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### A Retrospective on the Criminal Trial Jury, 1200-1800

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A Retrospective  
on the Criminal Trial Jury,  
1200–1800

*Thomas A. Green*

My recent book<sup>1</sup> provided an overview of the history of the institutional aspects of the English criminal trial jury upon which all of the contributors to this volume have, tacitly or otherwise, commented. That tentative institutional background was intended both to stand on its own terms and to provide a framework for the studies on the relationship between law and society and on the history of ideas regarding the jury that made up the larger part of the volume.<sup>2</sup> The two aspects of my book were joined: the socio-legal analysis and the history of ideas were to a large extent founded upon my arguments about the institutional setting of the jury. The relatively brief institutional overview thus played a crucial role. The preceding essays present new information that supersedes both my own tentative soundings on institutional matters and my syntheses of existing scholarship in that area. Little of my earlier work on institutional problems—jury composition and the like—remains exactly as it was before. Parts of that foundation have been shattered; here and there beams sag; some walls have, I am glad to say, actually been reinforced. In this essay I shall assess the present shape of the structure, following a roughly chronological approach, and, as I did in the conclusion to my earlier work, I shall indicate some matters that particularly require further investigation. My task is to provide an overview of the preceding essays, perhaps even to bring some unity to them, as I view them in relation to my own work. In particular, I shall emphasize the implications of these studies of jury composition for three problems central not only

1. Green, *Verdict According to Conscience*.

2. For the institutional background, see chaps. 1, 4, and 7 (sec. 1); for a social and legal analysis and the history of ideas, see chaps. 2, 3, 5, 6, 7 (secs. 2–4), and 8.

to the history of the English criminal trial jury but also to the history of the administration of the English criminal law generally. These problems involve (1) the way in which the medieval jury was informed and reached its verdict; (2) the degree and the form of the independence that the early-modern jury enjoyed at a time when the powers of the bench were very great; and (3) the role of the eighteenth-century trial jury, which, although clearly independent, was, by virtue of the status and experiences of its members, arguably a mere extension of the bench.

First, a precis of the institutional side of my published history of the jury. My earlier work suggested that the criminal trial jury emerged somewhat accidentally in about the year 1220, toward the end of what I have called the Angevin transformation of the criminal law and its administration. That transformation involved a shift from private to public prosecution and from predominantly private resolution through monetary compensation to predominantly capital punishment at the hands of the Crown. The presenting jury, dating from at least as early as the latter half of the twelfth century, exercised some significant discretion as it determined who must undergo the ordeal, the existing means of providing the proof normally required for conviction. In so doing, it reflected, broadly, communal attitudes about the sorts of persons who ought to suffer capital punishment or the sorts of offenses for which persons ought to suffer such punishment. After 1220 the trial jury, reflecting similar attitudes and diverging from standards set by the Crown—standards that the bench stood ready to enforce—played a similar role.

The trial jury's power to implement that role derived mainly from the fact that the bench was dependent upon the jury for information regarding the circumstances of presented offenses and the credibility of persons presented. I stressed the jury's role in the offense of homicide, but I also extrapolated outward to theft. I did not deal with the rarer offenses of treason, counterfeiting, rape, and arson. Implicitly, I excluded appeals, which were still mainly private prosecutions that continued to come into the royal courts, although in relatively small numbers.

In my interpretive overview of the administration of the criminal law in the medieval period, I argued that the centerpiece of the trial was the colloquy between judge and defendant. I left little room for other prosecution or defense testimony at the trial. The jury, I suggested, was influenced by the demeanor and responses of the defendant, which provided in-court evidence that it viewed in the context of what it already knew, or suspected, about the defendant, the alleged

offense, and the community's view of just deserts in the case at hand. The bench must have been aware that the jury departed from the strict rules of law in many cases involving homicide and theft. There is some evidence that judges occasionally questioned jurors, even pushed them hard, but little evidence that the bench succeeded in overturning jury domination of the resolution of most cases. At least in the law of homicide, legal change appears to have taken account of jury practices, and such change, along with the obvious willingness of juries to apply the law strictly in cases that the bench deemed most serious, encouraged judicial acquiescence in—and sympathy with—jury-based mercy in the less serious felonies. Over time, then, the bench assimilated popular attitudes even while it sought greater control over a system that it could not yet effectively monitor, much less definitively control.

As I formerly viewed the matter, the Tudor period witnessed developments that dramatically shifted the balance of power in the courtroom. Although some of these developments began in the later Middle Ages—most significantly the expansion of benefit of clergy and the investigative activity of the justices of the peace—the confluence of legal, political, and social change made for a great leap forward during the middle to late decades of the sixteenth century. These changes involved, *inter alia*, the long-term decline of the self-informing jury; the taking of depositions from the accuser, prosecution witnesses, and the accused; alterations in substantive law that reduced the distance between formal legal rules and social attitudes; and recourse to the Court of Star Chamber, or to fining by the assize judges themselves, to discourage jury recalcitrance. The resulting shift of control to the bench, I argued, nonetheless had limits. Had the bench not adhered to the application of legal rules in a manner that at least roughly met with approbation on the part of much of society, it might have failed to have its way. Considerations of time and bureaucratic capacities, as well as uncertainty about gaining convictions in some cases, underlay a judicial willingness to compromise, perhaps in return for a guilty plea. Moreover, the perception on the part of jurors and the wider community may well have been that the community shared with the bench the power of mitigation and absolute condemnation. A significant reduction in the number of acquittals and verdicts of self-defense was complemented by an increase in the number of convictions on charges that left the defendant eligible for benefit of clergy, a punishment that was sufficiently modest (branding and, after 1576, the possibility of one year's imprisonment) for jurors to consider themselves

merciful and for the bench occasionally to resort to withholding the privilege from those who in fact could satisfy the reading test.

By the eighteenth century, a much more substantial punishment had come to replace the sanction of branding in many cases: transportation. Although I did not explain the process in detail, I suggested that by then the jury had largely been "tamed," albeit in part because of the increasingly evident concurrence of the bench with what I termed "widespread community-based attitudes." Even the rule in *Bushel's Case* (1671) that the bench could not punish or threaten to punish jurors (except where true criminal fraud, contempt, or breach of administrative rules had been proved) did not often put the bench on the defensive. Judge and jury operated in tandem, efficiently and within a context wherein they conditioned each other's responses. Not that the system suited the needs of all parties at all times. There were cases—"political" in nature—where the bench sought tighter control of juries but found that the everyday practices in which the bench acquiesced provided an argument against that control. Moreover, there were critics of both capital sanctions and of a multi-level system of discretion who argued that certainty and proportionality of punishment were vital for deterrence. Reform of the law of sanctions in the nineteenth century not only greatly reduced recourse to the device of reprieve and pardon, it also reduced much of the by then highly "managed" jury law-finding that was, I argued, traceable ultimately to the early thirteenth century.

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It has long been conventional to date the criminal trial jury from about 1220. In recent years we have learned a good deal about the proto-juries of the period 1166–1220 that gave medial verdicts, the defendant who was thereby "convicted" being ordered to undergo the ordeal, to abjure the realm, or to face his accuser in combat. No one has contributed more to our learning in this regard than Roger Groot.<sup>3</sup> Groot has now analyzed the process by which, in the course of several years, such proto-juries paved the way for a criminal trial jury that gave final verdicts, the defendant thereby convicted being condemned to death on the gallows.<sup>4</sup> His work allows us to draw some important—albeit tentative—inferences regarding the relationship between

3. R. D. Groot, "The Jury of Presentment before 1215," *AJLH* 26 (1982): 1–24; *idem*, "The Jury in Private Criminal Prosecutions before 1215," *AJLH* 27 (1983): 113–41.

4. See above, chap. 1.

jury composition, the setting of the earliest criminal jury trials, and the manner in which "self-informing" came to be a natural aspect of trial jury process.

Groot takes the view that practically from the outset of the trial jury period the bench accepted final verdicts with little question. He does not attempt directly to explain why such great power was thus posited in the hands of the lay community. He certainly does not invoke the traditional view that the jury was in some sense, like its immediate predecessor the ordeal, a surrogate for the voice of God. One level of implicit explanation seems to be that proto-juries had given untrammelled verdicts when merely medial issues were involved, and this practice was then generalized to final verdicts in some natural fashion. At another level, the explanation may be that the post-1220 trial jury was an administrative expedient for which, in theory, the actual consent of the suspect was required. The bench conditioned "consent" by requiring a choice between jury trial and harsh imprisonment (what became the infamous *peine*—not *prisonne—forte et dure*) and then induced consent to trial by hundredors and members of the four neighboring vills by forcing nonconsenting suspects to be tried by the hundredors and a body of knights. Thus the authorities achieved nearly universal consent to trial by jury by establishing the more attractive local jury as the common means of proof. It was, in fact, the most logical candidate, for its members—at least those from the vills—were the best informed both about the offense charged and about the suspect's reputation generally. Presumably the hundredors, who had presented the suspect in the first place and who were men of higher standing with less investment in the interests—and prejudices—of the local community, would minimize the possibility of frivolous acquittal or conviction.

From the evidence Groot has marshaled, it appears that at the very outset the jury was forced on persons who were strongly suspected of serious offenses: the use of the jury, Groot shows, must be seen in relation to the extraordinary royal order of 1219.<sup>5</sup> A substantial number of the first persons to be tried by jury, being among the most serious offenders, were thus convicted, a circumstance that may have made jury trial all the more attractive to the authorities. As jury trial came to be the standard method of trial, however, defendants of all sorts put their lives upon the country, with—we might now think—predictable results. Jury trial very soon became a test of popular views on life and death that imperfectly mirrored the more abstract "letter of the law."

5. See above, chap. 1, text at n. 21.

To the extent that Groot distinguishes knights, substantial hundredors, the vill reeve, and men from the vill, he writes about jury composition and the relationship between that composition and the nature of trial. Representatives of the vill came to play a crucial role: their assent was typically required for a conviction. This should not blind us to the fact that such persons had long played a significant role in providing the evidence upon which presentments were based; doubtless, hundred jurors (presenters) did not translate the general suspicion they were bound to report into their own strong suspicion (which was required for trial to proceed, whether by ordeal or, later, by trial jury) without some confirmation from representatives of the locale of the offense. The importance of the local community in the administration of the criminal law thus pre-dated the trial jury, the adoption of which ought to be understood as a continuation and enhancement of traditional practices, not as a revolutionary step.<sup>6</sup>

How well was the bench positioned to see what lay behind a trial jury conviction or acquittal, and to what extent did the jury dominate the production of evidence? My own account of the way juries dominated trials in the Middle Ages probably overstates the matter.<sup>7</sup> There must have been some, perhaps many, cases in which inculpatory evidence came forward during proceedings at the eyre. Local officials were present, including the vill Reeves, who subsequently served on early trial juries. But their main duty was to report to hundred juries, who were in turn questioned by the bench, and the hundredors were in a position to relate who was suspected and then to confirm or to cast doubt on the charges. It is difficult to see how central authorities could have prevented local coloration of the facts presented either at the presentment or at the trial stage—how, on their own motion, they could have prevented either unjust conviction or false exoneration.

