The principle of noncoercion of jurors was established in 1671 in Bushel's Case. Chief Justice Vaughan's opinion is now famous: a judge may not punish or threaten to punish jurors for their verdict. Historians, however, have not always agreed about either the basis for, or the meaning of, Vaughan's opinion. What right did Vaughan intend to affirm? On which tradition of jury right did he draw? And which tradition did his opinion further? To answer these questions, we shall turn first to the background of Bushel's Case, then to Vaughan's opinion, and, finally, to the interpretation that some contemporaries put upon that opinion. We shall be tracing the development of the true law-finding, or nullifying, tradition. As we shall see, this tradition, to which Lilburne's 1653 trial had pointed the way, evolved almost accidentally out of different but related aspects of the administration of the criminal law. Its relationship to the older tradition of merciful application of the law in common-run felonies was complex. The two law-finding traditions developed partly in tandem, partly separately, each being pushed forward in a kind of chain reaction of events. Although the true law-finding view was a dissident position, it gained support on the eve of the Glorious Revolution from an important segment of the political establishment. After 1689 Englishmen were left to draw different conclusions about the legitimacy of the tradition, about its relationship to merciful application of the law in routine cases, and about its place in the evolving English constitution.

Section I of this chapter deals with the Quaker trials of the 1660s. Some Quakers argued for a jury law-finding power like that urged by Lilburne at his 1653 trial. While their arguments fell short of the most radical Leveller notion of law-finding, they went well beyond the conventional and, for the most part, accepted notion of jury-based application of law. Other writers, however, conceived of the jury verdicts in the Quaker cases simply as findings of fact. For them, judicial berating and fining of jurors was an invasion of what everyone agreed was a fundamental aspect of the trial jury's role. Their concern about the behavior of some members of the bench was complemented by the concern of some parliamentarians and lawyers about judicial badgering of jurors in common-run felonies. This

concern was manifested when the House of Commons censured Chief Justice Kelyng, whose rough treatment of juries—mainly in homicide cases—seemed to deny their traditional power of mitigation. I shall consider this problem in section II.

The most famous of the Restoration Quaker trials, the prosecution of William Penn and William Mead, produced a tract literature in which the various strands of jury argument that had been developing since Lilburne's day converged. In section III I shall examine the trial and the defendants' claims, both as to law-finding and fact-finding and as to the fining of jurors for their verdicts in criminal cases. Against that background section IV considers Chief Justice Vaughan's opinion in Bushel's Case. Vaughan, active in the parliamentary censure of Kelyng three years before, chose to view the case solely in terms of the jury's age-old right to find fact. He argued from that indisputable right to the conclusion that the judge was never in a position to say with certainty that a jury had found against either law or fact.

If Vaughan provided a lasting rationale for the jury's freedom from coercion, he did not lay to rest the debate over the jury. His opinion failed to confront the law-finding issues of the day and was thus vulnerable to appropriation by those who favored jury law-finding, especially by those who opposed the later Stuarts' treatment of defendants and juries in treason and sedition cases. The tracts and issues of the late 1680s are the subjects of the concluding section, V.

The principle of noncoercion by no means crippled the bench, nor even greatly affected the daily administration of the criminal law. Many institutional devices remained by which the bench could, if it chose, influence the verdict of all but an intransigent jury. In most routine cases, moreover, judge and jury agreed on standards of just application of the law. As we shall see in Part III, although the administration of the criminal law in the eighteenth century created even greater judicial dependence than before upon jury mitigation of the law of sanctions, the fact that the bench had lost the ultimate means of coercion scarcely affected the processing of routine felony cases. In political cases, however, where from the government's point of view something more was at stake, the principle of noncoercion represented a roadblock for authorities. The bench's approach to the allocation of judicial and jury duties in the law of seditious libel may have reflected the government's frustration with the principle of noncoercion. This problem, which is introduced in section V, is also properly the subject of Part III.
I

