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“THE PEACE,” DOMESTIC VIOLENCE, AND FIREARMS IN THE NEW REPUBLIC

*Laura Edwards**

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INTRODUCTION

The outlines of Sarah Butler’s story seem depressingly familiar. Her husband, Henry Butler, made multiple threats against her before he ambushed and shot her. Fortunately, Sarah escaped serious injury, although it was close: the bullet passed through her clothing. After that incident, Sarah made a complaint to local officials, who arrested her husband. His assault with a firearm, combined with testimony that established a pattern of threats against her life, resulted in a charge of attempted murder. Henry Butler was convicted and imprisoned.¹

* Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Princeton University. This Article is based largely in the research and analysis in my book, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009). The Author wishes to thank Charlotte Moriarty, Nicole Aboodi, Joseph Gomez, Katherine Heaney, Paris Rogers, Amanda Trau, Mackenzie Philbrick, Ashley Geisler, Jason Semaya, Antonia Spano, Sophia Slater, and Tammy Zapata for all their work on this Article.

1. *See* State v. Henry Butler, Court of General Sessions, Indictments, Kershaw District (1824) (located at S.C. Dep’t of Archives & Hist.); State v. Henry Butler, Court of General Sessions, Journal, Kershaw District (1824) (located at S.C. Dep’t of Archives & Hist.). Like the cases from most local jurisdictions, these cases are manuscript records and available only at the archives.

What distinguishes this case from other, similar cases today is that it took place in rural South Carolina in 1824.² That might seem surprising now, but it was not particularly unusual then. Lower levels of the legal system — county, municipal, mayors', magistrates', and justices' courts — regularly dealt with domestic violence, despite the restrictions of coverture, in its definition at the time, which gave husbands disciplinary power over their wives and limited married women's ability to prosecute husbands in their own names.³ In these cases, as in others involving violence, the presence of any kind of weapon, including guns, was assumed to elevate the threat.⁴

This part of the nation's legal history is not as well-known as the one documented in statutes, appellate decisions, and treatises. While local officials followed the rules laid out in justices' manuals, they applied a capacious definition of common law. Not all local jurisdictions kept written records.⁵ When records were kept, some have since been thrown away.⁶ Those that exist are difficult to access and use, because they remain in manuscript form and are located in archives scattered across the country.⁷

2. See *supra* note 1 and accompanying text.

3. For an analysis of domestic violence based on archival research in local court records from North Carolina and South Carolina see LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 107–11, 180–86 (2009). The patterns there are not specific to those states. For other work that deals with the prosecution of domestic violence in local jurisdictions, see Meggan Farish Cashwell, "To Restore Peace and Tranquility to the Neighborhood": Violence, Legal Culture and Community in New York City 1799–1827, at 87–93 (2019) (Ph.D. dissertation, Duke University) (on file with Duke University Libraries); Stephanie Cole, *Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore*, in *OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA* 148–69 (Christine Daniels & Michael V. Kennedy eds., 1999); Pamela Haag, "The Ill-Use of a Wife": Patterns of Working-Class Violence in Domestic and Public New York City, 25 *J. SOC. HIST.* 447, 462–63 (1992). For similar prosecutions in Boston, Philadelphia, and Virginia, see Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 *CRIME & JUST.* 19, 29–33 (1989). The analysis in Pleck, which tends to undercut the effectiveness of the proceedings and to dismiss the outcomes, reflects the bias in the primary sources against local jurisdictions and the kinds of matters they handled. Local courts were a frequent target of critique by those who wished to curtail their power. See *infra* note 65 and accompanying text. In the late twentieth century, moreover, these means of handling domestic violence seemed problematic compared to legal mechanisms that centered married women as legal actors in their own right.

4. See *supra* note 3 and accompanying text.

5. See EDWARDS, *supra* note 3, at 23.

6. See *id.* at 23, 27.

7. Local court records are usually housed in state, county, or municipal archives, although collecting practices have varied. Cases in North Carolina and many in South Carolina, for instance, reside in the state archives. For a description of these court records, see EDWARDS, *supra* note 3, at 22–24. Many of those in Mississippi remain within counties. For two books based in those court records, see generally ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000); KIMBERLY WELCH, *BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH* (2018). To complicate matters, not all records of local jurisdictions are kept in government archives.

But local jurisdictions also have received less attention because they are presumed to have been less important in defining law in the founding era than those at the state and federal levels. Local jurisdictions, it is assumed, simply followed the rules laid out in those other jurisdictions then, just as they do — or are supposed to do — today.⁸ Given those assumptions, the conventional approach has been to start where we are now and then move backward along a straight line when reconstructing the legal history of the early republic.⁹ Because statutes and appellate decisions at the state and

Because many local officials at the lowest levels of the system were not required to keep written records, some of those who did saw them as their own property, which means that they ended up in unusual places. Some loose records of the Boston Municipal Court are located in the Boston Public Library, in a collection named after the judge who reputedly rescued them off the floor, where they lay, on their way to the dumpster. *See* Case Files, Justices of the Peace, Adlow Collection (located at the Boston Public Library). Records of the Richmond Mayor's Court, 1836–1839, somehow found their way to Richmond's Valentine Museum, which specializes in fine and decorative art. *See* Docket of Mayor Joseph Tate, Mayor's Court, Richmond, 1836–1839 (located at the Valentine Museum). Even records that are in state or municipal archives are difficult to access. While relatively complete and still in the hands of the city, the New York City Mayor's Court records are located in the city's public record office where people go to research titles and other issues involved in current real estate transfers. *See* New York County District Attorney Indictment Records (located at the New York City Municipal Archives). The New Orleans notarial records are similarly situated. *See* Notarial Records (located at the Notarial Archives, New Orleans, Louisiana). Neither office is set up as an archive for historians.

8. Historians have long used the records of local jurisdictions for insights about cultural norms and social dynamics. More recently, legal historians have turned to local jurisdictions for insights into the structure of the legal system and operation of law. For a review underscoring the importance of local regulation and emphasizing the pervasiveness of regulation at the local level, see generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). In her path-breaking book, Ariela J. Gross relied on the manuscript records of local courts to reframe our understanding of civil matters involving enslaved people as property, showing how those cases actually depended on information that enslaved people supplied about their own humanity. *See generally* GROSS, *supra* note 7. For other work that has reframed our understanding of law and legal institutions through local jurisdictions, see generally MARTHA JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); KELLY KENNINGTON, *IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA* (2017); ANNE TWITTY, *BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN AMERICA'S CONFLUENCE 1787–1857* (2016); FELICITY M. TURNER, *PROVING PREGNANCY: GENDER, LAW, AND MEDICAL KNOWLEDGE IN NINETEENTH-CENTURY AMERICA* (2022); WELCH, *supra* note 7.