6. Green, *Verdict According to Conscience*, 4–13. Recent scholarship suggests that the pre-1220 origins of the criminal trial jury deserve greater emphasis than I have given them. Susan Reynolds has demonstrated that group decision making had long been the norm in England. *Kingdoms and Communities in Western Europe, 900–1300* (Oxford, 1984). The trial jury was a natural outgrowth of this fundamental aspect of English political life, as was the jury of presentment itself. I have probably understated the significance of the evidence regarding the use of presentment in the century preceding what I have referred to as the “Angevin transformation” of the criminal law. Robert C. Palmer has suggested that the ordeal was employed largely to determine a suspect’s “present moral standing,” not simply to ascertain whether specific charges regarding past acts were true. The trial jury carried this tradition forward: nullification of the strict letter of the law, Palmer argues, had relatively ancient roots. “Conscience and the Law: The English Criminal Jury,” *Michigan Law Review* 84 (Feb.–Apr. 1986): 792–94.

7. Green, *Verdict According to Conscience*, 16–20.

From our perspective this may seem intolerable, but it bears remembering that representatives of the villis, whether they spoke for themselves or through the hundredors, were rightly reckoned to be the best informed. Moreover, they could usually be counted on to condemn the worst offenders, the suspects who *at the outset* constituted most of the persons who underwent trial by jury.<sup>8</sup>

We still know very little about the transition from the earliest use of trial juries that Groot has explored to their later use in increasing numbers of cases both at the eyre and more specifically at trials on commissions of gaol delivery, oyer and terminer, and trailbaston.<sup>9</sup> Of these, gaol delivery was by far the most common, and significant, context for trials upon felony charges. I have emphasized the fact that those tried at gaol delivery had earlier been presented, taken, and held for trial (or bailed).<sup>10</sup> Many local officials attended the sessions of which gaol delivery was a part, but there was nothing like the general administrative process that characterized the eyre. Defendants were brought forward and the charges against them were read; the opportunity for testing these charges seems to have been meager, at least before the late fourteenth century. As before, much must have depended upon the views of the most knowledgeable of those summoned as trial jurors. But who were these persons, and how were they informed? And what does the sparse information we have on these points suggest about the nature of the trial and the judge-jury relationship from the late thirteenth to the late fourteenth centuries?

The cumbersome two-part trial jury of the early eyres (hundredors and members of the four villis) soon became a jury simply of twelve from the hundred in which the offense was committed. In practice it became more and more infrequent for those who served to have been among the original presenters;<sup>11</sup> although they were not representatives of the neighboring villis in any formal sense, some probably did come from the locale. What little we know about trial jury composition suggests that the jury of the later eyres and at gaol delivery was dominated by members of the village elites. These persons were typically members of the hundred in which the offense had been committed, but they were not necessarily its leading members. They constituted a kind of compromise produced by the interests of the

8. See above, chap. 1.

9. Green, *Verdict According to Conscience*, 20–21 nn. 64–67 and sources cited therein.

10. *Ibid.*, 21–22.

11. *Ibid.*



authorities, who wanted upstanding yet informed jurors, and the interests of laymen, the most substantial of whom had, to be blunt, better things to do.

Bernard McLane's focus on the special trailbaston proceedings of 1328 allows a glimpse into community processes that research into the gaol delivery records usually does not.<sup>12</sup> The 1328 proceedings involved both an elaborate presentment stage and the trials of those presented persons who volunteered themselves or were taken by force. Because the sessions were ad hoc and were held to deal with what was thought to be a crisis in public order, the presentments focused on common malefactors, persons whose misdeeds were numerous and notorious. McLane concludes that many offenses were thus strained out—settled at the local level. If so, this sheds important light on the latitude that presenters had. As to those charges that did go forward, McLane's comment that presentment was itself a form of punishment is apt, for it helps to explain the high rate of acquittal by trial juries.<sup>13</sup>

By 1328 the separation between presenters (the later grand jury) and trial jurors was well advanced but by no means completed. The former were of decidedly higher status than the latter. The trial jurors, however, included a sufficient number of members of the gentry or of public officials (approximately 25 percent) to allow the inference that most trial jurors were at least substantial freemen; that is, they were drawn from the groups that came to be called the yeomanry. John Post confirms the fact that at late-fourteenth-century gaol deliveries most jurors "came from a broad band in the middle classes of society."<sup>14</sup>

More important, however, is the finding that trial jurors did not often come from the "scene" of the offense, a finding echoed in Post's and Edward Powell's essays. McLane locates those jurors he has been able to trace as living anywhere from at the scene of the crime to ten or more miles distant. A very large number lived from five to nine miles away. But most juries included at least two persons who came from the scene or from no more than three miles away, and most jurors came from within the administrative unit and were, I would venture, people with access to the local officials responsible for hearing complaints and taking preliminary steps toward the final stage of presentment. I shall explore this last point presently. For the moment it is im-

12. See above, chap. 2.

13. See above, chap. 2, text at n. 76. Edward Powell makes a related point in chap. 4, text at nn. 75, 110.

14. See above, chap. 3, text at n. 5.

portant to remember that McLane is dealing with the unusual context of trailbaston proceedings, at which presentment and trial were tandem events. His trial jurors can hardly have been in the dark about the suspicions that grounded the presentments. The opportunities for self-informing were probably at least as great for them as for the presenters. Moreover, for both presentment and trial the nature of the proceedings put a premium on the role of notoriety—most defendants were persons whom local communities wanted to bring under some degree of embarrassment or actual punishment.

The nature of the proceedings also dictated the kinds of defendants who were tried and the considerations that determined the trial jurors' verdicts. Defendants in felony cases probably fell mainly into two classes: a few very serious offenders who stood a strong chance of conviction and who were already under guard at the time of presentment; and a far greater number of suspects who, upon presentment, allowed themselves to be taken, believing that they would not be convicted because they were innocent or because, although they were guilty, the evidence against them was slight or the community viewed them as persons who, all considered, did not deserve to be hanged. Trailbaston proceedings thus generated a communal sorting-out process that began as soon as the order for the sessions was announced. McLane's account of trial jury behavior bears significant relation to the pretrial stages he has investigated. I shall suggest presently that at most proceedings the category of persons acquitted literally for "lack of evidence" against them was smaller than might be assumed. In the case of trailbaston proceedings, it must indeed have been small if the process that generated presentments took the form that McLane outlines, as I believe it did. Even notorious felons and common malefactors were sometimes acquitted for a true lack of evidence in a specific case, but more often they were acquitted, as McLane suggests, for agreeing to appear and to put their lives on the country—and, I would say, for thus implicitly reuniting themselves with the local community. Bishop Brinton (whom McLane quotes) took a less charitable view; he stood at the head of a long line of observers who decried the "wrongheaded" mercy of the criminal trial jury.<sup>15</sup>

Nor were the judges who presided at these and other fourteenth-century felony trials wrong in their own assessment that many guilty persons were granted acquittals. They, too, heard the presentments and must have assumed that those named represented a bad lot. So far

15. For McLane's quote from Bishop Brinton see above, chap. 2, text at n. 1. See also below, text at nn. 51, 52; Green, *Verdict According to Conscience*, 288–310.

as we can tell, however, presentments were mainly conclusory statements regarding suspicions, not presentations of discrete bits of evidence that were tested before the bench. The "test" still resided in trial jury verdicts in those cases for which defendants appeared. Although, given the nature of the proceedings, many of those who appeared must in fact have been guilty, some were either not guilty or were not clearly proved to be, and over this determination, it seems to me, the bench possessed relatively little leverage. Judicial doubts in specific cases led, as McLane and Post have shown, to placing some acquitted persons under guarantors,<sup>16</sup> but not to refusals to accept the verdict of the community on the question of life or death. Whether the judges thought they were most often faced with honest acquittals, misconceived mercy, or outright corruption we cannot say.

If McLane examines an atypical setting, we must not assume that more common settings conformed to a single type. Post's conclusion that "no single or simple hypothesis" can be formulated regarding "the functions of the criminal trial jury" is timely<sup>17</sup>—although I remain convinced that real trends can nonetheless be identified. Post himself finds a mainly hundredal jury, so the system that Powell concludes had largely broken down by the early fifteenth century remains intact in Post's records of the preceding decades. Jurors did not often come from the specific locale of the offense, however, and the process of self-informing must have admitted of many and varied forms. In some cases, Post conjectures, witnesses came forward to testify in court. Although their presence, when it can be detected, as often as not has to do with the "good fame" proceedings that precluded an actual trial,<sup>18</sup> the era of witness testimony was already under way, with eventual revolutionary implications for trial by jury. Post's exhumation of late-fourteenth-century trial jurors suggests a transitional era, but one in which the older traditions nevertheless affected most cases. Jurors of the hundred, well positioned to know of defendants' reputations and often of the weight that the local community placed on specific charges, may well have dominated proceedings. The variety of exceptions to this rule is well marked in Post's essay. I think an extended discussion of Powell's essay will show, however, that the tradition of the community-based determination of just deserts remained the rule even in the early fifteenth century.

Edward Powell's essay focusing on the early fifteenth century sug-

16. See above, chap. 2, text at n. 79, and chap. 3, text at n. 53.

17. See above, chap. 3, text at n. 57.

18. See above, chap. 3, text at n. 47.

gests the need for far-reaching reinterpretation of the nature of the late medieval trial and of the role of the criminal trial jury.<sup>19</sup> Powell's research also cautions against the view that there was an early-modern transformation in the administration of the law; the situation in late Tudor times, it is suggested, differed little from that of two centuries before. The thrust of the argument is that by the early fifteenth century, juries were no longer mainly self-informing but instead heard and assessed evidence set forth by private accusers and government officials. By that date, if not before, the bench had the independent source of evidence that I have argued made the Tudor bench more powerful than its predecessors. There is some suggestion that the medieval trial had always possessed an active prosecution, even in the early days, when the trial jury was also, in fact, self-informed. In such a view, jurors originally had two main sources of evidence, and the judge had a check on the jury; acquittals in homicide and theft and verdicts of pardonable homicide were owing in many cases to a lack of sufficient evidence against the defendant (especially in cases where no accuser came forward) and in many others to merciful attitudes in which the bench actively concurred.

Although the evidence for an active prosecution, either by private prosecutor or by local officials, is still very sparse, Powell's speculations are plausible and could lead to a new view of the trial, at least as it was in the early fifteenth century. We should note at the outset that Powell is inclined to give substantial weight to the little evidence for an independent prosecution that has thus far surfaced, on the grounds that the early-fifteenth-century juries he has studied were no longer mainly drawn from the locale in which the alleged offense had been committed. This is an important finding, the significance of which must be assessed with care. First, and most significantly, some juries had no members from the relevant hundred, although on Powell's evidence this was the case for only 15 percent of the offenses. How were the jurors informed in these cases? Did the trial reduce itself to an assessment of the credibility of the defendant, who was closely questioned by the judge, and was this assessment influenced by the nature of the charge? Was the trial likely to lead to an acquittal on grounds of insufficient evidence? We do not know. But whatever we conclude regarding this subset of cases, we are not driven to conclude that there must *typically* have been an active and independent prosecution.

