelation XVIII.13. With an application thereof to the church of Rome. By a gentleman. [London], 1732. *Eighteenth Century Collections Online*. Gale. UNIV OF CALGARY. 16 Dec. 2013  
<<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=ucalgary&tabID=T001&docId=CW117647905&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>>

<sup>66</sup> *Proceedings of the Massachusetts Historical Society, 1864-1865*, Volume 8 (Boston: Wiggin and Lunt, 1866), 40n.

1717 until his death in 1656. He was appointed Justice of the Peace in 1728 and Suffolk County Probate Judge the same year, a post he held until 1755. Willard was elected to the Council and served from 1734 to 1755. It was said of him that “He always distinguished himself by his diligence, integrity, and fidelity to his trust.”

Jacob Wendell was a descendent of Germanic settlers who came to America in 1645 and took up residence near Fort Orange in what is now Albany, New York. They were well-to-do and of high social standing; in their new home they intermarried with the elite families of the town. The Wendells tended to have large families; Jacob, born in 1691, was the ninth child of Abraham Wendell who became a prominent Boston merchant in his own right. As such, he was active in public life having been elected to the Provincial Council and serving from 1734 to 1760. One of his descendants was Oliver Wendell Holmes.<sup>67</sup>

Anthony Stoddard was a wealthy Boston merchant descended from an English immigrant tradesman of the same name who came to Boston to make his fortune and elevate himself to country gentleman status. Stoddard was born in 1678 and graduated from Harvard College in 1697; he married Martha Belcher, sister of Jonathan Belcher. Despite his lack of legal education, Stoddard was appointed to the bench in 1733 and elected as a member of the Provincial Council from 1735 to 1742.<sup>68</sup>

---

<sup>67</sup> *The New England Historical & Genealogical Register*, 22 (Published by the Society, Boston, 1868), 420.

<sup>68</sup> William Thomas Davis, *History of the Judiciary of Massachusetts: Including the Plymouth and Massachusetts Colonies, the Province of the Massachusetts Bay, and the Commonwealth* (Clark, N.J: The Lawbook Exchange, Ltd., 2008), 153.

Samuel Welles, great grandson of Governor Thomas Welles of Connecticut, was born in Glastonbury, Connecticut in 1689 and graduated from Yale College in 1707; he afterwards trained in divinity for a vocation as a minister. However, when he became affianced to Hannah (or Abigail) Arnold of Boston, her parents only consented to their marriage if he would move to Boston. He agreed, gave up his parish for his new wife, and thus became connected with the wealthy Arnold family of merchants in Boston. When Hannah's parents died, the couple inherited a considerable estate of lands and a wharf which Welles assiduously developed along with his own estate which he still held in Connecticut. He was active in public affairs holding a number of positions including Judge of the Lower Courts, member of the House of Representatives, and member of the Provincial Council. Welles did not have a continuous period of service in the House of Representatives but he was one of the most active legislators when he sat in the House. Welles died in 1770 at the age of eighty-three.<sup>69</sup>

### **Conclusion**

By the 1730s in Massachusetts, the court system had become somewhat more sophisticated due in part to the number of immigrants with legal training who had come to Boston seeking greater opportunities than they could expect in London and others from the province who had been educated in England at the Inns of Court. Men such as Robert Auchmuty, John Read, William

---

<sup>69</sup> Albert Welles, H. H. Clements, Henry Winthrop Sargent, *History of the Welles Family in England: With Their Derivation in this Country from Governor Thomas Welles, of Connecticut* (Boston: J. Wilson and Son, 1874), 114-116. See also Schultz, *Legislators of the Massachusetts General Court*, 59.

Shirley, and Benjamin Lynde used their legal training in Massachusetts and helped to regularize the local courts. Robert Auchmuty taught students such as William Bollan, Barnes's defence lawyer, who went on to become a prominent lawyer in his own right. John Read used his knowledge of the law to simplify court documents and develop precedents for the use of Massachusetts courts that cut out the obtuse verbiage imported from English forms. Harvard College, which was established as an institution to train Puritan clergy early in the history of the colony, had become a less sectarian school by the eighteenth century and many of the sons of wealthy members of Boston society were educated there. In fact, five of the nine commissioners who sat on the Barnes's trial had been educated at Harvard, and although Harvard at this stage did not have a program of legal studies, most were involved in some aspect of the Massachusetts legal system.

The men who sat in the Vice-Admiralty Court and were in any way connected with the trial of John Barnes were of different social and economic status from the mariner in the dock. Most of them were wealthy and many came from wealthy families either in England or America. All were involved in public life to a greater degree than the average Bostonian and some like William Shirley spent the majority of their lives in public service. Even the ones who were most involved in public activities had to make at least part of their livelihoods in commerce or private law practice because public office did not provide a salary sufficient to pay for the social status that was expected of a prominent citizen. Francis Foxcroft at age forty-two was the youngest member of the Council in 1736 and William Bollan aged twenty-nine was just beginning his legal career under the tutelage of Read, Shirley, and Auchmuty.

The men making up this commission of the Council had similar backgrounds – they graduated from Harvard College, served in the House of Representatives, sat as judges in various courts, were appointed as Justices of the Peace, and were looked up to as men of integrity by their peers. Three of them owned slaves. All of them held several public offices during their lives such as selectmen or auditors in their home communities of Boston or close neighbouring towns; none were from towns in the country which would have made attendance at Council meetings and meetings of committees of Council difficult.<sup>70</sup> All of the court officers were essentially from the same rank in Boston society and had many ties – kinship, social, economic, political, and religious – binding them together. They looked at life from the same perspective and knew their role was one of leadership in New England, a role they played enthusiastically.

But if a man aspired to a high office in the province such as governor, advocate general, or judge, he needed to cultivate influential friends not only in Boston but also in London. For example, the fortunes of Jonathan Belcher rose and fell partially attributable to the status of his friends and supporters in London. In 1730, Lord Townshend was still a powerful influence in London though he was losing his ascendancy; Belcher relied on him and former Governor Schute to attain the governorship of Massachusetts. Jonathan Belcher Jr. and Belcher's brother-in-law, William Partridge, acted as his eyes and ears in London as well as his agents when Belcher needed to drum up support to remain in power. They were largely effective throughout the 1730s and only when Belcher's enemies led by William Shirley's wife, Frances, gained more

---

<sup>70</sup> Schultz, *Legislators of the Massachusetts General Court*, 209, 225, 259, 261, 280, 349, 374, 375, 382.

influence with the Duke of Newcastle and his brother, Henry Pelham, was he replaced by Shirley as governor. The British government at this time was led by Robert Walpole and the Duke of Newcastle; Walpole's political star was setting as Newcastle's power increased. William Shirley knew Newcastle because their families were neighbours in Essex when they were young boys and these ties allowed him to ask for and receive the Duke's patronage even though it was long in coming – ten years after the Shirleys moved to Boston and five years after Frances moved back to London to plead for a colonial appointment beyond that of advocate general for William.

New Englanders never lost sight of their origins and even though they fought hard for an independent government in Massachusetts, they clung to their loyalty to the crown and to their rights as English subjects. Even more did the men appointed by the Crown understand that they owed their positions to their continued allegiance to the king and they professed their loyalty at every opportunity. The fortunes of the colonial officers rose and fell with the political tides in London; a patron in power could advance the career of a friend or relative in New England but the advance could just as easily be reversed as power shifted in London.

## Chapter Six

### We “extend our Grace and Mercy unto Him”<sup>1</sup>: Trial and Pardon

#### Introduction

John Barnes was arrested and incarcerated in Boston on September 4, 1736, charged with the murders of William Milward, mariner, and Bawow, the young black slave. He was indicted for two trials – one for each deceased – held on consecutive days in October, 1736. Barnes was not convicted of murder for the death of Milward and a transcript of that trial does not seem to have survived so it can only be speculated why he escaped a guilty verdict in Milward’s death. He was not so fortunate in his trial for Bawow’s death and the trial summary that accompanied his application for a pardon to London is a valuable record of a Vice-Admiralty murder trial for this period. There are a number of aspects of the trial that will be discussed including the language used in the indictment, the details of the accused’s actions which were used to bring the charge of murder, the statements of the witnesses, the arguments of the defence counsel and the advocate general, and the judge’s reasons for judgment. No less important is the disposition of the case including the sentence, the respite of sentence, and the application for pardon.<sup>2</sup>

---

<sup>1</sup> SP 36/40, f. 258.

<sup>2</sup> A published case heard in Boston provided more details concerning the procedure of the Admiralty court in a criminal trial. “The Trials of five persons for piracy, felony and robbery, who were found guilty and condemned, at a Court of Admiralty for the trial of piracies, felonies and robberies, committed on the high seas, held at the court-house in Boston, within His Majesty's province of the Massachusetts-Bay in New-England, on Tuesday the fourth day of

## The Trial – Law and Procedure

The court trial for a felony commenced with the reading of the indictment which was “a plain, brief and certain narrative of an offence, committed by any person, and of those necessary circumstances, that concur to ascertain the fact and its nature.”<sup>3</sup> In the eighteenth century lawyers were using precedents to prepare indictments for felony trials and the same phraseology appeared in America in 1736 as had been used in England. Barnes’s indictment for murder used the phrases “feloniously, voluntarily and of his malice aforethought,” “did make an assault and with both his the said John Barnes’s hands took hold,” and variations on these statements. The indictment concluded with the statement, “And so the said. John Barnes the said. Bawow upon the High Sea in the Latitude aforesaid and within the aforesaid Jurisdiction in manner and form aforesaid feloniously willfully and of his malice aforethought did kill and murther against the Peace of our said. Lord the King his Crown and Dignity etc.”<sup>4</sup> The indictment presupposed that the reason Barnes committed the act of murder was that he killed Bawow “not having the fear of

---

October, anno domini, 1726. Pursuant to His Majesty's royal commission, founded on an act of Parliament made in the eleventh and twelfth years of the reign of King William the Third, entituled, An act for the more effectual suppression of piracy; and made perpetual by an act of the sixth year of the reign of our sovereign Lord King George.” (Boston : Printed by T. Fleet, for S. Gerrish, at the lower end of Cornhill, 1726). *Eighteenth Century Collections Online*. Gale.

UNIV OF CALGARY. 23 Nov. 2011

<<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW123991006&source=gale&userGroup=ucalgary&version=1.0&docLevel=FASCIMILE>>.

<sup>3</sup> W. Stubbs, G. Talmash, *The Crown Circuit Companion: containing the practice of the assises on the Crown side, and of the courts of general and general quarter sessions of the peace*, 2d ed. (London: Henry Lintot, 1749) I, 108.

<sup>4</sup> SP 36/39, Pt. 2, f. 88.

God before his eyes but being moved and Seduced by the Instigation of the Devil”; this was a common precedent statement used in murder indictments.<sup>5</sup>

Sir Edward Coke defined the elements of the crime of murder as “When a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king’s peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc. die of the wound, or hurt, etc. within a year and a day of the same.”<sup>6</sup> The same definition was repeated by William Blackstone but “man” had been changed to “person” by the eighteenth century.<sup>7</sup> The indictment must make out the elements of the definition, particularly the status of the accused, the status of the victim, the jurisdiction in which the assault and the death happened, and the malicious character of the deed. The accused is identified as “John Barnes of Boston aforesaid Marriner,” placing him as a subject of the King and by implication, of the age of majority. He was not exempted from liability as a foreigner, child, or person of unsound mind. The place where the murder was perpetrated was described by latitude and longitude, and specified as being on the high seas and therefore within the jurisdiction of the British Admiralty. The

---

<sup>5</sup> In the Atlantic world, people believed in a God who rewarded good and punished evil. Therefore, a person who voluntarily committed a crime obviously did not think properly about God and allowed himself to be led astray by the Devil. Both God and the Devil were believed to be intimately involved with man.

<sup>6</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (London: W. Clarke and Sons, 1817), 47.

<sup>7</sup> William Blackstone, *Commentaries on the Laws of England, Volume 4: A Facsimile of the First Edition, 1765-1769* (Chicago: The University of Chicago Press, 1979), 195.

indictment described the violence of Barnes's assault on the boy, pronouncing each separate violent act as having been performed "feloniously willfully and with malice aforethought" leaving no room for a defence of accident or misadventure. Having described the Barnes's assault on Bawow, the indictment connected the boy's death the next day with the injuries he received from the beating.

Courts were using precedents in the eighteenth century to make sure they employed the correct language for indictments and indictments were the same in the Vice-Admiralty Court as in Circuit Courts in England. *The Crown Circuit Companion* published in 1749 in London contains precedents for many different kinds of criminal indictments.<sup>8</sup> William Shirley no doubt brought with him to Massachusetts copies of the indictments he had used in his practice in England. The indictment against Barnes comprised all the required elements for an indictment of murder including his full name, an addition or description of who he was, the date of the offence, the place the offence was committed, the victim of the offence, a description of how the accused committed the offence, a statement of the charge including the words "feloniously" and "with malice aforethought," and a statement that the act was "against the Peace of our Lord the King, his Crown and Dignity." The indictment must use proper wording since "No circumlocution will supply the terms of art."<sup>9</sup> For example, if an accused was to be indicted for murder, the word "murdered" had to be used to describe the act and it must be stated that the victim died. If the

---

<sup>8</sup> Stubbs and Talmash, *The Crown Circuit Companion*, 308-9. The precedent of indictment given for murder is essentially that used by William Shirley for the Barnes's trial with changes made for the specific circumstances in Massachusetts.

<sup>9</sup> *Ibid.*, 108-125.

proper wording was not used, the indictment could be voided and the accused set free. In England, indictments were written in Latin until 1733 because, according to Matthew Hale, “it being a fixed and regular language, it is not capable of so many changes and alterations, as happen in vulgar languages.”<sup>10</sup>

The indictment in the Barnes’s trial recited his name as “John Barns” in the first instance and thereafter alternated the spelling between “Barns” and “Barnes”. It may have been that he used both spellings of his name and in the Vice-Admiralty Court the alternate spelling does not seem to have made any difference. In any case, his first name was spelled right which was more important. A wrong spelling of the Christian name could require filing a new indictment. Further description of the accused may be given such as his place of residence and his employment status but if it was not given and the accused entered a plea, he could not later claim that there was a defect in the indictment. Barnes was described as being “of Boston” and a “marriner”. If his residence was Boston, a question arises as to why he was hired in Newport, Rhode Island; there are a number of reasons why he could have been there but there is no way of knowing for sure.<sup>11</sup>

---

<sup>10</sup> Thomas Dogherty, *Historia placitorum coronæ. The history of the pleas of the crown, by Sir Matthew Hale. Pub. from the original manuscripts by Sollom Emlyn. With additional notes and references to modern cases concerning the pleas of the crown. By George Wilson. A new ed. And an abridgment of the statutes relating to felonies continued to the present time, with notes and references* (London: T. Payne, 1800) 169. The note elucidating this passage acknowledged that the legislation passed in 1733 determined that the use of English for indictments was preferable so that “they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties are to be affected thereby.”

<sup>11</sup> It is also possible that he was a resident of Boston. A John Barnes was the defendant in an action regarding a charter party in Boston which began in 1729 and continued on into 1733. *Journals of the House of representatives of His Majesty's province of the Massachusetts-Bay*

The indictment was required to recite the day and year and the location that the action took place. Barnes's indictment stated that it was the "sixteenth day of May in the Ninth year of the Reign of our said Lord the King upon the high sea in the Latitude of one Degree and forty minutes North or thereabout so nearest to the Coast of Guinea and within the Jurisdiction of the admiralty of Great Britain."<sup>12</sup> The indictment would normally identify the county in which the act took place so as to specify the jurisdiction; in this case the high seas place the jurisdiction within the scope of the Admiralty. Because Barnes was indicted for murder, the name of the person he murdered had to be stated; otherwise Bawow would have been numbered among the thousands of other nameless slaves who perished on the transatlantic voyages. A description of the crime was necessary including details of what he used to cause the victim's death since any weapon employed in a crime would be forfeited to the king as a deodand. Barnes used his hands and feet to injure Bawow and the various actions he took were described in graphic detail as required. The indictment had to describe the wounds Barnes inflicted on Bawow and where on his body those wounds were perpetrated. Finally, the indictment had to state the date of the victim's death and specify that after the wounding, the victim "did languish and languishing did live" and on the date of death, the victim "did die." Furthermore, his death was caused by the felonious and wilful actions of the accused with malice aforethought. Finally, the conclusion must close with the words "against the Peace of our Lord the King, His Crown and Dignity" to

---

1732-1734; IX, ed. by Worthington Chauncey Ford (Boston: Massachusetts Historical Society, 1930).

<sup>12</sup> SP 36/39, Pt. 2, f. 87.

indicate that the crime of murder is not just a private wrong but is an offence against the peace and order of the whole kingdom. The indictment against John Barnes included all necessary elements to charge Barnes with murder.

Once the indictment was read the accused was asked to enter a plea; John Barnes pleaded not guilty and the trial moved forward. The court then appointed William Bolland as counsel for Barnes and he accepted Bolland as his counsel. Bolland was a member of the inner circle of legal practitioners in Boston in 1736. He had worked closely with Judge Auchmuty from the time he came to Boston from England, and, as well, he worked for William Shirley when he became advocate general of the Vice-Admiralty Court and needed someone to tend his private practice when he was on circuit.<sup>13</sup>

The preliminaries of the trial having been concluded, Advocate General Shirley proceeded to read aloud to the Court the Information or the factual narrative of the incident which took place on board the ship from which the charge against Barnes arose. His words were chosen carefully to substantiate the charge in the indictment; he pointed out that the facts would be proven by the statements of the witnesses to the event. The statement of facts established that the *Defiance* was on a slaving voyage to West Africa and the West Indies and that Barnes had been hired on as first mate in Newport, Rhode Island. Either his violent character was unknown to Captain Cupit or he was the best of a bad lot, but he caused trouble among the crew who

---

<sup>13</sup> See above, 184.

believed he was possessed by a diabolical spirit “through the whole course of the voyage”.<sup>14</sup> Shirley’s narration compassed the death of Captain Cupit and the passing of Barnes from first mate to captain in which position he “exercised his outrageous Temper without Control”.<sup>15</sup> While his cruelty was not confined to Bawow, his brutal actions toward the slave boy proved fatal. The information dwelt on the details of the violent beating Barnes administered to Bawow, his condition after the beating, his death the following day, and Barnes’s orders to throw his body overboard.

After Advocate Shirley concluded the reading of the Information, he brought forward the witnesses, all of whom were on board the ship at the time of the incident. Not all the witnesses had observed the entire incident and one mariner, James Nichols, denied knowing anything about the death of Bawow or the disposal of his body. The testimony of the witnesses established that Bawow was well on the day preceding the beating, though as John Wood testified, he had apparently been sick previously as had some others aboard the ship, but he had recovered by the time of the beating. Three of the mariners, Benjamin Ricketts, Thomas Davis, and Peter Vroom, provided essentially the same details of the beating to which they were witnesses; three heard the details from other men and observed Bawow’s condition before and after the beating. Benjamin Ricketts and Peter Vroom testified that Barnes said he believed that he was responsible for the

---

<sup>14</sup> SP 36/39, Pt 2, f. 88.

