Part II  Transformations
The extensive powers of the medieval criminal trial jury resulted not from legal theory but from social and institutional circumstances. The jury helped the royal administration of criminal law to function, perhaps even alleviated tensions that might have brought it to a halt, by exercising its mediatory powers in two distinct but related ways. In individual cases, juries prevented the imposition of sanctions they deemed too harsh in light of the defendant's behavior, reputation, or the hardship he had already suffered. More generally, and as the result of its role in individual cases, the jury reflected the interests of the local community as opposed to those of central authorities. The Crown required the jury to play a role the royal bureaucracy was as yet unprepared to undertake—the gathering of evidence; this, in turn, enhanced the jury's power to render verdicts that both blunted royal power and made what power there was relatively palatable.

The stronger central institutions became, the less they required of juries, either as substitute bureaucrats or as political mediators. Indeed, the stronger the position of central government, the more it was bound to regard the jury as part of the problem rather than as a solution. By the Tudor period, jury-based nonenforcement of the rules of law seemed less often a political and social necessity and more often an affront to justice. The question remained: How far would the government go in its purification of the jury? Would an attack on embracery and similar perversions of justice suffice, or would the government attempt to remove the jury's power to reflect a different notion of justice on the merits of a given case than that embodied in formal rules?

Very little is as yet known about the institution of the trial jury in Tudor and Stuart England, about governmental policy toward juries, or about the vicissitudes of jury power. Much of what we do know we infer from the broader history of criminal law in the period. A virtual revolution was under way from the mid-fifteenth century, if not earlier, which had the effect of reducing the power of the trial jury and placed greater power in the hands of the bench. Although there is uncertainty about the reasons for this transformation in the criminal law, the institutional developments are unmistakable. The jury ceased during the later Middle Ages to be a (mainly) self-informing institution. Although the process by which this
occurred and the corollary emergence of the prosecution are largely hidden from our view, the later stages of prosecutorial development in the second half of the sixteenth century are visible. Crown officials then took increasing responsibility for the initiation and prosecution of criminal cases and for the management of the trial itself. The effects of these changes upon the jury were substantial. For one thing, the government sometimes used great art in persuading juries of the defendant’s guilt; perhaps more significantly, the jury lacked the means to manipulate the evidence, to suppress whatever might give the lie to the way it chose to view the facts. Moreover, perhaps as a result of these changes, the bench brought pressure to bear upon some juries that acquitted in the face of inculpatory evidence, binding them over to appear before Star Chamber or even fining and imprisoning them directly.

The government applied the most pressure—took the greatest pains to persuade—where its interest was greatest. In a succession of well-known state trials, mainly for treason, the Tudor and Stuart monarchs pressed their advantage to the fullest. Juries in these cases were probably chosen for their presumed loyalty and were discouraged from disappointing royal expectations. This is not to say that state trials invariably, or even often, ended in the sacrifice of the innocent but that the government tried to avoid the acquittal of the guilty through either mismanagement of the prosecution or an excess of mercy.

Yet there is reason to doubt that the state trials accurately reflect criminal procedure in the routine felony cases, which the Crown lacked both the interest and the capacity to manage. Although in particularly serious cases of homicide or theft the bench might take a special interest, pressing its view strongly upon the jury, in a far larger number of cases the bench actively questioned the defendant and revealed its point of view but left the jury to reach its own conclusion. To be sure, the mere fact of a prosecution—pretrial examinations available to be read in court, witnesses ready to testify for the Crown—must have made some difference. But in routine cases the jury’s traditional role was never expressly repudiated. Though usually closely guided by the bench, the jury was allowed to weigh all the evidence in light of both the defendant’s reputation and bearing and its own conception of his just deserts.

The direct and indirect changes in the administration of the criminal law in the late sixteenth and early seventeenth century produced a pattern of verdicts that differed from its medieval counterpart. The new pattern, which scholars are only now beginning to sketch out in detail, may usefully be summarized at this point. The overall percentage of convictions at assizes was strikingly higher than in the later Middle Ages. This was true both in homicide and in theft. The former offense came to be divided in the late sixteenth century into murder, which was capital, and
manslaughter, which was not unless it was the second such offense. The conviction rates were relatively high for both. The crime of theft remained divided into burglary and robbery, for which conviction was very common, and grand larceny, for which conviction was far less common. Many of those indicted for grand larceny were, by virtue of the jury’s undervaluation of the goods stolen or their own plea of guilty to a lesser offense, convicted of petty larceny, which was not capital, just as some of those indicted for murder were mercifully convicted of manslaughter. Convictions were high in those capital felonies that had long been viewed as particularly heinous and in those noncapital offenses that had come to serve as catchalls much as self-defense had served in earlier times. This series of changes in case outcomes resulted in part from the new divisions between capital and noncapital offenses and in part from the pressures that officials were able to bring to bear in the wake of changes in the administration of criminal law. Still other outcomes reflected age-old social attitudes that authorities were either unable or unwilling to resist. At some points, there was conflict between judge and jury; at others, authorities acquiesced in traditional jury practices, or even encouraged those practices.

The developments of the early modern period, then, mark only a partial revolution in criminal process. Moreover, the changes made for little difference in most cases, though they made for a dramatic difference in cases where the Crown or the bench used the new tools to the fullest. A new judge-jury relationship was emerging, but the old habits of thought and behavior survived, leaving the implications of the developing law obscured. How far the Crown had gone, in at least some cases, toward reversing the old, de facto order of things is evident from the attack launched on the judiciary during the Interregnum by those proclaiming the jury’s right to find the law. This attack the Cromwellian regime disdainfully brushed aside; neither would the restored Stuart monarchy concede such a right to the jury. How well, on the other hand, the medieval ethic of the jury’s right to find the facts according to its own conscience survived is evident in the judiciary’s concession in 1671 of the principle of noncoercion. The rhetoric of the jury right, the law of noncoercion, and their fusion in some legal literature toward the end of the seventeenth century are the subjects of the two following chapters of this middle section. These chapters analyze the unofficial and official legal writings from the years 1640–89 that established the ideology of the jury right.

Before turning to these writers and their discussion of the history and role of the trial jury, we shall, in the present chapter, survey the evolution of criminal procedure in the sixteenth and early seventeenth centuries. This interpretive and necessarily selective overview is divided into four
sections. The first deals with the major changes in the administration of the criminal law and how they came about. The second analyzes some effects of the new criminal procedure on the substantive criminal law. The third discusses the impact of these procedural and substantive developments on the trial and on the role of the jury. The final section examines the relationship between the problems of the administration of the criminal law generally and the bench’s handling of individual cases, specifically the role that the bench found it convenient for juries to play. I suggest that although this period saw a significant shift in courtroom power from the jury to the judge, the jury continued in many routine cases to function in a manner that provided a credible basis for many of the arguments of later pro-jury writers.

I

The most important changes in early modern criminal procedure were the decline of the self-informing jury and the development of the prosecution.1 Which of these two developments came first is not known. The link between them is a problem of the greatest importance and may provide some hint regarding the origin of modern criminal procedure.

As we have seen, the medieval jury was presumed to know something of the events underlying the cases it heard.2 Doubtless it often knew a very great deal—or at least some of its members did. Before the middle of the fourteenth century, petty jurors were sometimes among the presenters who promoted the case from the start. In the case of homicide, some who served on the inquest jury subsequently served on the petty jury or spoke of the case to those who did. We have seen also that the discourse between the judge and the defendant may have influenced the jury in some cases. But the job of the bench was far from easy, for aside from what the trial jury reported there was in the formulistic indictments little

1. I am grateful to Professor James S. Cockburn for allowing me to cite and comment upon a typescript version of his forthcoming book, the Introduction to his multi-volume edition of Calendar of Assize Records: Home Circuit Indictments, Elizabeth I and James I (London, 1975–82). I have incorporated chapter and subsection references to Professor Cockburn’s forthcoming book (hereafter cited as Cockburn, Introduction) alongside references to his earlier works that convey similar information. Where his Introduction modifies his earlier work I have so noted. Though it deals only with the Home Circuit, Professor Cockburn’s detailed study will, upon publication, stand as the most comprehensive account of procedure at late-sixteenth- and early-seventeenth-century assizes. My own (largely derivative) account of trial procedure, the text of which was completed before I had access to Professor Cockburn’s Introduction, serves as a framework for my synthetic and interpretive essay on the impact of the major procedural changes. My commentary on the differences between Professor Cockburn’s conclusions and my own is below, n. 179.

2. For discussion of details in this paragraph see above, Chapter I.
evidence about the crimes charged. A clever and steely defendant was not easily gotten round.

By the mid-sixteenth century the situation was very different. There were several sources of information to which the jurors were exposed after they had been sworn. Much of this information resulted from pretrial activity undertaken by the justices of the peace, in accordance with duties set forth in the Marian bail and committal statutes. The information was also available for the use of assize clerks, clerks of the peace, and the bench. In two steps, taken in two consecutive years, the traditional but intermittent investigatory activities of the justices were regularized and significantly elaborated. The Marian statutes mandated practices that for a century or more had served to inform grand jurors and that probably also established a public version of the facts that came to the attention of prospective trial jurors.

The first step in this process, and possibly the only step that the Crown intended at the outset, was the Marian bail statute of 1554, which tightened the procedure for the granting of bail. To remedy abuses that had frustrated the assize courts in their attempts to try suspected felons, the statute ordered that the justices granting bail examine the prisoner and "them that bring him" and send the results of the examination, in writing, to the judges at the next gaol delivery. The assize courts would then be in a position to monitor bail procedure. They would, as Langbein states it,


4. For an important discussion of the practice regarding use of depositions generated by the Marian statutes, see James S. Cockburn, "Trial by the Book? Fact and Theory in the Criminal Process, 1558-1625," in J. H. Baker, ed., *Legal Records and the Historian* (London, 1978), pp. 69 et seq. Cockburn argues that most of the "orchestration" at trial was done by the assize clerks. Justices were frequently not present; their indictments underwent some significant changes. In the present treatment, I assume that witnesses were in fact bound over and that some check on them—or prompting of them—was possible through the use of the examinations provided by the justices of the peace. See Cockburn, *Introduction*, ch. viii, sect. iii. Cockburn ("Trial by the Book?" p. 69) concedes the role of the justice of the peace down to the time of the trial. Orchestration at the trial by the assize clerks and bench is fully consistent with the views expressed here. See also Inner Temple Petyt MS 511/13, fol. 69. And see John H. Baker, "Criminal Courts and Procedure at Common Law," in James S. Cockburn, ed., *Crime in England, 1550-1800* (Princeton, N.J., 1977), p. 16, for a synthesis of the views of Langbein and Cockburn.

Transformations

have a basis for reviewing the propriety of the bailment in any case in which the accused had turned fugitive and the issue now was whether to discipline the bailing JPs. But when the accused was going to be gaoled, not bailed, there was no danger that he might not appear to stand trial.6

In the latter case there was no requirement that the justices of the peace make an examination. The bail statute was not concerned with procedure at trials of those held without bail—the most serious cases—and had only indirect and unintended effect on trials of those who had been bailed. For this latter group, the depositions that had been produced to defend the bailment might then have been used in court, though there is nothing in the statute to suggest that either Crown or Parliament had this in mind. The bail statute appears, in short, to have dealt solely with the problem of bail.

Within a year, Parliament passed a second statute, the so-called committal statute, dealing with pretrial procedures conducted by the justices of the peace. This statute extended the examination and deposition procedures to cases in which suspects were held without bail. Moreover, it ordered the justices to bind over witnesses to appear at trial and to give evidence against the accused. The committal statute, it has been argued, “turned the pretrial investigation into a device for the production of prosecution evidence at trial in every case of felony in the realm.”7 The statute ensured the appearance, where it could be had, of a private prosecutor. In theory, a private prosecutor was necessary in every case; in practice, an official might play the role of prosecutor.8 The prosecutor and any other witnesses who had been bound over gave their evidence in open court, where they might be prompted by, or examined in the light of, their pretrial depositions. Although the written depositions were not given under oath and thus were not binding as such, they were useful in coordinating and sustaining the case for the prosecution.9 In many if not all felony trials, the jury witnessed a rigorous testing of the defendant’s story. No longer could the defendant tell an elaborate tale and then reply to all skeptical queries with mere repetitions of his side of the case. The judge was now armed with evidence that he could use to challenge the accused’s statements. More effectively than in the past, the

8. Ibid., pp. 317–18.
bench could sum up the evidence, comment upon the defendant’s story, and leave the jury in little doubt regarding its view of the case.\textsuperscript{10}

These developments in criminal procedure have the deceptive look and feel of carefully planned Tudor governmental machinery. Until recently, the Marian statutes were regarded as an imitation of Continental criminal process, part of a program to make English criminal procedure more efficient and effective.\textsuperscript{11} That view is no longer tenable. The procedure which the statutes mandated differed crucially from Continental procedure.\textsuperscript{12} The all-important committal statute appears to have been something of an afterthought, drafted hastily and with the bail statute as its model,\textsuperscript{13} and both the bail and committal statutes may only have made mandatory investigatory practices that were already common among the justices of the peace.\textsuperscript{14} If the examination and binding over of witnesses did not begin with the Marian statutes, when and why did they begin? Were they nonetheless a tool of Tudor or pre-Tudor statecraft? There is as yet no answer to these questions, but we may consider some tentative hypotheses.

The role of the justice of the peace in the prosecution appears to have been a natural evolution that took place over a century or more.\textsuperscript{15} We have seen that the justices were an active part of criminal administration from the middle of the fourteenth century.\textsuperscript{16} Their duties ranged widely, from arresting persons suspected of the most trivial offenses and releasing them on recognizances for their good behavior, to trying felons at quarter sessions, and even to condemning convicted felons to death.\textsuperscript{17} From these duties grew the justices’ capacity as prosecutors. To their duty to arrest

\textsuperscript{10}. For a contemporary account of a felony trial see Thomas Smith, \textit{De Republica Anglorum}, Mary Dewar, ed. (Cambridge, 1982), pp. 110–16. [The original edition was published in 1583; the work was written in the period 1562–65 (\textit{ibid.}, p. I). I have left quotations from Smith in the original, as given by Dewar.] Smith must be used with care; on this point, however, his account is probably trustworthy. For a discussion of routine felony trials see below, section III.