In most cases, county-wide juries carried at least a few members

19. See above, chap. 4.

from the relevant hundred.<sup>20</sup> On some occasions there was only one, a third of the time there were two, and in another third of the time there were from three to six. Powell has shown that jurors were most often well-established persons. Many were hundred officials, and most of the others were persons who had ready access to such officials. Although occasionally jurors were signed on at the assizes at the last moment, typically they had some warning of their impending duty. Two-thirds of the time, jurors went off to a delivery at which only one or two persons from their hundred were due to stand trial; the rest of the time there were three to five suspects under lock and key. Many of these suspects had surrendered themselves to await the delivery well knowing how the community viewed them. Here Powell's data suggest a degree of preformed opinion about suspects to which prospective jurors had easy access. None of this is to say that those jurors who were from the defendant's hundred must necessarily have come to court ready to inform their fellow jurors of the community's view (or views) regarding the appropriate resolution; it is merely to say that they could easily have done so. All the more was this true for the slightly earlier, more heavily local juries whose composition Post has studied. Even if some members of most juries did come to court armed with knowledge of the community's view of the case and of the defendant's reputation generally, might the entire jury nevertheless have received more evidence in court? Surely, as I have suggested, the statements and demeanor of the defendant were very significant, and sometimes the judge must have elicited an all-too-candid response or otherwise incriminating behavior.<sup>21</sup> Should one suppose as well that a private accuser or local official typically testified against the defendant?

For the early period, some evidence takes a form that we would not expect it to take if formal testimony in court against the accused was common.<sup>22</sup> Thereafter, as stated, there is occasional evidence of a pri-

20. See above, Figure 4.2.

21. Green, *Verdict According to Conscience*, 67.

22. *Bracton on the Laws and Customs of England*, ed. S. E. Thorne (Cambridge, Mass., 1968), 2:404–6. Post correctly observes that justices interrogated “defendants and their accusers to elicit claims and statements well outside the formal needs of appeal and exception” (citing *Placita Corone*, ed. J. M. Kaye, Selden Society Supplementary Series, 4 [1966], 8–9, 15–22). See above, chap. 3, text at n. 40. It is important to emphasize that the instances in which this occurred were cases brought on appeal, not on indictment. In the latter cases, the bench interrogated the defendant before seeking the verdict of a jury, but no principal accuser or witnesses are mentioned. No doubt the procedure used in appeals (a small minority of cases) was a significant source of the procedure that eventually emerged in trials upon indictment (the great

vate accuser, but not much more. Altogether, there is too little yet for us to say very much. But, admittedly, this is mainly due to the state of the extant record. It is perhaps unsound to conclude in either direction. Rather, let us accept, for the sake of argument, the possibility of in-court prosecution testimony in the later Middle Ages and hypothesize about its nature and its likely effects. Our central question is, of course, how far does the presence of in-court testimony require a revision of the view that the medieval criminal trial jury typically exercised very substantial power over the resolution of cases?

It is important to keep in mind that the opportunity for self-informing was always present in the Middle Ages. We are not discussing a mythical beast. Powell himself asserts that as late as the early fifteenth century some jurors in some cases were still self-informed. The question he seems to be asking is whether they were still (or ever had been) *solely* self-informed. The evidence set forth by Groot, McLane, and Post is not, I suppose, inconsistent with the possibility of in-court prosecution testimony alongside self-informing, but that evidence—and the evidence adduced by Powell as well—does make it appear that self-informing was at the very least one inevitable and significant aspect of the medieval trial. In many instances, trial jurors simply could not have avoided knowing something about the community's view of events, parties, and appropriate results, and even of the credibility of specific claims. Many trial jurors in the early period had served as presenters in the same case; moreover, throughout the entire period jurors who were leading community figures (including officials) were bound to know a good deal about offenders held for trial. There was no requirement that jurors banish such things from their minds—quite the opposite. Jury self-informing was a lawful fact of legal life.

How ought one to think about testimony for the prosecution in the later Middle Ages *alongside* self-informing? To begin with, it is not yet certain that local officials were called upon to testify in court, beyond stating what formal charges had been laid against the accused. With the exception of some coroners' rolls, their rolls and memoranda rarely record the results of investigations, over and above the formal charges made before them, charges that were the basis for presentments and that remained a check on the level and kind of offense for which a defendant had been held for trial. This is not to say that such local officials (constables, hundred-bailiffs, coroners) did not possess

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majority of cases). But there are few, if any, signs that this latter development had taken place as of the time of *Placita Corone* (the mid to late thirteenth century).

useful information. By the time of the trial they probably knew a fair amount. But what they knew may have been, for example, the fact that the accusing parties were still furious or, conversely, that they were prepared to make a settlement; it may have been mainly a matter of the suspect's reputation generally and of the community's view about the "appropriate" resolution of a trial for life or death. It is my guess that if local officials testified, it was this kind of knowledge that structured their testimony. If they served as jurors, they gave their verdicts on a similar basis. Powell has suggested that one reason for the high acquittal rate even as late as the fifteenth century was the large number of cases in which there was insufficient evidence.<sup>23</sup> No doubt that is true. But it might well be the case that much of the time the conclusion "insufficient evidence" was a *result* of communal processes and not, as it were, an objective fact. If local officials did testify, what they said they "knew"—how certain they said they were about the truth of charges—was a reflection of the kind of filtering process that would be hidden from the bench and that I have attributed to verdicts rendered by jurors.<sup>24</sup> If such officials did testify, that is, they probably behaved largely as they did when they served—and Post and Powell show they did serve—as jurors.

We should not, however, overlook the possibility that local officials sometimes spoke with candor in court, even in cases where that candor required setting forth testimony that threatened the outcome that the local community had, through informal processes, agreed upon. Especially from the late fourteenth century on, increasing investigational activities by justices of the peace and their inferior officers probably created a relatively non-local source of pressure that placed the local official, in the courtroom, in a bind between his duties to the Crown and his role in the community.<sup>25</sup> Ultimately, it may have been

23. See above, chap. 4, text at nn. 118–19.

24. Green, *Verdict According to Conscience*, chap. 2.

25. The tension I am referring to is, of course, not merely a function of the pressure brought to bear by a "relatively non-local" justice of the peace upon "relatively local" village officials. Within most local areas there probably were significant differences of opinion between social groups—and even within such groups—regarding the resolution of disputes involving criminal offenses. It is important to recognize, however, that I am not denying that local communities were frequently divided on all sorts of questions, that for many purposes there was simply no "community" in the sense of a unified, or even general, community of opinion. What I am suggesting is that there was relatively widespread consensus *regarding the question of life or death*, that at the least there were some cases so serious (or offenders so nasty or untrustworthy) that death was generally deemed to be deserved and others so trivial (though capital under the law) that death was generally deemed unwarranted. In some cases, perhaps many, there were conflicting views. In some of these cases, the conflicts were worked

a recognition of the pressures of localism that led the Crown to place so much emphasis upon early intervention by the justices of the peace and upon the recording of statements from all the parties concerned. This practice, combined with the real decline of the local, self-informed jury (whenever it ultimately came about), constituted the transformation of early-modern criminal administration. Its source, but not its mature manifestation, is plainly visible by the early fifteenth century.

Even in Smith's day (1560s) the vitality of the system of prosecution seems to have depended upon in-court testimony of the accuser-victim and his supporting witnesses, not of officials—at least, so far as one can tell from either Sir Thomas's perhaps muddled account or from later depictions of felony trials.<sup>26</sup> What made the system so relatively powerful by Smith's day was the writing down of both the charges and the evidence (circumstances, reasons for beliefs, and other evidence), immediately after the commission of an offense, and the accused's story, probably given as soon as he was taken and before he had heard his accuser's account. This is the kind of information that allowed the Tudor bench a substantial advantage vis-à-vis what was by then clearly a non-local, non-self-informed jury.<sup>27</sup>

Assuming that by the late fourteenth and early fifteenth centuries accusers did often testify in court, their testimony may have constituted a relatively weak form of the prosecution that was common by late Tudor times. The accused's sang-froid in denying complicity, when it was in fact a dishonest denial, must have been much greater when he or she faced a local jury (or even a jury upon which only one or two local persons of substance sat) and knew that the local community took a relatively benign view of the case. (This last point—the defendant's knowledge of the community's view—is significant and not unfairly posited, for it is, quite reasonably, one of Powell's assumptions concerning the reasons why many defendants made them-

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out before trial, but in others they were not. I am conjecturing that pressure from "above" and outside the local community (in the form of the activities of justices of the peace) may sometimes have induced local officials to behave as though there were no consensus in the defendant's favor when in fact there was and, a fortiori, not to lean in the defendant's favor when there was no such consensus. I have consistently retreated to general tendencies, even though in particular cases the specific facts were of great importance, because I have sought to identify those trends that were sufficiently strong that they had an impact on, for example, typical jury behavior, dominant judicial perceptions of that behavior, and the "community's" general understanding of what it was appropriate for jurors to do.

26. T. Smith, *De Republica Anglorum*, ed. M. Dewar (Cambridge, 1982), 110–16; *Old Bailey Sessions Papers*, passim.

27. Green, *Verdict According to Conscience*, chap. 4.



selves available for trial at gaol delivery.)<sup>28</sup> And even an accusation that carried some force and was parried by only the weakest kind of denial was still a matter for the jury to resolve. So long as even a subset of the jury was composed of substantial local people on oath to sort out the weak accusations from the strong, the well-meant but “mistaken” ones from the convincing ones (“insufficient evidence” again), there was, more than just in theory, a body of “evidence” on credibility and the like dominated by jurors. Their manipulation of that evidence to exonerate those who were guilty but who ought not (in their view) to be hanged, could remain hidden from the bench. These were facts of life that were themselves instrumental in determining when victims would appeal, or appear to prosecute upon a presentment or indictment. I believe Powell would agree that one corollary of a relatively high conviction rate in appeals was a relatively low appearance rate by victims in the kinds of offenses for which the community rarely hanged offenders.<sup>29</sup>

The result of all this may well have been relatively little candid and forceful prosecution testimony in that great range of offenses for which society was typically reluctant to have recourse to the gallows, even in the later Middle Ages. And I would posit that in many cases there was therefore a continuation of older traditions of hidden, jury-based manipulation or suppression of evidence. This is not to deny, however, that as the bench’s views came to accord with those of the community—or were seen to—more and more candid testimony may have come forward, whether from the prosecution, the defendant, or the jurors. Especially in homicide, jury-based rejection of those coroner’s inquisition details that inculpated a defendant but did not establish a case for which the community would have him or her hanged was no longer critical. An “understanding” bench did not have to be kept in the dark. Powell’s suggestion that by the early fifteenth century the judge and jury openly agreed on mercy seems plausible.<sup>30</sup> If Powell’s surmise is correct that by the early fifteenth century there was more of a real prosecution, it may be that these developments were interrelated. That is, we might expect to find both an increase in prosecution by victim-accusers in the most serious cases, where the community was ready to apply the law to the fullest, and greater candor on the part of local officials and others (as jurors) in the least serious ones, where even the bench considered hanging inappropriate.

