Part I  Origins
From about 1220, trial by jury has been the primary means for determining guilt or innocence in prosecutions for felony. Trial by jury, as is well known, replaced trial by ordeal after the Church in 1215 proscribed clerical participation in that "barbaric" practice. Although regular use of the jury represented a significant transformation in the administration of the criminal law, juries had from time to time been employed in this particular setting for at least a generation. The historian has more reason to ask why it took so long for trial by jury to become the general rule than why it ultimately replaced the ordeal, for by the third decade of the thirteenth century juries were in common use in a variety of other closely related settings. Trial by something other than a jury had become virtually an anomaly.

It may be that as long as the ordeal was thought to reflect God's will it was thought necessary to invoke its powers before putting to death an alleged felon. Men might on oath make determinations that affected the disposal of property or the payment of fines, but God alone could mandate the taking of a human life. And even if belief in the divine nature of proof by ordeal had begun to wane long before the decree of 1215 brought its use to an abrupt end, tradition may have sustained its use in the late twelfth and early thirteenth centuries—tradition and the lack of a divinely endowed alternative. Even after 1215, recourse to the verdict of men sworn to say the truth could not be had without the suspect's consent.

The decision to employ a trial jury in criminal cases appears to have been an act of administrative expediency. The justices in eyre in 1218 had raised the issue of an appropriate substitute for the ordeal; they were ordered (in the absence of a formal trial mechanism) to imprison or to banish those accused by a jury of presentment of having committed a serious


offense. It seems more than a little odd that the question had not been settled before the justices reached the provinces. The solution seems only slightly less so. It is likely that the order to imprison or banish confirmed an existing plan and that the decision to punish mere suspects hardly imposed upon the presenters a new responsibility. Having named all those suspected of having committed a felony, the presenters probably indicated which suspects they considered guilty. This may not have been a departure from earlier practice; it does not seem plausible that before 1215 all whom the presenters had named had gone forward to the ordeal. The presenters had probably always determined who the "true" suspects were; the ordeal may well have been managed to confirm the presenters' determinations. From the 1218 procedure to the trial jury was, according to this theory, a relatively short step: a number of the original presenters, afforced perhaps by others, were sworn to give a verdict on those whom they and the other presenters had named as suspects. It was not so much that the trial jury was adopted as that the ordeal was dispensed with.

The resort to a trial jury in criminal cases was the final stage of a century-long evolution in the administration of the criminal law. Because that evolution involved the steady increase of royal control over the criminal process, it might seem paradoxical that this almost final stage placed the defendant in the hands of the local community. But, as we shall see, this was a natural development, one that at once expanded and defined the limits of royal power. It was a development that allowed the new form of criminal process to work. The interpretive overview presented here can hardly do justice to the complex legal and social origins of the criminal trial jury, a subject that has only recently received the attention it deserves. I shall piece together a story that, in its details, is both partial and tentative. Subsequent chapters shed further light, at least by way of inference, on the question of early jury behavior. The present discussion is intended to introduce an institution, its early institutional setting, and the problems involved in assessing its behavior and influence in the resolution of felony cases.

The roots of a royal system of criminal justice run deep into the English past. Long before the Conquest, perhaps even from the outset of the


Anglo-Saxon period, some offenses were prosecuted on behalf of the Crown, and those persons found to have perpetrated the most heinous of them were at the Crown’s mercy. Unless the king chose to commute their sentence, they were executed at the king’s hand. These offenses—pleas of the Crown—may be contrasted to all other pleas, which were prosecuted by the aggrieved or his kin, though typically in a public court, and which usually led to composition or monetary compensation by the convicted wrongdoer. At the core of the theory of royal pleas lay those enormities perpetrated against the Crown that amounted to treason. From very early the king also exercised sole jurisdiction over the most heinous offenses, such as murder—that is, homicide by stealth, in circumstances where the offender not only took his victim offguard but also concealed his identity from third parties. During the several centuries between the reigns of Alfred (871–99) and Henry II (1154–89), the list of royal pleas gradually lengthened so that the number of “private” criminal prosecutions leading to composition between private parties was steadily reduced. Nonetheless, until the twelfth century most prosecutions remained private; simple homicide and larceny, the two most common offenses, were still both privately prosecuted and emendable.

The expansion of the scope of royal pleas left its mark on even those offenses over which the Crown did not take sole jurisdiction. Offenders were required to pay a fine to the king in addition to the composition they rendered to the injured party. Yet there were limits at this stage to the practical effects of the growth of the theory of Crown law. Even where the king took sole jurisdiction, prosecution was commenced privately, either in the traditional Anglo-Saxon manner, wherein proof was achieved by compurgation or by ordeal, or through the Norman institution of the appeal, which led to trial by battle. Because punishment in Crown pleas


8. See generally Pollock, “The King’s Peace in the Middle Ages.”

9. On this fine, see e.g. Pollock and Maitland, History of English Law, 2:458–60.

10. On early modes of trial see James Bradley Thayer, A Preliminary Treatise on
was at the hands of the Crown, society may have viewed prosecution and trial in such cases as in the name of the Crown. Procedure, however, with its heavy dependence upon private initiative, remained largely the same as before.

The Crown's interest in prosecutions for crime was represented by the sheriff and the hundred official, who presided, respectively, in the courts of the county and of the hundred, a division of the county or "shire," where trials were traditionally held. Central justices at times joined or replaced these county-based officials, although how often they had come to do so by the early decades of the twelfth century remains unknown.

Yet even the sporadic appearance of royal justices must have reinforced the increasingly royal aspect of the administration of the criminal law and eroded the once firm distinction between Crown pleas and private prosecutions. Possibly a significant percentage of simple homicides and larcenies led to execution rather than composition as early as the reign of Henry I (1100-1135). Even so, the reforms effected in the later twelfth century by Henry II were hardly less dramatic than historians have commonly assumed them to be.

The Angevin reforms, whether they amounted to the creation of new procedures or the regularizing of preexisting ones, were embodied in the famous Assize of Clarendon of 1166. The Assize is a complex document registering the Crown's concern not only with felony but also with the


14. Assize of Clarendon, in C. Stephenson and F. Marcham, trans. and eds., Sources of English Constitutional History (New York, 1937), pp. 76-80. The Assize of Northampton (1176) developed the program set in motion by the earlier assize, increasing the range of felonies to be prosecuted. The presentment procedure was not altered. For the Assize of Northampton, see ibid., pp. 80-83, esp. c. 1.
political, religious, and social matters that interfered with effective policing of the realm. Henry II's government was moving decisively to assert its jurisdiction over trial and execution for all felony at the expense of existing, competing jurisdictions and to ensure that local officials were actively associated with the royal program of law enforcement. The key to the new program was the procedure of presentment, or lay accusation made on oath in the presence of royal officials. The presenters were bound by their oath to report all those suspected of the commission of felony; all those thus accused were ipso facto within the Crown's jurisdiction. No interference with the prosecution of the accused would be brooked, whether that interference stemmed from lawfully held liberties or the exercise by the Church of legitimate privileges.

