

# Convict Transportation and the Colonial State in Newfoundland, 1789

Jerry Bannister

Volume 27, Number 2, Spring 1998

URI: [https://id.erudit.org/iderudit/acad27\\_2art04](https://id.erudit.org/iderudit/acad27_2art04)

[See table of contents](#)

---

## Publisher(s)

The Department of History at the University of New Brunswick

## ISSN

0044-5851 (print)

1712-7432 (digital)

[Explore this journal](#)

---

## Cite this article

Bannister, J. (1998). Convict Transportation and the Colonial State in Newfoundland, 1789. *Acadiensis*, 27(2), 95–123.

JERRY BANNISTER

## Convict Transportation and the Colonial State in Newfoundland, 1789

WHEN AN IRISH CONVICT SHIP LANDED at Newfoundland in July 1789, the incident touched off crises for governments on both sides of the Atlantic. A month earlier the brig *Duke of Leinster* had left Dublin to transport more than 100 men and women to an unknown destination, though reports alluded to Botany Bay. After several weeks at sea fever broke out, supplies ran short, and the ship anchored at Bay Bulls. Put ashore with minimal provisions, the convicts made their way to St. John's and were eventually sent to England. Officials in Dublin and London then argued over responsibility for the convicts, and the debacle further undermined the Irish system of transportation to America.<sup>1</sup>

The affair has received attention from Irish, English and Australian historians but has yet to be placed in the context of 18th-century Newfoundland.<sup>2</sup> Full-length articles by Ged Martin and Bob Reece repeat many of the stubborn misconceptions about the island's government and judiciary. Denied the basic fixtures of a colonial state, Newfoundland endured the rough justice of fishing admirals and ignorant magistrates. As Ged Martin concludes, "In the summer of 1789 therefore no firm authority existed on the island".<sup>3</sup> Given the development of Newfoundland historiography, such claims are not surprising. The monographs on which Martin and Reece rely — by D.W. Prowse and A.H. McLintock respectively — were part of the traditional liberal

1 An earlier version of this paper was presented to the meeting of the Canadian Historical Association at the Congress of Learned Societies, 7 June 1997. For their criticisms and suggestions, I thank Simon Devereaux, Thomas Evans, Allan Greer, Christopher Munn, Jim Phillips, Patti Ryan and an anonymous reader at *Acadiensis*. The project received funding from the London Goodenough Association of Canada, the Institute of Social and Economic Research at Memorial University of Newfoundland and the Social Sciences and Humanities Research Council of Canada.

2 R. B. McDowell, *Ireland in the Age of Imperialism and Revolution, 1760-1801* (Oxford, 1979), p. 71; Brian Henry, *Dublin Hanged: Crime, Law Enforcement and Punishment in Late Eighteenth-Century Dublin* (Dublin, 1995), pp. 163-4; Simon Devereaux, "Irish Convict Transportation and the Reach of the State in Late Hanoverian Britain", *Journal of the Canadian Historical Association*, 8 (1997, in press).

3 Ged Martin, "Convict Transportation to Newfoundland in 1789", *Acadiensis*, V, 1 (Autumn 1975), pp. 85-99 [quotation at p. 90]; Bob Reece, "'Such a Banditti': Irish Convicts in Newfoundland, 1789. Part I", *Newfoundland Studies*, 13, 1 (Spring 1997), pp. 1-29; Reece, "'Such a Banditti': Irish Convicts in Newfoundland, 1789. Part II", *Newfoundland Studies*, 13, 2 (Fall 1997), pp. 127-41.

Jerry Bannister, "Convict Transportation and the Colonial State in Newfoundland, 1789", *Acadiensis*, XXVII, 2 (Spring 1998), pp. 95-123.

approach which saw early Newfoundland as politically backward and legally anarchic.<sup>4</sup> Led by Keith Matthews, historians have since rejected this perspective, though local government has been seen largely through the lens of imperial policy.<sup>5</sup> While Sean Cadigan has established a sophisticated model of economic development, the function of the pre-1832 state has received little scholarly attention.<sup>6</sup> Eighteenth-century government remains in the shadow of William Carson and Patrick Morris, both of whom portrayed naval authority as inherently weak and arbitrary.<sup>7</sup> Studies by Patrick O'Flaherty and Christopher English have begun the process of critically examining the island's judiciary.<sup>8</sup> Yet, on balance, the colonial state is still viewed in terms of official policies that restricted formal institutions; local customs were merely stand-ins for the real thing.<sup>9</sup>

At the heart of events in 1789 rests an apparent puzzle: with extremely limited administrative and judicial resources, how did the local government cope with what constituted a large-scale crisis? More than 100 convicts had made their way to St. John's, all of whom were in immediate need of food and shelter, many were seriously ill, and some were dangerous. The incident came at a critical juncture in the island's legal development; in 1788-89 problems in the civil courts threatened the entire judicial system. Yet authorities managed to house, clothe and feed the convicts while still maintaining law and order. What follows offers a simple explanation: 18th-century Newfoundland did not have an absence of government but, rather, a different type of governance, one in which naval and civil magistrates clearly exercised legal authority and merchants became actively involved when their interests were threatened. Newfoundland's criminal justice system had functioned effectively for 50 years before the exigencies of 1789 and would continue to do so until a reform

4 D. W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records* ([1895] Belleville, 1972); A. H. McIntock, *The Establishment of Constitutional Government in Newfoundland, 1783-1832: A Study of Retarded Colonisation* (London, 1941), p. 24. The historiography is discussed further in Jerry Bannister, "'A Species of Vassalage': The Issue of Class in the Writing of Newfoundland History", *Acadiensis*, XXIV, 1 (Autumn 1994), pp. 134-44.

5 Keith Matthews, "Historical Fence Building: A Critique of the Historiography of Newfoundland", *Newfoundland Quarterly*, 74, 1 (Spring 1978), pp. 21-30; Matthews, *Lectures on the History of Newfoundland, 1500-1830* (St. John's, 1988), chs. 15-16, 20-22, 30.

6 Sean Cadigan, *Hope and Deception in Conception Bay: Merchant-Settler Relations in Newfoundland, 1785-1855* (Toronto, 1995), esp. chs. 5-6. On the post-1832 era, see Philip McCann, "Culture, State Formation and the Invention of Tradition: Newfoundland, 1832-1855", *Journal of Canadian Studies*, 23, 1-2 (Spring/Summer 1988), pp. 86-103.

7 See, inter alia, William Carson, *Reasons for Colonizing the Island of Newfoundland* (Greenock, 1813), esp. pp. 11-13; Patrick Morris, *Remarks on the State of Society, Religion, Morals, and Education at Newfoundland* (London, 1827), esp. pp. 12-15, 30-31.

8 Patrick O'Flaherty, "The Seeds of Reform: Newfoundland, 1800-1818", *Journal of Canadian Studies*, 23, 3 (Fall 1988), pp. 39-56; O'Flaherty, "Francis Forbes", *Dictionary of Canadian Biography*, Vol. VII (Toronto, 1988), pp. 301-04; Christopher English, "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832", in L. Knafla and S. Binnie, eds., *Law, Society, and the State: Essays in Modern Legal History* (Toronto, 1995), pp. 73-93; 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), pp. 57-78.

9 On the dominance of imperial policy in Newfoundland historiography, see Olaf Uwe Janzen, "Newfoundland and the International Fishery", in M. Brook Taylor, ed., *Canadian History: A Reader's Guide, Volume One: Beginnings to Confederation* (Toronto, 1994), esp. pp. 301-02.

movement emerged in the 1820s. Prior to the establishment of independent newspapers in the 19th century, the island did not have a bourgeois public sphere in which to debate government policy. This left local officials and merchants to act as they saw fit.

Government in Newfoundland, as in many other British territories, was essentially reactive, limited by available resources and shaped by individual initiative. Under such a regime, official policy was alternatively upheld, ignored or superseded, depending upon local conditions. When propertied interests became threatened, however, officials and merchants reacted quickly and decisively. The response to the landing of Irish convicts represents a chapter in the history of a form of governance that survived basically intact for nearly a century. In light of the recent renaissance in the study of state formation in Canada, the case of 18th-century Newfoundland demonstrates the need to broaden the model of the colonial state to include customary sources of law and government.<sup>10</sup> The absence of modern forms of social control, such as professional policing and a centralized bureaucracy, did not compromise the ability of the early colonial state to enforce its authority when the need arose. With the backing of magistrates, merchants and the military, local government could vigorously pursue policies without having to answer to an independent press or elected assembly.

In early 1789 both the British and Irish governments faced the dilemma of finding a suitable place to ship their convicts. The English system of transportation to America had ended with the outbreak of the Revolutionary War in 1775, precipitating major changes in penal practices and an intensive search for another destination.<sup>11</sup> England and Ireland pursued different policies toward the Americas: whereas the former made only three small-scale attempts to resume transportation between 1783 and 1785, the latter sent approximately 1,400 convicts throughout the 1780s. When news reached London in March 1789 that the settlement of New South Wales had succeeded, it signaled the beginning of a new era of transportation to the penal colony at Botany Bay.<sup>12</sup> In the meantime, the chaotic system of transportation used by Ireland had run into serious difficulties: convicts aboard one ship mutinied; another group rioted while imprisoned in Dublin; and in December 1788 more than 100 convicts were forcibly put ashore on Cape Breton Island, where seven of them died of exposure before they could be rescued by local fishermen. Upon receiving a report from Cape Breton in July 1789, which categorized the incident as "terrifying to the inhabitants of this infant Colony", the British Home Secretary informed the Irish government that it

10 On the historiography of the state, see Allan Greer and Ian Radforth, "Introduction", in Greer and Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto, 1992), pp. 1-16; Rainer Baehre, "The State in Canadian History", *Acadiensis*, XXIV, 1 (Autumn 1994), pp. 119-133; Louis Knafla and Susan Binnie, "Beyond the State: Law and Legal Pluralism in the Making of Modern Societies", in Knafla and Binnie, eds., *Law, Society, and the State*, pp. 3-33.

11 J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, 1986), pp. 592-601; A. R. Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987), ch. 8.

12 Ekirch, "Great Britain's Secret Convict Trade to America, 1783-1784", *American Historical Review*, 89, 5 (December 1984), pp. 1285-91; Simon Devereaux, "Convicts and the State: The Administration of Criminal Justice in Great Britain during the Reign of George III", Ph.D. thesis, University of Toronto, 1997, pp. 289-310.

could transport convicts only to New South Wales.<sup>13</sup> Transportation to Britain's possessions in North America was now officially banned, but the *Duke of Leinster* had already put to sea.

In earlier decades Ireland and England had sent convicts to Newfoundland, but what occurred in 1789 had only one precedent in the island's history. In 1730-31 a brief experiment in transporting English convicts ended when it became clear that the small settlements along the coast could not absorb a shipload of offenders.<sup>14</sup> The justices of the peace in St. John's warned the governor about the dangers posed by the convicts, who were suspected of having committed five murders. Their petition reflected the relatively weak position of the island's magistracy, which had been established only two years earlier:

As we are a constitution not so capable of defending ourselves from such insults, as others of H.M. plantations, which are under better regulations, and have men and money for defence and security thereof at the public charge, we pray that the fear we are in from such bandits may be removed, by their being obliged to depart this island.<sup>15</sup>

Governor George Clinton complained to the Board of Trade, and no further attempts were made to send a British convict ship to Newfoundland, though offenders were individually transported from West Country ports. Between 1768 and 1774, for example, authorities at Poole contracted with magistrates in Newfoundland to transport three felons for seven-year terms.<sup>16</sup> A pamphlet published in 1787 suggested that Britain should transport convicts to Newfoundland, but the government did not seriously consider the island as a potential penal colony.<sup>17</sup>

Transportation of convicts from Ireland to Newfoundland had never been officially regulated. Although no convict ship had landed before 1789, individual offenders had been illegally contracted to work in the fishery. In 1731 Captain Henry Osborn reported that it had "become a practice of the masters of ships to bring over here transported felons instead of Irish servants", and other incidents likely went unreported.<sup>18</sup> Yet this extra-legal form of transportation did not become serious enough to warrant further complaints, nor did it constitute "plenty of precedents for taking convicts to Newfoundland".<sup>19</sup> Convicted offenders and outlaws were often suspected to be among the hundreds of Irish labourers who came over to work in the

13 Henry, *Law Enforcement in Eighteenth-Century Dublin*, pp. 162-3; Reece, "Irish Convicts in Newfoundland", p. 1; Devereaux, "Irish Convict Transportation and the Reach of the State", passim. [quotation Macarmick to Sydney, 18 December 1788].