28. See above, chap. 4, text at n. 115.

29. See above, chap. 4, text at nn. 76, 77.

30. See above, chap. 4, text at n. 123.

But all this remains a matter of conjecture. On the main point that Powell has raised, one must concede the possibility of a different kind of trial in a substantial number of cases by at least the later Middle Ages from the one I posited in my book as nearly universal virtually until Tudor times.<sup>31</sup> One must grant, too, that the "transformation" of the trial began earlier and moved more glacially than I suggested. Indeed, having earlier put my case in the strongest terms, I should now restate it in the weakest form, giving the new evidence both proper respect and room for growth and according the unknowable the caution that is its due.

Throughout much of the medieval period, we ought to conclude, the jury was at least in large part self-informing, and it frequently dominated the gathering and setting forth of evidence, especially in simple homicide and nonaggravated theft. There was a *sufficiently large body of such cases* for a tradition of nullification of the law by juries to develop, one that the bench recognized but was typically unable to prevent in specific cases. Over time the distance between judge and jury lessened with regard to the treatment of such cases, if, indeed, there ever had been real disagreement rather than a community-based fear of disagreement that conditioned the jurors' manipulation of the facts, lack of candor, or reliance upon "insufficiency of evidence." Judicial concurrence in such cases was to some extent the result of legal change that took account of jury behavior, but it also reflected the bench's realization that the jury acted with severity in many of the most serious cases. Nonetheless, it was the authorities' attempts to ensure even more convictions in the latter that led to the increased activity of royal officials and the greater frequency of the submission of a real case for the prosecution. This, in turn, allowed for more careful monitoring of jury verdicts, in the less as well as in the more serious cases. Combined as it was with the ascent of a county-based jury that included virtually no truly local and self-informed persons, the greatly enhanced prosecution augured a new age in the history of the criminal trial. Ultimately, more pliant jurors and the use of Star Chamber also contributed crucially to the power of the Tudor bench.<sup>32</sup> But it is also true that this transformation (if I may still employ that word) owed something significant to changes in the sixteenth century in substantive law that lessened the distance between official and popular attitudes regarding the use of capital punishment.

The truth of the matter, of course, probably lies somewhere be-

31. Green, *Verdict According to Conscience*, 26–27.

32. *Ibid.*, 140–43.

tween the two positions I have delineated. Over the long term, judicial control of proceedings probably increased faster than I have suggested but not so dramatically as to preclude an early period of relatively strong domination by the jury. Trials were probably more complicated affairs than I have suggested. As Post concludes, at least implicitly, sometimes the bench monitored and steered the outcome, sometimes it was overwhelmed. The working out of a judge-jury agreement, especially in homicide, may well have taken place in the context of trials that presented only a partially "hidden" defense. The bench may have acceded to a merciful view of the matter even though if it had pressed, it could have established the "truth" and determined the outcome mainly on its own terms. Trials were not only more complex from the point of view of the presentation of evidence and the options exercised by the bench; they were probably also more complex psychologically or, as it were, socially. All sorts of factors determined how each side would behave, and in this setting, as these studies on the composition of medieval criminal trial juries suggest, there prevailed an even more flexible understanding of the law—and of the appropriate application of legal standards—than the one depicted in my earlier work.

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When James Cockburn termed my book "one of the most uninhibited works" of recent legal history, he may have meant uninhibited by lack of hard evidence.<sup>33</sup> Cockburn and I have long differed in our views concerning the subject about which he knows most and I know least: judge-jury relations at criminal assizes between 1560 and 1660. In a lengthy footnote I cautiously suggested that Cockburn had overstated the degree to which the extant evidence suggests that judges controlled juries at assizes, particularly between 1570 and 1625.<sup>34</sup> More significantly, I attempted to shift the terms of the debate by suggesting that the exercise of judicial authority was itself contingent upon some substantial degree of judicial acquiescence in the "standards" that had long been applied by the community, or at least that part of it represented by the trial jury.<sup>35</sup> Of course, Cockburn and I agree that the bench was very powerful during this period. For the reasons stated above, I do believe that in the late Tudor period the constraints upon the jury were more powerful than at most other times and that the

33. *Ibid.*, dust jacket.

34. *Ibid.*, 150–52 n. 179.

35. *Ibid.*, chap. 4, sec. 2.

second half of the sixteenth century marks a culmination in the growth of the authority of the bench, as that authority was exercised in criminal trials at assizes. The issue between us has been, as is often the case, a matter of degree—but a matter of degree that matters.

Cockburn has now both strengthened the argument for the relative passivity of juries in the period 1560–1590 and conceded an increase in jury initiative thereafter. He has also made an important contribution to the history of the criminal law through his demonstration that jury composition, and probably judge-jury relations, underwent crucial changes in the middle of the seventeenth century.<sup>36</sup> I believe that there is much to the view afforded by the essays in this volume that the maturation of the judge-controlled trial was gradual, spanning the years from 1350 to 1550; that it reached a higher peak than I had hitherto supposed, perhaps in the very late sixteenth century; and that a modern era of greater sharing of power between judge and jury emerged fairly suddenly—rather than simply evolving out of a similarly textured past—in the several decades preceding the Restoration. Nevertheless, much as there is to this view, and in the face perhaps of other “jurors” who may be called upon to resolve this question, I should like to hold out a bit longer before reaching a final verdict. I am not fully convinced that jury passivity was ever anything like absolute. I am still inclined to the view that the “community” constituted a significant constraint upon judicial authority with respect to the administration of the criminal law even during the half century (roughly 1550 to 1600) still in dispute.

In part Cockburn and I view the late Tudor period with differing perspectives on what counts as the exercise of authority, and in part we are asking different questions. Where the bench prevented jury control of the outcome through a form of overruling of the verdict, Cockburn rightly sees judicial power and jury ineffectuality. But I see jury process as less than fully controlled and wonder whether the lesson learned is that the jury must not disagree with the bench, or that jury disagreement, although “allowed,” may sometimes be subsequently frustrated by the bench. Where Cockburn rightly sees judicial avoidance of the use of the jury, I infer a living awareness, and fear, of potential jury independence. Where Cockburn rightly sees judicial steering of jury resolutions that do not strictly accord with the letter of the law, I wonder whether one result might have been the jurors’ self-interested assumption that they shared the power of discretion.<sup>37</sup> In-

36. See above, chap. 6.

37. See above, chap. 6, text at n. 93. Cockburn, *Assize Introduction*, 131–33.

deed, I suspect that the bench fostered that very assumption, so far as it believed that doing so would enhance the administration of the law without undermining ultimate judicial control. I do not know how often the bench lost its bet on this risky device, but I doubt that it always won it.

We are only now coming to understand the nature of jury composition in the middle period, especially in the late sixteenth and early seventeenth centuries. Peter Lawson's work, which roughly complements the assumptions about jury composition of some other scholars, notably Cynthia Herrup, suggests that the later-Elizabethan and Jacobean trial juries drew heavily upon the yeomanry at the assizes and (here there is general agreement with Stephen Roberts) upon lesser yeomen and even husbandmen at quarter sessions.<sup>38</sup> Lawson rightly emphasizes that, in the main, jurors were drawn from the elites of England's villages. These were men who, in national terms, may be described as of the middling sort, but they stood closer to the top of society than that term suggests (certainly closer than I earlier suggested).<sup>39</sup> As Lawson admits, the evidence he has been able to muster with respect to the wealth of jurors is sparse, and our conclusions on the recruitment of jurors from the upper reaches of the yeoman class must remain tentative. Jurors were propertied, but they were not all farmers; men of small commerce—artisans and tradesmen—were among their ranks. From a local perspective they were, of course, of high status. Although they were not county leaders, they were nonetheless leaders of village society, persons upon whom much of English governance had devolved. Beholden in a sense to the sheriff, the justices of the peace, and others who exercised the power of selection, these men were, I would suggest, beholden also to the hundreds in which they dwelled and which they helped to govern.

Keith Wrightson has shown how this order both governed the base of the population and mediated between it and higher orders.<sup>40</sup> They had to live among those whose disputes they helped to resolve, and the resolution through jury verdicts at assizes was only one of many forms of intercession they were called upon to practice. It would be

38. See above, chap. 5; Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge, 1987), chap. 6. On Roberts, see above, chap. 7.

39. Green, *Verdict According to Conscience*, 133 and n. 111.

40. 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*, ed. J. Brewer and J. Styles (1980), 21–46.

incautious to view this order as being able with impunity to impose standards for which communal support was lacking upon the local community—or, if in some sense able to do so, as being so inclined. Lawson rightly calls attention to the instrumental role the yeomanry played in many aspects of local governance,<sup>41</sup> a role that—I would conjecture—conditioned them to understand and acquiesce in the standards of the respectable poor, who were frequently the victims of theft or physical assault.

It was this yeoman class that inherited the duties of the local constables and hundred elites whom Powell found serving on early-fifteenth-century juries. Their circumstances differed, however, from those of their medieval ancestors. As central authority reached down more pervasively into local life, the village elites came under greater pressure from above. Over the course of the seventeenth century, the gulf between rich and poor widened,<sup>42</sup> local elites identified more commonly with the county leadership, and the central authorities sought to rest governance, including assize jury duty, upon the more substantial of these yeomen, even upon some from among the gentry itself. Our glimpse into this world through Lawson's and Cockburn's research suggests that the resettlement of jury duty had begun to take place in the decades before the Puritan Revolution; the sharp increase in serial service and the regularization of the "office" of foreman allow us to identify a kind of watershed in the years around 1650.<sup>43</sup> Throughout this period the yeomanry remained dominant, and even its lesser figures occasionally played a prominent role. At the same time, however, authorities were severely limiting the number of persons who would be called to serve, thereby making it possible to secure jurors of higher status and greater experience—and perhaps ones who better understood, and more readily accepted, the judicial perspective.