According to the terms of the Assize, twelve lawful men of each hundred were to be chosen to take the oath. No doubt these were to be men of substantial stature, men whose word would not be doubted and whose role in the process would strengthen the royal position. Although their accusations were supposed to be made before the royal justices, it appears that more often than not they testified before the sheriff in county court. The presentments and the process those presentments set in motion were monitored, mostly after the fact, by royal justices, whose regular circuits commenced as a result of the Assize. The sheriff or justices ordered the accused persons to be taken and held for trial; those already in hand were tried immediately. Trial was typically by the ordeal of cold water. In this second stage of the transformation of criminal process the procedure of accusation was radically altered; the method of proof, however, remained unchanged.

15. Ibid., c. 7 (pp. 77-78): mandates construction of gaols; c. 8 (p. 78): requires holders of liberties to participate in presentment procedure; c. 9 (p. 78): states that no one may forbid the sheriff to enter land for view of frankpledge; c. 15 (p. 78): forbids giving lodging to strangers; c. 20 (p. 79): requires religious orders to examine reputation of prospective entrants.

16. The royal program was not so comprehensive as this suggests. For an excellent account of competing jurisdictions that lasted in some cases down to the fifteenth century see J. B. Post, "Local Jurisdictions and Judgment of Death in Later Medieval England," Criminal Justice History, vol. 4 (1983), pp. 1-22.

17. See Richardson and Sayles, Governance of Mediaeval England, pp. 198-202. The authors conjecture that the presentment jurors were to make their oath before local justices and sheriffs; they state that royal justices were deployed to "oversee the activities of the sheriffs and local justices" (p. 200). The account I give in the text should be taken as a model for succeeding accusations and visitations; the procedure under the Assize of Clarendon may have been almost entirely local. For discussion of the mechanics of late-twelfth-century presentment, see Kappauf, "Early Development of the Petty Jury," pp. 77 et seq. Kappauf concludes that presentments were often made in written form as well as recited orally.

18. Assize of Clarendon, c. 2 (p. 77). I use "proof" in the technical sense; in fact, the accusation process seems to have included a weighing of evidence that must be considered
The new, public procedure of accusation was mandated by the Assize, but it is by no means clear exactly what the presenting juries were supposed to do—or did. The Assize bound the lawful men to present all persons who had been accused of having committed theft, homicide, or another serious offense. The words seem very inclusive; there is little in them to suggest that the presenting jury was supposed to employ a significant degree of discretion. Nonetheless, we have good reasons for inferring that they did employ some discretion. At the very least, the presenting jury was to determine which persons had been “accused” or were “publicly known” to be felons. If the presenters were indeed required to pass along the names of all those who had been accused, no matter how casually, we cannot imagine that all those named were supposed in fact to undergo the ordeal. The most recent scholarship argues that the presenters were not merely conduits for private accusations but that they also played an adjudicatory or a screening role. Presentment by the twelve lawful men leading to the ordeal involved a broader-based accusation, one that carried greater force—a greater presumption of truthfulness—than the bare accusation of an aggrieved party.

Not everyone named by the hundredmen on oath could “make his law” by oath and ordeal. Not only those who had been caught red-handed or had confessed but also those of very low reputation were to be treated summarily. It appears even on the face of the Assize, therefore, that the presenting jury was in some cases to make a finding of its own regarding the character of the accused. There is one other point worth making. Although we have very little evidence regarding the manner in which the ordeal itself was administered, there are reasons for supposing it was not part of the method of proof. See below, nn. 20, 26, 35, and accompanying text. The ordeal of cold water involved submerging the suspect in water to determine whether God accepted him (in which case the suspect sank) or rejected him (in which case the suspect bobbed to the surface). The other common ordeal, reserved typically for freemen, involved carrying a bar of hot iron for a certain distance. If after several days one’s hands were still deeply scarred, one was adjudged guilty.

19. *Ibid.*, c. 1 (p. 77): the “lawful men” were put on oath “to tell the truth, whether in their hundred or in their vill there is any man accused or publicly known as a robber or murderer or thief.”

20. See Groot, “Jury of Presentment.” Groot argues convincingly (pp. 5 et seq.) that the presenters were first to name all who were suspected but then to specify whom they truly suspected; only the latter were forced to undergo the ordeal. Groot’s evidence does not allow the conclusion that the presentment jury’s true suspicion always amounted to the kind of certainty later trial juries were expecta to have before they convicted, or, for that matter, to the certainty the presenters would have insisted upon if their unfavorable “verdicts” were final ones. In this sense, the presenting jury was not a trial jury but was closer to our grand jury. I use the phrase “screening role” to signal this.

imposed upon everyone who was, in theory, liable to undergo it. Moreover, many who were subjected to the ordeal must have experienced only a very mitigated version of it. It is, then, reasonable to suppose that the presenting juries were instrumental in the sorting out of the accused. So long as the method of proof remained brutal and blunt, the process of accusation was probably sensitive and subtle.22

The Assize and subsequent commissions to justices to hear and determine hundred-jury presentments constituted a significant advance where the Crown took control over the law of felony. All homicide and all theft were subject to presentment by the hundredmen. Private accusations leading to private composition, in the Anglo-Saxon manner, had come virtually to an end. Only the appeal remained, and, as we shall see, even this private suit was about to be turned into a means of generating accusations for presenting juries to consider.

It is difficult to escape the conclusion that Henry II's reforms, by substantially widening the reach of monarchical power, created new tensions in the criminal process. Private parties were stripped of their traditional remedy; royal jurisdiction and royal remedies dominated. The injured or his kin sometimes attempted settlement out of court, using the threat of appeal or public accusation leading to presentment for leverage.23 The Crown, seeking to vindicate its jurisdiction, imposed fines upon defaulting appellors and upon presenting juries that concealed felonies, thereby limiting their discretionary role.24 Although in some cases the king or his justices allowed concords between the defendant and the aggrieved,25 most convicted defendants now faced mutilation or death rather than payment of monetary compensation. Inevitably, the presenting jury was being employed to undermine the interests of private parties in obtaining compensation for themselves. Perhaps more significantly, the


23. Hurnard, King's Pardon for Homicide, pp. 8–12.

24. Ibid., pp. 10, 24–25. Hurnard is concerned mainly with royal efforts to prevent concealment of felony by those seeking extrajudicial settlement. See also Pollock and Maitland, History of English Law, 2:648.

hundred jurors were constrained to set in motion a procedure that led to the mutilation or execution of many who, under the traditional system of dispute settlement, had been allowed a chance to make peace, to restore harmony through payment of fines.

