Scholarly Incursion
HISTORICAL METHODS, July–September 2014, Volume 47, Number 3

Routledge
Taylor & Francis Group

Random Selection of Petit Jurors on the Virginia Frontier, 1746–55

TURK McCLESKEY
Department of History, Virginia Military Institute
JAMES C. SQUIRE
Department of Electrical & Computer Engineering, Virginia Military Institute

Abstract. Eighteenth-century English common-law courts used petit juries in civil litigation to try issues of fact or find damages after defendants defaulted. In colonial Virginia, county sheriffs impaneled potential jurors for trials of the issue; before trial, litigants selected a 12-man jury during *voir dire*. By contrast, juries on writs of inquiry to ascertain damages were selected solely by sheriffs and reached verdicts under the sheriff's supervision. Scholarly consensus holds juror selection to have been prejudiced, but pure probability predictions generated with hypergeometric distributions indicate that on writs of inquiry sheriffs often picked jurors in a functionally random manner. This article presents a new test for identifying bias in jury selection by identifying improbable numbers of magistrates, constables, and grand jurors.

Keywords: colonial Virginia, common law, frontier, jury, legal

On the morning of August 22, 1746, Sheriff Henry Downs paced through the crowd outside the courthouse in a hamlet that became Staunton, Virginia. As he moved, Downs tapped at least 18 men for service as petit jurors.[1] Later that day, Downs selected 12 of those men to be jurors on a writ of inquiry in Benjamin Borden, Jr., v. John McFall. Theirs was the first jury on a writ of inquiry in newly created Augusta County, whose court governed the most expansive portion of Virginia's territorial claims west of the Blue Ridge (Hening 1819).[2]

Despite the county's remote location, Downs and other court officers conformed so closely with Virginia custom and statute that Augusta court orders appear indistinguishable from the records of decades-old Tidewater counties. As in other contemporary English common-law jurisdictions, the county court ordered writs of inquiry in civil suits when plaintiffs obtained judgment by default; such judgments routinely followed a defendant's refusal to appear in court. Having awarded judgment to the plaintiff, courts directed sheriffs to assemble a petit jury of 12 men outside the courtroom. Jurors on a writ of inquiry reviewed the plaintiff's evidence as provided by the sheriff, agreed upon the amount of damages suffered by the plaintiff, and returned to court to report their verdict. Because defendants in such cases already had defaulted, the jury heard no evidence from defendants or their attorneys (Roeber 1981; Blackstone 1768).

Petit jurors on writs of inquiry were picked solely by sheriffs, by contrast to jurors in contested cases known as trials of the issue; the latter jurors were chosen by *voir dire*, a process involving selections by both parties to the suit. In the decade between Augusta County's formation in December 1745 and the May 1755 court session, just before the onset of the Seven Years' War, sheriffs impaneled and oversaw 69 juries on writs of inquiry.[3] Because these juries were the product of a selection process vested entirely in an individual sheriff, they represent a significant opportunity to evaluate sheriff bias with regard to jury composition.

The full implications of sheriff bias or lack thereof will be the subject of a subsequent essay, but in brief, both the absence and presence of biased jury selection have utility for social historians. When sheriffs showed no selection bias, we will demonstrate that it is possible to estimate the size of the courtyard crowd from which the jurors were impaneled; the question of crowd size has important implications regarding popular support for the rule of law. Additionally, in sessions when sheriffs showed selection bias, the technique described below can be used to identify specific suits tried with statistically improbable juries. Identifying such suits makes it possible to search lawsuit files for evidence to explain sheriff motives.

Historians have scrutinized jury membership in only a few other early American jurisdictions. In every instance, scholars detected a biased, rather than random, selection process. By biased, we mean preferential selection for whatever reason; for our purposes, the causes of such selection biases were immaterial. The present study is not concerned with questions of bias in the sense of prejudiced opinions among individual jurors.

Address correspondence to Turk McCleskey, Department of History, Virginia Military Institute, 536 Scott Shipp Hall, Lexington, VA 24450, USA. E-mail: mccleskeynt@vmi.edu

With regard to the preferential selection of jurors, historians John M. Murrin and Anthony G. Roeber suspected that the sheriff of Surry County, Virginia, "chose the panels with care" that heard suits against the followers of rebel Nathaniel Bacon in the late 1670s (Murrin and Roeber 1987, 117). William M. Offutt, Jr., used the chi-square probability test to show that Quaker participation on juries in the Delaware Valley from 1680 to 1710 was disproportionately high compared to the number of Quakers in the jury pool (Offutt 1995). Allan Kulikoff asserted that jury service in Prince George's County, Maryland, became more selective after the 1730s; Kulikoff apparently was reporting his qualitative impression of the evidence since he presented no numerical evidence on this point (Kulikoff 1986). Carlton F. W. Larson demonstrated via prosopography that in Pennsylvania treason trials during the American Revolution, "defense counsel creatively used peremptory challenges ... to create favorable juries" (Larson 2008, 1441). These findings are consistent with Warren M. Billings' assessment that in eighteenth-century jurisprudence, no contemporary notion existed that juror selection ought to be unbiased.[4]

Given the modern scholarly consensus that early American petit jurors were selected preferentially, it seems unsurprising that on 18 September 1746, Sheriff Downs assembled a jury on a writ of inquiry in which two of the 12 members were former magistrates.[5] The county then contained an estimated 722 free adult white men, so the presence of two former magistrates on a 12-man jury appears biased prima facie (Table 1). Could it have been the product of random chance?

