

THE TRIALS OF ALLEGIANCE

Treason, Juries, and the American Revolution

CARLTON F.W. LARSON



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To my parents, Carl and Esther Larson

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The Trials of Allegiance

Introduction

WHEN DAWN BROKE on the morning of October 4, 1779, in the fifth year of the American War for Independence, James Wilson of Philadelphia was not expecting to face combat. If he had stood on ceremony, he could have called himself Colonel Wilson (he was formally a colonel in the Cumberland County militia), but his countrymen would probably have rolled their eyes. A scholarly, bespectacled lawyer with no obvious martial abilities, Wilson had yet to draw his sword in battle (Figure I.1).

But he had contributed notably to the cause of American independence with an even more powerful weapon—his pen. After emigrating from his native Scotland in his twenties, Wilson had become a leader of the Pennsylvania bar and the author of an influential pamphlet advocating the cause of the American colonies.¹ Elected as a delegate to the Second Continental Congress, Wilson had proudly signed the Declaration of Independence at the Pennsylvania State House, the building that future generations would enshrine as Independence Hall.

Wilson's conduct had thus made him one of the most prominent American traitors to Great Britain and a rich prize for any British military unit that managed to capture him. When Wilson heard the beat of the drums on October 4, 1779, he suspected that the armed men marching through the streets of Philadelphia might be on his trail. Hunkered down in his elegant brick mansion at the corner of Third and Walnut Streets, just a few blocks from where he had signed the Declaration of Independence, Wilson and a group of wealthy friends were prepared to resist, to the death if necessary.

Soon the armed men reached Wilson's house, and the battle, one of the war's rare instances of urban combat, erupted in full. The attackers began shooting at the windows of the house and attempting to force open the front door. From the second floor, Wilson and his friends returned fire. The battle might have continued much longer, but a Pennsylvania cavalry force arrived and quickly ended



FIGURE 1.1 Attorney James Wilson, one of only six men who signed both the Declaration of Independence and the United States Constitution.

Credit: Shutterstock.

the fighting. The battle of “Fort Wilson,” as it later came to be called, claimed at least six lives and injured many more. Wilson proved to be one of the lucky ones; he survived and later became a primary architect of the United States Constitution and one of President George Washington’s first appointees to the United States Supreme Court.

The armed and bitterly angry men attacking the house detested James Wilson for his political beliefs and for his actions at the Pennsylvania State House. But despite what one might expect, they were not British soldiers. Quite the opposite—the attackers were Wilson’s fellow Americans, Pennsylvania militiamen who were convinced that Wilson was insufficiently committed to the American cause. Wilson’s primary offense was the deployment of his legal talents in a cause that the militiamen found inexplicable—he had represented men accused of treason against the state of Pennsylvania for aiding the British army during the detested British occupation of Philadelphia. Just two days before the attack, in the grand courtroom at the State House, Wilson had won another acquittal for a man

accused of treason. But many of Wilson's fellow citizens were utterly perplexed. Why was a signer of the Declaration of Independence representing men accused of undermining the very Revolution to which he had pledged his life, his fortune, and his sacred honor? When the militiamen later sought to justify their conduct, they pointed to the "exceeding lenity which has been shown to persons notoriously disaffected to the Independence of the United States" as one of the reasons for the attack on Wilson's house.²

As the Fort Wilson incident vividly demonstrated, the American Revolution ripped the fabric of American society in half. Although sometimes portrayed as a genteel, intellectual rebellion, it was in fact a violent and bloody civil war, in which brothers fought against brothers and fathers fought against sons.³ An astute Frenchman living in America noted the changes with disbelief: "The rage of civil discord hath advanced among us with astonishing rapidity. Every opinion is changed, every prejudice subverted, every ancient principle annihilated, every mode of organization which linked us before as men and citizens is now altered."⁴ It was, in the words of a popular seventeenth-century song, a "world turned upside down."

The most serious—and frightening—implications of the new upside-down quality of American life related to the law of treason. When the troubles with England began, colonial Americans repeatedly denounced acts of Parliament, but stoutly insisted on their devotion to their English king. Betraying the king was not just a matter of political disloyalty—it was high treason, the most significant offense known to English law.

By the time the War for Independence erupted, the duty of allegiance had been fundamentally transformed. Loyalty to the king was no longer a duty, but a crime—high treason against the nascent American nation. As the British and American armies rampaged across the continent, the duty of allegiance imposed by law shifted with them. In Philadelphia, for example, this duty shifted from George III to the United States, then back to George III during the British occupation of Philadelphia, and finally back to the United States when the British army departed. As the late Robert Ferguson put it, "Nothing conveys the utter fluidity in Revolutionary American Culture more dramatically than the concept of treason."⁵

Although Benedict Arnold remains the Revolution's most famous traitor, the charge of treason could potentially be leveled against every American. Loyalty to the United States was treason against Great Britain, and loyalty to Great Britain was treason against the United States. Even those who tried to remain neutral were criticized on the ground that anyone who was not an active supporter was an enemy. The "Trials of Allegiance" referred to in this book's title are thus not

only court trials, but also the broader trials that the war and societal disruption posed to everyone living in British North America.

This book is an invitation to view the American Revolution from a new perspective—that of the law of treason. We have numerous accounts of the Revolution rooted in military, diplomatic, social, economic, political, and constitutional history. By contrast, the Revolution's interaction with the law of treason has remained largely unwritten. But in at least six key areas, treason played a fundamental role in the Revolution and in the lives of ordinary Americans.

First, in the years before the war broke out, American resistance leaders sought to justify the actions they were taking against British measures. These writers repeatedly distinguished legitimate resistance to tyranny, which was permissible, from outright treason, which was criminal. Although the arguments grew more and more distant from British law as the resistance activities increased, they provided much of the intellectual justification for the open defiance of British policies. Similarly, when British leaders threatened to try Americans for treason in England, American leaders responded with vigorous defenses of their right to a trial by a jury of their peers.

Second, although American resistance leaders insisted that they were innocent of treason, they did not hesitate to accuse others of the same offense. Prior to the Declaration of Independence, accusations of treason multiplied, generating rhetoric that was increasingly nationalistic in scope. Opponents of resistance activities were denounced as traitors against America and traitors against liberty. This rhetoric was soon converted into action and individuals accused of treason against America were tried before committees of safety and the military. These trials, scarcely noticed in much of the literature of the Revolution, demonstrated that American sovereignty was a functional reality well before independence was declared. As a practical matter, Americans no longer owed allegiance to the king of Great Britain, but to the individual colonies, to the nascent American state, or even to broad abstractions such as liberty itself.

Third, the Declaration of Independence was itself partially motivated by concerns over treason law. So long as the American colonies remained technically united with Great Britain, the adherents of the king could be indefinitely detained by extra-legal entities, but they could not formally be tried by a jury in a court of law or executed. The Declaration of Independence permitted the full force of the criminal law to be brought upon the Loyalists, and many proponents of the Declaration justified it for precisely that reason.