14 Glanville Davis, "England and Newfoundland: Policy and Trade, 1660-1783", Ph.D. thesis, University of Southampton, 1980, p. 360.

15 Weston and Southmayd to Governor Clinton, 20 August 1731, *Calendar of State Papers, Colonial Series: America and West Indies* (London, 1926- ), vol. 38, p. 279.

16 Quarter Session Minute Book (S 17-35), *Calendar of Local Archives*, vol. 2, Poole Borough Museum, I am indebted to Mr. Alan Perry for his help with the West Country archival materials.

17 *A Short Review of the Political State of Great Britain* (London, 1787), as cited in Martin, "Convict Transportation to Newfoundland", p. 85; Beattie, *Crime and the Courts in England*, p. 594.

18 Osborn to Popple, 28 July 1731, *Calendar of State Papers, Colonial Series: America and West Indies*, vol. 38, p. 205.

19 Reece, "Convict Transportation to Newfoundland", p. 5.

fishery each summer — in 1766, for example, a group of Whiteboys had reputedly fled to Trinity to escape arrest — but an entire shipload of Irish convicts had never arrived.<sup>20</sup> As the garrison commander in St. John's commented in 1789, the influx of more than 100 convicts was "something so novel in this part of the world".<sup>21</sup>

Preparations for what would be the last Irish convict ship sent to North America concluded in June 1789. As the Dublin gaol filled with offenders sentenced to transportation, newspaper reports claimed that the convicts were to be sent to Botany Bay; but the inspector of prisons stated that such a voyage would cost too much money — reputedly more than £100 per person — to be taken on by the government. The Lord Mayor of Dublin had contracted the brig *Duke of Leinster*, owned by Irish merchants and captained by an Englishman, Richard Harrison, to be fitted as a prison ship. When the convicts were brought in carts to the waterfront, they offered stiff resistance, and several jumped overboard while being ferried to the brig.<sup>22</sup> The ship received 102 men and boys and 12 women, brought on board in irons under military guard, and set sail on 14 June. During the voyage the convicts were chained in couples, though a defrocked clergyman convicted of forgery was allowed to board a ship headed for England. The *Duke of Leinster* had no official destination; one crewman later testified that he had no idea where the brig was bound. Once the ship had cleared the Irish Sea it soon became apparent that it was headed for North America. Rumours circulated that the captain had orders to land some of them in Newfoundland and the rest in Nova Scotia. Nonetheless, after a month at sea the ship stood in for the Newfoundland coast, where Harrison searched for a place to dump all his passengers. Why he chose to put in for the Southern Shore remains unknown, but the combination of short provisions, illness among the convicts and simple expediency probably motivated him to get rid of them at the first opportunity. To cover his tracks, Harrison told them to call the vessel the *Charming Nancy*, a notorious convict ship that had landed in Connecticut the previous year.<sup>23</sup>

On the night of 15 July, 97 convicts were put ashore at Bay Bulls and the next morning the remaining 17 landed at Petty Harbour. No one was forced off the ship, and some provisions were off-loaded at Bay Bulls. A few of the convicts monopolized the food, however, while those at Petty Harbour received none at all. According to a lurid account published in Halifax, "The hungry victims lived for three days in a state of warfare, quarreling about their food: the strongest beat the weak, and over a cask of rank butter, or beef, there was for a time as severe fighting as if a kingdom had been

20 On the Whiteboys in Newfoundland, see the report from Reverend Edward Langman, dated 8 November 1766, in *United Society for the Propagation of the Gospel, Calendar of Letters, 1721-1793* (London, 1972), p. 46; on their origins in Ireland, see James Donnelly, "The Whiteboy Movement, 1761-5", *Irish Historical Studies*, 21, 81 (March 1978), pp. 20-54.

21 Elford to Milbanke, 9 September 1789, Colonial Office Papers, series 194 [CO 194], vol. 38, pp. 97-8, Provincial Archives of Newfoundland and Labrador [PANL], St. John's.

22 Martin, "Convict Transportation to Newfoundland", pp. 87-8.

23 Unless otherwise noted, the following reconstruction of events is based on the collection of documents sent to London by the Newfoundland governor along with his report of the affair. Complete copies were sent to the Secretary of State and the Secretary of the British Admiralty and appear in Admiralty Papers, series 1 [Adm. 1], vol. 472, pp. 324-72, Public Record Office [PRO], Kew, and CO 194, vol. 38, pp. 86-101, and Vol. 41, pp. 27-42, PANL. I thank Patti Ryan for her help with the archival materials.

at stake".<sup>24</sup> Word of the convicts' arrival soon reached St. John's, where early reports claimed that they had torched a house in Bay Bulls and were advancing up the coast.<sup>25</sup> Within days they were walking about the town. Thefts were reported, and fears of a crime wave quickly arose. One of the convicts, James Reily, was subsequently convicted at the autumn Assizes for a burglary committed on 18 July and for two thefts on 4 August.<sup>26</sup>

Authorities in St. John's wasted little time in trying to find out who the Irish men and women were and how they had come to the island. At the court house on 20 July, the clerk of the peace took an affidavit from Richard Robinson, a disaffected crewman who had gone ashore with the convicts. Local magistrates then gathered as much information as possible before acting. Four of the justices of the peace — Archibald Buchanan, D'Ewes Coke, Jonathan Ogden and George Williams — examined two of the convicts, James McGuire and Matthew Dempsey. Their answers to the magistrates' 18 questions were carefully recorded and sent as an enclosure to the British government, along with Robinson's affidavit.<sup>27</sup> Within days of the convicts' arrival, the justices had compiled a fairly complete account of what had happened.

The magistrates' efforts to amass data on the convicts did not end there. On 7 September they drew up a chart of the identities of 65 of the male convicts which recorded their age and place of birth; for some of the convicts, it also listed their crime, sentence, and other applicable "remarks".<sup>28</sup> The information reveals that the convicts were a typical sample of offenders transported from the British Isles in the 18th-century. Ranging in age from 13 to 55, they were overwhelmingly young: more than 80 per cent were less than 30 years old. Most had committed various forms of larceny: 47 per cent of the known offences involved theft of personal property, such as clothing and tobacco, or farm animals. Two of the convicts appear to have been professional thieves: John O'Neal, convicted of stealing waistcoats, was described as "the best shoplifter in Ireland", while John Keogh was described as "a famous porter stealer but does not know for what he was tried". Others had been convicted of serious felonies — four for robbery and one for burglary — and another, Cornelius Brosnahan, had been condemned for murder, but his sentence was commuted to transportation because of "some error in the trial". At least seven others had received death sentences and were pardoned on condition of transportation. The convicts came from 25 different counties — they were concentrated in Dublin (34 per cent) and spread unevenly across the Irish provinces: Leinster, excluding Dublin (29 per cent); Ulster (20 per cent); Munster (15 per cent); and Connacht (2 per cent). But the southern counties were probably under-represented. The majority of the Irish living in Newfoundland were from Waterford city and its environs: convicts from this area would have had the best opportunity of assimilating into the local population and were

24 *Nova Scotia Gazette* (Halifax), 30 March 1790. The account is cited as an "extract of a letter from Portsmouth, November 14 [1789]". I thank Jim Phillips for this reference.

25 *Freeman's Journal* (Dublin), 24/26 September 1789, as cited in Martin, "Convict Transportation to Newfoundland", p. 90.

26 *R. v. Reily*, 1789 Assizes, CO 194, Vol. 38, pp. 168-72, PANL.

27 Adm. 1/472, pp. 328-30 (enclosure no. 4), PRO.

28 CO 194, vol. 41, pp. 35-7 (enclosure no. 5), PANL.



## *Convict Transportation and the Colonial State in Newfoundland 101*

perhaps more likely to be among the 37 men not listed by the magistrates.<sup>29</sup> When the convicts were sent to England, the British government relied heavily upon this list and other documents prepared at St. John's.<sup>30</sup> As an indicator of local government, this level of record-keeping conflicts with the portrayal of 18th-century Newfoundland as a "rough-and-ready frontier society".<sup>31</sup>

The St. John's magistrates had many years of judicial experience between them. All four men sat on the Assize bench as commissioners of oyer and terminer; Coke and Ogden, who were both surgeons, later became chief justices of the Supreme Court.<sup>32</sup> Surgeons filled the ranks of the magistracy — they were a fixture of the fishery, providing medical services in every major outpost — and the British government approved this trend because it viewed them as having greater economic independence than other candidates for office.<sup>33</sup> Like justices of the peace elsewhere in the 18th century, the magistrates were amateurs, with no formal legal training, who gained a thorough working knowledge of the law through experience.<sup>34</sup> While working as a customs officer in 1786, Buchanan had written an astute legal treatise for the British government. And Justice Coke, who had served as a magistrate since 1772, was highly regarded as a fair and competent judge.<sup>35</sup>

The legal system in which the magistracy operated had developed well beyond the limited constitution provided by statutory law. Under the "Act to encourage the Trade to Newfoundland", passed in 1699 and known popularly as "King William's Act", only the fishing admirals could legally hear and determine disputes, though the commanders of warships sent annually to the island were empowered to act as appeal judges.<sup>36</sup> This statute was largely ignored in practice; local customs emerged in its

29 Two convicts were from County Kilkenny, one from Tipperary, one from Waterford and none from Wexford. On Irish immigration, see John Mannion, "Introduction", in J.J. Mannion, ed., *The Peopling of Newfoundland: Essays in Historical Geography* (St. John's, 1977), p. 8.

30 See Bernard to Philip Stephens, 23 November 1789, Adm. 1/472, p. 338, PRO.

31 Reece, "Irish Convicts in Newfoundland", p. 16.

32 The fifth justice of the peace for the St. John's district, Richard Routh (who became chief justice of the Supreme Court in 1797), was not present during the sessions held in July 1789. The commissions of the peace are listed in the Newfoundland Colonial Secretary's Letterbook, GN 2/1/A, vol. 12, p. 10 (1789), PANL.

33 Jerry Bannister, "Surgeons and Criminal Justice in Eighteenth-Century Newfoundland", in G. Smith, A. May, and S. Devereaux, eds., *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie* (Toronto, 1998), pp. 104-34.

34 Even in England, the problem of having to rely on "trading justices", i.e. men of inferior status and education, arose in the 18th century. See Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley, 1984), pp. 184-90, 200-4; Clive Emsley, *Crime and Society in England, 1750-1900* (London, 1987), pp. 155-9.

