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### Résumé de l'article

L'article de Jerry Bannister remet en question l'idée généralement admise qu'il n'y ait pas eu d'État colonial à Terre-neuve au XVIIIe siècle. Il rejette la notion traditionnelle selon laquelle l'organisation judiciaire de l'île aurait conséquemment été illégitime ou inefficace. L'auteur démontre qu'en dépit du nombre limité d'institutions autorisées par les lois et par la politique impériale officielle, il se développa, pour répondre aux besoins de ceux qui exerçaient le pouvoir, un système efficace de gouvernement fondé sur les coutumes régionales, elles-mêmes inspirées de la common law. Au début de la colonisation de Terre-neuve, la Royal Navy assurait le pouvoir et maintenait l'ordre. En 1749, l'introduction d'importantes réformes solidifia l'instauration d'un « État naval », qui servit de cadre administratif au gouvernement local. L'auteur analyse le fonctionnement de cette organisation judiciaire jusqu'en 1791, date à laquelle fut adoptée la Judicature Act ; ses constatations devraient inciter les historiens à repenser la chronologie du développement politico-juridique au Canada. Le cas de Terre-neuve démontre que la formation d'un État à l'ère pré-industrielle n'a pas joué qu'un simple rôle de second plan dans la montée du puissant pouvoir colonial au milieu du XIXe siècle au Canada.

# The Naval State in Newfoundland, 1749-1791

JERRY BANNISTER

This study examines the colonial state in eighteenth-century Newfoundland. Its point of departure is a challenge issued by the late French anthropologist Pierre Clastres:

Primitive societies are societies without a State. This factual judgment, accurate in itself, actually hides an opinion, a value judgment that immediately throws doubt on the possibility of constituting political anthropology as a strict science. What the statement says, in fact, is that primitive societies are missing something – the State – that is essential to them, as it is to any other society: our own, for instance. Consequently, those societies are *incomplete*; they are not quite true societies – they are not *civilized* – their existence continues to suffer the painful experience of a lack – the *lack* of a State – which, try as they may, they will never make up.<sup>1</sup>

Clastres was attacking what he saw as the ethnocentrism and evolutionism in European chronicles of Aboriginal societies, but his argument is equally relevant to the study of legal culture in early Newfoundland. The island's historiography remains mired in an outlook that considers the colonial state – and, by extension, Newfoundland society – exclusively in terms of its deviance from the British colonial model and its dearth of modern forms of social control. This orthodoxy is the enduring legacy of nineteenth-century political reformers, who depicted the era of naval government as inherently anarchic, and those historians who uncritically accepted their polemics.<sup>2</sup> It is also a reflection of the broader trend among English-Canadian historians to focus overwhelmingly on the emergence of a “colonial leviathan” and the concomitant expansion of govern-

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- 1 Pierre Clastres, *Society Against the State: Essays in Political Anthropology*. Robert Hurley, trans. (New York: Zone Books, 1987), 189.
- 2 On this point see Keith Matthews, “Historical Fence Building: A Critique of the Historiography of Newfoundland,” *Newfoundland Quarterly* 74/1 (Spring 1978): 1-30; Keith Matthews, *Lectures on the History of Newfoundland, 1500-1830* (St. John's: Breakwater Books, 1988), chs. 15-16, 20-22, 30.

mental regulation in the mid-nineteenth century.<sup>3</sup> The basic question addressed by this article is how was the island governed, if at all, without the institutions established in most other British colonies in North America?

In strictly official terms, eighteenth-century Newfoundland was not a colony but rather a seasonal fishing station for the English West Country adventurers. Governed by the commodore of the squadron sent annually to protect the fishing fleet, it was seen as a valuable source of trained sailors for the Royal Navy. Historians have charted the impact of this policy through constitutional guideposts – the island had no court of civil jurisdiction until 1791, no newspaper until 1807, no civil governor until 1825, and no legislative assembly until 1832 – and the story of retarded political development has become a well-worn tale.<sup>4</sup> While Sean Cadigan has established a sophisticated revisionist model of economic development, the issue of state formation has received little scholarly attention.<sup>5</sup> Patrick O’Flaherty’s recent monograph provides the best published account of government and politics, but it glosses over the island’s naval administration.<sup>6</sup> The dominant view is that a colonial state simply did not exist in the eighteenth century. Christopher English has argued that a state did not emerge until after the end of the naval regime in 1825; during the eighteenth century, statute law and imperial policy stunted state formation, leaving settlers with only the barest rudiments of government.<sup>7</sup> English has revised this position somewhat – a recent article acknowledges that there was at least some type of state authority during the eighteenth century – but he essentially ignores the

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- 3 On the historiography of the state, see Allan Greer and Ian Radforth, “Introduction,” in *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, eds. A. Greer and I. Radforth (Toronto: University of Toronto Press, 1992), 1-16; Rainer Baehre, “The State in Canadian History,” *Acadiensis* 24 (Autumn 1994): 119-33; Louis Knafla and Susan Binnie, “Beyond the State: Law and Legal Pluralism in the Making of Modern Societies,” in *Law, Society, and the State: Essays in Modern Legal History*, eds. L. Knafla and S. Binnie (Toronto: University of Toronto Press, 1995), 3-33.
  - 4 See Olaf Uwe Janzen, “Newfoundland and the International Fishery,” in *Canadian History: A Reader’s Guide, Volume One: Beginnings to Confederation*, ed. M. Brook Taylor (Toronto: University of Toronto Press, 1994), 280-310.
  - 5 Sean Cadigan, *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland, 1785-1855* (Toronto: University of Toronto Press, 1995), chs. 5-6.
  - 6 Patrick O’Flaherty, *Old Newfoundland: A History to 1843* (St. John’s: Long Beach Press, 1999), chs. 4-6.
  - 7 Christopher English, “From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832,” in *Essays in Modern Legal History*, eds. Knafla and Binnie, 73-98; Christopher English, “Newfoundland’s Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92,” *Manitoba Law Journal* 32 (January 1996): 57-78; and, especially, Christopher English, “The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819,” in *Canadian State Trials, Volume One: Law, Politics, and Security Measures, 1608-1837*, eds. F. Murray Greenwood and Barry Wright (Toronto: The Osgoode Society, 1996), 296-322.

naval government that operated for over a century.<sup>8</sup> In short, the traditional image of isolated fishing outports languishing under an impotent, primitive, and corrupt legal system has never been seriously challenged.<sup>9</sup>

An alternative interpretation is presented in this article. It emphatically rejects the notion that the island's legal system was necessarily illegitimate or ineffective. Despite the limited institutions allowed under statutory law and imperial policy, an effective system of governance, based on customs adopted under the rubric of the common law, developed to meet the needs of those in power. While its structure differed from that of other colonial regimes in North America, its function remained essentially the same: power and authority flowed through institutions and customs designed to uphold the social order and to enforce the rule of imperial government. English historians have thoroughly discredited the traditional view of the Georgian navy as corrupt and inefficient, and its position in Newfoundland requires a complete reappraisal. Far from conforming to the caricature of quarterdeck despotism, eighteenth-century naval administration successfully managed the largest industrial organization in the western world.<sup>10</sup> The Royal Navy was the engine of law and authority in Newfoundland. The commodores of the annual squadron proved willing and able to administer law and government at St. John's; their junior officers convened courts throughout the outport districts, often alongside civil magistrates, and sat on the bench as surrogate judges. The watershed in the island's legal development – Governor George Rodney's reforms of 1749-50 – drew the Royal Navy deeply into the local administration of justice and precipitated the emergence of what I have termed a "naval state." Judicial administration varied somewhat from district to district, but governors exerted a dominant influence whenever they chose to intervene locally. In the second half of the eighteenth century, the courts reached into nearly every outport along the Anglo-Irish coast. The case of Newfoundland demonstrates the need to reconsider the conventional model of state formation and the role of the military in civilian governance.

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8 Christopher English, "Collective Violence in Ferryland District, Newfoundland, 1788," *Dalhousie Law Journal* 21/2 (Fall 1998): 475-89.

9 For a recent example of this cultural exceptionalism, see John P. Greene, *Between Damnation and Starvation: Priests and Merchants in Newfoundland Politics, 1745-1855* (Montreal & Kingston: McGill-Queen's University Press, 1999), ch. 1.

10 Daniel Baugh, *British Naval Administration in the Age of Walpole* (Princeton: Princeton University Press, 1965); Daniel Baugh, *Naval Administration, 1715-50* (London: Navy Records Society, 1977); and, most importantly, N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (Glasgow: William Collins, 1986).

## Defining the Colonial State

As historians have expanded and refined the boundaries of law and legal culture, the idea of the state has expanded exponentially. Michael Braddick argues persuasively that the definition of the state as a purely institutional phenomenon should be abandoned in favour of an inclusive model of state formation. At its extreme, this theory views the state as no less than society as a whole, for it encompasses the means through which social power is organized.<sup>11</sup> Braddick's critique of the traditional notion of the state bears directly on the legal history of eighteenth-century Newfoundland. Certainly the institutional model cannot be reasonably applied to Newfoundland, where the colonial state never conformed to the British archetype. Instead, John Brewer's definition of the British fiscal-military state provides a useful starting point. Brewer interprets the state as a territorially and jurisdictionally demarcated political entity in which public authority is distinguished from (though not unconnected to) private power; it is staffed by officials whose primary allegiance is to a set of political institutions under a single, that is sovereign and final, authority.<sup>12</sup>

This study adopts a significantly broader approach. I define the colonial state as a territorially and jurisdictionally defined entity in which formal and customary sources of legal authority comprise a single administrative regime that exerts effective political and military control over its inhabitants.<sup>13</sup> As in England, the state was essentially reactive, limited by available resources, and shaped by individual initiative.<sup>14</sup> This definition entails three major assertions: no substantive division existed between formal and customary institutions; public (naval and civil magistrates) and private (merchants and masters) sources of power overlapped; and the colonial state was never static but rather developed according to the variable pressures of contested authority. Under this model, a functional colonial state requires four basic properties. First, a monopoly must

11 Michael Braddick, "State Formation and Social Change in Early Modern England: A Problem Stated and Approaches Suggested," *Social History* 16/1 (January 1991): 1-17.

12 John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (London: Unwin Hyman, 1989), p. 252. On the institutional definition of the state, see also Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia, and China* (Cambridge: Cambridge University Press, 1979), esp. 29.

13 Brewer has also noted that the public and private spheres intermixed in the organization of state power. See John Brewer, "The Eighteenth-century British State: Contexts and Issues," in *An Imperial State at War: Britain from 1689 to 1815*, ed. Lawrence Stone (New York: Routledge, 1994), p. 54; and John Brewer and Eckhart Hellmuth, "Introduction: Rethinking Leviathan," in *Rethinking Leviathan: The Eighteenth-Century State in Britain and Germany*, eds. Brewer and Hellmuth (Oxford: Oxford University Press, 1999), 1-21.