Bushel's Case brought to an end the legal proceedings that began with the arrest and indictment of William Penn and William Mead. In the course of his trial, Penn, a leading Quaker preacher, requested that the court read his indictment to the jury, so that the jurors might "measure the truth of the indictment"; almost certainly, Bushel, and the three other jurors who insisted that Penn had been guilty of "preaching only" and refused to convict him for unlawful assembly and disturbance of the peace, believed the indictment to be defective. They did not doubt the truth of the facts alleged; that Penn preached, that a crowd formed, and that a tumult resulted was certain. What these jurors doubted, however, was that those facts amounted to the commission of the crime of taking part in "an unlawful assembly" or of causing a "disturbance of the peace" by a person who peacefully preached religious doctrine. In acquitting Penn and in thereby implicitly rejecting the theory underlying the indictment, Penn's jurors were responding not only to Penn's entreaties but also to those of Quaker writers since the early 1660s. Thus, the refusal of Bushel and the others to accept the official legal theory underlying the indictment did not mark the emergence of a new theory of jury nullification. Indeed, by 1670 the argument that the petty jury had a duty to scrutinize both the law and the indictment upon which the prosecution was based had attained widespread currency.

Restoration persecution of the Quakers began with the 1662 Quaker Act and reached its height in 1664, the year in which Parliament passed the Conventicles Act, which made most nonconformist religious meetings unlawful. The Conventicles Act, part of the "Clarendon Code," played a significant role in the enforcement of Anglicanism during the first decade of the restored Stuart monarchy. By the terms of the Act, which elaborated upon the Act of 1662, those convicted of meeting in groups of five or more persons under pretense of religion, but not according to the forms of the Anglican Church, were to be imprisoned for three months unless they paid a fine of five pounds. For conviction on a second offense the penalty was more onerous, and those convicted of the third offense would suffer seven years' transportation or a fine of 100 pounds.

2. State Trials, 6:951 (1770). See below, sections III and IV.
3. Ibid., col. 958.
5. Stat. 16 Chas. 2, c. 4 (1664).
7. Stat. 16 Chas. 2, c. 4, sects. 1–3, 5.
The Act to prevent and suppress seditious conventicles was literally interpreted by the Stuart bench. The Act's preamble declared that Parliament sought to suppress *seditious* conventicles, but the body of the Act proscribed meetings, "under pretence or colour of religion" without repeating the adjective "seditious." The bench concluded that the jury must convict if there was manifest proof that the defendant had taken part in what appeared to be such a meeting, unless the defendant showed either that the meeting was not under pretense of religion or that it was not nonconformist. Conviction did not require proof of seditious purpose. That, the bench ruled, was presumed by law.8

The trials of Quakers in 1664 under the Act occasioned the first major campaign in print since Lilburne's day regarding the powers of the criminal trial jury. A considerable number of Quaker tracts described the sect's travails before the law and exhorted prospective jurymen to apply the Conventicles Act "lawfully"—by which was meant to require proof of sedition.9 The Quakers established an effective program of legal education within their own ranks and perhaps also persuaded many non-Quaker jurors to the Quaker view of the statute's meaning.10 The Quakers' position, as it unfolded over the course of a year, mixed moderate and radical claims regarding the jury's role in the application of the Conventicles Act.

The most substantial analysis and discussion of the Conventicles Act was embodied in *The Jury-man charged*, which was published late in

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10. Most Quakers were convicted, but many jurors resisted finding the defendants guilty until pressed to do so by the bench. See below, n. 17. It is evident that some jurors did not believe Quakers ought to be punished for their worship, which they did not believe had been proved seditious (or even against the true liturgy). It is difficult to determine whether they believed the statute did not reach Quaker worship or believed that although it did, it ought not to be enforced. For cases in which Quakers were acquitted, see Alfred W. Braithwaite, "Early Friends' Experience with Juries," *Journal of the Friends' Historical Society*, vol. 50 (1962–64), pp. 217–27.
1664. The tract was in part a commentary upon proceedings at the Hertford summer assizes, perhaps the most significant episode in the Quaker trials under the 1664 Act. Like most of the Quaker tracts on the subject, *The Jury-man charged* argued that the Act had been incorrectly applied by the Stuart bench:

> [T]he intention of the Parliament is manifest from the title and preface of the Act: the title, *an Act to prevent and suppress seditious conventicles*: but what sedition in worshiping God erroneously? The preface, for remedy against seditious sectaries and other disloyal persons, who under pretence of tender consciences, do at their meetings contrive insurrections, etc. . . .