Fourth, the law of treason loomed large over the daily lives of ordinary people. Allegiances shifted with changes in military occupation, and that allegiance was now enforced through criminal penalties. Thousands of Americans played a role in the criminal justice system, whether as defendants, as witnesses, as bondsmen,

or as jurors. Through the jury system, ordinary Americans would be forced to confront the reality that other ordinary Americans may well have sided with the enemy. But the juries did something extraordinary—they consistently refused to send the defendants to the gallows. In case after case in Pennsylvania, the subject of this study, grand juries refused to indict and trial juries refused to convict. Even in the few cases in which they convicted, juries sought clemency for the defendant. The jury system would prove far more lenient to accused traitors than the two primary alternatives, military trials and trials by committees of safety.

Fifth, confiscation of Loyalists' property became a major issue during the Paris peace negotiations. Although the states contended that the confiscations were justified under state treason laws, British officials viewed them as illegal and sought compensation. Ultimately, the reintegration of former Loyalists into American society would produce heated denunciations, yet most Loyalists who returned found the path relatively smooth. Reconciliation, not vengeance, would be the order of the day.

Finally, the issue of treason became an early issue testing the strength of the new national government under the Constitution. Two rebellions in Pennsylvania, the Whiskey Rebellion and Fries's Rebellion, raised difficult questions about the application of English treason law in the new American republic. Should the law apply in the same manner, or had the Revolution limited its bounds, permitting even forceful resistance to particular laws, so long as the participants retained their underlying loyalty to the United States?

This book explores these issues in the course of answering a fundamental question: How did revolutionary Americans apply the law of treason, forged over many centuries in an island monarchy three thousand miles away, to instances of criminal disloyalty in their new republic? This question raises several subsidiary questions. How was the seeming tension between liberty and security resolved? To what extent did the law deviate from English patterns? To which legal entities was allegiance owed? How did patterns of prosecution change during the Revolution itself? And, perhaps most importantly, did institutions make a difference? What can one learn from the differing experiences of the military, committees of safety, and courts?

To be clear, my subject is not the general phenomenon of Loyalism or the motivations that drove people to one side or the other. It is not concerned with the details of treasonable plots or the frequency with which treasonable acts might have been committed. These topics, although fascinating, are beyond the scope of this work and have been well examined by other scholars.⁶ My purpose is different—to understand how the law of treason was understood and applied in the context of a convulsive, divisive civil war in which few people were free of the imprecation of treason.⁷ Many of the legal questions that American leaders

confronted during the war were not easy, and they continue to be debated even to this day—whether to suspend the writ of habeas corpus, whether to detain suspected traitors without trial, whether to exercise military jurisdiction over American civilians suspected of aiding the enemy, and whether to permit judicial review of executive detentions.

The book tells the story through the experience of Pennsylvania, as it was here that the issues raised by treason took on their greatest national significance. Pennsylvania was central to the Revolution from the very beginning. Its capital, Philadelphia, was the seat of the Continental Congress and the effective national capital, as well as America's largest city and busiest port.⁸ Philadelphia was the "political, economic, and cultural center of the colonies and the new nation."⁹ What happened there had nationwide implications. The cast of characters includes some of the most significant figures of the revolutionary era. A series of treason trials in Philadelphia, for example, were presided over by one signer of the Declaration of Independence, defended by two other signers, and involved participants who played a major role in the creation of the United States Constitution. In the early trials, both the presiding judge, Thomas McKean, and the principal prosecuting attorney, Joseph Reed, were simultaneously serving as members of the Continental Congress. Pennsylvania also generated the war's most intense controversy over treason trials, resulting in extensive newspaper discussions about the proper role of juries and, ultimately, in the violent confrontation and bloodshed of the Fort Mifflin incident.

One should not necessarily extrapolate the experience of Pennsylvania without qualification to the other American states. Although I have been researching this issue in Pennsylvania off and on for over twenty years, I have not devoted similar efforts to other jurisdictions, and therefore can offer only a limited comparative perspective.¹⁰ Certain factors rendered the Pennsylvania experience distinctive. The patterns of war were different from those in any other state. Although the British occupied New York from 1776 to 1783, they occupied Philadelphia for only nine months in 1778 and 1779. Pennsylvania escaped the early years of the war, which focused on New England, as well as the later years, which focused on the South. Moreover, the large population of Quakers, religiously opposed to bearing arms, presented peculiar problems that were less salient in other states. Pennsylvania's unusual and controversial 1776 constitution, with its unicameral legislature and plural executive, further rendered Pennsylvania distinctive among the states. Nonetheless, certain broad themes were consistent across jurisdictions, including the pre-Revolution debate about the nature of treason, the role of committees of safety, and the general question of the harshness to be meted out to Loyalists, even though the details may have differed from state to state.

The subsidiary theme of this book is the role of juries. The colonists' insistence on their right to a jury of their peers was a primary grievance in the years prior to the outbreak of the war. Yet when the fighting started, and internal enemies needed to be detected and subdued, colonial Americans did not resort to juries. Instead, investigatory and detention powers rested in committees of safety or the military, both of which acted without juries, a pattern that continued after independence. When jury trial was finally operational for treason trials, Pennsylvania juries proved exceptionally lenient and this leniency persisted through the rebellions of the 1790s.

The subject of jury service in eighteenth-century America has not been well explored by scholars. In 1975, historians Harold Hyman and Catherine Tarrant lamented the "very thin body of American legal history concerning juries," and argued that "[f]ew areas of legal history need attention more."¹¹ In 1984, John Murrin observed that the history of the American jury "has almost completely eluded sustained scholarly attention."¹² Jury trials have received some attention in the intervening years, but it is safe to say that we still know very little about how criminal juries actually functioned in late eighteenth-century America.¹³ It has been relatively straightforward to document what learned contemporaries *said* about juries, but it is much harder to determine what juries actually *did*. This lack of information is regrettable, because as historian J.R. Pole pointed out in 1993, trial by jury "is of the highest importance for understanding the character of American history in its colonial period and beyond."¹⁴

Chapters 6 and 7, the heart of this book, consider twenty-three jury trials prosecuted in Philadelphia in the fall of 1778 and the spring of 1779. These trials were aggressively prosecuted by the state in an atmosphere of widespread popular hostility to opponents of the American Revolution. The juries, however, convicted only four of these men, a low conviction rate even in an age of widespread jury lenity; moreover, in three of these four cases, the juries petitioned Pennsylvania's executive authority for clemency. What explains this lenity?

To answer this question we need to know more about the jurors themselves. Although the jury is often described as a black box, it can be illuminated, even after the passage of several hundred years. This book provides the most thorough analysis yet undertaken of a group of eighteenth-century American jurors. On the basis of extensive research in demographic records, I have reconstructed the Philadelphia jury box and identified not only the social status of the jurors, but also the intricate network of connections linking the grand jurors, the trial jurors, and the defendants. This study reveals, for the first time, how eighteenth-century American defense counsel creatively used peremptory challenges, deployed on the bases of religion, age, ethnicity, wealth, occupation, and political beliefs, to create juries more favorable to the defense. Jurors were also heavily influenced by

the death penalty, effectively nullifying Pennsylvania's treason laws rather than risk exposing accused persons to the hangman's noose.

But the jury verdicts did not go unchallenged. Significant popular opposition to the jurors' decisions led in 1779 to widespread condemnation in newspapers, to direct interference with a jury trial, and eventually to the armed attack on James Wilson's house. After Fort Wilson, attacks on juries diminished dramatically, and the jury recaptured its central role as a bulwark of popular liberty.