35 John Reeves, who was a legal advisor to the British government and the island's first chief justice, thought highly of Coke's abilities. Judge Prowse, who was no flatterer of the early magistrates, referred to Coke as "a man of considerable ability, and firm, determined character", and to Ogden as "a man of sound judgment". See *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 141 [testimony of John Reeves], in Sheila Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland, 1793-93* (Wilmington, 1975), p. 379; Prowse, *History of Newfoundland*, p. 360; Archibald Buchanan, *Concerning Landed Property in Newfoundland* [London, 1786], British Library, Additional MS 38347, ff. 373-88.

36 10 & 11 Wm. III, c. 25, ss. 4, 12-16 (1698-99).



place to meet basic needs; and, after repeated appeals, a naval governor and magistrates 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 George Brydges 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). By 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 criminal justice — such as constables, coroners, a sheriff and a grand jury — and the justices of the peace took recognizances, held petty sessions and organized Quarter Sessions on a regular basis. By 1780 the colonial state in Newfoundland had evolved into an entrenched customary regime based on two levels of authority: the seasonal administration of the royal navy, which had up to nine vessels patrolling the coast from mid-summer to early autumn; and the year-round sessions held by civil magistrates.<sup>37</sup>

On 22 July 1789, the same day the justices conducted their examination of the two Irish convicts, 13 “principal merchants and inhabitants” met to discuss the impending crisis. They resolved to petition the magistrates, “fearing, if they [the convicts] are permitted to range at large it may *endanger our property* and be the means of disturbing the peace of this district”. The merchants requested that the convicts be placed under guard until the governor's arrival; in return, they committed to render “every assistance in our power relative thereto and also contribute for their maintenance and support”.<sup>38</sup> According to the magistrates, the immediate danger posed by the convicts was twofold: they threatened propertied interests while the town was “crowded with idle persons” during the height of the summer fishery; and, “some of them appeared much diseased”, thereby bringing the risk of an epidemic at the worst possible time. In their report to the governor, the justices pointed out that they had warned the merchants about the problem and then acted in the best interests of the community in accordance with the expressed wishes of its principal inhabitants. Knowing that they had no legal authority to incarcerate men and women who had not committed an offence in their jurisdiction, they carefully stipulated that “we considered it our duty” to comply with the petition.<sup>39</sup>

The use of such meetings and petitions was a well established form of governance in 18th-century St. John's. Under the common law tradition, justices of the peace wielded extensive legal powers, whether acting alone, in petty sessions, or at Quarter Sessions. In most colonial societies that adopted English institutions, magistrates were the first layer of a larger system of government that included a grand jury, local corporations or town councils, and an elected legislature.<sup>40</sup> However, prior to the grant

37 This summary of the judiciary is drawn from Jerry Bannister, “The Custom of the Country: Justice and the Colonial State in Eighteenth-Century Newfoundland”, Ph.D. thesis, University of Toronto, forthcoming 1998, chs. 1-3.

38 CO 194, vol. 41, pp. 31-32 (enclosure no. 3), PANL. Emphasis added.

39 CO 194, vol. 41, pp. 29-30 (enclosure no. 1), PANL.

40 For a pithy overview, see Alan Tully, “The Political Development of the Colonies after the Glorious Revolution”, in J.P. Greene and J.R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution* (Oxford, 1991), pp. 28-38.

## *Convict Transportation and the Colonial State in Newfoundland 103*

of representative government in 1832, Newfoundland had only the grand jury, which was limited to issuing presentments during the autumn sitting of the Court of Oyer and Terminer. The practice of striking *ad hoc* committees to deal with local problems had emerged as a substitute for the representative institutions used in other colonies. This custom dated back to 1711, when Captain Josias Crowe presided over a series of public meetings of the “commanders of merchant ships, merchants and chief inhabitants and witnesses”, which approved “several laws and orders made at St. John’s for the better discipline and good order of the people and correcting irregularities”.<sup>41</sup> Marked by a high degree of cooperation among naval officers, magistrates and merchants, these informal assemblies were commonly used whenever English mercantile interests became threatened. In response to the Ferryland riots in 1788, for example, merchants and the “principal inhabitants” held a meeting, petitioned Governor John Elliot, and formed a committee to oversee the building of a district gaol.<sup>42</sup>

Merchants influenced but did not control local government. The meeting held in July 1789 resembled an Assize session more than anything else: the 13 men who signed the petition included two commissioners of Oyer and Terminer, the high sheriff and four grand jurors; three others had served on previous grand juries.<sup>43</sup> Merchants and prominent planters had long been involved in the island’s judicial administration — in 1723 they had temporarily established their own court at St. John’s — and met regularly with the governor to settle disputes over wages and prices, though they were notoriously reluctant to serve on juries during the summer fishery. They presented petitions on a wide array of issues, from customs house fees to the maintenance of coastal defences.<sup>44</sup> Although the social gulf between naval officers and the mercantile classes has been exaggerated, governors brooked no challenge to their authority and remained wary of any signs of commercial abuses in the fishery.<sup>45</sup> Yet merchants were also seen as the principal source for funding public

41 CO 194, vol. 5, pp. 26-27, PRO. Titled “Captain Crowe’s Laws”, a printed version appears at Prowse, *History of Newfoundland*, pp. 271-2. See also D.B. Quinn, “Josias Crowe”, *DCB, II* (Toronto, 1969), pp. 163-4.

42 GN 2/1/A, vol. 11, pp. 388-90, 437-41, PANL.

43 CO 194, vol. 41, pp. 31-32, PANL. The signatories to the petition were: William Gaden (commissioner of oyer and terminer); Adam McGlashan (grand juror in 1790); Alexander Stuart (grand juror); Richard Reed (grand juror); Henry Phillips (high sheriff); Nathan Phillips (agent to a merchant house; grand juror in 1786); James Stokes (English merchant; grand juror in 1788); William B. Thomas (English merchant); Robert Tremlett (English merchant; grand juror in 1788); John Gleeson (Irish merchant); Marmaduke Hart (grand juror); Hugh Rowe & Son (English merchants; Thomas Rowe was a grand juror); and John Rogers (commissioner of oyer and terminer). For the grand jury lists, see CO 194, vol. 38, p. 19 (1788), p. 151 (1789), p. 262 (1790), PANL; for the commissioners of oyer and terminer, see GN 2/1/A, vol. 12, p. 7 (1789), PANL; and on the merchants, see Keith Matthews, *Profiles of Water Street Merchants* (St. John’s, 1980), passim.

44 For examples of merchants’ petitions, see GN 2/1/A, vol. 1, p. 250 (wages, 1751); vol. 2, pp. 249-50 (property rights, 1755); vol. 4, pp. 14-17 (customs house, 1766); vol. 7, p. 60 (vice-admiralty court, 1777); vol. 7, pp. 92, 105, 120, 132, 139 (defence works, 1778); vol. 10, pp. 38, 40-43 (fish prices, 1784); vol. 12, p. 235 (convoys, 1793); vol. 12, p. 243 (British army garrison, 1794); vol. 12, p. 356 (naval impressment, 1795), PANL. On the 1723 court, see Jeff Webb, “Leaving the State of Nature: A Locke-Inspired Political Community in St. John’s, Newfoundland, 1723”, *Acadiensis*, XXI, 1 (Autumn 1991), pp. 156-65.

45 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), pp. 311-36.

works; in 1791, for example, Governor Mark Milbanke rebuked the justice of the peace in Trepassey for using the district's funds to pay for maintaining the local fort, pointing out, "if it be necessary that these things should be kept in repair, the merchants are the proper persons to provide the means".<sup>46</sup> With few exceptions, Newfoundland merchants considered themselves to be British, sharing the basic principle of conservative political ideology: a commitment to securing the protection of property.<sup>47</sup> Like the merchant elite of Saint John, New Brunswick a generation or two later, they rarely became actively involved in government unless their interests were threatened. Habitually fractious and often divided, merchants tended to unite when faced with a common threat, thus further blurring the line between private rights and public justice. When the magistrates acceded to the request to incarcerate the Irish convicts in 1789, they were not simply "acting at the dictation of local merchants".<sup>48</sup>

In the wake of the 22 July petition, the justices took measures to secure the convicts and protect the town. Health concerns were particularly pressing: the fever brought by the convicts — "a kind of spotted putrid fever", according to one observer — appears to have been typhus, known colloquially as gaol fever.<sup>49</sup> A highly contagious disease, it posed a major threat to the crowded fishing town. James Louis O'Donel, a Catholic priest who became the first Bishop of Newfoundland, offered a singularly bleak account:

This is the worst year ever remembered in this country; the low price of fish, together with the great reductions of the servants' wages brought the inhabitants to extreme poverty, and to increase this misery we've had a most malignant jail fever imported to us by some unhappy convicts landed here from your city, of which no less than 200 people [have] already died in this Harbour, which is as yet almost an entire hospital. I've, the Lord be praised, as yet escaped it though [it is] of a most infectious and dangerous nature.<sup>50</sup>

The magistrates decided to place the convicts in a house on the barrens north of St. John's. Owned by James Winter, and referred to by the convicts as a "plantation", the house was rented for £50. The guard assigned from the army garrison soon became sick, and a surgeon was contracted to provide medical treatment to the convicts,

46 Milbanke to Isaac Follett, 27 September 1791, GN 2/1/A, vol. 12, p. 112, PANL.

47 This is, obviously, an oversimplification, for British historians have long debated the nature of 18th-century political ideology. A standard account appears in H. T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (London, 1977), chs. 6-8.

48 Martin, "Convict Transportation to Newfoundland", p. 90. The term "local merchants" is in a strict sense a misnomer because relatively few of them had settled in Newfoundland. On the historiography of the merchants, see Sean Cadigan, "Planters, Households and Merchant Capitalism: Northeast-Coast Newfoundland, 1800-1855", in Daniel Samson, ed., *Contested Countryside: Rural Workers and Modern Society in Atlantic Canada, 1800-1950* (Fredericton, 1994), pp. 151-9; on the Saint John merchants, see T. W. Acheson, *Saint John: The Making of a Colonial Urban Community* (Toronto, 1985), pp. 48-66.

49 CO 194, vol. 38, pp. 280-82, PANL [extract of a letter from St. John's, 21 August 1789, addressed to Benjamin Lester]. On jail fever, see Beattie, *Crime and the Courts in England*, pp. 301-06.

50 O'Donel to John Troy, Archbishop of Dublin, 24 December 1789, in Cyril Byrne, ed., *Gentlemen-Bishops and Faction Fighters: The Letters of Bishops O'Donel, Lambert, Scallan and Other Irish Missionaries* (St. John's, 1984), p. 100. Spelling and punctuation have been modernized.

## *Convict Transportation and the Colonial State in Newfoundland 105*

though most of them had apparently become immune to the fever.

Disease was far from the only problem facing local authorities. The task of feeding 80 people every day proved much larger than had been anticipated. Within ten days the supplies ran out, and the merchants reported that they were unable to provide sufficient provisions to meet the convicts' needs. The magistrates then asked Lieutenant-Governor Elford, the commander of the St. John's garrison, to lend provisions from the army's stores. To justify this move, the justices stressed that because of the food shortage, signs of mutiny had begun to appear. Elford readily agreed to offer supplies from the garrison — most of which had already been condemned as unfit — and the convicts were thereby provisioned until their departure in October. The final account for feeding the convicts totaled just under 6,000 victualing days and cost £221.