14 Lee Davison, Tim Hitchcock, Tim Keirn, and Robert Shoemaker, "The Reactive State: English Governance and Society, 1689-1750," in *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689-1750*, eds. Lee Davison, Tim Hitchcock, Tim Keirn, and Robert Shoemaker (New York: St. Martin's Press, 1992), xi-xli.

exist over the legitimate use of official force: military power is not used indiscriminately but employed by a government to further specific aims within its jurisdiction.<sup>15</sup> Second, persons and institutions are parts of the state apparatus, whether formally or informally, only when they enjoy access to the means to enforce their authority through the state monopoly over legal violence. Third, the governing regime must have access to the means to legitimize its authority – particularly in the eyes of the propertied classes – through laws and customs that are known, recognizable, compulsory, and at least nominally consistent.<sup>16</sup> Finally, the government must be able to raise revenues locally to defray the costs of operating basic institutions such as a penal system. Whether accomplished through statutory levies or taxes approved by *ad hoc* committees, these funds are then allocated to a public purse. As part of a larger project, this article will focus principally on the operation of the naval state; other aspects of governance, such as the administration of criminal law, are discussed in other studies.<sup>17</sup> As I have argued elsewhere, Newfoundland had an effective magistracy by the mid-eighteenth century.<sup>18</sup>

### **The Development of Legal Institutions, 1699-1832**

The Act to Encourage the Trade to Newfoundland, passed in 1699 and known popularly as “King William’s Act,” formed the basis of the island’s statute law until 1791. It empowered the fishing admirals to hear and determine all local disputes, and authorized the commanders of warships stationed each summer at Newfoundland to act as appeal judges.<sup>19</sup> It was largely ignored in practice;

15 This, of course, did not constitute a total monopoly over all forms of legal violence. As Donald Fyson pointedly reminded me during our session at the annual meeting of the Canadian Historical Association, colonial states never actually maintained control over all types of physical violence: fathers and masters, for example, enjoyed the right to punish those under their authority. Nonetheless, the colonial state did enjoy a monopoly over the official use of legal violence at the governmental level; the naval state in Newfoundland never tolerated competition from rival sources of legal violence. The assertion and maintenance of this type of monopoly was, I would submit, an important step in state formation.

16 This concept of the state draws on Ralph Miliband, “The State,” in *Dictionary of Marxist Thought*, ed. Tom Bottomore (2nd ed. Oxford: Basil Blackwell, 1991), 520-24.

17 See Jerry Bannister, “Surgeons and Criminal Justice in Eighteenth-Century Newfoundland,” in *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie*, eds. Greg T. Smith, Allyson N. May, and Simon Devereaux (Toronto: Centre of Criminology, 1998), 104-34; Jerry Bannister, *The Custom of the Country: Law, Authority, and the Naval State in Newfoundland, 1699-1832* (in progress).

18 Jerry Bannister, “Convict Transportation and the Colonial State, 1789,” *Acadiensis* 27/2 (Spring 1998): 95-123.

19 10 & 11 Wlm. III, c. 25, ss. 4, 12-16 (1698-99). The material in this and the following paragraph is drawn from Jerry Bannister, “The Custom of the Country: Justice and the Colonial State in Eighteenth-Century Newfoundland.” (PhD thesis, University of Toronto, 1999), chs. 2-5.

local customs emerged in its place to meet basic needs; and, after repeated appeals, a naval governor and justices of the peace were appointed by royal prerogative in 1729. The dual system of naval and civil authority experienced growing pains and a struggle for legitimacy but had become firmly established by 1735. In 1749, Governor Rodney launched an ambitious series of reforms: within two years the island had a local court of Oyer and Terminer (an annual Assize court that tried felonies at St. John's), and a highly organized system of customary surrogate courts (convened in the outports by naval officers). In the mid-1760s, Newfoundland was divided into nine districts (administered by civil magistrates) and five maritime zones (governed by naval surrogates). It had many of the standard English institutions used to administer justice – such as constables, coroners, a sheriff, and a grand jury – and magistrates took recognizances, held petty sessions, and organized quarter sessions on a regular basis. By 1780, the colonial state had evolved into an entrenched customary regime based on two levels of authority: the seasonal administration of the Royal Navy, which had up to ten warships patrolling the coast from mid-summer to early autumn; and the year-round sessions held by civil magistrates.

In response to problems in the surrogate courts, the British government revised Newfoundland's constitution in 1791-92. The Judicature Act of 1791 constituted a court of civil jurisdiction; it was limited to one year, during which John Reeves, the newly-appointed chief justice, would assess the requirements for future reforms. Naval officers withdrew from their customary position as sole surrogate judges – after 1791 civilians began to sit on the surrogate bench – but the governor and his junior officers remained active in local government. In 1792, a second Judicature Act created a supreme court for both civil and criminal jurisdiction, and entrenched legally the system of surrogate courts that had long operated customarily. Again the statute was for one year only and had to be renewed annually until 1809, when the legal system was made permanent. To close the gap that had existed between imperial policy and local practice, the British government tailored law to suit available resources. These reforms were not rungs in a teleological ladder of legal progress; the naval state continued to function basically as it had prior to 1791.

With the growth of a local reform movement and the establishment of an independent press in the 1820s, however, this system of governance was no longer sustainable. The creation of a bourgeois public sphere meant that government policies were for the first time subjected to critical evaluation. In 1824, the reform movement won its first major victory: the British government passed a comprehensive Judicature Act which, among other things, abolished the surrogate courts and provided for a charter of incorporation to make town by-laws. In 1825 a Royal Charter finally bestowed official colonial status, with a civil governor and an executive council. When a broad coalition of reformers and merchants formed in response to concerns over taxation, it pressured

London into granting a legislative assembly in 1832.<sup>20</sup> By examining the period from 1749 to 1791, we can explore the rise of the naval state and its apogee in Newfoundland.

### The Royal Navy as Legal Agency

The British government depended heavily on the Royal Navy to police maritime commerce and enforce the imperial statutes regulating trade. Naval officers stationed in colonial ports gained considerable experience in dealing with local officials and merchant interests. London viewed the involvement of the Royal Navy in governing Newfoundland as a natural by-product of its responsibility to protect the English cod fishery.<sup>21</sup> Since the seventeenth century, commodores of the squadron stationed annually at St. John's had convened *ad hoc* courts to settle local disputes – a report issued in 1701 claimed that naval officers had already replaced the fishing admirals as the island's principal legal authorities – and the judicial role of the Royal Navy had become well established before the appointment of the first naval governor in 1729.<sup>22</sup> The custom of sending junior officers to convene surrogate courts in the outports had no basis in written law other than the governor's appellate jurisdiction granted by King William's Act.<sup>23</sup> But the custom worked because the Royal Navy was ideally suited to administer law in fishing communities: it had the resources required to enforce its authority, to present itself as an impartial arbiter of justice, and to bestow the majesty of English law. The squadron sent to Newfoundland usually consisted of at least two rated warships and an armed sloop. The flagship was typically a fourth- or fifth- rated warship of 40 to 60 guns, with two decks, a complement of 220 to 400 men, and a displacement of 650 to 1,000 tons. Commodores on the Newfoundland station often commanded a 50-gun flagship (such as the *Litchfield*, *Sutherland*, *Romney*, *Guernsey*, *Antelope*, and *Salisbury*), though 40-, 44-, and 60-gun warships were also used on occasion. The flagship of Commodore Rodney, for example, was HMS

20 The reform movement is discussed in Jerry Bannister, "The Campaign for Representative Government in Newfoundland," *Journal of the Canadian Historical Association* NS 5 (1994): 19-40.

21 On the Royal Navy and British maritime policy, see G.S. Graham, "Fisheries and Sea Power," in *Historical Essays on the Atlantic Provinces*, ed. G.A. Rawlyk (Toronto: McClelland & Stewart, 1967), 7-16; N.A.M. Rodger, "Sea-Power and Empire, 1688-1793," in *The Oxford History of the British Empire, Volume II: The Eighteenth Century*, ed. P.J. Marshall (Oxford: Oxford University Press, 1998), 169-83; Daniel A. Baugh, "Maritime Strength and Atlantic Commerce: the uses of a 'grand maritime empire'," in *Imperial State at War*, ed. Stone, 185-214.

22 For published accounts of courts convened by naval officers at St. John's in 1680 and 1711, see D.W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records* (Belleville, ON: Mika, 1972 reprint of 1895 ed.), 174-75 & 271-72.

23 10 & 11 Wm. III, c. 25, s. 15 (1698-99).

*Rainbow*, a 40-gun, fifth-rate ship, with 240 men. Sloops were unrated warships, with 8-18 guns, 80 to 130 men, and 140 to 380 tons. By contrast, the schooners and brigs used in the Newfoundland fishery were commonly two-masted vessels of 30 to 80 tons.<sup>24</sup> Even the smallest armed sloop had more than sufficient military resources to impose its authority on any fishing installation: weaponry (cannon and small arms), trained personnel (sailors and marines), and penal facilities (for corporal punishment and brief incarceration).

Equally important, every post-captain was well versed in the task of dispensing justice and meting out punishment. Through both their formidable summary jurisdiction on board individual warships and their service as judges in courts martial, officers gained a thorough knowledge of how to maintain law and order. Officers in the Georgian navy relied far more upon the unwritten customs of the sea than the cumbersome provisions in the Admiralty's *Regulations and Instructions* or the haphazard legal code in the Articles of War.<sup>25</sup> They were expected to act pragmatically to govern as effectively as possible in adverse maritime conditions. The corporal punishments most often used in the navy – floggings of up to twenty-four lashes or other relatively swift measures – could be readily transposed for use in fishing outports. Captains relied largely on the vague thirty-sixth clause in the Articles of War (which stated that where no punishment was specified or appropriate, offenders “shall be punished according to the laws and customs in such cases used at sea”) as authority for meting out whippings with the cat-o'-nine-tails.<sup>26</sup> Throughout the eighteenth century, naval surrogates in Newfoundland similarly ordered punishments with numbered lashes.

Unlike the army officers at Placentia and St. John's, naval officers had no local economic ties or interests to colour their appearance as impartial and fair

24 The Royal Navy's designation of warship types evolved over the course of the eighteenth century. The two-decker 40- and 44-gun ships were neither line-of-battle ships nor true frigates in the proper sense of the term; by the 1770s they were used largely as troopships, transports, and for patrol duty. The 50- and 60-gun ships were no longer considered to be line-of-battle ships by the 1780s, though they continued to be used as flagships of small squadrons for stations like Newfoundland. The 60-gun *Panther*, which was the Newfoundland flagship in the early 1770s, was the only one of its type to survive into the 1790s. See Brian Lavery, *Nelson's Navy: The Ships, Men and Organisation, 1793-1815* (London: Naval Institute Press, 1989), 35-52; Graham, *Empire of the North Atlantic*, 208, 219 & 227; Rodger, *Wooden World*, appendices 1-3; and Dudley Pope, *Life in Nelson's Navy* (Annapolis: Naval Institute Press, 1987), chs. 2-4.

25 Rodger, *Wooden World*, ch. 6; John Byrn, *Crime and Punishment in the Royal Navy: Discipline on the Leeward Islands Station, 1784-1812* (Brookfield, Vermont: Scolar Press, 1989), ch 3. For a discussion of the historiography of naval punishment, see Greg Denning, *Mr. Bligh's Bad Language: Passion, Power and Theatre on the Bounty* (Cambridge: Cambridge University Press, 1992), 113-16 & 377-96.