Recovering the world of treason and the American Revolution requires immersion in a much broader array of sources than the few accounts of American treason law have traditionally employed. Prior work has tended to emphasize statutes and the tiny handful of reported cases. Statutes are an important part of the story, but as legal historian Bruce Mann has emphasized, "The best evidence for the presence or absence of legal change lies not in what people said but in what they did. For that, one must consult court records in tedious, preferably quantitative, detail."¹⁵ The court records of Pennsylvania are not located in one place, and I have had to piece together information on court proceedings from a variety of archival and other sources. This material is presented in quantitative, although I hope not especially tedious, detail.

Many years ago, James Willard Hurst argued that

even a brief canvass of the variety of historical sources of potential help in explaining the policy background of the Constitution's treason clause suggests the complex wealth of material which such an approach may add to the case-trained lawyer's familiar tools of decision and opinion. But, likewise, it suggests that since the historical approach seeks nothing less than to comprehend the whole pattern of causes which shape a given policy, it requires of the advocate an imaginative readiness to forego the abstract logic of doctrine for the living logic of events.¹⁶

To fulfill Hurst's vision, I have also examined what Steven Wilf calls "extraofficial legal actions—what might be called law out-of-doors, vernacular legal storytelling, the bric-a-brac of criminal trials, and, above all, the explosion of law talk with a volatile mix of law and politics."¹⁷ These materials are supplemented with newspaper sources, pamphlets, and manuscript collections of letters and diaries, all of which provide a rich description of law on the ground, as it actually played out in the lives of ordinary and not-so-ordinary Pennsylvanians.

For the convenience of other researchers, I have cited published versions of eighteenth-century sources when possible, although in many cases I have examined the originals myself. Obviously, some editions are more reliable than others, and there are particular problems with the *Colonial Records* and

Pennsylvania Archives series, including the bowdlerization typical of nineteenth-century editors.¹⁸

In some cases, I have modernized punctuation and capitalization for the ease of the reader, although I have tried to do so with a light touch. I have tried to retain the terminology of the eighteenth-century sources as much as possible, although this task presents occasional difficulties. There is no perfect term for the opponents of the Revolution. They were described as “Tories” by the Revolution’s supporters, but this wasn’t a term they embraced themselves. The term “Loyalist” wasn’t coined until later in the conflict. Some historians have used the term “disaffected” to describe persons alienated from the revolutionary governments for a wide variety of reasons, many of which had nothing to do with loyalty to Great Britain, but this doesn’t always capture the spirit of the contemporary sources.¹⁹ I have tried to use terms that are appropriate in context, but there is no perfect solution to this problem.

Another troublesome term is “prisoner.” In the late eighteenth century, before the introduction of the modern American prison, the term was used to describe any person held in captivity, including persons awaiting trial. Modern usage tends to define “prisoner” as a person sentenced to a term of imprisonment in prison after a trial. Using “prisoner” in its eighteenth-century sense is therefore more likely to be confusing than helpful to a modern reader. Accordingly, I use the admittedly anachronistic term “detainee” to describe persons who have been detained, but not formally sentenced in a court of law. Although the term was not used in the eighteenth century in this context, I can think of no other way of precisely describing the legal situation of these individuals to a modern reader.

A brief overview by way of orientation: Chapter 1 explores the background of treason in colonial Pennsylvania, including the adoption of British treason law and the legal complexities that led to a general failure of the state to prosecute individuals for treason. Chapter 2 turns to the bitter debates between 1765 and 1775, when Americans defended themselves against charges of treason, while simultaneously hurling the same charge at British officials, and even at the king himself. Chapter 3 addresses the period between the outbreak of the war and the adoption of the Declaration of Independence, focusing primarily on the treason trials conducted by committees of safety. The tumultuous period between formal independence and the reopening of the courts is the subject of Chapter 4, including the controversial suspension of habeas corpus in the wake of the British invasion. The difficulties of reopening the courts, the issuance of attainder proclamations, and the wave of cases generated by the British invasion are considered in Chapter 5. Chapters 6 and 7 provide an extensive analysis of the Philadelphia treason trials of 1778 and 1779, the most significant treason trials of the American Revolution. Chapter 8 evaluates the aftermath of the trials,

including the turbulent year of 1779, the repercussions of Benedict Arnold's treason in 1780, and disputes over the scope of executive detention powers. Chapter 9 deals with the aftermath of the war, the adoption of the Treason Clause of the United States Constitution, and the first federal treason trials, those arising out of the Whiskey Rebellion of 1794 and Fries's Rebellion of 1799.

Treason in Colonial Pennsylvania

ON OCTOBER 22, 1682, the English ship *Welcome* sailed up the Delaware River, after a horrific fifty-three-day trans-Atlantic voyage in which nearly a third of the ship's passengers died from an outbreak of smallpox. The weary survivors who straggled onto the shore included a group of Quakers and their formidable leader William Penn, to whom King Charles II had granted vast land holdings in the new colony of Pennsylvania. The *Welcome* was packed to the brim with supplies for life in the New World, including nails, window glass, horse collars, saddles, candles, shoes, and glue.¹ But the ship also carried baggage of a more metaphorical sort: a long, complicated relationship with English criminal procedure.

As a persecuted minority in England, the Quakers had repeatedly found themselves on the wrong side of English law. In numerous cases, English judges had browbeaten juries, which were often sympathetic to Quaker defendants. William Penn himself had been prosecuted for his religious publications and preaching, and one of his cases led to a significant precedent on the scope of jury independence (Figure 1.1). When the presiding judge sought to punish the jurors for acquitting Penn on a charge of unlawful preaching, the Court of Common Pleas ruled in *Bushel's Case* in 1670 that judges could not punish jurors for verdicts with which the judges disagreed.² Transplanted to the New World, Penn now found himself exercising the same governmental authority his fellow Quakers had so stoutly resisted in England. His new colony of Pennsylvania would need to fulfill the basic function of protecting itself and its residents from external and internal threats, while at the same time recognizing the role of jury trials in protecting persons accused of dissenting views.³

Within the criminal law, the law of treason was a key tool for addressing basic security threats. Yet in Pennsylvania's earliest years, it was unclear whether there was any applicable treason law at all. The 1681 charter granted to William Penn provided that certain English laws, including the law of "felonies," would be in