9. *Bruen* and *Dobbs* are good examples of the approach in law. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022). Recent work that focuses on the institutional changes in the legal system has directly critiqued the assumption that the legal system in the early republic worked then as it does now. *See, e.g.*, Laura F. Edwards, *Sarah Allingham's Sheet and Other Lessons from Legal History*, 38 J. EARLY REPUBLIC 121, 122–23 (2018) [hereinafter Edwards, *Sarah Allingham's Sheet*]; LAURA F. EDWARDS, *ONLY THE CLOTHES ON HER BACK: CLOTHING AND THE HIDDEN HISTORY OF POWER IN THE NINETEENTH-CENTURY UNITED STATES* 8–9, 21–57 (2022) [hereinafter EDWARDS, *ONLY THE CLOTHES ON HER BACK*].

federal levels now play such an important role in defining our legal order, we look to similar kinds of laws in the past for our legal antecedents and give outsized meaning to both the presence and absence of laws in those arenas. Historians and legal scholars often assume that the passage of statutes criminalizing domestic violence in the late-nineteenth century meant that such acts were not legally actionable before then.¹⁰ Similarly, it is assumed that the absence of specific statutes or ordinances relating to firearms means that those weapons were unregulated.¹¹ But to compare past to present in that way is to compare apples to oranges, because the institutional context in the post-Revolutionary period was so different than it is now. In that period, law-making bodies at the state and federal levels shared space with local jurisdictions, which exercised considerable discretion over a wide range of issues involving the public order, including firearms and domestic violence.¹²

10. Historians and legal scholars continue to take Sir William Blackstone's version of coverture as an accurate statement about how those principles operated *before* the publication of his treatise. Blackstone's phrase — that coverture entailed the suspension of “the very being or legal existence of the woman . . . during the marriage” — has been repeated so often that it has the ring of truth. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 430 (Univ. of Chicago Press ed. 1979). By that logic, married women had no legal ability to challenge their husbands' authority in law, even violent assertions of it. Yet, according to Holly Brewer, Blackstone fashioned a new synthesis that elevated the restrictions of coverture over other practices in common law and even within coverture that allowed women more legal scope. See Holly Brewer, *The Transformation of Domestic Law*, in CAMBRIDGE HISTORY OF AMERICAN LAW 288, 289–90 (Christopher L. Tomlins & Michael Grossberg eds., 2008); see also *infra* note 73 and accompanying text. American legal treatises in the first half of the nineteenth century echoed Blackstone's definition of coverture, as did women's rights activists, who defined their movement in terms of their opposition to a very Blackstonian version of coverture. See *infra* Parts II, IV (on treatises). See generally MARY RITTER BEARD, *WOMEN AS FORCE IN HISTORY: A STUDY OF TRADITIONS AND REALITIES* (1946) (discussing the influence of this version of coverture in the women's rights movement). Even scholars who argue against a static view of coverture have tended to accept the concept that husbands' authority extended to “correction” that took physical form. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123–24 (1996). In fact, Siegel's overall point — that the notion of the household as an impenetrable private domain, governed by a husband without public oversight, was a product of the nineteenth century — fits with recent work, including this Article, that has shown that households were not the private domain of husbands and uncovered the ways in which husbands' authority was regulated.

11. See *supra* note 10 and accompanying text.

12. In further support of the importance of local jurisdictions within the federal system, see EDWARDS *supra* note 3, at 13; Edwards, *Sarah Allingham's Sheet*, *supra* note 9, at 122–23; Laura Edwards, *The Legal World of Elizabeth Bagby's Commonplace Book: Federalism, Women, and Governance*, 9 J. CIV. WAR ERA 504, 512 (2019); EDWARDS, ONLY THE CLOTHES ON HER BACK, *supra* note 9, at 10, 21–57.

I. THE IMPORTANCE OF LOCAL JURISDICTIONS IN THE NEW REPUBLIC

Governing institutions in the post-Revolutionary era were built on the foundations of the colonial past, characterized by overlapping jurisdictions and multiple centers of legal authority. As historian Lauren Benton has argued, the idea that states could claim sovereignty within certain geographic bounds developed slowly, over time.¹³ As a result, the territorial borders of nation states remained porous in the early modern period, resulting in overlapping legal regimes connected to different authorities operating in the same place.¹⁴

Similar dynamics characterized early modern nation states as well. At that time, the legal order of England consisted of a patchwork of jurisdictions associated with different governing bodies: estates, municipalities, corporations, the military, Parliament, the Church, and the King.¹⁵ Operating simultaneously and handling similar issues, these jurisdictions reflected the political context of the time, one in which authority was dispersed through multiple governing bodies. The North American colonies were no different. If anything, the situation was even more complicated there because of the nature of colonial rule. Control over colonies shifted from one imperial power to another, each with its own laws and governing practices, which were not always replaced when regimes changed.¹⁶ The

13. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* 2–5 (2011).

14. *See id.* at 2. As recent historical scholarship has argued, efforts to define sovereignty as exclusive power within a given geographic area extended well beyond the Revolution. *See generally* GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING VIOLENCE AND PROPERTY IN FIRST U.S. TERRITORIES* (2021) (discussing the difficulties of the U.S. federal government in enforcing its sovereignty); LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836* 60 (2010); DEBORAH A. ROSEN, *BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD* 51 (2015); LEONARD J. SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* 144–47 (2009).

15. The literature on early modern law and governance in Britain and Europe is vast. For examples of multiple, layered bodies of law, see generally HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005) (development of common law); AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* (1993) (options of determining property); CYNTHIA B. HERRUP, *THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND* (1987) (discretion given to local jurisdictions); TIM STRETTON, *WOMEN WAGING LAW IN ELIZABETHAN ENGLAND* (1998) (various bodies of law available to women); Keith Wrightson, *Two Concepts of Order: Justices, Constables, and Jurymen in Seventeenth-Century England*, in *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 21–46 (John Brewer & John Styles eds., 1980) (discretion given to local jurisdictions).

16. Eliga Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772*, 60 *WM. & MARY Q.* 471, 475 (2003); Eliga Gould, *Entangled Histories*,

different laws and legal practices piled up, layer upon layer because settlers kept to their own ways and imperial officials generally found accommodation easier than change.¹⁷ Added to those dynamics were the complications resulting from uneven imperial policies and enforcement; in the words of historian Stanley Katz, the colonial legal order was not a system, but a complex “set of systems.”¹⁸

That institutional situation persisted after the Revolution. The Articles of Confederation created the United States of America, but located sovereignty within the states, which retained control over the internal police.¹⁹ That term — “internal police” — represented an open-ended grant of authority, which covered virtually any issue that touched on the public interest.²⁰ At the time, conceptions of police power were decidedly local as well as exceptionally broad, which meant that the actual practice of internal policing had lain primarily with local governments in the colonial era; this model was directly acknowledged and continued in many Revolutionary-era state constitutions, which placed limits around the franchise, but located police powers in the people more generally.²¹ While the U.S. Constitution did elevate the federal government as a sovereign authority, at least in certain areas, it did not alter

Entangled Worlds: The English-Speaking Atlantic as a Spanish Periphery, 112 AM. HIST. REV. 764, 766–67 (2007).

17. For the layered quality of law in the Anglo-American colonies, see generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE & THE EMPIRE* (2004); JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* (1994); VICKI HSUEH, *HYBRID CONSTITUTIONS: CHALLENGING LEGACIES OF LAW, PRIVILEGE, AND CULTURE IN COLONIAL AMERICA* (2010); *THE MANY LEGALITIES OF EARLY AMERICA* (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

18. Stanley N. Katz, *Introduction: Explaining the Law in Early American History*, 50 WM. & MARY Q. 3, 6 (1993).

19. See ARTICLES OF CONFEDERATION of 1781, art. II (granting each state sovereignty and “every power, jurisdiction, and right” not expressly delegated to the federal government, including, impliedly, police power).

20. For the roots of this concept in early modern England, see generally HERRUP, *supra* note 15. See also EDWARDS *supra* note 3, at 41 (discussing extent of those powers in practice in the United States). Police powers extended to questions about the economy that were later deemed a matter of private property. See CHRISTOPHER L. TOMLINS, *LAW, LABOR, & IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 38–39 (1993). For their operation in the realm of social welfare and race relations, see generally Kate Masur, *State Sovereignty and Migration before Reconstruction*, 9 J. CIVIL WAR ERA 588 (2019).