\textsuperscript{12}. Langbein, \textit{Prosecuting Crime}, Part I. See esp. pp. 21–33. The central difference was that the English deposition was not given under oath and was not an instrument of record.


\textsuperscript{15}. Langbein, “Origins of Public Prosecution,” pp. 319–20. Although my account leans heavily on Langbein’s work, in this and the following several paragraphs I draw conclusions (by way of speculation) that Langbein does not draw and for which his work bears no responsibility. Professor Robert L. Woods, Jr., is presently completing an important study of the early Tudor justices of the peace which promises to expand our knowledge in this area substantially. I am grateful to Professor Woods for his comments on this section of this chapter.

\textsuperscript{16}. See above, Chapter 1, text at nn. 84–86.

persons on suspicion was added the power to examine suspects and witnesses. From keepers of the peace (with powers of arrest) to justices of the peace (with summary powers of conviction in minor offenses) was a dramatic step. To dislodge the local constables as law officers was one thing; to become a part of the English judiciary was quite another. What may have made this step possible was that the keepers' powers to hold or release suspected persons were so great that they inevitably involved investigation and judgment. The distinction between release on bond and release after summary conviction and payment of fine must at some point have become negligible, for the bond itself might be set in accordance with the quantum of evidence produced against the suspect and the seriousness of the act with which he had been charged.

It was natural for the justices to examine suspects in cases in which they were bound to render judgment, whether technically a legal "judgment" or something closer to an administrative decision. It was also natural for them to examine in cases on which they or some other, higher judge would sit pursuant to a grand jury's accusation. Thus, having grown accustomed to examining those accused of disturbances of the peace, the justices may have treated in similar fashion those suspected of treason, theft, or homicide, whom they were to bind over pending the action of a grand jury. It is possible that such investigatory action was commenced primarily in order to secure an indictment rather than to gather evidence for the trial itself. Inevitably, information that led to an indictment would subsequently be held over for use at trial. Thus, during two centuries of English criminal administration largely hidden from our view there were three critical, and probably connected, developments: the justices of the peace began to investigate, perhaps even to act as prosecutors; the grand jury underwent its metamorphosis from active presenter to passive indictor; and the trial jury began to receive most of its evidence at the trial itself.

All of these developments represented a kind of internal institutional growth, but at least indirectly they were also responses to external pressures. The expansion of the duties of the justices of the peace was, as we have seen, a governmental response to social and economic problems of the later Middle Ages. Some of those duties, including the power to examine, were fashioned specifically to deal with the criminal activity that such problems produced. In this sense, the transformation of the

20. See above, Chapter 1, section III.
criminal process was partly the result of governmental action. It is difficult to show, however, that in other than this sense the justice of the peace as prosecutor was a creature of governmental conception or mandate.

The social changes that created the need for the justices may also have helped to shape their specific responsibilities. Both the jury of presentment and the self-informing trial jury were by-products of the society whose decline the justices were supposed to halt. Those institutions presumed a stationary population; their capacities might be outstripped by more than modest levels of crime. The increase of serious crime, especially that perpetrated by roving gangs or by persons from afar, must have revealed the limitations of the two juries;\(^{21}\) the at least partial default of these essentially local institutions left the population without the protection it required. A vacuum from "below" drew the justices in at the same time that the need to produce indicted and convictable persons before commissioners of oyer and terminer constituted pressures from "above." Moreover, the pressures from below were more direct and suggested the very nature of the remedy: the justices must see to it that juries were informed.

The origins of early modern trial practice are therefore more ancient and more complex than the most visible agents of change, the Marian bail and committal statutes, suggest. Nevertheless, the Tudors knew a useful institution when they saw one, and they were responsible for the crystallization of prosecutorial practice. For the transformation of trial procedure paralleled—perhaps touched—several interrelated developments that are commonly associated with early Tudor government. Although these developments do not explain the emergence of the prosecution, or provide evidence of its pre-Marian stages, they help us to understand the nature of the terrain in which the justices came to function as quasi-prosecutors.

The early Tudors sought to ensure the stability of their monarchy through making existing institutions work as they were in theory supposed to work. They employed the Council and the court of Star Chamber to monitor the actions of royal officials and to root out the abuse of official institutions.\(^{22}\) Tudor efforts to purify jury process follow this pattern.\(^{23}\) By subjecting to investigation and judgment not only persons believed to have tampered with jurors but jurors themselves—in some cases entire juries—the Crown opened an important avenue to royal control of trial proceedings. For the moment, the object of Star Chamber interest was the

21. See above, Chapter 3, text at n. 9.
true malefactor: the person who obviously abused the juror's oath to render a verdict according to conscience. Unlawful pressures and inducements were alleged and proved: obstruction of the law, not unlawful "law-finding," was the most common charge against jurors in the early sixteenth century.24

Throughout the fifteenth and early sixteenth centuries, Parliament sought in a more traditional manner to render juries impervious to the political pressures that local magnates might bring to bear on behalf of their retainers. A series of statutes continued and attempted better enforcement of property qualifications for prospective trial jurors.25 To the extent these were enforced, they must have in the great majority of cases separated jurors and defendant both by class and by neighborhood and thus exacerbated the problems that social mobility and professional crime created for effective operation of the self-informing jury. The statutes effectively reduced the pool of eligible jurors, concentrating it within a class many of whose members did not desire to serve and found means to avoid doing so.26 It is possible that this particular governmental strategy hastened the day when resort to whomever bailiffs could find on assize days regardless of station (the tales de circumstantibus) became, if not the rule, something more than the exception.27

Still, it would be wrong to conclude that the vitality of the concept of trial by the country was weakened to the point that the very existence of

24. See below, n. 149 and accompanying text for discussion of cases in Star Chamber. One early statute relating to the Welsh Marches [Stat. 26 Hen. 8, c. 4 (1534)] dealt with punishment for perjury. It mandated fines for verdicts against "good and pregnant evidence," but it seems to presume subornation of perjury or browbeating of jurors by friends or relatives of the accused: "[D]ivers murderers, friends and kinfolk to such offenders have . . . suborned [jurors] to acquit [offenders]." See also G. R. Elton, Policy and Police: The Enforcement of the Reformation in the Age of Cromwell (Cambridge, 1972), pp. 310 et seq. Elton's discussion leaves open the possibility that jurors were punished merely for being too merciful, but seems to indicate that true perjury was almost always at issue. Elton's analysis of jury decision making is perhaps the most interesting "inside" look in the literature.

25. For statutes relating to criminal trial jurors, see e.g. Stat. 2 Hen. 5, st. 2, c. 3 (1414): lands or tenements of an annual value of 40 shillings; Stat. 23 Hen. 8, c. 13 (1531): in trials of murder and felony in cities and towns, jurors shall have forty pounds (suspending freehold requirement to prevent constant challenges on basis of previous statutes and substituting total worth requirement). For a complete listing of statutes, 1225-1730, see James C. Oldham, "The Origins of the Special Jury," University of Chicago Law Review, vol. 50 (1983), Appendix, pp. 214-21.


27. Cockburn, History of English Assizes, p. 118. See Cockburn, Introduction, ch. vi, sect. i. See Stats. 4 and 5 Philip and Mary, c. 7 (1557-58) and 14 Eliz., c. 9 (1572) for extensions of the use of the tales to criminal cases.
the institution was brought into question. Rather, the unquestioned right to trial by peers underlay the urgency of the reform measures; abolition was not a live issue. There were doubts in some circles about the effectiveness of the institution of the trial jury but not about the need for its continued use. Early sixteenth-century judges were not unmindful that the jury shielded them from a role they had little desire to play. A century and a half later even so powerful a figure as Sir Matthew Hale conceded that rendering verdicts on the facts was an awesome responsibility that the bench should not be anxious to shoulder.

The sanctity of the trial jury was revealed in yet another way. Charges of subornation of jurors had been leveled at grand juries as well as at trial juries. With the development of the indictment process, control over the grand jury was greatly increased, for royal officials were no longer at the mercy of the hundredors' selective memories. In turn, increased royal control of indictment helped make possible the mid-sixteenth-century changes that increased judicial control over the trial jury. But in the late fifteenth century control over indictment coincided with the moment of greatest threat of political decentralization, and the Crown's mastery of the indictment process depended upon its leverage over the powerful local figures who administered grand jury proceedings. Although the trial jury seemed to require men of greater substance, the grand jury might well—from the Crown's point of view—have benefited from an infusion of thinner blood. The government of Henry VII, drawing upon the momentum of its centralizing programs, attempted to avoid the grand jury altogether in noncapital, statutory offenses. The infamous statute of 1495, as short-lived as its drafters, Empson and Dudley, introduced

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29. Ibid., p. 43: "The judges sought refuge from the evils of mankind and the agonies of decision by umpiring the ancient game strictly according to the rules, and by refusing to meddle with questions of fact." (Baker here seems mainly to refer to civil trials.) See also ibid., p. 138: "No doubt judges could exert influence on a jury, but the forms of charge and oath made plain that the ultimate responsibility for a conviction rested on the jurors' consciences. The judges' task was to see that the rules were observed, and they evidently performed that limited role with absolute propriety." See Sir Thomas More, The Apology of Sir Thomas More, Knight (London, 1930), p. 150. More wrote in 1533 that "I durst as well trust the truth of one judge as of two juries. But the judges be such wise men, that for the avoiding of obloquy they will not be put in the trust."


31. See below, section III.

32. Stat. 11 Hen. 7, c. 3 (1495). [Repealed: Stat. 1 Hen. 8, c. 6 (1509)].

prosecution on informations into criminal procedure in noncapital cases. By its terms, however, it virtually conceded the requirement of an indictment jury in capital cases; and by implication, the statute and the crisis it provoked recognized the requirement of a trial jury in all felonies. The experience strengthened the foundations of jury theory by drawing attention to the argument that the defendant's right to trial by peers involved not one, but two, decisions by the country.

There were, of course, limits to the role that jury reform alone could play in the efforts to create a greater degree of social order. The prosecution and condemnation of serious offenders had long been hampered by the system of royal pardons; secular court jurisdiction over felony suspects had, in the course of the fifteenth century, been substantially reduced due to expansion of the benefit of clergy; and to a more limited but significant degree, the privilege of sanctuary became a serious problem in the early sixteenth century. The early Tudors took steps to bring these impediments to order under control, though not to eliminate them entirely. The closest Henry VII and Henry VIII came to eliminating one of the ancient privileges was their handling of sanctuary, a subject we need not pursue here. In the case of pardons of grace, the outrageous in a public mind saturated with jurisprudence, jealously tenacious of law above statute, but rather a determination of the propertied to be done with the exactions of Empson and Dudley” (ibid., p. 149).

34. “Provided always that any such information extend not to treason, murder or felony, nor to any other offence wherefore any person shall lose life or member.”

35. The statute and the roles played by Empson and Dudley figure prominently in seventeenth- and eighteenth-century jury tracts. See e.g. below, Chapter 6, n. 116.

36. See above, Chapter I, text at nn. 88-90.

37. See below, nn. 42-50 and accompanying text.

38. A felon who had escaped to a church or other designated holy place could remain there inviolate for forty days. If he confessed his felonies to a coroner within that time, he was allowed to abjure (swear he would leave) the realm. The coroner then assigned the abjuror a port and gave him a cross to carry as a sign of his abjuration. So long as the felon headed straight for the port, no one was permitted to harm him. See Hunnisett, *Medieval Coroner*, pp. 37-54. See generally N. Trenholme, *The Right of Sanctuary in England* (Columbia, Mo., 1903). For the Anglo-Saxon background of medieval sanctuary see Riggs, *Criminal Asylum in Anglo-Saxon Law*, pp. 31-36.

Although sanctuary was not abolished until 1624 (Stat. 21 Jas. I, c. 28, §§ 6, 7), the Tudors set strict limits upon the institution. Abjurers were branded to ensure their identification [Stat. 21 Hen. 8, c. 2 (1529)], and the statute of 1530-31 did away with abjuration of the realm (Stat. 22 Hen. 8, c. 14, § 1). Now the felon in sanctuary was to choose, or be assigned to, one of a number of appointed sanctuaries in England. Thereafter, he could not leave that appointed sanctuary without pardon or special license. See R. F. Hunnisett, “The Last Sussex Abjurations,” in *Sussex Archaeological Collections*, vol. 102 (London, 1964), p. 39; I. D. Thornley, “The Destruction of Sanctuary,” in R. W. Seton-Watson, ed., *Tudor Studies Presented . . . to Alfred Frederick Pollard* (London, 1924), pp. 198-207.

39. See Eric W. Ives, “Crime, Sanctuary, and Royal Authority under Henry VIII: The
Crown did not seek their elimination but sought intermittently to employ them in a manner that discouraged, rather than encouraged, heinous offenses by accepting legislation that revived the medieval proscriptions against the pardoning of particularly serious offenders. Pardons de cursu, on the other hand, continued to flow copiously in cases of “self-defense”—until, that is, the reform of the privilege of clergy and the mid-century developments in the criminal jury trial combined to create a workable law of felonious but noncapital manslaughter.

The institution of benefit of clergy took its basic form during the late-twelfth-century struggle between church and state, symbolized in the clash between Henry II and Thomas Becket. The Crown conceded to the Church ultimate power to try and punish ordained clergy, but it ordered that a cleric first be tried in a royal court and, if convicted, that he then be delivered over to the bishop as guilty in the eyes of the secular law. Access to benefit of clergy originally required that letters of ordination be formally presented to the trial court. By the late fifteenth century, however, mere literacy, and even feigned literacy, had come to suffice, so that even some of the worst lay offenders could avail themselves of the benefit.