Cockburn and Lawson nonetheless see the world of pre-Revolution criminal administration differently. For Cockburn, lesser men—especially less experienced men—meant greater judicial control, and a less regularized system of jury service meant far more frequent recourse to the *tales*.<sup>44</sup> Lawson depicts Elizabethan and Jacobean Hertfordshire jurors as accustomed to governance in their locales, even if they were less experienced as assize jurors than their later counter-

41. See above, chap. 5, text at nn. 80–85.

42. J. A. Sharpe, *Crime in Early Modern England, 1550–1750* (1984), 91.

43. See above, chap. 6, text at nn. 47–76.

44. See above, chap. 6, text at nn. 16–24.

parts. He finds little evidence of the use of the tales.<sup>45</sup> Moreover, Lawson emphasizes the independence jurors retained in this period, although he would agree that their natural inclinations led jurors to be severe where the bench, too, would have been so. Cockburn, Lawson, and I are all in agreement on this last point, and I would stress the importance of the fact that much of society—even England’s husbandmen and laborers—was prepared to have done with truly nasty offenders. It was this community of agreement on the most serious cases that had from earliest times, I argued in my book, made reliance upon local elites—a middling class in national terms—both possible and desirable.<sup>46</sup>

It remains unclear just how far assize judges bothered to steer jurors in cases on which general social agreement was less firm. Cockburn’s case is persuasive to a point, but the pattern of verdicts suggests a degree of jury-based resolution, which is a body of evidence that Lawson emphasizes.<sup>47</sup> It remains my view that judges were aware of and assimilated these standards, so that even when they led juries they were often moving toward goals jurors saw as their own, and that the process of steering was thereby partly invisible to jurors and the observing public. That “public,” moreover, must be viewed as wider than that in attendance at assizes; it included as well persons from the local communities to which those offenders who were not singled out for the most severe—and exemplary—punishment returned.<sup>48</sup> We shall probably never know for certain whether their neighbors attributed their narrow escape to judge or jury, or both. But I am inclined to think that some semblance prevailed of a tradition (that is, a community-based impression) of the jury’s right to share in the power of mitigation.

Finally, Lawson’s point that we ought not to make too much of the concept of mercy is important.<sup>49</sup> Juries could, in the first place, exercise great severity. And often where they acquitted or rendered partial verdicts they were responding to the degree of seriousness of an offense in a matter-of-fact way. Whether they had a subjective sense of acting out of mercy is more difficult to say. Lawson gives weight to the high standard of proof required by both the bench and the jurors (at least in cases where rank prejudice did not intervene), although he

45. See above, chap. 5, text at n. 43.

46. Green, *Verdict According to Conscience*, 99, 102.

47. See above, chap. 5, text at nn. 151–65.

48. See above, chap. 5, text at n. 95.

49. See above, chap. 5, text at nn. 163–65.

pays greater attention to the influence upon bench and jurors of the character of the offender and the nature of the offense.<sup>50</sup> These were not, of course, entirely separate phenomena: where the offense was capital but of a less serious variety (or where the offender was a recidivist) the standard was higher, and vice versa. Whether jurors thought in terms of the offense, as such, rather than self-deludingly in terms of a constant standard of proof, we cannot say. I shall return to this important point.

The selection process that Lawson describes—and that links his work to much of the scholarship on the late-seventeenth- and eighteenth-century criminal trial jury—may well have appeared differently to different observers. Some eighteenth-century legal writers characterized jurors as too merciful;<sup>51</sup> so, too, did Lambard in the period with which Lawson is concerned.<sup>52</sup> Moreover, the view from below may have been more complicated than the several essays on the early modern period in this volume suggest. Accusers and defendants, as well as the laboring poor of the local communities from which these participants came, no doubt internalized the message of the gallows ritual. Property was, after all, sacrosanct. But they also formed some understanding of the process by which defendants were spared: lives, too, held value, and the ritual of correction might involve forgiveness and reacceptance into the community of the living. From one perspective, as Lawson suggests, the law might not have been modified by jurors, whose independence expressed itself in the application of rules as they were meant to be applied.<sup>53</sup> Indeed, that is the view I have taken.<sup>54</sup> But this seems to me to redefine the law in a way that allowed it to be understood as a law of mercy.

One particular feature of Cockburn's perspective on the Elizabethan and early Jacobean period that I do not entirely share is its implicit message of the triumph of central authorities over the forces of localism. My use of the word *community* with reference to the jury and the people and interests it represented has been too casual. In my conclusion I belatedly pointed out that jury independence relative to the central authorities may sometimes have reflected jury dependence upon local ones.<sup>55</sup> This is a point that Stephen Roberts, writing

50. See above, chap. 5, text following n. 165.

51. Green, *Verdict According to Conscience*, 288–310.

52. See above, chap. 6, text at n. 99.

53. See above, chap. 5, text at n. 165.

54. Green, *Verdict According to Conscience*, 314.

55. *Ibid.*, 370.



about the Interregnum, makes with some force.<sup>56</sup> His focus is on quarter sessions, which were decidedly more local proceedings than those held before a predominantly royal bench. It remains to be seen whether gentry influence over quarter sessions jurors (to the extent that Roberts has been able to establish that influence) implies that there was a similar lack of jury independence at the assizes. For the moment, we might doubt that the local gentry surrendered the determination of life-or-death issues to royal judges. Why should we not suppose that the corollary of some manipulation by hundred or county potentates at quarter sessions was jury manipulation by the same local powers at the assizes? Cockburn's depiction of the assizes—the ritual and accoutrements of the presence of royal surrogates—is powerful, and his argument must be read in light of the theater that the assizes represented.<sup>57</sup> It was a moment of intrusion into county affairs that saw county gentry look to the source of power and preferment that was the Crown. But court and country relations were reciprocal. Royal policy always countenanced a sharing of power and discretion with county gentry and yeomanry, so long as it was implemented in appropriate fashion and did not function, as central authorities saw it, as a disparagement of royal authority.<sup>58</sup>

The jury, then, even in decline, was an extension of both central and local interests. Its power, particularly its recourse to discretion, sometimes reflected the limits of royal influence on local politics. I do not mean to suggest that the jury often overtly signaled a tension between central and local power; I do believe, however, that the relationship between central authorities and local interests naturally implied some limits upon judicial manipulation of the criminal assize jury. I suspect that the reorganization of the jury in the mid seventeenth century that Cockburn has convincingly depicted reflected a new era in central coordination of local matters. It both recognized the relatively mild degree of royal control (or the high costs of manifesting control) that had characterized the preceding era of court-country relations and prefigured later central dominance through more sophisticated forms of the cooptation of local elites, forms that, ironically, as I shall later suggest, maintained and even increased the local sharing of power with the central authorities.

Roberts's work on Devonshire reminds us of the diversity of local

56. See above, chap. 7.

57. Cockburn, *Assizes*, chaps. 4, 6.

58. See D. Hirst, *Authority and Conflict: England, 1603–1658* (Cambridge, Mass., 1986), 31.

conditions in seventeenth-century England and of the element of group (or class) interest that informed peacekeeping in the domains of England's local but "godly" magistrates.<sup>59</sup> Not surprisingly, Roberts finds the world of Leveller jury theory a far cry from the reality of everyday practice.<sup>60</sup> At the same time, his study of practices in Devon helps to put the radical jury rhetoric into perspective, because one glimpses therein the source of the frustration felt by those who idealized the legal practices of the original "free" Anglo-Saxon community.

Here one must recognize that the Levellers and some other contemporaries overstated the power of the central authorities. They portrayed those authorities as able to exert themselves almost without limits in the provinces. In this way the local gentry, even when acting on its own interests, was deemed to be in active collusion with royal officials and to be an enemy of the lesser propertied yeomanry and husbandmen whose autonomy had vanished, so the theory ran, with the Conquest.<sup>61</sup> Lilburne's was a view from the center, where the most important local figures sat in the Parliament that, in alliance with Cromwell, sought to stamp out political dissension in the counties and to maintain a tight grip on political representation and social and economic preferment. Digger opposition to the jury, an opposition that I have perhaps underestimated,<sup>62</sup> reflected a more accurate understanding of the interests that controlled provincial civil and criminal trial proceedings.

The Diggers, too, opposed the central government, but they had no illusions about the prospects for local democracy. Roberts's focus on the problem of nonconformity further exposes the absence of total overlap between central and local perspectives and the relatively free hand of local potentates on their own turf.<sup>63</sup> Such cases may have been particularly attractive—and misleading—to Leveller leaders, whose unyielding opposition to the central authorities may once again have diverted their attention from the undemocratic local conditions that paradoxically guaranteed effective resistance by the provinces. But the main point, as I have suggested, is that no matter how great the

59. See above, chap. 7.

60. See above, chap. 7, text at nn. 46–49.

61. Green, *Verdict According to Conscience*, 177–86. Cockburn's discovery that, at least on the Home circuit, 1650 was an important watershed is relevant here: Leveller complaints that jurors were being handpicked by the authorities may well have been influenced by the commencement of the practice of serial service.

62. *Ibid.*, 190 n. 122.

63. See above, chap. 7, text at nn. 70–78.

distance between Leveller law-finding theory and daily community-based practice, Leveller views—precisely because those views were expressed in the rhetoric of local democratic self-government—could nonetheless have great force within a certain restricted corner of the revolution.<sup>64</sup>

The inferences for assize jury independence that I have drawn from Roberts's evidence make more understandable the collision between such royal justices as Hyde, Twysden, and Kelyng and gentry-controlled grand and trial jurors, both in nonconformity cases and in routine felonies.<sup>65</sup> In the early 1660s at least, royal judges occasionally vied with local men of power, and I see no reason to suppose that this was a novel or exceptional event (although the lengths to which the Restoration bench went in order to resolve the tension probably were novel). The episode perhaps highlighted the need for greater central control over local juries and the limits that continued to present themselves to central authorities even into the era of the reform of jury selection and service. I have stressed Vaughan's detachment in *Bushel's Case*, a case that arose from Quaker preaching and that was at least in part colored by the exhortations of Penn and others to jurors. According to these exhortations, jurors were to "find the law," a theory that Vaughan clearly opposed but seemed not to want to confront openly.<sup>66</sup> A second form of detachment appears to characterize Vaughan's language—if, that is, one reads jury resolutions against the background of local interests and control. Vaughan would have us believe that the issue was, at base, freedom of conscience, presumably freedom from *all* "foreign" influences, local or central. We should not be surprised, however, to discover that all parties found such "freedom" a convenient rationalization for the self-interested resolutions that they sought to protect from other, alien interests. In the face of royal authorities, local men appealed not to their own interests but to principles of justice. Those principles soon took on some semblance of a life of their own.

The history of the jury in the sixteenth and seventeenth centuries, then, is the history of a struggle for control of an institution that stood in the front lines of many kinds of political struggle. Rhetorical declamations passed easily from one context to another; as I have suggested, some opponents of the later Stuarts employed the rhetoric of

64. Green, *Verdict According to Conscience*, 186.

65. *Ibid.*, chap. 6, sec. 2.

66. *Ibid.*, chap. 6, sec. 3, 4.