26 The Articles of War are contained in the 1749 Navy Act (22 Geo. II, c. 33). The *Regulations and Instructions Relating to His Majesty's Service at Sea* was printed annually after the first edition in 1731, though few alterations were made in subsequent editions. Both the Articles of War and the *Instructions* are reprinted in *Shipboard Life and Organization, 1731-1815*, ed. Brian Lavery (London: Navy Records Society, 1998), part E.

authorities. With the squadron present for only a few months each year, its officers often rotating with each commission, and the governors usually serving no more than three years, the Royal Navy did not become enmeshed in the divisive credit relationships and petty politics commonly found in the settlers' parochial society. It is no accident that problems of corruption and insubordination were largely restricted to the British army and garrison commanders such as Lieutenant Moody.<sup>27</sup> The status of the Royal Navy was also incomparably superior. Its officers were largely drawn from the ranks of respectable society, many of whom wielded considerable power and influence. While the social gulf separating naval officers and fish merchants has been exaggerated,<sup>28</sup> few local merchants and planters could display pretensions to gentility. Fishing admirals might have been able to bully magistrates from their own social caste, but they dared not challenge the character of a naval officer.<sup>29</sup> The social status of the island's naval officers stretched from the petty bourgeoisie to the peerage. It reached its zenith in 1786, when Prince William Henry (later William IV), who then commanded HMS *Pegasus*, was stationed at Newfoundland and served as a surrogate judge at Placentia. Officers in the Royal Navy generally remained aloof from the sharp personal attacks exchanged between the justices and fishing admirals. If the governor chose to intervene locally, he could publicly berate both factions without weakening his own authority.

The British government regularly used the Georgian navy as the standard-bearer of English law and royal sovereignty throughout the empire. The navy's presence in Newfoundland was not comparable to the nineteenth-century gunboat imperialism practiced in China, nor the brutal subjugation of Native communities in British Columbia.<sup>30</sup> Models of the dialectic of European-Native relations cannot be reasonably applied to Newfoundland, where the Royal

27 See Michael Godfrey, "John Moody," *Dictionary of Canadian Biography* [DCB], vol. 2 (Toronto: University of Toronto Press, 1969), 486-87; James Candow, "The British Army in Newfoundland, 1697-1824," *Newfoundland Quarterly* 79 (Spring 1984): 21-8; and the unedited collection, *Tyranny in St. John's, 1705-1706: A Sordid Story from the Colonial Records* (St. John's: Provincial Archives of Newfoundland and Labrador, 1971), 31-43.

28 John Crowley, "Empire versus Truck: The Official Interpretation of Debt and Labour in the Eighteenth-Century Newfoundland Fishery," *Canadian Historical Review* 70/3 (September 1989): 311-36.

29 Rodger, *Wooden World*, 252-72; Prowse, *History of Newfoundland*, 365.

30 On the Royal Navy in China and the Northwest coast of Canada, see Christopher Munn, "The Chusan Episode: Britain's Occupation of a Chinese Island, 1840-46," *Journal of Imperial and Commonwealth History* 25/1 (January 1997): 82-112; Barry Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver, 1984); Gough, "Official Uses of Violence Against Northwest Coast Indians in Colonial British Columbia," in *Pacific Northwest Themes: Historical Essays in Honour of Keith A. Murray*, ed. James W. Scott (Bellingham, 1978), 43-69; Jane Samson, "Commodore Justice on the Northwest Coast: What Law did the Royal Navy Represent and Enforce?" (Paper presented to the legal history conference at the Faculty of Law, University of Manitoba, October 1997).

Navy never sustained significant contact with the Beothuk.<sup>31</sup> Governors did not construct Newfoundland as an infidel country or an inherently barbaric frontier, although the island's sectarian divisions clearly affected naval officers. Their correspondence portrayed the island as a harsh place inhabited by ignorant fishermen but not beyond the pale of civilization. Furthermore, the British government was at the very least nominally committed to upholding the rule of law in Newfoundland and did not permit the indiscriminate use of military force. The judicial role of the Royal Navy functioned within the boundaries of English legal culture. Naval officers brought to the island the symbolic triumvirate of majesty, justice, and mercy. Although there are several parallels with the Anglo-French and European-Native legal relationships – particularly in the area of accommodation to suit material conditions – the case of Newfoundland was different in that it involved negotiation *within* a legal culture in the process of formation.<sup>32</sup> Displaying the navy's elaborate official ceremonies, as well as the increasingly-standardized Admiralty uniform, officers presented outport Newfoundland with a majesty of the law as impressive as that found in any town in rural England. Like the procession of the annual assize circuit, the cruises of the Royal Navy brought an unequivocal message of legal authority and political power to those occupying the strata of local society.<sup>33</sup> In both form and function, then, the Royal Navy was a dynamic force in state formation.

### Official Rituals and Local Customs

Each year the governor presided over a series of official ceremonies that marked the familiar rhythm of public life. These customs became integral parts of the legal culture that persisted well into the nineteenth century. Historians have typically viewed the presence of the Royal Navy in port through the lens of maritime culture, particularly the impact of sailors on popular politics, patterns of crime, and other social problems.<sup>34</sup> But with hundreds of men and

31 Ralph Pastore, "Archaeology, History, and the Beothuks," *Newfoundland Studies* 9/2 (Fall 1993): 260-78.

32 See, *inter alia*, John Dickinson, "Native Sovereignty and French Justice in Early Canada," and Hamar Foster, "The Queen's Law is Better than Yours: International Homicide in Early British Columbia," both in *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice*, eds. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto: Osgoode Society, 1994), 17-40 & 41-111; Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774," in *Crime and Criminal Justice in Europe and Canada*, ed. L.A. Knafla (Waterloo: University of Wilfred Laurier Press, 1981), 77-110.

33 On the English assize circuit and the elaborate ceremonies surrounding it, see Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986), 314-18; Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* eds. D. Hay, et al. (New York: Pantheon, 1975), 26-32.

34 For a succinct analysis of maritime historiography, see Daniel Vickers and Vince Walsh, "Young men and the sea: the sociology of seafaring in eighteenth-century Salem, Massachusetts," *Social History* 24/1 (January 1999): 17-38.

thousands of pounds invested in the defence and government of Newfoundland, the British Admiralty demanded that its squadron be well disciplined. The ships and sailors stationed at St. John's followed a detailed collection of port orders handed down from one commodore to the next. The squadron comprised both the symbolic and material power of the British crown, and the governor's authority depended in large measure upon the efficiency of the flagship and the attendant ships under his command.

Official protocols governed the Newfoundland squadron as soon as it approached the Narrows at the mouth of St. John's harbour. If sailing during the day, ships nearing the harbour hoisted a blue flag at the main topgallant masthead, with a half-red and half-white flag (the flag of the Newfoundland convoy), at the fore-topgallant masthead, to be answered by either Fort Amherst or Signal Hill with a red pennant over a yellow one. If at night, they fired guns at precisely five-minute intervals, to be answered by two guns with the same space of time between them.<sup>35</sup> Once the flagship had warped through the Narrows, it received a salute from the fort – ranging from 15 to 19 guns, depending upon the governor's rank – and returned it with an equal number. The flagship and its consorts then moored near the centre of the harbour with their bows facing the prevailing westerly wind; vessels were strictly forbidden to anchor above the flagship, i.e. to the westward side, without the governor's permission. The actual arrival ceremonies followed a series of regulations which were formalized in the early nineteenth century as a set of standing orders. Once the squadron had moored safely, the governor sent a memorandum to all of the commanding officers advising them to report aboard the flagship at precisely ten-thirty the next morning. The governor then embarked in his barge, flying his admiral's flag, followed by the rest of the commanding officers in their boats according to seniority, with their pennants at the bow.<sup>36</sup> At eleven o'clock the governor landed at the King's Wharf, where he was received by a captain's guard from the garrison and by the civil magistrates. He proceeded to the courthouse to read his commission before an assembly of the leading townspeople, and the chief justice administered the oaths of allegiance. With these legal duties completed, and having given sufficient time for the honour guard to re-form, the parade of dignitaries went to Fort Townshend, where the governor reviewed the garrison and received a salute from the army officers. Finally, the governor repaired to Government House – followed by the

35 The customs and regulations followed by the naval governors were codified in the early nineteenth century and are preserved in the papers of Governor John Duckworth. See The Provincial Archives of Newfoundland and Labrador [PANL], MG 204, Duckworth Papers, box 1, p. 291 (signals to be used by warships in Newfoundland, undated [c. 1807-08]).

36 PANL, MG 204, Duckworth Papers, box 1, p. 937 (General memo from HMS *Antelope* undated [c.1808]).

officers, magistrates, and principal inhabitants – and a large reception was held in the dining room.<sup>37</sup>

Once the ceremonies were over, the squadron settled into a routine based on the orders that every warship received when it entered St. John's harbour. The ships took turns launching a guard boat that patrolled the harbour each night and reported to the flagship every morning. Guard boats policed the ships arriving or departing St. John's harbour and inspected each vessel's articles to ensure that it carried no deserters or other unauthorized passengers. Seamen without a pass, except those sailing to other parts of the island, were detained aboard the flagship while the officer of the guard conducted an investigation. Guard boats were responsible for keeping the Narrows clear, and they carried two extra sailors to help vessels in need of assistance. No more than one in every five seamen of a crew could be impressed into the squadron; each vessel was subject to impressment only once during a voyage, and men were interrogated aboard the flagship before being entered into a ship's books. Liberty on shore for the sailors was strictly regulated and prohibited on Sundays. Officers of the guard were to report any irregularities or intelligence immediately to the governor at Fort Townshend, while all official letters and papers had to be sent directly to the governor's secretary.<sup>38</sup>

After the construction of Government House in the early 1780s, the governor usually resided ashore while the squadron was in port, but the warships remained a focal point for both civilians and the military. When a convoy of merchantmen prepared to set sail, it followed the lead of the flagship, which issued orders through a sequence of signals.<sup>39</sup> Each week the flagship signalled when the marines were to be landed ashore to drill and returned to the squadron in the evening.<sup>40</sup> While guns were periodically fired to reinforce urgent signals, a succession of ship's bells (rung every half-hour) and drums (played every evening when the crew beat to quarters) sounded regularly throughout the harbour. Without a town clock, people living in St. John's seemed to have relied on such maritime signals to help tell time. During a criminal trial in 1775, for example, a witness who had been asked to recount the circumstances surrounding a homicide testified that it had occurred "while the drum was beating on board the Admiral's ship." The squadron's warships were also a social venue for the local elite. At the 1789 Assizes, for example, a servant testified that his master and mistress had attended a large party aboard HMS *Pegasus* that lasted

37 PANL, MG 204, Duckworth Papers, box 1, pp. 935-36 ("Ceremonies to be Observed on the Governor's Arrival at St. John's Newfoundland," undated [c.1808]).