While local authorities managed to cope with the immediate difficulties of feeding and housing the convicts, the community still felt threatened. Only the male convicts were incarcerated; the 12 women — “more abandoned than you can conceive of”, one commentator declared — apparently stayed wherever they chose.<sup>51</sup> At least one of the convicts remained in the town's hospital, another died in August, two others escaped from custody, and more than 20 were never accounted for. Keeping nearly 80 men isolated in a makeshift prison proved to be a near impossible task. A pass system was established to allow individual convicts to go to St. John's for medical treatment; James Reily testified that he had received a pass from D'Ewes Coke and walked to town on his own. In spite of attempts to regulate their movements, escapes were bound to occur. At Reily's trial, John Neale, another of the Irish convicts, testified about security at the plantation. During the night of 4 August two of the convicts allegedly told him: “they knew how to get out without being discovered by the guard, and that they would go to the town on a cruise; that they went out accordingly and after having been out a considerable part of the night returned”.<sup>52</sup>

Fears among the townspeople escalated in August 1789 when an attempt was made to set fire to the town. Local magistrates detained two men on suspicion of arson, though no one was charged, and they offered a £100 reward for information. Armed patrols of six men, led by a constable and a “reputable housekeeper”, were ordered to walk the streets from ten o'clock each night to dawn the next day. When Governor Milbanke arrived he canceled the pass system and decreed that the convicts could enter St. John's only in the custody of an armed guard.<sup>53</sup> Six men escaped in October 1789, however, and other breakouts probably went unreported: 65 men are listed as incarcerated in early September; 74 men and six women were eventually sent to England; 33 of the convicts who landed in July presumably settled in Newfoundland or went elsewhere.<sup>54</sup> Given the scope of the problem, it is remarkable that local

51 CO 194, vol. 38, p. 282, PANL [extract of a letter from St. John's, 21 August 1789, addressed to Benjamin Lester]. On attitudes toward women and the administration of justice, see Sean Cadigan, “Whipping them into Shape: State Refinement of Patriarchy among Conception Bay Fishing Families, 1787-1825”, in C. McGrath, B. Neis, and M. Porter, eds., *Their Lives and Times: Women in Newfoundland and Labrador: A Collage* (St. John's, 1995), pp. 48-59.

52 *R. v. Reily*, 1789 Assizes.

53 GN 2/1/A, vol. 12, p. 8, PANL; CO 194, vol. 38, pp. 280-2, PANL.

54 CO 194, vol. 41, pp. 35-37 (list of 65 convicts, 7 September), GN 2/1/A, vol. 12, p. 37 (list of 6 escaped convicts, 13 October), CO 194, vol. 38, p. 112 (list of 80 convicts, 24 October), PANL.

authorities managed to ship 70 per cent of the convicts.

Magistrates also had to contend with fears that the island's large Irish population would support the convicts over the government. Despite periodic faction-fighting, the Irish men and women working in Newfoundland were a relatively cohesive group with a distinct identity, most of whom were bilingual or spoke only Irish.<sup>55</sup> Overwhelmingly Roman Catholic, they reputedly had strong Jacobite sentiments and were repeatedly accused of being disloyal to the British Crown. In 1750, for example, Governor Francis William Drake had warned that the Irish were "notoriously disaffected to the Government, all of them refusing to take the Oaths of Allegiance when tended to them", and in 1755 fines were issued for hoisting Irish colours.<sup>56</sup> One published account even alleged that, when the French occupied St. John's in 1762, "the merchants and inhabitants suffered more cruelties from the *Irish Roman Catholics*, than they did from the declared enemy".<sup>57</sup> The colonial state responded to fears of sedition with judicial force: at the 1762 Assizes Governor Thomas Graves refused to pardon an Irishman convicted of rape because he had been "guilty of many treasonable acts during the time the French were in possession of this place".<sup>58</sup> No open rebellion occurred until 1800, when part of the local garrison mutinied in support of the United Irish Rising, but tensions loomed beneath the surface.<sup>59</sup> Although none of the Irish convicts had been convicted of political crimes, they came from a country of mounting civil unrest.<sup>60</sup> At the trial of James Reily, the court heard that he had declared he "did not care for any prosecution that could be carried on against him in Newfoundland".<sup>61</sup> Further encouragement to deport the convicts as soon as possible came when a sergeant was court-martialled for allowing a group of convicts to escape in October 1789.<sup>62</sup>

The landing of the Irish convicts occurred at perhaps the worst possible time for the island's government. By July 1789 a series of problems in the civil courts had burst into a large-scale crisis, threatening the customary judicial system on which the governors had relied since 1749. The debacle stemmed from a prosecution brought in Exeter against Governor Richard Edwards for a decision he delivered in 1780 during a sitting of the Governor's Court; this court heard the bulk of major civil actions and functioned similarly to the Courts of Chancery held in other British colonies. Edwards' successors refused to sit as judges for fear of being prosecuted in England,

55 John Mannion, "Old World Antecedents, New World Adaptations: Inistioge (Co. Kilkenny) Immigrants in Newfoundland", *Newfoundland Studies*, 5, 2 (Fall 1989), pp. 103-76; Cyril Byrne, "Introduction", in Byrne, ed., *Gentlemen-Bishops and Faction Fighters*, pp. 9-22.

56 CO 194, vol. 12, p. 186, PRO; GN 2/1/A, vol. 2, p. 253, PANL.

57 Griffith Williams, *An Account of the Island of Newfoundland, with the Nature of its Trade, and the Method of Carrying on the Fishery* (London, 1765), p. 10. Emphasis in original.

58 GN 2/1/A, vol. 3, p. 164, PANL.

59 Cyril Byrne, "Ireland and Newfoundland: The United Irish Rising of 1798 and the Fencible's Mutiny in St. John's, 1799", paper presented to the Newfoundland Historical Society, 1977, pp. 1-8; Raymond Lahey, *James Louis O'Donel in Newfoundland, 1784-1807: The Establishment of the Roman Catholic Church* (St. John's, 1984), pp. 15-30.

60 Jim Smyth, *The Men of No Property: Irish Radicals and Popular Politics in the Late Eighteenth Century* (London, 1992), pp. 37-45.

61 *R. v. Reily*, 1789 Assizes.

62 GN 2/1/A, vol. 12, p. 37, PANL.

and this left a gaping hole in the administration of justice. As a customary institution, the Governor's Court had no formal legal basis other than the appellate jurisdiction granted to naval officers by King William's Act. Governor Milbanke summarized the crux of the matter: "it would be imprudent of me to risque my reputation and fortune in defence of a custom, which, if not a bad one, had never been legally sanctioned".<sup>63</sup> Efforts were made to transfer the governor's customary jurisdiction to three other courts — the Fishing Admirals' courts, the sessions held by the justices of the peace in the outports, and the Vice-Admiralty Court at St. John's — but none proved practicable. This left the naval surrogates to shoulder an increasingly heavy case-load, yet their powers also derived from customary law. At the Devonshire Quarter Sessions in 1788, Richard Hutchings, an English merchant, appealed a decision made by Captain Edward Pellew in a surrogate court. The judge ruled that Captain Pellew had no legal authority to hear Hutchings' case, thereby undermining the foundation of the surrogate system that had governed the outports in various forms since 1701.<sup>64</sup>

In April 1789 this imbroglio deepened further when Hutchings' solicitor brought an action against Captain Pellew. Pellew appealed to Admiral Mark Milbanke, who was to begin his first year as governor that summer, to help him secure a defence lawyer from the British Admiralty, explaining that it would be "extremely cruel to subject me to such an expense for having simply done what I conceived to be my duty".<sup>65</sup> Aaron Graham, who had served as civil secretary to the Newfoundland governors since 1779, intervened on Pellew's behalf. Explaining the history of the island's customary judiciary, Graham asked Admiral Milbanke to arrange for the Crown's law officers to consider the entire matter. Milbanke did not receive the legal opinion until 24 July, the day he was to set sail from Spithead in HMS *Salisbury*. According to the report, neither the governor nor the surrogates could legally sit as judges in civil causes.<sup>66</sup> This placed Milbanke in an extremely difficult position: on the one hand, word of Hutchings' prosecution had already reached Newfoundland, where naval officers were unwilling to hear the scores of writs that had accumulated; on the other, the British government had neither constituted a new jurisdiction to replace the surrogate courts, nor provided instructions on how to administer justice in the interim. Even before he set foot on the island, then, Milbanke's administration had received its first blow.

Upon arriving in St. John's on 4 September, Governor Milbanke discovered that the legal conundrum was the least of his worries. On 8 September the justices of the peace presented their written report on the convicts' arrival and the measures taken to secure the safety of the town. To justify their actions, the magistrates stressed three points: there were no precedents for how to respond to the landing of a shipload of

63 *Report upon the Judicature of Newfoundland* (31 December 1789), f. 7, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 71.

64 CO 194, vol. 21, pp. 254-56, PANL (report submitted to the Board of Trade by Admiral Milbanke and Mr. Graham, undated [c. December 1789]); Keith Matthews, "Richard Hutchings", *DCB, IV* (Toronto, 1979), pp. 443-4; Matthews, *Lectures on the History of Newfoundland*, pp. 135-41.

65 Pellew to Milbanke, 19 April 1789, Adm. 1/472, p. 305, PRO.

66 Graham to Milbanke, 24 April 1789, Adm. 1/472, pp. 303-04, Thomas Grettton to Pellew, 6 April 1789, *ibid.*, p. 307, Milbanke to Philip Stephens, 24 July 1789, *ibid.*, p. 312; Calvin Evans, "Aaron Graham," *DCB, V* (Toronto, 1983), p. 361.



transported offenders; the convicts had brought a highly contagious disease which threatened the townspeople; and a meeting of the merchants and inhabitants had declared their property to be in grave danger. Milbanke commended the justices for acting “very prudently”. Though fully aware of the questionable legality of detaining men and women who had not been convicted in Newfoundland of any crime, Milbanke judged the dangers posed by their presence to be the more important consideration. By complying with “the desire of the inhabitants”, he explained, the magistrates had prevented “many irregularities in the fishery which would have been the consequence of suffering such a banditti to go at large about the Island”. But Milbanke also identified two outstanding problems: where to send the convicts and how to pay for it. The former he committed to take on himself, “and trust to His Majesty’s approving my conduct therein”, while the latter would be the community’s responsibility. Milbanke directed the magistrates to convene a meeting of “merchants, traders, and inhabitants”, and to propose a plan whereby half of the expenses would be paid by St. John’s and half by the other districts around the island.<sup>67</sup>

In pursuing this course Milbanke was following imperial policy. The “Act for the encouragement of the Fisheries carried on from Great Britain”, passed in 1775 and known colloquially as “Palliser’s Act”, clearly prohibited persons who were not indentured servants from remaining on the island after the summer fishery had ended.<sup>68</sup> Year-round settlement by planters and their servants had never been proscribed — in fact, the migratory fishery depended in large measure upon the resident population, which had grown from around 3,000 in 1720 to more than 10,000 in 1785 — but the British government wanted to prevent surplus labour from accumulating during the winter.<sup>69</sup> Servants who lived in Newfoundland without a written contract to serve under a master were referred to as “dieters”, a designation that linked idleness with a propensity for crime and social unrest.<sup>70</sup> In 1764 Governor Hugh Palliser had promulgated a penal code designed to control the mobility of labourers, the majority of whom were Irish Catholics. “For better preserving the peace, preventing robberies, tumultuous assemblies, and other disorders of wicked and idle people remaining in the country during the winter”, Palliser ordered:

That no Papist servant man or woman shall remain in any place where they did not fish or serve during the summer preceding.

That not more than two Papist men shall dwell in one house during the winter, except such as have Protestant masters.

67 CO 194, vol. 41, pp. 29-30 (report of St. John’s magistrates, 8 September 1789), p. 40 (Milbanke to St. John’s magistrates, 10 September 1789), PANL.