Thus, the author concluded, Parliament sought to punish those who only pretended to take part in religious exercise, but who in fact used their meetings to further their seditious ends. Echoing Lilburne's 1653 defense, the author asserted that the very nature of the punishment—banishment for seven years—indicated that this was what Parliament had in mind: "[F]ar be it from us to think so unworthily of an English Parliament" that it would impose a "horrid banishment" for religious practice according to an imagined "erroneous persuasion, . . . for in all just laws the penalty is not greater than the nature of the fault requires." 11

Finally, the author of *The Jury-man charged* criticized the bench's attempt to make guilt or innocence turn mainly on the question of presence at a religious exercise "in other manner than is allowed by the liturgy or practice of the Church of England." 13 How were witnesses to know whether the exercise was allowed or not? The bench's interpretation supposed either that witnesses were authorities on matters of religion, or that witnesses would simply describe what they had seen and the bench would inform the jury whether these practices were allowed. The former notion was unrealistic; the latter course was totally unacceptable:

> But will this satisfie you sir? Can you take a passionate and testy judge's word as your infallible director in so many most difficult controversies as must in this case be decided? Will you pin your faith upon the judge's sleeve in matters of religion (of which perhaps he knows no more than he can find in the statute book)?" 14

Must not the conscientious juror, if the question resolves itself to this point, look to the Scripture rather than take his rule from the judge? The

13. Ibid., p. 7.
question at most of the hundreds of Quaker trials in the mid-1660s did not resolve itself into this point, at least not overtly. Nevertheless, the appeal to the jurors' understanding of the true religion, of the unity of sincere worship, was a constant theme in the tracts, as one defense against the strict judicial interpretation of the Act.

As The Jury-man charged suggests, there were two aspects of the judicial interpretation of the Conventicles Act that Quakers opposed both in their writings and at the trials: that proof of a meeting under color of religion and contrary to the allowed liturgy sufficed for conviction; and that proof of mere presence at a Quaker meeting cast upon the defendant the burden of proving either that the meeting had not been for religious worship, or that the worship had been according to the Anglican form. Typically at the trials, there was little testimony about what had transpired at an alleged meeting; since the meetings were held in silence, the witness could testify to the defendant's presence but little more. Their religious nature had to be inferred, and the bench frequently pressed witnesses in vain for evidence that the meeting involved prayers. 15 If the jury believed that the meeting was under color of religion, evidence that Anglican prayers had not been said aloud was held to be sufficient proof. As Orlando Bridgeman, who presided at the Hertford summer assizes, instructed the jury:

[You] are not to expect a plain, punctual evidence . . . for [Quakers] may speak to one another though not by or with auricular sound, but by a cast of the eye, or a motion of the head or foot. . . . [I]f you find, or believe in your hearts that they were in the meeting, under colour of religion in their way, though they sat still only, and looked upon each other, seeing they cannot say what they did there: it was an unlawful meeting. 16

Bridgeman's instructions became the model for most judges during the ensuing months, as proof of presence at a Quaker meeting came to suffice for conviction under the 1664 Act.

Juries, then, if they were not to follow the lead of the bench (although most of them did), 17 naturally took their lead from the defendant. On occasion defendants put to the task of showing that they had not been