We are not in a position to say how the presenting jury functioned in these straits. Our best guess is that the hundredmen made presentments—thus avoiding being fined for concealment of pleas—and then exercised discretionary power in the subsequent task of stating whom they truly suspected. If suspects of particularly bad reputation were not allowed to exculpate themselves entirely by making their law, it seems likely that the same discretion might be exercised to spare persons of particularly good reputation the pain and ignominy that accompanied the ordeal.26

The Angevin transformation of the criminal law was largely a jurisdictional revolution. By harnessing the prestige and knowledge of the most respected members of local communities, the Crown was able to assert its sole jurisdiction over virtually all those suspected of felony. Surely the Crown’s first priority was to shore up the enforcement of law against those over whom the Crown already had sole power of punishment—traitors, murderers, and robbers—but who escaped all punishment unless a private accusation were made and sustained through the traditional Anglo-Saxon trial procedure. Prudence may have suggested that the Crown hear presentments of all felons; otherwise, injured parties seeking compensation might pass off the most heinous offenses as lesser felonies that were still emendable.27 The extension of mutilation or (as soon came to be the general sanction) capital punishment to lesser felonies was a clear result of Angevin policy; it was probably not its raison d’être. Why lesser punishments for simple homicide and larceny were not established is difficult to explain unless we assume that the Crown either believed such offenses merited execution or, realizing the nature of the presenting and ordeal practice, expected such offenders would not in fact be subjected to capital punishment. As we shall see, the little evidence that sheds light on this problem is ambiguous. Probably we shall never know why all felony was made capital or how much discretion the Crown

26. Groot does not discuss the problem of presentment jury “discretion,” or the refusal, on grounds of mercy, to send to the ordeal persons whom the presenters truly suspected. The evidence he has adduced—and no one has yet dug deeper—does not make clear whether presenters exercised such discretion. My account encourages the speculation that presenters played such a role; any excess in this regard should be blamed on me, not on Groot.

27. Hurnard, King’s Pardon for Homicide, pp. 23–27. Hurnard thus explains the requirement for reporting all homicides and the need for a royal pardon even in excusable homicides. It seems likely that the logic of her argument extends also to cases of theft.
intended for the presenting jury. 28

The half century that followed the Assize of Clarendon was the foundation period of the English common law. Henry II put the ancient practice of sworn lay testimony to work in a variety of contexts. In private law the grand and petty assize juries came to dominate; 29 on the criminal side, the jury of presentment was in frequent use. All of these juries, save for the presenting jury, rendered verdicts on the question of guilt or innocence, or on some other dispositive question of fact. In theory the purpose of the presenting jury was solely to name persons who were suspected of having committed a felony. In practice, it then stated whether it believed there was a credible basis for the suspicion. The suspects it exonerated went free; those it truly suspected were held to undergo the ordeal. By and large, dispositive verdicts leading to the severe sanctions of the criminal law were left to the ordeal and to God.

There was, nevertheless, sufficient leeway for other embryonic forms of the criminal trial jury to make their way into the workings of the law around the year 1200. The difficulties and dangers that beset the highly formal Norman institution of private accusation by the victim of a felony or by the victim’s close kin—the accusation and process known as the appeal—proved fruitful in this regard. Persons who had been appealed and imprisoned could secure an inquest into the merits of the appeal before being subjected to the forms of physical proof available in such actions—combat or ordeal. 30 These early jury trials usually involved soliciting a verdict from the presenters who had presented the appeal (in effect, noted the existence of the private accusation) or from an inquest composed of similar persons. 31 In theory, the jurors usually were to respond to the question whether the appeal had been made out of “hatred and malice” (de odio et atia), 32 but, in fact, from early on the jurors

28. I shall return to this matter of the “original assumptions” in Chapters 2, 3, and 9.
30. See Roger Groot, “Jury in Private Criminal Prosecutions,” pp. 113-41. Because Groot’s recent article appeared as the present work was going to press, I have only partially incorporated his findings. Groot’s work is central: it lays bare the workings of proceedings set in motion by appeals and relates those workings to the interests (often financial reparation rather than “punishment” of the accused) of the private parties involved. Taken together, Groot’s articles on presentments and appeals constitute the foundation for the prehistory of the criminal trial jury.
31. Groot (ibid., p. 126) points out that appeals in the central courts at Westminster could result in referral of an inquest to a local jury. At the eyre, the jury that presented the appeal was immediately available.
looked to the more general question of the appellee's guilt or innocence. It is not always easy to tell whether such inquests undertook full-scale resolutions of guilt or innocence or, instead, rendered a more modest assessment of the credibility of the private accusation (the screening process undertaken by presenting juries in public prosecutions). If merely the latter, we should not be surprised, for the appellee who received an unfavorable verdict had still to be tried by a form of physical proof. Recent research suggests, however, that many early inquests pursuant to appeals were indeed comprehensive determinations. If presentment-process jury determinations were limited in nature—and even that remains unclear—at least many appeals inquest determinations were not.

There is some evidence that suggests defendants incarcerated pursuant to a hundred-jury presentment also availed themselves of writs ordering special inquisitions. In such cases the need for screening private accusations likely was not involved; that step had already been undertaken by the presenting jury. It is probable that defendants claiming to have slain through accident or self-defense were among those who secured the writs. Like many who had been appealed, they were not asserting noninvolvement or that they had been accused out of malice. They were claiming, rather, that they had not acted feloniously. Ultimately, they would seek and obtain a royal pardon; pending the eyre, they would establish their bona fides and secure bail. Others, too, obtained the writ, either to secure

35. Groot, "Jury in Private Criminal Prosecutions," pp. 127–28. The use of the word "guilty" (as opposed to "suspected") is probably significant. In this regard, see Groot's remarks, pp. 129–30. He rightly points out that the same persons served sometimes as presenters of presentments, sometimes as presenters of appeals, and sometimes as inquest jurors in appeals. In practice, presenters may have done much the same thing in their screening and their inquest roles, whatever the difference may have been in theory between the two roles.
bail pending trial or to avoid trial by ordeal altogether. Typically, these last persons paid a substantial sum for the privilege of what amounted to jury trial at the eyre.37

By 1215, when the use of the ordeal in England came suddenly to an end, there was ample precedent for putting substantial laymen on oath to say whether or not a suspect was guilty of felony. The prototype trial juries were very similar to their descendants, although the student of the history of jury discretion must recognize that the unfavorable verdicts of the pre-1215 prototypes were rarely final and thus may not have been rendered by jurors who went through the same psychological process as the later true trial jurors.38 The institution of the trial jury had developed largely, though not entirely, as a remedy for the defects of the appeal that the evolving procedure of presentment threw into relief. It may in some few cases have been employed as a true alternative to the ordeal. But that step, which was momentous if not unprecedented, was not commonly taken until the ordeal was formally abolished.39

II

It is well known that the institutions of presenting jury and trial jury were from the outset closely related. It would be too much to say, however, that, as of 1220, they were usually identical in composition. That was sometimes the case, but more often the presenters made up one part of the trial jury, which might be a larger body. This was a time for experiment, and it appears that the Crown was anxious that the trial jury carry real authority.40 The trial jury undertook one facet of the parent institution’s earlier role. Before 1215, that “screening” aspect of the

37. See e.g. Hurnard, King’s Pardon for Homicide, p. 345; Kappauf, “Early Development of the Petty Jury,” pp. 143, 164, 165. It is possible that had these suspects been “found guilty” by the inquests they procured they would have had to go to the ordeal.