An accurate statistical answer to this question can be calculated by examining how the probabilities of a series of unique events change over time in the wake of individual events. For example, the probability of drawing a spade from a 52-card deck is 13 spades ÷ 52 cards = 1/4 or 0.25. Once a spade is drawn, the probability of turning up a second spade on the next draw is 12 ÷ 51 = 0.235. The odds of producing a third, fourth, and fifth spade sequentially thus become 11 ÷ 50 = 0.22, 10 ÷ 49 = 0.204, and 9 ÷ 48 = 0.188, respectively. The likelihood of drawing five spades in a row is calculated by multiplying the five probabilities by each other: (0.25)(0.235)(0.22)(0.204)(0.188) = 0.05%.

TABLE 1. Estimated Tithables Eligible for Petit Jury Service

Year ending June 10	Tithable count (A)	Tithable slaves		Convict and indentured servants tithables (D)		Free white (D = A – B – C)	Jury-eligible free white adults (D × 75.8%)
		Documented	Estimated (B)	Documented	Estimated (C)		
1746	961	1	2	4	7	952	722
1747	1,670	1	3	6	12	1,655	1,254
1748	1,423	2	7	13	17	1,398	1,060
1749	1,670	10	14	9	13	1,643	1,245
1750	2,122	8	10	8	13	2,099	1,591
1751	2,278	4	5	9	12	2,261	1,714
1752	2,317	1	6	5	8	2,302	1,745
1753	2,573	10	17	5	17	2,539	1,925
1754	2,663	14	14	23	31	2,597	1,969
1755	2,272	40	44	16	31	2,197	1,665

Note: Reported tithables: (1746) AOB 1:132; (1747) Augusta Parish Vestry Book, 12 and AOB 1:321; (1748) ibid. 2:66; (1749) ibid. 2:296; (1750) ibid. 2:489; (1751) ibid. 3:205; (1752) ibid. 3:365; (1753) ibid. 4:69; (1754) ibid. 4:321; (1755) ibid. 4:495 and Brock 1884, 2:353.
Estimates of tithable slaves: No systematic tally survives of Augusta County slaves from 1746 to 1754. A 1755 colony-wide tally of white and black tithables was based on county-level reporting as of 10 June 1755. For Augusta County in the period 1746 to 1754, estimates for slaves are calculated by adding half of next year's identified unique adult slaves to the current year's identifiable unique slaves. Most of the unique slaves enumerated above were identified in AOB vols. 1–4, Augusta Deed Books 1–6, and Augusta Will Books 1–2. See also Brock 1884, 2:353.
Estimates of tithable servants: Estimates for white servants are calculated by adding half of next year's identified unique adult servants to the current year's identifiable unique servants. Most of the unique servants enumerated above were identified in AOB vols. 1–4, Augusta Deed Books 1–6, and Augusta Will Books 1–2.
Estimates of adult white tithables: No systematic records indicate the proportion of tithables who were minors. The proportion of 75.8% adults was derived from Virginia data in the 1800 Federal census as follows. According to the 1800 census, Virginians of ages 15–24 years numbered 100,000, and ages 25 years and more numbered 157,000. We assumed that the 15–24 cohort was evenly distributed, so an estimated 50,000 Virginians were aged 16–20 years. These represented 24.2% of the 207,000 estimated Virginians aged 16 or older. We estimated eligible white adult tithables proportionally. This is an admittedly rough estimate, but as described in the essay, large changes in eligible tithables (the variable T) produced only small changes in probabilities calculated with hypergeometric distributions (U.S. Department of Commerce 1975, 36).

The probability calculation becomes more complex when computing the chance of drawing 12 spades or 12 jurors, in any order, in exactly 12 selections. This is addressed by using the hypergeometric probability distribution function available in specialized mathematical programs like Matlab. Its equation is:

$$\text{Prob(k magistrates)} = \frac{\binom{M}{k}\binom{T-M}{12-k}}{\binom{T}{12}}$$

and $\binom{M}{k}$ [Read as "M choose k"] is $\frac{\text{M!}}{\text{k!(M}-\text{k)!}}$. (Read M! as "M factorial.")

In this formula, the variable k is the number of past or present magistrates on a given jury, T is the total of persons eligible for jury duty, and M is total number of past or present magistrates. The expected number of petit juries that were composed of exactly k magistrates out of a total number n of petit juries on a writ of inquiry is n times the above probability.

Hypergeometric probability distribution functions involve such complex calculations that specialized mathematical programs are required to solve them. The four types of data, however, are simple. First is the number of current or former magistrates present in a jury. In the hypergeometric distribution equation, the number of current or former officeholders is represented by the variable k. In this example, the values of k range from 0 (no magistrates on a jury) to 2, the maximum number of magistrates appearing on any jury selected by Sheriff Downs (Table 2).

The next variable, n, represents the number of petit juries on writs of inquiry. In all, Downs oversaw 18 such juries during his tenure as sheriff, but this study excludes half of them. Some of the omitted cases reflect the fact that Downs (like his peers in other counties) occasionally reused the same jury on a writ of inquiry during a given day. Additionally, sheriffs assembling a jury on a writ of inquiry sometimes recycled juries that had been previously selected by *voir dire* for trials of the issue.[6] The duplicated cases do not represent independent decisions by the sheriff, so we omitted them from this study. Isolating the unique juries on a writ of inquiry, $n = 9$ for Sheriff Downs.