Lilburne, although they felt little kinship with leveling ideas.<sup>67</sup> Perhaps that rhetoric also drew upon the claims made by selfish local men who put their right to determine local cases of life and death in the most high-minded terms. Whatever the role of central-local tensions in the episode that brought embarrassment to Kelyng, the parliamentary censure of that royal judge came to be understood in terms of a true right of non-coercion.<sup>68</sup> These essays, and similar work recently completed or in progress, have begun to establish the distance between rhetoric and reality in seventeenth-century politics and legal practice.<sup>69</sup> Moreover, this body of scholarship also holds the potential for exposing the relationship—that is, the exchange—between rhetoric and reality, and thus for allowing us to produce an informed history of contemporary ideas about the jury, particularly about the influence of those ideas on ongoing practices at all levels.

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The three essays on the jury from the Restoration to the late eighteenth century situate the members of the assize criminal trial jury among the upper orders of English society. I have pointed to the emergence by the seventeenth century of a gulf between the few relatively wealthy and the many poor or downright destitute Englishmen. In this context it will hardly do to speak of jurors simply as middling men, for those groups were nonetheless among the more exalted of English society. Moreover, as these three essays conclusively demonstrate, the authorities strove persistently and successfully to ensure that jurors came from that class of persons who were the cities' and the countryside's natural, though local, governors, men who in almost all aspects of political, social, and economic life dominated the everyday affairs of most of society. Not only were jurors experienced in the affairs of local government and drawn from groups that were used to working together, but they also came from elements that, in many matters, looked for leadership from, and alliance with, England's most exalted rulers. How much a part of, or bound to, this highest order were they? As jurors, to what extent did they, for all their relatively high status, nonetheless reflect the interests and attitudes of the numerically greater part of society? What can one say about the

67. *Ibid.*, 252–60.

68. *Ibid.*, 220.

69. See, for example, J. A. Phillips and T. C. Thompson, "Jurors v. Judges in Later Stuart England: The Penn-Mead Trial and *Bushel's Case*," *Law and Inequality* 4 (1986): 189ff.

class aspect of the administration of the criminal law? Our essays, and work related to them, have begun to answer these questions, but we have not yet achieved a fully unified view.<sup>70</sup>

At least two fairly distinct emphases now characterize scholarship on the political and social role of the criminal trial jury. Peter King identifies the assize trial jurors as men of the middling sort, members of a class or group of classes that stood in the top third of English society but, he significantly emphasizes, below and apart from the gentry in wealth, office, outlook, and manners.<sup>71</sup> King views the middling order as having its own interests. Nevertheless, to some extent he sees its members as reflecting attitudes shared by those below as well as above them, depending upon the issue at hand. Douglas Hay, in the essay published here (more distinctly perhaps than in his earlier work), situates the jurors about where King does in terms of wealth and background, but portrays them as more prosecution-oriented, as less prone to empathize with those below them who were tried at the assizes.<sup>72</sup> Beattie's detailed essay on the trial jurors of late-seventeenth-century London demonstrates that the economic status of these jurors was substantially higher than that of persons who served on the provincial (Surrey and Sussex) juries he studied earlier.<sup>73</sup> He characterizes the status of provincial jurors in terms that accord with King's evidence, but he emphasizes the broad agreement between judge and jury. It appears to be his view that the justice meted out at provincial assizes reflected the attitudes of at least the top third of society. Beattie draws no conclusions about the justice meted out at London trials, but his characterization of London trial jurors suggests that it reflected the views of persons immediately below the small aristocratic elite.<sup>74</sup> Although in Beattie's view London emerges as an exception, it is an exception of great importance, both because of London's influence on the development of English criminal administra-

70. For a review of the literature on the eighteenth century generally, see Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *Journal of British Studies* 25 (1986): 380-435.

71. See above, chap. 9.

72. See above, chap. 10, and D. Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Hay et al. (Harmondsworth, 1975), 17-63.

73. See above, chap. 8, and Beattie, *Crime and the Courts*, 378-89.

74. Beattie shows, however, that London jurors were far less wealthy than London's wealthiest persons. Moreover, he points out that the groups that served as trial jurors in London were as involved as rural jurors in all aspects of local governance and were thus involved with a wide range of people.

tion and because of the place London trials held in the minds of contemporaries, that is, in what was coming to be the prevailing idea of the jury in trials for felony. In the end, each of these views about the jury possesses its own kind of truth.

I previously maintained that the jury functioned throughout its long history to effect an accommodation between ruling authorities and a substantial part of English society.<sup>75</sup> In this sense, I suggested, the jury was both an elitist and a democratizing institution, although I also cautioned that too much ought not to be made of the latter notion: one man's democratizing institution is another's coopted extension of aristocratic rule. Here Hay and I have disagreed, at least in emphasis, and in my view his present essay strengthens his position considerably. Quite obviously, juries did not represent the entire population; in some times and places, and with regard to some kinds of offenses, they represented a relatively small part of society. We are perhaps reduced to deciding how often jurors had to represent (in terms of their perspective, not their status) how many people and in what kinds of cases in order to be of the larger community, as opposed to being above it. Do we not also need to know the subjective state of jurors as they went about their work? Surely we do, but is even that knowledge sufficient?

Here I would resist an affirmative answer, and my reasons for resisting may help explain my own preference for what I (and I alone) have termed the communitarian view. It will not do to define the jury solely in terms of the class ties of its members, or of their politics in the simple sense of their conscious identification with, or rejection of, authority. We need to know the constraints within which juries acted, even when they were not cognizant of those constraints, and we need to know the psychology that jurors typically possessed when reaching determinations of life or death, even when they were unaware of those feelings. There were instances of people and offenses—the two were not always related, as King's work makes clear<sup>76</sup>—for which the decision to end a life was easy; there were others for which it was unthinkable; and there were still other instances, perhaps very many, in which, whether one took a life or spared a life, some translation into a special language of justification was necessary. Herein lay the potentially competing claims of just retribution and mercy; the latter claim was sometimes (but only sometimes) so broadly defined as to be equivalent to a claim of simple humanity. Our study of that language

75. Green, *Verdict According to Conscience*, 374–75.

76. See above, chap. 9, text at nn. 174–75.

of humanity is primitive, and its inaccessibility to us may lead us to underestimate its pervasiveness and importance.

It is equally possible, however, to overstate the role of mercy, which was, in any case, only one of several significant and conflicting aspects of the administration of the criminal law. We must assess that role in the context of a harsh penal law that claimed the lives of many Englishmen whose crimes were produced by the rigors and injustices of economic life. The mitigation practiced at eighteenth-century assizes was itself often mitigated: the principal alternative sanction to execution was transportation for seven or fourteen years or for life.<sup>77</sup> Indeed, from one perspective the capital sanction was instrumental not only because it induced terror but also because it allowed higher orders to conceive of themselves as merciful even as they sent thousands into long and often cruel exile. Moreover, as had always been the case, it was the widespread agreement that the nastiest offenders ought to suffer the extreme rigors of the law that made even the modest form of mitigation that was commonly practiced an acceptable feature of the law.

Whatever the actual degree of mitigation, and whatever were the conditions that made it common, the manner in which the various orders of English society viewed the abundant recourse to it remains a complex matter. The juror class, for its part, was a law-enforcing class that spent much of its time and energy arranging for its own physical security. But at the moment of trial, and especially at the moment of judgment—that is, of rendering verdict—its perspective may often have been shaped by other inclinations and concerns as well. The courtroom was not a meeting room for an association for the prevention of crime. Its doors may have been open to people and attitudes whose presence caused jurors to see themselves and their role in a more broadly representative fashion. In many cases the moment of verdict may well have been a moment in which, in an important sense, Englishmen acted against their “better” judgment.

In his essay on London jurors, as in his previous work, Beattie seeks the roots of the fundamental changes in the administration of the criminal law that occurred early in the eighteenth century. Emblematic of those changes was the legislative adoption of the lesser sanction of transportation. First and foremost the crime problem was a problem of penology, the tail of the system that, some hoped, might wag the dog.<sup>78</sup> Important, too, however, was the regularization of jury

77. Beattie, *Crime and the Courts*, 450–519.

78. *Ibid.*, 500–513.

service and its settlement upon people whose judgment could be trusted and whose interests made them, if not outright dependent, at least relatively dependable. Beattie here rightly accords great importance to the conscious policy changes of 1650, which constituted a turning point in the history of criminal trial jury composition. In Beattie's view, the London jury system of the 1690s both represented a maturation of mid-seventeenth-century experiments and became, at least in some respects, the model for the experiments of the eighteenth century.<sup>79</sup> And it brought into the everyday practice of the London courts the men who would help frame and inaugurate those latter experiments. Beattie's instinct for the accidents that create new practice and policy—and in short order, ideology—led him to investigate the circumstances that, in London, first delayed and then produced in-court deliberation.<sup>80</sup> It would appear that even as central authorities were rationalizing, streamlining, and taming the potentially erratic impulses of the criminal law and criminal trial procedure, they were, unintentionally to be sure, creating conditions within which competing influences could continue to exert themselves. We can be certain that London jurors worked quickly, often guided by their foremen, and usually decided in accordance with the interests and prejudices of their caste. But, like jurors in the provinces, they also came to do their work in the heated and constraining atmosphere of the public domain.<sup>81</sup>

Placing the status and experience of London jurors is of particular importance. If the typical trial jury was as exalted in the mid eighteenth century as it had been in the early 1690s, what, we are led to wonder, must have been the composition of the special juries that were sometimes employed in London in seditious libel and other political cases?<sup>82</sup> Surely the special jury cannot have been of a much higher class; perhaps it was more dependable in the sense that it was purged of people well known for their dissident views. If so, this tells us something about the less-than-perfect overlap in interests of authorities and the upper middling classes that typically served the London courts. And even special juries could find against the Crown, so there were quite evidently limits even to their dependability, at least

79. See above, chap. 8, text at nn. 5, 15, 50.

80. See above, chap. 8, text at nn. 13, 14.

81. For King's important speculation regarding the impact of in-court deliberation see above, chap. 9, text at nn. 164–69.

82. J. C. Oldham, "The Origins of the Special Jury," *University of Chicago Law Review* 50 (1983): 137–221.



in a specific range of cases.<sup>83</sup> Yet another point: In the pamphlets that debated the law regarding criminal libel, much is made of the question of London jurors' ability. Can this criticism of jurors be well informed, given their position and experience?<sup>84</sup> If all that is meant is that no layman possesses the judge's knowledge of the law, the argument is understandable. Otherwise, it rings quite false. Moreover, jury proponents sometimes wrote about jurors as though the latter took part in common political discourse. Although extremely well off, jurors were—or were alleged to be—fairly common by class standards, part of the large middle class from which Wilkites and others of a similar cast of mind came.<sup>85</sup> In London, as in the provinces, England's ruling elites saw the groups that yielded jurors as a class apart—indeed, as without "class."<sup>86</sup>

More curious still is the role that English jurors in general played in applying the law in routine cases of property crime. Here they cannot have been very far from the bench's point of view. Hay's argument is persuasive.<sup>87</sup> Jurors were the employers of those who were accused of routine felonies, not their co-workers. They owned property or capital and were set apart from the masses of laborers who were called before them to be judged. Jurors may well have identified with England's highest elites insofar as they were part of the natural governing and property-owning classes. They were an important extension of those elites, whose members made law in Parliament or on the bench. And in some respects that law was, as Hay emphasizes, a "class" law that reflected existing gross inequalities of wealth.<sup>88</sup> From one perspective, then, jurors represented an instrument of centrally monitored propertied-class power.