<sup>15</sup> *Ibid.*, f. 89.

slave boy's death. All of the witnesses testified that Barnes did not make any effort to care for the boy after the beating nor did he ask the doctor on board the ship to attend to him.<sup>16</sup>

William Bolen was appointed as counsel for Barnes on Friday morning at the beginning of the trial for murder of William Milward. The record indicated that the trial proceeded immediately after his appointment, giving him no time to prepare and presumably no time to ask for access to the evidence on which the Crown would rely for both trials. One historian commented that the statutory low fees that lawyers could collect from clients would have limited the time they were able to spend on trial preparation in any case.<sup>17</sup> Barnes was fortunate that he had one of the most able young Boston lawyers acting for him and an older experienced lawyer in John Read on his defence team.

Counsel for the accused Barnes briefly described the beating given to the boy and agreed that he died within about twenty-four hours after the abuse. He went on to argue that the assault occurred in the heat of the moment and that none of the crew had testified that he had treated the boy any worse than any of the other slaves prior to the night of the beating. In other words one of the elements of the capital crime of murder, that of malice aforethought or "upon deliberation" in the words of counsel, was not made out as required by the Civil Law. If Barnes acted in the heat of the moment, killing Bawow would be manslaughter, not murder for which at this time in

---

<sup>16</sup> SP 36/39, Pt. 2, fols. 90-93.

<sup>17</sup> David H. Flaherty, "Criminal Practice in Massachusetts," in *Law In Colonial Massachusetts: 1630-1800* (Boston: Colonial Society of Massachusetts, 1984), 234. While we do not know what the fee would have been for Barnes in the Vice-Admiralty Court, fees for defence counsel in Massachusetts courts were set at ten or twelve shillings.

Massachusetts he could claim benefit of clergy.<sup>18</sup> Furthermore, Barnes, even though he was provoked by the noise made by the slave boy, it was his duty as a prudent master of a slave vessel to keep silence aboard the ship and prevent any occasion for the slaves below deck to remove their shackles and overpower the crew. The recitation of this argument is rather confusing and the court must have been unclear as to whether the killing was the outcome of provocation resulting in a sudden fury or a deliberate beating to restrain Bawow from endangering the ship by his cries in the night. The defence lawyer could not point to any evidence that the boy's cries caused real apprehension of a slave revolt by the captain or the crew. Barnes admitted that he had likely caused Bawow's death, but he did not appear to have tried to justify his actions to mariners Ricketts or Vroom.

Perhaps the clerk summarizing the trial documents had difficulty understanding the structure of the first defence argument, but the second argument was very clear. Bawow was a slave bought from his captors on the West African coast. All nations allowed the captors in war the right of life and death over the slaves taken. Not only the captor had this right but the right devolved to any who purchased slaves acquired in war and no free man could lose his life for killing a slave thus taken in war. At most, the punishment for killing a slave in the West Indies was a fine or restitution in the amount of the value of the slave; the trial should have taken place in Antigua, St. Christopher, or Surinam where Barnes would not have been in danger of capital

---

<sup>18</sup> Alan Rogers, *Murder and the Death Penalty in Massachusetts* (Amherst: University of Massachusetts Press, 2008), 22. Benefit of clergy had been available to mitigate the death sentence in a capital crime for only five years in Massachusetts.

punishment. Presumably, the *Defiance* had stopped at each of these places to sell slaves from its cargo.

Defence counsel argued that “the deceased and the other slaves on board this Vessel were in a direct State of Hostility when this killing happened they being sold into bondage and then Actually bringing away by the present Prisoner (Barnes) from their Own Country by force and therefore Shackled and deprived of all Liberty to prevent their rising against and destroying the Ship’s Crew (which undoubtedly they would have done if they could) which treatment is the plain evidence of a State of Warr”.<sup>19</sup> Counsel referred to “Mr. Locke” as authority for the premise that slavery is a “continued state of Warr” and therefore any killing that occurred between master and slave was not murder. What counsel did not include in his argument was the concept that slavery could only be justified if the slave had done some act that deserved death and therefore forfeited the preservation of his own life. The person to whom he had forfeited his life could choose to keep the slave alive and use him for his own purposes as long as he desired or transfer his life to another if he wished.<sup>20</sup> Locke theorized that slavery was only justifiable for aggressors taken captive in a just war; he spoke from vast knowledge of New World slavery having been involved as a colonial agent from 1667 and later moving on to collecting information on numbers and conditions of American slavery and the slave trade in his capacity

---

<sup>19</sup> SP 36/39, Pt. 2, f. 94.

<sup>20</sup> Locke, 2-24-25.

as a member of the Board of Trade at the turn of the century.<sup>21</sup> Whether or not he understood Locke's theories, Bolla's defence argument did not accurately apply Locke's theory to the Barnes case. There was no indication that Bawow was an aggressor conquered in a just war and therefore subject to the tyranny of slavery. In fact, Locke specifically denied that an aggressor's children could be taken as slaves<sup>22</sup>.

The arguments used by the defence appeared to be particularly weak and not well articulated, though that may be attributed to the clerk summarizing the court files. "Since the killing in the Present Case was the fruit of a Sudden transport of Passion they (the slaves) Accidently Occasioned it must with reason be Judged to have been done with deliberate intention and therefore cannot amount to the Crime wherewith the Prisoner is charged."<sup>23</sup> There was no evidence adduced by the defence that the slaves below deck had put Bawow up to making noise or that they were taking advantage of the boy's cries to try to knock off their shackles. Bawow had been crying out in his dreams for some time even before he was moved to sleep on deck at night; it is reasonable to assume that the crew, if they were concerned about their safety and a possible slave uprising, would have paid attention to the state of the slaves' shackles and reported any damage to the captain. Even if Bawow was making noise "with deliberate intention" to allow the other slaves to knock off their shackles, there is no indication that they

---

<sup>21</sup> James Farr, "Locke, Natural Law, and New World Slavery," *Political Theory*, 36 (2008), 497-498. Farr listed the positions Locke held and the information he dealt with both in his employment capacity and in his personal involvement as an investor with the Royal African Company and the Bermuda trade.

<sup>22</sup> Locke, 2-196.

<sup>23</sup> SP 36/39, Pt. 2, f. 94.

were in conspiracy with him and prepared to take advantage of his cries. He was a young child and was probably unaware of tactics used by other slave cargoes to break free. Finally, no evidence was adduced to show that Barnes was concerned about the safety of his ship or that he was motivated by anything other than his own evil temper in assaulting the boy.

Defence arguments focused on theoretical premises which were not directly relevant to the case before the court and could not be shown to be relevant without much more evidence. Defence counsel concluded his argument by differentiating between slaves on ships in the transatlantic trade and those slaves on plantations in the Americas and the West Indies. His argument took a strange turn when he posited a paternalistic relationship between master and slave on the plantations. “Wherefore there is a great difference between Slaves under these Circumstances (i.e. on slave ships) and the Slaves in our Plantations between whom and their masters there is in Some measures an Exchange of Natural for moral Bonds there being a Sort of said Agreement that the master shall yield Protection and Support and the Slave obedience and Some Share of mutual Confidence arises between them and Some Liberty is thereupon allowed the Slave by his Master”.<sup>24</sup> His argument then reverted to the continuing state of war and the rights the captor gained over the slave according to his interpretation of Locke’s Treatise.

The Advocate General’s arguments were more firmly based on the evidence before the court. He firstly dealt with the allegation that the accused’s actions were voluntary and malicious because they were devoid of any reasonable provocation. The boy’s cries were involuntary, not

---

<sup>24</sup> SP 36/39, Pt. 2, fols. 94-95.

designed to conceal the noise of the other slaves attempting to escape and Barnes was well aware that Bawow was not part of an intended conspiracy to overthrow the crew and take over the ship. Furthermore, even if the crying out was either intentionally or unintentionally a cover for escape attempts, it was totally ineffective because it was of a spasmodic nature, too short in duration, and not loud enough. The maliciousness of Barnes's actions was evidenced by the fact that Bawow's death resulted, not from a few unfortunately delivered blows given in the heat of the moment, but a series of vicious acts calculated to kill the boy. Barnes showed no remorse for what he had done after the assault was over and the boy was placed back in the longboat; he did not attempt to provide any care for Bawow even though there was a surgeon on board the ship.

Shirley agreed with the defence counsel that some nations allowed the master authority of life and death over his slave but not all nations subscribed to such absolute power by the master. Furthermore, "such legal Right of killing the Slave was ever universally Condemned as repugnant and Contrary to moral Right and Equity for which reason it never was Admitted among Christians and was never part of the Law of Slavery in any Christian Nation."<sup>25</sup> Shirley's argument under this head covered a broad scope of law. Even if the master did have legal dominion over his slave, the right to kill a slave was morally wrong and contrary to the law of Equity. It is crucial to understand the concept of the law of equity and its relationship to the common law in England prior to the eighteenth century.<sup>26</sup> The common law was a diverse set of

---

<sup>25</sup> SP 36/39, Pt. 2, f. 96.

<sup>26</sup> I have used several articles in this discussion of the law of equity and tried to summarize and simplify the concepts in applying them to this case. The Court in early 18<sup>th</sup> century

rules adopted, adapted, and administered by the courts in England from medieval times and based on precedent. These rules did not always fit the case before the courts and it was obvious that sometimes following the rules of the common law did not achieve justice for the parties.

Equity, therefore, had to be found initially outside the common law courts and with the King-in-Council. Equity was more often invoked in civil matters but even in civil matters, the exercise of equity sprang from natural justice or natural law. The king was the final arbitrator to protect the weak from the strong when the letter of the law was used as a weapon against the defenseless. Equity was dispensed in chancery and “The view of the Chancery as providing a regime to deal with miscellaneous defects in the late medieval common law, which lacked any other general or common underlying principle and gravitated to the Chancellor as the minister responsible for justice, was the view of F.W. Maitland and has become substantially the current orthodoxy”.<sup>27</sup> By the eighteenth century in Massachusetts, the Court system was a very simple one consisting of a Superior Court of Judicature which dealt as a first instance court for serious felonies as well as hearing appeals from county courts.<sup>28</sup> Issues of positive law and equity were

---

Massachusetts would likely have understood the broad outlines of equity without being familiar with the details of its development and the minutia of its application. Mike Macnair, “Equity and Conscience,” *Oxford Journal of Legal Studies* 27 (2007): 659-681; Edwin S. Mack, “The Revival of Criminal Equity,” *Harvard Law Review*, 16 (1903): 389-403; A. E. Popple, “A Court of Criminal Equity,” *Journal of the American Institute of Criminal Law and Criminology*, 16 (1925): 151-153.

<sup>27</sup> Macnair, “Equity and Conscience.”

<sup>28</sup> David H. Flaherty, “Criminal Practice in Massachusetts,” in *Law In Colonial Massachusetts: 1630-1800* (Boston: Colonial Society of Massachusetts, 1984), 192. While Flaherty discussed criminal practice in provincial courts, it is possible to see many of the same practices at work in the criminal vice-admiralty court.

heard in the same courts in Massachusetts, a major difference from the practice in England.

Therefore the court officials and lawyers who practiced criminal law in both the provincial courts and the Vice-Admiralty court applied principles of equity and natural law to the cases at trial.

This is especially clear in the arguments used by both the advocate general and defence counsel in the Barnes case.

William Shirley admitted that, while in some nations the law allowed a master the power of life and death over his slave, the law of equity in Christian nations harked back to natural law which was the foundation of positive law in Christian Europe. It was morally wrong to kill another human being; the Ten Commandments given by God to Moses decreed, “Thou shalt not kill”.<sup>29</sup> Therefore, Shirley implied that the command not only applied to white Christians, but to black non-Christians who were human beings protected by the divine laws as well. He attacked the master-slave question even further by arguing that even if the master had the power of life and death over his slave, John Barnes was not the master of Bawow and he “had no property in the Deceased, but only a trust to transport him safe or sell him for the benefit of Captain Cupit, his late master’s Representatives.” Barnes did not stand in the place of the captain in relation to the slave boy; his total responsibility was as a trustee to take good care of the property of his master. Once again, Shirley invoked the law of equity within which the law of trusts or “uses” was founded; this time he referred to the slave as property and argued that, even if he accepted the defence argument that Barnes controlled his master’s property in the slave, his role as a

---

<sup>29</sup> Exodus 20:13, King James Version.

trustee for his master forbade him not only from destroying that property, but required him to preserve it for the benefit of his master's estate and deliver that benefit in the form of the boy himself or the proceeds of his sale to the estate's personal representatives.<sup>30</sup>

Shirley went on to discuss necessity as a defence against a murder conviction. The argument would have been that the captain had the right to deal as necessary with anyone who was endangering the safety of the ship and its company and cargo even to the extent of taking the life of such a person. While Shirley granted the validity of the defence, he disparaged the allegation that the young boy was capable of carrying out any hostilities that could endanger the ship. Furthermore, the right of capture and killing captives of war did not extend to women and children so the so-called state of hostilities on board the ship did not give Barnes the right to kill any of the women or children. "Wherefore the killing of the Deceased by the Prisoner notwithstanding the Condition of the Deceased was in all respects illegal as well as unjust."<sup>31</sup>

Shirley wrapped up his argument by reference to the capital nature of the crime. He reminded the Court that this was a prerogative Court and the rules regarding sentence for a

---

<sup>30</sup> Benjamin Lynde, *The Diaries of Benjamin Lynde and of Benjamin Lynde, Jr.* (Cambridge: Riverside Press 1880), 89. The entry about the trial of John Barnes contained misspelled names of most of the parties which may have been a problem in the transcription. It is unlikely that Lynde who had been an integral member of the Boston legal community would not have been familiar with the spelling of Bolland's name and as a trained lawyer and experienced judge he would have known the importance of spelling the names of the parties right. He provided a slightly different take on the argument about the boy making noise ie. Bawow was calling out in his sleep for water which Barnes had rationed on board. Barnes was afraid that the boy's cries would cause further demands for more water by the slaves below deck and possibly the sailors as well.

<sup>31</sup> SP 36/39, Pt. 2, f. 96.

capital felony were everywhere the same in the British colonies; the venue in which the trial was taking place did not determine the sentence to be imposed. And the venue was determined by the fact that the killing took place on the high seas. So even if the colonial laws of the West Indies plantations only required a pecuniary fine for the killing of someone else's slave, those laws did not apply to the Vice-Admiralty courts which were proxies in the colonies for the High Court of Admiralty in London; the rules and procedures were set in that court and applied to all Vice-Admiralty Courts regardless of their location in Halifax, the Cinque-Ports, or Antigua.

Advocate General Shirley concluded his representation to the court with the statement that "as this killing was a Voluntary malicious shedding of the blood of the deceased it come within the Original Law universally received by all Civilized Nations of the world and which is recorded by the Great Lawgiver of the Jews *that whoso Sheddeth man's blood by man shall his Blood be Shed*. Wherefore I conclude upon the whole that the Prisoner ought to be adjudged to Suffer death."<sup>32</sup>

After the representations by Barnes's defence lawyer, the Court deliberated in the absence of the accused and the majority found Barnes guilty of the crime of murder. Lynde's diary indicated that one member of the Court did not agree with the guilty verdict but he did not give the name of the dissenter.<sup>33</sup> After the decision was made, the Court called Barnes back in and delivered the verdict. He was asked if he had anything to say "why a sentence of death

---

<sup>32</sup> SP 36/39, Pt. 2, f. 97.

<sup>33</sup> Lynde, *The Diaries of Benjamin Lynde*, 89.

should not be pronounced against him.”<sup>34</sup> At this point his counsel, John Read, the venerable Boston lawyer who had twenty-eight years’ experience at the bar, replied on John Barnes’s behalf.<sup>35</sup> He made a motion in writing for an Arrest of Judgment and spoke to the motion giving several reasons why it should be granted. The reasons are not included in the document and were apparently not compelling enough for the Court to grant the motion.

Motions in arrest of judgment were put forward at the time that the verdict was rendered to prevent the judgment from being entered, usually claiming “that the court has no jurisdiction of the parties; that the offence was not committed in the jurisdiction; that there is an omission of a penalty in the statute; that the prosecution was barred by the statute of limitations; that the statute has been repealed; that the statute is unconstitutional; that there is a lack of venue in the court ; or, that there was a failure to arraign and plead.”<sup>36</sup> The document did not give the reasons Read offered in support of his motion, but the court’s reason for not granting the motion was that the application was not made until after the guilty verdict had been declared. Applications for arrest of judgment were only made after a judgment was rendered, therefore, either the court did

---

<sup>34</sup> SP 36/39, *ibid*.

<sup>35</sup> While the local courts often appointed two defence counsel for offenders indicted for serious crimes, the record for this case indicated that only William Bolan was appointed by the court for Barnes’s defence; John Read is only referred to when the judge delivered the verdict and sentenced Barnes to death. There is no reason given why John Read took over Barnes’s defence at this juncture. It could be speculated that Read as the more senior counsel would make a more effective application for arrest of judgment but it is clear that Bollan had used this tactic in September, 1736. He was successful in this application but, for various reasons, it took the court two years to dismiss the conviction. Flaherty, “Criminal Practice in Massachusetts,” 235.

<sup>36</sup> De Reign, Morrell. “The History and Development of the Motion for New Trial and in Arrest of Judgment,” *American Law Review* 47 (1913), 391.

not understand the nature of this little used motion in Massachusetts or Read's reasons in support of his motion were not substantive. Perhaps the court was not prepared to allow Barnes to escape the death penalty in this trial as he had in his trial for the murder of Milward the day before.

The guilty verdict was followed by a sentence of death against Barnes and he was delivered to the marshal to be incarcerated. His execution would normally have been carried out on November 18, 1736, but the Commissioners present at the trial put forward a motion for reprieve for the execution of his sentence for twelve months so that he could make an application for pardon to the King if he wished. A week after the trial, Governor Jonathan Belcher granted the motion for reprieve with the twelve month term commencing on October 16, 1736.<sup>37</sup> Barnes made an application for pardon on February 4, 1736/7 to which was appended the summary of the trial catalogued in the State Papers. There is no indication as to who prepared the application for him.

### **Pardon – Application and Grant**

John Barnes's application for pardon was a one page manuscript document setting out the charge against him, the court's decision and sentence, the grant for reprieve, and the basis Barnes was putting forward for his application for pardon. The documentation he provided was unusually voluminous; most applications in England only required a certificate from the sentencing judge that the condemned person was a fit object of His Majesty's mercy and should be pardoned.

---

<sup>37</sup> SP 36/39, Pt. 2, f. 248.