21. See, e.g., PA. CONST. of 1776, art. IV; MD. CONST. of 1776, art. IV; N.C. CONST. of 1776, arts. I, V; VT. CONST. of 1777, ch. I. Later revisions to some state constitutions dialed back on those promises. The preamble of Pennsylvania’s revised constitution of 1790, for instance, still based governing authority in the people: “We, the People of the Commonwealth of Pennsylvania, ordain and establish this Constitution for its Government.” See PA. CONST. of 1790, pmb. But the revised constitution jettisoned the language that gave the people the “right of governing and regulating the internal police.” See PA. CONST. of 1776, art. III. That revision was consistent with the removal of local authority to states. See, e.g., *infra* notes 26–27 and accompanying text.

the situation otherwise.²² On paper, the division of authority was clear: the federal government dealt with certain issues; the states handled matters relating to the public welfare; and local governments administered the states' policies.²³ In practice, though, this system operated just like the overlapping jurisdictions of the colonial era: a distant central government (although considerably weakened); states instead of colonies (although states had more power than colonies, at least in theory); and local government (which still had expansive authority, particularly in matters involving the public order).²⁴ While this division of authority had deep roots in the colonial past, it also accorded with Revolutionary ideology, which promised to keep law and governance close to the people.²⁵ This balance remained in place for most of the period between the Revolution and the Civil War, even as states began to exert more power over local jurisdictions.²⁶

In most states, counties were the basic unit of local governance, although the discretion given to counties varied by state. Counties, in turn, were often divided up into townships and cut through with municipalities.²⁷ Municipalities were separate jurisdictions, although the relationship between them and the counties in which they were situated varied by state.²⁸ The key officials were mayors, commissioners, sheriffs, and magistrates, who were also called justices of the peace.²⁹ All of these officials could act as justices

22. For background on the institutional continuities between the colonial and early national eras, see generally Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019) (explaining continuation of early modern conceptions of government in the post-Revolutionary federal system, particularly in the balance of power between states and the federal government); EDWARDS, *supra* note 3, at 42 (discussing continuation of early modern conceptions of governance in the post-Revolutionary federal system, particularly in the discretion given to local jurisdictions); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (discussing the continuation of early modern conceptions of government in the post-Revolutionary federal system, particularly in the framing of the U.S. Constitution).

23. See *supra* note 22 and accompanying text.

24. See *supra* note 22 and accompanying text.

25. See EDWARDS, *supra* note 3, at 40–47; see also SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* 68–80 (1999) (discussing the importance of local control).

26. For a discussion of states' delegation of police powers to local jurisdictions, see EDWARDS, *supra* note 3, at 40–63. See also NOVAK, *supra* note 8, at 10–11, 13.

27. See, e.g., N.C. CONST. of 1868, art. VII.

28. See *id.*

29. See Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 347, 348–50 (1967). The fact that key books on local government are so old suggests how this area has been generally overlooked. See, e.g., HOWARD KEMBLE STOKES, *THE FINANCES AND ADMINISTRATION OF PROVIDENCE* (1903); JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650–1825* (1975) (on the importance of municipalities); EDWARD M. COOK, JR., *THE FATHERS OF THE TOWNS: LEADERSHIP AND COMMUNITY STRUCTURE IN EIGHTEENTH-CENTURY NEW ENGLAND* (1976) (on the importance

of the peace, an office that came with legal authority over a range of offenses, the exact definition of which varied by state law.³⁰ Justices, for instance, generally oversaw petty theft, although the states defined the value of property crimes within justices' jurisdictions.³¹ They also handled most instances of minor violence, including assaults, riots, affrays, and other more general threats against individuals, property, and community order.³² Some of these cases passed through magistrates to other levels of the system; but not all.³³ While many of these officials were appointed, not elected, they all lived in the areas they oversaw and knew the people with whom they dealt.³⁴ There were also outside judges who ran circuit courts, which met on a regular schedule in local areas and handled cases that moved on from the jurisdiction of magistrates.³⁵

Participation in local governance extended far beyond the officials who oversaw the system or even men who could claim the full array of rights. Local officials all depended on the people who provided information about problems and whose insight was necessary to the resolution of those problems.³⁶ Grand juries, for instance, played a significant role in local governance, particularly in the decades immediately following the Revolution.³⁷ They screened complaints about ongoing community concerns and recommended action on everything from mistreated apprentices, incorrigible drunks, ill-kept latrines, and impassable roads to state legislation and federal policies relating to foreign wars.³⁸ While composed of propertied white men, juries acted on the complaints of men

of local officials); TOWN AND COUNTY: ESSAYS ON THE STRUCTURE OF LOCAL GOVERNMENT IN THE AMERICAN COLONIES (Bruce C. Daniels ed., 1978) (on the operation of local government).

30. See, e.g., Surrency, *supra* note 29, at 351. For the range of issues, see HERRUP, *supra* note 15, at 42–43.

31. For the extent of those powers in practice in the United States, see EDWARDS, *supra* note 3, at 67–69.

32. See *supra* note 30 and accompanying text; EDWARDS, *supra* note 3, at 69. For examples, see *id.* at 231–32 (minor violence); *id.* at 73 (threats against individuals); *id.* at 192 (threats against “community order”).

33. See EDWARDS, *supra* note 3, at 66–78; *supra* note 29 and accompanying text.

34. See *supra* note 33 and accompanying text.

35. See EDWARDS, *supra* note 3, at 64; *id.* at 75–78.

36. See *id.* at 71.

37. For further explanation of the role of grand juries in the post-Revolutionary era, see *id.* at 90–92.

38. See *id.* County courts served administrative functions that were later taken over by other parts of government. See Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth-Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 284 (1976). As Hartog's work suggests, the governing work of courts was displaced earlier in this area of Massachusetts than in other parts of the United States; but this does not consider the broader range of governing work done by local legal jurisdictions. See *id.* at 285.

and women who lacked the rights necessary to serve, but who nevertheless knew a great deal about the conditions in the communities where they lived.³⁹ The participation of those without property, rights, or both is most evident in another key form of local governance: court cases brought by individuals who made complaints about public disorder that were adjudicated by local officials.⁴⁰ Even those without the vote had a role in local governance. They were part of “the people,” a category that recognized a broad conception of the public order and included everyone who lived within local jurisdictions.⁴¹

II. THE PUBLIC ORDER AND THE PEACE

The importance of local jurisdictions means that statutes, appellate decisions, and treatises did not define the full ambit of law or legal practice in the new republic. Of course, not all areas of law devolved to local jurisdictions. States and the federal government kept a grip on the area of private law, which adjudicated matters involving property through the framework of rights.⁴² But for most the period between the Revolution and the Civil War, local jurisdictions controlled the vast, open-ended area of law that involved everything relating to the health, safety, and welfare of the public.⁴³ As historian William Novak describes it, local jurisdictions were in charge of the “people’s welfare.”⁴⁴ Examples include: the regulation of markets, with restrictions on their location and days and hours of operation;

39. See EDWARDS, *supra* note 3, at 119; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 UNIV. CHI. L. REV. 867, 884 (1994) (“[T]he first African Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860.”); Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 56, 58–62 (2020).

40. See EDWARDS, *supra* note 3, at 58, 79–89. Sung Yup Kim makes a similar point in relation to local discretion in applying state laws regarding debt. See Sung Yup Kim, “*In a Summary Way, with Expedition and at a Small Expence*”: *Justices of the Peace and Small Debt Litigation in Late Colonial New York*, 57 AM. J. LEGAL HIST. 83, 107 (2017); see also Brewer, *supra* note 10, at 291 (discussing local discretion in applying state laws relating to race); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* 226 (1989) (discussing the private prosecution of public crimes in local courts); MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835* 244 (1996) (discussing the private prosecution of public crimes in local courts).