38 PANL, MG 204, Duckworth Papers, box 1, pp. 247-50 ("Port Orders," undated [c.1808]).

39 PANL, MG 204, Duckworth Papers, box 1, p. 257 (undated memorandum).

40 PANL, MG 204, Duckworth Papers, box 1, pp. 255-56, 259 (orders regarding the Royal Marines, undated [c.1808]).

well into the night.<sup>41</sup> In addition to the harbour policing performed by the guard boats, the warships acted as the town's fire department, providing sailors and fire engines whenever a blaze erupted.<sup>42</sup>

### **Inventing Legal Traditions (1): the Surrogate Courts**

In 1749 Newfoundland witnessed the single most important series of legal reforms undertaken prior to the grant of representative government. In what amounted to a revolution in government, Governor George Brydges Rodney launched an array of initiatives that reshaped local governance. Governor Rodney's administration formalized two courts that became pillars of the naval state: the surrogate courts and the governor's court in St. John's. His reforms were part of a broader trend that was sweeping both domestic politics in England and imperial administration.<sup>43</sup> From the perspective of the British Admiralty, the Newfoundland station represented a useful tool for furthering its political aims. The power of the Admiralty Board rested in its ability to reward loyal followers, and its leaders – successively the Duke of Bedford, Lord Sandwich, and Lord Anson – carefully factored political patronage into their decisions.<sup>44</sup> With numerous ambitious officers facing a dearth of prospects for advancement, the appointment as commodore of the island's squadron was highly valued. The flagship of the Newfoundland squadron, HMS *Rainbow*, was one of the coveted warships to remain in full commission after the Peace of Aix-la-Chapelle in 1748. In addition to bestowing a temporary promotion on a post-captain, the commission as commodore and thereby governor of Newfoundland brought the honorific title of Excellency, three years of secure employment, and the chance to earn extra income carrying freight on the return voyage from Lisbon to Portsmouth.<sup>45</sup> It is not surprising that the Admiralty decided to appoint Captain Rodney as governor of Newfoundland; Rodney's political patron, the Duke of Bedford, was now serving as Secretary of State, whose endorsement was necessary because the governorship was a Crown appointment. This remarkably strong political support ensured that, as governor, Rodney would receive the full backing of the British government.

41 *R. v. Cameron*, 1775 Assizes; *R. v. Reilly*, 1789 Assizes. See the database of archival court records in Bannister, "Custom of the Country," 438-42.

42 PANL, MG 204, Duckworth Papers, box 1, p. 258 (undated memorandum).

43 Paul Langford, *A Polite and Commercial People: England, 1727-1783* (Oxford: Oxford University Press, 1989), 155-62; Ian K. Steele, "The Anointed, the Appointed, and the Elected: Governance of the British Empire, 1689-1784," in *Oxford History of the British Empire*, ed. Marshall 119-21.

44 Rodger, *Wooden World*, ch. 8.

45 Rodney earned £570 by carrying freight in 1749. Like other governors, he dabbled in the fishery and earned some additional income by transporting cured codfish. See David Spinney, *Rodney* (London: Allen and Unwin, 1969), 99.

To the office of governor, Captain Rodney brought the reforming zeal of an ambitious officer looking for the chance to make his mark. Since the outbreak of peace left no opportunities to distinguish himself in action, the Newfoundland station represented the only immediate chance to impress his patrons.<sup>46</sup> Within a week of warping into St. John's harbour in August 1749, he ordered his officers to patrol the coast and to call at all the major outports. Captain Jonathan Knight in the sloop-of-war *Saltash* sailed south to visit communities along the Southern Shore and Placentia Bay, while Captain Francis Drake proceeded north in HMS *Mercury* along Conception and Trinity bays, as far as Cape Bonavista. Rodney gave Drake and Knight written instructions to supplement their commissions from the Admiralty, and a blank commission of the peace to be bestowed on "men of probity and good character." The captains' formal responsibilities were to hear cases upon appeal from the fishing admirals and to ensure the enforcement of King William's Act. Informally, they were expected to settle all outstanding disputes and to refer difficult cases to St. John's, where the governor would issue additional orders as circumstances dictated.<sup>47</sup>

Governor Rodney decided to augment this arrangement with two additional floating surrogate courts. He informed the Admiralty that he had received a steady stream of complaints, from almost every part of the island, of illegal trading practices in the fishery and a general lack of law and order. Rodney reported: "I have been necessitated to hire two small vessels in each of which I have put a lieutenant and a sufficient number of men, with orders, one to repair to the Northern parts the other to the Southern, there to administer justice."<sup>48</sup> Treated at the time as a temporary expedient, this move marked a turning point in the history of the island's legal system. With the practice of securing local sloops – later governors contracted the building of specifically-designed vessels, which became known as the "King's schooner" – the navy extended the government's reach into small harbours and coves that the heavy frigates had been unable to navigate. Rodney also centralized the process of information-gathering by hiring another sloop and sending a crew around the island to compile the data needed for the Board of Trade's annual report.

To confirm the authority of the officers sent on surrogate cruises, Rodney created a new jurisdiction. Unlike Captains Knight and Drake, the lieutenants to whom he had given the responsibility to convene surrogate courts had no

46 On Rodney's reputation as an able administrator and ambitious officer, see James Ralfe, *The Naval Biography of Great Britain* (Boston: Gregg Press, 1972 reprint of 1828 ed.), vol. 1, 2-26.

47 Public Record Office, Kew [PRO], 30/20/6, The Rodney Papers (instructions issued 16 & 20 August 1749). This manuscript is in its original state: there are no page or folio references in this unbound archival collection; specific references cannot be made beyond the applicable dates.

48 PRO, 30/20/6, The Rodney Papers (Rodney to John Cleveland, 6 September 1749).

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commission from the Admiralty to command a warship. Rodney therefore had his clerk draft two new commissions, which were given to lieutenants Robert Frankland and Lord Balenden before they sailed from St. John's. As Frankland's commission records, the officers were given conspicuously broad powers:

Whereas divers complaints have been made to me, by the inhabitants of the northern parts of this Island of many illegal practices committed by several people and the great want there of a proper person to administer justice, to prevent the like evil for the future. Being therefore convinced at your good sense integrity and judgement I do hereby require and direct you forthwith to repair to Bonavista and the ports adjacent, and there hear and determine all such causes as shall come before you agreeable to the commission herewith given to you.<sup>49</sup>

In his exhaustive report submitted to the British government in 1789, Admiral Mark Milbanke testified that such commissions had no legal foundation but were nevertheless a mainstay of the island's judicial regime.<sup>50</sup>

This surrogate's commission became a fixture of the Newfoundland legal system. Within a decade it had become as standardized as the commission of the peace. Over fifty such commissions were issued in St. John's prior to 1791, when civilians began to be appointed alongside officers to the surrogate bench.<sup>51</sup> Governor Milbanke's report gave a generic example of the surrogate's commission:

I do hereby appoint you [XXX] to be my Deputy or Surrogate, with full Power and Authority to assemble Courts within the District of [XXX] to enquire into all such Complaints as shall be brought before you, except such as are excepted in the Instructions annexed, and to hear and determine the same to all Intents and Purposes as I myself might or could do by virtue of the Power vested in me.<sup>52</sup>

Legally this conferred a power no greater than the governor's own appellate jurisdiction. But in practice the commission represented an authority superior to both the magistrates' commission of the peace and the fishing admirals' statutory prerogative. In effect, while in session, the surrogate court was the highest jurisdiction in the districts outside St. John's.

49 PRO, 30/20/6, The Rodney Papers (Rodney to Robert Frankland, 3 September 1749).

50 *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), ff. 7-37, in *House of Commons Sessional Papers, Volume 90: Newfoundland, 1792-93*, ed. Sheila Lambert (Wilmington, DE: Scholarly Resources, 1975), 71-101.

51 Bannister, "Custom of the Country," 171-80.

52 *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), f. 14, in *House of Commons Sessional Papers, Volume 90: Newfoundland*, ed. Lambert, 78.

The instructions that accompanied the surrogate's commission directed the officers to assume complete authority upon entering a harbour. As Rodney's orders to Lord Balenden illustrate, they included a wide range of responsibilities:

1st — Herewith you will receive a commission giving you power to administer justice agreeable to the laws and customs of the country, and an Act of Parliament [King William's Act].

2nd — On your going into any port you are to summon the principal inhabitants and all his Majesty's officers civil and military, when you are to cause your commission to be read with all decency and respect.

3rd — You will receive herewith a commission appointing justices of the peace for the District of Ferryland, which you are to deliver them, after administering to them the proper oaths, copies of which you will herewith receive.

4th — You are likewise to tender the oaths to all the inhabitants at the places you call in at, and procure exact accounts of the number of Protestants and Papists inhabiting each port.

5th — You will receive a general scheme of the fishery, which you are to fill up agreeable to the ports you call at.

6th — You are to take notice that all causes relating to the fishery are first to be heard by the Admirals of the respective harbours, the parties aggrieved have an appeal to you, but in case there is no Admiral in port, you are to decide the cause yourself.<sup>53</sup>

Significantly, the first clause placed the customs of the country on an equal footing with statutory law: it formally recognized the customary laws by which the island had been governed for generations. While Lord Balenden was ordered to uphold statute law, he was also expected to contravene it by hearing cases summarily when the fishing admirals were out to sea, a situation that occurred frequently during the busy fishing season. The surrogates' instructions tacitly acknowledged that King William's Act provided an insufficient basis on which to administer law.

Although this shift in legal powers had begun in the 1730s, the surrogate system became fully legitimized only under Rodney's tutelage. The fishing admirals were no longer an independent force; in many instances, they were co-opted into assisting the naval officers. The justices of the peace also became absorbed into this naval regime, though the final process of amalgamating the civil/district and naval/surrogate systems took another decade to complete. Legal semantics remained eclectic. As late as the 1780s, officers still employed a mixture of titles, such as deputy governor, to denote their surrogate's commission. Their proceedings cited a variety of terms — usually general court or surrogate court of sessions — to describe the same surrogate court. Chief Justice

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53 PRO, 30/20/6, Rodney Letterbook (Rodney to Lord Balenden, 6 September 1749).

Reeves speculated that the surrogacy had been an idea borrowed from admiralty law,<sup>54</sup> though the term was used commonly in ecclesiastical jurisdictions to denote proctors who convened courts on the authority of a senior judge.<sup>55</sup> The island's surrogate court was, in fact, simply a more formal organization of judicial practices that had operated in various forms since the turn of the century. Governor Rodney had recast the island's *lex non scripta* as the King's law.

### **Inventing Legal Traditions (2): the Governor's Court**

Captain Rodney's next move was to establish a governor's court. A direct by-product of his drive to centralize authority, this reform became an integral part of the island's constitution. Like the surrogates' proceedings, this court had no legal foundation beyond the governor's instructions and the appellate jurisdiction granted by King William's Act. In 1731, the solicitor general had ruled that the governor could not legally sit as a justice but could appoint only others to that office.<sup>56</sup> However, if Rodney had been aware of this restriction, he entirely disregarded it. He created his own personal court at St. John's to hear and determine a variety of cases, both written petitions (many of which he could hear legally as appeals), and complaints brought *viva voce* in a manner similar to the sessions held by justices in outport districts. Unlike the general courts convened by commodores in the early eighteenth century, naval governors never shared the bench with the fishing admirals, though the St. John's justices did attend as assistants.