Nowhere in the documentation sent to the King does the Court explicitly recommend that John Barnes should be pardoned. Nor is there any new evidence provided that would indicate he is a fit object of the King's mercy; the evidence he adduced was almost exactly what had been provided to the court in the first instance.

Barnes's argument in the application for pardon seems fit for one that would have been used for an appeal of sentence. He used the argument that, as master of the vessel, he was obliged to keep silence as much as possible so that if the slaves tried to saw or knock off their shackles in preparation for a revolt on the ship, the noise could be heard by the crew and a revolt prevented. He indicated that the noise made by Bawow was designed to "drown out noise of their sawing or beating off their shackles which they had once attempted."<sup>38</sup> No evidence of an attempted escape by the slaves was presented to the court, so it is possible that Barnes was adding this allegation to strengthen his application; it seemed to have worked. It is likely that he or the Court chose the option to apply for a pardon rather than to launch an appeal of sentence because a general pardon was less expensive than an appeal, a serious consideration for a poor sailor.

The monarch's pardon for convicted criminals had a long history in England reaching back to medieval times. It was used regularly and extensively in the Tudor period by all the kings and queens; part of the festivities of each coronation included a general pardon for crimes

---

<sup>38</sup> SP 36/39, Pt. 2, f. 250.

committed before the accession of the new monarch.<sup>39</sup> While not all crimes were pardonable, thousands of English men and women from all ranks of society were absolved of crimes they had committed by general pardons proclaimed from time to time. Pardons took several different forms through the centuries and were administered by different means to different people, but all kinds of pardons were very important both to the status of the monarch and to subjects benefiting from such pardons.

General pardons were granted on special occasions, such as the coronation of a monarch, and, during Queen Elizabeth's reign, as a regular part of each session of Parliament.<sup>40</sup> Persons who wished to take advantage of general pardons could purchase a copy for a few pence and use it as a defence if accused of a crime not excluded by the pardon. Later it was recognized that even a few pennies for a copy of a general pardon was beyond the means of many poor accused persons and copies were free for those who could not pay. The king also granted special pardons or pardons intended for named persons or groups of persons. These pardons could be costly, bringing in much needed wealth to the king from those who could afford to pay for their freedom. Mercy became much more formalized as by the late seventeenth century, at the end of each Assizes, the judge would review all of the felons convicted of capital crimes at that session

---

<sup>39</sup> K.J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge: Cambridge University Press, 2003), 56. Kesselring discussed in detail the increasing use of the pardon by the Tudor monarchs in the sixteenth century; many of the processes of later pardons were established at this time. Chapter 3 of her work is particularly useful in this aspect.

<sup>40</sup> Kesselring, *Mercy and Authority*, 67.

and decide who should be recommended for pardon and who should be hanged<sup>41</sup>; the names of those on the pardon list were sent to the king who most often took the advice of the judge who had had the chance to form an opinion of the accused during trial from his own observations and from the testimony of witnesses.<sup>42</sup> Judges could also grant a reprieve from execution to give the

---

<sup>41</sup> J.M. Beattie, "The Royal Pardon and Criminal Procedure in Early Modern England," *Journal of the Canadian Historical Association* (1987), 13. A sample of a punishment list from June 1, 1704 ran the gamut of punishments. *Old Bailey Proceedings Online* ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), version 7.0, 19 April 2014), June 1704 (s17040601-1).

"Received Sentence of Death 3.

Thomas Hunter, Augustin alias Silvester Rice, and Mary Warters, alias Pines.

Christopher Hibbert, was respited, being Burnt in the Hand, till further Order.

Burnt in the left Cheek 8.

Susanah Davis, Elizabeth Fox, Ann Hutchings, Samuel Kilby, Elizabeth Miller, Mark Silvester, Mary White, and Martha Watson.

To be Whipt 8.

Jeremy Barret, Mary Burnet, Mary Brown, Mary Dean, Jane Eglestone, Mary Farrel, Ann Jones, and John Smith.

W - T - Fined 200 l. and to lie in Prison for three Months without Bail or Mainprize.

H - J - Fined 100 l. and to lie in Prison for three Months without Bail or Mainprize.

Mary Warters pleaded her Belly, saying she was with Child and a Jury of Matrons being Impanelled found her to be with quick Child.

After which 32 Condemned Criminals pleaded her Majesties most Gracious Pardon on their Knees, some on Condition never to return into her Majesties Realms during their Lives. Others on Condition to transport themselves into America, and not to come into this Kingdom during the term of Seven years, on forfeiture of their Lives; and others to go as Soldiers into Her Majesties Service beyond the Seas, and there to remain for the term of 7 years."

<sup>42</sup> CO 36/9, fols. 149-150. December 1728. Judges were directed to provide recommendations for free or conditional pardons at the end of each circuit and only reprieve those they thought had a good chance of receiving a pardon. All other convicted felons were to be assigned a date for execution at a "not ... unusual distant time" presumably so as not to put the country to extra expense in housing incarcerated convicts. "[A]t your return from your respective circuits, you will please each of you to send to one of the Secretarys of State to be laid before his Majesty a particular list distinguishing therein those whom you shall judge proper to be freely pardoned, and those who in your opinion should be transported to his Majestys plantations, according to the Act of Parliament in that behalf."

convicted felon opportunity to make application to the king for mercy; the king generally requested a report from the judge as to the suitability of the applicant for a pardon, with or without conditions.<sup>43</sup> Even if a convicted felon's name appeared on the list of conditional pardons, he or she could further apply for an unconditional pardon if the condition was too onerous. In May of 1737, Margaret Hodges requested and received a respite from transportation pending a report from the judge in her case.<sup>44</sup> The ancient process by which the condemned prisoner was held in custody until the king's will was known – *ad gratiam* – was essentially the process used by the Vice-Admiralty court in Boston.<sup>45</sup> The judge had ruled according to the law, but remitted the sentence pending a decision by the king regarding the convicted felon's application for a pardon.<sup>46</sup>

Those convicts who were not fortunate enough to be recommended for a free or conditional pardon usually were not hanged immediately; there was often a period of several weeks during which the condemned man or woman languished in gaol before the date set for

---

<sup>43</sup> SP 44/83 fols. 196,197. After listing the names and crimes of the various convicted felons, in this case from the Northern District, and noting that “the respective Judges before whom the said persons were convicted, having by certificate under their hands, recommended them to the King as fit objects of His Majesty's Mercy, on condition of Transportation, I am commanded to signify to you His Majesty's pleasure that you give the necessary orders for the Transportation” of the listed felons to the American colonies. This was the normal form of the order in the 1730s.

<sup>44</sup> SP 44/130, f. 203. It is unclear as to whether she was transported or not.

<sup>45</sup> Naomi D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* (Oxford: Clarendon Press, 1969), 45-47.

<sup>46</sup> J.M. Beattie, *Crime and the Courts in England: 1660-1800* (Princeton: Princeton University Press, 1986), 431. Beattie made the point that the reprieved prisoner would be held in prison until the pardon “had been issued under the Great Seal” and then he would be returned to court to plead the pardon. There appears to be no extant record showing that Barnes ever pleaded the pardon issued for him in April 1737.

execution. Barnes would have been hanged on November 18, 1736, a month after he was found guilty of murder if he had not been respited. This period of time after judgment and sentencing could be used by the convicted person to formulate a petition to the king for pardon and to support his application with endorsements from family and friends, even prominent peers or politicians if he was fortunate enough to have such connections. Applications for pardon were often sent back to the sentencing judge for a further report before a decision was made by the king or Privy Council, a questionable practice since the judge had already had a chance to remit the sentence and had chosen not to do so.<sup>47</sup> However, some petitions were still successful even at this stage. Beattie noted that the reference for a further report could have put the trial judge in a difficult position, especially if the application for pardon was accompanied by a character reference from a person of political or social eminence.<sup>48</sup> The judge could only provide his report from what he had observed and leave it to the king to decide based on any further information presented with the application.

Blackstone in his *Commentaries on the Laws of England* stated that “Laws (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his

---

<sup>47</sup> Beattie, “The Royal Pardon,” 18, 19.

<sup>48</sup> *Ibid.*

own.”<sup>49</sup> The courts were required to apply the letter of the law in the realm, making for certainty and equality for all men, but the king had the power to “extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.”<sup>50</sup> The king, therefore, was seen to be making laws, looking after his people, and showing compassion to those of his subjects who were proper objects of his grace. Judge John Comyns of Newcastle rendered an opinion on the fitness of a pardon for a woman convicted of infanticide which seems to have had very little to do with legal guilt or innocence. He said, "I am very tender of hindering punishment in a case of murder where the fact is evident, but am persuaded in this case mercy will give a general satisfaction. And I think it my duty not only to raise in the minds of the people a reverence and veneration towards his Majesty and his administration on account of his justice, but to engage their love and affection towards him on account of his goodness and mercy in cases of hardship or compassion.” The king’s subjects, having seen him as a bountiful and loving father to the nation, were thus able to give him that filial affection and loyalty which was his due.<sup>51</sup>

Blackstone considered the facets of pardons as they related to the power of the king. The king could pardon all kinds of offences against the crown and the public except an offence against *habeas corpus* in which a person is sent to prison outside the country, an offence in

---

<sup>49</sup> Blackstone's *Commentaries on the Laws of England: 1765-1769*, Vol. IV, ch. 31, 389. While Blackstone's *Commentaries* were published later in the eighteenth century, he was describing what was already in practice in Britain and had been in practice for some time.

<sup>50</sup> *Ibid.*, 390.

<sup>51</sup> SP 36/9, fols. 11-16.

which a private person brings a suit for justice, and an offence consisting of an ongoing common nuisance.<sup>52</sup> The wording of the pardon was very important; general words could not be used in serious cases of treason, murder, or rape. During the reign of Richard II, legislation was passed that allowed the king to grant a pardon for these kinds of crimes as long as the document spelled out the details of the offender's actions. It was assumed that the king would not want to pardon an offender who had committed such egregious acts, so if the king were to grant a pardon, the specific actions of the offender had to be set out, for example, if he committed murder as a result of an assault or by "malice prepense". Blackstone pointed out that the register did not record any pardon for homicide other than in situations of self defence or homicide resulting from misfortune or accident. Underlying all requirements for a valid pardon is the rule that the king must have full disclosure so that he would not be deceived by suppression of facts or outright falsehoods; if so, the pardon, even if it was granted, would be void.<sup>53</sup> Thus it is clear why Barnes's application for pardon appended the detailed summary of his trial and Charles Taston, the marshall of the Court of Admiralty in Boston certified it as a true copy.<sup>54</sup>

In England, in the eighteenth century, many pardons were conditional on the convicted felon allowing him or herself to be transported to one of the king's colonies overseas.<sup>55</sup> This

---

<sup>52</sup> *Ibid.*, 391.

<sup>53</sup> *Ibid.*, 393.

<sup>54</sup> SP 36/39, Pt. 2, f. 99.

<sup>55</sup> Abbot Emerson Smith, "The Transportation of Convicts to the American Colonies in the Seventeenth Century," *AHR*, 39 (1934), 232-249. Smith's very helpful article showed that transportation was not uncommon throughout the seventeenth century and, primarily in the earlier part of the century, transportation was more a commercial undertaking by merchants and

process was a carryover from the seventeenth century during which the necessity for the king to find a way to show mercy to the many convicted felons who would otherwise have been executed coupled with the needs of merchants to populate the early West Indian and American colonies provided an obvious means for the removal of many convicts from England, thus avoiding wholesale slaughter of hundreds of petty criminals. The felons sent to the colonies were those found guilty of less serious felonies such as thievery and crimes for which benefit of clergy was not available.<sup>56</sup> Transportation served the purpose of removing felons and other disorderly persons from the community and at the same time providing much needed manpower for the colonies. Transports were sent to the colonies in which they were most needed – the Chesapeake in the seventeenth and eighteenth centuries<sup>57</sup>; the Summer Islands, Barbados, and Jamaica later

---

planters than a penal measure. Each felon selected for transportation had to agree to the conditional pardon and received a certificate of fitness. Disputes occurred as to who would be responsible for jail fees for these men and women; mostly the captains of transport ships absorbed the costs and recouped their outlays from the proceeds of the sale of the felon's labour in the colonies. Once in the colonies, the transported felon was treated in the same manner as an indentured servant, with the exception that if he or she returned to England prior to the end of the transportation term, the original death sentence would be reinstated.

<sup>56</sup> Ibid., 233. Legislation dealing with transportation in the seventeenth century specified only those crimes for which a reprieve for transportation could not be granted. This was more effective given the number of crimes which drew capital punishment. Criminals who had already received benefit of clergy could also be transported to the colonies as a penalty for their recidivism.

<sup>57</sup> A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775* (Oxford: Clarendon Press, 1987), 117-119; Gwenda Morgan and Peter Rushton, *Eighteenth Century Criminal Transportation: The Formation of the Criminal Atlantic* (New York: Palgrave Macmillan, 2004), 131. Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776* (Chapel Hill: University of North Carolina Press, 1947). While total numbers of transports to America are difficult to ascertain, the estimate that seems most reliable is 50,000.

in the seventeenth and into the eighteenth century. Other American colonies received a small number of convicts over the eighteenth century.

Transportation was seldom used as a felony punishment in the American or West Indian colonies as it was in England; only the most incorrigible criminals and those who failed to conform to religious norms were banished from the community.<sup>58</sup> There was a difference between a pardon conditional on transportation and banishment as punishment. Massachusetts Bay banished religious non-conformists in the seventeenth century; Roger Williams in 1635 went on to found the colony of Rhode Island, Anne Hutchinson was banished in 1638 and founded the colony of Portsmouth. Banishment was used in the colonies later in the seventeenth century and the early eighteenth century to remove groups of people, such as rebellious slaves or American Indians, Quakers, Jews, and political rebels such as Nathaniel Bacon, who threatened the stability of the colonies in Massachusetts, Maryland, Virginia, and Barbados. But free pardons were granted to convicted persons like Sarah Williamson and Mary Thornton, women convicted of murdering their children in Virginia.<sup>59</sup> These were poor women who had been convicted of infanticide and while the details of their trials are unclear, there was enough doubt about the evidence used to convict them that, not only did the judges respite their execution, but their applications for mercy were successful in London.

---

<sup>58</sup> Peter Rushton and Gwenda Morgan, *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves* (London: Bloomsbury Publishing, 2013), especially Chapter 6.

<sup>59</sup> CO 324/37, fols. 80–81; CO 5/869. fols. 381–406v.

In the early eighteenth century, Massachusetts was a colony of mostly small villages and towns in which residents knew each other and adhered to a set of local behavioural norms. Many potential offenders were kept in line because they lived in close proximity to neighbours who knew them and their families. In addition, because colonial communities even into the eighteenth century were relatively small, they could ill afford to lose any able-bodied workers unless the individual posed such a threat of disorder that normal punishments consisting of fines, shaming, or corporal punishment could not serve to reintegrate the offender back into his or her place in the community. It was more to the advantage of the community to punish the offender by levying fines or prescribing whipping than executing much needed labourers who could be brought into conformity with acceptable behaviour and return to being a productive member of society.

Even though felons were not likely to be subjected to transportation in the eighteenth century in Massachusetts, few were executed for capital crimes. Kathryn Preyer's figures for the seventy-five year period between 1693 and 1769 showed a total of fifty-six felons executed for crimes including murder, infanticide, rape, arson, and burglary.<sup>60</sup> The incidence of serious crimes in Massachusetts was relatively low in the eighteenth century so few executions were necessary.<sup>61</sup> Even then, criminals found guilty of a capital crime and sentenced to death could

---

<sup>60</sup> Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *AJLH*, 26 (1982), 343. She borrowed from David Flaherty's research relating to provincial Massachusetts.

<sup>61</sup> *Ibid.*, 342. "David Flaherty's ongoing work concerning crime in provincial Massachusetts concludes that the amount of serious crime in Massachusetts was very low in the eighteenth century, occurring at roughly similar levels throughout the province, with Suffolk County (Boston) the main exception. A relatively homogeneous population living in small organized townships, the outmigration of potentially disruptive young persons, low population density, and

and did plead benefit of clergy for a first offence in Massachusetts after 1732, were burnt on the thumb to indicate they had received their one and only reprieve from a death sentence, and were then allowed to go free. Persons indicted for serious crimes could make a motion in arrest of judgment either before or after judgment but this tactic was seldom used in New England before the 1740s and Barnes's motion was denied when John Read brought it after his judgment was rendered. Appeals from judgment could also mitigate a death sentence but these were expensive and the outcome could be uncertain.

John Barnes, after his motion for arrest of judgment failed, was given respite of sentence for one year in order to have time to apply to the king for a pardon. Convicted criminals frequently made application to the king for pardon in the seventeenth and eighteenth centuries and pardons were regularly granted. The sentencing judge was asked if the convicted felon was a suitable candidate for a conditional or unconditional pardon and his recommendation was generally followed in the decision to grant a pardon. More often than not, the judge recommended a pardon conditional on transportation to the colonies for both men and women. Some convicted felons were offered a pardon conditional on transportation but refused to accept such a pardon because they feared the dangers of crossing the Atlantic and life in the American wilderness more than death at home.<sup>62</sup> The number of crimes constituting felonies for which

---

the absence of substantial poverty, Flaherty argues, account for the low levels of serious deviant behavior.”

<sup>62</sup> Michael Zuckerman, “Identity in British America: Unease in Eden,” in *Colonial Identity in the Atlantic World, 1500-1800*, eds. Nicholas Canny and Anthony Pagden (Princeton: Princeton University Press, 1987), 119. Zuckerman outlined the perils experienced by emigrants crossing

death was the mandatory punishment required that some way be found to prevent hundreds of executions every year in Great Britain alone; the king's pardon therefore was one of a number of very necessary means for blunting the sharp edge of the law's effect.<sup>63</sup>

Applications to the crown for pardon from felons in the colonies were likely to be unconditional if they were granted. George Condick, one of the crew of the pirate vessel *Elizabeth*, was pardoned on the basis that he was "a drunken, ignorant fellow who served as ship's cook"; several of the other crew members were executed after trial in 1726.<sup>64</sup> Likewise, Mary Thornton of Virginia was convicted of murdering her bastard child in April, 1737 and sentenced to death.<sup>65</sup> She asserted that the child was stillborn and with the assistance of the

---

the ocean and the function of the actual voyage as a rite of passage, not only physically but spiritually.