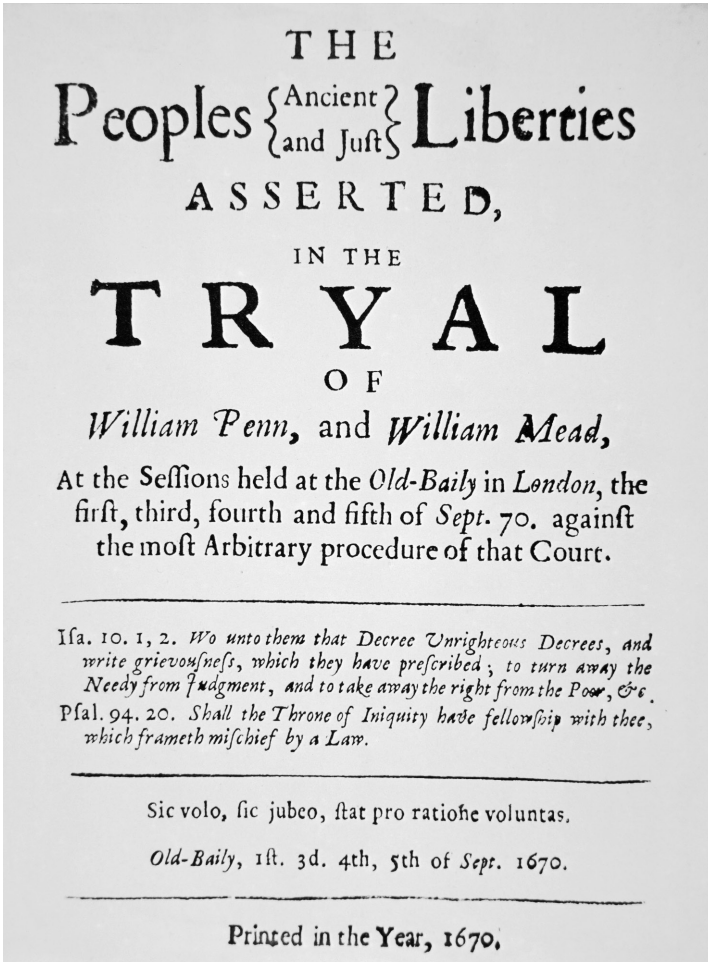


FIGURE 1.1 William Penn's legal struggles helped vindicate the rights of jurors.

Credit: Document describing the trial of William Penn in London for preaching the Quaker religion, 1670 (print), English School (17th century)/Private Collection/Peter Newark American Pictures/Bridgeman Images.

effect until altered by Penn and the freemen of the province. Although this provision might be read to include treason, seventeenth-century usage routinely distinguished “felonies” from “treason.” Another provision of the charter granted Penn the power to grant pardons for “all crimes and offences. . . . Treason and willful and malicious murder only excepted,” language that implies that treason prosecutions were at least theoretically possible. Moreover, various early judiciary statutes explicitly reserved prosecutions for treason to the colony’s highest court.⁴

Although Pennsylvania's colonial assembly passed legislation identifying numerous offenses as crimes, it never enacted a treason law. It came very close in 1684, with a statute that prohibited compassing the death of the proprietor and the governor, levying hostility against them, or moving with force to invade the province.⁵ The statute did not formally use the term "treason," but much of its language came directly from English treason law. This statute, however, was abrogated in 1693. A similar statute enacted in 1700 was rejected by British officials several years later, a fate that also befell a companion statute that prohibited speaking and writing that tended "to sedition or disaffection to this government."⁶

The question of whether English parliamentary criminal statutes, the primary source of English treason law, directly applied in the colonies was fiercely contested.⁷ Arguably, treason could be prosecuted under England's unwritten common law, but such prosecutions had been effectively prohibited since the mid-fourteenth century, and Governor William Penn had little enthusiasm for recognizing common-law crimes.⁸ In 1685, David Lewis was arrested "upon suspicion of treason" in one of the counties that later became part of Delaware for allegedly declaring his involvement with the Duke of Monmouth's Rebellion in England. However, no trial appears to have occurred.⁹ The legal authority to try cases of treason in the early decades of the Pennsylvania colony was therefore highly uncertain.

The Adoption of English Treason Law

In 1718, the Pennsylvania Assembly enacted a comprehensive criminal statute that put any such doubts to rest. The colony's full-throated embrace of English law is apparent in the statute's opening lines:

And whereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts.

The statute then provided the following:

[A]ll inquests and trials of high treason shall be according to the due order and course of the common law, observing the directions of the statute laws of Great Britain, relating to the trials, proceedings, and judgments in such cases.¹⁰

With this statute, English treason law became fully applicable in Pennsylvania. By 1718, this law was reasonably well developed, explicated by numerous commentators and reports of notable treason cases.

The foundation of English treason law was a centuries-old statute that most Pennsylvanians probably could not even read. The Statute of Treasons of 1351 (25 Edward III), written in Law French (the language of Norman governance), limited the crime of treason to seven basic categories. Roughly translated, they are (1) compassing or imagining the death of the king, the queen, or their eldest son and heir; (2) violating the wife of the king, the king's eldest unmarried daughter, or the wife of the king's eldest son; (3) levying war against the king in his realm; (4) adhering to the king's enemies in his realm, giving them aid and comfort in the realm, or elsewhere; (5) counterfeiting; (6) killing the chancellor, the treasurer, or the king's justices; and (7) the murder of a master by a servant, a husband by a wife, or a prelate by a cleric. The last category would come to be called "petty treason" to distinguish it from the other categories, which constituted "high treason." The statute further provided that "if any other case, supposed treason, which is not above specified, doth happen before any justices," the case should be delayed until the king and Parliament could declare whether the offense constituted treason. This provision would be later used to justify parliamentary acts of attainder (which declared persons guilty of treason without a trial), as well as additional statutes expanding the crime of treason.¹¹

Although English lawyers occasionally argued that the Statute of Treasons did not entirely supplant the common law of treason, the more typical professional view was that treason offenses must meet the statutory definition. Indeed, limiting the offenses that constituted treason was one of primary purposes of the statute. In the early seventeenth century, Sir Edward Coke wrote that the Parliament that enacted the statute "was called *Benedictum Parliamentum*, as it well deserved." As Coke explained, "For except it be *Magna Charta*, no other Act of Parliament hath had more honor given unto it by the King, Lords Spiritual and Temporal and the Commons of the Realm . . . , then this Act concerning treason hath had."¹² During the Tudor, Stuart, and Commonwealth periods, a number of additional treason statutes were passed, many of which were aimed at disloyal forms of speech.¹³ By 1718, however, these statutes were no longer in effect, and treason indictments were required to be based on the statute of 25 Edward III.

Under this statute, the primary focus of treason law was the betrayal of the king. Yet by 1718, a strand of legal thinking had developed that viewed treason not as a betrayal of personal loyalty to a monarch, but as an offense against an impersonal state.¹⁴ As early as 1607, an English civil lawyer defined treason as "an offense committed against the amplitude and majesty of the commonwealth."¹⁵ This view culminated in the most spectacular trial in English history, when King

Charles I was tried and convicted of high treason. In January 1649, the House of Commons declared that by the “fundamental laws of this kingdom, it is treason in the King of England, for the time being, to levy war against the Parliament and Kingdom of England.”¹⁶ The Kingdom of England was thus completely abstracted from the person of the king.¹⁷ From this perspective, treason was not limited to monarchical governments and could be readily adapted to republican regimes. When Charles II was restored to the throne, however, the regicides themselves were prosecuted as traitors for having compassed the death of the king.¹⁸

The offense of levying war against the king was explicitly limited to offenses within the king’s realm, and the offense of adhering to the king’s enemies was somewhat awkwardly expressed, leaving some doubt as to whether adherence outside the realm could be prosecuted. In 1544, near the end of Henry VIII’s reign, Parliament enacted a statute designed to address “doubts and questions” about treasons committed outside the realm of England. The statute provided that all treasons committed outside the realm could be tried in the Court of King’s Bench, before a Westminster jury. Alternatively, the king could appoint special commissioners in any English county, who would hear the case with a jury drawn from that county. In some ways, the statute was beneficial to the accused. If the offense happened in France, or some other country where English law could not impose a local jury, the accused traitor at least received an English jury trial, as opposed to a summary or military proceeding. Prior to 1718, this statute might readily have been used to try treasons committed in America in England. But Pennsylvania’s adoption of English treason law complicated matters. Under one view, the statute’s explicit adoption of English treason law included the Henrician statute about offenses committed outside the realm. A suspected traitor could be tried either in Pennsylvania, before a local jury, or could be sent to England for trial there. Alternatively, the adoption of English treason law in Pennsylvania obviated the need for removal to England, because a local jury could always be obtained in Pennsylvania, and the subject’s right to a jury trial guaranteed. It appears that no one in 1718 gave this matter any particular degree of thought, thus leaving unanswered a question that would become highly critical in the years prior to American independence.