A third variable, T, represents the total number of persons eligible for jury duty and is analogous to the complete 52-card deck in the example above. A calculation of T for

TABLE 2. k Values for Officeholders Selected as Petit Jurors by Augusta County Sheriffs

		Number of juries selected per sheriff containing k officeholders			
Office held by juror	k (# of men per jury with this office)	Henry Downs June 11, 1746–June 14, 1749	John Lewis June 14, 1749–July 1, 1751	David Stuart July 1, 1751–November 21, 1753	Robert Breckinridge November 21, 1753–November 19, 1755
Magistrate[a]					
	0	6	6	3	6
	1	2	4	—	5
	2	1	6	—	1
	3	—	—	—	1
Constable[b]					
	0	2	7	0	10
	1	5	7	3	2
	2	1	2	—	0
	3	1	—	—	1
Grand juror[c]					
	0	3	4	0	3
	1	—	4	2	—
	2	—	2	—	—
	3	—	0	—	—
	4	—	0	—	—
	5	—	1	—	—

[a]Current magistrates plus all living past magistrates since the county's inception in 1745; attendance at court was not mandatory.
[b]Current year's constables plus all living previous year's constables; attendance at court was not mandatory.
[c]Current session's grand jurors (May and November courts only); attendance at court was mandatory.
Source. AOB 1:87–4:443.

Augusta County begins with the total number of tithables, or taxable persons; by Virginia law, tithables were counted annually as of 10 June and recorded by the county court at the annual laying of the county levy, typically in November or December. Tithable counts included all white males aged 16 years and older, as well as all slaves, free blacks, and taxable Indians of either sex aged 16 or older (Hening 1819–1823).

Given that unfree white male laborers, free persons of color, and slaves were excluded from jury service, the calculation of T, men eligible for jury duty, begins by subtracting ineligible unfree laborers from the annual tithable totals (Table 1). The number of remaining white tithables also requires an additional adjustment for age: Virginia law did not explicitly bar minor white males between 16 and 21 years of age from petit jury service (Brewer 2005). In Augusta County, however, no known minor was a petit juror. No records permit systematic evaluation of tithable ages, so we estimated minors as comprising 24.2% of free white tithables.[7] Table 1 presents annual estimates of jury-eligible, free, white adult males. Sheriff Downs assembled juries on a writ of inquiry from August 1746 to August 1748; the average of eligible tithables for the years bracketing Downs' term, June 10, 1746 through June 10, 1749, is 1,070, so T = 1,070.

We considered but ultimately rejected one other adjustment in the calculation of T for property qualification. By law, petit jurors in county courts possessed a distinctive economic identity: As of 1705, jurors were required to own "a visible estate, real or personal, of the value of fifty pounds sterling, at the least" (Hening 1823, 3:370). A 1748 revision of that law omitted the monetary qualifier "sterling," effectively lowering the property requirement by 25% and expanding the pool of eligible jurors (Hening 1819, 5:526; McCusker 1978, 211).[8] No contemporary records indicate how many men owned sufficient property to qualify for petit jury service, so we cannot calculate the proportion of unqualified tithables included in our estimates of T. In practice, however, the property qualification may not have made a difference. Sheriffs frequently ignored a more exclusive statutory requirement concerning the qualifications for grand jury duty by picking landless men as grand jurors, an office with more responsibility and status than petit jurors (Hening 1823). During the study period, the annual proportion of landless grand jurors in Augusta County ranged from 9.1% to 24.4%.[9]

The number of unqualified, poor white men in Augusta County appears to have been low, though.[10] During the study period, county or parish officials identified only eight men as objects of charity, two recently deceased men with an estate too small to be administered, and four men as vagrants lacking a visible means of support.[11] Given that the number of known poor men was low and that sheriffs sometimes ignored the landed property requirement for grand jurors, we hypothesized that the proportion of poor men deliberately excluded from petit jury service by sheriffs was too small to be discernible.[12] We tested that hypothesis by reducing the eligible tithables a presumably high 20%, a reduction that produced only negligible changes in graphs of Augusta County sheriff selection probabilities. We therefore declined to estimate the number of ineligible poor men and opted not to exclude them as a proportion of potential jurors. Our probability estimates for a tithable's selection as a petit juror thus are conservatively low, because if ineligible poor men were excluded by sheriffs, then the remaining qualified individuals would have been more likely to be selected.

The final information required for the hypergeometric probability distribution function is the size of the sub-population that could have been selected. This variable is designated M. In the card deck example, M was 13 spades; for petit jury membership, M represents the number of current and still-living former magistrates. M was a constant value of 42 past and present magistrates during the period when Sheriff Downs selected juries on a writ of inquiry (Table 3).

Putting these variables together, the hypergeometric probability distribution function calculates the likelihood that in $n = 9$ petit juries randomly selected from a total eligible jury pool of T = 1,070 that included M = 42 present or former magistrates, k magistrates would be included in a given jury. The result of that calculation is depicted by the curving line in Figure 1, and the observed number of juries with k magistrates is shown with histogram bars. The bars fit the pure probability curve closely and lie well inside the 95% confidence interval, indicating that Downs' selection of past and present magistrates for jury duty on a writ of inquiry was functionally random. By functionally random, we mean that small biases which can be discerned statistically were not apparent to contemporary participants. People flipping a coin once, for example, are satisfied that the toss has an equivalent chance of returning heads or tails, despite the fact that a large number of tosses will reveal the coin to have been manufactured slightly out of balance.