15. E.g. The Cry of the Innocent, pp. 19 et seq.
17. E.g. Another Cry . . . or a Third Relation, p. 14: The jury first returned a verdict of "guilty of meeting," but subsequently, apparently under some pressure, changed their verdict to "guilty." Another Cry . . . or, A Second Relation, p. 14: At first eleven of twelve were found guilty but doubt was expressed about the twelfth, then the twelfth was convicted. The trial accounts were written by Quakers and may overstate the juries' original reluctance to convict.
engaged in religious exercise remained silent, but many invited the inference that they had met to worship God. If the defendant admitted presence but not worship, the jury might acquit on insufficiency of proof of contrary religious practices. If the defendant admitted presence and worship, but denied seditiousness, his jury—if it sought to avoid finding him guilty—found that there had been a meeting and worship, but that the defendant had not broken any "true law." Thus it was that the tracts implored jurors to reject the judge’s view of the statute—to find law insofar as that involved finding the true meaning of the statute. As this exhortation was repeated during the fall and winter of 1664–65, more and more defendants admitted to having been present at religious meetings—i.e., they took their stand on what they asserted was the "true law." Frequently, Quaker appeals to jurors to find law as well as fact were only implicit: they were couched in the claim regarding the jurors’ duty to apply what the tract writer took to be the true meaning of the statute. Indeed, these writers appear to have conceived of the jurors’ duty as one of mere fact-finding. Sometimes the writers challenged the judges’ ruling that mere presence at a Quaker meeting sufficed for a guilty verdict, asking prospective jurors to find that worship had not been proved. Or they beseeched jurors to find that there had not been proof of seditious activity—again a finding of fact. For a jury to find these facts, of course, it had first to reject the bench’s ruling as to the question of what facts were to be found. But recognition of this level of law-finding often remained submerged. For instance, Another Cry of the Innocent and Oppressed, for the most part a description of the Old Bailey

18. E.g. Smith, A Second Relation from Hertford, pp. 1 et seq.; Another Cry . . . or, A Second Relation, p. 14 (first defendant remained silent; second defendant was not given an opportunity to answer; third defendant denied being at a "seditious meeting or conven­ticle"; fourth defendant asserted that "there is nothing proved that the meeting I was at, is unlawful"; fifth defendant: "I was at no unlawful meeting"); sixth defendant admitted meeting “amongst the dear children of the Lord”).

19. Joseph Besse, A Collection of the Sufferings of . . . Quakers, from . . . [1650 to 1689], 2 vols. (London, 1753), vol. I, p. 401. The jury in the case Besse epitomizes brought in a verdict of "guilty of meeting, but not of fact." The jurors said there was no evidence concerning what was done at the meeting, but when asked whether they believed "in their consciences, that [the defendants] were there under colour and pretense of worship," two replied that they did, but the worship was "in truth." One of them said: "[I]f any man in the world worship God in the spirit, he doth not worship contrary to the liturgy." [Several jurors, presumably including these two were bound over to King’s Bench "for their misdemeanor" (Besse’s phrase).]


21. E.g. Another Cry . . . or, a Second Relation, p. 17.


Quaker trials before Justices Robert Hyde and John Kelyng in December, 1664, appealed to jurymen "to consult the law itself, which declares what the fact is," and not to rely on the judge's statement of what the law declares the facts to be. Nevertheless, Another Cry describes this aspect of the jurors' role as resulting from their duty as "sole and absolute judges of matter of fact."25

The furthest reaching articulation of the Quaker position was set forth in the closing pages of Some Clear Truths, a tract written by William Smith in the fall of 1664.26 In the "Postscript to all Honest, Sober and Impartial Jurors," Smith asked his readers to consider, when hearing a case, "whether it be properly and truly law that [the defendant] is tried by"; and "whether the thing done be really an offense against the law."27 Law was based, Smith said (echoing early Leveller writings), on "mercy, justice and equity."28 An interpretation that does not meet this standard does not "unite with the body of the law," and thus such a law is void.29 The Conventicles Act will "unite" only if it is interpreted to require evidence of true seditiousness; jurors who convict on less evidence would wrongfully condemn the defendant.30 In asking prospective jurors to judge the law as stated by the bench in the light of general principles of justice, Smith went beyond The Jury-man charged, and beyond nearly all of the other significant tracts, which advised jurors to take the "intended meaning" of the Act not from general principles, as such, but from the wording of its preamble (which was particularly to be understood in the light of the recent history of armed insurrection). Some Clear Truths was one of the most radical of the Quaker writings, but in its very broad implications for jury law-finding and in its explicit invocation of the jury's duty generally to measure indictments against "true law," it remained an anomaly.