41. See EDWARDS, *supra* note 3, at 58.

42. Classic legal histories on the nineteenth century focus on laws involving property (including enslaved property), because that was the focus of state legislatures and courts. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 31–32 (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 22–29 (1956).

43. See NOVAK, *supra* note 8, at 13.

44. *Id.*

the maintenance of basic infrastructure, such as roads and bridges; health measures, such as quarantines to stop the spread of disease and the oversight of businesses with known health hazards, such as butchering; safety measures, including restrictions on vagrants deemed undesirable or threatening and the use of dangerous elements, including weapons and gun powder; and the provision of welfare for the orphaned, aged, and infirm.⁴⁵

While some of these laws took written form, others did not. Local jurisdictions did pass ordinances and issue other, similar, measures.⁴⁶ They also drew on well-established principles of Anglo-American law, carried over from the colonial era, as with the provision of welfare — although not all elements of English law were adopted in the colonies or the new republic.⁴⁷

But the power of local jurisdictions extended even further than ordinances or colonial precedent because one of the well-established principles that carried over into the post-Revolutionary era was local authority over an open-ended charge to tend to the “peace,” which covered anyone and anything that undermined the collective wellbeing of the community. The concept was both established and flexible, which allowed people a legal means to address new problems as they arose.⁴⁸

The location of such broad legal authority in local jurisdictions was a feature, not a bug in the legal system at the time. To be sure, state leaders grumbled about local discretion and worked to elevate state authority over local jurisdictions.⁴⁹ But while the extent of local control was contentious,

45. See, e.g., *id.* at 3–4 (outlining regulatory powers allotted by the legislature to the city of Chicago to regulate markets, weapons, and gun powder); *id.* at 13–16 (outlining regulatory powers allotted by the legislature to the city of New York). For the importance of counties in the distribution of poor relief, see generally CORNELIA HUGHES DAYTON & SHARON V. SALINGER, ROBERT LOVE’S WARNINGS: SEARCHING FOR STRANGERS IN COLONIAL BOSTON (2014).

46. See, e.g., Laws and Ordinances, Ordained and Established by the Mayor, Aldermen, and Commonalty of the City of New-York (1812); Laws and Ordinances Ordained and Established by the Mayor, Aldermen, and Commonalty of the City of New-York (1817); Laws and Ordinances Made and Established by the Mayor, Aldermen, and Commonalty of the City of New-York (1827).

47. Many authors have written on the dramatic differences between the legal traditions of England and those in the British North American colonies and the new republic. See, e.g., Holly Brewer, *Entailing Aristocracy in Colonial Virginia: “Ancient Feudal Restraints” and Revolutionary Reforms*, 54 WM. & MARY Q. 307, 341–45 (1997) (discussing differences in entail and inheritance practices). See generally CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021) (discussing differences in the rules regarding the seizures of property, including landed property, for debt).

48. See EDWARDS, *supra* note 3, at 64–99; see also Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. IRVINE L. REV. 565, 572–74 (2011).

49. See EDWARDS, *supra* note 3, at 205–19.

the concept was well established and stated clearly in justices' manuals that, while based in guides from the colonial period, were updated after the Revolution.⁵⁰ Many of those manuals were penned by state founders who also played a significant role in defining state law and who clearly saw local discretion as integral to the system they were putting together.⁵¹

Given the Revolutionary experience and past practice, the idea that state laws could supersede local control in the area of public law struck many Americans as odd, if not downright wrong.⁵² How could an over-arching state government legislate for all the various problems of all the different people in all the diverse communities within each state? The differences within states were endless: problems of cities were not those of rural areas; places near the coast were different than those situated inland; ethnic communities in one part of the state followed different customs than those in another. The problems of individuals within those communities were even more varied. How could someone hundreds of miles away distinguish between an inveterate brawler from someone who had a bad day and took it out on someone else, but would not offend again? In the period between the Revolution and the Civil War, state legislatures acknowledged that situation and generally limited their involvement in public law, which is why there are so few statutes dealing with so many of the issues that later moved into the purview of states and, even later, the federal government.⁵³ There were

50. For the original manuals, see, e.g., RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* (1755); MICHAEL DALTON, *THE COUNTRY JUSTICE* (1619). For examples of updated post-Revolutionary handbooks, see, generally, JOHN HAYWOOD, *THE DUTY AND OFFICE OF JUSTICES OF PEACE, SHERIFFS, CORONERS, CONSTABLES, ETC.; ACCORDING TO THE LAWS OF THE STATE OF NORTH CAROLINA* (2d ed. 1808); RICHARD BURN, *BURN'S ABRIDGEMENT, OR THE AMERICAN JUSTICE: CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE* (1792); WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* (2d ed. 1819); HENRY POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* (1816); JOHN FAUCHERAUD GRIMKÉ, *THE SOUTH-CAROLINA JUSTICE OF PEACE* (1788); BENJAMIN SWAIM, *THE NORTH CAROLINA JUSTICE* (2d ed. 1846). *See also* SAMUEL FREEMAN, *THE MASSACHUSETTS JUSTICE: BEING A COLLECTION OF THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, RELATIVE TO THE POWER AND DUTY OF JUSTICES OF THE PEACE* (2d ed. 1802).

51. Updated justices' manuals, created for states in the decades following the Revolution, document the delegation of power to local jurisdictions clearly, particularly in areas relating to actions that disrupted the peace. *See, e.g.*, HAYWOOD, *supra* note 50, at 28–32. In many instances, the handbooks' authors were involved in state government and wrote on state law, as was the case with Haywood and Grimké, indicating that they were aware of the balance of power between local and state jurisdictions.

52. *See* EDWARDS, *supra* note 3, at 47–50.

53. *See* EDWARDS, *supra* note 3, at 289–90; *see, e.g.*, Hartog, *supra* note 38, at 284–86 (describing a lack of “legislative attention” paid to localized courts in post-Revolution Massachusetts).

exceptions, notably in the areas of slavery and race.⁵⁴ State legislatures, moreover, did begin to move into public matters over time, a shift noticeable by the 1830s and 1840s, although the transition was slow and uneven. Some states made the move before others. When they did, the resulting legislation targeted some issues before others, which left wide areas unaddressed.⁵⁵

Given the institutional context of the post-Revolutionary period, even state laws — statutes and appellate decisions — that purported to relate generally to the public interest were not always what they appeared to be. Some statutes were actually intended to apply only in specific areas.⁵⁶ When that was not the case, local jurisdictions still retained considerable discretion over the interpretation and application of state laws, to the point of ignoring them altogether.⁵⁷ The situation with state appellate decisions was similar. While the decisions of state appellate courts established precedent, they did not necessarily supersede other, existing legal options.⁵⁸ The fact that many appellate courts did not publish or circulate their decisions in the first decades of operation is suggestive.⁵⁹ Obviously, local officials could not follow the rules laid out in appellate decisions if they had no way of knowing what they were. But publication mattered less at the time because appellate decisions did not occupy the same space in the legal system as they do today. Some of the statute collections in the volumes now accessible on the shelves

54. The literature on the laws relating to race and slavery is vast and underscores the propensity to legislate in this area, largely because slavery and distinctions based on race did not exist in common law. *See, e.g.*, ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* (1992); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860* (1996). For 19th-century treatises summarizing the laws on which scholars still rely, see THOMAS READE ROOTES COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (1858); JOHN BELTON O'NEALL, *THE NEGRO LAW OF SOUTH CAROLINA* (1848).