In 1489 the Crown sought to reduce the impact of benefit of clergy by prohibiting a layman from twice having recourse to it for homicide, rape, robbery, theft, “and all other mischievous deeds.” In order that the court might know who had already been once benefited, the offenders were ordered branded after first conviction. For “manslayer,” the brand letter was “M”; for all other felonies, of which theft was by far the most common, “T.” An offender other than an actual cleric may not have been


40. Statutes granting pardons were issued frequently, but typically they excluded serious homicide, burglary and robbery. See e.g. Stats. 1 Edw. 6, c. 15 (1547); Eliz. 1, c. 30 (1562–63); 13 Eliz. 1, c. 28 (1571); 27 Eliz. 1, c. 30 (1584–85); 3 Jas. I, c. 27 (1605–6). For references to cases in which defendants charged with homicide pleaded eligibility for such a pardon on grounds they had slain “on a sudden occasion,” or the like, see below, n. 63.

41. This development is discussed at length in section II.


43. See e.g. JUST 3/127D, m. 11d (1337): “And in order that it might be ascertained in what capacity [the prisoner] should be delivered, let the truth of the matter be inquired into by a jury.”


46. “Murder” was at this time used as a catchall term embracing all felonious homicide. See Green, “The Jury and the English Law of Homicide,” pp. 473–74.
turned over to the church; certainly he was not after 1576. If after conviction he successfully pleaded clergy, he was subjected to branding and, at the discretion of the court, up to a year’s imprisonment. This important curtailment of benefit of clergy was only the beginning. Soon thereafter, legislation excluded laymen from pleading clergy for petty treason, that most heinous of common law felonies. Subsequently, in piecemeal fashion, most other serious offenses were similarly placed outside benefit of clergy for laymen.

As we shall see, this regulation of the benefit of clergy bore rich fruit. Statutory recognition of clergy for virtually all “literate” male offenders for the first commission of a lesser felony (including manslaughter and simple theft) removed much of the pressure from juries, at least in some cases. Where clergy was proscribed the pressure remained, but this cannot have been serious so long as the parliamentary approach to the gradation of punishment and the typical juror’s concepts of liability continued to overlap. Where these were in conflict, the jury presumably sought to use its de facto power to put the defendant beyond the law. Until the jury’s power to do so was substantially reduced, the system would, in cases of conflict, function much as before.

The development of English criminal trial procedure was more evolutionary than sudden. We have seen that the Marian statutes dealt with practices that to some extent predated the 1550s; and it has been


49. E.g. robbery or murder (used as term of art) in a church, on the king’s highway or in the victim’s house: Stat. 4 Hen. 8, c. 2, § 1 (1512) (statute only temporary); arson added to previous list: Stat. 23 Hen. 8, c. 1; buggery: Stat. 25 Hen. 8, c. 6 (1533–34); piracy: Stat. 27 Hen. 8, c. 4, § 3 (1535–36).

50. See Cockburn, “Trial by the Book?” p. 77: “Between 1559 and 1589 the assize files do not reveal a single instance in which clergy was denied because the claimant failed the reading test.” Thereafter, such failures were noted; Cockburn suggests that the evidence “indicates the reemergence of benefit of clergy as a meaningful test of literacy,” and that its reintroduction was connected with the “introduction of ‘plea bargaining’ at assizes.” See Cockburn, Introduction, ch. xi, sect. ii. For an important discussion of the treatment of women at the Home Circuit assizes see ibid., ch. xi, sects. ii, iii, and vi (table II). Women were not allowed benefit of clergy until 1693 (stat. 4 Wm. and Mary, c. 9). By virtue of a statute of 1623, however, they were allowed to claim the benefit in cases involving larceny of goods worth ten shillings or less (stat. 21 Jas. I, c. 6). Many women did claim pregnancy, a claim that was often false or that was made “true” through conception during imprisonment after conviction (technically, too late, but often allowed).
persuasively argued that the procedures outlined in the statutes represented an ideal that, in practice, did not become universal until long thereafter. The line of development is flatter than focus on the statute book alone would suggest. Nonetheless, the Tudor and early Stuart period witnessed a sharp and important increase in the production of pretrial examinations and witness testimony for use in criminal trials. This is reflected in virtually every aspect of the system. Though we know little about how such testimony was employed, who employed it, and on whose direction they did so, it is likely that the assize clerks wielded significant influence in the conduct of trials and that they were in some fairly direct fashion carrying out government policy. But it is not altogether clear just what the government policy was or whether the changes that flowed from that policy were foreseen.

The shift from a trial dominated by the self-informing jury to a trial based mainly on evidence produced by the prosecution not only transformed the relationship between judge and jury but gave greater opportunity for judicial instruction and enhanced the growth of the substantive law. Open confrontation between the witnesses and the defendant must have produced far more candid testimony than the conclusory tales that juries had formerly recorded in their verdicts. Now close and difficult cases came inescapably to the attention of the bench. Complicated testimony of a sort not often heard before allowed the bench to refine and elaborate rough distinctions, and to apply and elaborate those already propounded in the Inns of Court. In this process the law of crimes took on its modern form.

The paradigm example of substantive legal development is once again the law of homicide. Of the two other principal concerns of the royal courts, treason and theft, little will be said. The law of treason was

52. See Cockburn, "Trial by the Book?" passim, whose discussion assumes the existence of a substantial body of pretrial documents. See Cockburn, Introduction, ch. viii, sect. iii.
53. Idem.
54. Baker (Reports of Sir John Spelman, 2:303) has definitively shown that discussion of the substantive law had already begun at the Inns in the late fifteenth and early sixteenth centuries. Some of this discussion was prompted by cases wherein defendants based claims upon statutes dealing with clergy and pardons. My own discussion focuses on the application and further development of the emerging law in actual cases before the royal courts. I have on a previous occasion overstated the degree to which the post-1550 development was innovative rather than elaborative ("The Jury and the English Law of Homicide," pp. 491-92).
55. This discussion is a foreshortened version of my fuller account in Green, "The Jury and the English Law of Homicide," pp. 473-97.
elaborated in a series of statutes and applied in state trials that are now famous and have been described at length elsewhere.\textsuperscript{56} There were notable developments in the law of theft, but they were either statutory and geared mainly to increasing the scope of capital theft by the preclusion of benefit of clergy for specified offenses,\textsuperscript{57} or judicial and concerned largely with the definition of physical circumstances involved in such offenses as burglary and robbery.\textsuperscript{58} Few of the changes in commonly tried cases of theft involved the theory of felonious intent and, as we shall see, it was this problem that lay at the heart of future tensions between judge and jury.

The development of the substantive law in homicide as in other crimes involved a dialectical process that centered on the judge-jury relationship but which was affected by much else, including, of course, the Tudor use of the benefit of clergy. The statutes defining eligibility for benefit of clergy, unlike the medieval statutes dealing with pardons of grace, succeeded in making a lasting impact on the substantive law of felonious homicide. Perhaps the most important difference between those two attempts to deal with professional or otherwise serious homicide was the stage of the judicial process at which the protection proscribed by the legislation was normally obtained. As we have seen, pardons of grace were obtained before trial, and, until 1390, they foreclosed prosecution. Thereafter, while courts were in theory required to test such pardons, they generally took at face value almost all pardons set before them and thus, by default, left administration of the statute of 1390 to the Crown.\textsuperscript{59}


\textsuperscript{57} See above, n. 49.

\textsuperscript{58} Baker, \textquotedblleft Criminal Courts and Procedures,	extquotedblright\ p. 41. For an example of the interplay out of which rules developed (though in this case not a new rule), see J. H. Baker, \textquotedblleft Criminal Justice at Newgate 1616–1627: Some Manuscript Reports in the Harvard Law School,	extquotedblright\ \textit{Irish Jurist}, vol. 8, new ser. (1973), p. 313. In an indictment for theft [Harvard Law School (hereafter, H.L.S.) MS 112, p. 296], where a servant stole from his mistress and placed the stolen items in his own trunk (as the evidence showed), the jury, having left the bar, returned to ask advice of the court. Their concern was that it had not been shown that the trunk had been removed from the house. The Recorder told the jury that under the law the alleged deed was a felony, for the act of putting the goods in the trunk and afterward denying that he had done so indicated that the defendant had taken the goods with felonious intent. (The jury convicted the defendant and he was hanged.)

In the sixteenth century, the bench began to exclude from the categories of \textquotedblleft luxuries,\textquotedblright\ which could not be the subject of an indictment for theft, certain edible birds and animals, thus increasing the scope of the law of capital theft. See Baker, ed., \textit{Reports of Sir John Spelman}, 2:318.

\textsuperscript{59} See Green, \textquotedblleft The Jury and the English Law of Homicide,	extquotedblright\ pp. 469–72.
Benefit of clergy operated in a different way. Although in the Middle Ages the benefit could be pleaded either at the outset of the trial or after an adverse verdict, the trial was always held, a jury impaneled, and a verdict given. That remained the case as clergy expanded; indeed, with that expansion, it came to make no sense at all to turn over to Church courts most of those who benefited from "clergy."

Because many convicted defendants were likely to plead clergy, and because clergy was not available for all offenses, the nature of the felonious homicide became an important jury question. For the first time, it would seem, juries had to be questioned closely concerning the specific nature of the defendant's felonious act. For the first time, a jury verdict of "felony but not murder" might save the defendant's life, even though it would not spare him entirely from punishment. The new statutory scheme regarding clergy presented an important opportunity for legal growth.

The combined effects of the clergy statutes and of the transformation of the trial itself were significant. Some of them are easily traceable in the reports and legal literature of the sixteenth and early seventeenth centuries; others are less well understood. One clear result of these changes was that the law of homicide as applied by the courts evolved within a matter of decades into one of the most complex areas of the substantive criminal law. For the purpose of determining eligibility for clergy, the general rule of Salisbury's Case, which distinguished deliberate but sudden homicide from homicide through something approaching true

60. In the reign of Henry VI, it was established that the "clerk" had to be convicted before claiming the benefit. Stephen, History of the Criminal Law, 1:460. See Leona Gabel, Benefit of Clergy, p. 30.


62. Salisbury's Case (1553) [Edmund Plowden, Les Commentaries (London, 1558), fol. 100] is the earliest recorded case that demonstrates this point. See below, n. 64 and accompanying text. There are no gaol delivery or criminal assize rolls for most of the fifteenth century or the first half of the sixteenth century.

63. See Baker, ed., Reports of Sir John Spelman, 2:305, n. 5, for two cases (1531, 1540) in which defendants, claiming eligibility for statutory pardons, pleaded that they had committed felonious homicide but not murder. Such cases may have required close questioning of the jury, but it is unlikely that there were a great many of them (as there were regarding benefit of clergy). Nevertheless, the development of the law of homicide resulted in part from the Tudor revival of the medieval statutes precluding pardons of grace in murder.

64. See above, n. 62. And see my discussion in Green, "The Jury and the English Law of Homicide," pp. 484-85 and accompanying notes.
premeditation, was further refined. For example, of all the new doctrines which emerged from the bench in its treatment of complex cases, none was more difficult to apply than the rule of manslaughter committed in "hot blood," or "continuing fury." Rules applicable to the slaying of officials—most important, the rule of implied malice, which made such slayings murder—also took a heavy toll of the once-streamlined law of intentional slaying.

A second, less easily traceable result of the benefit of clergy statutes and the changes in trial procedure was their effect upon the treatment of defendants in homicide cases. Since assize records are primarily indictments with brief and sometimes ambiguous notations as to the outcome at the trial stage, they do not provide much insight into jury behavior. Nevertheless, the pattern of late-sixteenth-century jury verdicts in homicide is revealing. Compared with the fourteenth century the conviction rate was high (50 percent or more as compared to 20–25 percent), but the percentage of defendants actually condemned remained about the same (20–25 percent) and the percentage of self-defense verdicts was significantly lower (3–8 percent as compared to 10–40 percent). Thus it appears that juries, recognizing that benefit of clergy provided an alternative sanction for simple homicide, or, as it was now coming to be called, "manslaughter," felt free to convict in many cases they had formerly described falsely as acts of self-defense. The formal rules and the social response had come closer together. And we may speculate that more often than in the past recipients of pardons for self-defense were in fact true self-defenders. The extension of justifiable homicide by a statute of 1532 to cover slayers of would-be murderers may have been facilitated by a lessening of the fear that manslaughterers would be acquitted along with true self-defenders. Indeed, although officially the medieval treatment of excusable homicide was not abolished until 1828, there is evidence that judges frequently allowed self-defenders, whether they had slain murderers or not, to go quit without pardon or forfeiture as early as

68. James S. Cockburn has edited the extant assize indictment files for the reigns of Elizabeth and James I. See his forthcoming introductory volume (Cockburn, Introduction) for his analysis of these records.
69. Green, "The Jury and the English Law of Homicide," p. 493. Not all of the "condemned" were in fact hanged. Some probably were pardoned or had their sentences commuted. See below, nn. 162–68 and accompanying text. See Cockburn, Introduction, ch. ix, sects. iii–vi.
71. Stat. 9 Geo. 4, c. 31, § 10 (1828).
the sixteenth century.\textsuperscript{72} This too may have reflected heightened confidence in jury verdicts.

The history of the judicial treatment of accidental homicide, on the other hand, appears to be more complex. It is difficult to chart the line of development in this area from the adoption, in the fourteenth century, of the rule of automatic forfeiture for excusable homicide to the abolition, in the nineteenth century, of both pardon and forfeiture. At the outset, we have seen, the judicial handling of accidental homicide was relatively lenient: the courts granted acquittals in a wide variety of cases that had formerly led to pardons for accidental homicide.\textsuperscript{73} The theory most often employed to rationalize acquittal in these cases was that the deceased, through his own actions, had slain himself. Although this theory was repeated in the sixteenth century,\textsuperscript{74} and might still have governed the outcome of some cases, it is clear from the notations of judgments on the late-sixteenth-century Chancery records that pardon procedures were followed in the majority of accidental homicide cases.\textsuperscript{75}

The reasons for this strict treatment of accidental homicide are not altogether clear. The most dramatic aspect of the new approach was the insistence upon initiating the pardon procedure for deaths resulting from shooting accidents, both by bow and arrow and by firearms.\textsuperscript{76} The latter

\textsuperscript{72} Very little is now known (or may ever be known) about judicial treatment of defendants for whom a jury returned a verdict of self-defense. Scholars have assumed that even before the statute of 1828 (Stat. 9 Geo. 4, c. 31, § 10), judges allowed juries to acquit such defendants, but the evidence these scholars have adduced is inconclusive. See Michael Foster, \textit{Discourse on Homicide} (2nd ed., London, 1776), pp. 288–89; Pollock and Maitland, \textit{History of English Law}, 2:481, n. 3; Stephen, \textit{History of Criminal Law}, 3:76–77. See also Joseph Beale, "Retreat from a Murderous Assault," \textit{Harvard Law Review}, vol. 16 (1903), pp. 573–76.