In a treatise on Newfoundland law, Archibald Buchanan, a resident justice of the peace, offered by far the best surviving account of the governor's court.<sup>57</sup> Buchanan began by noting that the governors had used their appellate jurisdiction granted by King William's Act as a basis for hearing a wide range of cases, such as actions for the recovery of debts.<sup>58</sup> He then compared this prerogative to the powers wielded by governors of other British possessions; while the

54 John Reeves, *History of the Government of the Island of Newfoundland* (New York: Johnson Reprints, 1967 reprint of 1793 edition), 154.

55 W.R. Cornish and G. de N. Clark, *Law and Society in England, 1750-1950* (London: Sweet & Maxwell, 1989), 28.

56 The reception of law in the 1730s is discussed at length in Bannister, "Custom of the Country," 91-133.

57 British Library [BL], Add. Mss. 38347, Archibald Buchanan, "Concerning Landed Property in Newfoundland." (unpublished treatise, 1786), ff. 373-88. In addition to serving as a JP, Buchanan worked as the island's senior comptroller of customs: see PANL, Colonial Secretary's Letterbook [GN 2/1/A], vol. 8, p. 357 (appointment of comptroller of customs, 1782).

58 Justice Reeves' history confirms much of Buchanan's analysis. According to Reeves, "Every matter, civil, and criminal, used to be heard, and determined in open court before the governor." Reeves considered this to be a highly improper practice. See Reeves, *Government of Newfoundland*, 155.

governors in the West Indies had a commission to preside over courts of chancery, the Newfoundland governors had no such legal powers vested in them, and unlike the American colonies, the island had no courts of civil judicature.<sup>59</sup> Buchanan claimed that some Newfoundland governors presided over sessions very similar to courts of chancery, while others refused to exceed their specific appellate authority, but the custom of holdings governor's courts had never been legally sanctioned.<sup>60</sup> As Buchanan stated baldly: "Some of the Governors of Newfoundland have held courts (known by the name of the Governor's Courts) for determining actions of debt and causes of contested property, not properly cognizable by Justices of the Peace." He continued, "The truth is, there is no court, legally established, at Newfoundland for determining questions at common law, which exceed the powers of Justices of the Peace."<sup>61</sup> Nonetheless, the governor's court operated as a central part of the judiciary until 1780, when an appeal in England challenged its legality.<sup>62</sup> Subsequent governors were unwilling to risk being sued for rendering unlawful judgments. Buchanan suggested that the British government formally give naval governors the authority to convene courts of judicature competent to hear actions at common law beyond the jurisdiction of justices of the peace. The most compelling reason to confer such a power on the governor was, he affirmed, the fact that "the people of Newfoundland are disposed to believe that the Governors have the power of holding courts of this sort, if they chuse to exert it."<sup>63</sup> The customary governor's court became entrenched in the island's legal culture in large measure because it had been so firmly established by Governor Rodney.

When Rodney inaugurated the governor's court in 1749, he relied upon his personal authority to enforce its administration. The opening of the first court in September 1749 comprised a public demonstration of the governor's power: the principal inhabitants were assembled in the courtroom; the various oaths (of allegiance, supremacy, abjuration, and declaration against transubstantiation) were administered before the entire assembly; and the list of petitions and complaints was presented to the governor and read out in court.<sup>64</sup> During this session Rodney heard five cases brought by written petition, attested to personally by the

59 BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386.

60 On courts of chancery and the administration of equity, see Cornish and Clark, *Law and Society in England*, 26-27.

61 BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386. This statement of course excludes maritime law and the actions cognizable by admiralty courts.

62 This case is not to be confused with the later appeal brought by Richard Hutchings against a judgment of a surrogate court in 1787-88. On the challenges to both the governor's court and the surrogate court system, see Reeves, *Government of Newfoundland*, 159-60; Bannister, "Custom of the Country," 264-83.

63 BL, Add. Mss. 38347, Buchanan, "Concerning Landed Property in Newfoundland," f. 386.

64 PANL, GN 2/1/A, vol. 1, p. 43.

deponents. Only one was attended by the respondent. One petition was for trespass, while the other four alleged instances of violent assaults; three of these charged a planter and his servants in Conception Bay with beating and whipping local fishermen. Rodney responded by ordering warrants sent to the district's magistrates to apprehend the accused and bring them before the next sitting of the court. When none of the defendants answered the summons, Rodney ordered warrants for contempt of court to be served by the justices of the peace.<sup>65</sup>

Effectively assuming the role of chief justice, Governor Rodney worked to ensure that the authority of his court was properly respected. In a letter to the Conception Bay justices, who had not promptly acknowledged receipt of his warrants, he admonished them for neglect of duty and warned them never to do so again. His rebuke illustrates the personal nature of the governor's administration, on which his reforms depended:

Your behaviour in this affair has obliged me to reprimand you in this manner, for remember Gentlemen, I am sent here to administer Justice to Rich and Poor, without Favour or Partiality; you likewise by the oath you have taken, as Justices of the Peace, are obliged to do the same, in the neglect of which you will not only foreswear yourselves, but be liable to be severely punished, according to law, and you may depend upon it, I am not to be trifled with, in the execution of my office; this much I hope will suffice, to remind you of your duty and make you more diligent in the execution thereof for the future.<sup>66</sup>

Before Rodney returned to England in October 1749, the governor's court heard twenty more civil suits, ranging from petitions for wages to disputes over property ownership. In addition, shortly before he left, the St. John's justices held a general session of the peace. It is not known whether Commodore Rodney attended this court – it seems to have functioned as an autumn quarter sessions – but it did proceed to hear three cases that had originated in the governor's court.<sup>67</sup> The governor's court assumed primarily a civil jurisdiction and apparently never proceeded by indictment. It heard a wide range of causes and petitions involving misdemeanours, many of which were then tried at the St. John's quarter sessions.

The type of custom underpinning both the surrogate courts and the governor's court had a number of distinct characteristics. It was not popular, in the sense of being a product of plebeian culture, nor was it an early-modern construct used in defence of encroaching capitalist forms of regulation. Customary laws and courts established in Newfoundland were constituted, staffed, and overseen by officials (naval and civil magistrates) and private citizens from the propertied ranks of society (merchants and prominent townspeople). Put

65 The proceedings of the governor's court appear at PANL, GN 2/1/A, vol. 1, pp. 43-46.

66 PANL, GN 2/1/A, vol. 1, p. 44.

67 PANL, GN 2/1/A, vol. 1, pp. 52-55 & 61-62.

simply, they were legal – not popular – forms of custom.<sup>68</sup> Equally important, custom was at once unwritten law and state law. I reject the basic interpretive dichotomy of state law (statute) versus folk law (unwritten law).<sup>69</sup> State law in early Newfoundland relied extensively upon unwritten law: custom and common law formed the foundation of governance; for most of the eighteenth century, statute law was of secondary importance. The case of Newfoundland suggests that statutory codification was not a precondition of a colonial state; rather, the resiliency of the customary legal system actually facilitated state formation. Naval governors were relatively free to respond to local problems using whatever resources they deemed necessary. Without the constraints of the panoply of English institutions, the island's government was divested of many obligations and processes of accountability. The fact that many aspects of this customary regime were informal did not make them ineffective.

Custom was rarely ancient in the conventional use of the term. Although some customs of the fishery stretched back to the beginnings of European presence in the sixteenth century, most of the practices that became part of the colonial state first appeared regularly only after 1729. The time needed for a custom to become an entrenched tradition was not as long as some historians have admitted. Eric Hobsbawm's stimulating analysis allows for too large a gap between genuine customs and invented traditions.<sup>70</sup> In Newfoundland, ancient and recent elements of law melded together to form the basis of the naval state. What made a practice legitimate was how contemporaries perceived it, not whether it appears to the modern eye to be a fabrication. When Admiral Mark Milbanke looked back on Newfoundland's legal system, he saw the surrogate court as an institution dating from time immemorial. According to a report he presented in 1789, it had been operative long before the passage of the 1699 act regulating the fishery.<sup>71</sup> Seen in this light, the creation of custom was no more a sham than the making of any other type of authority.

68 These customs bear little resemblance to the types of cultural expression described by historians such as E.P. Thompson, Bob Bushway, or Robert Malcolmson. See E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1991); Bob Bushway, *By Rite: Custom, Ceremony and Community in England 1700-1880* (London: Junction Books, 1982); Robert Malcolmson, *Life and Labour in England, 1700-1780* (London: Hutchinson, 1981), ch. 4.

69 A recent collection of essays treats unwritten law and folk law as largely one and the same thing. Alison Dundes Renteln and Alan Dundes employ a series of dichotomies – e.g. oral versus written, flexible versus fixed – to construct an inclusive definition of folk law. See Alison Dundes Renteln and Alan Dundes, "What is Folk Law?," in *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*, eds. Dundes Renteln and Dundes (Madison: University of Wisconsin Press, 1995), vol. 1, esp. 2-4.

70 Eric Hobsbawm, "Introduction: Inventing Traditions," in *The Invention of Tradition*, eds. E. Hobsbawm and R. Ranger (Cambridge: Cambridge University Press, 1983), 1-14.

71 *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), f. 22, in *House of Commons Sessional Papers, Volume 90: Newfoundland*, ed. Lambert 86.

### The Operation of the District System

As had occurred in 1749, the onset of peace in 1763 released naval officers stationed at Newfoundland from the exacting demands of wartime service. Governor Hugh Palliser, appointed in 1764, built on Rodney's reforms, in particular the system of surrogate courts in the outports.<sup>72</sup> Palliser's first move, even before he arrived in Newfoundland, was to establish the commissions and districts to be allocated to his junior officers. He added the innovation of formally matching these naval zones with the civil districts of the justices of the peace. The strengthened surrogate courts covered all of the coasts and islands under the governor's jurisdiction. Like earlier initiatives, this move was designed to protect British sovereignty against incursions by the French. With five ships stationed around the island – plus the King's schooner or other small craft at his disposal – Governor Palliser had ample resources with which to operate the judiciary and to implement whatever policies he saw fit.

The surrogate court convened by Captain Charles Sexton at Placentia in September 1764 provides an excellent example of how this district system operated. Upon arriving in HMS *Pearl*, a 32-gun frigate, Captain Sexton held eight sittings by adjournments during the fifteen days his warship was in port. The court proceeded according to the daily business brought personally before the surrogate; on two occasions it convened but did not hear any cases.<sup>73</sup> One of Captain Sexton's first duties was to assert British sovereignty via the governor's commission. Sexton took pains to promulgate Palliser's decrees, ensuring that they were copied into the district minute-book. He also used the surrogate court to certify locally a decision that had been made by the governor's court at St. John's. Upon hearing a suit for trespass, Governor Palliser had examined both parties, fined the defendant £10 in damages, and stipulated that the verdict be confirmed at the next sitting of the Placentia district court.<sup>74</sup>

Captain Sexton worked cooperatively with Robert Edgecombe, the senior justice of the peace. When a deponent appeared in court to make an affidavit, he was sworn by both Sexton and Edgecombe. The surrogate court apparently heard all of the outstanding cases in Placentia: of the seven suits brought before Sexton, four were for servants' wages, two for ownership of local property, and one for a disputed hand-note.<sup>75</sup> Captain Sexton's court functioned as a forum

72 On Palliser's administration, see Matthews, *Lectures on the History of Newfoundland*, ch. 20; William Whitley, "Governor Hugh Palliser and the Newfoundland and Labrador Fishery, 1764-1768," *Canadian Historical Review* 50/2 (June 1969): 141-63; and Crowley, "Empire versus Truck," pp. 311-36.