Given the scholarly consensus that early American jury selection was not random, could the functionally random presence of magistrates on Henry Downs' juries for writs of inquiry represent a unique anomaly not discernible among other types of officeholders? To expand the study, we tested jury membership in Augusta County for two other subsets of eligible jurors. Figure 2 presents predicted and actual distributions of jury service for the office of constable, a court-appointed minor official who assisted sheriffs with the collection of debts, the service of writs, and other court-directed functions. The number of Downs' juries on a writ of inquiry containing k past or present constables appears in Table 2; the weighted average of total constables serving while Downs was sheriff was M = 59.2 (Table 3); eligible tithables T remained 1,070 (Table 1); and the observed number of juries $n = 9$. As with magistrates, the

TABLE 3. Weighted M Values for Augusta County Officeholders Selected as Petit Jurors, 1746–55

Sheriff and session (yyyymm)	Petit juries with magistrates[a] (A) *n*	(B) M per session	(C) product (A×B)	Petit juries with constables[b] (A) *n*	(B) M per session	(C) product (A×B)	Petit juries with grand jurors[c] (A) *n*	(B) M per session	(C) product (A×B)
Downs									
174608	1	42	—	1	60	60	0	—	—
174609	2	42	—	2	47	94	0	—	—
174709	2	42	—	2	57	114	0	—	—
174711	2	42	—	2	57	114	2	22	44
174805	1	42	—	1	86	86	1	24	24
174808	1	42	—	1	65	65	0	—	—
Weighted M[d]			—			59.2			22.7
Lewis									
174912	2	55	—	2	55	110	2	20	40
175002	1	55	—	1	52	52	0	—	—
175005	6	55	—	6	84	504	6	18	108
175102	0	—	—	4	61	244	0	—	—
175105	0	—	—	2	60	120	3	19	57
Weighted M[d]			—			68.7			18.6
Stuart									
175111	2	57	114	2	58	116	2	16	32
175211	1	58	58	1	56	56	0	—	—
175305	0	—	—	0	—	—	2	17	34
Weighted M[d]			57.3			57.3			16.5
Breckinridge									
175403	2	58	116	2	58	116	0	—	—
175405	2	58	116	2	71	142	2	16	32
175408	3	58	174	3	52	156	0	—	—
175411	1	58	58	1	45	45	1	15	15
175503	2	65	130	2	42	84	0	—	—
175505	3	65	195	3	55	165	0	—	—
Weighted M[d]			60.7			54.5			15.7

[a]Sources for magistrates: Initial commission of the peace, dated 30 Oct. 1745 (Hall 1967, 191; AOB 1:1); second commission, 13 June 1746 (Hall 1967, 214; AOB 1:68); third commission, 9 May 1749 (Hall 1967, 289; AOB 2:127); fourth commission, 14 June 1749 (Hall 1967, 290–1; AOB 2:149); fifth commission, 27 Oct. 1749 (Hall 1967, 303; AOB 2:287); sixth commission, 11 June 1751 (AOB 3:176); seventh commission, 30 Apr. 1752 (Hall 1967, 389; AOB 3:242); eighth commission, 16 June 1753 (AOB 4:1); ninth commission, uncertain date but presented in court on 21 Mar. 1755 (AOB 4:395, 425, 465, 489, 498).

[b]Sources for constables: AOB 1:4 through 4:439.

[c]By law, Augusta County should have conducted 19 grand juries every May and November between the county's founding and the May 1755 session closing this study period. In reality, however, four grand juries did not convene. Magistrates immediately dismissed the unnamed May 1746 grand jury for procedural reasons. On 19 Oct. 1748, the court ordered the sheriff to summon 24 freeholders to the next court, but no court was held in November 1748 (AOB 2:66). No grand jury was held in May 1752 because the preceding winter session (when the court would have ordered the sheriff to summon grand jurors) was not held. In the March 1755 session, the court neglected to order the sheriff to summon a grand jury for May 1755. Grand juror sources, with number of named jurors in parentheses: AOB 1:129 (24), 192 (24), 319 (22); 2:6 (24), 104 (17), 288 (20), 357 (18), 485 (18), 561 (19); 3:202 (16 jurors; this page was not microfilmed but can be viewed at the Augusta County Circuit Court in Staunton), 362 (1), 437 (17); 4:64 (16), 189 (16), 320 (15).

[d]The hypergeometric probability distribution function requires a constant number of past or present officeholders, M. This number varied within most sheriff sessions, so we used a weighted average for M, shown here as Weighted M. Weighted M for each sheriff and in each category equals the sum of the products of n and M per session (column C) divided by the sum of n (column A). Weighted M values were not calculated for Downs' and Lewis' juries with magistrates because M did not vary from session to session.

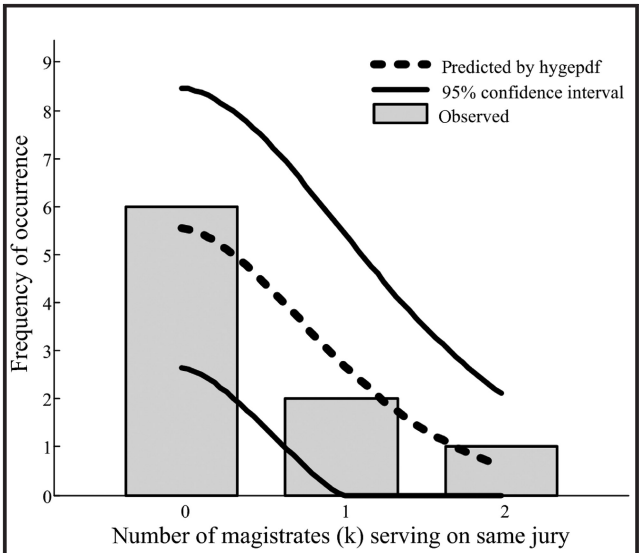

FIGURE 1. Sheriff Downs' juries with magistrates, 1746–9.

observed distributions of constables on juries fall inside the 95% confidence interval. Henry Downs' selection of past or present constables for service on petit juries was functionally random.