The evidence from the assize rolls is also unclear on this point. In the late sixteenth century there were still cases ending in verdicts of self-defense and, apparently, an order that the defendant obtain a pardon. See e.g. James S. Cockburn, ed., \textit{Calendar of Assize Records: Sussex Indictments, Elizabeth I} (London, 1975), p. 319, no. 1639 (1596). In other self-defense cases there is no indication that a pardon was required. See e.g. \textit{ibid.}, pp. 281–82, no. 1475 (1594); p. 333, no. 1714 (1597).

The strongest evidence for the proposition that self-defenders were not required to obtain pardons is the fact that Chancery class 260, which contains many post-1550 cases in which the pardon procedure was required for accidental homicide, contains practically none by that late date for homicide in self-defense.

\textsuperscript{73} See above, Chapter 3, text at nn. 64 \textit{et seq.}

\textsuperscript{74} See William Staunford, \textit{Les Plees del Coron} (London, 1557), p. 16a, commenting on a 1370 case (Y.B. Hil. 44 Edw. 3, pl. 94).

\textsuperscript{75} See Chancery classes 260 and 244, \textit{passim}. The hundreds of cases where pardon procedure was followed for accidental homicide between 1550 and 1650 suggest that judges were infrequently allowing such defendants to go quit.

\textsuperscript{76} See e.g. C 260/166, no. 20 (1573); C 260/171, no. 46 (1583); C 260/173, no. 52 (1588); C 260/184, no. 131 (1631).
devices, of recent invention and currency, were responsible for close to 40 percent of the accidental homicides for which pardons *de cursu* were granted in the century 1550–1650.77 The special dangers surrounding the use of firearms no doubt contributed to judicial conservatism in accidental homicide generally, and this concern might explain the insistence on pardons in cases of unintentional slayings through the use of more traditional weapons.

It is also possible that the flow of evidence now revealed more clearly than before the degree of negligence attributable to the defendant in accident cases. Juries, having lost most of their control over the production of evidence, might have found it more difficult to persuade the court that the deceased had been responsible for his own death. Indeed, jury verdicts of excusable accidental homicide might have been returned in cases that, according to the evidence produced at trial, appeared to the bench to fit within the emerging category of involuntary manslaughter.78 Surely, in these cases, the bench might have deemed insistence upon the pardon requirement appropriate. In those (presumably) rare instances, on the other hand, where trial testimony was consistent with a special verdict that the deceased had slain himself in the course of an attack upon the defendant, the bench might have felt greater confidence in assimilating the cases with self-defense and allowing an acquittal.79 If so, this was one more example of the effect of the new trial procedure on judicial treatment of excusable homicide. But this remains a matter of speculation.80

77. This estimate is based upon a study made for me by David Clark, formerly of the Public Record Office, of the post-1550 cases contained in Chancery classes 260 and 244.


79. Such cases rarely appear among those accidental homicides for which pardons were granted.

80. The history of the jury and the law of homicide after 1550 remains shrouded in mystery. The subject requires a systematic analysis of the series of criminal assize records that begin in the 1550s.

I have suggested that the emergence of a large category of noncapital felonious homicide and the beginnings of modern trial procedure produced changes in the behavior of both bench and jury. My tentative thesis is that the conditions that had produced the earlier pattern of jury behavior and judicial response had been substantially removed. There were fewer verdicts of self-defense and probably there was greater judicial leniency in those cases that did occur. Factors other than the existence of a category of noncapital felony and the new trial procedure probably played an important role. But these factors, I believe, must be considered in relation to the formal law and trial procedure. Juries might have been comprised of persons less inclined to save defendants through verdicts of excusable homicide, but it may still be true that, absent the category of manslaughter, they would not
Certainly tension between judge and jury as to the border between manslaughter and excusable homicide was still common after the middle of the sixteenth century.\textsuperscript{81}

The rough distinctions in the Tudor law of homicide reflected age-old attitudes regarding capital liability. The success of the new use of the benefit of clergy, the chief agent for introducing these distinctions into daily courtroom judgments, depended upon a means of monitoring the veracity of verdicts. Without such a means, there would have been no assurance that the new category would not suffer at the hands of jurors. The substitution of clergy for pardons \textit{de cursu} would have availed the Crown and bench almost nothing. For although the law of homicide was being made to reflect social attitudes, its operation was also intended to set limits where particular juries might otherwise respond to "unwarranted" feelings of mercy or illegitimate forms of pressure.

Although the friction between law and social attitudes was greatly reduced, it was by no means eliminated. And, in time, as the law of murder and manslaughter was further refined, the potential for disagreement increased. The policy that led the bench to "imply malice" or to take a strict line with the negligent use of firearms must have had some connection with widespread social views. But the fit between judicial policy and a jury's sense of justice could not be perfect. The judicial concern with application of the law to set an example, for instance, might make the bench impatient with a jury's merciful desire, in a given case, to overlook the general reasons for concern with a certain sort of behavior.

I introduced statistics (above, p. 122) on verdicts to suggest a relationship between the structure of formal legal categories and jury behavior, and to suggest that, taken at their broadest, characteristics of social attitudes toward homicide remained fairly constant throughout the period 1300–1600. I do not mean to suggest that these observations constitute an in-depth picture of the social history of the law of homicide in Elizabethan England. Further research can shed light on a number of important questions and provide significant refinement of the rough outline presented here. It is possible to determine the social status of defendants and jurors in homicide cases and to correlate that information with verdicts. It may be possible also to establish differences in the practices of justices of the peace and the bench. See e.g. Samaha's analysis of the extant Essex criminal records (\textit{Law and Authority in Historical Perspective}). See also Joel Samaha, "Hanging for Felony: The Rule of Law in Elizabethan Colchester," \textit{Historical Journal}, vol. 21 (1978), pp. 763–82; Herrup, "Common Peace," ch. 5; J. A. Sharpe, "Enforcing the Law in the Seventeenth-Century English Village," in V. A. C. Gatrell et al., eds., \textit{Crime and the Law: The Social History of Crime in Western Europe since 1500} (London, 1980), ch. 4.

\textsuperscript{81} See below, Chapter 6, text at nn. 70–83.
The jury’s most important factual inquiry, and the one that most often led to friction with the bench, involved its assessment of the defendant’s intent. Of course, judge and jury sometimes disagreed on the matter of whether the defendant had struck a blow, shot a gun, or taken an object of value, but disagreement was far more likely to concern the defendant’s motives. The factual issue of intent was complicated enough, but it was all the more so when juries brought to it powerful feelings about the defendant’s personal worth and the justice of taking his life for the act he had committed. Although Tudor developments in criminal procedure did not eliminate the jury’s field of play regarding these considerations, they may have substantially circumscribed jury discretion by making recourse to it visible to the bench. It is ironic, then, that the ambiguity of the merciful role of the jury was intensified.

Part of the ambiguity surrounding the trial jury resulted from the jury playing a different role in each of the three main kinds of cases it commonly faced. Its role in homicide cases was the most complex. The emergence of the distinction between culpable-but-sudden homicide and slaying through malice aforethought simultaneously reduced the number of cases involving judge-jury tension and built into the fact-finding process more room for the kind of discretion juries had always exercised. The flow of evidence provided some control, but in fact many cases lay so close to the legal line between capital and clergyable homicide that the bench had no grounds for second-guessing the jury. Moreover, homicide had always involved a large number of cases of relatively little interest to authorities. Casual fights that resulted in death were always of less concern than were homicidal attacks in the course of robbery or arson. For centuries the law reflected an attempt to prevent the kind of brawling that might result in serious injury, but the administration of criminal justice reflected also the recognition that such a policy could have only a very limited impact. The transformation of the criminal process, to the extent that it was planned at all, was not effected in order to deal with such cases. Nor did it in fact have a determinative impact on the historic role of the jury in its resolution of those cases.

Theft, like homicide, was a routine felony. Much of it was casual, in the sense of opportunistic rather than truly planned, and much of it was perpetrated by vagrants filching to sustain a mean existence rather than by gangs of professional thieves. Nevertheless, even much casual theft

82. The difference between capital homicide and true self-defense had of course been very clear. The new line between murder and manslaughter was blurred, as was that between manslaughter and true self-defense, for manslaughter covered the entire universe of cases that had not in reality fit within one of the two more ancient categories.

was committed stealthily, and by outsiders, and if it was not specifically planned, it was nonetheless committed by persons ready to seize upon an unexpected opportunity. There was no element of provocation, at least not in the ordinary sense; one did not (typically, at least) steal to defend one’s honor. If the petty thief was pitied it was because necessity had stripped him of any honor whatsoever.

The line between nonclergyable and clergyable theft was mechanical, but it perhaps corresponded roughly with a general view that trivial, nonviolent takings ought not to place the thief beyond redemption and that even some substantial nonviolent ones ought to be forgiven at least once. The preclusion of clergy in robbery and burglary may have been popular, for many such cases involved gang attacks or truly professional crime; the conviction rates in these offenses were relatively high. Of course, these lines could make but rough approximations. There may in general have been opposition to the literacy standard. In particular cases, a robber or burglar might seem to have more in common with an unlucky petty thief, and the fact that he took several pounds rather than several pence might reflect nothing more than the fortuity of his victim’s wallet.

The jury’s role in such cases was quite different from its role in homicide. Because there was in theft little question regarding intent, there was little opportunity to conceal a merciful verdict. Juries were forced to acquit the defendant, perhaps against substantial evidence that he was involved, i.e., to deny robbery or burglary when one or the other had in fact been proven, or to undervalue goods despite incontrovertible evidence of their real worth. The jury’s role in theft was open to view, especially after the decline of the self-informing jury. Moreover, justices of the peace, assize clerks, and the bench probably took an active role in cases that fell within the statutes of preclusion, for these cases represented a kind of behavior that Parliament had singled out as especially threatening to the social order. Merciful verdicts were not unknown in theft; in fact they were very common. In the Elizabethan and Jacobean period many defendants indicted for grand larceny were, through open undervaluation of the goods that had been stolen, found guilty of

84. The effect of the statutes regulating benefit of clergy was to make larceny of twelve pence or more capital for the second offense. Multiple offenses of larceny of less than twelve pence remained petty larcenies and noncapital.


86. See Cockburn, Introduction, ch. ix, sect. i. It should be noted that where a defendant’s act was clergyable he might be indicted for petty larceny, or found by the jury to have committed petty larceny, in order that he might be whipped, a harsher punishment
noncapital petty larceny. But most of these merciful verdicts were strongly recommended by, or in any case undertaken with the leave of the bench, and they did not lead the bench to conclude that what the jury was doing was deciding difficult questions of law. There is some indication that a social theory of necessity was coming to play a quasi-legal role, as simple homicide had done in the Middle Ages. By and large, however, to the extent that there was conflict between judge and jury in cases of theft, it was a matter of differing opinions on the appropriateness of extending mercy (in specific cases) to thieves who clearly fell within the new classes of capital theft.

Treason cases became common in the sixteenth century, especially after the English Reformation. They were complex cases that raised legal and factual issues of nearly every kind. Treason, which was altogether nonclergyable, went through many changes in its definition, but at its core the crime included writing or speaking words signifying an intent to do the Crown serious harm. It was not always easy to prove that a person had spoken certain words, and often their correct interpretation was not obvious without reference to the demeanor and inflection of the speaker. Here, within factual issues involving both commission and intent, there was more than enough room for jury discretion, but acquittals in treason than mere branding for a first offense. This practice was common in the late seventeenth century, until transportation was ordered for clergyable felony. At that point, verdicts of simple grand larceny increased and a harsh punishment (short of execution) was achieved. See below, Chapter 7, n. 30. I am grateful to John Beattie for this important point.

87. For evidence that some commentators thought necessity might even be a legal defense, see Baker, ed., Reports of Sir John Spelman, 2:300, 323. For discussion of necessity in theft cases, see Cockburn, “Nature and Incidence of Crime,” pp. 60–61. The notion of necessity was reflected in the justifications stated for pardons (usually commutation) granted after conviction. It is possible that juries began to take such considerations into account (as though it was a form of mitigation at law) in reaching their verdicts. See below, Chapter 7, section III, for discussion of this kind of jury behavior in the eighteenth century.

88. But see Baker, “Criminal Justice at Newgate,” p. 314, where the jury may have been attempting to reject the law (H.L.S. MS 112, p. 296). The defendant was indicted as an accessory to a burglary; it appeared on the evidence that he had received the principals and the goods but had not had knowledge of the breaking and entering. The jury convicted the principals of burglary and the accessory of mere felony (clergyable). The judge directed the jury “not to distinguish whether the party were accessory to the burglary or to the felony only,” but one of the justices “was in doubt.” The jury “were very much unsatisfied, yet they went and afterwards returned and found the accessory guilty of accessory to the burglary.”

89. Bellamy (Tudor Law of Treason, pp. 31–33) argues that this had been the law since 1352 (Stat. 25 Edw. 3, stat. 5, c. 2), and that it is wrong to think that the 1536 statute (Stat. 28 Hen. 8, c. 10) originated the standard that required no overt act beyond words proving the intent.

90. Ibid., p. 178.
were far fewer in number than in homicide and theft.91 The Crown paid a
great deal of attention to treason prosecutions, making certain that the
evidence for conviction was very strong. On occasion, judges spared no
effort to charge the jury with the importance of conviction and the
inappropriateness of mercy.92 There is some question concerning how far
the Crown went to ensure that the jury would be sympathetic to its point
of view, but it cannot be doubted that the Crown exerted pressure in some
cases.