73 PANL, GN 5/4/C/1, Placentia District, minutes for 26 September 1764.

74 PANL, GN 5/4/C/1, Placentia District, minutes for 17 September 1764 (Proclamation of Governor Hugh Palliser, 14 July 1764).

75 PANL, GN 5/4/C/1, Placentia District, minutes for 13-28 September 1764. Captain Sexton likely heard several additional cases: there is at least one page missing from the minute-book for the proceedings of his court.

for transacting the business of local government. In effect, it substituted for the quarter sessions that figured prominently in the management of English counties and towns. Sexton's judicial administration conflicts with the caricature of quarterdeck justice: he dismissed one case for want of evidence and another because of a lack of material witnesses.<sup>76</sup> In his capacity as deputy governor, Captain Sexton issued a grant for a piece of land and conferred seven licenses to sell liquor. He also received a petition from the local planters on problems in the provisioning trade in Placentia.<sup>77</sup>

The high level of cooperation between justices and naval surrogates shown during Captain Sexton's visit to Placentia was echoed throughout the island. In Trinity, joint sessions held by justices of the peace and naval surrogates settled over forty percent of the total cases heard from 1760 to 1790. These data likely underestimate the number of actions heard by the justices of the peace because they did not always keep regular court records. The joint sessions convened by the surrogate and magistrates in the autumn – often termed a surrogate court of sessions or general court of sessions – combined the broad powers of quarter sessions with the wide jurisdiction afforded by the surrogate's commission. At four of the sessions at Trinity, the local fishing admiral sat alongside the magistrates as an assistant. Autumn quarter sessions, which had become formalized as "surrogate courts" by 1770, heard virtually every type of dispute except for capital offences.

**Table 1. Distribution of Cases in Trinity District, 1760-1790**

	Composition of the Presiding Magistracy		
	Justices	Surrogate	Surrogate and Justices
Number of Cases Heard	25	63	67
Proportion of Caseload	16%	41%	43%

Total Number of Cases: 155

Source: PANL, GN 5/4/B/1, boxes 1 & 2

The effect of the Royal Navy's presence extended well beyond the period its warships were actually in port. John Reeves (first Chief Justice of Newfoundland), who was no apologist for the navy, portrayed its officers as champions of the rule of law. Reeves argued that the office of surrogate was a well-known and widely respected institution. "The time of *surrogating* was looked forward to as a season when all wrongs were to be redressed against all oppressors," Reeves claimed, "and this naval judicature was flown to by the poor inhabitants and planters, as the only refuge they had from the west country

<sup>76</sup> PANL, GN 5/4/C/1, Placentia District minutes for 25 September 1764.

<sup>77</sup> PANL, GN 5/4/C/1, Placentia District minutes for 25-26 September 1764.

merchants, who were always their creditors, and were generally regarded as their oppressors."<sup>78</sup> Reeves overstated the case, but he captured the essential role of the surrogate system: whether the annual surrogate courts were entirely fair or just mattered less than the fact that they were *seen* to represent law and order. Justices of the peace in the fishing outports relied upon the surrogate courts, where they sat alongside naval officers, as an opportunity to settle serious disputes and to complete outstanding judicial business. After Captain Sexton sailed from Placentia in 1764, for example, the magistrates reverted to holding petty sessions when the need arose. The next spring, one of the justices bound two planters in recognizance on condition that they personally appear at the next session of the surrogate court.<sup>79</sup> The annual arrival of the King's schooner was a custom that local magistrates took for granted as part of the natural course of governance.<sup>80</sup>

When the surrogates began their seasonal cruises along the coast, merchants such as Benjamin Lester, who was one of most powerful magnates in Newfoundland, took full advantage of the opportunity to collect information and socialize with the naval officers. For example, as his diary for 1767 reveals, Lester viewed the annual arrival of the King's schooner as a natural part of the familiar rhythm of the fishery. In early August 1767, while drinking tea at another merchant's home, Lester first heard that Lieutenant John Cartwright, who had served as surrogate the previous year, had already begun to hold courts in Bonavista Bay.<sup>81</sup> Lester received a letter from Governor Hugh Palliser, along with proclamations and orders to be published during the autumn sitting of the surrogate court.<sup>82</sup> In mid-August HMS *Spy*, commanded by Captain Albright, arrived in Trinity Harbour.<sup>83</sup> Albright came ashore to drink tea with Lester and brought a personal letter from Governor Palliser, informing him about the status of the French fishery. Albright dined at Lester's home the following evening and again three days later, before the *Spy* departed for St. John's on August 25th.<sup>84</sup>

78 Reeves, *Government of Newfoundland*, pp. 154-55. Emphasis in original.

79 PANL, GN 5/4/C/1, Placentia District, minutes for 23 May 1765.

80 On the use of surrogate/surrogating in local nomenclature, see *Dictionary of Newfoundland English*, eds. G.M. Story, W.J. Kirwin, and J.D.A. Widdowson (2nd ed. Toronto: University of Toronto Press, 1990), 547-8.

81 Dorchester Records Office, D/LEG D365/F8, Records of the Lester-Garland Families, Diary of Benjamin Lester (entry for 2 August 1767). Although I have consulted the original manuscript in the Dorchester Records Office, this article relies on the printed transcript prepared by Professor Gordon Handcock at Memorial University of Newfoundland. I wish to thank Professor Handcock not only for discussing the diary with me and sharing his wealth of knowledge, but also for generously providing me with a full access to the computerized transcript. Citations to this manuscript source will be hereinafter shortened to Lester Diary Mss., with date of diary entry.

82 Lester Diary Mss., 16 August 1767.

83 Lester Diary Mss., 19 August 1767.

84 Lester Diary Mss., 20 & 23 August 1767.

In late September and early October, Lieutenant Cartwright presided over the annual sitting of the surrogate court in Trinity Harbour. Sailing south from Bonavista Bay, he arrived in on September 25th, and Lester noted, "at 8 a Clock arriv'd the King's Schooner Mr Cartwright from Shatteau Bay to hold his Courts as last Year."<sup>85</sup> Two days later Cartwright dined with his officers at Lester's home.<sup>86</sup> When the court opened later in the week, Lester figured prominently in the proceedings. Unfortunately, he offered no comment on the actual ceremonies that accompanied the arrival of the King's schooner and the opening of the surrogate court. The only known description of a surrogate court appears in a memoir of Captain William Glascock, a naval officer who served during the governorship of Admiral Charles Hamilton:

The court room had been a wooden storehouse for cured fish. Upon this store it was the bowman of the boat's duty to hoist a spare ship's ensign as a signal for holding court. Shortly afterward followed the captain's or lieutenant's coxswain, laden with a cloak-bag filled with books, the surrogate officer closed the train, attended by two of the resident magistrates, a couple of midshipmen, the captain's clerk as register of the court and a few fishermen of the place as criers and tipsavers.

Glascock believed that the local people saw the visiting naval surrogate as an impartial arbiter:

On arriving near the court house he is met by a crowd of litigants and their friends, who are generally sincere in their demonstrations of personal respect and gratification at his arrival since they are more likely to obtain redress or justice at the hands of any stranger than from their own magistrates, who are often either plaintiffs or defendants themselves, and do not hesitate to influence their brother magistrates or even sit on the bench pending decisions of their own cases.<sup>87</sup>

As an institution, the surrogate's court appears to have been bereft of the majesty typically associated with modern courts of law, but it nevertheless had its own distinctive maritime ceremonies and cultural significance for those who witnessed its proceedings.

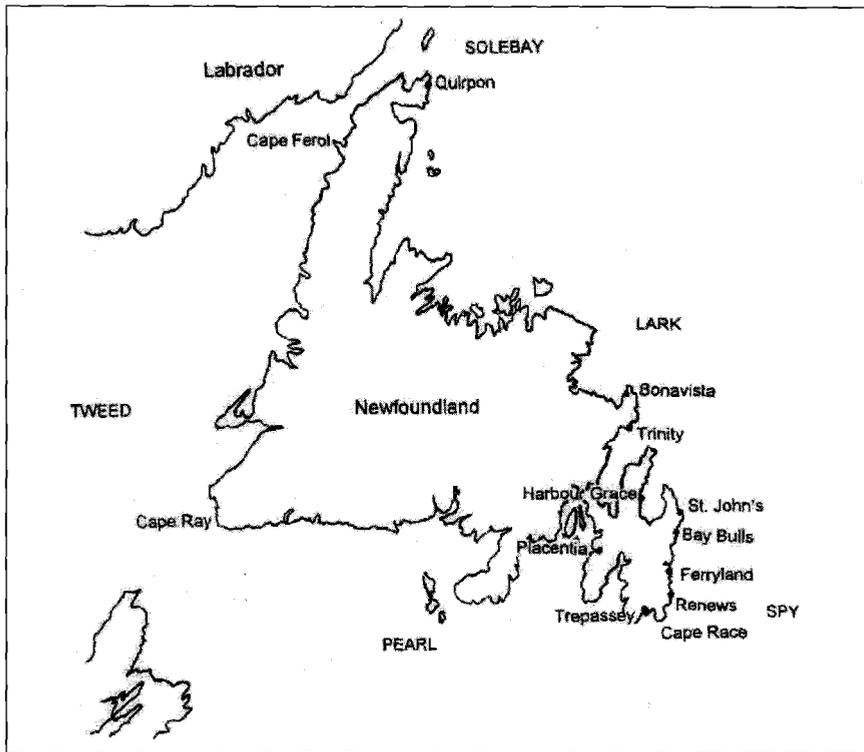
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85 Lester Diary Mss., 25 September 1767.

86 Lester Diary Mss., 25 September 1767.

87 William N. Glascock, *Naval Sketchbook; or, the Service Afloat and Ashore* (2 vols. London: Printed for the author, 1826), 180-81. Quoted from the extract printed in Waldo Smith, *The Navy and its Chaplains in the Days of Sail* (Toronto: Ryerson Press, 1961), 175-76.

THE NAVAL STATE IN NEWFOUNDLAND, 1749-1791



**Map 1: Governor Palliser's Scheme of Civil and Naval Districts, 1764**

**Surrogate's Commissions**

Capt. Hay	HMS <i>Solebay</i>	from Quirpon to Ferol and Labrador coast
Capt. Perceval	HMS <i>Tweed</i>	from Cape Ferol to Cape Race
Capt. Thompson	HMS <i>Lark</i>	from Cape Race to Quirpon
Capt. Sexton	HMS <i>Pearl</i>	from Cape Ray to Cape Race
Capt. Phillips	HMS <i>Spy</i>	from Cape Race to Bay Bulls

**Commissions of the Peace**

	Bonavista	William Keen
To the Northward	Trinity	John Harris; John Garret Blake
	Harbour Grace	Charles Garland
	St. John's	Michael Gill; Edward Langman
	Bay Bulls	Nath. Brooks
To the Southward	Ferryland	Peter Weston; Robert Carter
	Renews	Richard Ball
	Trepassey	William Jackson
	Placentia	Robert Edgecombe; Jonathan Haddock

Source: PANL, GN 2/1/A, vol. 3, pp. 222-23 (lists of commissions, 4 May & 19 June 1764).