A third type of Augusta County officeholder serving on juries for writs of inquiry was grand juror. A panel of 15 to 24 grand jurors was required by Virginia law to meet at county courts in May and November (Hening 1823). Sheriffs summoned grand jurors well before the court session; unlike constables and magistrates, grand jurors were required to attend court.[13] Given that current grand jurors must attend their court session and past grand jurors did not, we omitted past grand jurors from this analysis.

As elsewhere in colonial Virginia, grand jurors typically served on the first day of the session and occasionally were selected as petit jurors in subsequent days of the same session. Not all May and November sessions saw both types of juries impaneled, however. Grand juries sometimes failed to meet as prescribed by law, and in some sessions when the grand jury was convened, no petit jury trials were conducted. Our examination of Augusta County grand jurors selected for petit jury service therefore is limited to the four sessions during Downs' term as sheriff when a grand jury was sworn and a petit jury was convened on a writ of inquiry.[14]

Table 2 enumerates the juries on writs of inquiry selected by Henry Downs that contained k grand jurors. The weighted average of total grand jurors, the variable M, was 22.7 (Table 3), and the observed number of juries on a writ of inquiry, the variable n, was 3. Because the court sessions only included the period from November 1746 through May 1748, the population eligible for petit jury duty was estimated using data from June 1746 through June 1748, a calculation that yields T = 1,012 (Table 1). Figure 3 presents predicted and observed distributions; the observed distribution closely fits the predicted value. Henry Downs' selection of grand jurors for service on petit juries for writs of inquiry during the same court session was functionally random.

Magistrates, constables, and grand jurors shared certain attributes that from a sheriff's perspective made them desirable jurors on a writ of inquiry. Past and present magistrates were peers of the sheriff, who was nominated by his fellow justices of the peace and who would return to their ranks on

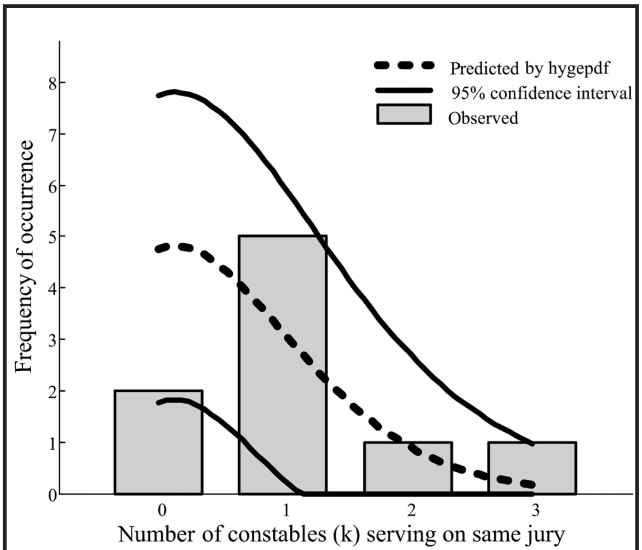

FIGURE 2. Sheriff Downs' juries with constables, 1746–9.

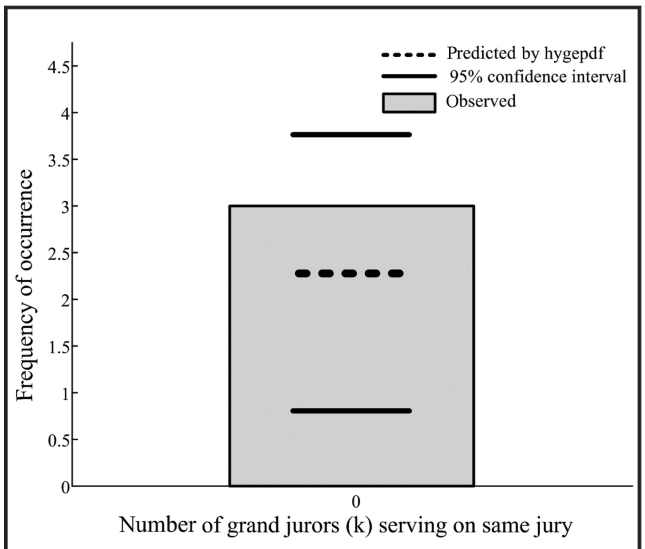

FIGURE 3. Downs' juries with grand jurors, 1746–9.

completion of his term. Such men were committed to defending private property and social stability. Past and present constables had a record of service to the court, so a sheriff already knew whether they would enforce the court's will and support the recovery of private debts. Current grand jurors had been selected recently by the same sheriff as men of probity who would maintain the moral and social health of the county.