<sup>63</sup> The other method the English justice system used to prevent wholesale executions after conviction was the legal fiction known as "benefit of clergy." Benefit of clergy, which was an almost universal mitigation of the death penalty after 1717 legislation in England, was a carryover from a period when clergy were tried in ecclesiastical courts. They were allowed to prove they were educated members of the clergy by reading a passage of scripture. By the early eighteenth century, benefit of clergy was granted to almost all felons except those whose crimes were, by legislation, exempted from the privilege. It became a means of pardoning a first offence; a brand on the hand notified courts that the privilege had been used if the person was ever brought to trial again. K.J. Kesselring, *Mercy and Authority*, 46-48. See also Arthur Lyon Cross, *The English criminal law and benefit of clergy during the eighteenth and early nineteenth centuries*. [U.S.], [1917?]. *The Making of Modern Law*. Gale. 2014. Gale, Cengage Learning. 06 March 2014

<<http://galenet.galegroup.com.ezproxy.lib.ucalgary.ca/servlet/MOML?af=RN&ae=F153273934&srcht=a&ste=14>. This interesting pamphlet sketched the history of benefit of clergy from medieval times.

<sup>64</sup> CO 5/869. fols. 381-406v.

<sup>65</sup> "All the judges were of opinion that there appeared circumstances sufficient on her trial to induce them to believe the child was still-born and have therefore unanimously desired me to obtain for her H.M.'s pardon by getting her name as usual in the Newgate list. She is a very poor

Lieutenant-Governor of the colony, she was granted a free pardon within two months.<sup>66</sup> An earlier Virginia case in 1728 saw Sarah Williamson, an Indian woman, also pardoned after she was convicted of murdering her child whom she declared had been stillborn. She was charged with murder because she buried it privately; the Lieutenant-Governor interceded on her behalf saying “There were indeed very strong presumptions but no positive proof of her guilt: but her Christian behaviour during the time of her tryal and imprisonment, her resignation under her sentence, her willingness to die, and at the same time her constancy in denying the fact, with some other circumstances, perswade me that she was not guilty, and that her ignorance betray'd her into the resolution of burying the child privately, which she constantly affirms was born dead.”<sup>67</sup> In each of these cases, the convicted felon was recommended for mercy by a prominent person in the colony. There is no indication that anyone performed the same office for John Barnes after his trial in 1736; the President of the Court, Jonathan Belcher, agreed with the Commissioners that he should be respited so he could apply for a pardon but it appears that there was no specific recommendation that he was a fit object for the King’s mercy. The warrant for pardon referred to “some circumstances represented to us, in his behalf inducing us to extend our Grace and Mercy unto him”; this reference could have been simply the circumstances related by him in his application for pardon.

---

woman, must lie in prison till it comes over at the country's charge, so I hope to have it by one of the first ships.” CO 5/1337, fols. 195–199.

<sup>66</sup> CO 324/37, fols. 80–81.

<sup>67</sup> CO 5/1337. fols. 42, 43. June 9, 1728.

The King's warrant for entering John Barnes's name on the next list of Newgate pardons was issued in April, 1737 and it can be presumed that his name was so inserted. However, just because his name was on the Newgate pardon – a procedure designed for poor prisoners so they would not have to pay for a special pardon – did not mean that he was actually pardoned. Barnes would have to comply with any terms of that pardon and return to court to plead the pardon before it became effective.<sup>68</sup> Most pardons were general and could be pleaded at any time before the court and, assuming this was the case for Barnes, there is no evidence that he ever appeared before the court to plead his pardon.

J.M. Beattie is of the opinion that “The English courts in the eighteenth century, while not wanting to see the innocent wrongly charged and convicted, seem not to have been as concerned with the abstract issues of guilt or innocence or the justice of the verdict and sentence as they were with the general outcome of a court session and the overall impression it was likely to make. The royal pardon was the crucial instrument in the manipulations and management that

---

<sup>68</sup> Cecil Headlam (editor), "America and West Indies: March 1702, 21-25," Calendar of State Papers Colonial, America and West Indies, Volume 20: 1702, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=71641&strquery=pardon>. This is a reference to a Newgate Pardon in which the prisoners did not appear to plead their pardon and forfeited their bail money but not the pardon itself. “Henry Newton to [? William Popple]. In answer to the demand of the Lords Commissioners for Trade and Plantations, March 20, I have perused the register of the Admiralty, and doe find that How and Churchill were convicted of piracy in May, 1701, and that the late King did by his warrant, June 28 after, order them to be put in the next General Pardon, and that they should give bayle to plead the pardon on the 9th of July, at the next General Sessions of the Admiralty. Their names were inserted in the general Newgate pardon, Aug. 28, but it does not appear by the Register that the pardon was ever pleaded by them. *Signed*, Hen. Newton. *Endorsed*, Recd. 23rd. Read March 24, 170½ . ¾ [CO 5/1261. No. 55; and 5, 1289. 390, 391.]”

produced those desired effects and that characterized the eighteenth century criminal justice system.”<sup>69</sup> A convicted felon was always subject to a death sentence and the “bloody code” of the eighteenth century which increased the number and variety of crimes carrying a death sentence required a delicate balance between ultimate enforcement of the letter of the law and some lesser punishment or none at all.

In New England, there were fewer capital crimes than in England so mercy as a means of preventing excess executions was not needed as often. But even though crime was defined more in moral terms than in property rights in New England as opposed to England in the eighteenth century, New Englanders seem to have valued certainty over flexibility in sentencing. In England in the seventeenth century, Puritans suffered persecution for their insistence on a return to a Biblically-based morality enforced by law. When they moved to New England and established their “city set on a hill” on Massachusetts Bay as an example to all the world, they chose Biblical, and particularly Old Testament, principles as the basis for their laws. The parallels between their situation – embarking on a journey into the American wilderness – and that of the Israelites’ passage through the wilderness to the Promised Land was not lost on the first settlers; they soon developed a rudimentary code, the Body of Liberties, upon which their local laws and judiciary would be based that differed substantially from the English forms they had left behind.

---

<sup>69</sup> Beattie, “The Royal Pardon,” 22.

## **Conclusion**

Colonial law was still developing in Massachusetts in the 1730s, borrowing from English precedents as the need arose, but remaining much simpler in procedure than the courts in Britain. The more unified court system suited the needs of New Englanders and the relatively small and generally unsophisticated bar. Other than the absence of a jury and the presence of commissioners, the Vice-Admiralty court trial showed little difference from a criminal trial in the superior court of the province, a not surprising situation given that most of the performers were also involved in the provincial legal system.

Finally, the men involved in the trial and pardon at all levels were persons of their time and place and each one came to the event with his unique set of experiences in the law and slavery. Some owned slaves and some dealt in the slave trade, but almost all agreed that slaves were human, created by God, and Barnes's conduct towards Bawow constituted murder for which he should die. Governor Belcher, who had been involved in the slave trade, gave Barnes a reprieve to apply for a pardon which he probably knew would be granted by the king. Whether Barnes knew he had been issued a warrant for pardon or not, he took his desire for freedom into his own hands and broke out of gaol twice. It is possible that he never received the pardon he had been granted.

## Chapter Seven

### “The Court adjudged the Prisoner Guilty”<sup>1</sup>: Conclusion

On that Friday morning, October 15, 1736, when John Barnes stood in the dock awaiting trial in the Admiralty Court in Boston, the British Atlantic world was becoming more complex, the parts more interdependent, and the wilderness more settled. British ships plied the ocean, carrying raw materials to Britain and between the American and West Indian colonies, and manufactured goods from England to Africa and the colonies. Ships laden with slaves, criminals, and indentured servants crossed the Atlantic to plantations in the new world, providing labour to produce Europe’s seeming insatiable hunger for sugar, as well as tobacco, cotton, rice, and indigo. It was clear by this time that bullion was not going to make Britain rich, but the agricultural products of the Americas and West Indies were making British individuals and families very wealthy. American planters and businessmen were profiting from agriculture and trade among themselves and with consumers around the Atlantic basin.<sup>2</sup> British ships were an integral part of the Atlantic world and sailors by the thousands participated in the busy Atlantic trade and commerce.

---

<sup>1</sup> SP 36/39, f. 246

<sup>2</sup> Vincent T. Harlow, *History of Barbados 1625-1685* (New York: Negro Universities Press, 1969). Harlow’s chapter “Trade Relations between Barbados and New England” detailed the kinds of provisions New England supplied to Barbados and the relative importance of these goods to the island. Disruptions in trade caused by the English Civil War and later wars with other European nations made Barbadian trade with New England and, to a lesser extent, Virginia essential to the subsistence of the colony. In the seventeenth century, fish and timber were the main imports from New England.

The slave trade carried on in British ships was not an inconsequential part of the whole Atlantic trade system. The triangular slave trade conjures up visions of British ships leaving the ports of London, Bristol, and Liverpool laden with goods to trade on the African coast for slaves. Slaves were traded in the West Indies for sugar, molasses, tobacco, and other luxury goods in demand in England. But the triangular trade in the eighteenth century also originated in New England, particularly in Rhode Island beginning in the 1720s and continuing throughout the century. The *Defiance* was part of that trade and indeed the 1735 trade voyage was one of approximately eight ships that left Rhode Island bound for the West Indies by way of the Guinea coast. Trade in provisions and timber from New England to the West Indies had been long established by the second quarter of the eighteenth century, so the slave trade was just another variation on a relationship already in place. Relationships aboard ship were a microcosm of hierarchical society on land, so when John Barnes took command of the *Defiance* of the coast of Africa in 1735, his position gave him total authority over the ship, the crew, and the cargo of slaves for the duration of the voyage. But, like the king within the kingdom, the captain on the ship was bound by the law of the sea and the law of nature; he could not act as a tyrant with impunity.

There are several questions which arise from the John Barnes trial for which answers can only be suggested. Why was Barnes brought to trial for the death of a young slave boy on the middle passage? Thousands of slaves did not survive the Atlantic crossing for one reason or another every year; how was this death different? Did the Boston trial venue affect the judge's decision and sentence? Why was Barnes tried on a charge for murder when slaves were property

and he could have faced a much less severe sentence for destruction of property or breach of trust? Why was Barnes respited to give him time to apply for a pardon and on what basis could he have been granted a pardon by the king?

Coughtry, in his discussion of the Middle Passage, observed that “Disease and revolt were the two biggest killers aboard the slavers; therefore, health and security were the captors’ principal preoccupations. In the final accounting, it was “mortality” that determined the size of profits and losses.”<sup>3</sup> Mortality would have been even more of a concern on the smaller ships that Rhode Islanders used in the slave trade; the loss of any slaves directly affected the bottom line for that voyage and unnecessary losses were particularly disturbing. Bawow’s death was unnecessary; he was a healthy young boy and while he was a bit younger than the ideal slave, he could have been sold for a good price in the West Indies. It is unlikely that Barnes saw him as a security risk either. Slave revolts, when they happened on Rhode Island slavers, were more frequent when the ship was close to shore and the slaves had an opportunity to return to the land they had recently left.<sup>4</sup> The ship had left the shore and was at one degree forty minutes north latitude, well away from land. The commissioners and the judge did not accept that Barnes had any safety concerns sufficient to warrant beating the child to death.

---

<sup>3</sup> Coughtry, *The Notorious Triangle*, 145.

<sup>4</sup> *Ibid.*, 151. Coughtry made the point that there were records of only seventeen slave revolts between 1730 and 1807, fourteen of which occurred after the *Defiance’s* voyage. Slaves were more likely to attempt to revolt when the crew charged with tending or guarding them was inadequate and the slaves were unshackled for washing or eating during the day.

Barnes was a violent individual; Captain Cupit had to reprimand him for his behaviour even before they reached the Guinea coast because the crew complained bitterly of his actions. He threatened to shackle him if Barnes did not moderate his behaviour. The threats were effective for a time until Captain Cupit died and Barnes became the captain of the ship. The crew had good reason to fear Barnes's temper; on the way back he beat the sailor Milward so viciously that he died of his injuries. The circumstances of that incident were given only briefly in the *New England Weekly Journal* article regarding Barnes's trial for murder of Milward. For whatever reason, he was acquitted of Milward's murder, but immediately tried for the murder of Bawow. It is conceivable that the Advocate General was intent on convicting Barnes for his crimes but did not have as strong a case for Milward's killing as for that of Bawow. By charging him for murder in both cases, Advocate General Shirley could be quite sure of getting a conviction on at least one of the charges. Since murder was a capital offence it did not matter if Barnes died for murdering one or both of his victims. The court accepted that Bawow was included in the Biblical quote from the Old Testament – "Whoso sheddeth man's blood by man shall his blood be shed." In other words, Bawow was fully human in the eyes of God and his death was every bit as wrongful as the death of any other man.

In eighteenth century Britain, the perception was that crime was increasing and with increased crime came an increasingly disordered society. "Because a felony was both intentional and immoral, it struck at the very heart of a community. Because criminal acts threatened the peace of society, criminal justice could not be simply the concern of victims or their families. The prosecution of felonies belonged to the commonwealth, and by extension, to the monarch.

The injury in crime transcended the loss of any single individual. It was the king who stood as the symbolic victim, and who had to be revenged.”<sup>5</sup> Felonies had to be punished by the state in the name of the king and the primary purpose of punishment was deterrence. It was believed that the most effective kinds of punishment were ones that inspired fear and shame in not only the person charged with a crime but in the general populous.

Ships as a microcosm of society likewise required order to function effectively, so intentional transgression of law must be punished to deter the offender from reoffending and others from committing the same or similar acts. The excessive violence committed by Barnes on the *Defiance* militated against peace and order on the ship and could not go unpunished. The Vice-Admiralty Court in Boston, while it was part of the Admiralty system for the whole of the British Empire, appeared to have adopted some of the philosophy of the common law courts, probably because some of the same judges officiated in both jurisdictions. In its beginnings, Massachusetts could be said to have opted for simplicity and unity in its judicial system, thus moving away from the complex chaos of the British court system.<sup>6</sup>

---

<sup>5</sup> Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth Century England* (Cambridge: Cambridge University Press, 1987), 3.

<sup>6</sup> Mark DeWolfe Howe, “The Sources and Nature of Law in Colonial Massachusetts,” *Law and Authority in Colonial America*, ed. George Athan Billias (Barre, Massachusetts: Barre Publishers, 1965). DeWolfe discussed the Puritan establishment of law in Massachusetts Bay as it was practiced and evolved over the first century of the colony’s existence. They viewed the common law as a set of principles defining public law to which they must adhere and they could therefore make their own private law to fit the circumstances of the colonial community. Even colonial private law drew from historical and contemporary English and Roman laws when they could be made to serve the needs of the colony.

In considering the law that must be applied to the death of Bawow at the hands of Barnes, the Vice-Admiralty Court did not feel they had to look far for principles to guide them. The Admiralty did not have a special set of rules that applied to non-whites or slaves, and the laws in Massachusetts had few legislative provisions directed towards slaves – they certainly did not have a local slave code as did some of the other colonies. While England had a few judicial decisions that related to individual slaves, there was no slave law as such within the English common law. Therefore, the judge and commissioners looked to the local common law for guidance as to how to deal with willful killing of one man by another and found that murder was murder whether on land or sea and without regard to the status of the victim as free or unfree.<sup>7</sup>

After his trial and the Commissioners' recommendation that he be respited to give him time to make application for pardon, Governor Belcher granted the motion for respite for twelve months. The Court had the authority to execute Barnes after his trial so the question arises why they gave him time to appeal to the king for mercy. Did they know that most applications for pardon were granted and in giving him the opportunity to apply for pardon, they were balancing the certainty of punishment valued in Massachusetts against the flexibility for individual cases practised in England? They were letting the king decide how far a captain of a ship could go in meting out punishment and exercising authority on his ship. The Vice-Admiralty court punished a captain who went too far in terrorizing his crew but did not totally undermine the hierarchical

---

<sup>7</sup> Perhaps Barnes murderous violence towards one of the local sailors made him a less sympathetic figure and as they contemplated his punishment it was easier to find him guilty of Bawow's murder.

structure of the ship. Barnes spent almost a year in gaol awaiting his pardon – not an insignificant punishment in itself. He was only at large in September, 1737 because he had once again escaped. Did John Barnes ever receive his pardon and did he ever appear before the court to plead that pardon so it would be effective? After his escape from the Boston gaol in September, 1737, John Barnes disappeared from history, an outlaw and a convicted felon.

As for the Vice-Admiralty court that had convicted Barnes, the men who were present there had varied careers in the years following the trial. Belcher's career in Massachusetts had a further five tumultuous years to run before his commission was revoked and he was succeeded by William Shirley as governor of the province assisted greatly by his ambitious wife, Frances. The commissioners generally remained pillars of Boston society; William Bolla's star continued to rise as he became a prominent lawyer in Boston. John Read lived the remainder of his life in Boston and enjoyed his reputation as senior counsel in the province.

The American slave trade from Newport, Rhode Island flourished for the remainder of the eighteenth century and was responsible for the greatest number of slaves imported into the West Indies and Atlantic North America by American ships. Even though slavery continued in all of the American colonies, more voices were raised against it with the passing of every decade of the eighteenth century.<sup>8</sup> The arguments in the Barnes case provide a window onto the views of at least some of the opinions regarding slavery and the treatment of slaves in Massachusetts.

---

<sup>8</sup> Quakers, some of whom were viewed as radicals, were in the forefront of the antislavery sentiment beginning with George Keith in the seventeenth century and including Benjamin Lay, John Woolman, and Anthony Benezet in the mid eighteenth century. Non-Quakers such as Samuel Sewell also advocated antislavery.

The tone of William Shirley's arguments placed slaves squarely within the human family protected by the laws of Moses; he masterfully disposed of the defence arguments which not only seemed weak but gave the impression they were made with much less conviction. Perhaps the relative difference in advocacy experience between Shirley and Bollan was a factor in convincing the Commissioners and judge but Bollan and Read together would have more than made up for any discrepancy in experience.

The tenor of the entire summary sent to the king in support of the application for pardon appeared to militate against any implied recommendation for mercy and yet the warrant for pardon was signed by the king citing "some circumstances humbly represented" unto him. Since the reasons for granting the pardon are not given, we can only suggest some of the factors which may have come under consideration. Perhaps the king was influenced by the reference to Barnes's wife and children who depended on his income and would likely become a burden on the community if Barnes was executed. Maybe the king was moved by the need to bolster the authority of ships' captains who were to the crew as the king was to his subjects; by increasing captains' authority, he was reinforcing his own authority. The king also may have decided that a winter languishing in the Boston gaol was punishment enough to guide Barnes to a more merciful attitude towards his fellow man. Or the warrant may have been granted as an automatic response to Barnes application.

Well might the slaves represented by the statue in the Inner Temple garden lament that the law ate them alive. All the efforts that many men in New England had made to obtain justice for the little boy so brutally killed on board the *Defiance* were apparently wasted by a simple

signature on a warrant for pardon from the king. However, thirty-five years later, Lord Mansfield stated, “The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, ...: It’s so odious, that nothing can be suffered to support it but positive law.”<sup>9</sup> In 1737, English law was less kind in protecting slaves than was the law of nature and the law of God as it had been applied in the Vice-Admiralty court in Boston.

---

<sup>9</sup> William M. Wiecek, “Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World,” *The University of Chicago Law Review* 42 (1974), 86.