## Warships and State Formation

Throughout this period the Royal Navy continued to expand its presence in Newfoundland. In 1770, Governor Byron approached Benjamin Lester about building two shallops for the navy at his Trinity shipyard. Lester did not tender a bid until the Admiralty raised its initial offer, but in 1771 and again in 1772 he signed contracts to build two vessels, between 25 and 30 tons, to be used for the annual surrogate cruises.<sup>88</sup> The number of warships stationed at Newfoundland reached nine in 1773, enabling the governor to enforce his authority throughout the island. The outbreak of the American Revolutionary War intensified this process. In 1778, local merchants requested protection against American privateers; promising to defray the costs of coastal defences, they successfully petitioned the government to station warships year-round.<sup>89</sup> Demands from the North American station temporarily drained the squadron – only three armed sloops were present in 1775-76 – but by 1777 the ships patrolling Newfoundland consisted of two 60-gun ships, plus seven frigates and armed sloops.<sup>90</sup> After the Americans captured the frigate HMS *Fox* off Newfoundland in June 1777, the Admiralty quickly dispatched a line-of-battle warship, HMS *Bienfaisant*, to bolster the island's squadron.<sup>91</sup>

The increase in military force was part of a larger policy of deterrence designed to contain American and French expansion. Despite the overall failure of British strategic planning during the American Revolutionary War, the deployment of naval forces largely succeeded in protecting the fishery.<sup>92</sup> The commitment to become more deeply involved in Newfoundland precipitated other initiatives, the most important of which was the surveys conducted by Captain James Cook in the 1760s. In 1766, Captain Cook published his first detailed surveys of the south and west coasts. Based on these charts, a new map of the entire island became available in 1775, giving naval officers a far more accurate knowledge of the navigable waters and thereby strengthening the entire surrogate system.<sup>93</sup> And, with several vessels stationed in Newfoundland

88 Lester Diary Mss., 6 November 1770; PRO, ADM 1/470, p. 87 (Byron to Stephens, 14 November 1771) & 145 (Shuldham to Stephens, 26 November 1772).

89 PANL, GN 2/1/A, vol. 7, pp. 92, 105, 120, 132, & 139.

90 Graham, *Empire of the North Atlantic*, 208; Olaf Janzen, "The Royal Navy and the Defence of Newfoundland during the American Revolution," *Acadiensis* 14/1 (Autumn 1984): 24-48.

91 David Syrett, *The Royal Navy in American Waters, 1775-1783* (Aldershot: Scolar Press, 1989), 72.

92 Stout, *The Royal Navy in America*, ch. 10; Nicholas Tracy, *Navies, Deterrence, and American Independence: Britain and Seapower in the 1760s and 1770s* (Vancouver: University of British Columbia Press, 1988), ch. 6.

93 On Captain Cook's surveys, see C. Grant Head, *Eighteenth Century Newfoundland: A Geographer's Perspective*, (Toronto: McClelland and Stewart, 1976), pp. 161-65 & 180-84; for a sample of Cook's cartography, see *The Oxford Illustrated History of the Royal Navy*, ed. J.R. Hill (Oxford: Oxford University Press, 1995), 193.

year-round, officers could now convene surrogate courts during the winter months. In January 1779, for example, Captain Thomas Durell sailed to Trinity to oversee a homicide investigation conducted by the local magistrates.<sup>94</sup> As a consequence of the naval build-up, the British government appointed the first civil secretary to assist the island's governor. In 1779 Aaron Graham, an English lawyer, arrived at St. John's to serve under Governor Richard Edwards.<sup>95</sup> To be sure, this nascent bureaucracy was very small compared to the large North American colonies, but it met the basic needs of propertied interests in Newfoundland. Although not as dramatic or far-reaching as Governor Rodney's reforms in 1749, the advent of the office of governor's secretary, which continued to be augmented by the commodore's clerk serving aboard his flagship, further entrenched the naval state.

**Table 2: Warships Stationed at Newfoundland, 1773**

Vessel	Naval Station
HMS <i>Panther</i>	St. John's Harbour
HMS <i>Alborough</i>	From Cape Bonavista to Cape Norman
HMS <i>Rose</i>	From Cape Race to Cape La Hune
HMS <i>Nautilus</i>	On the Grand Banks and along the coast from St. John's to Cape Race
HMS <i>Otter</i>	On the coast of Labrador and the northwest coast of Newfoundland
<i>Egmont</i> (Schooner)	From Cape La Hune to Cape Ray and northward to Point Riche
<i>Labrador</i> (Armed schooner)	From St. Lawrence harbour to Cape Ray
<i>Placentia</i> (Armed schooner)	From St. John's harbour to Cape Norman and on occasional services
<i>Grenville</i> (Armed brig)	Carrying on a survey of the coast from Point Lance to Cape Race

Source: PRO, ADM 1/470, p. 158 (Admiralty orders, 26 June 1773).

### The Apogee of the Naval State

Throughout this period, naval governors also significantly expanded the district system. Both the number and the range of judicial districts increased, in each of which justices of the peace were appointed. Naval surrogates conferred

94 At a court presided over by Durell, and attended by the district justices, depositions were taken from all of the available witnesses, including those who could speak only Irish, and the evidence formed the basis of the subsequent prosecution at the autumn Assizes. See Bannister, "Surgeons and Criminal Justice," 123-24.

95 Calvin Evans, "Aaron Graham," *DCB*, vol. 5, 361.

commissions of the peace in four new districts: Fogo Island (1776); Fortune Bay, on the western side of the Burin Peninsula (1784); Great St. Lawrence, on the eastern side of the Burin Peninsula (1787); and St. Mary's, on the Cape Shore of the Avalon Peninsula (1785).<sup>96</sup> By 1790, the areas under the jurisdiction of the naval state stretched from Cape Ray on the southwest corner of the island, to Fogo Island off the northeast coast. To meet its growing administrative responsibilities, the Admiralty requested that two additional armed sloops be commissioned to serve on the Newfoundland station. The commissioner of the Navy Board asked Benjamin Lester whether he could construct two sixth-rate vessels in Trinity. Lester made a successful bid to build two 40-ton sloops for £6 per ton, and the vessels were launched in 1790.<sup>97</sup> In 1793, the island's squadron included one 64-gun warship, three frigates, and five armed sloops. Over the next twenty years the number of warships fluctuated from a low of five in 1797 to a high of thirteen in 1805.<sup>98</sup> Although the squadron never became very large compared to others, such as the fleet stationed at the Leeward Islands, it was still large enough to dominate the waters around Newfoundland.

When placed in the broader context of colonial development, the naval state in Newfoundland appears as effective as most other local regimes in North America. The costs of operating a centralized penal system were prohibitive in the eighteenth century; the British government assumed added expenses only when forced to adopt reforms.<sup>99</sup> With an entire budget of less than £1,200, the island's government was not in a position to embark on large-scale projects.<sup>100</sup> Throughout colonial America and the early Republic, state authority was generally weak and institutional coercion relatively limited. Local law-enforcement and penal practices varied markedly from region to region; the administration of justice was often ineffective and arbitrary.<sup>101</sup> Royal authority

96 PANL, GN 2/1/A, vol. 6, p. 109 (Fogo Island), vol. 10, p. 28 (Fortune Bay), vol. 11, p. 201 (Great St. Lawrence), vol. 10, p. 215 (St. Mary's).

97 Lester Diary Mss., 30 April 1789; Derek Beamish, "Benjamin Lester," *DCB*, vol. 5, 491.

98 There were nine ships stationed in 1793, five in 1797, seven in 1799, thirteen in 1805, ten in 1808, and twelve in 1812. See Lavery, *Nelson's Navy*, 247-50.

99 Simon Devereaux, "Convicts and the State: The Administration of Criminal Justice in Great Britain During the Reign of George III" (PhD thesis, University of Toronto, 1997), ch. 4; C.A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London: Longman, 1989), 195 & 209.

100 The island's civil establishment totaled £1182 in 1788-89, nearly all of which was allocated for the salaries of the governor and four other local officials. See PANL, GN 2/1/A, vol. 11, p. 144.

101 Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," *American Journal of Legal History* 26 (1982): 293-325; Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *American Journal of Legal History* 26 (1982): 326-53; Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 47-51.

operated on the surface of American life, concealing the underlying array of decentralized institutions and localized authorities that comprised the governance of the colonies.<sup>102</sup> Most colonists had little meaningful contact with the apparatus of state authority, leaving many local communities virtually autonomous.<sup>103</sup> A by-product of the dearth of formal systems of social control was the evolution of locally oriented cultural rituals that replaced the criminal law as the principal forum for regulating community relations.<sup>104</sup> The inability of colonial states to enforce official authority beyond garrison towns and regional capitals was not restricted to the Thirteen Colonies.<sup>105</sup> Across British North America, official authority was often contested, superseded, or simply ignored. In addition to the fur trade territories, areas dominated by either staple industries or large-scale employment of wage labour witnessed systemic violence and outbreaks of unrest.<sup>106</sup> Episodes such as the Shiner's War in Upper Canada demonstrated the limits to authority. Even in relatively quiet rural townships, the local magistracy could have difficulty imposing the rule of law.<sup>107</sup> Authoritarian administrations dominated by the British military – most notably the government in Halifax – were the exception rather than the rule of the colonial experience.<sup>108</sup>

102 Alan Tully, "The Political Development of the Colonies after the Glorious Revolution," in *The Blackwell Encyclopedia of the American Revolution*, eds. J.P. Greene and J.R. Pole, (Oxford: Basil Blackwell, 1991), 28-38; Jack Greene, "The American Revolution," *American Historical Review* 105/1 (February 2000): 93-102.

103 Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1991), 109-24.

104 Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 3rd series, 47 (1990): 3-29.

105 On the debate over the thesis of garrison government in early America, see Stephen Saunders Webb, "Army and Empire: English garrison government in Britain and America, 1569-1763," *William and Mary Quarterly* 3rd series, 34 (1977): 1-31; Richard Johnson, "The Imperial Webb: The thesis of garrison government in early America considered," *William and Mary Quarterly* 3rd series, 43 (1986): 408-30.

106 Ruth Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s," *Labour/Le Travailleur* 7 (1981): 9-39; Michael Cross, "'The Laws Are like Cobwebs: Popular Resistance to Authority in Mid-Nineteenth Century British North America,'" in *Law in a Colonial Society: The Nova Scotia Experience*, eds. T.G. Barnes, et al. (Toronto: Carswell, 1984); Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Vancouver: University of British Columbia Press, 1994), ch. 1.

107 Susan Lewthwaite, "Violence, Law, and Community in Rural Upper Canada," in *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice*, eds. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto: The Osgoode Society, 1994), 353-86; Michael Cross, "The Shiners' War: Social Violence in the Ottawa Valley in the 1830s," *Canadian Historical Review* 54 (1973): 1-26.

108 Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815," *University of Toronto Law Journal* 42 (1992): 401-49; Barry Cahill, "The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution," *Acadiensis* 26/1 (Autumn 1996): 52-70.