55. As Naomi Lamoreaux and John Joseph Wallis argue, the idea that the primary business of state legislatures was to pass *general* laws that applied to *all* the state's residents and addressed their *collective* interests was not institutionalized until the 1830s and 1840s. *See* Naomi Lamoreaux & John J. Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy*, 41 *J. EARLY REPUBLIC* 403, 406, 408–10 (2021). Until then, state legislatures passed far more private bills (which responded to the requests of particular counties, groups, or individuals) than general legislation, even legislation related to property. *Id.* at 406–10. For the limits of state legislative lawmaking, see generally Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 *MD. L. REV.* 712 (2018).

56. *See* EDWARDS, *supra* note 3, at 214–15; Peterson, *supra* note 55, at 720 (discussing the specificity of statutes); Lamoreaux & Wallis, *supra* note 57, at 408 (discussing the specificity of statutes).

57. *See* EDWARDS, *supra* note 3, at 101; Kim, *supra* note 40, at 105 (discussing the discretion allowed to local jurisdictions despite assertions of state authority); *see, e.g.*, Masur, *supra* note 20, at 603–05 (discussing local areas ignoring laws relating to race in particular).

58. *See* EDWARDS, *supra* note 3, at 209–10.

59. *See id.* at 26, 50–51, 107.

of law libraries and through major online databases were put together well after the fact.⁶⁰ The reconstruction of past decisions was made all the more difficult because some judges had not put them in writing at the time they were issued.⁶¹

The silences in state law spoke volumes about the importance of local regulatory authority. The absence of state law in any given area did not mean that those issues were left to the discretion of individuals. To the contrary, states stayed out of a wide range of issues because local jurisdictions handled them.⁶² In dealing with public matters, local officials followed common law in its literal meaning: not common law as defined by treatises, legislators, or jurists; but common law defined in terms of commonly followed practices in particular places, which could include state laws and the laws summarized in treatises, but not necessarily limited to them.⁶³ That conception of common law meshed with the backgrounds of local officials, many of whom did not have legal training.⁶⁴ When facing a particularly thorny conflict, they would not have reached for published state laws or even the treatises now thought to define common law, even if they had those books, which they likely did not. If they reached for a book at all, it would have been a justices' manual. Those manuals, moreover, tended to emphasize process as opposed to any unified theory of law.⁶⁵ To address the issues raised by the conflict itself, local officials had to rely on common law in its more expansive form.⁶⁶

Some of the treatises that scholars now cite as authoritative expressions of common law did not reliably summarize the full range of operative legal principles or existing legal practice. They tended to mix established principles with new interpretations of them with the intent of shaping the law. Sir William Blackstone's definition of coverture in *Commentaries on the Laws of England*, provides a good example — and one with particular resonance for this Article, because his definition of coverture is often used today as the official statement of coverture as it operated in law in the late eighteenth and early nineteenth centuries, and as evidence that domestic violence could not be legally prosecuted in this period.⁶⁷ One of the most

60. *See id.* at 36.

61. *See id.* at 23, 39.

62. *See id.*; *see also* NOVAK, *supra* note 8, at 10.

63. EDWARDS, *supra* note 3, at 26–27, 94, 139.

64. The lack of legal training among magistrates and other officials at the local level was a common complaint among state leaders and legal professionals. *See* Lars C. Golumbic, *Who Shall Dictate the Law?: Political Wrangling Between "Whig" Lawyers and Backcountry Farmers in Revolutionary Era North Carolina*, 73 N.C. HIST. REV. 56, 69–81 (1996).

65. *See supra* note 50 and accompanying text.

66. *See* EDWARDS, *supra* note 3, at 100–32 (on the process of defining offenses); *id.* at 133–68 (on property); *id.* at 169–201 (on the operation of patriarchal authority).

67. *See supra* note 10 and accompanying text.

frequently cited passages posits the wife's legal death at marriage: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing."⁶⁸ But, as historian Holly Brewer has shown, Blackstone's definition of coverture was innovation disguised as tradition.⁶⁹ Selecting from among conflicting principles, Blackstone fashioned a new synthesis that elevated selected restrictions of coverture over other practices, narrowing the legal prerogatives of wives.⁷⁰ His definition not only undercut wives' connections outside their households, but also characterized husbands' authority as an unconditional right they held as individuals, rather than a privilege exercised for the good of their families and the public at large.⁷¹ Then he wrapped it all up in the mantle of timelessness, portraying his newly restrictive version of coverture as the way it had always been.⁷²

Blackstone's definition of coverture was incorporated into state statutes, appellate decisions, and even justices' manuals over the course of the nineteenth century.⁷³ Some jurists and officials even interpreted that revised

68. See BLACKSTONE, *supra* note 10, at 430.

69. See generally Brewer, *supra* note 10.

70. See *id.* at 289–90; see also Edwards, *Sarah Allingham's Sheet*, *supra* note 9, at 132.

71. See Brewer, *supra* note 10, at 289–91, 297–302.

72. See Edwards, *Sara Allingham's Sheet*, *supra* note 9, at 132. According to Brewer, eighteenth-century interpreters of common law, such as Sir Edward Coke, allowed for much greater legal leeway for wives, children, and servants. Brewer, *supra* note 10, at 305. Those elements of the common law past were later buried by Blackstone and his version of the common law tradition. See *id.* at 308. Blackstone also presented coverture as if it was a coherent set of principles, which it was not at that time. Rather, coverture was a loose set of principles, some of which contradicted each other. See EDWARDS, ONLY THE CLOTHES ON HER BACK, *supra* note 9, at 21–38. For the variation in coverture's rules and their application over time and space, see generally SARA T. DAMIANO, TO HER CREDIT: FINANCE AND LAW IN EIGHTEENTH-CENTURY NEW ENGLAND CITIES (2021) (on the legal actions of married women and widows); CORNELIA H. DAYTON, WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639–1789 (1995) (on the scope of women's legal actions before professionalization in the late colonial period); ELLEN HARTIGAN-O'CONNOR, THE TIES THAT BUY: WOMEN AND COMMERCE IN REVOLUTIONARY AMERICA (2009) (on the extent of married women's economic dealings despite the restrictions of coverture); LINDA L. STURTZ, WITHIN HER POWER: PROPERTIED WOMEN IN COLONIAL VIRGINIA (2002) (on the extent of married women's economic dealings despite the restrictions of coverture); SERENA ZABIN, DANGEROUS ECONOMICS: STATUS AND COMMERCE IN IMPERIAL NEW YORK (2009) (on the extent of married women's economic dealings despite the restrictions of coverture).