68 15 Geo. III, c. 31, s. 13 (1775). The three subsequent statutes relating to the Newfoundland fishery — 26 Geo. III, c. 26 (1786), 28 Geo. III, c. 35 (1788), and 29 Geo. III, c. 53 (1789) — did not significantly alter the provisions in Palliser’s Act. On Palliser’s Act generally, see Sean Cadigan, “Seamen, Fishermen and the Law: The Role of the Wages and Lien System in the Decline of Wage Labour in the Newfoundland Fishery”, in Colin Howell and Richard Twomey, eds., *Jack Tar in History: Essays in the History of Maritime Life and Labour* (Fredericton, 1991), pp. 105-31.

69 C. Grant Head, *Eighteenth Century Newfoundland: A Geographer’s Perspective* (Toronto, 1976), pp. 82-100; W. Gordon Handcock, *Soe longe as there comes noe women: Origins of English Settlement in Newfoundland* (St. John’s, 1989), pp. 91-120.

70 On the term “dieter” in local nomenclature, see, G. M. Story, W. J. Kirwin, and J. D. A. Widdowson, eds., *Dictionary of Newfoundland English* (Second edition, Toronto, 1990), p. 140.

## *Convict Transportation and the Colonial State in Newfoundland 109*

That no Papist shall keep a publick house or vend liquor by retail.  
That no person keep dyeters [dieters] during the winter.  
That all idle disorderly useless men and women be punished according to law  
and sent out of the country.<sup>71</sup>

This decree, which magistrates were to read at Quarter Sessions each year, was renewed by Governor John Byron in 1770. Enforcement varied according to administrative initiative: governors and surrogates enforced or ignored proclamations as they saw fit. In 1777, for example, an order forbade Irish women from coming to Newfoundland but this was not widely enforced.<sup>72</sup>

Added to these restrictions was the uneasy relationship between the colonial state and Roman Catholicism. Attitudes of governors ranged from tolerance to outright prejudice, but local authorities did not actively pursue religious persecution until 1755, when Governor Richard Dorrill outlawed the saying of mass to allay fears arising from the murder of a St. John's magistrate the previous year by an Irish gang. Yet Dorrill's draconian penal code was the exception rather than the rule. His successors adopted a *modus vivendi* which developed into limited toleration in 1779 and a formal grant of "full liberty of conscience" by Governor John Campbell in 1784, though the status of Roman Catholicism remained insecure. In 1786, for example, while serving as a naval surrogate at Placentia, Prince William Henry (later William IV) physically assaulted Father O'Donel. The faction-fighting in Ferryland, and O'Donel's ongoing dispute with an itinerant priest, also threatened to undermine the church's position with the government. O'Donel had established a sound relationship with Governor Elliot but had to start from scratch when Milbanke arrived.<sup>73</sup>

It is not surprising that Governor Milbanke determined from the outset that the convicts had to be deported from Newfoundland. Milbanke wanted to uphold the regulations governing the movements of masterless servants. Following established policy, he strictly forbade the "harbouring or entertaining of dieters", and warned that "persons coming from other parts of the Island to St. John's to remain the winter as dieters will be punished as vagrants and sent back from whence they came".<sup>74</sup> Milbanke also viewed tolerance of Catholicism as an encouragement to Irish servants to settle in Newfoundland after they had served out their contracts. Determined to check the recent trend toward greater religious freedom, he refused O'Donel's request to build a chapel in Ferryland.<sup>75</sup> Equally important, with a resident population of less than 3,000 people, St. John's could not readily absorb an influx of more than 100

71 GN 2/1/A, vol. 3, p. 272, PANL.

72 GN 2/1/A, vol. 4, p. 285 (re-issuing of Palliser's decree, 1770), vol. 7, p. 35 (order forbidding women to be brought from Ireland, 1777), PANL. The relative absence of women in pre-1815 Newfoundland society was due far more to the structure of the migratory fishery than any legal restrictions. See Cadigan, *Merchant-Settler Relations in Newfoundland*, pp. 64-65.

73 Hans Rollmann, "Religious Enfranchisement and Roman Catholics in Eighteenth-Century Newfoundland", in Terrence Murphy and Cyril Byrne, eds., *Religion and Identity: The Experience of Irish and Scottish Catholics in Atlantic Canada* (St. John's, 1987), pp. 34-52; Raymond Lahey, "Catholicism and Colonial Policy in Newfoundland, 1779-1845", in Terrence Murphy and Gerald Stortz, eds., *Creed and Culture: The Place of English-Speaking Catholics in Canadian Society, 1750-1930* (Montreal and Kingston, 1993), pp. 49-55.

74 GN 2/1/A, vol. 12, pp. 38-40, PANL.

75 Frederic Thompson, "Mark Milbanke", *DCB*, V (Toronto, 1983), pp. 595-6.

convicts: unlike economies with a relatively high demand for labour, such as in Maryland and Virginia, there was little work on the island after the summer fishery had ended.<sup>76</sup> From the governor's perspective, therefore, the dilemma was not whether to get rid of the convicts but rather how to pay for it.

Unwilling to act unilaterally, Milbanke waited for a response from the St. John's committee before taking further action. At a meeting on 14 September, a committee of 12 men, seven of whom had attended the 22 July assembly, proposed to raise a local tax to pay for deporting the convicts.<sup>77</sup> The duties would be ten shillings for each merchant ship or banker, four shillings for each four-man shallop, two shillings sixpence per skiff, and three shillings for each inhabitant. Milbanke had no statutory authority to impose these duties, since Palliser's Act exempted fishing ships from taxation.<sup>78</sup> The plan also meant that the island would apparently endure "taxation without representation", a practice widely condemned as unconstitutional. Nonetheless, Milbanke eagerly promoted the new tax as a means to finance a project vital to the island's security. On 16 September he sent a circular letter to justices of the peace in each district in Newfoundland, directing them to collect the duties recommended by the St. John's committee.<sup>79</sup>

Milbanke's decision to impose taxation in Newfoundland was neither a rash nor an unprecedented move. A recent claim that the levy represented an extraordinary and illegal measure distorts the legal context in which the island's government operated.<sup>80</sup> The 1778 Colonial Tax Repeal Act applied only to taxes levied by the king and parliament of Great Britain, leaving colonial assemblies relatively free to impose local assessments.<sup>81</sup> Whether an *ad hoc* committee constituted an equitable form of representative government remains debatable, but it certainly was not without precedent. The question of whether the island's government could legally impose local taxation arose originally in 1730, after the first governor, Captain Henry Osborn, had ordered a levy to pay for building a prison at St. John's. Facing stiff opposition from some merchants, Osborn referred the matter to the British government. The Attorney General ruled that the tax contravened both King William's Act, which designated the fishery a free trade, and the English jail-building Act, which authorized an assessment only upon a grand jury presentment.<sup>82</sup> While stipulating that the

76 Ekirch, *Transportation of British Convicts to the Colonies*, pp. 108-18; Head, *Eighteenth Century Newfoundland*, pp. 203-14.

77 CO 194, vol. 41, p. 41 (enclosure no. 10), PANL. Stuart, Phillips, Thomas, Tremlett, Gleeson and Rowe had been replaced by A. Thomson, William Henley, William Farley, Edward Lee and John Harvey. Farley had been a grand juror in 1788, while Henley and Harvey served on the 1789 grand jury.

78 15 Geo. III, c. 31, s. 7 (1775). Section seven stipulated only customs house fees, and it could be argued that Milbanke's tax did not contravene the letter of the law.

79 CO 194, vol. 41, pp. 41-42 (enclosure no. 11), PANL.

80 Reece, "Irish Convicts in Newfoundland", p. 13; see also Martin, "Convict Transportation to Newfoundland", p. 92.

81 18 Geo. III, c. 12 (1778). On the distinction between internal and external taxation, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Second edition, Cambridge, Mass., 1992), pp. 209-21.

82 10 & 11 Wm. III, c. 25, s. 1 (1698-99); 11 & 12 Wm. III, c. 19 (1700). The administrative initiatives of the early governors and the opposition they encountered from merchants and fishing admirals are discussed at length in Jerry Bannister, "Law and Custom Reconsidered: The Struggle for Authority in Newfoundland, 1729-1750", unpublished paper presented to the Canadian Legal History Conference at the Faculty of Law, University of Toronto, 7 May 1998.

## *Convict Transportation and the Colonial State in Newfoundland 111*

governor should not act “without the consent of some assembly of the people”, the Attorney General acknowledged that “so far as the people have submitted to this tax, there may be no occasion to call it in question”.<sup>83</sup> The Board of Trade reassured Osborn that it approved of “all the steps you have taken there for preserving the peace and tranquility of the inhabitants”.<sup>84</sup> Successive governors imposed taxation usually after some type of consultation with merchants and other prominent townspeople.

By 1789 the custom of raising local taxes had become a firmly established part of the government’s mandate. Governors encouraged magistrates to collect duties to fund construction of court houses and jails, or to defray costs arising from criminal trials, throughout the island’s districts: Placentia (1757-58), Harbour Grace (1765, 1771), St. John’s (1772-73), Bonavista (1774-75), Bay Bulls (1775), and Trinity (1758, 1777-78).<sup>85</sup> Taxes were regularly raised locally in Placentia, for example, where magistrates convened meetings during the annual sitting of the Surrogate Court. As the minutes of the Placentia court indicate, warrants for tax collection comprised a standard element of the naval surrogates’ jurisdiction:

Whereas upon the representation of the principal inhabitants that a tax is absolutely necessary for the repairing of the gaol, keeping up the railing of the church yards, the support of the poor, and other necessary services for the publick that may occur, [the court has] ordered a tax of two shillings to be levied on every boatkeeper, fisherman, and servant employed in the fishery in the district of Placentia, for the above services to be continued for one year only.<sup>86</sup>

In other instances, such as in Trinity in 1758, governors authorized the justices of the peace to use fines to pay for public works.<sup>87</sup>

Once Milbanke had secured the backing of the St. John’s merchants, he vigorously worked to collect the tax. Pointing out that the convicts posed a major threat to the fishery, he asserted that everyone on the island was “equally interested in getting rid of such a banditti”.<sup>88</sup> He empowered the district magistrates to fine those who did not comply, citing the Vagrancy Act as legal authority.<sup>89</sup> Under English law, justices of

83 *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain*. George Chalmers, ed. (Burlington, 1858), pp. 537-38.

84 In May 1730 the Solicitor General provided another legal opinion on raising a tax in Newfoundland: “I think Capt. Osborne will be very well justified in pursuing it as it seems to be the only method whereby the design and intention of H.M. commission can be executed”. This report and the Board of Trade’s letter to Osborn, dated 13 May 1730, are reprinted in *Calendar of State Papers, Colonial Series: America and West Indies*, vol. 37, p. 108.

85 GN 2/1/A, vol. 2, pp. 338-39 (Placentia), vol. 3, pp. 317, 329 & vol. 5, pp. 45, 140 (Harbour Grace), vol. 5, pp. 58, 78-87 (St. John’s), vol. 5, p. 207 & vol. 6, pp. 67-78 (Bonavista), vol. 6, p. 71 (Bay Bulls), vol. 2, pp. 437-38, 475-78 & vol. 7, p. 33 (Trinity), PANL.

86 GN 5/4/C/1, Placentia District Court Records, minutes for 21 September 1772, PANL. For other instances of local taxation in Placentia, see the court minutes for 2 October 1760, 6 September 1769, 25 September 1770, 1 September 1773, 11 July 1774, and 18 September 1776.

87 GN 5/4/B/1, box 1, Trinity District Court Records, minutes for 29 September 1758, PANL.

88 CO 194, vol. 41, p. 42 (enclosure no. 11), PANL.

89 17 Geo. II, c. 5, s. 23 (1744).

the peace exercised summary jurisdiction for offences such as vagrancy — a single justice could incarcerate “idle or disorderly” persons — and two magistrates could authorize local assessments in conjunction with the overseers of the poor.<sup>90</sup> When informed of the affair, officials in London made no comment on the legality of Milbanke’s initiative. As long as there were no social disturbances, petitions from merchants or remonstrances in parliament, the British government remained content to allow Newfoundland governors to take care of local problems as they saw fit.