38. A suspect who was purged by the ordeal might be required to abjure the realm. Groot, “Jury in Private Criminal Prosecutions,” pp. 118, 140. How this prospect affected jury behavior we cannot say. The risk that the “suspected” person would not be purged and would be put to death would probably have sufficed to induce presenting juries to render merciful verdicts in at least some cases, if anything would have made them do so. See Kappauf, however, who reports that most suspects were purged by the ordeal (“Early Development of the Petty Jury,” p. 167).

39. See Hurnard’s comments (King’s Pardon for Homicide, pp. 345–46) on Magna Carta, c. 36, which stipulated that “the writ of inquisition concerning life and limbs . . . shall be issued gratis and shall not be denied” (Stephenson and Marcham, trans. and eds., Sources of English Constitutional History, pp. 120–21). Hurnard contends that this clause referred not only to the writ de odio but to writs for inquisitions in cases begun by indictment. The framers of Magna Carta, Hurnard suggests, were anxious to create the right to jury trial in place of the ordeal for all who preferred it.

presenting jury's role had been nearly incidental and never well-defined. It had been, I have suggested, largely a by-product of the traditional method of proof, the ordeal. The ordeal may have been seen as a ritual that confirmed the judgment of the lawful men of the hundred; in a certain sense, it may have been "rational" precisely because it was implemented in accordance with the presenters' own belief about a defendant's guilt. The ultimate verdict was seen to be God's; He demonstrated the innocence or guilt of the accused who, presumed guilty by men, was made to endure the ultimate test.\textsuperscript{41} When the ritual was dispensed with, the two functions of the jury were separated and, thus, more clearly defined. The presenting jury proper now named \textit{all} those for whom there was a soundly based accusation. If the defendant consented to a verdict by the "country," untutored by God's confirming judgment, he put himself upon the judgment of his countrymen, who were sworn to give a truly dispositive verdict on the basis of what they had learned about the suspect's guilt.

The trial jury's role in part corresponded to the earlier screening function and possibly in practice to the discretionary role of the presenting jury—but only in part. For one thing, it must have made some difference to the hundredmen that the ordeal stood between their verdict and the defendant's fate. The trial jury was, in contrast, formally charged with finding the guilt or innocence of the accused. Moreover, the trial jurors gave their verdict in open court, not only upon their prior knowledge but also upon their viewing of the confrontation between the accused and the bench. Thus, the history of the trial jury can only be understood in terms of the history of the trial. Since we shall return to specific aspects of the medieval trial in Chapters 2 and 3, a brief overview of its history will suffice.

The judicial eyres of the thirteenth and early fourteenth centuries were undertaken in a given county at six- or seven-year intervals.\textsuperscript{42} They were administrative as well as purely legal undertakings. The king's justices in eyre were empowered not only to hear civil and criminal pleas but also to scrutinize coroners' rolls and other official records for notations of fines owed to the Crown. It is well known that these visitations inspired a

\textsuperscript{41} This remains unclear. Much depends upon what the presenters actually did, or were thought to have done. The more the screening process involved a full assessment of the defendant's guilt or innocence, the more the ordeal may have been accepted as mere confirmation.

mixture of awe, fear, and hatred. The judicial business of the eyre was routine and tedious. This must have been especially true on the criminal side, for the justices apparently heard an interminable series of present­ments involving defendants who had not been taken or who had been bailed but did not appear at the eyre. The records contain many more judicial orders that suspects be taken than judgments upon verdicts of trial juries. Process in all of these cases was carefully noted; communities, frankpledges, and officials were amerced, the fines being inscribed on the eyre rolls by the busy clerks. The tedium was relieved from time to time by the trial of a suspect who had appeared and put himself, for good or ill, upon the country.

Most of those persons who were tried at the eyre were brought forward after they had been named by the presenting jury and were asked how they pleaded. Virtually all pleaded not guilty and put themselves on the country. A few refused to plead, exercising a right that was by the later decades of the thirteenth century a bare fiction. They were subjected to the infamous peine forte et dure, wherein weights were laid upon them until they pleaded or expired; the recalcitrant perished, but, not having been convicted, they avoided forfeiture. To go on the country meant, at first, to be tried by a body of persons that included some or all of the hundredmen who had comprised the jury of presentment. From the outset, however, there were exceptions to this, and over the course of the century the two juries became increasingly distinct. Some defendants requested an entirely different jury, or challenged at least some of those trial jurors who had been part of the presenting jury, but it appears that defendants could not yet demand such a jury as a matter of right.

45. Plucknett, Concise History, p. 126; Harding, Law Courts of Medieval England, p. 67. See also Groot, "Jury in Private Criminal Prosecutions," pp. 137–41. Groot has found pre–trial-jury-period cases in which the bench ordered inquests (leading potentially to trial by ordeal) where neither presentment nor continued appeal was forthcoming. This, he conjectures, suggests ancient roots of later royal attitudes about subjecting defendants to trial on the Crown's own order.
47. Plucknett, Concise History, p. 127. For an interesting case involving a knight who successfully challenged prospective trial jurors who had served on the jury of presentment that accused him (of rape) see Henry Summerson, "Plea Roll and Year Book: The Yorkshire Eyre of 1293–94" (paper presented at the Fifth British Legal History Conference, Bristol, July, 1981). I am grateful to Dr. Summerson for allowing me to see his important study based
real break between presenting and trial juries came in the last decades of the century, however, and accompanied the expansion of the system of gaol delivery.

We know very little about what transpired after the jury was sworn, whether at the eyre or at gaol delivery. The defendant stood at the bar, in the sight of both judge and jury; he stood alone, unaccompanied by counsel or friend. The sheriff or other official repeated the charges, then fell back, leaving the defendant to face the bench. No witness could come forward either for or against him, the self-informed jurors were the witnesses for good or ill.48 Two voices only were to be heard: the justice questioned, the defendant answered. Presumably the defendant was asked what he had to say for himself and in most cases replied he had not committed the act with which he had been charged. We do not know how often he supplied an alibi.49 Occasionally, a defendant who had pleaded not guilty to a charge of homicide admitted he had slain the deceased but claimed to have done so accidentally or in self-defense.50 In such a case the bench had some leeway to test the defendant’s story, at least with respect to its internal consistency, and even to attempt to trick the defendant into an assertion that fell short of what the law required for pardonable homicide.51 In most cases, however, the exchange between the bench and the defendant must have been brief and productive of little hard evidence beyond that which the jury had in hand at the moment they were sworn to serve.