## Appendix

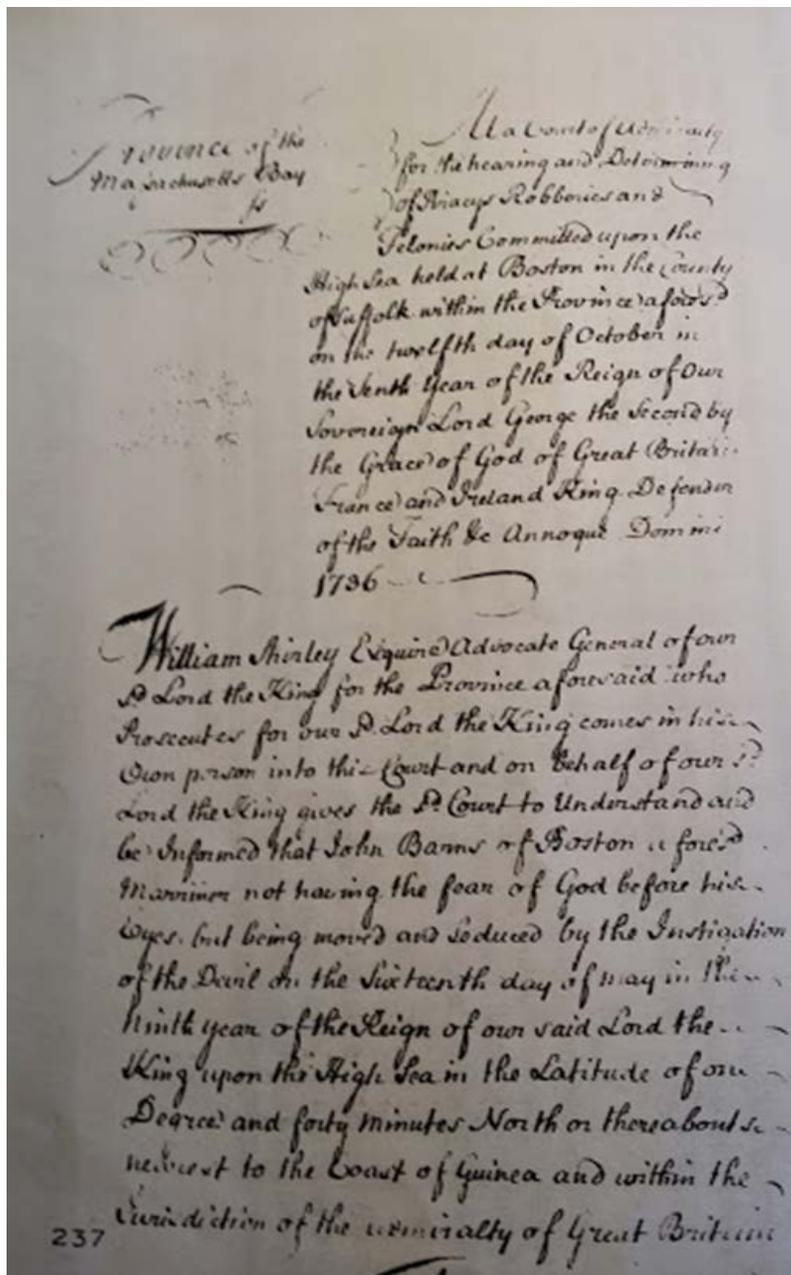


Figure 2: A manuscript page of the trial summary printed from the microfilmed copy.

Photo by Madeline Wood

**Transcript of a summary of the trial of John Barnes from a manuscript in The National Archives, London, UK catalogued as SP 36/39, fols. 236-250 and SP 36/40, fols. 258-259**

I first found this document in September, 2011 while researching at the National Archives and was intrigued by the details of the trial presented. As I read it more carefully, I realized that it was a unique document describing a fascinating event that could shed new light on a period and place in the British Empire that historians may not have known as well as they thought they did. My transcription follows the original manuscript as closely as possible.

I have retained the few abbreviations used by the clerk believing them to be easily understood; the most often used abbreviation was the word “said” abbreviated to “s’d”. The clerk used random capital letters scattered throughout the sentences and I have copied this style as closely as possible. The punctuation was not always clear and some sentences seemed to run on forever but I followed the sentence structure used as closely as I could. Where words were illegible or totally faded out in the original, I have used the convention [...] and indicated approximately how many words could not be deciphered; fortunately I did not have to use it very often. I have also retained the spelling of words as they were used by the clerk even though the spelling of names may vary throughout the manuscript. I have not used the term [sic] to denote mistakes in spelling. There were very few corrections in the manuscript; a few missed words were added by interlinear insertion. I have not retained the length of lines from the manuscript nor the marks showing the end of each line. The beginning of a folio page is indicated by [237].

For the transcription, I was required to work with a microfilm copy rather than the original, which may have accounted for some difficulty in deciphering a few of the illegible parts of the document. Most of the summary was written in a clerical hand that was easy to read and the difficulties arose from the age of the document and the way it was microfilmed. A query to the National Archives confirmed that the original could only be seen “in exceptional circumstances”; nonetheless, I hope to view the original in the near future in order to bring the transcription to greater accuracy.

Anno Regni Regis Georgij Secundi Magna Britania, Francia et Hibernia, decimo<sup>1</sup>

At a Court of Admiralty for the Trial of Piracies, Felonies and Robberies Committed upon the High Seas held at the Court House in Boston within the Province of Massachusetts Bay in New England on Tuesday the twelfth day of October, Anno Domini 1736.

Present

The Honourable Spencer Phips Esquire, Lieutenant Governour of the Said Province, President, in the absence of His Excellency the Governour of the said Court and the other Honourable Commissioners following viz.

Benjamin Lynde

Thomas Hutchison

Paul Dudley

Francis Foxcroft

John Jeffries

Esquires of the Council of His Majestys

Josiah Willard

Province of the Massachusetts Bay

Jacob Wendell

aforesaid

Anthony Stoddard

Samuel Welles

Robert Auchmuty, Esquire Judge of the Vice Admiralty etc.

John Leugrum Esquire Surveyor General of His Majestys Council

---

<sup>1</sup> In the tenth year of George the Second, King of Great Britain, France and Ireland

Province of the Massachusetts Bay

At a court of Admiralty for the hearing and determining of Piracys Robberies and Felonies Committed upon the High Sea held at Boston in the County of Suffolk within the Province aforesaid on the twelfth day of October in the Tenth Year of the Reign of Our Sovereign Lord George the Second by the Grace of God of Great Britain France and Ireland King Defender of the Faith etc. Annoque Domini 1736.

William Shirley Esquire Advocate General of our Said Lord the King for the Province aforesaid who Prosecutes for our Said Lord the King comes in his Own person into this Court and on behalf of our Said Lord the King gives the Said Court to understand and be informed that John Barnes of Boston aforesaid Marriner not having the fear of God before his Eyes, but being moved and seduced by the Instigation of the Devil on the Sixteenth day of May in the ninth year of the reign of our said Lord the King upon the High Sea in the Latitude of our Degree and forty minutes North or thereabouts to the Coast of Guinea and within the Jurisdiction of the Admiralty of Great Britain On Board a certain Brigantine or vessel called the Defiance with force and arms upon a Certain Negro Boy called and known by the name of Bawow to the said Brigantine then belonging and in the Peace of God and our Said Lord King being feloniously Voluntarily and of his malice forethought did make an assault and with both his the said John Barnes's hands took hold of the said Bawow by both his Ears and holding him thereby knocked his head with great Violence against the Bow timbers of a certain Boat in the said Brigantine lying Sundry times and that he the said John Barnes then and there feloniously willfully and of his malice aforethought

with both his hands took hold of one arm and one leg of the said Bawow and with his said hands him the said Bawow from the Gunnel of the said Boat over the Barricadoe<sup>2</sup> upon the Quarter Deck of the said Brigantine with great Violence threw and the said Bawow so lying upon the said Quarter Deck upon his body did kick and then and there with both his feet feloniously willfully and of his malice aforethought upon the body of the said Bawow did stamp sundry times, and that he the said John Barnes upon the head of the said Bawow so lying on the Ground then and there with both his hands feloniously willfully and of his malice aforethought did lay hold and so holding the Same with great Violence the face and forehead of the said Bawow divers times did knock and bruise against the Ground by means whereof his blood issued out at his mouth and that the said John Barnes the said Bawow so lying on the Ground then and there feloniously willfully and of his malice aforethought [238]on his body did kick with Such Violence that his said body by the said kicking was forced and drove along the Ground for the space of four feet by reason of which said knocking and bruising of the head face and forehead of the said Bawow against the said Timbers of the aforesaid Boat and Ground and also of the said kicking stamping upon and bruising his body and of the throwing of him over the said barricade upon the said Quarter Deck he the said Bawow from the said Sixteenth day of May to the Seventeenth day of the Same month in the said year upon the High Sea in the aforesaid Latitude nearest to the said Coast of Guinea and within the aforesaid Jurisdiction on board the

---

<sup>2</sup> The barricadoe or barricado was a wall built on the deck of the ship, sometimes dividing a higher part of the deck from the lower, behind which the crew could shelter and fire upon slaves in case of a revolt. On the *Defiance*, the barricado was about six feet higher than the deck of the ship.

said Brigantine of the said knocking kicking bruising and stamping upon did languish and Languishing did live, on which said Seventeenth day of May he the said Bawow on board the said Brigantine upon the High Sea in the aforesaid Latitude nearest to the said Coast of Guinea etc. within the Jurisdiction aforesaid did die. And so the said John Barnes the said Bawow upon the High Sea in the Latitude aforesaid and within the aforesaid Jurisdiction in manner and form aforesaid feloniously willfully and of his malice aforethought did kill and murder against the Peace of our Lord the King his Crown and Dignity etc...

William Shirley, Advoc'

etc. Dno' Rege

To which Information the said John Barnes pleaded not guilty

Then the Court was pleased to Appoint William Bollan, Gentleman attorney to be advocate for Prisoner who accepted that Fact.

M<sup>f</sup> Advocate General opened the Information in the following manner

May it Please your Excellency M<sup>f</sup> President and the rest of the Honourable Commissioners,

The Prisoner at the Barr stands Charged with the murder of a Negro Boy Slave of about ten years of age on board the Brigantine or vessel called the Defiance upon the High Seas nearest to the Coast of Guinea which if my instructions are right, he committed without the least provocation given him on the part of the deceased; nor can any other reason be assigned for his

Shedding this blood than what is expressed in the Information viz. that he was moved and seduced to it by the instigation of a Diabolical spirit which seems to have possessed him thro' the whole course of the Voyage.

I shall briefly state the facts to the Honourable Court and then Produce the Witnesses to prove them.

In the year 1735 ~~~~~ Captain John Cupit then Master of the before mentioned Brigantine ship'd the Prisoner at Newport in Rhode Island first mate on board the said Vessel for a slaving voyage as it is generally thought to proceed from Newport to Guinea and thence to the West Indies and back again to Newport, and they had not been long at Sea before the Effects of the Prisoner's violent Temper were so Intolerable to the Ship's Company and such heavy Complaints were made of him on that Accord to Captain Cupit that he threatened to lay the Prisoner in Irons if he did not moderate his behavior and declared if it was not out of [239] Compassion to the Prisoner's wife and family that he would sett him on the first land they could make and rid the ship of him. This was some Check and Restraint up on the Prisoner 'till they arrived on the coast of Guinea where several of the Ship's Crew and among the rest Captain Cupit were unfortunately poisoned by the Negos with whom they traffiqued for Slaves. The effects of their poison were so malignant upon Captain Cupit that he dyed at Unamabo in their Passage to the West Indies; and upon his decease the Prisoner at the Barr to the great misfortune of himself and the rest of the Ships Company by right of his Post succeeded to the Command of

the Vessel whereby he was invested with a despotick Power of Exercising his outrageous temper without Control and it was not long before he gave a loose to it. Among other instances of its Cruel Effects this Negro boy was a fatal one. He it seems was addicted to bawl out sometimes in his sleep for Victuals and for that reason was removed from among the other slaves and placed in the long boat, where on the sixteenth day of May one thousand and seven hundred thirty five he unhappily made his usual noise in his sleep thereupon the Prisoner Ordered one of the men upon watch to Correct him upon which he took the boy up in his arms and gave him three or four strokes on his buttocks with a ropes end and laid him down again in the boat. This waked the boy and he forbore his noise for some time 'till he fell asleep again and repeated it twice upon which the Prisoner in a rage swore that he would stop the boys mouth and going into the boat to him first licked him with a ropes end and then taking hold of him by both his ears with great violence knocked his head Several times against the Bow timbers of the boat after which he took him by one of his arms and a leg and threw him out of the boat over the Barricado which was Six feet high upon his Quarter Deck and getting over it after him kicked him up and down the deck Several times upon his Sides and Belly with all his force 'till the boy who had just strength enough left to raise himself upon his hands and knees happened unfortunately to look up at the Prisoner upon which the Prisoner Cryed "Damn you, you dog do you look up at me" and taking hold of the back part of the boy's head with both his hands knocked his Forehead against the floor of the Deck so often and with Such Violence that the blood came out at both Corners of his mouth and he became Senseless after which the Prisoner kicked his body with that force toward the Gunnel that he forced it along with one kick above the distance of three feet and having

afterwards Caused near twenty bucketts of water to be thrown upon him with Such force that it made his body rebound from the Deck ordered him to be laid again in the long boat where one of the men laid him with his eyes Closed and his teeth sett fast and without any signs of life in him except a Small [240] Palpitation to which continuing some little time without any endeavors used to recover him the Boy expired in the boat, and within twenty four hours after the beating was by the Prisoner thrown over board.

I shall now Call the Witnesses and fully prove these facts and then doubt not but your Excellency and the rest of the Honourable Commissioners I will do this unfortunate Boy Justice upon the Prisoner at the Barr.

Then the Cryer of said Court was directed by the Advocate to call the Kings Evidences.

The Witnesses for our Sovereign Lord the King namely John Wood, Allan Mullins, Benjamin Ricketts, Peter Vroom, James Nichols, Thomas Davis and Stephen Langworthy were called and Sworne and Severally Deposed as forthwith Viz.

John Wood of Newport in the County of Newport Mariner deposeth and Saith that he saw the Negro Boy Bawow lay in the long boat with his Lips very much bruised that he dyed the night following and was thrown over board in the morning by the Prisoner's Order, that he was told by the men on board the Vessel that the Prisoner had beat him, but the Deponent did not see the beating, that the negro boy was about ten years old and was called Captain Cupit's Boy, that the boy in his Sleep in the night would often cry out as he was dreaming but was quiet in the day

time tho asleep. That the boy was as well walking about the day before as he had been for some time tho he had been ailing as some others aboard had been.

Allan Mullins of New London in the County of New London in the Colony of Connecticut Surgeon<sup>3</sup> of the Brigantine Defiance deposeth and faith that in the morning he saw the Negro Boy in the long boat dying as he thought with some blood at the corner of his mouth and his face and lips much bruises and Swelled, that he knows nothing was the occasion of it only as he was told by the men aboard That the Prisoner had beat and abused him, that he was as well the Evening before [241] as he had been for sometime and that he was purchased by Captain Cupit as his slave, that he do's not know he was poisoned, that he was as well before the beating as he was at any time after his coming aboard that the boy in his sleep in the night would often cry out as he was dreaming but was quiet in the day time tho' asleep.

Benjamin Rickets of Newport in the county of Newport Shipwright deposeth and Saith That in the night about Eleven a clock in the in the Captain's watch the Negro boy cried out and asked for water upon which the Prisoner sent Thomas Davis to whip him with a Catt<sup>4</sup> which he

---

<sup>3</sup> Surgeons were able to provide only rudimentary care to crew and cargo and few Rhode Island ships included a surgeon on the crew. Alan Mullins was an unusual addition to the crew and may have been an indication of Cupit's concern for the health of all on his ship. Coughtry, *The Notorious Triangle*, 56, 146.

<sup>4</sup> The Catt was a cat o' nine tails or a whip used to flog recalcitrant crew members or slaves. It is more likely that the punishment was as other witnesses testified, simply a couple of whacks with the end of a rope to wake Bawow and still his cries.

did and the Negro boy cried again, then the Prisoner run and took the boy by the Ears and Jammed or Struck him near twenty strokes against the Bow timbers of the Long Boat and then took him by one leg and One arm and threw him over the Barricado which was Six foot high and then kicked him Several times in and about his body backward and forward and then took him by the Ears again and Struck his head near a dozen times against the Deck Cursing and Swearing all the time he was beating him calling him “Dog” and saying “God Damn your blood you son of a bitch” that the Negro’s head face and Lips were very much bruised and swelled and blood Came out of his mouth and then the Prisoner threw about a dozen pails of water upon the boy in Order to bring him to as the Deponent Supposes, and then the boy by the Prisoner’s Order was laid in the long boat and dyed the next night, that the boy in his Sleep in the night would often cry out as he was dreaming but was quiet in the day time tho’ asleep , that the Deponent never heard the boy Speak after the Beating and the Prisoner declared he believed he had been the occasion of the boys death. The deponent further sayth that the boy was as well before the beating as he had been at any time after he came aboard the Vessel.

Peter Vroom deposeth and saith that he heard the Negro in the Night call out for water upon which the Prisoner went to the Long Boat and Struck him and then took him by the Ears and Struck him Several times with violence against the Bow timbers of the Boat then took him by one Leg and one Arm and threw him over the Barricado then he kicked him several times backward and forward and then took him by the Ears again and slammed his face several times against the Deck which was about a dozen times cursing and swearing all the time he was

beating him calling him Dog and saying God Damn your blood you son of a bitch then he took him up and Carried him to the light whose the Deponent saw his face and lips much bruised and swelled and blood in his mouth then the Prisoner threw him back again on the Deck and ordered the Negro to draw water and then Prisoner threw near twenty pails of water with great violence on the deceased as he lay on the deck then the Prisoner Ordered the Deponent to lay him in the long boat which he did and the Deponent never heard the boy [242] speak after the beating but he dyed the night following and was thrown over board by the Captains Order in the morning. That the boy was well the day before, and the Dept.<sup>5</sup> heard the Prisoner say he believed he had been the means of Shortning the boy's days, and further the Deponent sayth that the boy in his sleep in the night would often cry out as he was dreaming, but was quiet in the day time tho asleep.

James Nichols of Newport in the County of Newport Marriner deposeth and saith that he knows nothing of the beating or of the Negro's being thrown over board.