But provincial jurors, perhaps more than their London counterparts, were at the same time members of local elites who had to live with, if not precisely among, lesser farmers, artisans, and tradesmen, if not the laboring poor. They were, it would seem, people whose power over the less well off depended on a mixture of authority and empathy. The groups from which Essex and Surrey jurors—and even Staffordshire and Northamptonshire jurors—were drawn could not separate themselves entirely from their social and economic inferiors, particularly,

83. Green, *Verdict According to Conscience*, chap. 8.

84. *Ibid.*

85. *Ibid.*

86. *Ibid.*

87. See above, chap. 10.

88. See above, chap. 10, text at n. 147.

I would venture, from the attitudes of the more substantial of the latter on life-and-death questions. To a significant degree, they were held in check by groups below them in the social hierarchy, and they were both inclined and *required* to satisfy the instincts of those groups for mercy as well as for retribution, or perhaps more accurately, they were bound to act in accordance with widespread expectations concerning an appropriate regard for the value of a human life. Jurors, then, were part of a set of institutions that created a fit—albeit only an approximate one—between widespread social attitudes and the attitudes of England's natural rulers. One would do well to pause at this point to ask about this fit. Why should we suppose there was one at all? Why was it not closer? What were the "rules" of governing that made the perspective of the ruling groups diverge from those of much of society, if one assumes, as I do, that in a special sense the latter both legitimated and determined the power of the former?<sup>89</sup>

Society in general was not captured, as the legal elites were, by a notion of the rule of law in which a *formal* theory of consistency loomed very large. Communal judgment had always been a complex process in which ad hoc decisions arose from conditions that made them seem natural, appropriate, of a piece. Royal authorities who came to manage that process in serious cases of crime instinctively (some would say, manipulatively) sought to purge that process of the arbitrary and the incidental. Although authorities in fact accommodated a system of justice built largely upon exceptions to firmly expressed rules, they nonetheless created means for articulating fairly precisely the conditions in which those exceptions would apply. Social resistance to capital punishment created pressures, for example, for legal rules justifying mitigation or outright acquittal on technical grounds, so that rough agreement on outcome was achieved even while the larger community and the bench regarded individual cases from very different perspectives. Doubtless, society came to view many cases on the authorities' terms: the indictment was "defective"; the high standard

89. By determined I mean limited, in the specific sense that the assize juror classes drew their views regarding the appropriate use of the gallows at least in part from groups below them economically and socially, perhaps from something like the middle third of English society. As suggested in this paragraph of the text, I do not mean simply that jurors (or those among the highest ruling elites) feared that extensive recourse to the gallows would lead to political conflict but that a more subtle assimilation of attitudes from below resulted from informal contact such as that involved in the carrying out of local governance. Although such influences, of course, worked downward as well as upward, I have emphasized the often-neglected upward side of the process. I have also tried to make clear that the influences from below were partly responsible not only for upper-class notions about when mercy was appropriate but also for upper-class notions about when it was not.

of proof had not been met. In the same way, the authorities perhaps unconsciously adopted social standards regarding merciful treatment of many specific offenders. But the differing perspectives remained, each side thinking in its own terms about the resolution of very many cases. This should come as no surprise. The needs of governors have always embodied their own special rules and forms.

King's research offers a significant vantage point from which to survey some of the issues I have raised. His conclusions, even when they are not startling, are indeed penetrating. Although they are based on a study of a county that was represented by solid middling, rather than distinctly upper-middling, jurors,<sup>90</sup> they seem to me to hold true even for areas that produced jurors of the latter description. King himself makes little claim for a true communitarian approach. Essex jurors were from the local elites, and although only some of them played significant roles in local government, they held together as a class—or set of sub-classes—as persons with a variety of life styles and attitudes that set them apart from both the gentry and the laboring poor.<sup>91</sup> If anything, they were farmer-dominated, quick to condemn sheep stealers, used to employing farm as well as household servants, and ready to discipline them. This was a breed that well knew the temptations to which the young were vulnerable and that could conclude as quickly to remove a threat to their order as to be lenient with a young man understandably (although not excusably) gone astray. One has the sense of a *potentially* arbitrary system, the defendant in many cases owing his life to the happenstance of a few understanding father-figures on the jury. But King argues that jury decisions were in fact “principled,” however they may have appeared to some outside observers.<sup>92</sup> King's study makes clear the strength of the claim to good character, in the sense of widespread acceptance of the rules of the game, that the leading local orders, broadly defined, exacted.

For whatever reason, Essex jurors came to be even more experienced, although not necessarily more exalted in rank, after 1784. In a move reminiscent of mid-seventeenth-century attempts to rationalize jury service and to place the responsibility of judgment in the hands of those who understood the parameters of judicial expectations, Essex jurors came to serve once in three years, as members of ongoing entities made up very largely of the same people.<sup>93</sup> In this the

90. See above, chap. 9, text at nn. 18–74.

91. See above, chap. 9, text at nn. 190–93.

92. See above, chap. 9, text at n. 5.

93. See above, chap. 9, text at nn. 114–17.

Essex jury system was, as far as we know, unique, but the reform may prove to be an accurate measure of what the national government hoped generally to achieve. There may have been a parallel in at least one of the counties Hay has studied.<sup>94</sup> By the late eighteenth century, criticism of arbitrariness had become common, and crime rates were (or were thought to be) once again on the rise.<sup>95</sup> The government perhaps hoped to safeguard the existing system by reducing the occasions on which jurors might exercise leniency foolishly, thus maximizing the degree to which measured, selective non-enforcement was applied in a consistent fashion and blunting the charge of inexperience.<sup>96</sup> How far any of this went toward reducing actual arbitrariness we are unable to say, but it hardly brought the charges of arbitrariness to a halt or disguised the fact that the root of the problem lay not with the mechanisms for selection among offenders but with the process of selection itself.<sup>97</sup>

In King's essay we sense that the critical juncture had been reached: no group of jurors could lend credibility to a system of blanket capital sanctions to which, given prevailing social attitudes, recourse could not be had in more than about 10 percent of the cases that came to trial. The criticism of the system was simply too far advanced and too plausible. King and Hay note that elite commentators often derided jurors as illiterate, inexperienced, and of low status, and the two authors rightly suggest that this perspective says more about the critics than about the jurors.<sup>98</sup> King takes this point yet a step further; he suggests that England's highest classes had not so much misgauged the composition of trial juries as they had come to see the groups that yielded jurors as representing a force of their own.<sup>99</sup> Although it may be that jurors' occasional recalcitrance in political cases was partly responsible for this view, much of the criticism was aimed at jury be-

94. See above, chap. 10, text at nn. 122–24 (Staffordshire).

95. See above, chap. 10, text at n. 127. See also D. Hay, "War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts," *Past and Present* 95 (1982): 139, 145, 156.

96. Hay notes that, with regard to Staffordshire in 1787, it is not known whether recourse to experienced jurors "was on local initiative or at the suggestion of the assize judges." See above, chap. 10, text at n. 125.

97. Green, *Verdict According to Conscience*, 356–63.

98. See above, chap. 9, text at nn. 179, 193, and chap. 10, text at nn. 2, 8, 10, 11, 129. It remains unclear why contemporaries not only viewed jurors as ignorant (perhaps a class perspective) but also thought that they came from groups far lower in the economic hierarchy than was the case, and that officials were not enforcing the relevant statutes when they were in fact doing so.

99. See above, chap. 9, text at nn. 184–93.

havior in routine felony cases, and in this context the problem of class was perhaps of less significance. Indeed, the most persuasive and telling criticism came, I believe, not from those who thought that jurors were not up to the task set for them, but from those who objected to the task itself.<sup>100</sup> These latter publicists were the new breed of reformers, who both criticized jurors for being too merciful and conceded that, given the prevailing law of sanctions, simple humanity inevitably would, and probably ought to, govern jury reactions.<sup>101</sup> There is little suggestion that these critics—or any critics when they truly confronted this problem—thought that even the highest-born were significantly less susceptible to the impulse to be merciful. Even the bench and the Crown were said to share in the only-too-human “poor judgment” that allegedly characterized the system.

The system held on for a time despite the onslaught. In his earlier work Hay perceptively argued that the ruling elites were blinded to this particular criticism (or persuaded to weather it) by the advantages they saw in the power of selective enforcement.<sup>102</sup> This was, no doubt, one aspect of the mind-set of many late-eighteenth-century propertied Englishmen. I have myself suggested that at the same time the tradition of jury-based mercy drew its strength from other sources as well, and that those who were less well placed than the authorities but able nonetheless to play a role in various stages of criminal administration may have viewed the institution of jury trial in quite different terms.<sup>103</sup> The leaders of local communities had always possessed the “right” to apply the prevailing law regarding life and death; the jury class held that right not only from the beneficence of the ruling elite that presided over criminal trials but also as an aspect of its prerogative of local governance, which involved managing the affairs of those who were, among many other things, commonly the victims, as well as the neighbors, of local bullies and thieves. Moreover, from the perspective of many of these middling men in their role as jurors (I am conjecturing), this process of judgment was not arbitrary and did not have to be defended against the new reformers; it was, because it was socially based, a natural and predictable process. Only when faith in the efficacy of this process broke down, especially among London

100. Green, *Verdict According to Conscience*, chap. 7, sec. 3. This was particularly true, I believe, of Blackstone, Eden, and Romilly, whose writings were widely circulated and accorded great importance.

101. Green, *Verdict According to Conscience*, chap. 7, sec. 3.

102. Hay, “Property, Authority and the Criminal Law.”

103. Green, *Verdict According to Conscience*, 310–15 and n. 156.

men of commerce in the early nineteenth century, was the system brought to the brink of reform.<sup>104</sup>

Of course, as long as the government could restrict the selection process to those with substantial property, the highest elite's own perspective might emerge as the stronger of the two perspectives that vied for dominance in the minds of those who served as jurors. Hay's definitive analysis of Staffordshire and Northamptonshire jury panels suggests that in some times and some places, something close to aristocratic control could result. He locates those who served as close to the very apex of English society. But again, those who served held places in a relatively local society and had local responsibilities and sensibilities. Their views on most matters can hardly be taken to be those of society at large, but their behavior on life-and-death questions in England's close and crowded courtrooms may have reflected not only elite notions but also the attitudes of much of village society. We must proceed here with caution, but it may well be that the dynamics of the courtroom—especially when deliberation was undertaken in open court—combined with the tendencies produced by the unanimity rule further to ensure that even the most exalted jurors often applied the capital law according to well-understood, widespread, and—where much of society deemed it appropriate—distinctly merciful standards.<sup>105</sup> I must concede I have overstated the degree of agreement within the community that characterized English criminal administration regarding the imposition of the capital sanction,<sup>106</sup> but just how far I have overstated the case I am still not sure. Much searching work remains to be done, though it will have to be impressionistic, for, as I have emphasized, we are dealing here with a matter of psychology and of constraints barely felt, or felt but misinterpreted by those who sensed them.