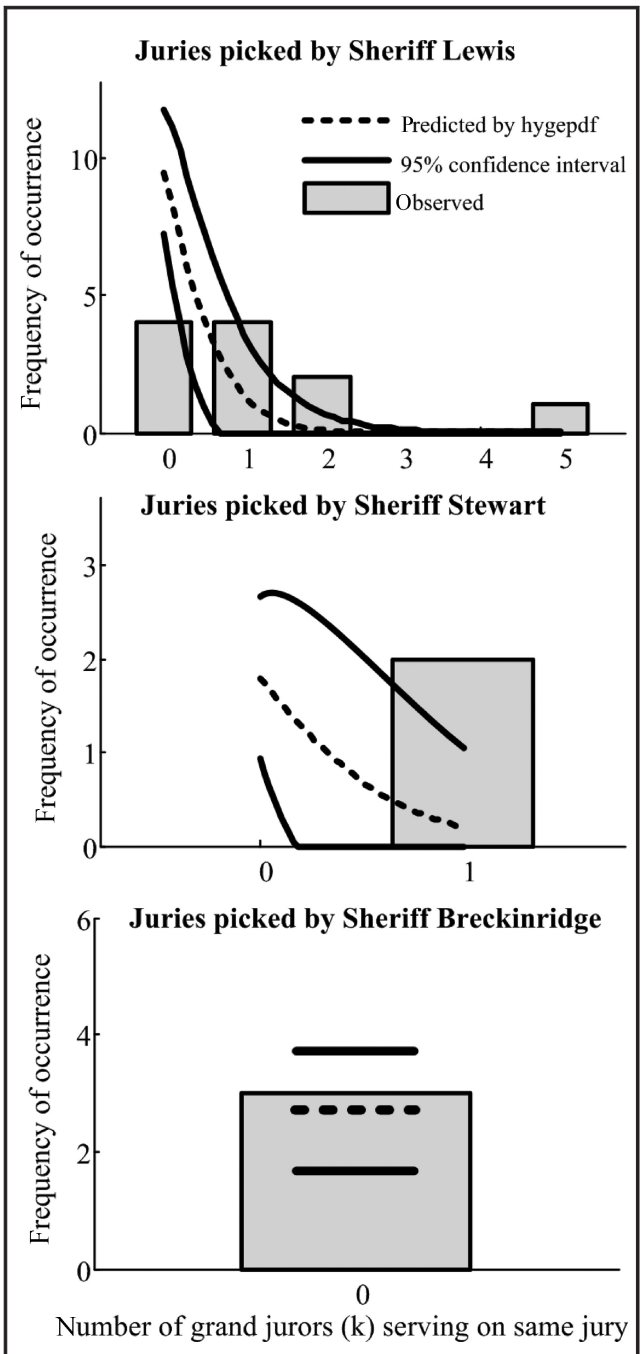

FIGURE 4. Petit juries containing grand jurors, 1749–54.

By contemporary standards, the suitability of magistrates, constables, and grand jurors for service as petit jurors on a writ of inquiry is so obvious that it begs the question of whether Downs took his obligations as sheriff seriously. Could the functionally random distribution of such obviously well-qualified jurors simply reflect Downs's carelessness? To test that proposition, we examined the next three sheriffs serving after Downs through the May 1755 court, the last session before the onset of the Seven Years' War triggered large-scale flight from Augusta County. As indicated in Figure 4, the last of the three sheriffs to follow Henry Downs, Sheriff Robert Breckinridge, showed no bias in favor of grand jurors when selecting petit jurors on a writ of inquiry. In six out of 11 juries (54.5%), sheriffs Lewis and Stewart included no statistically implausible grand jurors serving on petit juries for writs of inquiry.

Probability calculations with regard to constables and magistrates on juries for a writ of inquiry show similar mixed results. Downs and his immediate successor, John

TABLE 4. Testing for Correlation between Landholding and Petit Jury Selection

Year (sheriff)	*p* values for landholding jurors on writs of inquiry
1746 (Downs)	.5678
1747 (Downs)	.1833
1748 (Downs)	.7619
1749 (Lewis)	.6103
1750 (Lewis)	.0316
1751 (Lewis)	.1926
1751 (Stewart)	.6894
1752 (Stewart)	.1976
1753 (Stewart)	*
1754 (Breckenridge)	.0811
1755 (Breckenridge)**	.1289

*No juries met in 1753 on a writ of inquiry.
**Through May court session.
Statisticians use *p* values in hypothesis testing to indicate the probability that a test result will match an observed result. In general, *p* values less than .05 are taken to be statistically significant because in 19 trials out of 20, they indicate the means of the two populations were not equal. Specifically, in a given year, the test compared the acreage of all landowning jurors to the acreage of all Augusta County resident, adult, white male landowners except for the county clerk, landowning attorneys, and magistrates. The hypothesis being tested is that sheriff selection of landowning petit jurors was random with regard to the amount of juror acreage. In every year but 1750, the hypothesis cannot be discarded. Exceptionally, however, the *p* value of .0316 indicates the hypothesis does not hold for jurors impaneled on writs of inquiry by Sheriff John Lewis in 1750. Lewis's landowning jurors on writs of inquiry in that year possessed more acreage than can be accounted for by random chance.
Jurors: Augusta OB 1:81–4:443. Land: see note 8.

Lewis, always selected constables for petit jury duty in a functionally random manner. The next two sheriffs, David Stewart and Robert Breckinridge, each assembled a single jury with a statistically improbable number of past or present constables; the rest of their selections were functionally random. Downs and Stewart picked functionally random juries with regard to magistrates; Lewis and Breckinridge picked functionally random juries with regard to magistrates on 25 out of 29 occasions (86.2%). Overall, each of the three sheriffs to follow Downs selected petit jurors for writs of inquiry with an absence of bias regarding at least one of three types of offices (Figure 5).