In summary, at the same time that advances in criminal procedure
strengthened the position of the bench vis-à-vis the jury, developments in
the substantive law reduced the area of conflict between the two institu­
tions. Conflict remained, but in varying degrees, depending on the kind of
case involved. Treason cases were few enough, and important enough,
for the Crown to manage most of them in a way that avoided conflict. In
theft, the new form of prosecution made it difficult for the jury to conceal
merciful verdicts within findings of fact; if there were merciful verdicts,
y they were recognized as such—even encouraged—by the bench. Homo­
cide presented far fewer instances of conflict than in the past because of
changes both in substantive law and in procedure. But fact-finding was, if
anything, more complex than ever, especially in cases close to the
borders of the newly drawn legal categories. Here the jury continued to
have some freedom of action, and, unlike the situation in theft, its
freedom extended beyond the open granting of mercy to the concealed
finding of law.

III

The extent to which juries exercised discretion in routine cases, or were
led to believe that they might legitimately do so, naturally depended on
the manner in which judges oversaw trials, charged juries, and reacted to
verdicts that displeased them. These are subjects about which all too little
is known.93 Trial records are somewhat fuller for the late sixteenth and
early seventeenth centuries than for the Middle Ages, but they remain
opaque on the point that most interests us, the judge’s handling of the
jury. Nor is there abundant material reflecting official views (bench,
council, or Crown) of the jury’s role. Enough of the official view remains for us to be certain that trial juries were thought to be fact finders and assessors of the credibility of those who testified at the trial, not law finders. But on the question of the limits of appropriate jury discretion, especially as regards the granting of merciful verdicts, the evidence is ambiguous. What does emerge, however, is the outline of the central paradox of the early modern history of the criminal trial jury. The development of controls over the jury, and their use in some cases (mainly the so-called state trials), produced a reaction in which it was asserted that the jury possessed a legitimate law-finding role. At the same time, judicial attempts to deal with the great press of routine cases led to a form of judicial dependence upon the jury. It began to appear that efficiency and at least a limited degree of jury discretion were natural allies. As a result, although the bench’s position vis-à-vis the jury became stronger, the system of criminal law continued to function in a way that allowed for the inferences that proponents of jury law-finding desired to draw.

Although the Tudor transformation of criminal procedure appears to have redesigned the balance of power between judge and jury and between defendant and prosecution, it did not immediately result in a much more highly structured trial. Rather, a few substantial changes radiated new prosecutorial powers in ways that were sometimes dramatic, sometimes subtle. The extent to which these powers were used depended upon the government’s interest in a given case or upon its concern with establishing an efficient process for a large class of cases. Because so little of the trial was formalized and so much of it proceeded according to the needs of the moment, it is difficult to speak of the “typical” trial. There were relatively few state trials, where governmental interest and power were most determinative; there were numerous routine felony trials, where the courtroom balance of power was more even; there were a myriad of trials that fell between these two extremes.

Most of the extant evidence regarding the management of the Tudor and early Stuart criminal prosecution comes from the collections of state trials, predominantly composed of treason cases. These trials were well known in their own day, both because of the personalities involved and because of the government’s interest in publicizing the prosecutions of suspected traitors. Most of the important treason trials were held in London, either before King’s Bench or before justices of oyer and terminer, and thus they were assured of a large and politically significant

audience. But the point of the prosecution was not lost on the county where the offense was committed, for indictment proceedings continued to be held locally.96 Those who knew anything at all about criminal trials must have been aware of the difference between proceedings at the great political trials and proceedings in more routine cases at the assizes. But the differences were largely of degree and may have been thought to reflect—as they almost certainly did—different levels of governmental interest in getting all of the facts before the jury. What was apparent was that the government had not taken political cases out of the hands of the jury, however much more pressure it in fact brought to bear upon jurors to render a verdict of guilty.

As we have seen, early modern criminal procedure was distinguished as much by the passive indictment jury as by the passive trial jury. The Crown could assert itself by handpicking the grand jury97 or by overwhelming it with evidence. The latter strategy was usually successful and can hardly have been thought illegitimate. Most of the important state trials for treason followed upon reports to the Council, which then carried on an extensive investigation and forwarded the most promising cases to grand juries.98 Indictment under these circumstances was nearly a foregone conclusion.99 The resulting document was usually long and denunciatory, embodying the essentials of the Crown’s case, and very likely drafted in part for its dramatic effect upon a hushed courtroom, as the defendant—perhaps a once-mighty subject—stood at the bar listening to the charges against him. It was in any case more elaborate and devastating in tone than the typical charge of homicide, theft, or other routine felony.

An overwhelming majority of defendants in most kinds of cases pleaded not guilty—in this there had been no change since the Middle Ages—even in response to the most detailed indictments, including those based upon examinations of the accused himself.100 In some treason trials this meant

96. Bellamy, Tudor Law of Treason, p. 133.
97. British Library (hereafter, B.L.) MS Caligula B. i, fol. 319. According to Bellamy (Tudor Law of Treason, p. 128): “In the sixteenth century, when the government felt it to be necessary, it did not hesitate to appoint the [grand] jurors itself.”
99. Statistics regarding specific kinds of cases are difficult to compile. Typically, bills not found were discarded. See Baker, “Criminal Courts and Procedure,” pp. 19–20; Cockburn, “Trial by the Book?” p. 71. Elton’s statistics (Policy and Police, p. 387) indicate that not more than 5 percent of treason cases put before grand juries resulted in an ignoramus. For common-run cases see Cockburn, Introduction, ch. v, sect. iv.
100. But see Cockburn, “Trial by the Book?” p. 73. Cockburn notes that there were, apparently, no confessions at assizes between 1558 and 1586, but that thereafter confessions
the repudiation of an alleged confession, with occasionally the implication that the confession had not been voluntary. In all felony cases the court was supposed to ensure that defendants were fully aware of the implications of a guilty plea, although by the end of the sixteenth century there is substantial evidence of a form of "plea bargaining" that produced confessions to reduced, noncapital charges.

We have seen that the early Tudors continued the late medieval campaign to obtain twelve honest men, if not a jury downright solicitous of the Crown's interests. In the mid-1580s, the forty-shilling requirement was raised to four pounds, a figure that remained in force with minor exception until the late seventeenth century. These efforts were often frustrated by nonattendance of the panel at the assizes. Thus the growing dependence upon the *tales*, and, ironically, the decline—rather than the upgrading—of the common-run felony trial jury.

At state trials, however, this was rarely the case. Royal officials were generally too careful on such occasions, and failure to attend was less often braved by those called. How far the government went in state trials to secure a friendly jury is still a matter of debate. Surely it defended itself against a jury inimical to its interests. There is some evidence of the "preparation" of jurors before the trial got under way, even an indication that Star Chamber played a role in pretrial rehearsals of the case for the

became common in theft, when there were experiments with "plea bargaining." See Cockburn, *Introduction*, ch. vi, sect. iii.


102. Seventeenth-century sources reveal this. See e.g. Hale, *History of Pleas of the Crown*, p. 225: "[B]ut it is usual for the court, especially if it be not of clergy, to advise the party to plead [not guilty] and put himself upon his trial." See, however, Baker, "Criminal Justice at Newgate," p. 315, for a report of a case (H.L.S. MS 112, p. 297) in which one who had "confessed the indictment" and "afterward, being asked what he would say why judgment of death should not be given against him, answered that he was not guilty and that his former confession was out of ignorance and unadvised. But [the Recorder] cited the example of David with the Amalekite, Samuel 2, Cap. 1, that his blood must be upon his own head."


104. Stat. 27 Eliz. 1, c. 6 (1584–85). For the late seventeenth and eighteenth centuries see below Chapter 7, n. 4 and accompanying text. For discussion of the impact of inflation on sixteenth-century juror-qualification requirements see Oldham, "Origins of the Special Jury," pp. 148–50. Oldham concludes that the real value of the property requirements was small, even after the statute of 1584–85.


In general, however, the Crown seems to have relied upon the force of its case and upon the defendant’s lack of opportunity to foresee the elements of the Crown’s case rather than upon true jury packing. The government’s efforts may as well have been aimed at countering the impact of local interests that might sway a jury to acquit; for it must have been the case that the classes from which the Crown sought to select trial jurors were subject to the very pressures of county politics that the elaborate ritual and presentation of monarchical sanctity were designed to erode. In more routine cases, local sympathies rather than politics had to be overcome. But there were simply too many cases, too few willing jurors, and too little effective governmental machinery to ensure that even a “neutralized” jury would always be impaneled. It seems likely that the government achieved less through efforts at jury selection than it did through charging (and threatening) those selected.

Just as one must be alert to the difference between state trials and common-run proceedings, one must also recognize that trials in London and other urban centers generally differed in important respects from trials in the provinces. This was especially true with regard to the relationship between jurors and defendants in cases of theft, which dominated the assize calendars. Smith, whose account is open to question on many points, probably was accurate in stating that in London defendants rarely knew the jurors, and vice versa, for they came from very different classes. London assizes processed a virtual parade of lower-class robbers and pickpockets, many of them professional; even men of the tales must have been a cut above these rogues. In the counties, and especially in rural areas, the jurors far more frequently faced their neighbors or village ne’er-do-wells of whom they had long been aware, or with whose more fortunate relations they fraternized.

108. Ibid., p. 181. See Stat. 33 Hen. 8, c. 23 (1541), which empowered the Crown to hold treason trials upon commission of oyer and terminer in the shire of the Crown’s choosing.
109. Cockburn, *History of English Assizes*, p. 123. See Cockburn, *Introduction*, ch. vi, sect. i. But see below, n. 179 and accompanying text for discussion of this problem. In my view, the bench exercised its power selectively. Cockburn himself notes (“Trial by the Book?” p. 73) that the court apparently manipulated the law to counteract jury leniency; if so, the bench could not always rely on its own powers of persuasion to obtain the verdict it preferred.
111. For a study of trial jury composition at early seventeenth-century quarter sessions and assizes see Herrup, “Common Peace,” ch. 5. Herrup found that those (mainly quarter-session) jurors whom she could trace came from the lower end of the yeomanry, lower-middling persons of some property who were used to undertaking official responsibilities that the more wealthy, substantial freeholders were able to avoid. Herrup’s conclusions accord roughly with those of Joel Samaha (“Hanging for Felony,” p. 781): “The trial juries
Smith's point, however, was that defendants rarely challenged prospective jurors: neither knowing them nor being known by them, they had little reason to do so. However, whatever the truth of Smith's remarks about class differences, such differences as there might have been hardly suffice to explain the relative rarity of recourse to challenges in criminal cases over practically the entire early history of jury trial. Traditionally, defendants had been entitled at common law to three dozen peremptory challenges. This number had been reduced in the 1540s to twenty, though it is difficult to imagine why anyone paid attention to the matter. In 1554, however, Throckmorton probably set a record by challenging as many as ten of his panel, and in the following year Parliament increased the allowance in treason to the original thirty-six. Perhaps these maneuverings were purely symbolic. The fact is that, by exercise of their challenge rights, defendants could have brought assizes to a standstill. Either they did not know this, or they were discouraged from such lawful sabotage.

Having been selected and sworn, jurors once again heard the indictment against the accused. At state trials the impact of this recital upon the jurors (and those in attendance) was meant to be very great. In more routine cases, where jurors might hear up to a half dozen or more cases before reaching their verdicts, the court supplied them with notations of the prisoners' names and the charges brought against them. Except for the great state causes, most trials were very brief. From the jurors' perspective, trial was a contest in which accuser and accused exchanged

[in Colchester] were comprised of ordinary people in the town—petty tradesmen such as alehouse keepers and occasionally even day labourers.


113. The medieval trial records are unhelpful on this point. For the Elizabethan and Jacobean periods, see Cockburn, *History of English Assizes*, p. 120; see Cockburn, *Introduction*, ch. vi, sect. i; Herrup, "Common Peace," p. 376, n. 2. Apparently, challenges were more common in the early sixteenth century in urban areas where defendants sought to remove those who failed to meet statutory property qualifications [see Stat. 23 Hen. 8, c. 13 (1531), which removed the freehold requirement and substituted a high (forty pounds) personal worth standard. Above, n. 25].


115. Stat. 33 Hen. 8, c. 23 (1541-42).


117. Stat. 1 and 2 Philip and Mary, c. 10 (1555).

118. B.L. MS Lansd. 569, fol. 1lv.


their stories in a heated give-and-take. The accuser might be prompted by the bench, which had in hand a written record of the charges he had laid before the justices or, in pretrial sessions, before the assize clerks. The accuser's statement was supposed to correspond closely with the actual indictment upon which it had been based, lest the indictment be quashed for variance. In fact, there were frequent variances in details, which were rarely challenged. Nonetheless, the jurors' impressions of the main elements of the case against most defendants must now have been distinct and convincing. Other witnesses for the Crown then spoke, perhaps prompted by the bench, sometimes adding little to the prosecution case beyond emphasis and whatever force their reputation, demeanor, and number might have carried. It is not clear whether the jurors always heard the pretrial examination of the accused; where it supported the Crown's case they almost certainly did, but probably in other cases they did not.

The case for the defense was put by the accused, for himself and by himself. No one interceded on his behalf to influence the impression he made upon the jurors. In rare cases, the accused had the assistance of counsel at the outset of the proceedings in order to make objections on matters of law as they arose from the indictment; but at trial, upon indictment, the accused was not allowed counsel, a rule that persisted in treason until 1696 and in all other capital cases until well into the eighteenth century. We may never, at this remove, understand how contemporaries felt about the denial of counsel. Some apparently believed that the judge served as counsel to the defendant, or that the government's case had to be so strong to convict that it would be beyond the power of legitimate legal advice to refute it. Most may have worried that intervention by counsel would make it more difficult for the jury to

121. See above, text at nn. 8-9.
122. For discussion of Cockburn's contrary view (Cockburn, Introduction, ch. vii, sect. ii) see below, n. 179.
123. On witnesses see B.L. MS Harl. 1603, fols. 76v-77. See also Smith, De Republica Anglorum, ed. Dewar, pp. 113-14.
127. The rule was different in appeals and misdemeanors, where counsel was allowed. Baker, "Criminal Courts and Procedure," p. 37.
128. Stat. 7 and 8 Wm. 3, c. 3 (1696) (treason). The extension of the right to counsel in felony [see Stat. 6 and 7 Wm. 4, c. 14 (1836)] was recognized in practice long before it was made statutory.
130. Rex v. Thomas, 2 Bulst. 147, 80 Eng. Rep. 1022 (1613), per Coke, C.J.
get at the truth, and this appears to be the way that contemporaries rationalized a rule that was sometimes subjected to telling criticism. Some of the criticism of the denial of counsel stemmed from the fact that counsel for the prosecution played a prominent role in state trials. There was a hollow ring to the bench’s refusal to even the scales in such cases, and the belief that the rule was intended to secure convictions may have carried over into attitudes toward the handling of routine cases where counsel rarely appeared for the Crown.