Thomas Davis of Newport in the County of Newport Marriner Deposeth and saith that about nine a Clock at night the Prisoner Ordered the Deponent to whip the Negro Boy for Crying which he did two several times with a Catt on his Buttocks and the Boy crying again the Prisoner swore he would make him easy and went and took him by one arm and leg and threw him over

---

<sup>5</sup> Deponent.

the Barricado then the Prisoner kicked him several times backward and forward in and about the body cursing and swearing all the time he was beating him calling him Dog and saying God Damn your blood you son of a Bitch and then hawled him by one leg to the Binnacle<sup>6</sup> and the Dept. Saw his face and lips much swelled and bruised and his face and mouth bloody. Then the Petitioner Ordered water to be drawn and thrown on the deceased to bring him to which was done by himself and the Negro to the number of nearly twenty Pails and then by the Prisoners Order he was laid in the Long boat and dyed the next night and was thrown over board by the Prisoners Order the next morning that sometime afterwards when the Prisoner was speaking about the Number of Negros that dyed on board the Prisoner said he believed he had been the means of shortening the deceased days, that the boy in his sleep in the night would often cry out as he was dreaming but was quiet in the day time though asleep.

Stephen Longworthy of Newport in the County of Newport Cooper deposeth and saith That he belonged to the mates watch and saw nothing of the Beating, That in the morning he saw the boy lay dead in the boat and upon the Prisoners being told of it, he said Damn him, then throw him over board which was accordingly done, The Deponent further deposeth that before the beating the boy was well running about, and as well as he had been from the time he came aboard, that the Boy in his sleep in the Night would often cry out as he was dreaming but was quiet in the day time tho' asleep.

---

<sup>6</sup> The binnacle housed the compass and had a light attached so the compass could be read at night.

Note all the Witnesses declared the Prisoner took no care of the boy after he was beat, neither did he direct the Doctor on Board to look after or take any care of him. [243]

Two of the Witnesses declared the Negro boy had been aboard the Brigantine about three months before he was beat and abused by the Prisoner and all who testified to the Facts declared it was about twenty four hours between the time the Boy was beat, and the time when he dyed.<sup>7</sup>

For the Prisoner it was said by his Council that it appeared by the Evidence Oral and written which had been given That Bawow the deceased was at first placed between decks among the other Slaves but upon his frequently crying out and making a noise he was by the Prisoner's Orders removed and placed in the long boat upon deck that in the Evening before the beating which occasioned his death the deceased made a Considerable noise for Some time Whereupon the Prisoner Ordered one of the Vessel's Crew to Correct and Silence him which was accordingly done but Soon after he repeated his troublesome noise and therefore the Prisoner sent again one of his men to Silence him and thereupon he forbore his noise for a Short Space of time but soon returned to his bawling whereupon the Prisoner in great wrath runn and laid hold of him in the boat Struck his head against Some part of it threw him out of the Boat upon the Quarter deck and there kicked him about with great fury and in twenty four hours or

---

<sup>7</sup> The depositions were obviously a summary of the deponents' testimony and did not include all of the information each one gave to the court.

somewhat longer time he dyed. That none of the Ship's Crew had at any time before observed the Prisoner shew any Ill will to the deceased but the Prisoner used him in the same manner as the rest of the Slaves on board and that the deceased was the Property of the former master Captain Cupit and was designed to be Sold with the other Slaves at some market in the West Indies, and thereupon the Council for the Prisoner argued that he was not guilty of murther, that is to say of a Voluntary killing upon deliberation which is the only killing punishable with death at the Civil Law, the Rule in the present Case. For that this killing was the effect of a furious Sudden passion occasioned by the deceased time after time making a great noise notwithstanding the several corrections given him the intent whereof 'tis plain from the Evidence he [244] Understood and which was a greater Provocation to the Prisoner who was master of the Ships and a thing of much greater Consequence on board their Slaving Vessel than it appears at the first mention of it by reason that tis the Practice of the Slaves when any considerable noise is making to embrace that being the fittest Opportunity to knock off their Irons if they can (which if effected is generally fatal to the Ships crew) and to that end tis said the slaves frequently sett some to crying and making a noise that they may in the meantime get out of their shackles unheard by the Ships Crew and therefore all prudent masters of these Slaving vessels enjoin and keep silence on board as much as may be and Since the killing in the Present Case was the fruit of a sudden transport of Passion they accidentally occasioned it must w<sup>ith</sup> reason be Judged to have been done with deliberate Intention and therefore cannot amount to the Crime wherewith the Prisoner is Charged.

It was argued in the next place that the killing of the said Bawow could not be a crime Capital by reason of his Condition he being a Slave of a large number on board said vessel which were bought on the Coast of Africa from their Conquerors and Captors in Warr and all nations have generally allowed the master of Power of Life and death over his Slave, this power indeed has been Abridged in diverse Countrys by particular laws. But since this Case falls not with in any of those Laws tis conceded recourse ought to be had for the Trial of it to the Original foundation of Slavery the law of Arms and to the rights and Powers which thereby result from Capture in Warr which are altogether Illimited with respect to the Captor and those on whom his rights are devolved and with respect to other persons it has this Effect, that the life of a free man is never to be taken away to Attone for the death of such Captive reduced to Slavery. And in all reason the Original Laws of Slavery ought to take place where no particular provision is made. It is remarkable that in the British Isles in the West Indies (where most of the Slaves in the British Dominion are) as well as in most of the Foreign Plantations the punishment for killing a slave by any Person is altogether pecuniary and had the Prisoner received his Tryal at Antigua St. Christophers or Surrinam which by the Course of Judicial Proceedings he ought his life had not been brought in peril for this fact.

And it was much relied on that the deceased and the other slaves on board this Vessel were in a direct state of Hostility when this killing happened they being Sold into bondage and then Actually bringing away by the present Prisoner from their Own Country by force and therefore shackled and deprived of all Liberty to prevent their rising against and destroying the

Ships Crew (which undoubtedly they would have done if they could) which treatment is the plain Evidence of a State of Warr and without which tis not possible this trade Can be Carried on at all wherefore there is great difference between Slaves under these circumstances and the Slaves in our Plantations between whom and their masters there is in Some measures an Exchange of Natural for moral Bonds there being a sort of said Agreement that the master shall Yield Protection and Support and the Slave obedience[245] Some share of mutual Confidence arises between them and some Liberty is thereupon allowed the Slave by his master. Yet with respect to all Slaves what the Scythians Said to Alexander of Old namely That altho the Master and Slave live in peace yet the Rights of Warr remain<sup>8</sup>, Has been of late maintained by Mr. Locke who in his Treatise of Civil Government Insists upon that slavery is a Continued State of Warr,<sup>9</sup> and for these reasons it was Conceded by the Council for the Prisoner that he ought not to be adjudged to suffer Death.

To this defense made for the Prisoner it was replied by the Advocate General that it appeared from the Evidence that the killing of the deceased was voluntary and malicious, First because it appears to have been done without any reasonable Provocation given the Prisoner by

---

<sup>8</sup> Bolla seems to be quoting Grotius out of context. See Hugo Grotius, *The Rights of War and Peace, in Three Books: Wherein Are Explained, the Law of Nature and Nations, and the Principal Points Relating to Government*, To which are Added, All the Large Notes of Mr. J. Barbeyrac... London: Printed for W. Innys [et al.], 1738. Reprinted (Clark, N.J.: The Lawbook Exchange, Ltd., 2004), 676.

<sup>9</sup> John Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, (Mineola, N.Y.: Dover Publications Inc., 2002), 11.

the deceased, For that the Pretended provocation was only an Involuntary noise made by the Deceased in his sleep which the Prisoner well knew and for that reason as well as on Account of the age of the deceased could not Suspect was designed by him to favour any Attempt of the other Slaves to knock off their Irons, nor was there any danger that that could be the Effect of the noise made by the deceased which in the nature of it could not be Continual but must be by fits and Starts and not of any length nor Sufficient to drown any noise which must necessarily have been made by the Slaves in attempting to get rid of their Shackles. Secondly it appears to be Voluntary and malicious from the manner of doing it. For that the killing was not occasioned by two or three unfortunate Blows given the Deceased in Sudden Transport of Passion but by a Series of many Cruel Acts necessarily tending to the Immediate Destruction of the Deceased without the Least appearance of Remorse or Relenting Consequent upon the Death of the deceased as appears by the Circumstances of the beating. For upon the boys repeating his Cry after he was twice Corrected for it the Prisoner went into the Boat to him and knocked his head with great Violence many times against the Bow timbers of the Boat then the Prisoner took the deceased by one Leg and an arm and threw him over the Barricado which was Six feet high upon the Quarter deck after which he followed him over the Barricado and kicked his body which was lying upon the ground backwards and Forwards upon the Deck Several times with all his force till the Deceased happened to look up at him upon which [246] The Prisoner cursed him for looking at Him and took hold of the back part of the Deceased's head with both his hands and knocked his forehead with great Fury against the deck 'till the Deceased was Senseless after which the Prisoner gave him one kick on his body with Such Violence that he forced it along the

Ground about five feet and having caused Several Bucketts of water to be thrown upon him, Ordered him to be laid again in the Boat without using any other Endeavours to save his Life, or expressing any Concern for having killed him, all which it was insisted amounts to a full evidence of malicious Voluntary killing and was therefore murder.

And as to that part of the Prisoners Defence raised from the Condition of the deceased who was a Slave and one of a great number on board the said Vessel who had been bought on the Coast of Africa from their Conquerors and Captors in Warr and that all Nations have generally allowed the master a Power of Life and death over his slave ~~ It was replied That it was true that such an absolute Dominion had been allowed the master over his Slave by Some Nations but never Generally by all nations as is alleged by the Prisoner's Advocate; and that such legal Right of killing the Slave was ever universally Condemned as repugnant and Contrary to moral Right and Equity for which reason it never was admitted among Christians and was never part of the Law of Slavery in any Christian Nation.<sup>10</sup>

And that such a power of Life and Death over a Slave as contended for, was never allowed by any Nation to any other Person than the Slaves master which is not the case of the Prisoner at the Barr, who had no property in the Deceased but only a Trust to transport him Safe,

---

<sup>10</sup> It is not clear what authority William Shirley is relying on for this statement. If he is quoting Grotius, he does not go far enough since Grotius said Christian nations do not make the conquered into slaves but only hold them as hostages until a ransom has been paid. Grotius, *The Rights of War and Peace*, 607.

or sell him for the benefit of Captain Cupit his late masters Representatives and as to that part of the argument so much relied on by the Prisoners Advocate viz. that the Deceased and other Slaves on board the Vessel were at the time of this killing in a direct states of Hostility and would if it had been in their Power have risen against the Ships Company, It was replied that the master of a Vessel as such has no right over the life of any slave on Board his ship except in cases of Necessity where the killing of any of them is necessary for the Safety of the Ship and is no more than a Right of Self Preservation; That it can't be Pretended there was any such necessity for the Prisoners killing the Deceased whose Age rendered him Incapable of any Act of Hostilities; and who does not appear in the least to have endangered the Ships Company; and that even the Captor in Warr was never deemed to have a Right to kill Captives of such an Age, Children and women being ever exempted by Laws of Arms from a forfeiture of their Lives; Wherefore the killing of the Deceased by the Prisoner notwithstanding the Condition of the Deceased was in all respect illegal as well as unjust and as to the British Plantations in the West Indies making the Punishment for Killing a slave pecuniary only by their Colony Laws and that if the Prisoner had taken his Trial at Surrinam Antigua or Christophers as he ought to have done at one of those Places his life would not have[246] Been in any Peril for this killing of the Dec'ed.<sup>11</sup>

It was replied that the Law of those Colonys which are calculated for the killing of slaves within the Respective Colonys and were adapted to the Particular Circumstances of the

---

<sup>11</sup> Deceased.

Inhabitants don't extend to the killing of a slave upon the High Seas, and so would not have benefited the Prisoner at the Barr who ought if he had taken his Tryal at any of these Places to have been condemned or acquitted upon the Same Law by which he is now tryed; and as this killing was a voluntary malicious Shedding of the blood of the deceased it comes within the Original Law universally received by all Civilized Nations of the world and which is recorded by the Great Lawgiver of the Jews that whoso Sheddeth man's blood by man his Blood be Shed.<sup>12</sup> Wherefore I concluded upon the whole that the Prisoner ought to be adjudged to Suffer Death.

After hearing of evidences for the King with the Prisoners defence, the Court adjudged the Prisoner Guilty. When the Prisoner was called in and declared Guilty by the President in the Name of the Court, whereupon the Prisoner was asked what he had to Say, why sentence of Death should not be Pronounced against him. Upon which he by his council John Read Esquire moved in Arrest of Judgment and Offered Several Reasons to Induce the Court thereto and filed his motion in writing, which was overruled by the Court; for that the Same was not made nor Offered until after the Court had Declared the Prisoner Guilty.

And then His Excellency the President in the Name of the Court Pronounced Sentence of Death against the Prisoner in the usual Form, and He was Remanded to Prison again the Marshall being Strictly Charged by the Court with the Care and Custody of him.

---

<sup>12</sup> Underlined in the manuscript.

But upon the motion and at the instance of the Honorable Commissioners present, to his Excellency the Governour that he would be pleased to grant to the said Barnes a Reprieve or Respite of the Execution of His Sentence for the space of twelve months, that so in the mean time the Prisoner of he thinks fit may make application to his Majesty for a Pardon in order that His Majestys Pleasure may be known in this affair His Excellency declared he would consider therefore. [248]

Benjamin Rolfe Register of the Court of Admiralty aforementioned do hereby certify that what is aforewritten (consisting of twenty five sides or pages as numbered) contains the copy of the trial of the aforementioned John Barns.

And in Testimony thereof I have hereunto sett my hand and the Seal of my office at Boston in New England the Twenty eighth of day of January Anno Domini one thousand seven hundred and thirty six, and in the tenth year of the Reign of our Sovereign Lord George the Second of the Grace of God of Great Britain, France and Ireland King Defender of the Faith etc.

Benj. Rolfe, Reg.

George the Second by the Grace of God of Great Britain France and Ireland King,  
Defender of the Faith

To Our Marshall of Our Court of Admiralty within Our Province of the Massachusetts  
Bay in New England

His Deputy and Deputys and every one of them, Greeting

Whereas in our Court of Admiralty held before Our Commissioners Specially appointed for the trial of Piracies Felonies and Robberies Committed on the High Seas within the Jurisdiction of the Admiralty of Great Britain and held at Boston upon Tuesday the twelfth day of October and continuing by several Adjournments to Saturday the Sixteenth day of October. John Barnes of Boston, aforesaid marriner, now a Prisoner in our Gaol in Boston who is in Your Custody detained was convicted of Feloniously and willfully killing and murdering upon premeditated malice, a certain Negro boy called and known by the name of Bawow belonging to the Brigantine Vessel called the Defiance on board the said Brigantine on the Sixteenth day of May last upon the High Sea in the Latitude of One Degree and forty minutes North or thereabouts nearest the Coast of Guinea and within the Jurisdiction aforesaid, against Our Crown and Dignity etc. and he was therefore sentenced by our said Court to Suffer the Pains of Death and a Warrant hath been issued out of our said Court for executing the Sentence accordingly on the Eighteenth day of November next ensuing which to Us appears of Record. But Forasmuch as the Prisoner hath humbly supplicated Our mercy for respiting the Execution of the said sentence for Some time that so he may have Opportunity to apply to and lay his case before Us in Our own Person in Our Kingdom of Great Britain So that our Will and pleasure may be made known

therein (which supplication has been recommended by the Commissioners of our aforesaid Court to be [249] Granted by Us). We do therefore of our Special Grace certain Knowledge, and meer motion at the request of Our said Commissioners, hereby order that the Execution of the Sentence of Death on the said John Barnes be respited and Deferred for the Space of twelve months from the said sixteenth day of October Current, that so he the said John Barnes may have Opportunity to Apply to Us in Our own Person in Our said Kingdom, for Our Royal Will and pleasure to be Signified touching the Premises the aforesaid Warrant of Our said Court of Admiralty notwithstanding. And that then the said Warrant take Effect for the Execution of the said Sentence unless Our will and pleasure be Notified to the Contrary

In Testimony whereof we have caused the Publick Seal of Our Province of the Massachusetts Bay aforesaid to be hereunto affixed.

Witness Jonathan Belcher Esquire Our Captain General and Governour in Chief of Our said Province at Boston the twenty-third day of October Anno Domini 1736 and In the Tenth Year of Our Reign.

By His Excellencys Command

J Belcher

J Willard, Sec'ry

I, Charles Taston, Marshall of the Court of Admiralty aforementioned do hereby certify that what is aforewritten is a true and perfect copy of John Barnes Trial.

And in Testimony thereof I have hereunto set my hand and Seal at Boston in New England the Seventh day of Feb<sup>y</sup> Anno Domini one thousand seven hundred and thirty six and in the tenth year of the reign of Our Sovereign George the Second by the Grace of God of Great Britain, France and Ireland, King Defender of the Faith etc.

Charles Taston

Marshall

To His most Excellent Majesty George the Second by the Grace of God,  
King of Great Britain, France & Ireland,  
Defender of the Faith etc.

The most humble petition of John Barnes of Boston in New England,  
mariner, a close prisoner in chains, under  
a Sentence of death there

Sheweth that on the 15<sup>th</sup> of October last your Majestys most humble petitioner was  
arraigned before a Court of Admiralty for hearing and determining of Piracys Robberys and  
Felonys committed upon the High Seas, held at Boston aforesaid, and charged with beating and  
murthering a negro called Bawow one of his cargo on board his Brigantine whereof he was then  
master on the Coast of Guinea and upon the Evidence thereof produced was convicted & had  
Sentence of death pronounced upon him.

Thereupon the Honourable Commissioners of that Court, from the fresh views they then  
had of all the circumstances of the case, and of their own free will, moved and made instance to  
his Excellency the Governour & President of that Court, to grant your petitioner a reprieve for  
twelve months that he might apply to your Majesty for a pardon of his offense. His Excellency  
considered it & upon the 23 of October granted and Signed the reprieve accordingly {...}<sup>13</sup>  
appear by the tenor of y<sup>e</sup> Record herewith presented.

---

<sup>13</sup> One word is illegible.

And the case truly is this that being upon a dangerous voyage where if the Negroes can Saw or knock off their shackles, they rise & destroy the ships crew, he was obliged to keep all still, that the negroes might be easy in their bonds or if they attempted any thing they might be early discovered & prevented and as this negro boy by his often crys might disturb & irritate the negroes & drown y<sup>e</sup> noise of their sawing or beating off their shackles which they had once attempted, he thought it of absolute necessity to still him by corrections but in the correction, he in his passion exceeded the Bounds of Justice & the boy died about 24 hours after.

Now therefore Your Majestys most humble petitioner, considering that upon y<sup>e</sup> learning of the whole case, the Honobl' Commissioners that tryed {...}<sup>14</sup> to him were moved with compassion and recommended him as an object of mercy to his Excellency the Governour {...}<sup>15</sup> be reprieved. And that most tender {...}<sup>16</sup> humbly throw himself at your Majestys feet praying for mercy and pardon of this offence. And your Majestys most humble petitioner as is duty bound shall ever pray etc..

John Barnes

---

<sup>14</sup> Possibly five words are illegible.