It is commonplace that the medieval jury was “self-informing.” But just how jurors came to be informed remains largely a matter of conjecture. The problem is less intractable with regard to the early period. So long as trial jurors were drawn, at least in large number, from the

upon his comparison of a plea roll with the yearbook version of several cases on the plea roll. See below, n. 58.

48. This may be an exaggeration of the situation at the eyre. Witnesses as well as others were attached to appear at the eyre, either as witnesses or as potential suspects. It is not clear that they gave information at the trial itself rather than before the trial to presentment and trial juries. When the suspect did not appear they may have given evidence that was instrumental to his being exacted and outlawed.

49. See Kaye, ed., Placita Corone, pp. 1-31. This mid-thirteenth-century pleading manual provides the best extant descriptions of medieval trials. It must be used with care, however, for it was compiled with the purposes of instruction in mind. It is not always clear whether a particular procedure or colloquy was included because it was typical or because it was unusual. Most of the “cases” involve appeals (this was above all a form book for pleaders); the accusations and denials are therefore highly formal. In one case which has the ring of the commonplace, the defendant, indicted for theft of farm animals, claimed he had purchased the animals at a certain fair on a certain day (ibid., p. 18).

50. See below, Chapter 2.

51. See below, Chapter 3, text at nn. 3-7.
presenting jury, the appropriate question to ask is how the presenters learned the facts of individual cases. The answer, at least in general, is not difficult to imagine. The presenters were established figures in the hundred. Although they were not likely to have firsthand knowledge of slayings and thefts, they were well positioned to make inquiries. They soon learned of complaints made to local officials, who were bound to keep track of the raising of the hue and cry. In the case of homicide, the coroner’s inquest provided a context for the gathering of testimony, little of which was taken down by the coroner or his clerk but much of which must have come to the attention of the village elites.

Formal presentments were made in hundred and county courts in the years between judicial visitations. The rumors and suspicions that circulated in the wake of a felony became the governing perceptions of the truth of the matter; the early stages of criminal procedure gave shape to the facts of individual cases. By the time of the eyre, much had been sorted out, though many cases must have remained tentative for lack of solid evidence. The eyre and the imminence of trial must have given focus to those cases where the suspect was likely to be present. The defendant’s reputation, his bearing since the time of the felony in question, the response of those into whose midst he would be returned if acquitted—these and other considerations must have been central to the men who would present and try him. This is not to say that these matters were unknown before the coming of the justices. In many cases, this complex process of community judgment had been completed long before the eyre, and its results were well enough known that they conditioned the willingness or unwillingness of those suspects who were not under secure guard to come forward after presentment to be tried.

So far as we can tell, juries rendered their verdicts in simple and conclusory terms, stating that the defendant was guilty or not guilty, or that, in some cases of homicide, he had slain the deceased but had done so accidentally or in self-defense. In these last cases, the jury repeated


55. The extant trial rolls record the jury’s verdict: *est culpabilis; non est culpabilis*, except in cases of excusable homicide, for which see below, Chapter 2. *Placita Corone* is no more helpful. It is possible that juries said a great deal more, especially at the eyre where,
the story the defendant had told, perhaps embellishing it to meet the rules of law. The fact that the jury had in many cases decided upon its verdict even before it was sworn does not mean that it was not in many others influenced by the defendant’s statements and bearing in court or by the tone or substance of the questions that the justices asked. The trial often may have constituted an important part of the process by which the jury informed itself or confirmed its earlier impressions. 56

The jury may have retired to discuss their verdict among themselves; the evidence on this point is far from clear. In some instances, juries were unable to reach unanimous agreement and reported a divided verdict to the court. In the early decades of recourse to trial jury verdicts, the bench did not always require unanimity. Later on, when unanimity became the rule, the justices pushed juries to reach agreement, as was already the practice in civil cases, and even applied some degree of coercion to help the process along. 57 Only rarely, it seems, did the bench question a jury’s verdict. In cases of pardonable homicide they sometimes did so, but only because jury verdicts in such cases were not entirely conclusory and left the bench some measure of freedom to test the jurors’ report. 58 In the great majority of cases, the verdict was conclusory and conclusive. Only the defendant’s demeanor provided the bench with grounds for doubting an acquittal in a particular case, though the steady flow of not guilty verdicts doubtless made the bench suspicious of acquittals in general. The pretrial and trial procedure left the jury in almost total control of the outcome of cases. The bench might doubt the veracity of a defendant’s story or of the jury’s verdict, but lacking an independent source of evidence, the bench was not in a position to challenge either one effectively. 59

if they found the defendant not guilty, they often said whom they did suspect. See Kappauf, “Early Development of the Petty Jury,” pp. 196-201.

56. This is largely conjecture. It is borne out, however, by sixteenth-, seventeenth-, and eighteenth-century trial procedure and writings on the criminal trial, and there is no reason to believe that jury practice had changed in this respect. See below, Chapters 4 and 7.

57. Plucknett, Concise History, p. 129.

58. See below, Chapter 2. See also Summerson, “Plea Roll and Year Book.” Dr. Summerson demonstrates that judges frequently put questions to juries. His study does not suggest that judges frequently questioned juries on their verdicts; what is most striking about the evidence he has uncovered—it seems to me—is that judicial questioning (and even badgering) of juries on specific aspects of given cases did not seem to prevent those juries from returning an acquittal.

59. In the two chapters that follow, I shall develop this theme in some detail. I have perhaps overstated the point here. It is possible that witnesses attached to appear at the eyre in the thirteenth century made representations before the justices; victims of theft, especially those who had been robbed by persons they could subsequently recognize, may have played a role. It would appear, however, that such testimony was taken into account by presentment juries. The justices might choose to weigh all indictments heavily, but from
The jury’s power to determine the defendant’s fate was virtually absolute. Those acquitted were with only rare exceptions released sine die; a few of them were released upon pledges of an official or other person of importance for their good behavior. The guilty were hanged almost immediately. There was no time for appeal or pardon. In a very few cases the bench refused to accept a verdict, but those cases involved special verdicts of self-defense where the original verdict left some doubts. It does not appear that a second trial jury ever reversed the verdict given by the trial jury it superseded.

Although jurors might be held liable to punishment for what amounted to perjury—giving false verdicts under oath—that liability extended in criminal cases only to outright corruption. Jurors proven to have been bribed or who admitted they had lied might be fined or imprisoned. The more general liability to attain, and to the extreme form of punishment it involved, was never extended to the criminal trial jury. The closest the bench came to application of the dreaded process of attain was the impanneling of a second jury to test the first jury’s special verdict of self-defense, and there is no evidence to suggest that the first jury would have been punished had its verdict been repudiated.