73. Influential American-authored treatises in the late eighteenth and early nineteenth centuries incorporated a Blackstonian version of coverture. See, e.g., JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 109 (1827); ZEPHANIA SWIFT, 1 A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 194 (1795); ZEPHANIA SWIFT, 1 A DIGEST OF LAWS OF THE STATE OF CONNECTICUT 18 (1822); ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES 55 (1803). Later treatises did the same. See, e.g., JOHN B. MINOR, INSTITUTES OF COMMON AND

version of coverture to extend to husbands' authority to physically 'correct' their wives.⁷⁴ The resulting legal record made it seem as if the domestic realm had always been treated as the private domain of husbands, shielded from the purview of legal regulation.⁷⁵ But that legal record from the nineteenth century actually represented a novel change in the operation of coverture, not an expression of past practice.⁷⁶

Legal practice depended on a much wider array of principles, even in the nineteenth century, even as Blackstone's definition of coverture was gaining ground. Common law, where coverture resided, was not the only body of law that defined married women's legal status in the late nineteenth or early nineteenth centuries. Indeed, the term "law," a shortened form of common law used frequently in the late-eighteenth and early nineteenth centuries, tends to confuse modern readers, erasing the presence of equity and other bodies of law, including legal principles that were not recorded in writing.⁷⁷ Equity provided remedies unavailable in common law.⁷⁸ So did the law

STATUTE LAW (1870). For the adoption of Blackstonian principles in justices' manuals over time in the nineteenth century, see Laura F. Edwards, *The Material Conditions of Dependency: The Hidden History of Free Women's Control of Property in the Early Nineteenth Century South*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 180 (Sally Hadden & Patricia Minter eds., 2013). Those principles worked their way into practice slowly, given the countervailing importance of other legal practices. See *infra* note 78–84 and accompanying text.

74. Pleck, *supra* note 3, at 32–33.

75. Scholarship that focuses on the published materials rightly notes the increasing importance placed on the conceptions of domestic privacy in Blackstone's version of coverture but overstates its operation in legal practice. See, e.g., Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 EARLY AM. STUDIES 223, 223 (2007); Siegel, *supra* note 10, at 2151; see also EDWARDS, *supra* note 3, at 220–55.

76. Treatises and even justices' handbooks did not necessarily describe legal practice in the late eighteenth and early nineteenth centuries. For the limits of Blackstone in practice, see EDWARDS, *supra* note 3, at 104–11; Edwards, *supra* note 12, at 507–508; EDWARDS, ONLY THE CLOTHES ON HER BACK, *supra* note 9, at 21–38. But it is hard to overstate the influence of Blackstone in the historical and legal scholarship, because it is so entrenched in our narratives of change when it comes to married women. Mary Ritter Beard's classic *Women as Force in History: A Study of Traditions and Realities* made this point decades ago. See generally BEARD, *supra* note 10 (describing an overemphasis on Blackstone). Critiques have recurred repeatedly in the literature. See Joan R. Gundersen & Gwen Victor Gampel, *Married Women's Legal Status in Eighteenth-Century New York and Virginia*, 39 WM. & MARY Q. 114, 114 n.2 (1982) (making the point about the over-emphasis on Blackstone in defining coverture; in their second footnote, they point out that "[s]cholars continue to cite Blackstone as the 'real' law and then note a few exceptions"). The Author is, herself, guilty of overstating the importance and acceptance of this version of coverture in her early work. See generally LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997).

77. See EDWARDS, *supra* note 3, at 105.

78. Equity — a distinct body of law, which was still practiced in the early nineteenth century, but was later dropped in many states in favor of common law — is the best-known

associated with church courts, which married women used in both England and the North American colonies to contest their husbands' abuse of authority.⁷⁹ In the colonies where the Anglican Church was the established church, those courts had been an extension of state power, just as they were in England.⁸⁰ After disestablishment, in the wake of the American Revolution, the ties between church courts and state were severed.⁸¹ But church courts continued to operate as independent entities and continued to handle domestic violence, using established legal forms — which were still seen as legal even though they no longer had the backing of states.⁸² Those legal traditions — which had existed alongside and in conversation with coverture in common law in England and the British North American colonies — continued to shape legal practice in the nineteenth-century United States.⁸³

It took time for the rigid definition of Blackstonian coverture to gain ground, even among legal professionals. In the post-Revolutionary decades, not all jurists with legal training were as enthusiastic about the Blackstonian conception of coverture as later generations — and later scholars. Elihu Hall Bay, a South Carolina circuit judge who was well-read in the law, is reputed to have summarily dismissed the claim that coverture allowed husbands to use physical force against their wives.⁸⁴ After verbally contradicting the defendant's lawyer during the trial for making that argument, he instructed the jury, that “the common law was the perfection of reason, and notwithstanding the loose remarks of writers, there was no such principle” that would allow a husband to beat his wife.⁸⁵ The man was convicted.⁸⁶

example in U.S. history, thanks to Beard's classic *Women as a Force in History*. See generally BEARD, *supra* note 10.

79. There is an established body of literature in early modern English history that questions the emphasis placed on certain elements of common law and highlights women's active use of other bodies of law and other legal arenas, particularly in matters involving domestic violence. See generally Susan Dwyer Amussen, “Being Stirred to Much Unquietness”: Violence and Domestic Violence in Early Modern England, 6 J. WOMEN'S HIST. 70, 71 (1994); ERICKSON, *supra* note 15; LAURA GOWING, DOMESTIC DANGERS: WOMEN, WORDS, AND SEX IN EARLY MODERN LONDON (1996); STRETTON, *supra* note 15.

80. See JOHN K. NELSON, A BLESSED COMPANY: PARISHES, PARSONS, AND PARISHIONERS IN ANGLICAN VIRGINIA, 1690–1776 3, 9 (2001).

81. See EDWARDS, *supra* note 3, at 316. See generally Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L.R. 307, 307–72 (2014); NELSON, *supra* note 80, at 8–9.

82. See EDWARDS, *supra* note 3, at 83–84, 180.

83. See *id.* at 40–42.

84. See JOHN BELTON O'NEALL, 1 BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 56–57 (1859) (note that this story is an anecdotal report).

85. See *id.*

86. See *id.*

Bay's pronouncement on domestic violence relied on the legal logic that guided the regulation of public matters throughout the United States. The point was the maintenance of the public order, not the rights or even the authority of specific individuals.⁸⁷ In the terminology of the time, public law kept "the peace"—a well-established concept in Anglo-American law that expressed the ideal order of the metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system.⁸⁸ The peace was inclusive, although in a coercive sense. The point was to keep everyone and everything in their appropriate places, as defined by the rigid inequalities of the early nineteenth century.⁸⁹ As such, keeping the peace necessarily involved liberal applications of the police powers delegated to local jurisdictions, with the intent of punishing those who challenged the existing order and keeping them from doing further damage.⁹⁰

In the logic of public law, the authority granted to heads of household was not absolute, based in their rights as individuals, but contingent on the alignment of that authority with the public order.⁹¹ The possession of authority did not constitute a license to do as one pleased. Authority came with obligations. Husbands exercised it within an institution — marriage — that was designated as central to the interests of the public order.⁹² If husbands abused their power, then the public had the duty to intervene to protect the community's interests.⁹³ The abuse of authority did not just hurt the individual victim; it threatened everyone by undermining the legitimacy of society's basic institutions. Officials could and did prosecute husbands, fathers, and masters for violence and threats of violence against their wives, children, servants, and even the people they held in bondage.⁹⁴ The same logic applied to all expressions of authority in public law, including the use of weapons.⁹⁵

87. See EDWARDS, *supra* note 3, at 180–86.

88. See *id.* at 59–201 (on the operation of the peace).

89. See *id.* at 110–11.

90. See *id.* at 59–201 (on the operation of the peace); *id.* at 220–55 (on state laws that operated by the logic of individual rights). See also Edwards, *Sarah Allingham's Sheet*, *supra* note 9, at 135; Edwards, *supra* note 12, at 511–12; EDWARDS, ONLY THE CLOTHES ON HER BACK, *supra* note 9, at 21–38.