By 1718, the consensus of professional opinion was that words alone could not constitute treason, although there was debate over the precise scope of this doctrine. The core principle dated back to *Pine’s Case* of 1627, in which the twelve common-law judges concluded that treason required proof of some overt act. Speaking in derogation of the monarch was not in itself treason; words could be used only as evidence of “the corrupt heart of him that spake them” with respect to some other overt act.¹⁹ Subsequent treatise writers, such as William Hawkins, Michael Foster, and William Blackstone, echoed this point.²⁰

The offense of treason was not limited to the king's subjects. A treason prosecution required a breach of allegiance, but, in certain circumstances, aliens owed allegiance to the British crown.²¹ Aliens lawfully present within the king's realms owed him what was termed "temporary", or "local", obedience. A breach of this obedience subjected the alien to culpability for treason. This aspect of treason law is regularly misunderstood, but the English sources are clear. As Sir Edward Coke put it, "all Aliens that are within the Realm of England, and whose Sovereigns are in amity with the King of England, are within the protection of the King, and do owe a local obedience to the King . . . and if they commit High Treason against the King, they shall be punished as Traitors."²² Writing in the early eighteenth century, William Hawkins contended in his *Treatise of the Pleas of the Crown*, "Also it seems clear, that the subject of a foreign prince coming into England and living under the protection of our King, may, in respect of that local allegiance which they owe to him, be guilty of high treason." By contrast, when "aliens" invaded the kingdom in a "hostile manner," they "cannot be punished as traitors, but shall be dealt with by martial law."²³ English law thus made a sharp distinction, rooted in allegiance, between persons subject to the criminal law of treason and persons subject to military authority. This distinction was repeatedly recognized in American law until World War II.²⁴

After a series of notoriously biased treason trials under Stuart judges, Parliament passed the Treason Trials Act of 1696, which provided significant new procedural protections to persons accused of treason. Under English felony procedure, the accused was denied both the assistance of counsel at trial and compulsory process for securing witnesses, and defense witnesses were not sworn. The Treason Trials Act permitted the assistance of defense counsel both in pretrial proceedings and at the trial itself, and granted compulsory process for defense witnesses, who were now allowed to be sworn. The act also required that the accused receive a copy of the indictment at least five days before trial and a list of the jury panel at least two days before trial. The act did not extend these new protections beyond cases of treason, but it increased procedural fairness in precisely those trials that had been viewed as most heavily weighted against the accused.²⁵

Pennsylvania's 1718 legislation adopting English treason law explicitly extended many of these protections to all persons accused of capital crimes. Under the Pennsylvania statute, all capital defendants could have the assistance of "learned counsel," compulsory process, and the privilege of sworn defense witnesses.²⁶ These innovations dated back to William Penn's Charter of Privileges of 1701, which stated that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors."²⁷

The punishment for treason was the most horrific that English law had ever devised. As Blackstone described it:

1. That the offender be drawn to the gallows, and not be carried or walk . . .
2. That he be hanged by the neck, and then cut down alive.
3. That his entrails be taken out, and burned, while he is yet alive.
4. That his head be cut off.
5. That his body be divided into four parts.
6. That his head and his quarters be at the king's disposal.²⁸

Formally, this punishment was fully applicable in British America. But who would perform it? As John Bellamy has noted, even Tudor England “was not well provided with proficient executioners.” Hanging a man was relatively straightforward, “but the more demanding arts of decollation and disemboweling, which were peculiar to the crime of treason, were rarely practiced with great competence.”²⁹ A death sentence for high treason in colonial America would have most likely placed the convict in the hands of a complete novice, greatly increasing the likelihood of a bungled execution even more hideous than the one contemplated by law.

Although colonial courts occasionally ordered this grisly punishment, it was never actually carried out. In 1691, Jacob Leisler and his associates were sentenced to death for high treason in New York. Although the presiding judge ordered the traditional English punishment, Leisler and his son-in-law were hanged and then beheaded, without the intervention of disembowelment.³⁰ In 1766, a New Yorker convicted of high treason was given the traditional sentence, but he was subsequently pardoned.³¹ Similarly, in 1771, several men were convicted of high treason in North Carolina for their role in the Regulators' Rebellion. The presiding judge's imposition of the English sentence was so noteworthy that newspapers throughout the colonies reported it verbatim.³² The defendants, however, were simply hanged.³³

Lawyers in colonial Pennsylvania had ready access to the main sources of English treason law. When the colony adopted the English statutory law, Edward Coke's *Institutes* were widely available. Subsequent decades saw the publication of major works by Matthew Hale, William Hawkins, Michael Foster, and William Blackstone, all of which carefully analyzed English treason law. These treatises were supplemented by a wide variety of statutory compilations and case reports.³⁴ Major Jacobite rebellions in England in 1715 and 1745 had made treason a subject of considerable interest and had produced a number of reported decisions.³⁵ Aspiring colonial attorneys used all of these sources to transcribe and annotate English treason law in their commonplace books.³⁶

Pennsylvania's Earliest Treason Cases

Pennsylvania's first treason case was heard in 1720, just two years after the formal adoption of English law. Edward Hunt was convicted of high treason for counterfeiting Spanish silver coins.³⁷ The prosecution seems not to have rested on the statute of 25 Edward III, which prohibited counterfeiting only English currency. Under a statute of Queen Mary, however, Parliament had declared it high treason to counterfeit foreign coins in current use in the realm. Since Parliament had recognized Spanish coinage as legal tender in the American colonies, Spanish coin was thus protected from counterfeiting under the later statute of Mary.³⁸ Hunt himself nonetheless complained bitterly that he "was judged and condemned to die for the breach of a law of man that was not duly published, which for that reason I transgressed it ignorantly."³⁹

Hunt's plight triggered some sympathy with members of Pennsylvania's Provincial Council, several of whom felt that since this was the first offense of that nature in the colony, "it therefore seemed to claim some compassion." Other members acidly pointed out the "very little or no service at all that a reprieve to so miserable a life could be to him." The Council was equally divided and left Hunt's fate in the hands of the governor, who allowed the execution to proceed.⁴⁰ Hunt's only bit of good fortune was that English law had traditionally imposed hanging as the punishment for counterfeiting, rather than the more elaborate procedure of decollation and disembowelment.⁴¹