The trial jury’s immunity to punishment for an honest but mistaken verdict has never been easy to explain. It may be that the divine aspect of the ordeal, which at first delayed the adoption of the trial jury, attached to the latter institution when it replaced the ordeal after 1215. The verdict of the criminal trial jury, unlike that of the civil trial jury, was thus not open to challenge, for its judgment reflected a will greater than that of humans, a will to which all humans were bound. But this traditional explanation seems entirely too mechanistic. It is more plausible that the immunity of the criminal trial jury was owing to the presumption of lawfulness accorded its members in the institution’s early years, when presenters made up a large percentage of many, perhaps most, juries. Nothing short

the records it does not appear that they were in a position to determine which indictments were particularly well grounded. So many indictments were ultimately repudiated by juries on which at least some of the indictors sat, that the justices must have been stymied in their efforts to get at the truth. At gaol delivery (see below, text at n. 79) their job was doubly difficult.

60. See e.g. C. A. F. Meekings, “Introduction” to Meekings and Crook, eds., The 1235 Surrey Eyre, p. 126.
61. See below, Chapter 3 text at nn. 3–7 and passim.
62. Plucknett, Concise History, p. 132; Milsom, Historical Foundations, p. 411. On attain see Thayer, Preliminary Treatise, pp. 137 et seq. The matter of fining jurors in the sixteenth and seventeenth centuries is discussed at length below, Chapters 4, text at nn. 149–58, and 6, passim. Seventeenth- and eighteenth-century commentary on attain in criminal cases is discussed below, Chapters 6, text at nn. 138–46, and 8, nn. 95–96 and accompanying text.
of proof of gross abuse of office sufficed to refute the word of the substantial hundredmen who served as presenters. Moreover, that the defendant's life was at stake must have counted for something. The power of the jury may have reflected more than its institutional setting and role: it may have reflected a social understanding about the appropriate circumstances under which a person's life might be surrendered to the Crown. On this view, jury discretion was from the outset a given of the administration of the criminal law. Abuse of discretion involved conscious subversion of the trial process, the rendering of a verdict in bad faith. A verdict rendered according to conscience and reflecting the jury's conception of just deserts was divine in the sense that it was beyond judicial reproach.63

III

The adoption of the trial jury as a regular means of proof effected the first major transition in the post-Angevin administration of the criminal law—a natural, though profound, step. Less dramatic but perhaps not less important was the second transition, one that occurred over several decades: the decline of the eyre and the recourse to regular commissions of gaol delivery.64 There were frequent gaol deliveries in the mid- and late-thirteenth century; by the early fourteenth century, deliveries were held at least twice yearly.65 The eyre was infrequently held by that time.66

63. Maitland's classic explanation of the finality of the criminal trial jury's verdict stressed the fact that the defendant "had put himself upon the oath of the jurors; a professedly unanimous verdict would satisfy the justices; it was the test that the prisoner had chosen. On the whole, trial by jury must have been in the main a trial by general repute." Pollock and Maitland, History of English Law, 2:655. Milsom gives a similar explanation: "Because a jury was the defendant's own proof, chosen by himself, attaint was in principle not available in criminal cases. This process, by which a verdict could be challenged before a larger jury, was appropriate to such procedures as the petty assizes, where the defendant had no choice either in the question or the means by which it was to be answered." Historical Foundations, p. 411.

64. For discussion of the transition from eyre to gaol delivery and other, related proceedings (and of the relevant literature on the subject) see Bernard McLane, "The Royal Courts and the Problem of Disorder in Lincolnshire, 1290-1341," doctoral dissertation (University of Rochester, 1979), ch. I.


The Criminal Trial Jury: Origins and Early Development

The decline of that cumbersome and unpopular administrative and judicial institution was also signaled by the Crown's increasing use of special commissions of trailbaston and of oyer and terminer to hear presentments and to try those taken pursuant to them.67 These special commissions had broader authority than did justices of gaol delivery, whose jurisdiction extended only to persons already gaol ed upon an indictment for felony.68

Our own interest lies mainly with felony trials at gaol delivery. But we shall have to keep in mind the contemporaneous proceedings, in the main for trespasses,69 before justices upon commission of oyer and terminer, and we must remember that the transition from eyre to gaol delivery involved a major readjustment in the Crown's administration of criminal justice.70 This readjustment, which reflected new and sometimes contradictory attitudes, involved changes—though perhaps unintended ones—in the institution of the trial jury in felony cases. The commissions to justices to deliver England's gaols ordered the justices to make certain that jurors from each hundred in the counties they were to visit would be present at the proceedings.71 The justices in turn notified the sheriffs of those counties, and the sheriffs sent appropriate orders to the hundred bailiffs.72 Typically, a hundred was represented by a panel of eighteen persons from whom the twelve triers would be chosen for each felony committed in the hundred.73 Those who were tried had been presented earlier in the county court; because they were not re-presented before the justices of gaol delivery, the attendance of the presenters was not required. There was nothing to prevent a bailiff from returning persons

68. See generally Kaeuper, "Law and Order," pp. 734-84.
69. See McLane, "Royal Courts and the Problem of Disorder," pp. 11-12, 24.
70. Ibid., ch. I. The increase in actions for trespass contributed to the need for frequent local sessions; the strain thus placed on the central justices contributed to the use as judges (for oyer and terminer; not for gaol delivery, where felony was the principal business) of local magnates and gentry and to the development of the offices of keeper of the peace and, by the 1330s, of justice of the peace. By then, if not long before, the easy availability of such actions drew cases away from the gaol delivery and other sessions that heard felonies. Especially important was the prosecution of much relatively minor theft that might have been prosecuted as felony, as mere, indictable trespass, or indeed as private suits of trespass for money damages. On the origins of trespass see Alan Harding, The Roll of the Shropshire Eyre of 1256 (London, 1981), pp. xxxii–lvi, and sources cited therein.
72. Idem.
73. See e.g. C 260/4, no. 19 (1288); C 260/6, no. 7 (1292); C 260/16, no. 12 (1306).
who had served in the county court on the presenting jury.\textsuperscript{74} In some instances there must have been substantial overlap between the original presenters and those sent to the county town for proceedings before justices of gaol delivery. But more often than not these frequent proceedings saw men of lesser status, men less able to avoid the onerous service of the trial juror. The separation of the juries was not, however, merely the result of the transition from eyre to delivery. During the late thirteenth and early fourteenth centuries it had come to be thought that the defendant ought to be tried mainly by persons who had not presented him. Thus administrative development and nascent concepts of due process worked together to produce the virtual separation of the two juries long before 1352, when statute allowed challenge of a prospective juror on grounds he had served as an indictor.\textsuperscript{75}

The decline in the status of trial jurors was not dramatic in the early decades of the fourteenth century. But gradually thereafter its impact was felt as exemptions from service reduced the base of substantial jurors. This apparent "democratizing" of the trial jury may have weakened the institution, as its members were now more often susceptible to pressure from powerful friends or foes of defendants.\textsuperscript{76} Legislative attention to jury malpractices grew more intense, and in the fifteenth century there were attempts to set property qualifications for jury service.\textsuperscript{77} By then, the resistance to serving was great enough to doom any meaningful reform.