<sup>15</sup> Possible six words illegible.

<sup>16</sup> About a line and a half is illegible.

Whereas John Barnes of Boston in New England in America, Mariner, was at a Court of Admiralty for hearing and determining of Pyracys, Robberys and Felonys, committed upon the High Seas held at Boston Aforesaid on the Fifteenth Day of October last, tried and convicted of beating and murdering a Negro Boy, called Bawow and had Sentence of Death passed upon him for the same; We have thought fit upon Consideration of some Circumstances humbly represented unto Us, in his behalf, inducing Us to extend Our Grace and Mercy unto him, to grant him Our Pardon for this said Crime and accordingly, Our Will and Pleasure is, that you cause the said John Barnes, to be inserted for the said Crime in the first and [259] next general Pardon that shall come out for the Poor Convicts of Newgate. And for so doing, this shall be your Warrant. Given at Our Court at S<sup>t</sup>. James's the <sup>17</sup> Day of April 1737, in the Tenth Year of Our Reign.

To Our Trusty and

By His Majesty's Command

Welbeloved S. William

Thomson, Knt. Recorder

Of Our City of London,

The Sheriffs of Our

---

<sup>17</sup> No date given

Said City and County

Of Middlesex, and all

Others, whom it may concern.

## **Bibliography**

### **Primary Sources**

#### **Manuscript Sources from The National Archives of Great Britain**

CO 1/41, No. 51

CO 5/5, f. 31-47

CO 5/126, fols. 390-391

CO 5/869. fols. 381–406v

CO 5/905, 130-41

CO 5/905, fols. 85-106.

CO 5/1337, fols. 42-3, 195–199d

CO 30/2/16-26

CO 36/9, fols. 149-150

CO 324/37, fols. 80–1

CO 391/2, 101-104

SP 36/9 fols. 11-16

SP 36/39, f. 236-42

SP 36/40, f. 258-9

SP 44/83 fols. 196-7

SP 44/130, f. 203

## Printed Sources

“Memoirs of the first settlement of the island of Barbados, and other the Carribbee islands, with the succession of the governors and commanders in chief of Barbados to the year 1742. Extracted from ancient records, papers and accounts taken from Mr. William Arnold, Mr. Samuel Bulkly, and Mr. John Summers” by William Arnold, UNIV OF CALGARY. 2 Oct. 2013 Eighteenth Century Collections Online

<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=ucalgary&tabID=T001&docId=CW116318092&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>

An act for the more effectual suppression of piracy, 1700, 11 & 12 Wm. III, c. 7.

An act for prosecuting frauds, and regulating abuses in the plantation trade, 1696,. 7 & 8 Wm. III, c. 22.

An act to punish governors of plantations in this kingdom for crimes by them committed in the plantations, 1700, 11 & 12 Wm. III, c. 12.

The Anglo-Saxon Bible. <http://wordhord.org/nas/>.

Aristotle. *Aristotle: Nicomachean Ethics*. Port Chester, NY, USA: Cambridge University Press, 2000.

Aristotle. *The Politics*. T.A. Sinclair, translated, Trevor J. Saunders, revised. Hammondsworth, UK: Penguin Books, 1957.

Bayne, Paul. *An Entire Commentary upon the Whole Epistle of St Paul to the Ephesians*.  
<http://www.digitalpuritan.net/Digital%20Puritan%20Resources/Baynes,%20Paul/Commentary%20on%20Ephesians.pdf>.

Blackstone, William. *Commentaries on the Laws of England*, Volume 4: A Facsimile of the First Edition, 1765-1769. Chicago: The University of Chicago Press, 1979.

*Boston News-letter*. J. Draper, printer.

*Calendar of State Papers, Colonial Series, America and West Indies, 1574-1739*. CD-ROM, consultant editors Karen Ordahl Kupperman, John C. Appleby and Mandy Banton. London: Routledge, published in association with the Public Record Office, 2000.

Coffin, Joshua. *An account of some of the principal slave insurrections, and others, which have occurred, or been attempted, in the United States and elsewhere, during the last two centuries. With various remarks*. Collected from various sources. New York: American Anti-Slavery Society, 1860.

Coke, Sir Edward, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes*. W. Clarke and Sons, London 1817.

Coke, Sir Edward. *The fourth part of the institutes of the laws of England. Concerning the jurisdiction of courts*. Authore Edwardo Coke, Milite, J. C. Haec ego grandaevus posui tibi, candide lector. London, M.DCC.XCVII. [1797]. Eighteenth Century Collections Online. Gale.

Coleman, Elihu, *A Testimony against That Anti-Christian Practice of Making Slaves of Men Wherein it is Shewed to be Contrary to the Dispensation of the Law and Time of the Gospel, and Very Opposite Both to Grace and Nature*. Reprinted for Abraham Shearman, Jr., 1825.

Davies, K. G. (editor). "America and West Indies: January 1738, 1-15," *Calendar of State Papers Colonial, America and West Indies*, Volume 44: 1738, British History Online, [http://www.british-history.ac.uk/report.aspx?compid=72940&strquery=william shirley](http://www.british-history.ac.uk/report.aspx?compid=72940&strquery=william%20shirley).

Dogherty, Thomas, *Historia placitorum coronæ. The history of the pleas of the crown*, by Sir Matthew Hale. Pub. from the original manuscripts by Sollom Emlyn. With additional notes and references to modern cases concerning the pleas of the crown. By George Wilson. A new ed. And an abridgment of the statutes relating to felonies continued to the present time, with notes and references, (T. Payne, London) 1800.

Dudley, Paul. *An essay on the merchandise of slaves and souls of men; Revelation XVIII.13. With an application thereof to the church of Rome*. By a gentleman. [London], 1732. Eighteenth Century Collections Online. Gale.

Equiano, Olaudah. *The Interesting Narrative of the Life of Olaudah Equiano*, Angelo Constanzo, ed. Peterborough, ON: Broadview Press, 2001.

Firth, C.H., and R.S. Rait (eds), "July 1653: An Act for settling the Jurisdiction of the Court of Admiralty.," *Acts and Ordinances of the Interregnum, 1642-1660*, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=56492&strquery=admiralty>

Great Britain. *The Laws, ordinances, and institutions of the Admiralty of Great Britain, civil and military*. London: A. Miller, 1746.

Headlam, Cecil (editor). "America and West Indies: June 1720," *Calendar of State Papers Colonial, America and West Indies*, Volume 32: 1720-1721, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=74101&strquery=&quot;commonlaw&quot;>.

Headlam, Cecil, (editor) and Arthur Percival Newton (introduction). "America and West Indies: September 1725, 16-30," *Calendar of State Papers Colonial, America and West Indies*, Volume 34: 1724-1725, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=72415&strquery=negrosailors>.

Headlam, Cecil, (editor) and Arthur Percival Newton (introduction). "America and West Indies: September 1725, 16-30," *Calendar of State Papers Colonial, America and West Indies*, Volume 34: 1724-1725, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=72415&strquery=negro>.

Headlam, Cecil, (editor). "America and West Indies: June 1720," *Calendar of State Papers Colonial, America and West Indies*, Volume 32: 1720-1721, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=74101&strquery=&quot;commonlaw&quot;>.

*Holy Bible*, New International Version and New American Standard Version.

Hutchinson, Thomas, *The History of Massachusetts, From The First Settlement Thereof In 1628, Until The Year 1750*. In two volumes. Volume 2. The third edition. With additional notes and corrections. [Salem], 1795. Eighteenth Century Collections Online. Gale.

*Journals of the Board of Trade and Plantations, Volume 7: January 1735 - December 1741* (1930), 17-33. URL: <http://www.british-history.ac.uk/report.aspx?compid=81649&strquery=Massachusetts> .

*Journals of the House of Representatives of His Majesty's province of the Massachusetts-Bay 1732-1734*; Vol. XI, ed. by Worthington Chauncey Ford. Boston: Massachusetts Historical Society, 1930.

Ledward, K. H., (editor). "Journal, June 1735: Volume 44," *Journals of the Board of Trade and Plantations, Volume 7: January 1735 - December 1741*, British History Online, <http://www.british-history.ac.uk/report.aspx?compid=81649&strquery=Massachusetts>.

Lubbock, Basil, ed., *Barlow's Journal Of His Life At Sea In King's Ships, East And West Indiamen & Other Merchantmen From 1659 To 1703*. London: Hurst & Blackett, Ltd., 1934.

Lynde, Benjamin, *The Diaries of Benjamin Lynde and of Benjamin Lynde, Jr.*, Private printing, Cambridge: Riverside Press, 1880.

Massachusetts (Colony). General Court. House of Representatives. *Journals of the House of Representatives of Massachusetts*. Boston: Massachusetts Historical Society, 1919. Vol. 11.

New England Weekly Journal, May 18, 1730.

Newton, John. *Thoughts upon the African slave trade*. Samuel J. May Anti-Slavery Collection, Ithaca, New York: Cornell University Library, London: Printed for J. Buckland, in Pater-Noster-Row; and J. Johnson, in St. Paul's Church-yard, 1788, <http://ebooks.library.cornell.edu/cgi/t/text/text-idx?c=mayantislavery;idno=21874801>.

Phillips, Thomas, *A Journal of a Voyage made in the Hannibal of London, Ann. 1693, 1694 from England, to Cape Monseradoe, in Africa, And thence along the Coast of Guiney to Whidaw, the island of St. Thomas, And so forward to Barbadoes.* Walthoe, 1732.

[http://books.google.ca/books?id=qFJBAAAACAAJ&pg=PA172&lpg=PA172&dq=captain+thomas+phillips+hannibal&source=bl&ots=j4lsF1MPJ9&sig=vApcVQZgKPiRXnuRmhIAwcht3Jg&hl=en&sa=X&ei=YV2bU\\_zQJ8uGyATW2IHwDQ&ved=0CGkQ6AEwCQ#v=onepage&q=captain%20thomas%20phillips%20hannibal&f=false](http://books.google.ca/books?id=qFJBAAAACAAJ&pg=PA172&lpg=PA172&dq=captain+thomas+phillips+hannibal&source=bl&ots=j4lsF1MPJ9&sig=vApcVQZgKPiRXnuRmhIAwcht3Jg&hl=en&sa=X&ei=YV2bU_zQJ8uGyATW2IHwDQ&ved=0CGkQ6AEwCQ#v=onepage&q=captain%20thomas%20phillips%20hannibal&f=false).

Raithby, John, (editor). "William III, 1695-6: An Act for preventing Frauds and regulating Abuses in the Plantation Trade [Chapter XXII. Rot. Parl. 7 & 8 Gul. III. pt.5.nu.8.]," Statutes of the Realm: volume 7: 1695-1701, *British History Online*, <http://www.british-history.ac.uk/report.aspx?compid=46829>.

Raithby, John, *The statutes relating to the admiralty, Navy, shipping, and navigation of the United Kingdom, from 9 Hen. III to 3 Geo. IV inclusive. [1225-1822] With notes, referring in each case to the subsequent statutes, and to the decisions in the Courts of Admiralty, Common Law, and Equity, in England, and to the Scotch law.* Collected and arranged, under the authority of the Lords Commissioners of the Admiralty.

Randolph, Edward. *Edward Randolph : including his letters and official papers from the New England, middle, and southern colonies in America, with other documents relating chiefly to the vacating of the royal charter of the colony of Massachusetts Bay, 1676-1703* (1898), Toppan, Robert Noxon, and Alfred Thomas Scrope Goodrick, eds. Boston: Prince Society , 1909.

*Records of the governor and company of the Massachusetts Bay in New England*, v.4 pt.2, Shurtleff, Nathaniel Bradstreet, 1810-1874. ed, Boston: W. White, printer to the commonwealth, <http://archive.org/details/recordsofgoverno42mass>.

Sewall, Samuel, "The Selling of Joseph," University of Nebraska – Lincoln DigitalCommons@University of Nebraska – Lincoln, accessed October 4, 2013 <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1026&context=etas>.

Sewall, Samuel, *The Diary of Samuel Sewall: 1674-1729*, Vol. I, M. Halsey Thomas, ed. New York: Farrar, Straus and Giroux, 1973.

St. Patrick, *A Letter to the Soldiers of Coroticus*, <http://www.yale.edu/glc/index.htm>

St. Patrick, Confessions of St. Patrick, <http://www.ccel.org/ccel/patrick/confession.ii.html>.

Stubbs, W.; Talmash, G., *The Crown Circuit Companion: containing the practice of the assises on the Crown side, and of the courts of general and general quarter sessions of the peace*, Volume 1, Second Edition, (Henry Lintot, London) 1749.

*The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906.* Francis Newton Thorpe, ed. Washington, DC : Government Printing Office, 1909.

The Massachusetts Body of Liberties, (1641), part of the Hanover Historical Texts Project, accessed October 2, 2013 at <http://history.hanover.edu/texts/masslib.html>.

“The Trials of five persons for piracy, felony and robbery, who were found guilty and condemned, at a Court of Admiralty for the trial of piracies, felonies and robberies, committed on the high seas, held at the court-house in Boston, within His Majesty's province of the Massachusetts-Bay in New-England, on Tuesday the fourth day of October, anno domini, 1726. Pursuant to His Majesty's royal commission, founded on an act of Parliament made in the eleventh and twelfth years of the reign of King William the Third, entituled, An act for the more effectual suppression of piracy; and made perpetual by an act of the sixth year of the reign of our sovereign Lord King George.” Boston : Printed by T. Fleet, for S. Gerrish, at the lower end of Cornhill, 1726. *Eighteenth Century Collections Online*. Gale. UNIV OF CALGARY. <<http://find.galegroup.com.ezproxy.lib.ucalgary.ca/ecco/infomark.do?&contentSet=ECCOArticles&type=multipage&tabID=T001&prodId=ECCO&docId=CW123991006&source=gale&userGroupName=ucalgary&version=1.0&docLevel=FASCIMILE>>.

Told, Silas. *An account of the life, and dealings of God with Silas Told: ...* Written by himself. London: printed and sold by Gilbert and Plummer; and by T. Scollick, 1785.

Zouch, Sir Richard, *The jurisdiction of the admiralty of England asserted against Sr. Edward Coke's Articuli admiralitatis*, Printed for Francis Tyton and Thomas Dring, and are to be sold at their shops ..., 1663. [http://gateway.proquest.com/openurl?ctx\\_ver=Z39.88-2003&res\\_id=xri:eebo&res\\_dat=xri:pqil:res\\_ver=0.2&rft\\_id=xri:eebo:citation:12484343](http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&res_dat=xri:pqil:res_ver=0.2&rft_id=xri:eebo:citation:12484343).

### Secondary Sources

‘Balthild 1’, *Prosopography of Anglo-Saxon England*, <http://www.pase.ac.uk>.

- Amussen, Susan Dwyer. *Caribbean Exchanges: Slavery and the Transformation of English Society, 1640-1700*. Chapel Hill: University of North Carolina, 2007.
- Andrew, John. *The Hanging of Arthur Hodge*. (Xlibris Publishing, 2000).
- Andrews, Charles M. "Introduction," In *Records of the Vice-Admiralty Court of Rhode Island, 1716-1752*, Towle, Dorothy S. Philadelphia: American Historical Association, 1937.
- Andrews, Kenneth. *Trade, Plunder, and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480-1630*. Cambridge: Cambridge University Press, 1984.
- Aston, T. H. "The Origins of the Manor in England". *Transactions of the Royal Historical Society*, Fifth Series, 8 (1958): 59-83.
- Bailyn, Bernard. *Faces of Revolution: Personalities & Themes in the Struggle for American Independence*. New York: Knopf Doubleday Publishing Group, 1990.
- Baker, Emerson W. and John G. Reid. *The New England knight: Sir William Phips, 1651-1695* Toronto: University of Toronto Press, 1998.
- Baston, Grudzien. "Ward, Nathaniel (1578–1652)," *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, 2004; online edn, Oct 2006.  
<http://www.oxforddnb.com.ezproxy.lib.ucalgary.ca/view/article/28700>.
- Batinski, Michael C. "The Two Faces of Jonathan Belcher: An Exercise in Biography as Synthesis". *Biography* 19 (1996): 178-197.
- Batinski, Michael C. *Jonathan Belcher, Colonial Governor*. Lexington: University of Kentucky, 1996.

Beattie, J.M. "The Royal Pardon and Criminal Procedure in Early Modern England," *Journal of the Canadian Historical Association*, 22, 1, 9-22.

Beattie, J.M. *Crime and the Courts in England: 1660-1800*, Princeton: Princeton University Press, 1986.

Benton, Lauren and Richard Ross. "Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World". In *Legal Pluralism and Empires, 1500-1850*, Lauren Benton and Richard Ross, eds. New York: New York University Press, 2013.

Benton, Lauren. "This Melancholy Labyrinth: The Trial of Arthur Hodge And The Boundaries of Imperial Law". *Alabama Law Review* 64 (2012): 91-122.

Berlin, Ira. *Many Thousands Gone: The First Two Centuries of Slavery in North America*, Cambridge: Harvard University Press, 1998.

Bilder, Mary Sarah, *The Transatlantic Constitution: Colonial Legal Culture and the Empire*. Cambridge: Harvard University Press, 2004.

Bolster, Jeffrey. "An Inner Diaspora: Black Sailors Making Selves". In *Through a Glass Darkly: Reflections on Personal Identity in Early America*. Ronald Hoffman, Mechal Sobel, Fredrika J. Teute, eds., UNC Press Books, 1997.

Bolster, Jeffrey. "Putting the Ocean in Atlantic History: Maritime Communities and Marine Ecology in the Northwest Atlantic, 1500–1800". *AHR* 113 (2008): 19-47.

Bolster, Jeffrey. *Black Jacks: African American Seamen in the Age of Sail*. Cambridge: Harvard University Press, 1997.

Bradley, Keith. *Slavery and Society at Rome*. Cambridge: Cambridge University Press, 1994.

Brown, Christopher Leslie. *Moral Capital: Foundations of British Abolitionism*. Williamsburg: University of North Carolina Press, 2006.

Browning, Reed. *The Duke of Newcastle*. New Haven: Yale University Press, 1975.

- Burnard, Trevor. *Mastery, Tyranny, and Desire: Thomas Thistlewood and His Slaves in the Anglo-Jamaican World*. Chapel Hill: University of North Carolina Press, 2004.

Bushman, Richard L. *King and People in Provincial Massachusetts*. Raleigh, NC: University of North Carolina Press, 1985.

Cambiano, Guiseppi. "Aristotle and the Anonymous Opponents of Slavery" In *Classical Slavery*. Ed. M.I. Finley. London: Frank Cass & Co. Ltd., 1987.

Chapin, Bradley. *Criminal Justice in Colonial America, 1606-1660*. Athens: University of Georgia Press, 1983.

Christopher, Emma. *Slave Ship Sailors and Their Captive Cargoes, 1730-1807*. Cambridge: Cambridge University Press, 2006.