Pennsylvania convicted and executed several other individuals for counterfeiting in the early 1770s, but none seem to have been specifically charged with high treason.⁴² By this point, the colony had adopted more specific anti-counterfeiting legislation, and the offenders were most likely prosecuted under these statutes, rather than as traitors under 25 Edward III.⁴³ In 1793, Justice William Bradford of the Pennsylvania Supreme Court noted that "the monstrous folly of considering [counterfeiting] as an usurpation of sovereignty, and, therefore as a species of high treason, is past; and it may now be safely ranked with other base frauds against individuals."⁴⁴

In 1731, Catherine Bevan was convicted of petty treason in one of the Delaware counties for murdering her husband, with the assistance of a servant. Under 25 Edward III, petty treason was defined as the murder of a husband by a wife, or the murder of a master by a servant. Men convicted of this crime were drawn and hanged; women were drawn and burnt. Benjamin Franklin's *Pennsylvania Gazette* described Bevan's execution: "[The rope] was designed to strangle her dead before the Fire should touch her; but its first breaking out was in a stream which pointed directly upon the Rope that went round her Neck, and burnt it off instantly, so that she fell into the Flames, and was seen to struggle."⁴⁵

The Outbreak of War

High treason, of course, is a crime most associated with war and rebellion. The relative tranquility of Pennsylvania's first fifty years was finally shattered with the outbreak of the Seven Years' War and the subsequent conflict known as Pontiac's Rebellion. For the first time, Pennsylvania's leaders had to confront difficult issues of war and peace and address potentially treasonous behavior.⁴⁶

The troubles, and eventually the Seven Years' War itself, began in the Pennsylvania backcountry, where colonial troops under George Washington came into conflict with French forces in 1754. The Delaware and Shawnee tribes soon sided with the French and unleashed a series of devastating attacks on the Pennsylvania frontier.⁴⁷ In response, Pennsylvania, for the first time in its history, declared war. On April 14, 1756, Lieutenant Governor Robert Hunter Morris declared that the Delaware Indians were "enemies, rebels, and traitors to His Most Sacred Majesty." By attacking Pennsylvanians, these Indians had acted "contrary to their most solemn treaties." Accordingly, Pennsylvanians were invited to "embrace all opportunities of pursuing, taking, killing, and destroying the said Delaware Indians."⁴⁸ As an incentive, the colony offered bounties for Delaware scalps, a controversial and relatively ineffective policy.⁴⁹ Pennsylvania's declaration of war against the Indians preceded the larger imperial war with France. Great Britain did not declare war against France until May 17, 1756, and it took several months for news of this declaration to reach Pennsylvania.⁵⁰

Despite the official declaration of the Delaware Indians as traitors, no Indian was ever tried for treason in a Pennsylvania courtroom. Such a prosecution would have raised legal issues of considerable complexity. Most fundamentally, did the Indians owe allegiance to either the British king or to the government of Pennsylvania, the breach of which could constitute treason?⁵¹ In William Penn's 1701 treaty with various Pennsylvania tribes, the Indians had acknowledged "the authority of the Crown of England and Government of this Province."⁵² Moreover, under the treaty, Penn's government provided protection and friendship to the Indian tribes.⁵³ Arguably, this provision was sufficient to bring the Indians within the compass of English and provincial treason law. Since the Indians received the protection of the crown of Great Britain, they owed a corresponding duty of allegiance. There was even a possible precedent. In 1676, in the aftermath of King Philip's War, the colony of Rhode Island had tried various Indians before a court-martial on the charge of "disloyalty to his majesty" by "trayterously" and "rebelliously" murdering his majesty's inhabitants.⁵⁴

But the matter was far from straightforward. The Rhode Island prosecutions were not technically for treason. Treason was not cognizable before a court-martial and the punishment imposed, death by firing squad, was not an accepted

punishment for treason.⁵⁵ Indeed, British officials in the mid-1760s were concerned about the legal implications of recognizing the Indians as subjects of the British crown. As Sir William Johnson pointed out, if Indians were British subjects, they might be “liable to the punishments for high treason,” an “impossible” outcome, in Johnson’s view.⁵⁶ Moreover, viewing the Indians as subjects would have been inconsistent with the practice of making treaties with them, since treaties are agreements between governments, not between a sovereign and his subjects. No precedent supported treating a breach of a treaty as a form of treason against the other contracting party. The scalp bounty itself illustrates the distinctive status of the Indians. Pennsylvania officials would never have considered such a bounty to contain a rebellion of white subjects. Even after American independence, members of Indian tribes were not treated as citizens, but as members of domestic dependent nations capable of entering into government-to-government relations with the United States. Despite numerous military conflicts, no nineteenth-century American Indian was ever tried for the crime of levying war against the United States.⁵⁷ Pennsylvania’s declaration notwithstanding, it is hardly surprising that no eighteenth-century Indian was tried for treason, either.

The Seven Years’ War eventually concluded with these questions entirely avoided. No individual, either European or Indian, was prosecuted by Pennsylvania for treason.⁵⁸ The only evidence hinting at treason prosecutions is a November 1756 report from the colony’s chief justice to the Provincial Council on evidence “given against some Roman Catholicks of this City, for disaffected and Treasonable.”⁵⁹ The surviving records break off at this point, and although the Council may have issued arrest warrants in response, no actual trials appear to have ensued.⁶⁰

An important consequence of the war was the early resignation of a number of Quaker members of the Pennsylvania Assembly, who concluded that enacting defense legislation was inconsistent with the Quaker peace testimony. As historian Jack Marietta has pointed out, “Perhaps nothing in the lives of this generation of [Quakers] staggered them as much” as the proclamations against the Delaware Indians.⁶¹ Foreshadowing many of the problems that Quakers would experience during the Revolution, the Quaker withdrawal from politics ensured that future Pennsylvania governments would be unencumbered by doubts about the propriety of military action.⁶²

Pennsylvania’s problems with internal violence, however, were just beginning. Soon a bloody epilogue to the Seven Years’ War would bring Pennsylvania to the brink of serious rebellion, and expose deep fissures between the colony’s Quakers and Presbyterians and between western settlers and residents of the more developed eastern counties.

In 1763, Pontiac's Rebellion, as it came to be called, erupted with a series of Indian attacks throughout the American Northwest, including numerous frontier areas of Pennsylvania. Western settlers, concerned that the government in Philadelphia was insufficiently attentive to frontier security, aimed to take matters into their own hands. The most controversial incident was the attack of the so-called Paxton Boys on a peaceful Indian village on December 14, 1763. A group of men marched forty-five miles from the small community of Paxton on the Susquehanna River to the Indian village of Conestoga Indiantown, where they brutally murdered six Indians. Colonial officials quickly moved the surviving fourteen Conestoga Indians to presumed safety in Lancaster. But the Paxton Boys struck again, marching to Lancaster on December 27, 1763 and killing the remaining Indians.⁶³

These savage attacks on seemingly peaceful Indians were intensely controversial, and were especially unpopular in Pennsylvania's eastern counties, which were heavily populated by Quakers. The Paxton Boys were denounced as murderers who must be brought to justice. Word quickly spread that the Paxton Boys were not finished with their attacks; the next victims would be a group of Moravian Indians living at Province Island, near Philadelphia. Lieutenant Governor John Penn issued a proclamation denouncing the "riotous and tumultuous" behavior of the Paxton Boys and offering rewards for their apprehension.⁶⁴