This is not to suggest that, at least in the fourteenth century, the system of gaol delivery was unworkable. In fact, it represented in some respects a great improvement over the eyre in the administration of criminal law with regard to felonies. The system's most significant virtue was the frequency of judicial visitations. Suspects who had been taken were tried within a matter of weeks or months, not years; bail was less important and less universally resorted to. In homicide, special commissions were very rarely held after the late thirteenth century, for the denial of bail worked far less hardship.\textsuperscript{78}

The conviction rate at gaol deliveries was roughly what it had been for homicide at the eyre, and double what it had been for theft. Juries condemned about 15 percent of homicide suspects and nearly one third of those indicted for theft.\textsuperscript{79} One might have expected higher rates of

\textsuperscript{74}. Pugh, "Reflections of a Medieval Criminologist," pp. 92–93.
\textsuperscript{75}. Stat. 25 Edw. 3, stat. 5. c. 3. See Plucknett, Concise History, p. 127.
\textsuperscript{76}. See e.g. J. H. Bellamy, Crime and Public Order in England in the Later Middle Ages (London, 1973), p. 149.
\textsuperscript{77}. See below, Chapter 4, n. 25 and accompanying text.
\textsuperscript{79}. Given found that 17.4 percent of those charged with homicide alone at eyres in the thirteenth century were "executed." This may include cases actually tried at gaol delivery.
conviction at gaol delivery than at the eyre: relatively few suspects appeared at the eyre, and many of those who did had reason to be confident that they would be exonerated. At gaol deliveries, all those who were being held pending trial had to come forward to face the bench and a trial jury. Far fewer suspects had been bailed; certainly those held for the most heinous offenses and possibly those who were most suspect had not. If the conviction rates are surprisingly low by the standards of the eyre, they are even more strikingly low by modern standards. The reasons for this are complex and require further consideration of the administration of criminal justice in the period that began with the decline of the general eyre.

The maturation of gaol delivery belongs to the period of late medieval criminal administration about which we know least. The attention of modern scholars has fallen mostly on the mid-thirteenth-century eyres and on the fourteenth-century system of gaol delivery. It is conventional to treat the late thirteenth century as the beginning of a long period of social decline and disruption and to treat the transition from eyre to delivery as in part a symptom of that decline and in part an attempt to remedy the disruption.\(^80\) All ages think themselves the victims of increasing criminal activity. In some, people are especially articulate about their perceptions, and we must not uncritically equate oft-stated fears with realities.\(^81\) The attention which Edward I's legislation pays to the problem of crime may say more about such fears\(^82\) and about the impulse to legislate than about relative rates of criminal activity. Edward's legislation and the creation of new procedures to deal with crime may have represented (amateurish) attempts to deal with longstanding problems for which the eyre was too irregular and too cumbersome.\(^83\)

but reported and recorded at a subsequent eyre; it does not include many tried by special commissions and found to have slain in self-defense. James B. Given, *Society and Homicide in Thirteenth Century England* (Stanford, 1977), p. 133. Hanawalt gives 12.4 percent as the conviction rate for homicide at early fourteenth-century gaol deliveries and about 30 percent as the conviction rate for theft. *Crime and Conflict*, p. 59. Pugh examined the Newgate (London and Middlesex) gaol delivery rolls for the decade 1281–90; he found a condemnation rate of 21 percent for homicide (where no other charge was involved) and 31 percent for all forms of theft (excluding only cases where an additional charge of homicide, forgery, or prison breach accompanied the charge, or charges, of theft). “Reflections of a Medieval Criminologist,” pp. 6–7.

\(^80\) On the literature regarding the “crisis in order and justice” in this period see Kaeuper, “Law and Order,” p. 735, n. 4, and works cited therein.

81. See Kaeuper's excellent treatment of this problem at *ibid.*, pp. 735 et seq. See also McLane, “Royal Courts and the Problem of Disorder,” pp. 60, 115. McLane concludes that there was an increase.


The late thirteenth and early fourteenth centuries saw the use of special commissions of trialbaston and oyer and terminer, increased reliance on keepers of the peace, and an attempt to tighten the bail system.\textsuperscript{84} By the middle of the fourteenth century the keepers had attained the status of justices, adding the capacity to try misdemeanants and (sometimes) felons to their traditional power to hear presentments.\textsuperscript{85} The quarter sessions of the justices of the peace soon absorbed most of the criminal business that had earlier been handled by the less flexible commissions of trialbaston and oyer and terminer. Local law enforcement capacities had been greatly enhanced during the period of transition from eyre to quarter sessions and regular delivery of gaols.\textsuperscript{86} Frequent gaol deliveries, therefore, were only one aspect of a major overhaul of the system of criminal administration. Conviction rates at gaol delivery must be read in the light of these reforms: the results must have been disappointing.

The statistics must also be read in light of the disasters that beset England in the fourteenth century. Famine, plague, and war brought on social dislocation, hurrying the disintegration of older forms of social structure and increasing the numbers of dispossessed.\textsuperscript{87} The Crown sought to establish means to deal with these problems and with the criminal activity they brought in their wake, but it may have intensified them through, among other things, the granting of pardons "of grace" to those who would serve in foreign wars.\textsuperscript{88} Pardons of grace, which absolved the most hardened criminals of all their felonies by making them immune to prosecution,\textsuperscript{89} were issued in large numbers in the 1290s and


\textsuperscript{86} See McLane, "Royal Courts and the Problem of Disorder," pp. 37–43, for discussion of the reforms effected and the problems they brought in their wake. See also Post, "Local Jurisdictions and Judgment of Death," pp. 12–15, for the impact of royal commissions of the peace on residual private jurisdiction over felony.

\textsuperscript{87} See below, Chapter 3, text at nn. 8–10.

\textsuperscript{88} Pardons of grace are to be distinguished from pardons of course. All pardons were emanations of the royal prerogative. Those pardons that came to be granted automatically, for slaying in self-defense, through accident or through insanity, as though the defendant had done no wrong, were pardons "of course." All other pardons were granted by "grace" of the king, who—usually for a price—"mercifully" absolved a person of a wrongdoing, or at least insured the person against prosecution.

\textsuperscript{89} See e.g. Humard, \textit{King's Pardon for Homicide}, pp. 311–23; H. J. Hewitt, \textit{The
throughout the fourteenth century. Assumptions of contemporaries about the destructive impact of this policy are reflected in parliamentary petitions and statutes seeking to limit the royal pardoning power. Periodically the Crown consented to limit the sale of pardons but then soon breached its promise; not until the last decade of the fourteenth century was even a mildly effective brake placed on the flow of pardons of grace.  