However much ammunition the Crown employed in a given case—the coaching of witnesses, the reading of examinations (including those few induced by torture), the use of counsel for questioning the defendant or for making dramatic, inflammatory speeches—from the jurors’ perspective the defendant’s answer remained the crux of the contest. The government may have therefore assumed that the truly innocent person could not be made to appear guilty, whereas the guilty might not reveal themselves without being subjected to the most searching interrogation. For the Crown forced the defendant to rebut evidence he had not seen beforehand and to answer questions designed to throw him off balance. Moreover, the Crown employed sworn witnesses to aid private prosecutors, while only grudgingly allowing any witnesses, and never sworn ones, for the accused. It appears that the Crown devised a proceeding wherein the accused was stripped of defenses that, from its perspective, only stood in the way of truth and aided the accused in the too-easy task

131. Staunford, Les Plees del Coron, fols. 151v–52; Ferdinando Pulton, De Pace Regis et Regni (London, 1609), pp. 184–85: “[P]eradventure, [the defendant’s] conscience will prick him to utter the truth, or his countenance or gesture will show some tokens thereof, or by his simple speeches somewhat may be drawn from him to bolt out the verity of the cause.” Cf. the earlier eighteenth-century rationale of Hawkins, Pleas of the Crown, 2:400: “This indeed many have complained of as very unreasonable, yet if it be considered, that generally every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make plain and honest defence, which in cases of this kind is always the best; the simplicity and innocence, artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own . . . whereas on the other side, the very speech, gesture and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them.”


135. Baker, “Criminal Courts and Procedure,” p. 38. Witnesses for the accused were not allowed to be sworn until 1696 in treason and 1702 in felony. Stats. 7 and 8 Wm. 3, c. 3, § 1; 1 Anne, st. 2, c. 9, § 3. See also B.L. MS Lansd. 569, fol. ll.
of fooling his countrymen or playing upon their compassionate tendencies. Smith's description of a routine felony case is famous: the accused and accusers stood in "altercation";\textsuperscript{136} the judge asked questions, guided by examinations that the defendant would have ex tempore to explain away. All of the pressure was brought to bear on a single point: the jurors waited to hear the accused speak for himself.

It is easy to underestimate the importance of the oral and personal aspect of trial by jury. The proceedings I have described in summary fashion were weighted in the Crown's favor, but they did not do away with the centerpiece of the medieval trial: the defendant's unsworn testimony and tacit appeal to his countrymen. That remained inviolable. None of the pretrial examinations was of record; the defendant might repudiate any confession he had made; and every prosecution witness had to testify personally, regardless of the strength of his deposition.\textsuperscript{137} The coordinated prosecution developed within the logic of the English trial by peers; it was not an attempt to undermine that form of trial. From the government's perspective, it redressed a severe imbalance that had resulted from the inability to challenge the defendant and thus turn the trial into a proper test. Juries typically had been inclined to hang only the nastiest offenders, and even these they sometimes acquitted out of fear, pity, or infirmities of evidence. The Crown had a long way to go if it was intent upon substantially broadening the field of offenders it could convict of capital charges, or significantly reducing the chances that an individual offender would mislead the jury. In state trials, where the stakes were especially high, each "mistaken" acquittal loomed very large. Precautions were called for, the more so because defendants were often clever, in league with others, and politically powerful enough to sway an insufficiently "neutralized" jury. Common-run felonies were handled differently. The prosecution could go only so far, given the press of time and the difficulty of securing detailed evidence. Far less was at stake, and jury leniency was to be expected, indeed, to a certain extent, tolerated. The odd case of unwise leniency, or plain obduracy, could be dealt with by stern treatment by the bench or even by procedures in Star Chamber.

At some point the judicial coercion of juries violated the sanctity of trial by peers, but it is not clear just where that point was. This problem has received more attention than careful sorting out. Although little will be offered here by way of firm conclusions, it is necessary to provide a background to the discussion in Chapter 6 of the debate over the legality


\textsuperscript{137} An exception was made where the deponent had died or fallen gravely ill before the trial. See Hale, \textit{History of the Pleas of the Crown}, 2:284-85.
of threatening and punishing juries that was carried on in both lay and official literature of the mid-seventeenth century.

From medieval times the bench played a leading role in the questioning of defendants. Medieval juries had two overlapping and presumably complementary duties: to state what they knew and to render a verdict. They were not under a duty to know all the facts. They might, and often did, say they did not know the truth of the matter, but they were not to suppress what they did know or to avoid the opportunity to become better informed. At the trial the principal source of information, over and above what the jurors had already learned, was the defendant himself. The fact that the jury was "self-informing" in no way implied that their verdict was to be settled by the time they were sworn. Like the judge, they were sworn "to hear and to determine," and they were expected to put questions where they desired further information. Having consented to be tried by the country, the defendant could be examined by them, or by the judge on their behalf. If there were limits to the judge's role of informing the jury, they were imposed by his dependence upon the defendant and the jurors for evidence.

The transformation of the trial in the early modern period did not bring this judicial role to an end. Quite the opposite: it enhanced that role, and made it far easier to play. Even the appearance of counsel at the state trials was in service to the bench, which followed up the counsel's questions or the accused's replies to them with questions of its own. Of course, it was impossible for the bench to take so active a part in the trying of the accused without signaling to the jury its own view of the truth of the matter. This must have been all the more inevitable as the flow of candid evidence increased. Whether the practice of commenting upon the evidence followed from the fact that often the judge's views were at all events obvious, we cannot say. We do know, however, that the practice was common by the mid-sixteenth century, if not long before,138 and it may have been thought a part of the judge's duty to help inform the jurors. Judicial impartiality did not require that the judge keep his opinions to himself but only that his comments be favorable to the defendant where that was appropriate. As we shall see, there developed a significant tradition of favorable comment on the evidence and on the desirability of a "partial," or saving, verdict.139 The tradition of the active judge was integral to trial by peers, and it remained so long after "coercion" was ruled unlawful.

138. See Baker, ed., Reports of Sir John Spelman, 2:141. Baker asserts that the bench used this role with discretion.
139. See below, Chapter 7.
There was no real separation between the judge’s comments upon the evidence and his charge to the jury. The charge might embody the most direct statement of the judge’s point of view and must have been influential in many major trials. During the sixteenth and seventeenth centuries it does not appear that charges were elaborate in most routine cases: the law was typically straightforward and the judge rarely bothered to sum up his views of the facts.140 Many cases must have resolved themselves into assessments of credibility that the bench either happily or for a lack of time or interest was willing to leave to the jury. The judge’s charge always invoked the jurors’ duty to God and their consciences,141 and it was upon that admonition that the trial proper ended and the jury’s resolution process began. About that process we know very little. It is not even clear whether juries typically retired from the bar to discuss cases or, as appears to have been the case at eighteenth-century Surrey assizes, simply huddled together in front of the bench.142 Juries usually heard several or more cases before “retiring” to resolve them and, in the press of time, must have reached their verdicts quickly.143 Having been guided by the bench, jurors probably knew how they would determine most cases even before they gathered for discussion. They probably also knew which cases remained unclear and had been left largely to their discretion, the judge having given only some indication of his view concerning the range of appropriate results.144

Where the bench believed that the jury had convicted the defendant against the evidence, it might reprieve the defendant and request that the Crown pardon him either freely or upon condition,145 a practice that


141. See Langbein, Prosecuting Crime in the Renaissance, p. 50. Langbein quotes a “charge” that seems to have been in its entirety: “Doe in it as God shall put in your hearts” [The wonderful discoverie of Elizabeth Sawyer a witch . . . written by Henry Goodcole, Minister . . . and her continual Visiter in the Gaole of Newgate (London, 1621)]. See also Smith, De Republica Anglorum, ed. Dewar, p. 114: “[D]oe that which God shall put in your mindes to the discharge of your consciences, and marke well what is saide.”

142. There is some evidence that in this period the jury left the bar and sequestered itself. See STAC 5, A3, no. 30 (“in usual manner did sequester themselves”); Smith, De Republica Anglorum, ed. Dewar, p. 114. See however Cockburn, Introduction, ch. viii, sect. iv, who suggests that juries may have deliberated at the bar.

143. See Cockburn, Introduction, ch. vi, sect. ii.

144. But see Cockburn, Introduction, ch. viii, sect. iv, and ch. ix. Cockburn suggests that juries did not exercise much discretion; resolutions, he believes, were made speedily and largely ratified the views of the bench. For my comments on Cockburn’s conclusions see below, n. 179.

145. See below, nn. 165–67 and accompanying text.
extended even to some state trials.\textsuperscript{146} Most instances of judge-jury disagreement, however, involved perceived acquittals against the facts, and here the bench often confronted the jury head-on, using what pressure it could. Judicial coercion must be kept separate from the judge’s unquestioned right to make his views known to the jury. Coercion involved threat of punishment for not finding as the judge deemed appropriate. At some point, even the physical discomfort involved in being held without refreshment or sleep by a judge who would not accept a verdict amounted to coercion, but it was, of course, its least serious form and the one most difficult to characterize as unlawful.\textsuperscript{147} The judge might examine each juror individually in the hope of breaking his resolve,\textsuperscript{148} but probing the jurors to make certain they were firm in their view and forcing them to consider further and to report again was a standard and accepted part of trials. Threatening to punish, and actually punishing, were of another sort of behavior—one that historians are only now beginning to explore in depth.

We have seen that the early Tudors took steps to punish bribery and extortion at all levels, including such behavior when it touched criminal trial juries. Star Chamber was active in these cases, and, no doubt, this was one part of the Court’s business that made it popular. The use of examinations and witnesses for the prosecution made it easier to monitor such behavior, for the presumption of embracery or perjury was strong in cases where the verdict clearly flew in the face of the evidence. Did the Crown use the theory of true perjury as a makeweight in prosecutions of jurors who were not thought guilty of bribe taking or other “ministerial” wrongdoing but were thought nonetheless to have found against the evidence? Perhaps so. More likely, however, the Crown typically presumed that a finding against the evidence involved bribery or similar wrongdoing and punished the jury accordingly within accepted notions of its duty to enforce the law.

The surviving records of Star Chamber proceedings do not settle all questions regarding the theory upon which that institution punished juries. During the reigns of the first three Tudors, such prosecutions were common enough, but they appear to have been aimed mainly at ministerial wrongdoing.\textsuperscript{149} Thereafter the quantity of Star Chamber prosecutions

\textsuperscript{146} See Elton, \textit{Policy and Police}, p. 303.

\textsuperscript{147} It was a longstanding rule that jurors were not to eat or drink until they rendered their verdict. See e.g. B.L. MS Harl. 1603, fol. 77.

\textsuperscript{148} B.L. MS Add. 25228, fol. 41, pl.850 (1620).

\textsuperscript{149} See e.g. STAC 1, II, no. 121 (perjury); STAC 2, XXIII, no. 114 (perjury); STAC 2, XXIV, no. 199 (perjury). “Perjury” may in fact be the charge when the jurors were thought to have been too merciful. More likely, authorities believed the jurors had gone against their oaths knowingly and for an ill motive. STAC 3, VI, no. 69: the information charged that half
of jurors increased. Although in 1554 the entire common-law bench ruled that it could not on assize fine or imprison jurors, its members occasionally continued to do so as well as to exercise its increasing power to monitor juries by binding them over to Star Chamber, typically for finding "contrary to the evidence," a phrase that had become common by the later decades of the sixteenth century. In many such cases where juries were bound over to Star Chamber or were subsequently summoned to appear there, the informations aver that the jurors acted for personal gain or out of favoritism, or the interrogatories include questions concerning allegations of bribes. A few of them may be interpreted to proceed of the jury were "men corrupted," but this may mean only that they went against the evidence. See also above, n. 24 (regarding punishment for "perjury" of jurors in the Welsh Marches).

150. "Dalison's Reports," B.L. MS Harl. 5141a, fol. 27. The report states that the bench proscribed fining by courts presided over by justices of assize, justices of oyer and terminer, justices of the peace, or justices of gaol delivery. This accords with the view expressed by Hale in the 1660s, when he grudgingly admitted King's Bench's right to fine (or, at least, its immunity to collateral review) because it was a superior court. See below, Chapter 6, text at n. 38.

151. For juries bound over to Star Chamber see below, nn. 152-56. For juries fined (or threatened with fines) by assize judges see Cockburn, History of English Assizes, p. 123. See Cockburn, Introduction, ch. vi, sect. iv. See also Smith, De Repubica Anglorum, ed. Dewar, p. 121. Smith remarked that juries sometimes "not onely be rebuked by the Judges, but also threatned of punishment, and many times commaunded to appeare in the starrechamber, or before the privie counsel! for the matter. But this threatening, chaunceth oftener than the execution thereof, and the [jurors] answere with most gentle wordes, they did according to their consciences, and pray the Judges to be good to them, they did as they thought right, and as they accorded all, and so it passeth away for the most part." Smith may have understated the use of coercion in such cases. [Cockburn ("Trial by the Book?" p. 72) calls it a "pious disclaimer." But see his Introduction, ch. vi, sect. iv, for practice on the Home Circuit after the mid-1570s, and my comments below, n. 179. Herrup's study of early seventeenth-century East Sussex quarter sessions and assizes ("Common Peace"), however, suggests that judicially imposed fines were rare and that Star Chamber was employed primarily where there was suspicion of outright corruption.] Smith noted that he had "seen in [his] time" a jury "for pronouncing one not guiltie of treason contrarie to such evidence as was brought in were not onely imprisoned for a space, but an houge fine set upon their heads, which they were faine to pay." This seems to refer to the punishment of the jury in Throckmorton's Case (see State Trials, 1:901-2 and Bellamy, Tudor Law of Treason, pp. 172-73). Smith concluded: "But those doinges were even then of many accounted verie violent, and tyrannical, and contrarie to the libertie and custome of the realme of England. This cometh verie seldome in use, yet so much at a time the enquest may be corrupted, that the Prince may have cause with justice to punish them: For they are men, and subject to corruption and parcialitie, as others be."