91. EDWARDS, *supra* note 3, at 90, 103–10.

92. See *id.*

93. See *id.*

94. See *id.* at 106–11.

95. See *id.* at 59–201.

III. MAINTAINING THE PEACE

What constituted a threat to the peace? There were the usual suspects: drunks, gamblers, brawlers, prostitutes, malingerers, and thieves.⁹⁶ As might also be expected, many of the charges were directed at subordinate people — particularly the working poor, people of color, and the enslaved — for actions perceived as unruly.⁹⁷ Local officials also spent a great deal of time handling interpersonal conflicts within families and among neighbors.⁹⁸ When dealing with all these matters, officials used general, generic charges: assault, riot, vagrancy, or simply disorderly conduct or disturbing the peace.⁹⁹ Those charges tend to obscure the actual nature of the incidents, while emphasizing the underlying point: the specifics did not matter if the behavior threatened the peace.¹⁰⁰

Many of these threats involved violence or the possibility of violence. Local officials assessed the threat level of any specific disruptive incident based on what they knew of the people involved.¹⁰¹ One incident of bad behavior by someone who was well-known as a hard-worker and good neighbor might be overlooked. Similar behavior from someone known for chronic drinking and brawling would not. Weapons, by definition, heightened the threat, although what constituted a weapon was situational. The “arms” in the common law phrase “with force and arms” referred to anything used in the manner of weapons: sticks, pots, knives, swords, and guns.¹⁰² All kinds of everyday items, with practical uses, could be turned into weapons. In fact, the formulaic language “with force and arms” did not always refer the use of a specific weapon; it could refer to a fist or other body parts used as weapons.¹⁰³ Therefore, determining when something became a weapon *required* the consideration of context, the way it was used, and the person who used it. To be sure, regulations and limitations applied to some categories of people. But that was because they were known threats — either because of their structural position within the public order (as in the case of

96. *See id.* at 90.

97. *See id.* at 70.

98. *See id.* at 82.

99. *See id.* at 65, 74, 85, 105.

100. *See id.* at 100–32.

101. *See id.* at 220–21.

102. *See* GRIMKÉ, *supra* note 50, at 23–24 (stating “[a]ssault is an attempt to offer, with force and violence, to do a corporal hurt to another,” and giving examples of the array of weapons that qualify as arms “as by striking at him, with or without a weapon; or presenting a gun at him, at such a distance, to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one’s fist at him; or by any other such like act, done in an angry threatening manner”); *see also* EDWARDS, *supra* note 3, at 181–82 (giving examples of such cases).

103. *See supra* note 102 and accompanying text.

people who were enslaved, whose subordinate position was based on coercion rather than consent) or because of past history (as in the case of religious dissenters, who were known to question the authority of the state).¹⁰⁴ Even then, those limitations depended on context when they were applied in local jurisdictions.¹⁰⁵

The legal principles that regulated all threats to the public order could and did extend to guns, which were treated no differently than other weapons. An individual's prerogative to have weapons ended when they disturbed the peace, which — by definition — was when other people felt threatened by them. One justice's manual, for instance, defined assault as the "offer" of violence, such as "presenting a gun . . . at such a distance, to which the gun will carry."¹⁰⁶ In the legal logic of the peace, the prerogative of anyone to own, carry, and use weapons could never take priority over the peace of the community.

Offenses against the peace resulted in penalties meant to diffuse the threat and deter future disruption, which meant the loss of personal freedom.¹⁰⁷ Criminal charges, such as assault or riot, resulted in criminal proceedings, penalties of fines, and jail time, just as they do today.¹⁰⁸ Convicted offenders also had to pay the costs of the trial and their imprisonment, which could result in the forced sale of all their property.¹⁰⁹

But those criminal charges do not capture the full range of acts prosecuted as offences against the peace. A wide range of threats were handled as breaches of the peace.¹¹⁰ A breach of the peace charge did not require a trial or even a hearing, which made it easier to levy than other charges — such as assault, riot, or affray — that resulted in formal proceedings and, sometimes, trials at higher levels of the court system.¹¹¹ Complainants came before a local official and stated their fears that an offender had threatened them harm.¹¹² Often, little evidence was required beyond that statement.¹¹³ If the

104. See EDWARDS, *supra* note 3, at 116, 283 (describing how certain factors came together to determine and define an individual's rights); see also *id.* at 156–57 (describing how the activities of "religious dissenter" Thomas Cooper prompted an investigation).

105. See *id.* at 258–59, 283.

106. See GRIMKÉ, *supra* note 50, at 23–24.

107. Peace bonds, for instance, were issued on the basis of the threat of future violence. See, e.g., HAYWOOD, *supra* note 50, at 28–32.

108. See *id.*; EDWARDS, *supra* note 3, at 181.

109. EDWARDS, *supra* note 3, at 64–99.

110. See *id.* at 73–74, 90, 96–97.

111. See *id.* at 180–81 (explaining magistrates issued peace warrants for husbands charged with breaches of the peace to bring them under public scrutiny).

112. See *id.*

113. EDWARDS, *supra* note 3, at 180–81.

official found the complaint credible, the offender was arrested.¹¹⁴ A situation such as that reflected a very different context: one in which people in local communities knew each other, the operative laws elevated the public interest over the rights of individuals, and criminal defendants did not have the array of protected rights that they do today. This whole process would be problematic now, although elements of it persist in some parts of the legal system.¹¹⁵

The remedy for breaches of the peace was a peace bond, which formalized public intervention to diffuse volatile situations before they escalated into something more serious. Peace bonds were intended to disarm an offender in the broadest sense of the term: to deprive a person of the *power*, in whatever form it took, to hurt or intimidate another person.¹¹⁶ Once charged, the offender was required to find at least one other surety, sometimes more, to post bond; failing that, they were jailed.¹¹⁷ While the bond's amount depended on the nature of the charge, it was usually significant because it was meant as a means of surveillance to make sure offenders did not abuse their power again.¹¹⁸ Bond was not given in exchange for the offenders' freedom, in the way the bonds are often understood today. Sureties gave bond on the promise to assist in keeping the peace, by monitoring the offender, preventing further bad behavior, and reporting it if and when they found themselves unable to intervene and stop it.¹¹⁹ The terms of these bonds did not specify the removal of weapons, because that was unnecessary. The use of any kind of weapon that threatened anyone else was, by definition, off limits. If the offender violated the peace in any way again, sureties lost their money and the offender was jailed.¹²⁰ The logic underscored a central principle of public law: everyone was responsible for maintaining the peace. By posting bond, sureties affirmed their responsibilities to the public and acquired broad authority over the offender's life. Offenders convicted of other offenses, such as assault, were often required to post a peace bond in addition to their other penalties.¹²¹ Henry Butler, for instance, had to post a

114. *See id.* at 184.

115. *See id.* at 183.

116. For the process, see EDWARDS, *supra* note 3, at 73–74, 96–97; Cole, *supra* note 3, at 52–57. For an example of a description of the process from a justice's manual, see HAYWOOD, *supra* note 50, at 28–32.

117. *See supra* note 116 and accompanying text.

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.* For the communal nature of maintain order and local legal processes, see Cashwell, *supra* note 3, at 28–32.

peace bond, in effect for a full year, after he served his prison term for the attempted murder of his wife.¹²²

IV. THE PEACE AND DOMESTIC VIOLENCE

Domestic violence figured in many of the criminal charges that defined offenses against the public order, such as assault and attempted murder, although the crime was not named as a separate category, “wife-beating” or “domestic violence.” Officials invoked the peace, construing wives’ injuries as a threat to the public order and forcing husbands to account for their actions as an offense against the community generally.¹²³ The prosecution of threats against wives as a breach of the peace was also routine in local jurisdictions throughout the United States and specifically allowed in justices’ handbooks.¹²⁴ While arrest and the necessity of finding sureties to post bond likely did nothing to improve a husband’s temper, that was not the point. Peace bonds allowed wives a way out of the confines of coverture, by ensuring public monitoring of the situation and promising penalties for further abuse. With this process, married women could transform their husbands’ violence from personal conflicts into illegal acts that endangered the public order. They also affirmed a view of marriage in which their husbands’ patriarchal authority was not absolute. Even in this period, coverture did not sever married women’s ties to the public order. To the contrary, the legal system provided oversight for wives, precisely because their husbands’ authority came with public obligations. Given the importance of marriage to the public order, it was in the public interest to regulate it.¹²⁵

122. *State v. Henry Butler*, *supra* note 1.