The test we have described with regard to office-holding reveals that sheriffs typically exhibited no statistically discernible preference for jurors who had demonstrated their commitment to the rule of law. It is possible that sheriffs selected jurors for writs of inquiry using some other criterion, so we tested for economic bias by comparing petit juror acreage to that of the county's entire population of white male landowners. Sheriffs kept systematic records of acreage in order to collect the land tax known as quitrents, so it would have been easy for sheriffs to identify the most substantial landowners.[15] This apparently happened in 1750, when jurors selected by Sheriff John Lewis owned so much more land than was typical in Augusta County that the difference cannot be accounted for by random chance. Notably, however, the three other sheriffs in the study period selected landed petit jurors for writs of inquiry without a statistically detectable preference for larger juror acreage. Nor was Lewis consistent in his preference: The juries on writs of inquiry that he assembled in 1749 and 1751 had no bias with regard to the quantity of land owned (Table 4). Having applied a different numerical analysis to a different aspect of juror identity, we find that jurors for writs of inquiry rarely were picked with discernible sheriff bias regarding acreage.

The technique described above for testing probabilities of selection for service as a juror on a writ of inquiry can be

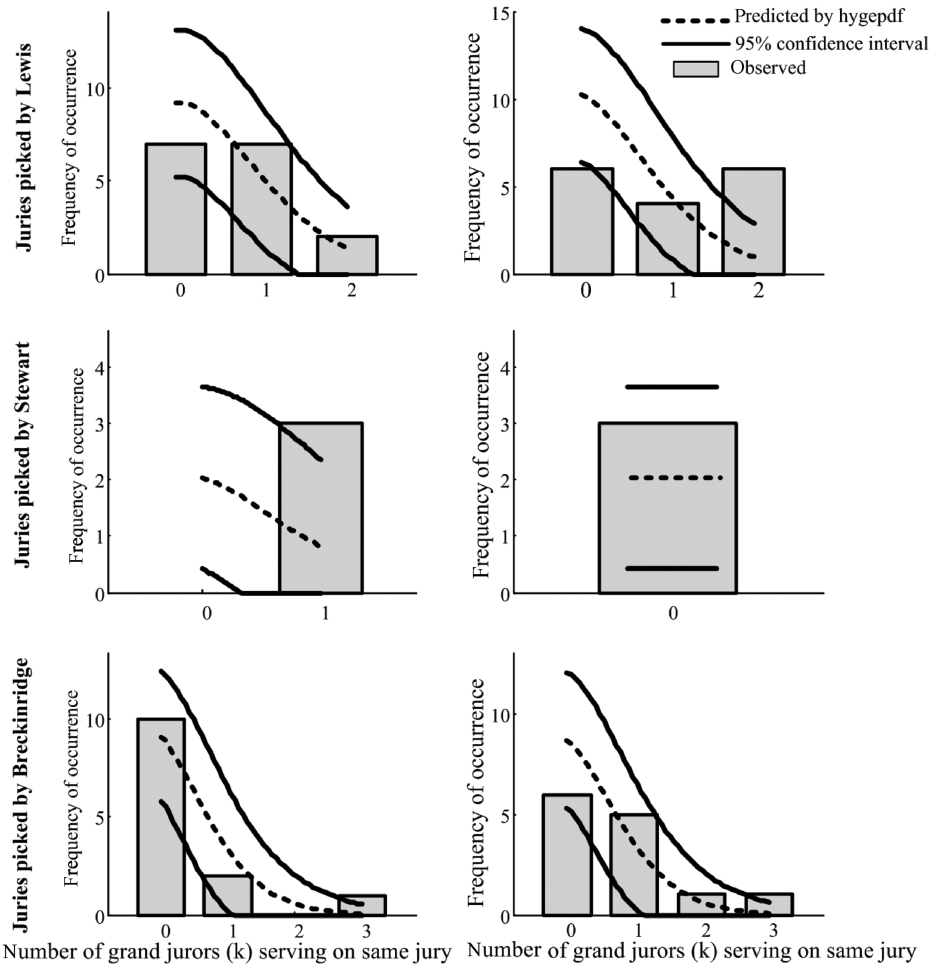

FIGURE 5. Petit juries containing constables (left) and petit juries containing magistrates (right), 1749–55.

applied in other locales to assess sheriffs' biases. Additionally, because this method identifies particular cases with statistically improbable juries, further analysis of case files may reveal the motives of biased sheriffs. More broadly, a test for sheriff bias with regard to officeholders in juries on a writ of inquiry provides a base line for comparative analysis of litigant bias in the *voir dire* process for selecting juries in contested suits that produced trials of the issue. The technique of employing hypergeometric distributions to analyze jury membership thus can be used to develop a range of new insights into early American law and society.

NOTES

1. The term petit jury referred to 12 men summoned for service in either civil or criminal cases. In civil suits, county sheriffs summoned petit jurors to determine facts, to attend surveys in actions for real estate, to value lands or improvements, and to render verdicts in cases involving dower, partition, or forcible entry. County coroners also summoned petit juries for inquisitions on corpses. In criminal cases, petit jurors were summoned for misdemeanor cases tried in county courts and for felonies tried in Williamsburg by the General Court. The term thus distinguishes them from grand jurors (Webb 1736).

2. Jury: Augusta County, Virginia, Order Book No. 1, 87, microfilm, Library of Virginia (hereafter AOB). Sheriff: ibid.

3. Ibid. In Augusta County during the study period, 69 juries on a writ of inquiry for damages comprised 35.9% of 192 juries involved in all civil trials of issue or assessment of damages. Such juries thus played a relatively more important role in frontier litigation than in eastern Virginia; in York County during a comparable period, juries on a writ of inquiry comprised only 16.0% of 206 juries involved in civil cases from January 1746 to November 1754 (York County Orders and Wills, vol. 19:409–97, and Judgments and Orders vols. 1:4–516, 2:2–491, as transcribed by Colonial Williamsburg Foundation's York County Project; microfilm of manuscript originals is available at the Library of Virginia. York County court orders from the second half of the November 1754 session through 1758 do not survive).