As hundreds of Paxton Boys began marching toward Philadelphia, the Assembly passed a "Riot Act." Modeled on an English statute enacted in 1714 at the beginning of George I's reign, Pennsylvania's new Riot Act authorized colonial and local officials to order the dispersal of any group of twelve or more people "unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace." Any person who failed to disperse within one hour would be subject to capital punishment if convicted of the offense. The act also authorized the use of force against any persons who failed to disperse. The Assembly viewed the act as a temporary measure to deal with the Paxton crises; by its own terms the act expired one year after publication.⁶⁵

The march of the Paxton Boys filled Philadelphia with alarm. A volunteer militia was quickly formed, headed by Benjamin Franklin, to defend the city. When the Paxton Boys finally arrived, crossing a bridge that had erroneously been left unguarded, the potential for violence was high. But calmer heads eventually prevailed. A delegation of leading colonial officials, under the leadership of Benjamin Franklin, met with the Paxton Boys, and after extensive negotiations, the marchers agreed to disperse and to submit their grievances in writing.⁶⁶

By engaging in an armed march on their provincial capital, the Paxton Boys came very close to outright rebellion and treason. Could Pennsylvania officials have launched a treason prosecution? Technically, such a prosecution might have

been viable. The offense of levying war against the king had been defined under English law to include “insurrections . . . for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the king.”⁶⁷ An armed insurrection to attack Indians living under the protection of the Pennsylvania government could easily fall within this broad definition of levying war. Critics of the Paxton Boys hinted at this idea by frequently using the language of treason and rebellion to denounce their conduct. The march on Philadelphia was described as “downright rebellion,”⁶⁸ the “late insurrection,”⁶⁹ the “late rebellion,”⁷⁰ and “treasonable conduct,”⁷¹ and the Paxton Boys themselves were denounced as “insurgents.”⁷² Quaker pamphleteers prided themselves on not “promoting or countenancing any plots or insurrections against the government” and on abhorring any “traitorous proceedings.”⁷³ Another pamphlet directly linked the Presbyterian faith of the Paxton Boys to treason, noting “Presbyterianism and Rebellion, were twin-Sisters, sprung from Faction. . . . What King has ever reigned in Great Britain, whose Government has not been disturbed by Presbyterian Rebellions?”⁷⁴ The Paxton Boys themselves, in their *Declaration and Remonstrance*, sought to clear themselves of the taint of treason by insistently claiming to be “loyal Subjects to the best of Kings, our rightful Sovereign George the Third, firmly attached to his Royal Person, Interest and Government.”⁷⁵

One of the paradoxes of internal rebellions, however, as the English government well knew, is that the larger the rebellion, the less likely it is that any particular participant will be executed for treason. Although thousands of rebels participated in the 1715 Jacobite rebellion, only 40 people were executed for treason; another 638 were transported to various English colonies.⁷⁶ Similarly, in the 1745 Jacobite rebellion, the government captured thousands of rebels, but ultimately executed a little over a hundred, while transporting hundreds more to the colonies.⁷⁷ It is plausible to execute every member of a five-person rebellion; it is nearly impossible to devote the resources necessary for the trial and execution of thousands of people. Indeed, after the 1745 rebellion, British authorities resorted to a lottery to determine which prisoners would stand trial for treason; only one out of every twenty prisoners would be tried.⁷⁸ The pattern would recur during the American Civil War. Most members of the Confederate army were guilty of treason against the United States of America, but none was ever successfully prosecuted.⁷⁹

Moreover, once a rebellion has been quelled, the government has a strong interest in maintaining the hard-earned peace. This is almost always far more likely to be accomplished through leniency than by executing every last defeated rebel. Such considerations governed the treatment of the Paxton Boys. Treason trials and executions would have inflamed backcountry resentments and potentially

jeopardized the internal security of the colony. Moreover, the Pennsylvania government ultimately agreed to one of the Paxton Boys' demands, issuing a declaration of war against several Indian tribes, denouncing them as "enemies, rebels, and traitors to his most sacred majesty." As in 1756, the colony again offered bounties for Indian scalps.⁸⁰

A potentially more clear-cut case of treason arose in April 1764, when a man named Gershom Hicks appeared at Fort Pitt. Hicks had lived for years among the Indians, and General Thomas Gage suspected Hicks of espionage and of participating in Indian warfare against the British. Although initially intending to try Hicks under military authority as a spy, Gage changed his mind.⁸¹ Instead, Gage recommended that both Hicks and his brother be tried as "Traitors to their Country." Under long-standing principles of treason law, however, such a trial had to be in a civilian court. As Gage explained, "these Trials must be in the Country below by the Civil Magistrates, to whom they should be given up. The Military may hang a spy in Time of War, but Rebels in Arms are tried by the Civil Courts." This practice, Gage noted, had been followed in Scotland in the aftermath of the 1745 rebellion.⁸² The Hicks brothers were accordingly ordered to be transferred to the custody of the Sheriff of Carlisle County to await trial for high treason.⁸³ There are no surviving records that shed any light on the brothers' subsequent fate; Gershom was clearly not executed, however, since he re-emerged during the Revolution to serve as a spy, sometimes dressed in Indian attire, for George Washington.⁸⁴

The summer of 1765 presented another potential treason case, but it, too, fizzled out. General Gage reported to John Penn that the Cumberland County inhabitants "daily appear in arms, and seem to be in a state of rebellion." The "King's troops are fired upon, and his forts threatened with assaults by men in arms, headed by magistrates, who refuse the ordinary course of justice demanded of them by the officers."⁸⁵ Penn promptly traveled to Cumberland County and gathered evidence. These actions, if true, might have constituted treason by levying war against the king. The grand jury that heard the witnesses' testimony, however, concluded that "there was not sufficient testimony to convict a single person charged" and refused to issue any indictments.⁸⁶

The Disputes with Virginia and Connecticut

In the early 1770s, in addition to the growing resistance to parliamentary policies, Pennsylvania confronted a problem that was perhaps unique among the American colonies: it was engaged in what amounted to low-level open warfare with two other colonies, Virginia and Connecticut.⁸⁷ In both cases, the disputes turned on land claims.