In the meantime, Governor Milbanke also confronted the breakdown in the civil courts. Unsure of how to proceed, he asked Aaron Graham for advice on how to administer justice under the cloud of Hutchings’ suit. Graham recommended that Milbanke use the clause in his governor’s commission empowering him to appoint judges and magistrates — specifically commissioners of oyer and terminer and justices of the peace — as a basis to establish a Court of Common Pleas to settle the petitions and writs that had accumulated. Graham later testified that this rather spurious use of the commission was designed so that, “as little alteration as possible might be made from the old mode of proceeding”. As he explained it,

[Governor Milbanke] appointed the captains of the ships of war to be Judges at the out ports on their respective stations, so that they only changed the name of Surrogate with that of Judge, and continued to do the business exactly or nearly in the same manner as they had before been used to it; the principal alteration was in the appointment of the court at St. John’s, where, instead of sitting as a Judge himself, he appointed three gentlemen to sit as Judges.<sup>91</sup>

On 17 September Milbanke appointed seven men, including Graham, to be judges in the Court of Common Pleas, three of whom — Coke, Ogden, and Buchanan — were already serving as justices of the peace.<sup>92</sup> Courts of Common Pleas were duly held in the districts of Ferryland and Harbour Grace in September and October 1789.<sup>93</sup> Pronouncing the new courts an unqualified success, Governor Milbanke reported: “during my short stay there they decided in the most formal manner near thirty causes, without meeting with the smallest obstruction”.<sup>94</sup> In spite of such optimism, the British government had not sanctioned this legal innovation. Like the decision to deport the Irish convicts, Milbanke would have to wait until he returned to London to secure approval for his reforms.

On 20 September Milbanke sent his report to William Grenville, Home Secretary in the ministry of Pitt the Younger. He began by stressing that prior to 1789, “open and professed villainy, it seems was little known” in Newfoundland, but had risen

90 Landau, *Justices of the Peace*, pp. 23-28; Beattie, *Crime and the Courts in England*, pp. 267-70.

91 *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 4 [testimony of Aaron Graham], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 242.

92 GN 2/1/A, vol. 12, p. 13, PANL.

93 GN 5/4/C/1, Ferryland District Court Records (minutes for 29 September, 1 October 1789), PANL, GN 5/1/B/1, Harbour Grace District Court Records (minutes for 19-22 October 1789), PANL.

94 *Admiral Milbanke’s Report upon the Judicature of Newfoundland* (31 December 1789), f. 11, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 75.

dramatically since the Irish convicts had arrived. “Unless the greatest precautions are taken to prevent it”, he warned, “the spirit of thieving will soon find too good root in the Island to be eradicated”. In addition to noting the dangerous fever brought by the convicts, he was careful to emphasize that he had received no directions from the British Admiralty and had consulted with the “principal merchants of this town” before taking any action. “My present intention”, Milbanke concluded, “is to send the convicts to Spithead with directions to the person having the charge of them to wait the commands of one of His Majesty’s ministers”.<sup>95</sup> He enclosed all of the documents relating to the affair — from the depositions taken in July 1789 to the advertisement for a vessel to ship the convicts posted on 17 September — and sent the British Admiralty a full copy.

Milbanke’s decision to ship the convicts to Spithead reflected his intention to deal only with the immediate problem of deporting the Irish convicts. No evidence exists to support the assertion that he sent the convicts to Portsmouth, instead of Plymouth, which was closer to Ireland, out of hopes that they would then be sent to New South Wales.<sup>96</sup> On the contrary, Spithead, the anchorage off Portsmouth, had been the standard destination of warships returning from the Newfoundland station, either directly or via Lisbon, throughout the 18th century.<sup>97</sup> Milbanke remained well aware of the potential fallout from his decision — hence the careful documentation — but focused solely on the pragmatic difficulties within his own jurisdiction. He did not have the luxury of time: all the necessary preparations had to be made before the autumn departure of the fleet and the onset of harsh weather conditions. Further, Milbanke had no legal prerogative to justify deporting the convicts either back to Ireland or to another British territory. And if he allowed them to stay he would endanger not only the safety of the townspeople but also the lives of the convicts themselves, who would be hard pressed to find sufficient food and shelter over the winter. Given this limited range of options, sending them to Spithead represented the most defensible course of action.

In October 1789 the numerous arrangements for deporting the convicts were completed. The advertisement for a ship had stipulated that the master provide “between 60 and 80 men and women” with sufficient food and water for an Atlantic crossing. Robert Coysh, master of the Dartmouth brig *Elizabeth and Clare*, signed a contract with the governor on 23 October. Milbanke directed Coysh to notify William Grenville upon his arrival and then to await further orders from the British government. He also ordered John Lee, barrack master of the St. John’s garrison, to deliver to Coysh forty beds and blankets.<sup>98</sup> Not surprisingly, the final cost of

95 Milbanke to Grenville, 20 September 1789, CO 194, vol. 41, pp. 27-28, PANL.

96 The speculation by Martin and Reece about Milbanke’s conduct places a false importance upon penal policy. They both ascribe to the Newfoundland governor responsibilities and concerns far exceeding anything Milbanke was likely to have either considered or attempted. See Martin, “Convict Transportation to Newfoundland”, p. 93, fn. 51; Reece, “Irish Convicts in Newfoundland”, p. 19.

97 The navigation at Plymouth was also much more difficult than at Spithead. See N.A.M. Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (Glasgow, 1986), p. 49.

98 CO 194, vol. 41, pp. 42-43 (advertisement for a ship, 17 September 1789), CO 194, vol. 38, pp. 114-117 (contract between Coysh and Milbanke, 23 October 1789), GN 2/1/A, vol. 12, p. 54 (Milbanke to Lee, 21 October 1789), PANL.



incarcerating, treating, feeding and shipping the convicts proved to be extensive. Among the charges to the government were £50 for renting Winter's house, which was "very much damaged," £10 for medical services, £73 for navy slops to clothe the convicts, over £200 for food supplies and £400 for chartering the brig. The total, at least £775, amounted to more than half the entire civil establishment voted for Newfoundland.<sup>99</sup>

By early October Milbanke knew that the fund-raising efforts would fall short. Collecting duties on each ship and person proved too large a task to be undertaken quickly, and Milbanke's report to the Admiralty on 30 September noted that he had encountered some opposition to his plans.<sup>100</sup> Half of the island's eight districts (excluding St. John's) cooperated while the other four did not respond to the governor's directive. The governor received £184 from the outports: £90 from Harbour Grace, £54 from Trinity, £20 from Placentia and £20 from Trepassay. Milbanke had to pay the balance out of his own pocket and was later compensated for £226. The contribution of St. John's remains unclear but presumably accounted for a portion of the remaining £365.<sup>101</sup>

Although Milbanke claimed to be disappointed by the lack of support for his scheme, the response from the island's merchants and planters was decidedly mixed. Admitting that the plan proposed by the St. John's committee "does not seem agreeable to the inhabitants of the other districts," Milbanke informed the Ferryland magistrates that they could raise the money in whatever manner "the merchants and inhabitants shall think proper".<sup>102</sup> He asked that the portion for their district, estimated at £90, be collected without delay, but received no reply. Many merchants and planters in the outports doubtless felt that the convicts did not threaten their interests — or no longer did so — yet others were willing to cooperate as much as possible. In September a committee of merchants met in Harbour Grace to discuss the plan for deporting the convicts and informed the governor that they would raise the required funds. Milbanke assured them that he had "nothing more at heart than the public good", confessing that the entire affair had given him "infinite trouble and uneasiness".<sup>103</sup> Shortly before leaving for England, Milbanke wrote personally to the Harbour Grace merchants to "entreat of them to accept of my best thanks".<sup>104</sup>

On 24 October the *Elizabeth and Clare* sailed from St. John's harbour with 74 men and six women on board. Governor Milbanke departed St. John's shortly thereafter in HMS *Salisbury*, and both ships made the Atlantic crossing in less than four weeks. On 17 November William Grenville received the papers sent by Milbanke, and the Admiral himself was in London two days later. While the convicts remained aboard the ship anchored at Portsmouth, the British government responded to the situation. Grenville drafted a warrant authorizing Coysh to transport the convicts to Ireland and

99 CO 194, vol. 38, pp. 180-82 (Milbanke to Grenville, 5 December 1789), PANL. The island's civil establishment totaled £1182, nearly all of which was allocated for the salaries of the governor and four other local officials. See GN 2/1/A, vol. 11, p. 144, PANL.

100 Milbanke to Philip Stephens, 30 September 1789, Adm. 1/472, p. 323, PRO.

101 Martin, "Convict Transportation to Newfoundland", p. 93, fn. 50.

102 Milbanke to Ferryland magistrates, 7 October 1789, GN 2/1/A, vol. 12, pp. 31-32, PANL.

103 Milbanke to Harbour Grace magistrates, 7 October 1789, GN 2/1/A, vol. 12, pp. 30-31, PANL.

104 Milbanke to Harbour Grace committee, 20 October 1789, GN 2/1/A, vol. 12, p. 48, PANL.

sent this to Lord Thurlow, the British Lord Chancellor. A meeting of the government's lawyers, including the Attorney General, was discussed but Thurlow proposed that the government order Coysh to proceed straightaway to Ireland and inform Dublin after the fact. The brig was apparently in poor condition, however, and leaking too much to leave Portsmouth without repairs.<sup>105</sup>

On 25 November Grenville notified the Irish government of what had happened. The situation presented a potentially serious dilemma: if the convicts appeared in Ireland before the expiration of their term of transportation, they were in theory guilty of a capital offence. Grenville stated the government's intention to send the convicts directly to Dublin, contending that they could not be convicted of returning early from transportation because they had not done so willingly. He also made one point clear: "our lawyers here all agreed that the proceeding thus far is perfectly legal and regular". Taking the opportunity to urge the Irish government to stop sending convict ships to the Americas, he affirmed: "you may depend upon it that, after the example set them by Admiral Milbanke, none of our Governors will suffer any of these people to be landed in their governments".<sup>106</sup>

The Irish government protested strongly against the plan to send the convicts to Dublin. John Fitzgibbon, the Lord Chancellor of Ireland, pointed out that Ireland had "for time immemorial" sent convicts to the British colonies in America.<sup>107</sup> He further noted that if the convicts landed in Ireland either they would indeed be guilty of a capital offence or, if unwillingly returned by order of the British government, they could not be legally detained by Irish magistrates. Fitzgibbon asked that no action be taken until the legal quandary could be ironed out. On 1 December, Robert Hobart, secretary to the Lord-Lieutenant of Ireland, presented Grenville with the Irish government's position. He cited an Irish statute passed in 1786 authorizing Ireland "to send convicts to any of his Majesty's plantations in America".<sup>108</sup> Hobart asserted that the Newfoundland governor thus had no justification for his actions, observing that Milbanke had admitted that the convicts had committed no offence to justify their incarceration in July 1789. "Should the Government of England support Admiral Milbanke", Hobart declared, "the Parliament of Ireland will be much pressed to resent it as a national indignity". He ended by disclosing that the government had dispatched a revenue cruiser to prevent the convicts from being landed in Ireland.