4. Warren M. Billings to author, e-mail, July 19, 2010 (in author's possession).

5. *Benjamin Borden, Jr., v. James Greenlee* jurors: AOB 1:108. Past magistrates Robert Poage and Adam Dickenson were named in the 30 Oct. 1745 commission of the peace and omitted from the June 13, 1746 commission. Ibid. 1:1, 68.

6. We defined a recycled jury as including two-thirds or more of the members employed in a preceding trial on the same day.

7. See Table 1 for our calculation of this estimate.

8. It is unclear whether that omission was intentional or accidental. Thanks to John J. McCusker for pointing out the effect of the change.

9. Grand jurors named: see Table 3, note c. Landholding (all microfilm available at Library of Virginia): Augusta County Deed Book vols. 1–17, microfilm; Augusta County Will Book vols. 1–4, microfilm; Orange County, Virginia, Deed Book vols. 3–10, 14, microfilm; Orange County, Virginia, Will Books vols. 1–2, microfilm; Orange Order Book vol. 4, microfilm; Virginia State Land Office County Abstracts, Patents, and Grants, microfilm.

10. The situation in Augusta County may have contrasted sharply with Tidewater Virginia locales at mid-century. In Middlesex County about 1700, an analysis of estate inventories indicates that approximately one-third of the heads of household owned less than 2% of the county's wealth (Rutman and Rutman 1984). Presumably few if any of those heads of household would have been eligible for petit jury service. How much the inequality of wealth distribution in eastern Virginia changed by the period of the present study (1746–55) is unclear.

11. Augusta Parish Vestry Book, 109, 129, 132, 142 (photocopy, Special Collections, University of Virginia); AOB 1:65, 151, 334, 335, 358.

12. Petit jury service was widespread in Augusta County from 1746 through May 1755. During the study period, the county's estimated population of free, white adult males ranged from a low of 722 to a high of 1,969 (per Table 1). Of those, 528 individuals served as petit jurors. The proportion of landless petit jurors per year ranged from a low of 18.8% of petit jurors to a high of 56.3% (median = 32.5%). Such extensive jury participation by free white adult males, to include men with no land, indicates that either most of them met the minimum personal property qualifications for petit jury duty or that the sheriff disregarded the statute regarding personal property. Therefore, it appears justifiable to treat the entire free, adult white male population of Augusta County as eligible for service as a petit juror.

13. For the order to summon 24 freeholders for Augusta County's initial grand jury in May 1746, see entry dated March 10, 1745/6 (AOB 1:20).

14. Downs' sessions with grand juries and petit juries on a writ of inquiry included November 19–22, 1746, May 21–23, and November 18–21, 1747, and May 18–21, 1748 (AOB 1:129, 194, 317, 2:2).

15. For an example of an Augusta County sheriff's quitrent list, see William Preston, Quitrent Roll, 1760–1, Preston Family Papers, 1727–1896, Virginia Historical Society, Richmond.

REFERENCES

Blackstone, W. 1768. *Commentaries on the laws of England. Vol. 3, Of private wrongs*. Facsimile of the first edition, with an introduction by J. H. Langbein. Chicago: University of Chicago Press, 1979.

Brock, R. A. 1883–4. *The official records of Robert Dinwiddie, Lieutenant-Governor of the colony of Virginia, 1751–1758*. Richmond: Wm. Ellis Jones.

Hall, W. L., ed. 1967. *Executive journals of the council of colonial Virginia*. Vol. 5. Richmond: Virginia State Library.

Hening, W. W., ed. 1819–23. *The statutes at large: Being a collection of all the laws of Virginia. . . .* Richmond/Philadelphia.

Kulikoff, A. 1986. *Tobacco and slaves: The development of southern cultures in the Chesapeake, 1680–1800*. Chapel Hill: University of North Carolina Press.

Larson, C. F. W. 2008. The Revolutionary American jury: A case study of the 1778–1779 Philadelphia treason trials. *Southern Methodist University Law Review* 61:1441–1524.

McCusker, J. J. 1978. *Money and exchange rates in Europe and America, 1600–1775: A handbook*. Chapel Hill: University of North Carolina Press.

Murrin, J. M., and A. G. Roeber. 1987. Trial by jury: The Virginia paradox. In *The Bill of Rights: A Lively Heritage*, edited by J. Kukla, 109–29. Richmond: Virginia State Library.

Offutt, W. M., Jr. 1995. *Of "good laws" and "good men": Law and society in the Delaware Valley, 1680–1710*. Urbana and Chicago: University of Illinois Press.

Roeber, A. G. 1981. *Faithful magistrates and republican lawyers: Creators of Virginia legal culture, 1680–1810*. Chapel Hill: University of North Carolina Press.

U.S. Department of Commerce. 1975. *Historical statistics of the United States: Colonial times to 1970*. Bicentennial Edition, Part 1. Washington, DC: U.S. Government Printing Office for U.S. Bureau of the Census.

Webb, G. 1736. *The office and authority of a Justice of Peace*. Williamsburg, VA: William Parks. Facsimile ed. Holmes Beach, FL: William W. Gaunt and Sons, 1969.