The Virginia dispute was the less serious of the two, although it was nonetheless highly troubling to Pennsylvania's leaders. In 1772, the British army had evacuated Fort Pitt and Pennsylvania officials declined to fortify it. The result was a jurisdictional vacuum in the area surrounding Pittsburgh, an area claimed by both Pennsylvania and Virginia.⁸⁸ The newly appointed governor of Virginia, John Murray, the Earl of Dunmore, was eager to assert Virginia's authority over the region, and many prominent Virginians, including George Washington, supported him.⁸⁹ In a curious twist, Dunmore had a deep personal history with respect to armed disputes over governmental legitimacy—his own father had been convicted of treason for supporting the 1745 Jacobite rebellion and he himself had served as a “page of honor” to Bonnie Prince Charlie.⁹⁰ Dunmore's primary agent in the region was a former surgeon in the British army named John Connolly, who did everything he could to undermine Pennsylvania authority. On New Year's Day 1774, Connolly issued a proclamation announcing that the Pittsburgh region was now incorporated into Virginia's Augusta County.⁹¹ Arthur St. Clair, the leading official of Pennsylvania's competing Westmoreland County, responded by arresting Connolly, only to eventually release him on bail.⁹² Connolly responded by arresting a Westmoreland County sheriff's officer and three Pennsylvania magistrates, whom he sent to Virginia for trial, an outrage for which Penn firmly blamed Lord Dunmore.⁹³ Penn was especially worried that Connolly's aggressive conduct would provoke a war with the Indians, who were engaged in a series of revenge killings against the Virginia settlers.⁹⁴ Penn's fears were confirmed when what became known as Dunmore's War broke out between the Virginia forces and the Shawnee and Mingo tribes later that year.⁹⁵ In February 1775, Connolly's forces openly attacked the Westmoreland County jail and continued their pattern of harassing Pennsylvania officials.⁹⁶ In June 1775, however, St. Clair managed to arrest Connolly on a charge of raising a body of men against the liberties of America. Connolly's forces retaliated by capturing three Pennsylvania officials, who were then exchanged for Connolly as part of a prisoner swap.⁹⁷ The outbreak of the War for Independence did little to resolve these tensions, and the region persisted in a state of jurisdictional confusion until 1780, when Pennsylvania and Virginia finally resolved the dispute.⁹⁸ Connolly, as we shall see in Chapter 3, would become one of the first Pennsylvanians charged with treason during the Revolution.

The Connecticut dispute had deeper roots and proved even more intractable. In 1753, a group of prominent Connecticut men formed The Susquehannah Company, with the intention of settling on land allegedly within Connecticut's jurisdiction. The land, located in modern northeastern Pennsylvania, however, also fell within the grants to the Penn family, Pennsylvania's proprietors. As early as 1754, the Pennsylvania Provincial Council was concerned that the

Connecticut claim risked a “civil war.”⁹⁹ Pennsylvania’s Attorney General warned, “To enter and seize the Lands of the Proprietaries or Others without their Permission, are Acts against the Laws, and manifest Breaches of the Public Peace. Such offense, by a multitude, are of dangerous Example, and highly penal, as they tend to Sedition, and are likely to terminate in Capital Crimes.”¹⁰⁰ Delayed by the outbreak of the French and Indian War, Connecticut settlers did not arrive in the Wyoming Valley until 1760. In 1761, Pennsylvania Lieutenant Governor James Hamilton issued two proclamations demanding the departure of the Connecticut settlers and stating that they would be “prosecuted with the utmost Rigour of the Law.”¹⁰¹ Hamilton seemed to have the law on his side. The English Solicitor General in 1761 had found no validity to Connecticut’s claims, and the settlements were denounced by both the Connecticut governor and George III, who ordered that the Connecticut settlements be stopped. But ultimately Indians accomplished what official proclamations could not.¹⁰² In late 1763, they attacked and killed most of the Connecticut settlers, temporarily ending the intrusion into Pennsylvania.¹⁰³

The Susquehannah Company eventually regrouped and more Connecticut settlers arrived in the late 1760s. Not surprisingly, Pennsylvania officials remained unwilling to tolerate settlements that did not recognize Pennsylvania’s jurisdiction and they responded with repeated attempts at force, coupled with invocation of the criminal law. In early 1769, Northampton County authorities arrested three Connecticut settlers for riot.¹⁰⁴ A settler tartly responded that they would “mind our own business & affairs Cultivate our own lands Manufacture our own Necessaries eat our own Cheese & drink our own Beer and Carefully Avoid Superfluities all which taken together I hope will not be Constructive Treason even in England.”¹⁰⁵ A Northampton County grand jury later indicted 31 Connecticut settlers for riotous and unlawful assembly.¹⁰⁶ By May 1769, Pennsylvania Lieutenant Governor John Penn had concluded that the Connecticut settlers were so numerous that they could be removed only by a military force, but he continued to try to resolve the problem through the criminal courts.¹⁰⁷ He issued yet another proclamation demanding the settlers’ immediate removal.¹⁰⁸ When the hapless sheriff of Northampton County read the proclamation to the Connecticut settlers, they treated the proclamation “with Great Contempt & as Soon as the Sheriff was finished one of them fired a Gun over his Head.”¹⁰⁹ In June 1769, a Northampton grand jury indicted an additional 120 Connecticut settlers for riot and forcible entry.¹¹⁰ Although the Northampton County sheriff managed to arrest some of the settlers, many escaped from the Easton jail, and only 16 were ultimately convicted.¹¹¹ For their part, the Connecticut settlers expressed willingness to have the title issue resolved through civil litigation in

a Pennsylvania court, but they deeply resented Pennsylvania's attempt to resolve the dispute through the use of the criminal law.¹¹²

By late 1769, the tide had seemingly turned in Pennsylvania's favor. In November, Pennsylvania forces ejected numerous Connecticut settlers from the Wyoming valley.¹¹³ A large number of additional indictments of Connecticut settlers followed.¹¹⁴ But just when things looked bleakest, the settlers formed a providential alliance with the Paxton Boys, essentially guaranteeing a dramatic escalation in violence.

Fortified by the Paxton Boys, the Connecticut settlers went on the offensive, driving out rival Pennsylvania settlers and destroying their houses.¹¹⁵ A few months later, John Penn concluded that it was "impossible for the civil power to serve any process against them."¹¹⁶ But Penn soldiered on, issuing yet another proclamation against the Connecticut settlers and securing indictments against the leaders of the Paxton Boys.¹¹⁷ Indeed, the tide seemed to again turn in Pennsylvania's favor in September 1770, when Pennsylvania forces captured a prominent fort as well as a number of Connecticut settlers, who were sent to Easton and Philadelphia.¹¹⁸

This victory was short lived. The leading Paxton Boy, Lazarus Stewart, managed to escape from custody while under indictment for arson.¹¹⁹ The Pennsylvania Assembly, reviewing Stewart's activities on behalf of the Connecticut settlers, complained about the "daring insult he has committed on the authority of government," and darkly warned "there is cause to suspect the said Stewart hath been guilty of a crime of a more atrocious nature."¹²⁰ Several months later, Stewart shot and killed a Pennsylvania deputy sheriff.¹²¹ This violent attack prompted the Pennsylvania Assembly to quickly pass a new Riot Act.¹²²

As the Connecticut settlers saw it, Pennsylvania was essentially treating them as traitors. One group of Connecticut men complained, "Why is the Riot Act against rebellious and traitorous Rioters become necessary to be introduced against a Number of Inhabitants on those Lands, who claim an Absolute Title to them, and stand ready to maintain their Rights, and are willing to have it decided by Either Law or Equity."¹²³ Others worried about the threat of treason prosecutions.¹²⁴

In May 1771, the conflict with the Connecticut settlers took on a far more dangerous tone. Previously, the dispute was between Pennsylvania and The Susquehannah Company; now, the Connecticut legislature formally asserted its claim to the lands in question.¹²⁵ And violence continued to erupt. Pennsylvania officials issued another proclamation against the Connecticut settlers and sent in forces to enforce the Riot Act.¹²⁶ Lazarus Stewart, who had escaped to Connecticut, returned and led an attack on Fort Wyoming. A Pennsylvanian complained that summer, "A Kind of internal War is carried on within the Bounds