One clue to the distorted perspective of these eighteenth-century jurors—and earlier ones, no doubt—lies in the importance they all accorded to a very high threshold of proof.<sup>107</sup> This is itself a difficult concept. I have suggested at a number of points that from medieval times onward the conclusion that there was "insufficient evidence" was the

104. *Ibid.*, 361; L. Radzinowicz, *History of English Criminal Law* (1948), 1:727–32.

105. For King's discussion of the impact of the unanimity rule, see chap. 9, text at nn. 160–64, 172; for his discussion of courtroom dynamics, see *ibid.*, at nn. 164–69. My own discussion is speculative and, in its invocation of "widespread" views, goes beyond the conclusions that King draws.

106. Green, *Verdict According to Conscience*. See also above, n. 25.

107. Green, *Verdict According to Conscience*, 274.

result of a variety of factors, only some of which we would identify as strictly a matter of the quantity of proof. Critics saw the "high standard" as irrational, too high by far, and they correctly explained its existence in terms of resistance to the use of the gallows,<sup>108</sup> but they often underestimated its importance to the administration of the criminal law. The high standard of proof and the *sense* often experienced in close and crowded courtrooms that it had not been reached were crucial to the system of trial by jury as it worked for centuries. They allowed jurors to conceal from themselves the extent to which myriad other concerns determined the outcome of their deliberations. Perhaps the most significant of these other concerns was the reputation of the defendant, and reputation had to do not only with the likelihood that the defendant had indeed acted as charged but also with more open-ended matters of just deserts that jurors could not easily confront as such.<sup>109</sup> The high standard was a powerful legal and psychological force. It was, to be sure, an instrument of justice, indeed of circumspection and delicacy,<sup>110</sup> a pervasive rationalization that held people of all orders fixed in their respect for the system and their place in it. It was also, however, a surrogate for the implicit understanding, which the bench shared, that general social attitudes regarding the value of human life could not—indeed, should not—be breached. It tended to deceive the English about the nature of their law, their legal system, and their biases. It produced a powerful ethic of supposed legal certainty and consistency, but its true sources lay in an uneasy combination of responses to the needs, both downward-projecting and upward-flowing, of politics and social existence.

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Research on trial jury composition, as it now stands, suggests that the English criminal trial jury, especially in cases of felony, was dominated by local elites, men who played a significant governing role in everyday life at the level of the ward, parish, or hundred. The assize criminal trial jury forged a connection between the central authorities

108. *Ibid.*, chap. 7, sec. 3.

109. *Ibid.*, 282–85. See also P.J.R. King, "Decision-Makers and Decision-Making in English Criminal Law, 1750–1820," *Historical Journal* 27 (1984): 25–28. I reserve for another occasion discussion of a closely related phenomenon that I believe played a significant role in the resolution of capital cases in the eighteenth century (and since): the tendency of jurors to take into account—consciously or otherwise—the degree to which, as jurors perceived the matter, offenders had acted under the influence of circumstances beyond their control. I allude to this point in *Verdict According to Conscience*, 301–2, 316, 383.

110. Hay, "Property, Authority and the Criminal Law," 49.

and the level of government below county leadership, a level with which county officials always had to deal. When the hundredal requirement broke down, or was jettisoned, county officials turned to persons of the same class as those who had served earlier, taking them from wherever in the county they might be obtained. If the persons to whom they turned were therefore not dependent upon the politics of the specific locales of the cases they heard, they nonetheless reflected the needs and interests of similarly situated local elites elsewhere in the county. The tie between Crown and countryside reflected in the jury was an important instrument that gave thrust to central initiatives and prestige to local middle-class men. Central authorities both coopted the latter and were, I believe, coopted by them. We are little closer than we were at the outset to being able to describe the power relationship in which judge and jury were locked. But that is as much because that relationship was two-sided and contradictory as because the evidence has been lost.<sup>111</sup>

We are, however, better able to identify the main turning points in the history of trial jury composition. The partial outline of events I formulated elsewhere has been significantly modified and elaborated to produce a revised version that can be summarized as follows. At the outset, jury service was aimed at knights and very substantial freeholders, who were expected to draw upon the knowledge of those lesser landholders whom they trusted or whom they could coerce into cooperating with them. Presentment was the crucial stage, and when a second, final resolution came to be made by jury, it proved to be dominated by those who had served as presenters. To encourage acceptance of this ultimate verdict, the Crown allied with the presenters the more substantial men of the villis nearest to the location of the offense. Thus began the history of a trial jury that, although elitist in the most local context, was composed of men who sometimes ranked below the elites at the hundredal level and nearly always ranked below those who governed the county. The structure of the eyre allowed for continued domination by hundredal leadership, and this under the eye of county potentates at gaol delivery. Hundred representatives were less constrained from above, but their position within the local elites was mixed. The county and hundred officials who supplied the panels increasingly relied on local officials—village constables, coro-

111. Joan R. Kent has approached the problem of the relationship between the central government and village communities in early modern England in *The English Village Constable, 1580–1642: A Social and Administrative Study* (1987). Kent's study provides an excellent context for understanding the role of the administration of the criminal law in the development of the English state.



ners, and the like. By the later Middle Ages, not only was the jury less likely to come from the hundred wherein the offense had been committed, but it was also more likely to contain members of merely village elites rather than the grandest men of the hundred. With the increase of small farmers who laid claim to a place among these local elites, the jury came to be identified squarely with the yeoman class. By the late sixteenth and early seventeenth centuries there were rarely many gentry on the trial jury even at the assizes. For the gentry, powerful representation upon, and direct domination of, the grand jury had become standard. Ultimately, an important social distinction between service on the two juries, grand and petty, became fixed; by the late seventeenth century there was a firm upper limit on the status of persons eligible (in social, not legal, terms) for trial jury service.

The middling groups, then, constituted the trial jury class. In national terms its ranks were small, and it sometimes included quite substantial farmers, and artisans and tradesmen of independent standing in commerce, although these latter groups shaded off more gradually into the ranks of the lesser artisanry and craftsmen, who were themselves above, but not entirely separate from, the better off of the laboring-poor. From the perspective of the authorities, jury service by this middling class was appropriate as long as those who served were trustworthy, experienced, and inclined to follow the advice and inclinations of their betters. In a sense, the authorities settled for a "yeoman" jury that seemed to embody gentry instincts. Reforms during the middle and late decades of the seventeenth century stressed both formal property qualifications and a regularization of service, and they began—but only began—to undermine the dependence of the juror class upon local rather than national interests. As the rich and poor separated, jurors increasingly represented groups that were well above the great majority of defendants yet still far below England's wealthiest elite. The late-seventeenth- and eighteenth-century jury remained, to an important extent, a mediating body that was at once drawn from the higher ranks and still (although decreasingly) hemmed in by its involvement in local life. It was, as always, drawn from the propertied classes, and property was more and more a "statement" as well as an economic and political resource. There were perhaps differences from county to county regarding the sheer representation of wealth deciles on assize trial juries. Most often, jurors came from the top third or quarter of society; if some ranged into the highest decile, some others came from below the top third, although rarely

if ever from the bottom half of society. This much we now know of the pre-Victorian criminal assize trial jury's economic status.

To an important degree, jury composition remained fairly stable while other aspects of criminal administration changed around it. Although some of these changes were themselves direct responses to the jury, most of them were responses to factors that implicated the jury only indirectly if at all. Historians have associated the rise of an independent prosecution with the decline in late medieval England of a social organization that made self-informing possible. Probably one ought to reconsider this view. There was, perhaps, a potential for an independent prosecution at a very early date, and victims may have pushed themselves forward rather than having been impelled by the breakdown of self-informing. As I have suggested, it was concern with serious crime that governed the decisions of Crown and bench; their treatment of lesser, nominally capital offenses emerged as a byproduct of new capacities for control rather than evolving as a consciously designed policy. Once effected, however, the elaboration of the prosecution allowed in turn for the control of juries in ways that may not have been intended. At the same time, enhanced royal control threatened an imbalance between the state and the individual that threw the jury's role into a special kind of relief. As self-protective and sincerely believed rationalizations of its own position and authority, the state emphasized what had long been mainly the case: that conviction at a capital level required virtually absolute proof, and that the bench stood ready as counsel to the accused. The practice of reprieve for an "unsafe" verdict partially nullified jury convictions against the evidence, an ironic response to the growth of an independent prosecution. Thus jury powers and their limits and the place of the jury in the constitution and in historical myth all owed their existence to the tensions created by the growth of government capacity as it pressed upon the once largely open-ended power of governance by local community elites. The idea of a prophylactic against government overreach—the principle of noncoercion—cannot be entirely separated from that of a safeguard against jury-based lynching or simple error. The struggle for control of jury ideology involved a more two-sided, rhetorical invocation of the right of the defendant than is sometimes recognized.

In such a climate it was inevitable that multiple perspectives on the jury would compete for a place in the English culture's idea of the criminal trial jury. Further regularization and control of the jury would proceed upon an argument for consistency and fairness. Even as late as the eighteenth century, appeals to a right to find the law

would lay claim to the notion of a simple law evident to all men of conscience. To some, the jury would seem an unlearned and rustic mob; to others it would appear so much an arm of landed elites as to be a perversion of the very notion of communal judgment. Both of these perspectives were, of course, true. That is what made the jury so powerful an institution, one fluid enough in the impressions society had of it to weather all attacks. It was both the cutting edge of reform and the bastion of the status quo, and those who reviled it in one context lauded it in another. In that climate, one might ask, did subtle changes in composition matter very much?

Of course, changes in composition did matter. They affected actual behavior as well as perceptions of that behavior. The essays presented here not only help to establish who served in the capacity of criminal trial jurors, noting some substantial differences over time and place, they also link composition to behavior in ways that suggest how, both at the micro and the macro level, who sat could mean who lived and who died. There were, however, limits to this compositional effect. These limits inhered not only in the idea or ideas about the jury that prevailed in society at large; they resided also, and perhaps more significantly, in the ideas that jurors—representing the jury as an institution—had of themselves. Behavior was not solely a function of class or status or interest in any narrow, material sense; it was crucially a function of self-image and of one's own perceived role in national governance, in local society, and in the constitution. As jury composition altered, so too did ideas about the jury, but given ongoing traditions of thought, this process of change was necessarily gradual, and its impact on jurors within the age-old context of the ritual of determining life or death must have been all the more subject to ideological friction. Perhaps even highly placed jurors unconsciously acted out a kind of mediatory role on a basis far different from that on which the authorities intended them to proceed. It is even possible that the higher the central authorities raised jurors, the further those authorities expanded the process by which England's national elites gained experience in seeing human behavior from the perspective of society's wide and troubled base.

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