Clarke, Mary Patterson. "The Board of Trade at Work". *AHR* 17 (1911): 17-43.

Costello, Ray. *Black Salt: Seafarers of African Descent on British Ships*, Liverpool: Liverpool University Press, 2012.

Coughtry, Jay. *The Notorious Triangle: Rhode Island and the African Slave Trade, 1700-1807*. Philadelphia: Temple University Press, 1981.

Craton, Michael. "The Role of the Caribbean Vice Admiralty Courts in British Imperialism". *Caribbean Studies* 11 (1971): 5-20.

Cross, Arthur Lyon. "The English criminal law and benefit of clergy during the eighteenth and early nineteenth centuries." [U.S.], [1917?]. *The Making of Modern Law*. Gale. 2014.

Crump, Helen J. *Colonial Admiralty Jurisdiction in the Seventeenth Century*. London: Longmans, 1931.

Cumming, Charles S. "The English High Court of Admiralty". *Tulane Maritime Law Journal* 17 (1993): 209-256.

Curtin, Philip. *The Atlantic Slave Trade: A Census*. Madison: University of Wisconsin, 1969.

Davis, David Brion. *Inhuman Bondage: The Rise and Fall of Slavery in the New World*. New York: Oxford University Press, 2006.

Davis, David Brion. *The Problem of Slavery in the Age of Revolution*. New York: Oxford University Press, 1999.

Davis, David Brion. *The Problem of Slavery in Western Culture*. Ithaca: Cornell University Press, 1988.

Davis, William Thomas. *History of the Judiciary of Massachusetts: Including the Plymouth and Massachusetts Colonies, the Province of the Massachusetts Bay, and the Commonwealth*. Clark, N.J.: The Lawbook Exchange Ltd., 2008.

De Luca, Kelly A. "Beyond the sea: Extraterritorial jurisdiction and English law, c. 1575—1640," PhD thesis; 2008; ProQuest Dissertations & Theses.

De Reign, Morrell. "The History and Development of the Motion for New Trial and in Arrest of Judgment." *American Law Review* 47 (1913): 377-391.

Deyle, Steven. "'By farr the most profitable trade': Slave trading in British colonial North America". *Slavery and Abolition, A Journal of Slave and Post-Slave Studies* 10 (1989): 107-125.

Dickerson, Oliver Morton. *American colonial government 1696-1765; a study of the British board of trade in its relation to the American colonies, political, industrial, administrative*. Cleveland: Arthur H. Clark, 1912.

Donnan, Elizabeth, *Documents Illustrative of the Slave Trade, Vol. 3, New England and the Middle Colonies*. Washington: Carnegie Institution of Washington, 1932.

Dutchak, Pat. "The Church and Slavery in Anglo-Saxon England". *Past Imperfect* 9 (2001-2003): 25-42.

Earle, Peter. *Sailors: English Merchant Seamen, 1660-1776*. London: Methuen, 1999.

Ekirch, A. Roger. *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775*. Oxford: Clarendon Press, 1987.

Elliott, J. H. *Empire of the Atlantic World: Britain and Spain in America, 1492–1830*. New Haven: Yale University Press, 2006.

Eltis, David and David Richardson. *Atlas of the Transatlantic Slave Trade*. New Haven: Yale University Press, 2010.

- Eltis, David et al., eds. *The Trans-Atlantic slave trade: a database on CD-ROM*. Cambridge, 1999.
- Eltis, David et al., ed. *Voyages: The Transatlantic Slave Trade Database*.  
<http://www.slavevoyages.org/tast/database/search.faces>.
- Farr, James. "Locke, Natural Law, and New World Slavery". *Political Theory* 36 (2008): 495-522.
- Flaherty, David A. "Criminal Practice in Provincial Massachusetts". In *Law in Colonial Massachusetts, 1630-1800*. Boston: The Colonial Society of Massachusetts, 1984.
- Ford, Amelia (ed.) and Samuel Rhode, "A Sea Captain To His Owner". *New England Quarterly* 3 (1930): 136.
- Ford, Amelia C. "William Shirley to Samuel Waldo". *AHR* 36 (1931): 350-360.
- Fury, Cheryl. *Tides in the Affairs of Men: The Social History of Elizabethan Seamen, 1580-1603*. Westport: Greenwood Press, 2002.
- Garnsey, Peter. *Ideas of Slavery from Aristotle to Augustine*. Cambridge, Cambridge University Press, 1996.
- Glancey, Jennifer A. *Slavery in Early Christianity*. Oxford: Oxford University Press, 2002.
- Greene, Johnston. *The Negro in Colonial New England: 1620-1776*. New York: Columbia University Press, 1942.
- Haffenden, Philip. "Colonial Appointments and Patronage under the Duke of Newcastle, 1724-1739". *The English Historical Review* 78 (1963): 417-435.

Hall, Michael G. "The House of Lords, Edward Randolph, and the Navigation Act of 1696". *WMQ*, Third Series, 14 (1957): 494-515.

Halley, Janet. "My Isaac Royall Legacy." In *Harvard Blackletter Law Journal*, Vol. 24(2008): 117-131 <http://www.law.harvard.edu/students/orgs/blj/vol24/Halley.pdf>

Harlow, Vincent. *History of Barbados: 1625-1685*. New York: Negro Universities Press, 1926.

Harrington, Matthew P. "The Legacy of the Colonial Vice-Admiralty Courts" (Part I). *Journal of Maritime Law & Commerce* 26 (1995) 581-602.

Heath, Malcolm. "Aristotle on Natural Slavery." *Phronesis: A Journal for Ancient Philosophy* 53 (2008): 243-270.

Hedges, James B. *The Browns of Providence Plantations*. Cambridge: Harvard University Press, 1952

Henretta, James A. "*Salutary Neglect*": *Colonial Administration under the Duke of Newcastle*. Princeton: Princeton University Press, 1972.

Herrup, Cynthia. *The Common Peace: Participation and the Criminal Law in Seventeenth Century England*. Cambridge: Cambridge University Press, 1987.

Higginbotham, Jr., Leon. *In the Matter of Color: Race and the American Legal Process, The Colonial Period*. New York: Oxford University Press, 1978.

Howe, Mark DeWolfe. "The Sources and Nature of Law in Colonial Massachusetts". In *Law and Authority in Colonial America*. Ed. George Athan Billias. Barre: Barre Publishers, 1965. <http://archive.org/stream/doctorrobertchil00kitt#page/n9/mode/2up>.

- Hurnard, Naomi D. *The King's Pardon for Homicide before A.D. 1307*. Oxford: Clarendon Press, 1969.
- John Andrew. *The Hanging of Arthur Hodge*. Xlibris Publishing, 2000.
- Jones, Alison. "The Rhode Island Slave Trade: A Trading Advantage in Africa" in *Slavery and Abolition*, 2, 3(1981): 227-244.
- Jordan, Winthrop D. "The Influence of the West Indies on the Origins of New England Slavery". *WMQ*, Third Series, 18 (1961): 243-250.
- Jordan, Winthrop D. *White over Black: American Attitudes Toward the Negro, 1500-1812*. New York: W.W. Norton & Company, 1968.
- Kesselring K.J. *Mercy and Authority in the Tudor State*. Cambridge: Cambridge University Press, 2003.
- Keynes, Simon. "An abbot, an archbishop, and the viking raids of 1006–7 and 1009–12." *Anglo-Saxon England* 36 (2007):155-57.
- Kittredge, George Lyman. "Dr. Robert Child the Remonstrant." *Publications of the Colonial Society of Massachusetts*, XXI. 18.
- Knapp, Samuel L. *Biographical Sketches Of Eminent Lawyers, Statesmen, and Men Of Letters*. Boston: Richardson and Lord, 1821.
- Laing, Lionel H. "Historic Origins of Admiralty Jurisdiction in England". *Michigan Law Review* 45: 163-182.
- Langford, Paul. *A Polite and Commercial People: England, 1727-1783*. Oxford: Oxford University Press, 1992.

Lawson, M. K. "Archbishop Wulfstan and the Homiletic Element in the Laws of Æthelred II and Cnut". *English Historical Review*, 424 (1992): 566-588.

Lemmings, David. *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century*. Oxford: Oxford University Press, 2000.

Lethaby, W. R. *Leadwork, old and ornamental, and for the most part English*. London: Macmillan & Co., 1893.

Lettieri, Ronald. "Bollan, William." *American National Biography Online* Feb. 2000  
<http://www.anb.org/articles/01/01-00085.html>.

Lin, Rachel Chernos. "The Rhode Island Slave-Traders: Butchers, Bakers and Candlestick-Makers." *Slavery and Abolition* 23 (2002): 21-38.

Linebaugh, Peter, and Marcus Rediker. *The Many-Headed Hydra: Sailors, Slaves, Commoners, and The Hidden History Of The Revolutionary Atlantic*. Boston: Beacon Press, 2000.

Mack, Edwin S. "The Revival of Criminal Equity." *Harvard Law Review* 16 (1903): 389-403.

MacMillan, Ken. "Bound by Our Regal Office". In *British North America in the Seventeenth and Eighteenth Centuries*. Ed. Stephen Foster. Oxford: Oxford University Press, 2013.

MacMillan, Ken. *Sovereignty and Possession in the English New World*. Cambridge: Cambridge University Press, 2006.

MacMillan, Ken. *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World*. New York: Palgrave MacMillan, 2011.

MacMillan, Ken. "To punish and correct: the rise of criminal courts in Bermuda, 1615-1622". *Atlantic Studies: Global Currents*, 10, 3, (2013): 302-322.

Macnair, Mike. "Equity and Conscience". *Oxford Journal of Legal Studies* 27 (2007): 659-681.

Mancke, Elizabeth and Carole Shammas, eds. *The Creation of the British Atlantic World*. Baltimore: Johns Hopkins University Press, 2005.

Massachusetts Historical Society *Proceedings of the Massachusetts Historical Society, 1864-1865*, Volume 8. Boston: Wiggin and Lunt, 1866.

Minkema, Kenneth P. "Jonathan Edwards on Slavery and the Slave Trade." *WMQ*, Third Series, 54 (1997): 823-834.

Morgan, Gwenda, and Peter Rushton. *Eighteenth Century Criminal Transportation: The Formation of the Criminal Atlantic*. New York: Palgrave Macmillan, 2004.

Morgan, Kenneth. *Slavery and the British Empire: From Africa to America*. Oxford: Oxford University Press, 2007.

Morris, Richard B. "Massachusetts and the Common Law: The Declaration of 1646". *AHR* 31 (1926): 443-453.

Morrow, Glenn R. *Plato's Law of Slavery in its Relation to Greek Law*. New York: Arno Press, 1976.

Nelson, William E. "The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686". *American Journal of Legal History* 46 (April, 2005): 183-230.

Nicholson, Bradley J. "Legal Borrowing and the Origins of Slave Law in the British Colonies". *American Journal of Legal History* 38 (1994): 38-54.

Olson, Alison G. "The Board of Trade and London-American Interest Groups in the Eighteenth Century". In *British Atlantic Empire Before the Revolution*. Eds. Peter Marshal and Glyn Williams. London: Frank Cass Publishers, 1980.

Otterness, Philip. "The New York Naval Stores Project and the Transformation of the Poor Palatines, 1710-1712." *New York History* 75 (1994): 132-156.

Pagan, John Rushton. *Anne Ortwood's Bastard: Sex and Law in Early Virginia*. Oxford: Oxford University Press, 2003.

Patterson, Orlando. *Slavery and Social Death: A Comparative Study*. Cambridge: Harvard University Press, 1982.

Pelteret, David A.E. *Slavery in Early Medieval England: From the Reign of Alfred until the Twelfth Century*. Woodbridge: The Boydell Press, 1995.

Pelteret, David A.E. "Slave raiding and slave trading in early England." *Anglo-Saxon England* 9 (2007): 99-114.

Peterson, Mark A. "Theopolis Americana: The City-State of Boston, the Republic of Letters, and the Protestant International, 1689-1739". In *Soundings in Atlantic History: latent structures and intellectual currents, 1500-1830*. Eds. Bernard Bailyn and Patricia L. Denault. Cambridge, Harvard University Press, 2009.

Platt, Virginia Bever. " 'And Don't Forget the Guinea Voyage': The Slave Trade of Aaron Lopez of Newport". *WMQ*, Third Series, 32 (1975): 601-618.

Popple, A. E. "A Court of Criminal Equity". *Journal of the American Institute of Criminal Law and Criminology* 16: 151-153.

Preyer, Kathryn. "Penal Measures in the American Colonies: An Overview". *The American Journal of Legal History* 26 (1982): 326-353.

Putnam, Lara. "To Study the Fragments/Whole: Microhistory and the Atlantic World". *Journal of Social History* 39 (2006): 615-30.

Rediker, Marcus. *The Slave Ship: A Human History*. New York, Viking Penguin, 2007.

Reed, George B. *Sketch of the Life of the Honorable John Read of Boston: 1722-1749*. Boston, Privately Printed, 1903.

Rodger, N.A.M. *The Wooden World: An Anatomy of the Georgian Navy*. Glasgow: Fontana Press, 1988.

Rogers, Alan. *Murder and the Death Penalty in Massachusetts*. Amherst: University of Massachusetts Press, 2008.

Rouleau, Brian J. "Dead Men Do Tell Tales: Folklore, Fraternity, and the Forecastle." *Early American Studies*, 5 (2007): 30-62.

Rushton, Peter and Gwenda Morgan. *Banishment in the Early Atlantic World: Convicts, Rebels and Slaves*. London: Bloomsbury Publishing, 2013.

Schultz, John A. *William Shirley, King's Governor of Massachusetts*, Chapel Hill: University of North Carolina, 1961.

- Schultz, John. *Legislators of the Massachusetts General Court, 1691-1780*. Boston: Northeastern University Press, 1997.
- Setaro, Franklyn C. "The Formative Era of American Admiralty Law." *New York Law Forum* 5 (1959): 9-44.
- Sharpe, James. *The Bewitching of Anne Gunter*. New York: Routledge, 2001.
- Smallwood, Stephanie *Saltwater Slavery: A Middle Passage from Africa to American Diaspora*. Cambridge: Harvard University Press, 2007.
- Smith, Abbot Emerson. "The Transportation of Convicts to the American Colonies in the Seventeenth Century." *AHR* 39 (1933): 232-249.
- Smith, Abbot Emerson. *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776*. Chapel Hill: University of North Carolina Press, 1947.
- Snell, Steven L. *Courts of Admiralty and the Common Law: Origins of the American Experiment in Concurrent Jurisdiction*. Durham: Carolina Academic Press, 2007.
- Sosin, J. M. *English America and the Restoration Monarchy of Charles II: Transatlantic Politics, Commerce, and Kinship*. Lincoln: University of Nebraska Press, 1980
- Sosin, J.M. *English America and the Revolution of 1688: Royal Administration and the Structure of Provincial Government*. Lincoln: University of Nebraska Press, 1982
- Staples, Hamilton B. *The Province Laws of Massachusetts*. Worcester: The Press of Chas. Hamilton, 1884.
- Staples, Hamilton B. *The Province Laws of Massachusetts*. Worcester: The Press of Chas. Hamilton, 1884.

Steele, Ian K. *Politics of Colonial Policy: The Board of Trade in Colonial Administration, 1696-1720*. Oxford: Clarendon Press, 1968.

Steele, Ian. *The English Atlantic, 1675–1740: An Exploration of Communication and Community*. New York: Oxford University Press, 1986.

Taylor, Alan. *American Colonies: The Settling of North America*. New York: Penguin Books, 2002

*The New England Historical & Genealogical Register*, Volume 22. Boston: Published by the Society, 1868.

Thompson, Mack. *Moses Brown. Reluctant Reformer*. Chapel Hill: University of North Carolina Press, 1962.

Thorpe, Francis Newton. *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906*. Washington, DC: Government Printing Office, 1909.

Tomlins, Christopher. “Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery.” *Theoretical Inquiries in Law* 10 (2009): 389-422.

Towner, Lawrence W. “The Sewall-Saffin Dialogue on Slavery.” *WMQ*, Third Series, 21 (1964): 40-52.

Vickers, Daniel, and Vince Walsh. “Young Men and the Sea: The Sociology of Seafaring in Eighteenth-Century Salem, Massachusetts.” *Social History* 24 (1999): 17-38.

Vickers, Daniel, and Vince Walsh. *Young Men and the Sea: Yankee Seafarers in the Age of Sail*. New Haven: Yale University Press, 2005.

Von Frank, Albert J. "John Saffin: Slavery and Racism in Colonial Massachusetts". *Early American Literature* 29 (1994): 254-272.

Warren, Charles. *A History of the American Bar*. Boston: Little, Brown & Company, 1911.

Watson, Alan. *Slave Law in the Americas*. Athens: The University of Georgia Press, 1989.

Welles, Albert, H.H. Clements; Henry Winthrop Sargent. *History of the Welles Family in England: With Their Derivation in this Country from Governor Thomas Welles, of Connecticut*. Boston: J. Wilson and Son, 1874.

Westerman, William Linn. "Slavery and the Elements of Freedom in Ancient Greece." In *Slavery in Classical Antiquity: Views and Controversies*. Ed. M.I. Finley. Cambridge: W. Heffer & Sons Ltd., 1960.

Wiecek, William M. "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World." *The University of Chicago Law Review* 42 (1974): 86-146.

Wiecek, William. "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America." *WMQ*, Third Series, 34 (1977): 258-280.

Wolford, Thorp L. "The Laws and Liberties of 1648 - The First Code of Laws Enacted and Printed in English America." *Boston University Law Review* 28 (1948): 426-464.

Wood, George. *William Shirley, governor of Massachusetts, 1741-1756*. New York: Columbia University, 1920.

Wrightson, Keith. *English Society: 1580-1680*. London: Hutchison & Co., 1982.

Wrightson, Keith. *Ralph Taylor's Summer: A Scrivener, his City and the Plague*. New Haven: Yale University Press, 2011.

Wroth, L. Kinvin. "Auchmuty, Robert". *American National Biography Online* Feb. 2000. <http://www.anb.org.ezproxy.lib.ucalgary.ca/articles/01/01-00035.html>.

Wroth, L. Kinvin. "The Massachusetts Vice-Admiralty Court." In *Law and Authority in Colonial America*. Ed. George Athan Billias. Barre: Barre Publishers, 1965.

Yale Avalon Project: "Documents in Law, History, and Diplomacy."  
[http://avalon.law.yale.edu/subject\\_menus/major.asp](http://avalon.law.yale.edu/subject_menus/major.asp)

Zanger, Jules. "Crime and Punishment in Early Massachusetts." *WMQ* 22, 3 (1965): 471-477.

Zuckerman, Michael. "Identity in British America: Unease in Eden". In *Colonial Identity in the Atlantic World, 1500-1800*. Eds. Nicholas Canny and Anthony Pagden. Princeton: Princeton University Press, 1987.