Milbanke thus found himself at the center of a political battle between the British and Irish governments. On 2 December Dublin repeated its attack on the Newfoundland governor. Fitzgibbon asserted that Milbanke "has done an act highly indiscreet at best" and caustically remarked that the Admiral would never deign to come to Ireland nor to "feel any comments which our worthy Whigs may make upon

105 Unless otherwise noted, the narrative in this section is based on the Historical Manuscripts Commission, 30th Series, *Manuscripts of J.B. Fortescue Preserved at Dropmore* (London, 1892-1927), vol. 1, pp. 538-61 [*Dropmore Papers*]. I thank Simon Devereaux for generously sharing his research materials and expertise. The impact of the landing of the Irish convicts on British penal policy is reappraised in Devereaux, "Irish Convict Transportation and the Reach of the State", passim.

106 Grenville to Hobart, 25 November 1789, *Dropmore Papers*, vol. 1, pp. 542-43.

107 Fitzgibbon to Grenville, 28 November 1789, *Dropmore Papers*, vol. 1, p. 544.

108 Hobart to Grenville, 1 December 1789, *Dropmore Papers*, vol. 1, pp. 544-46. Emphasis in original. The statute in question was 26 Geo. III, c. 24, ss. 64-70 (Ireland 1786).

him”.<sup>109</sup> Grenville ignored the virulence but pounced on the fact that Ireland was entitled to transport convicts only to a British *colony*. In a statement often cited by historians, Grenville declared:

Newfoundland is in no respect a British colony, and is never so considered in our laws. On the contrary, the uniform tenor of our laws respecting the fishery there, and of the King’s instructions founded upon them goes, as I apprehend, to restrain the subjects of Great Britain from colonizing in that island. I am not quite certain, but I believe that this policy is carried so far as even to authorize the Governor to remove by force the British fishermen who may show a disposition to settle on the island, and remain there during the winter.<sup>110</sup>

He was asserting that since the convicts had not been transported to a British colony, their sentences had not been legally executed. The Irish government could therefore detain the convicts in Dublin and arrange to transport them somewhere else. Grenville’s statement represented no more than an attempt to solve the immediate problem of the Irish convicts and formed neither a general nor an accurate statement on the operation of the island’s government.

The disparity between official imperial policy and the actual administration of Newfoundland was larger than the Irish government could have imagined. In official terms, Newfoundland was not a colony but a seasonal fishing station. It was, to repeat a hackneyed quotation, “a great English Ship moored near the Banks during the fishing season, for the convenience of the English fishermen”.<sup>111</sup> On the other hand, as Keith Matthews has demonstrated, implementation of policy varied considerably according to economic pressures and political expediency.<sup>112</sup> Domestic politics and European imperatives determined the course of British colonial administration far more than the particular legal or political concerns of the colonies themselves.<sup>113</sup> John

109 Fitzgibbon to Grenville, 2 December 1789, *Dropmore Papers*, vol. 1, p. 548. The tone of Fitzgibbon’s remarks did not reflect Irish nationalism: one of the most powerful Protestant politicians in Dublin, he became an advocate of the Act of Union in 1800-1. See J. C. Beckett, *The Making of Modern Ireland, 1603-1923* (Second edition, London, 1981), pp. 232-36, 268-71.

110 Grenville to Fitzgibbon, 2 December 1789, *Dropmore Papers*, vol. 1, p. 549. For examples of how historians have misinterpreted this statement, see W. S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto, 1965), p. 110; Ann Gorman Condon, “1783-1800: Loyalist Arrival, Acadian Return, Imperial Reform”, in P. A. Buckner and J. G. Reid, eds., *The Atlantic Region to Confederation: A History* (Fredericton, 1994), p. 189.

111 *Second Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (April 1793), f. 16 [testimony of William Knox], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 188.

112 In early 1765, for example, Lord Grenville’s government considered making major changes to its policy toward Newfoundland — Matthews argued that the proposed reforms would have given the island colonial status and perhaps representative government by 1770 — but the initiative died when the Rockingham ministry came to power. In the wake of the Stamp Act crisis, Newfoundland once again fell off the political map. See Matthews, *Lectures on Newfoundland*, p. 123. On government and policy generally, see Keith Matthews, “History of the West of England — Newfoundland Fishery”, D.Phil. thesis, Oxford University, 1968, pp. 337-66.

113 As C. A. Bayly observes, “the formal statements of constitutions or colonial minutes are a poor guide

## *Convict Transportation and the Colonial State in Newfoundland 117*

Reeves, the first chief justice of the island's Supreme Court, decried the neglect fostered by the West Country merchants: "The consequence has been, that Newfoundland has been peopled behind your back; you have abandoned it to be inhabited by any one who chooses, because you thought appointing a Governor would constitute a Colony and encourage population".<sup>114</sup> Reeves exaggerated both the influence of English merchants and the degree of official neglect — as recently as 1786 the British government had received a detailed report on law and government and the island's growing population — but he accurately identified the gap that existed between policy and practice.<sup>115</sup>

On 9 December 1789 Grenville reiterated his position that Newfoundland's status as a mere fishing station meant that the convicts' sentences had not been carried out. To back his claim he cited "the Act of William and Mary and that of 1773 respecting the fishery there".<sup>116</sup> Not surprisingly, Fitzgibbon replied that he was unable to find any 1773 act (Palliser's Act of 1775), but he had perused King William's Act and its provisions for "temporary property" in Newfoundland. Yet Grenville's scheme had the desired effect. Fitzgibbon reported that the Irish government had recalled the revenue cruiser and, while still maintaining that Milbanke had acted improperly, informed Grenville that he had reconsidered the affair in light of the fact that "*Newfoundland is not a British colony*".<sup>117</sup> Betraying a mistaken impression that settlement was strictly forbidden in Newfoundland, which British officials were not about to correct, Fitzgibbon conceded:

Certainly, if the King's subjects are by law prohibited from remaining in Newfoundland after the fishing season, with a view to prevent them from interfering with the persons who carry on the business of the fishery, this will go a great way to justify Governor Milbanke in the act which he has done; and if we are enabled to stand upon his conduct as justifiable by the laws of England, I am ready to agree with you that the British Government could not dispose of our convicts in any other way than that in which I fear they have already been disposed of.<sup>118</sup>

With the primary legal obstacle removed, the crisis diffused, and the Irish convicts were finally returned to Dublin on 21 January 1790. "I am in great hopes", Hobart wrote to Grenville, "that you have given us a loop hole [sic], which will get us out of the scrape".<sup>119</sup>

to real social and political change; there are distinct limitations to history based on what men tell their lawyers they are doing". See C. A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London, 1989), pp. 8-11, 93-5. On this point, see also Gerald Graham, *Empire of the North Atlantic: The Maritime Struggle for North America* (Second edition, Toronto, 1958), p. 144.

114 *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 172 [testimony of John Reeves], in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, p. 410.

115 See Papers of the Board of Trade [BT], 6/89, pp. 10-20, 78-87, 167, PRO. Appendix no. 1 listed the population of Newfoundland from 1718 to 1785.

116 Grenville to Fitzgibbon, 9 December 1789, *Dropmore Papers*, vol. 1, p. 553.

117 Fitzgibbon to Grenville, 14 December 1789, *Dropmore Papers*, vol. 1, p. 554. Emphasis in original.

118 Ibid.

119 Hobart to Grenville, 22 January 1790, *Dropmore Papers*, vol. 1, p. 560.

The loophole provided by Newfoundland's legal status proved to be sufficient. Though the fate of the Irish convicts remains unknown — Bob Reece has traced 12 of them in a shipment of convicts transported from Cork to New South Wales in 1791 — the affair was over as far as the island's government was concerned.<sup>120</sup> Able to return to his crusade for legal reform, on 31 December 1789 Governor Milbanke submitted a comprehensive report to the Home Secretary and the Committee of the Privy Council for Trade. Compiled by Aaron Graham, it outlined the problems in the civil courts and argued strongly in favour of the Court of Common Pleas.<sup>121</sup> In response to petitions by West Country merchants against the new court, Milbanke reiterated his case in February 1790.<sup>122</sup> Yet London took no action: in July 1790 Milbanke appealed to Grenville that the Admiralty had ordered him to sail for Newfoundland, but he had not received any word about his proposed reforms.<sup>123</sup> Belatedly, the Committee of Trade heard the report of the Attorney and Solicitor Generals, both of whom ruled that the island's Court of Common Pleas was "not founded on any authority legally given to the said Governor, and cannot be supported or justified by law".<sup>124</sup> The British government then informed Milbanke that it would not constitute any new courts in 1790, directing him instead to rely upon the justices of the peace to hear civil cases.<sup>125</sup> When Milbanke returned to Newfoundland he again operated the Court of Common Pleas and — not for the first time in the island's history — official policy was subordinated to administrative expediency.<sup>126</sup>

When legislation was passed in 1791, it provided only for a temporary court of civil jurisdiction. The Judicature Act was limited to one year, during which John Reeves, the newly-appointed chief justice, would assess the requirements for the administration of law in Newfoundland.<sup>127</sup> In November 1791 Reeves prepared his first report on Newfoundland's legal system in which he sketched plans for a new judiciary. He concluded by recommending that the British government establish some type of legislature in Newfoundland. Specifically, Parliament "should give out of its hands, a small portion of its Legislative Authority and confer it, where it can be exercised with more circumspection and effect". Reeves continued:

I propose that the Governor of Newfoundland should be authorized with the advice (but not to be controlled by such advice) of a certain number of persons not being more than five justices of the peace, five merchants, five boatkeepers, and five other persons, whom he may please to summon (meaning to select some out of the different classes of men in the Island) and

120 Reece, "Irish Convicts in Newfoundland, Part II", pp. 139-40.

121 *Admiral Milbanke's Report upon the Judicature of Newfoundland* (31 December 1789), ff. 7-37, in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 71-101.

122 "Letter from Admiral Milbanke", (20 February 1790), in Lambert, ed., *House of Commons Sessional Papers, Volume 90: Newfoundland*, pp. 102-08.

123 Milbanke to Grenville, 6 July 1790, CO 194, vol. 38, p. 190, PANL.

124 Privy Council Registers [hereafter PC] 2/135, pp. 201-10 (23 July 1790), PRO. Quotation at p. 205.

125 Evan Nepean to Milbanke, 24 August 1790, CO 194, vol. 38, pp. 192-93, PANL.

126 John Reeves, *History of the Government of the Island of Newfoundland* (New York, 1967 [1793]), pp. 166-7.

127 31 Geo. III, c. 29 (1791). See also Peter Neary, "John Reeves", *DCB*, VI (Toronto 1987), pp. 636-7.

## *Convict Transportation and the Colonial State in Newfoundland 119*

the Chief Judge and two Assessors of the Supreme Court, to make bye laws, and regulations.<sup>128</sup>

In his second report, however, he abandoned the concept of a legislature in favour of more pragmatic measures. After visiting the outports in 1792, he affirmed, "I am convinced, from what I there saw, that there is less need of regulations than of persons to execute them; and that instead of making new laws, we should first find a new set of magistrates to execute the old ones."<sup>129</sup> In the wake of the Hutchings affair in 1788-89, naval officers had withdrawn from their customary position as sole surrogate judges. Civilians began to fill the surrogate bench after 1791, though the governor and his junior officers remained active in local government.<sup>130</sup>

Chief Justice Reeves' recommendations formed the basis of Newfoundland's constitution for the next 30 years. 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.<sup>131</sup> Again the act was for one year only and had to be renewed annually until 1809.<sup>132</sup> The British government was trying to close the gap between imperial policy and local practice, but it did so by tailoring law to available legal resources. Far from being seen as an aberration, this preference for local customs conformed to the English common law tradition. As Reeves explained to the House of Commons in 1793:

It is a peculiar property of the law of England to give sanction and effect to local usages and customs that have prevailed for length of time. If the law of England is the rule of decision in Newfoundland, the customs and usages of Newfoundland would thereby become established, because the law of England opens and receives the customs and usages of the place into itself as a part of it, and the usage and custom would then become the law of the land by virtue of the force and efficacy given to them by the law of England.<sup>133</sup>

Existing institutions, such as the surrogate courts, were favoured over innovations, in particular the Court of Common Pleas. The administration of justice in pre-1792 Newfoundland therefore appears to have been largely customary, often ad hoc, and in

128 CO 194, vol. 38, pp. 290-326, PANL [(report on judicature of Newfoundland, 28 November 1791), quotation at pp. 316-17]. Reeves submitted this paper to the Secretary of State, Henry Dundas, and sent a second report to the Committee for Trade on 16 December 1791. See PC 2/136, p. 540, PRO.