152. E.g. STAC 4, VIII, no. 17. The interrogatories in this case follow a common form used even where, as here, the extant record of the information states only that the jurors found "against pregnant evidence." The questions put to the jurors were designed to determine: how the jurors came to serve; whether they had been chosen by the defendant or by his friends or relatives; whether they had received money; what evidence the jurors
solely upon the theory that the jury wrongly but with good intention took the law into its own hands, or extended mercy where doing so was inappropriate, but typically the charges were much stronger. In most of the cases brought into Star Chamber the jurors actively defended themselves by asserting that they had evidence of their own or that the evidence presented in court seemed to them to be inconclusive. Occasionally some members of a jury claimed that they had been persuaded by their cojurors. By and large the jurors deposed in Star Chamber asserted their right to assess the evidence as they saw it and denied having acted out of corrupt motives.

based their verdict upon. STAC 4, X, no. 31: one of the jurors disclosed after the trial that the other jurors had forced him to go along with an acquittal. He stated that two others had gone along on the belief that the remaining nine "be all bribed and have received money." These allegations led to the entire jury being bound over to Star Chamber. STAC 4, X, no. 32: strong suggestion that Star Chamber was investigating a charge of bribery; STAC 8, II, no. 42: the jurors denied corruption or hope of gain, as alleged; STAC 8, II, no. 46: corruption and subornation alleged in the information; STAC 5, A 34, no. 3: the jurors denied that they had been "laboured" or spoken to on the defendant's behalf.

153. E.g. STAC 4, III, no. 41; STAC 4, III, no. 43: some suggestion that the foreman overbore the others for a corrupt motive; STAC 4, VIII, no. 16: information alleges that the jury "most wilfully, falsely and untruly found . . . not guilty"; STAC 4, VIII, no. 16; STAC 4, X, no. 35; STAC 5, A 3, no. 30.

154. STAC 4, III, no. 41: the jurors were charged with neglect of duty to find according to "pregnant evidence" and for "little dreading the offense of perjury." Most of the jurors said that they were "near neighbors" of the parties and the witnesses and knew "the credit and estimation of every of the same deponents and witnesses, and also some of the said defendants, knowing more of themselves in that matter than was openly given in evidence." STAC 4, X, no. 35: one juror deposed that six of the others "said of their own knowledge they knew that [the defendant] was not at the felony and further said that their own knowledge was as good to them and better than any evidence" given in court. STAC 5, A 51, no. 6: jurors said that the chief witness for the Crown was known to most of them "to be of light behavior and small credit although he was not so known to the judges." See also STAC 5, A 4, no. II.

155. E.g. STAC 4, III, no. 41: the jurors said that "they did according to their oaths, consciences and the truth of the matter justly and truly give their verdict." They said that "all of the evidence given against [the defendant] was only matter of suspicion and presumption, not sufficient in the conscience of the [jurors]. . . . All which matters the said defendants are ready to aver and prove as this honorable court shall award, and [they] pray that they may be dismissed out of this honorable court without any further vexation or trouble." (No result noted.) STAC 5, A 4, no. II: jurors gave a very detailed answer reviewing the large body of testimony given against the defendant (for counterfeiting coin) and explaining why it seemed insufficient for a conviction. See also STAC 5, A 34, no. 3; STAC 5, A 51, no. 6; STAC 5, A 52, no. 34.

156. STAC 4, III, no. 43: Eleven of the jurors stated that the foreman was the only juror who could read and that he convinced them that there was no evidence against the defendant. The foreman said that he believed the defendant to be innocent and admitted to some persuading of the others. STAC 4, VIII, no. 17: Two jurors claimed that although they opposed the others' opinion that the defendant had acted in self-defense they finally gave in. They gave their verdict "against their minds." See also STAC 4, X, no. 35.
It would appear that as common as the binding over of juries to Star Chamber became, the theory upon which such treatment proceeded never entirely detached itself from the traditional notions of jury corruption over which, it was agreed, Star Chamber had jurisdiction. Nearly all of the disputed verdicts were given in trials on indictments for what authorities deemed particularly egregious behavior. From their perspective, the jury was either corrupt, in the sense of acting for personal gain, or wilfully dishonest, in the sense of going against their true beliefs out of contempt for the law. It is significant, for example, that these cases did not raise the kind of issues raised by cases on the border between murder and manslaughter. These issues did emerge by the middle of the seventeenth century, by which time the common-law courts had inherited from Star Chamber the power to monitor verdicts and to fine and imprison jurors who acted wrongfully. By then, surely, the courts no longer always required a theory of ministerial wrongdoing, and the true issue of coercion—as opposed to protecting against foul play—was squarely presented. As we shall see, coercion on such grounds was practiced, but also protested, and never entirely assimilated.

Whatever the theory was upon which jury verdicts were monitored and jurors punished, because of the presumption of ministerial wrongdoing that theory was broad enough to cover virtually any case wherein the bench believed the defendant ought to have been found guilty on the evidence. In practice, then, juries were sometimes "menaced" or even punished, and whether one thinks contemporaries viewed these constraints as prevention of perjury or as coercion of jurors' consciences, they were a part of the criminal process that presumably left its mark both upon the fate of defendants and on contemporaries' understanding of the role of the criminal trial jury.

157. See William Hudson, A Treatise on the Court of Star Chamber, in Francis Hargrave, ed., Collectanea Juridica, 2 vols. (London, 1791–92), vol. 2, p. 72. Hudson addresses the issue of perjury, which he does not define. He asserts that in the Tudor period "there was scarce one Term pretermitted but some grand inquest, or jury was fined for acquitting felons or murderers; in which case lay no attaint." Hudson gives several examples, some of which relate to grand juries, a coroner's inquest jury, persons lying in an affidavit or examination. Six appear to be trial juries: Throckmorton's jury and five others (including the one that acquitted one Hoody, who may be the same Hoody as in STAC 5, A 3, no. 30, above, n. 153). Hudson does not make clear the reasons for the fines. Perjury probably means a conscious lie under oath, and excludes merely foolish (or otherwise) opinions about the evidence. It might include "lying" in order to extend mercy in a case where the jury honestly believes mercy is appropriate, but possibly it was charged only where, on the bench's view of the evidence, the jury was acting out of fear, favoritism, or contempt for the law. See also R. Crompton, Authoritie et Jurisdiction des Courts (London, 1637), fol. 32b.

158. See below, Chapter 6, section II.
The increased duties and activity of the justices of the peace insured that the institution of indictment by true bill would supplant the more ancient system of presentment. The indictment procedure and the preparation necessary to it paved the way for the pretrial examinations and the production of witnesses that were central to early modern prosecutorial practice. In turn, systematic in-court presentation of evidence enhanced the powers of the trial judge, while it diminished the evidence-gathering role of the jury, and thus its powers. The new triangular relationship of prosecution, judge, and jury accompanied the development of substantive legal doctrine, a development that the Tudor adjustment of benefit of clergy helped greatly to stimulate; doctrinal refinement and gradation of offenses eased the tension between judge and jury, though tension remained and occasionally the bench used one technique or another to induce the outcome it desired. But trial by jury had by no means become trial by the bench: older traditions were maintained, depended upon, and further sanctified.

One important measure of the harshness of early modern criminal process is the rate of execution for treason, murder, and felony. Modern historians have recorded their shock at the numbers sent to the gallows, for by eighteenth-century standards, not to mention later ones, the numbers are high. From the perspective of Elizabethan and Jacobean Englishmen, too, these figures may have seemed lamentably high, though the execution scenes themselves were boisterous and revealed a fascination with morbidity that was fueled by the popular chapbooks of the day. Nevertheless, although the numbers of men and women hanged may have been high in absolute terms relative to those executed in the Middle Ages, the percentage of those tried who were found guilty of capital crimes and condemned was no higher than it had been for the three preceding centuries, and the percentage of accuseds actually hanged was substantially lower.

162. Cockburn, *History of English Assizes*, pp. 128–31. Cockburn estimates that “only about ten per cent of those convicted were actually executed.” He apparently is including many who were convicted of a noncapital offense by virtue of jury leniency as well as those convicted of a capital offense and subsequently favored by Crown or bench. His figure, then, does not include those indicted for a capital offense who were ultimately acquitted. The
Some of the means used to avoid carrying out sentences of death were in the hands of the bench or Crown. Here, too, the transformation of procedure played a role. The Crown now embarked on the large-scale posttrial system of pardon and commutation that was to dominate the administration of the criminal law well into the nineteenth century. To be sure, reasons of state—rewarding the turning of state evidence, obtaining fit and able military conscripts—accompanied the application of emerging penological ideas and the influences of post-Reformation religious thought.163 But pretrial depositions as well as posttrial petitions rationalized selection of those to be saved. In this regard, the flow of evidence at trial was of particular importance where the bench reprieved offenders it believed had been convicted against the evidence.164 Some of the off-

percentage of medieval accuseds hanged was 20–30. See above, Chapter I, n. 79. See also Herrup, “Law and Morality in Seventeenth-Century England,” nn. 1, 9.

163. The problem of postconviction mitigation of the law of sanctions in the eighteenth century is treated below, Chapter 7. The beginnings of this development have received relatively little attention in the literature on the history of the criminal law. See Cockburn, History of English Assizes, pp. 128–31; Cockburn, “Trial by the Book?” p. 75. See Cockburn, Introduction, ch. ix, sect. vi. Pardons granted at the request of justices of assize cited a variety of reasons for clemency. As a group, they are not markedly different in this respect from the many more such pardons granted in the eighteenth century. See e.g. C 66/1329, mm.25–26 (July 2, 1584): (infanticide) on the information of the Mayor and J. P. and on the plea of mercy from the jury; C 66/1256, m.32 (March 22, 1585): (clipping coin) in consideration of convict's confession of the crime, his informing against an accomplice, and the trivial extent of the offense; C 66/1388, m.27 (May 27, 1592): (housebreaking) a young man led astray by comrades, able to do good service, and his first offense; C 66/1426, mm.20–21 (July 14, 1594): (treasonable words) that she was pregnant at the time and in compassion for the frailty of her mind; C 66/1413, mm.11–12 (May 24, 1596): (burglary) truly sorry for his offenses, has revealed many criminals, some of whom have threatened him with death or robbed him of his goods; C 66/1591, m.22 (Nov. 14, 1602): (highway robbery) acted on the instigation of an accuser and also he is young and it is his first offense.

164. Smith provides insight into reprieve on grounds of an unsafe verdict (De Republica Anglorum, ed. Dewar, p. 120): "If the enquest of xii men do seeme to the Judges and the Justices to have gon too violently against the evidence given in matters criminall, either it is that upon slender evidence they have pronounced him gilty, whom the judges and most part of the Justices thinkes by the evidence not fullie prooved guiltie, or for some other cause, do thinke the person rather worthie to live than to die. The enquest is nevertheless dismissed: but when the Judges should pronounce the sentence of death . . . he [sic] will differ it, which is called to reprise the prisoner (that is to say to send him againe to prison) and so declare the matter to the Prince, and obtaineth after a time for the prisoner his pardon: for as for provocation and appeale which is used so much in other countries, it hath no place in England, after sentence given by the xii."

The bench might also seize upon technical error in the indictment (so that the defendant might move to quash the indictment) where it believed the verdict unsafe or the punishment too harsh. See Baker, ed., Reports of Sir John Spelman, 2:301.
fenders who were reprieved were conscripted into the military,\textsuperscript{165} transported overseas,\textsuperscript{166} or unconditionally pardoned\textsuperscript{167} after sentence had been pronounced. More were never sentenced at all but were allowed clergy despite their ineligibility or their failure to read, or were allowed claim of pregnancy although they were not in fact pregnant, or had not been at the time of their conviction.\textsuperscript{168} In these latter cases, too, the defendant’s fate was in the hands of the bench, although it is possible that the jury that convicted had reason to anticipate such merciful treatment. Leaving aside all such instances of postconviction escape from the gallows, the percentage of accuseds the jury had reason to believe it was condemning to death was little if at all higher than in the Middle Ages. It is, then, fair to ask whether very much had changed with regard to the balance of power between judge and jury.

Indeed, there had been change. By redefining the scope of capital felony, the Crown turned a significant percentage of the cases involving concealed verdicts \textit{against} the law into lawful verdicts of clergyable felony or simple misdemeanor. These verdicts had the imprimatur of the bench; juries in these cases were now finding fact in accordance with the accepted view of their role. Moreover, in some cases where the jury left to its own devices might have found a clergyable offense, the bench induced, even directed, a verdict of capital felony. And probably in many cases in which the defendant received merciful treatment, it was the bench, not the jury, that made the decision to mitigate the law. This was obviously so where reprieve or pardon followed conviction; it was arguably so where the jury extended mercy on the recommendation of the bench, a matter to which we shall turn in due course.


\textsuperscript{167} See class C 66 \textit{passim}. See Cockburn, \textit{Introduction}, ch. ix, sect. ii.