123. See EDWARDS, *supra* note 3, at 180–86; Bloch, *supra* note 75, at 237 (“Whereas assault and battery involving men primarily fell under the rubric of a ‘private wrong,’ the beating of a wife amounted exclusively to an injury to the state.”).

124. Manuals for justices of the peace dating from the early part of the century clearly stated that wives could swear out peace warrants against their husbands. See, e.g., HAYWOOD, *supra* note 50, at 29; GRIMKÉ, *supra* note 50, at 452; JAMES EWING, A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE, SHERIFF, CORONER, CONSTABLE, AND OF EXECUTORS, ADMINISTRATORS, AND GUARDIANS . . . ADAPTED TO THE STATE OF NEW-JERSEY 545 (1805); JOHN A. DUNLAP, THE NEW-YORK JUSTICE; OR, A DIGEST OF THE LAW RELATIVE TO JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK 174 (1815).

125. In law, the offense acquired the status of a public crime because it was a breach of the public peace. While peace warrants covered threats, there was no clear legal line between peace warrants and other crimes involving violence. Local officials could charge abusive husbands with the crime of assault either in addition to or as a component of the peace warrant. See, e.g., HAYWOOD, *supra* note 50, at 6–7, 15–16, 28–32, 191; GRIMKÉ, *supra* note 50, at 7–9, 23–32, 450–68. Justices followed these precepts. See EDWARDS, *supra* note 3, at 180–86; Cashwell, *supra* note 3, at 87–88; Cole, *supra* note 3, at 153.

Domestic violence cases made their way through the system with little fanfare or note because the notion that wives' injuries constituted an offense to the peace was well established. They surfaced regularly.¹²⁶ Surviving records, moreover, likely undercount the total number of cases, particularly peace bonds issued by justices of the peace and other local officials for a variety of reasons. Many local officials simply did not record the complaints they heard and on which they acted.¹²⁷ When records were kept, they were not always saved.¹²⁸ They also appear in unusual places, because some officials saw their records as their own property, not that of the state. They are now housed with their personal papers or in archives that are not connected to states.¹²⁹

Women's desperation is painfully audible in the documents that do still exist. They begged local officials to act, corroborating their complaints with the physical evidence of their bruised and bloody bodies.¹³⁰ But their desperation also carried a strong undertone of confidence: not the self-possession of women standing up for themselves to challenge existing norms, but the certainty of women who were familiar with legal practice and felt entitled to support. Even so, they knew that support would not materialize without effort, and they knew enough about the law to know what to do. They had to work hard to make their problems a public matter — and they did, although they were not always successful. Married women talked.¹³¹ “They displayed their injuries. They appeared on doorsteps, sometimes with angry husbands on their heels. They even posted notices in newspaper advertising their husbands' bad behavior.”¹³² In so doing, they created the evidence necessary to obtain the legal protection they sought. Then they brought all their evidence in a neat package to local officials.¹³³

That domestic violence cases appeared on court dockets speaks to the power of the legal principles that defined domestic violence as a threat to the public order as well as the persistence and legal knowledge of married

126. For the regularity of such cases, see EDWARDS, *supra* note 3, at 180–86; *see also* Cashwell, *supra* note 3, at 87–93 (illustrating the commonality of these cases in New York City); Cole, *supra* note 3 at 148–49 (illustrating the commonality of these cases in Baltimore).

127. *See* EDWARDS, *supra* note 3, at 73–74 (discussing the small fraction of complaints that resulted in formal charges due to the magistrate's “murky” role as a settlement broker).

128. *See* EDWARDS, ONLY THE CLOTHES ON HER BACK, *supra* note 9, at 9.

129. *See* EDWARDS, *supra* note 3, at 22–23.

130. *See id.* at 182. For women's efforts to prosecute such cases, *see id.* at 180–84; Cole, *supra* note 3, at 157–62; Cashwell, *supra* note 3, at 87–93.

131. *See* EDWARDS, *supra* note 3, at 182.

132. *See id.*

133. *See, e.g., id.* at 184–85 (describing Sarah Chandler's use of evidence of her husband's abuse alongside neighbors' testimony regarding his credit in the community, which combined garnered jury support for a divorce proceeding).

women. Countervailing cultural norms and competing legal principles pulled in the opposite direction, sanctioning wives' submission to their husbands' authority and undermining their credibility as witnesses. Given those countervailing forces, the evidence in these cases also suggests the power of the legal framing. The crime was the injury to the public body, through the body of the wife, which placed the legal emphasis on the physical act: on what abusive husbands threatened and did, not why they did it.¹³⁴ Intent was beside the point, because fact of the threat or the violence, particularly if coupled with a weapon, was sufficient to establish an offense to the public order.¹³⁵ That threat — and the need to diffuse it — took precedence over the rights of men to exercise their power, either through the domestic authority granted by coverture, or their weapons.¹³⁶

CONCLUSION

What stands out in this history are the continuities between the past and the present. Local jurisdictions routinely balanced the public interest against the prerogatives of individuals, particularly those whose status placed them in structural positions of authority or those who claimed authority by wielding weapons in ways that others found threatening. What constituted the peace, moreover, was defined by perceptions of the people who made up the public order. The underlying logic regulated behavior in public spaces and in institutions considered essential to the public order, even domestic relations, despite other legal principles that shielded husbands from outside intervention.

Given the backdrop of this history, more recent statutory changes appear as continuity. In 1850, Tennessee was the first state to outlaw wife-beating by statute.¹³⁷ Other states followed suit in the late nineteenth and early twentieth centuries.¹³⁸ But those statutes did not criminalize domestic violence, which had been handled as criminal offenses before the statutes' passage.¹³⁹ They reflected institutional changes in the legal system, whereby states began taking on more responsibility for overseeing a wide range of issues once handled by local jurisdictions. By the late nineteenth century and certainly in the twentieth, the legal forms for handling domestic violence shifted again, as married women acquired the legal ability to act in their own names, separately from their husbands. Those legal changes opened new

134. *See id.* at 181.

135. *See, e.g., id.* at 181–82 (describing examples of claims by women detailing threats of violence with weapons).

136. *See id.* at 180–85.

137. *See* Pleck, *supra* note 3, at 32.

138. *See id.* at 40–41.

139. *See generally id.*

avenues for redress, particularly in civil law.¹⁴⁰ But the specific legal forms used to handle domestic violence do not detract from the broader continuities: there is a strong, consistent legal tradition of addressing domestic violence, based on a longstanding public commitment to protecting vulnerable people from the abuse of those who are supposed to love and protect them. To sanction terrorism within institutions on which we all depend undermines the public order. Similarly, the changes in the legal handling of firearms also underscore more fundamental continuities. Local jurisdictions in the late eighteenth and early nineteenth century regularly disarmed people, in the sense of limiting their power to hurt and intimidate others with weapons, particularly firearms. That legal tradition also persists today.

140. *See id.* at 32, 40–41, 49.