129 BT 1/8, pp. 49-91, PRO [(report on judicature of Newfoundland, 5 December 1792), quotation at p. 83].

130 See, *inter alia*, the list of appointments in GN 2/1/A, vol. 12, pp. 210-12 (surrogates' commissions, 11 October 1793), PANL. The changes in the naval surrogate system are discussed at length in Bannister, "Law and Criminal Justice in Eighteenth-Century Newfoundland", ch. 3.

131 32 Geo. III, c. 46 (1792). A summary of Reeves' 1791 report and a concomitant draft of the 1792 Judicature bill appear at CO 194, vol. 38, pp. 328-53, PANL.

132 49 Geo. III, c. 27, s. 2 (1809).

133 *Third Report from the House of Commons Committee to Enquire into the State of the Trade to Newfoundland* (June 1793), f. 148, in Lambert, ed., *House of Commons Sessional Papers, Volume 90*, p. 386. On the place of local custom in English jurisprudence, see Carleton Kemp Allen, *Law in the Making* (Seventh edition, Oxford, 1964), ch. 2; Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Cambridge, 1991), pp. 2-18.



many respects contrary to statutory law. Does this mean, as liberal historiography suggests, that the island's government was necessarily primitive, corrupt or simply absent?

The short answer is no. As the response to the landing of Irish convicts demonstrates, government in Newfoundland — consisting of magistrates, merchants, the civil secretary and the naval governor — reacted effectively when confronted with major problems. This is not to suggest that the administration of pre-1832 Newfoundland 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>134</sup> It is, however, to argue that the model of Newfoundland simply as politically backward cannot account for the events of 1789, nor for earlier examples of administrative initiative and local taxation. Despite the declaration by Grenville that Newfoundland was in no sense a colony, London knew that settlement, government and law operated year-round after 1729. In addition to annual reports, the British government received detailed representations in 1718, 1765-66, 1786, and 1789-92. The statements made by British officials during their debates with Dublin in 1789 cannot be separated from the specific political context of the Irish convicts crisis.

Ironically, government in Newfoundland functioned essentially the same in 1789 as the legislative model proposed by Reeves in his first report. Governor Milbanke consulted the justices of the peace and the merchants, who had formed a committee, before issuing instructions and continued to solicit their cooperation until his departure in October. The limited administrative apparatus in 18th-century Newfoundland both inhibited governors' abilities to act unilaterally and encouraged the process of working with magistrates and merchants. With neither an elected assembly nor an independent press to monitor or question decisions, governors were relatively free to act as they saw fit. They had no vested economic or political interests to protect locally, aside from their naval squadron, and they were comparatively free of the parochial politics that eclipsed many colonial governments. Since their appointments were usually for three years — prior to 1818, they resided at St. John's only from mid-summer until the departure of the naval squadron in early autumn — they seldom embarked on ambitious administrative projects. Accountability to London tempered this political autonomy: as Milbanke discovered, the British government periodically rejected local initiatives, though it rarely reprimanded governors. Pragmatism guided the implementation of imperial policy to a greater degree than statutory law or mercantile tenets.

The reforms of 1791-92 were not rungs in a teleological ladder of legal progress. Government after 1792 continued to function basically as it had during Milbanke's tenure. When the next large-scale crisis hit Newfoundland in 1816-17, magistrates, merchants and the governor again managed the local response. In the face of disastrous fires, waves of bankruptcies and outbreaks of civil unrest, merchants in St. John's organized public meetings, established a committee and proposed measures for

134 Patrick O'Flaherty, "Government in Newfoundland before 1832: The Context of Reform", *Newfoundland Quarterly*, 84, 2 (Fall 1988), pp. 26-30; O'Flaherty, "The Seeds of Reform", pp. 40-56.

## *Convict Transportation and the Colonial State in Newfoundland 121*

the immediate relief of the community. These efforts were remarkably similar to the actions taken a generation earlier. In January 1817 Captain David Buchan, a resident surrogate magistrate at St. John's, convened a public meeting to nominate a committee, consisting of merchants and other "gentlemen", which acted as an informal legislature; it passed a series of resolutions that included the division of the town into a system of wards.<sup>135</sup> Merchants also appeared before a parliamentary committee to advise the British government on the situation in Newfoundland.<sup>136</sup> 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.<sup>137</sup> The creation of a bourgeois public sphere meant that government policies were for the first time subjected to critical evaluation in local newspapers.<sup>138</sup> When a broad coalition of reformers and merchants formed to protest against "taxation without representation" in 1828, it pressured London into giving Newfoundland an elected assembly four years later.<sup>139</sup>

The events in 1789 shed light on why the structure of governance in Newfoundland remained intact for such an extended period of time. The success in coping with the influx of Irish convicts illustrated the ability of local government to protect proprietary interests. From the 1730s to the 1820s the governor, magistrates and merchants constituted a *de facto* legislature and executive to approve and enforce local policies. This arrangement was limited to specific projects, such as the building of court houses and other public works, or defraying the cost of criminal trials. Merchants did not become significantly involved in local government unless they perceived their interests to be directly threatened, as they did in 1789, 1817 and 1828. From London's perspective, government in Newfoundland functioned relatively well, cost comparatively little and caused few political problems. When the island's governance briefly occupied the centre of a dispute between London and Dublin in 1789, the British government used Newfoundland's lack of colonial status as a political loophole. Britain's policy toward the island was not wholly neglectful, nor was it inherently repressive or particularly enlightened. Rather, it followed the path of least resistance until forced in 1791-92 to legislate the minimum changes required for a functional judiciary. An act passed in 1811 conferred limited property rights; the 1824

135 *Royal Gazette* (St. John's), 21 January 1817.

136 Sean Cadigan, "The Staple Model Reconsidered: The Case of Agricultural Policy in Northeast Newfoundland, 1785-1855", *Acadiensis*, XXI, 2 (Spring 1992), p. 54.

137 On the economic transformation that preceded the political reform movement, see Shannon Ryan, "Fishery to Colony: A Newfoundland Watershed, 1793-1815", in P. A. Buckner and David Frank, eds., *The Acadiensis Reader, Volume One: Atlantic Canada Before Confederation* (Second edition, Fredericton, 1990), pp. 138-56.

138 When the British government proposed establishing a duty on imports into Newfoundland in 1827, the local reform discourse — in particular the editorials by John Shea and Henry Winton — made the link between taxation and political representation. See the *Newfoundlander* (St. John's), 21 November 1827; *Public Ledger* (St. John's), 15 December 1827. On the creation of a public sphere generally, see Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Mass., 1991), esp. pp. 19-26.

139 The island's reform movement is discussed further in Jerry Bannister, "The Campaign for Representative Government in Newfoundland", *Journal of the Canadian Historical Association*, 5 (1994), pp. 28-40.

Judicature Act bestowed piecemeal reforms; and the 1825 Royal Charter awarded official colonial status but did not provide for representative institutions beyond a town corporation.<sup>140</sup> The British government was highly skeptical about establishing a local legislature in 1832 and did so only when spurred by a determined reform movement.

The development of law and government in 18th-century Newfoundland demonstrates the inadequacy of employing a narrow model of the state. A generation ago Ralph Lounsbury suggested that the island endured a limited political and legal system because it had a primitive society in which there existed neither need nor demand for representative government.<sup>141</sup> Recently, Christopher English has argued that by 1815, “only the rudiments of a state had been achieved”.<sup>142</sup> Yet to stress the island’s anomalous legal status cannot adequately account for the evolution of local government before 1832. More specifically, to conflate the growth of civil society with the operation of an effective colonial state obscures the function of customary institutions. With three layers of authority — the governor’s office at St. John’s, the surrogate courts in the districts, and the sessions held by justices of the peace — the system of policing and punishment in Newfoundland was as strong as that in many other rural societies. In colonial America and the early Republic, state authority was generally weak and institutional coercion relatively limited compared to Great Britain. Local law-enforcement and penal practices varied markedly from region to region; in Upper Canada too the central government had difficulty enforcing its authority in rural townships.<sup>143</sup>

Finally, the story of the Irish convicts bears on the problem of defining the colonial state. To view government from the altitude of imperial policy overlooks much of what was happening on the ground. “The state”, as Michael Braddick contends, “is not a purely institutional phenomenon”.<sup>144</sup> In other words, it comprises much more than the sum of its bureaucratic parts. Given the range of available resources and the nature of local conditions, the seasonal judiciary of the naval governor and his junior

140 51 Geo. III, c. 45 (1811); 5 Geo. IV, c. 67 (1824). Two other acts passed in 1824 also revised aspects of the island’s legal system: the Fisheries Act (5 Geo. IV, c. 51), and the Marriage Act (5 Geo. IV, c. 68). On the 1825 Royal Charter, which was promulgated on 2 January 1826, see the *Mercantile Journal* (St. John’s), 5 January, 2 March 1826.

141 Ralph Lounsbury, *The British Fishery at Newfoundland, 1634-1763* (New Haven, 1934), esp. pp. 307-10.

142 Christopher English, “The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819”, in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials, Volume One: Law, Politics, and Security Measures, 1608-1837* (Toronto, 1996), pp. 296-322 [quotation at p. 317].

143 Kathryn Preyer, “Penal Measures in the American Colonies: An Overview”, *American Journal of Legal History*, 26 (1982), pp. 326-53; Gordon Wood, *The Radicalism of the American Revolution* (New York, 1991), pp. 109-24; Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, 1993), pp. 47-51; Susan Lewthwaite, “Violence, Law, and Community in Rural Upper Canada”, in Jim Phillips, Tina Loo and Susan Lewthwaite, eds., *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice* (Toronto, 1994), pp. 353-86.

144 Michael Braddick, “State Formation and Social Change in Early Modern England: A Problem Stated and Approaches Suggested”, *Social History*, 16, 1 (January 1991), pp. 1-17 [quotation at p. 2]. On this point, see also Michael Ignatieff, “State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment”, in Stanley Cohen and Andrew Scull, eds., *Social Control and the State: Historical and Comparative Essays* (Oxford, 1983), pp. 96-101.

## *Convict Transportation and the Colonial State in Newfoundland 123*

officers provided a remarkably effective administrative regime. The involvement of merchants and magistrates in local government — particularly their use of ad hoc committees — formed a substitute for the formal institutions granted to most colonies in British North America.<sup>145</sup> If the island's customary sources of legal authority are considered as parts of the colonial state, the relative effectiveness of the magistracy in coping with the landing of Irish convicts can be clearly discerned. The malleability of the common law tradition had allowed 18th-century Newfoundland to develop a legal system that met the needs of those in power.

145 Thus informality (which Greenwood and Wright see as characterizing the administration of justice in pre-1832 Newfoundland) does not denote ineffectiveness. See F. Murray Greenwood and Barry Wright, "Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada", in Greenwood and Wright, eds., *Canadian State Trials, Volume 1: Law, Politics and Security Measures, 1608-1837* (Toronto, 1996), pp. 14-15.