How, then, does one begin to account for the vast number of acquittals even of those accused and held for commission of felony? And what pressures were brought to bear upon the juries that were forced to respond in individual cases to the question of capital liability? These are among the questions that the following chapters explore. By way of conclusion to this introductory essay we may suggest the direction that our explorations will take.

Some, perhaps many, of those tried at gaol delivery were not guilty of the acts with which they had been charged. The system of presentment, including the supporting scheme of amercements for failure to name a suspect, produced some false accusations. This had been true from the beginning of the presentment process. It is possible that the replacement of the ordeal by the jury actually increased the amount of false charging, for the latter institution provided a more trustworthy and less painful means of exoneration. By the fifteenth century, the modern indictment process was emerging out of the older system of presentment. This process, wherein officials investigated complaints and put the evidence they had gathered before the grand jury, must have placed a check on unsubstantiated accusations, but for most of the medieval period the margin of error at the presentment stage was very great. In addition, many of those accused were guilty in fact but not proven to be so. Jurors

Organization of War under Edward III, 1338-62 (Manchester, 1966), pp. 173-75; Hanawalt, Crime and Conflict, pp. 235-37. Hanawalt cautions that the gaol delivery rolls do not provide clear evidence that the pardoning policy resulted in a dramatic increase in crime.

90. See below, Chapter 3, nn. 12-30 and accompanying text.

91. Not all “false” accusations resulted from bad faith. Perhaps the better phrase is “wrong accusations.” Presentment, we have seen, was deemed an improvement upon the appeal, which produced a substantial amount of truly false (“malicious”) prosecution.


93. The crime of “conspiracy” in its original meaning: an agreement falsely to indict of crime, was statutorily defined in 1300. Statutes of the Realm, vol. I, p. 139. See also Pugh, “Reflections of a Medieval Criminologist,” p. 97. For a recent important account of conspiracy see Harding, “Origins of the Crime of Conspiracy.” Harding marshals the evidence for a near-crisis in the administration of the criminal law owing to the practice of false accusation (pp. 97-99). It remains unclear how much such false accusation was responsible for trials at gaol delivery of persons held for homicide or theft (as opposed to trials at eyres or before justices of trailbaston for assaults and like offenses).
were sworn to state the truth, not to confirm suspicions. They were supposed to acquit those against whom a firm case had not been made, and probably they generally did. 94

At the other extreme were cases where the jury believed the defendant to be guilty but acquitted him nonetheless out of fear of retribution or out of partisanship. This latter category included the simple favor shown to friends and neighbors as well as the more serious instances where the jury had been bribed to save the guilty suspect's life. Authorities believed that coercion and bribery were common and that the truly corrupt verdicts that resulted forestalled attempts to bring very grave offenders to justice. Concern with this kind of corruption lay behind parliamentary attempts to secure more qualified jurors and might have been reflected in the increasing investigative activity of the justices of the peace. 95

There were, of course, many other defendants who were guilty under the strict rules of the law whom juries refused to convict. These were persons whose acts, whether theft, homicide, or rape, were not considered sufficiently serious to merit capital punishment. The jury was reacting to the reputation of the accused, 96 the nature of his offense, and—perhaps most important—the punishment he would incur. Thefts of a relatively trivial amount perpetrated by persons in dire straits, slayings born of sudden anger by persons long of good standing, these were offenses for which the law prescribed death but for which the community frequently refused to convict. Juries in these cases simply nullified the law of felony. 97

The jury's power to render verdicts against the evidence was perhaps the most distinctive aspect of medieval criminal law. Whether such verdicts resulted from mercy, fear, or outright corruption, they evidenced the trial jury's domination of the system of justice. In part, the jury's power flowed from its institutional setting. From its inception, and perhaps until Tudor times, the jury was the source of practically all of the

94. See Pugh, "Reflections of a Medieval Criminologist," pp. 97-98. Jurors were sworn to tell the truth "to the best of their knowledge. If, however, they did not know it or possessed imperfect knowledge they could not then support the prosecution, for they must not reach their verdict on the basis of mere 'thoughts.'" See also Thayer, Preliminary Treatise, pp. 100-101, n. 2.

95. See Bellamy, Crime and Public Order, pp. 149-50. On statutes setting qualifications for jurors see below, Chapter 4, n. 25. On investigation by justices of the peace see below, Chapter 4, text at nn. 15-21.

96. Pugh, "Reflections of a Medieval Criminologist," p. 98: "When acquitting [jurors] often said no more than that a suspect's character was good. He who had the reputation of Fidelitas must have had a flying start toward liberation." The role played by reputation is difficult to assess. Jurors might have been using it as evidence and inferring innocence from good reputation or taking it into account in extending mercy to one they believed guilty.

97. See below, Chapter 2.
evidence put before the court. Typically, jury verdicts were conclusions based on assessment of facts gathered before the defendant went on trial. Although juries were probably influenced by the defendant’s bearing in court, their reactions to that drama must have been played back against what they had already learned about him and the circumstances of the act with which he had been charged.

In part, too, the jury’s power reflected deep-seated assumptions about justice, assumptions which—as may increasingly have become the case—authorities shared with those they ruled. The verdict was a verdict “of the country,” made by persons on oath before God to tell the truth according to their consciences. It was an inscrutable verdict, though it is by no means clear to us why that was so. We may try to understand the various aspects of the inscrutability of verdicts: they were, it was thought, divinely inspired; if the defendant so chose, the matter of life and death was for his countrymen to determine. Nevertheless, the trial jury’s power also reflected incapacities of central government that could not be confronted openly and that may have induced authorities to conceive of jury verdicts as presumptively legitimate. Only clear corruption was open to correction; the notion of truth according to conscience was sufficiently broad to cover misreadings of evidence and verdicts rendered knowingly against the evidence but inspired by mercy.

The problem of merciful or otherwise principled nullification—the subject of this study—is extremely complex. In the medieval period, for one thing, specific instances of nullification were largely hidden from view. Such verdicts were usually indistinguishable, from the perspective of the bench, from acquittals based on the belief that the defendant had not been involved. Moreover, if the justices did in a given case suspect nullification, they might have thought it of the unprincipled sort, the product of bribery, extortion, or abject fear. Those were more serious and perhaps more common problems. Simple merciful nullification, especially in close cases, was often sheltered from view and frequently protected by the jury’s duty to acquit where the evidence was uncertain. It was also a relatively trivial matter, given the perception of a substantial increase in truly serious crimes. Nullification, in this particular sense, was probably an unintended by-product of the medieval system of criminal justice. But its importance should not for that reason be underestimated. Although it was a relatively insignificant form of jury lawlessness, it involved serious long-term implications for the relationship between rulers and ruled. In the ensuing chapters we shall search out the evidence for jury nullification of the rules of capital felony, and we shall attempt to assess the judicial reaction to this kind of jury behavior. We shall, in short, inventory a lost part of the legacy of the medieval criminal trial jury that the modern world inherited and took over for its own.