### Evaluating the Surrogate Courts

The surrogate system was arguably the most practicable available framework in which to administer law in early Newfoundland. Even if the British government had been willing and able to construct roads as overland links to the outports, sailing ships would still be a far more efficient means of transport. Nearly every settlement sat immediately on the coast and the island's interior was largely unknown to Europeans. Excursions inland were usually made only to hunt, trap, or collect firewood. With favourable winds, a sloop could make the run from Trinity to St. John's harbour in less than two days; two hundred years later, to drive by automobile between the two communities was still a day-long journey. The problem was that weather conditions often forced delays and made many cruises quite hazardous; Justice Reeves saw this as a serious drawback to the surrogate system, though he viewed the surrogate courts as crucially important to the administration of justice in the outports.<sup>109</sup> Yet this was true for every fishing ship and applied to road travel as well. Surrogate cruises were generally restricted to the period from mid-summer to early autumn, but few ships sailed freely around the island until the ice had cleared in May and all maritime traffic slowed considerably when winter storms began hitting the coast in late November.<sup>110</sup> Regardless of imperial policy, naval officers would have been unable to sail on regular surrogate cruises for the better part of six months each year.

The annual courts held by the governor and the surrogates reflected the seasonal nature of the eighteenth-century fishery. As a proportion of the population, permanent settlers had steadily increased but were still dwarfed by the thousands who came over each year to work in the summer fishery. In 1763, for example, the population was calculated at 13,112 in the summer and 7,497 in the winter.<sup>111</sup> Justice was unquestionably needed year-round, which the civil magistrates provided, but it was particularly imperative when the population climaxed during the summer. At the height of the fishery from late June through August, servants could work as much as eighteen to twenty hours a day to take advantage of the run of fish. Effective courts were particularly needed from mid-August to late September, a period that witnessed four major events: breaking the price of fish in August, in which the governor consulted with the merchants to determine the rate for the season's catch; culling the fish locally to determine its market-grade; loading quintals of salted codfish, during which

109 PRO, Papers of the Board of Trade [BT] 1/8, pp. 61-62 (Report on the Judicature in Newfoundland, 5 December 1792).

110 On the island's environmental conditions, see Head, *Eighteenth Century Newfoundland*, chs. 4-5.

111 Shannon Ryan, *Newfoundland Consolidated Census Returns* (St. John's: Centre for Newfoundland Studies, Memorial University, 1992), 56.

disputes over ownership and thefts often occurred; and settling contracts, in particular servants' covenants, when quarrels over outstanding wages produced a flood of petitions and complaints.<sup>112</sup> The surrogate and governor's courts were convened purposely to coincide with the needs of the local economy. Not only did the governor's court arbitrate civil disputes each autumn, for example, but it also fined those who contravened the set price for provisions.<sup>113</sup> By the time the naval squadron was ready to set sail with the fishing fleet in the autumn, few serious cases remained to be heard.

The cost of the surrogate system was met entirely by the imperial government. No record exists of any naval officer ever receiving a special emolument or additional pay for working as a surrogate judge. The governor received a salary of £500 but did not accept any known payments for operating his court at St. John's. By contrast, other local officials – the prison keeper, constable, beadle, and clerk – charged at least one shilling each time their services were used.<sup>114</sup> The commissioners of Oyer and Terminer and the sheriff were each paid two guineas for every trial at the Assizes.<sup>115</sup> A New England physician visiting Newfoundland estimated the cost of prosecuting a typical case at the Court of Oyer and Terminer to be £20.<sup>116</sup> When civilians began to sit on the surrogate bench after 1791, Justice Reeves warned that acquiring a sufficient number of qualified men to serve as justices for reasonable pay represented the most pressing problem.<sup>117</sup> The use of warships provided a substitute for much of the machinery needed to operate a system of courts. Nearly every frigate had a clerk proficient in record keeping; many rated warships had a company of marines assigned to serve under the commodore; and some ships carried chaplains who were active in fishing communities.<sup>118</sup> Even the smallest schooners and armed sloops could serve as temporary prison facilities to confine offenders awaiting punishment or transport to the St. John's jail. Governor Thomas Cochrane claimed that after the abolition of the surrogate courts in 1824 and the intro-

112 Matthews, *Lectures on the History of Newfoundland*, ch. 9; Harold Innis, *The Cod Fisheries: The History of an International Economy* (2nd ed. Toronto: University of Toronto Press, 1954), 306; Shannon Ryan, *Fish Out of Water: The Newfoundland Saltfish Trade, 1814-1914* (St. John's: Breakwater Press, 1986), ch. 1.

113 In 1781, for example, Governor Edwards fined Luke Ryan £10 for selling beef for 3 pence more per pound than was legally allowed. See PANL, GN 2/1/A, vol. 9, p. 257. For other examples of the role of the courts in regulating prices, see GN 2/1/A, vol. 3, pp. 123-26; vol. 7, p. 131; vol. 8, p. 12; vol. 10, pp. 38-43.

114 PRO, Colonial Office Papers, series 194 [CO 194], vol. 9, p. 41 (list of court fees, 1731).

115 PANL, GN 2/1/A, vol. 9, p. 204 (list of court fees, 1780).

116 BL, Add. Mss. 15493, Sylvester Gardner, "Some facts collected, and observations made on the fisheries, and government of Newfoundland," (unpublished mss., 1784), f. 29. Gardner correctly noted the fees charged by the commissioners of Oyer and Terminer: his estimates on the costs of prosecution are therefore probably fairly accurate.

117 PRO, BT 1/8, pp. 82-83 (report on judicature of Newfoundland, 5 December 1792).

118 Rodger, *Wooden World*, 26, 40, 55, 66, 245 & 258.

duction of a system of civilian circuit courts, the cost to the British treasury began to decrease because it no longer had to pay for sending naval vessels on surrogate cruises.<sup>119</sup>

## Conclusion

The reliance on customary sources of authority in eighteenth-century Newfoundland did not mean that the island was somehow anomalous or inherently backward. The diverse colonies and territories which comprised the first British Empire never adhered to any uniform mode of development; the decentralized imperial system exerted a relatively low level of political control and legal coercion over local societies; and the constitutional doctrine of customary powers figured prominently throughout America. As Jack Greene has argued, it was precisely because local customs had become so deeply entrenched throughout colonial America that the administrative incursions of the British government in the 1760s met such fierce opposition.<sup>120</sup> Still, with no governor until 1729, no Assizes until 1750, and no local legislature until 1832, Newfoundland obviously did not follow the patterns that have long occupied legal historians of British colonies. This fact presents an exceptional opportunity to view the formation of a colonial state in a society where the typical forms of early-modern social control were absent. Eighteenth-century Newfoundland represents an instructive case study of how formal and informal sources of authority can coalesce to form an effective system of governance. It demonstrates the malleability of the common law tradition in the face of a social environment that demanded significant adaptation to local conditions.

The development of the naval state illustrates the need to widen the orthodox view of regulation to include custom as a potent legitimizing force. Statute law was never the dominant means through which state power was organized in early Newfoundland. Customary arrangements could function at least as effectively as the panoply of English law established in other colonies; the absence of the standard array of formal institutions did not necessarily produce an enfeebled state. Newfoundland was far from unique in this respect: all British colonies had informal networks that played key political roles, and the military often became involved in the administration of law in British territories.<sup>121</sup> What set the island

119 O'Flaherty, *Old Newfoundland*, p. 241, n. 232.

120 Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill: University of North Carolina Press, 1988), esp. 199-200. See also Doron Ben-Atar, "The American Revolution," in *The Oxford History of the British Empire, Volume V: Historiography*, ed. Robin Winks (Oxford: Oxford University Press, 1999), 94-112.

121 H.V. Bowen, *Elites, Enterprise and the Making of the British Overseas Empire, 1688-1775* (New York: St. Martin's Press, 1996); Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice since 1689, especially in North America* (Chicago: The University of Chicago Press, 1967).

apart was the fact that local customs substituted for the legal regimes entrenched elsewhere in written law. This is not to suggest that the naval state was socially just or even particularly fair; the inequities noted by Patrick O'Flaherty were indeed by-products of an absence of representative institutions.<sup>122</sup> It is, however, to argue that the exceptionalist model of early Newfoundland as politically backward cannot account for the development of local governance. The naval state had recognized and enforced boundaries; clear divisions existed between legitimate forms of authority that fell within the ambit of the state and extralegal actions prohibited by governors. Governors and surrogates encouraged private arbitration where possible and were careful not to upset existing structures of social power, but they never condoned whippings carried out summarily by masters against their servants. Exercising the basic function of a colonial state, the naval government maintained a monopoly over the official means to exercise legal violence.

Warships on the Newfoundland station provided the infrastructure, personnel, legitimacy, and material force needed to administer law and government. The colonial state and the Royal Navy were not one and the same thing; rather, Newfoundland had a co-operative system of civil and naval authority. The judicial regime relied heavily upon civil magistrates, particularly the commissioners of Oyer and Terminer and the justices of the peace, who presided over Assizes and petty sessions respectively. Magistrates and officers never became rivals for power. Justices of the peace performed a role similar to their counterparts in other British colonies, serving as the bulwark of government and the only legal authority after the naval vessels had completed their surrogate cruises. Individual initiative marked the administration of justice – some magistrates adhered to statutory law while others did not – but with few exceptions, they upheld the authority of the naval state. As distinct as early Newfoundland was, offenders brought before the courts encountered personnel and processes similar to those found throughout the British Empire. The most significant difference between magistrates in Newfoundland and those in other colonies was the fact that the island's justices could count on the regular presence of the Royal Navy to reinforce their authority. Arguably the most powerful military organization in the western world, the Royal Navy conferred unrivalled material and symbolic power. It also acted as a check on the magistracy, for governors did not hesitate to dismiss justices of the peace when faced with serious complaints of misconduct from the outport districts.

The case of Newfoundland points to the need for Canadian historians to rethink the chronology of politico-legal development as well as the model of state formation. As Allan Greer and Ian Radforth have noted, Canadian historians

<sup>122</sup> Patrick O'Flaherty, "Government in Newfoundland before 1832: The Context of Reform," *Newfoundland Quarterly* 84/2 (Fall 1988): 26-30.

have long been particularly interested in the mid-nineteenth century and the expansion of executive power in British North America.<sup>123</sup> The example of Newfoundland indicates that state formation in the eighteenth century cannot be relegated to merely an ancillary role in the broader narrative of Canadian political history. Governance prior to the rise of the industrial state involved much more than simply the local application of paternalist authority.<sup>124</sup> The naval state bore little relation to the civil regime that succeeded it – executive authority actually became considerably weaker after the grant of representative government – and eighteenth-century legal culture needs to be assessed on its own terms.<sup>125</sup> The emergence of the naval state offers a key to understanding the island's seemingly anomalous development: propertied interests and colonial authorities did not support the establishment of a legislative assembly in the eighteenth century because they did not need it.

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123 Greer and Radforth, "Introduction," in *Colonial Leviathan*, eds. Greer and Radforth 3-6.

124 On this model of paternalist authority, see Bryan D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (Toronto: McClelland & Stewart, 1992), ch. 1.

125 The problems encountered by the island's government are detailed in Gertrude Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto: University of Toronto Press, 1966).