\textsuperscript{168} Cockburn, \textit{History of English Assizes}, pp. 128–29. The bench might, on the other hand, apply the literacy test strictly. See Baker, \textit{"Criminal Justice at Newgate"}, p. 315, where the Recorder (H.L.S. MS 112, p. 297) doubted that a convicted felon who read "distinctly and well" could in fact read. Believing the defendant had memorized the usual lines, the Recorder assigned the defendant another passage. [The defendant read the new passage with ease; the reporter "doubted whether (the defendant) ought to be put to read again." Had the "\textit{Quod legit ut clericus}" been entered on the record, the reporter stated, "clearly . . . (the defendant) ought not then to have had another (passage) assigned him." ] On judicial treatment of convicted women who claimed pregnancy see Cockburn, \textit{Introduction}, ch. xi, sect. iii. As Cockburn points out, the bench often exercised leniency in such cases. According to Cockburn’s figures [\textit{Ibid.}, ch. xi, sect. vi (table II)], about 15 percent of indicted persons were female; about 40 percent of indicted females were convicted; of those, about one third successfully claimed pregnancy. See also Herrup, \textit{"Common Peace"}, ch. 5, for similar indictment and conviction figures.
In sum, the Tudor transformation of criminal procedure combined several interrelated factors that greatly increased judicial control over the exercise of discretion. In a sense, the Crown and bench had turned their weakness into a strength. Unable to impose rules of law greatly at variance with widespread social attitudes, authorities modified the substantive law, implicitly recognizing the power of those attitudes and dramatically reducing the field of disputed cases. Resolution of these cases was kept largely in governmental hands: making use of the tools of pretrial examinations and witnesses for the prosecution, the bench monitored verdicts, employed blunt threats, and, where necessary, called upon the support of Star Chamber process. Having secured convictions in apparent conformity to the rules of law, the bench made a show of its beneficence through relieving the rigors of these very rules in selected cases.

There were, of course, limits to the Tudor and early Stuart revolution in criminal trial procedure. Even in state trials, where acquittals were relatively rare,\textsuperscript{169} some juries stood firm although the evidence against the accused was strong enough to produce a close case.\textsuperscript{170} In routine felony trials juries held out more frequently in the face of pressure from the bench.\textsuperscript{171} Jury finality regarding the facts put in evidence was by no means completely overthrown; not only did it remain a matter of daily practice but, given the narrowness of the government's most commonly stated rationale for the punishment of juries, it retained vitality at the level of legal theory.\textsuperscript{172} Finally, and most important, the relative strength or weakness of the government was reflected in the scope of the cases it chose—or dared—to dispute.

For a variety of reasons, the government often chose to work with and not against juries in order to achieve its central aims. The administration of the criminal law had made important strides forward with regard to determining the outcome of significant cases, but those cases were still a very small percentage of the total number of criminal offenses. Much crime went unreported, or unprosecuted;\textsuperscript{173} evidence in routine cases


\textsuperscript{170} Bellamy, \textit{Tudor Law of Treason}, p. 181.

\textsuperscript{171} Cockburn, ""Trial by the Book?"" p. 73 (by implication; see above, n. 109). Cockburn (Introduction, ch. vi, sect. iv) argues that after the mid-1570s the jury was very passive, as evidenced by, inter alia, the absence of Home Circuit bindings over to Star Chamber. See my comments below, n. 179.

\textsuperscript{172} See also below, n. 179.

\textsuperscript{173} Cockburn, ""Nature and Incidence of Crime,"" pp. 50-51. Cockburn cites the ""not implausible"" estimate of a contemporary magistrate, Edward Hext, that 80 percent of all criminals evaded trial. See Cockburn, \textit{Introduction}, ch. viii, sect. i. See also Bruce Lenman and Geoffrey Parker, ""The State, the Community and the Criminal Law in Early Modern
often was hard to obtain; and only so many juries could be brought under control. The machinery of detection and prosecution simply failed to hold its own. Moreover, so many offenders had been statutorily precluded from pleading benefit of clergy that in property crimes especially the rules of law and social attitudes remained apart.\(^{174}\) The number of cases in which jury and bench were bound to clash was once again on the rise. At the same time, by the late sixteenth century the continued increase in criminal activity had reached what authorities thought were crisis levels. This may have increased the interest of society in prosecution, conviction, and punishment, but only to a point: the severity of the law of sanctions and perhaps also a growing sense that much property crime was less the product of inherent evil than the result of the economic troubles of the day\(^{175}\) undermined the effectiveness of law enforcement at all stages.

Then as now authorities lacked a coherent strategy for dealing with serious criminal behavior. Rather, they responded in several contradictory ways. On the one hand, authorities apparently experimented with a form of "plea bargaining," reducing charges from nonclergyable to clergyable (or to petty larceny) in return for guilty pleas. In so doing, the bench implicitly conceded that it could not ensure a guilty verdict at the capital level or even count on a given jury to convict of minor theft or of manslaughter rather than acquit the defendant altogether.\(^{176}\) On the other hand, the bench urged—even coerced—juries to convict defendants in order to set an example. In still other cases, the bench encouraged juries to undervalue goods and convict the defendant of a clergyable offense,
either to avoid the possibility of a full acquittal against the evidence or, out of compassion, to do rough justice in cases where the punishment would otherwise have appeared disproportionate to the culpability of the offender. Inevitably, especially in close cases, the bench had either to fight with juries or to adopt their standards of justice and, having thus stamped most resolutions as in accordance with judicial will, to allow juries some leeway in reaching their verdict. 177 There was a cost in this: the failure to contest the verdicts of merely merciful juries, seen alongside the determined attempt to overturn verdicts authorities viewed as corrupt and truly damaging, must have reinforced society’s sense that jury insistence upon the former kind of verdict was appropriate. The bench strove, of course, to retain its substantial degree of control over such discretion. By recommending merciful acquittals or partial verdicts, the bench attempted to maintain the notion that the discretion to mitigate the law lay with it and not with the jury. But not all could have been really deceived. It was in fact a shared power, and the age-old view that a shared power was integral to the very right to trial by peers survived the legal transformations of the sixteenth and early seventeenth centuries. 178

Two important additional factors guaranteed the survival of the tradition of the jury’s right to exercise discretion. The fact that the trial remained oral and personal reinforced the popular conception that the trial was as much an assessment of just deserts as it was a search for the truth in the case at hand. This was not, of course, the way in which authorities viewed the matter. The oral and personal trial was also consistent with the view that the jury was bound to find the facts and nothing else. It represented both the concession of a fundamental right to have the truth of accusations tested under the most grueling circumstances and the potentially contradictory notion that the accused could not be shielded by another personality from the heat of the contest. Nevertheless, so long as the sanction for felony remained so severe, and so long as it applied at least in theory to so large a field of cases, the very nature of the trial was bound to be seen as related to the concept of merciful verdicts.

Moreover, the development of the substantive law of homicide at once reduced the number of disputed cases and provided cover for jury discretion in some of those cases in which the jury was inclined to go its

177. I deal with this point more generally, below, Chapter 7, section IV.
178. Some contemporaries may have exaggerated the barbarousness of English law, because, as Baker points out (Reports of Sir John Spelman, 2:299, 300), of their understatement of the “extent to which sanctuary, abjuration, clergy and the jury system itself, saved lesser felons from the gallows.” But it is likely that society at large, though it may have viewed the law of sanctions, and occasionally its application, as “barbarous,” understood the extent of mitigation of the law in practice.
own way. The question of life or death more than ever depended upon a subtle assessment of intent, and that assessment had to be made retrospectively by way of inferences drawn from the defendant’s present assertions and demeanor.

The survival of the right to grant merciful verdicts did not, in logic, imply the survival of the power to find the law. This power had never had a grounding in theory; the medieval jury’s de facto power to find law had always been founded on the realities of process. The age of nearly unlimited jury control of evidence was passing; the age of the law and of the bench was commencing. The conflict between judicial and social concepts of liability remained, to be played out perhaps less often but far more visibly in the courtroom relationship between judge and jury. Whether the jury would return a verdict clearly at odds with the evidence set forth by the prosecution, in the face of judicial charge and threat of punishment, was now the question upon which control of the legal process depended. The right of the jury to do so had now to be invented and given a place in political and constitutional theory.179

179. How far the balance of power had in fact shifted from jury to judge—leaving aside, for a moment, the question of society’s perception of the matter—remains unclear. Marshaling evidence regarding several related points of procedure, Cockburn (Introduction, ch. x) draws the inference that on the Home Circuit after the mid-1570s the jury was virtually a passive body. I do not find the arguments for such a view of the jury entirely persuasive even for the Home Circuit. (Cockburn concedes that his conclusion might not apply to other circuits.) I shall summarize and comment upon Cockburn’s main points.

Cockburn notes that the increase in the number of indictments in the latter half of Elizabeth’s reign led the bench to experiment with plea bargaining, thereby removing many cases from the jury. To speed up trial procedure and to reduce the total number of jurors required to hear cases, judges increased the number of cases that a single jury heard before retiring. Each case, Cockburn concludes, must have proceeded rapidly, given the number of cases tried in the few days during which the bench sat; the relatively inexperienced jurors (most sat at only one assize) cannot have found it easy to keep each case separate or to recall much more than the judge’s opinion as to the appropriate outcome. Few cases (5–10 percent) resulted in partial verdicts, which suggests relatively little recourse to discretion on the part of the jury. After 1575, there is little evidence of judicial punishment of jurors, which again is suggestive of the degree to which the jury did as the bench bade it to do.

The overall trend seems clear, and in the main we are in accord on the point that the bench exercised very substantial control. Certainly this seems to have been the case at Home Circuit assizes. But judicial control had its limits; and even when it was dominant, it did not preclude some significant degree of jury-based mitigation. I have dealt in my own essay with some of the factors to which Cockburn points, but have not drawn from them the same inference with regard to the role of the jury.

I think it particularly important that redrafted indictments and plea bargains siphoned off a large number of cases in which the jury might otherwise have exercised discretion, though it seems to me that this suggests not only that judges sought to expedite process but also that they entertained doubts about their ability to obtain a capital conviction in such cases. At any rate, this hardly accounts for the great majority of cases; and Cockburn himself shows that much mitigation was postconviction, by virtue of judicial intervention. Thus not all
cases where mercy was thought appropriate had been dealt with before they went to the jury. We cannot assume, therefore, that the jury did not have the opportunity to extend mercy; more likely (as Cockburn would agree), the jury substantially reduced the number of cases that the bench would otherwise have dealt with through posttrial reprieve and recommendation for pardon. The question remains, Did the jury do so solely on judicial mandate?

Multiple arraignments must have made it somewhat more difficult for jurors to keep individual cases in mind. But jurors would not have found it beyond them to recall the one or two (if that many) of the six or so defendants arraigned for whom they independently concluded that death was too harsh a sanction. As Cockburn establishes, ten to twenty cases per day meant that each case averaged no more than half an hour, and many cases took no more than fifteen or twenty minutes. But jurors (on Cockburn's evidence) did not deliberate after each case. Rather, they deliberated toward the end of a two-or-three-hour period of testimony. For all we know, many cases took a mere ten minutes and the total time for deliberation was that much longer. For the few "difficult" cases there may well have been ample time. It is premature to conclude that jurors, who typically sat only at one assize session, were too inexperienced to reach decisions on their own: they may well have sat previously at quarter sessions or on any of the many other kinds of juries of the day. Doubtless, service before royal judges was more awe-inspiring and induced an unusual degree of timidness. Cockburn's findings concerning frequent resort to mere bystanders and the apparent institution of professional jurors are in this regard of great importance. It is not clear, however, that these corruptions rendered jurors "passive" in all, or even most cases. Judicial attitudes probably deterred acquittals in egregious cases and ensured them where the offense was slight: as I have argued, changes in the law and the use of benefit of clergy had brought judge and jury closer together. But judicial attitudes had probably changed in other ways, too, perhaps also because of the press of business. We cannot be certain that the bench cared very deeply about the ultimate resolution of all those close cases that had not already been resolved through bargain. It is true that there were relatively few partial verdicts on the Home Circuit, but there were many acquittals. Why should not these stand as some evidence of jury-based discretion? Many acquittals followed a pattern that suggests that the quantum of evidence was not the sole determinant. It is, of course, possible that the bench told juries to acquit women or persons who stole one kind of object rather than another; more likely, however, juries were themselves inclined to do so, and where the offense did not seem particularly serious, or definitively proven, the bench did not attempt to dissuade them.

It is not even clear that in the more serious cases the bench always had its way. Cockburn (Introduction, ch. ix, sect. i) states that "forty two percent of those tried for non-clergyable highway robbery were acquitted." This was a relatively serious offense, and Cockburn cites the acquittal rates as dramatic evidence of the reluctance to send offenders to the gallows. But whose reluctance? Can all these acquittals really have been mandated by the bench? Moreover, there were cases, Cockburn states (idem), where, because "attempts to influence the jury were time consuming," judges "simply ignored the jury verdict and ordered the punishment of prisoners whose delinquency was, presumably, notorious or had been demonstrated to the judge's satisfaction by the evidence. Despite acquittal, such men might be whipped [or] imprisoned." This in itself suggests a certain degree of jury independence, and it reveals the effects on the bench of the all-important constraints of time. Juries in such cases might have been frustrated in their desire to acquit, but not in their desire to prevent execution. They might in fact have been well satisfied with the "compromise" punishments that were inflicted.
In some other, perhaps less serious cases, jury resolution probably went on as before, at least in the popular imagination. Surely the bench often recommended a specific verdict, but it was still the jury that actually rendered that verdict. In form, certainly, the jury undertook the exercise of discretion. Often it did so in substance as well, in a certain sense: i.e., if we ask, not merely whether the bench gave orders, but whether jurors thought of themselves as sharing in the decisions they were rendering. For even when judges were dominating juries, they were often using them to register verdicts that departed from the letter of the law and accorded with widely held social attitudes; and, from the point of view of the bench, so much the better if the jury genuinely favored the result. To be sure, Cockburn’s important work suggests we must proceed with great caution. Nonetheless, I believe it remains a fair conclusion that, amid all the abuses, shortcuts, and cynicism, from the perspectives both of jurors and of the observing community, the exercise of jury-based discretion remained a part of the doing of justice, even at Home Circuit assizes. Surely this could have been the case on other circuits. As Cockburn points out (*Introduction*, ch. ix. sect. i), partial verdicts appear to have been common at London and Middlesex trials, and the struggle between bench and jury reflected in punishments at the bar or in Star Chamber continued in still other parts of England, long after Home Circuit justices had, for whatever reason, abandoned the practice of formally disciplining jurors.