Thus, for the most part, the Quakers' appeal to jurors was narrow. The Quaker writers made no assertion regarding the general duty of juries to state the law for the community; certainly there is little indication that they conceived of the English criminal law as merely a modern edition of the Scriptures. While they implicitly carried forward Lilburne's appeal not to find the defendant guilty of what they believed to be "void law,"

27. Ibid., p. II.
28. Ibid., p. 7.
29. Ibid., p. 12. See also p. 8: "And it is very clear and plain, that if there be no wrong-doers, as the object of the law, that then the law in itself is silent, as having nothing to operate upon that offends it."
30. Ibid., p. 12.
they assumed the validity of the statute in question in order to address instead the issue of its "true" meaning. Nonetheless, the Quakers believed that no juror in good conscience could convict a person who worshipped God according to the "true religion." For the "conscientious Quaker," no statute that proscribed this form of worship—should Parliament ever create such a statute—could be valid. For the authority that constituted the ultimate legal command imposed the ultimate claim upon a man's conscience.

Thus, by the time Penn's case came to trial, the groundwork for his appeal to the jury had been thoroughly prepared. Ultimately, Penn would draw upon the example of John Lilburne. Yet the image of that figure of earlier, more tumultuous times had been perpetuated, albeit in a slightly different form, by the Quaker writers of the mid-1660s. Their calls to jurors to consider the "true law," although couched as appeals to jurors' consciences, were modest in their implicit acceptance of traditional common-law guideposts. The force of the Quakers' exhortations, however, was heightened by the special context in which they were raised, for theirs was an argument mainly against persecution of peaceful spiritual activity. The circumstances that gave rise to Penn's prosecution were similar but at least one step removed. The charge against Penn was not that a certain form of religious preaching or meeting was unlawful per se but rather that his actions amounted, under the circumstances, to causing an unlawful assembly and a disturbance of the peace. In *Penn's Case* the question of what circumstances were in fact involved was as complex and doubtful as the question of whether such circumstances amounted, in law, to a disturbance of the peace. This additional factual matter complicated both the nature of Penn's claim and the bench's reaction to his acquittal. For, as we shall see, the issue of finality of verdict regarding fact was itself very unsettled.

II

Though Penn's trial was the highpoint of the long line of Quaker prosecutions, it should also be viewed as an important sequel to the parliamentary censure of Lord Chief Justice John Kelyng for his menacing, fining, and imprisoning of jurors. That parliamentary incident, which will be reconstructed below in some detail, resulted in what many contemporaries must have taken to be sincere support for the principle of noncoercion of jurors. Indeed, it quite possibly sent shocks through the legal world in a way that the Quaker proceedings did not. The charges against Kelyng related to trials at the Old Bailey and on the Western Circuit between 1665 and 1667, proceedings involving both grand and trial juries, one prosecution for violation of the Conventicles Act and several
The manner in which Kelyng treated jurors was probably an exaggeration of the practice rather than an exception to it.31 We have seen that since the middle of the sixteenth century, if not earlier, judges had at times imposed their views upon petty jurors—and even fined and imprisoned them. However, the theory upon which the bench acted had never been clearly articulated, and until the Restoration the legality of coercion remained largely untested.

Though fining jurors did not begin with the Quaker cases of the early 1660s, the practice may have been accelerated by judicial reaction to jury recalcitrance in those cases. As we have seen, the Quakers found supporters among their jurors. Some juries, refusing to convict defendants prosecuted under the Conventicles Act, acquitted; others rendered something akin to a partial verdict ("guilty of attending a meeting") that took the form of a special verdict but, not being stipulated as such, threatened to bring the proceedings to a stalemate. During (and shortly after) Sir Robert Hyde's tenure as Chief Justice of King's Bench, at sessions presided over by him or by his fellow justices—Twisden, Bridgeman, or Kelyng—juries were frequently threatened, fined, and ordered to remain in prison until the fines had been paid.32

31. The assize records for the decade beginning with the Restoration reveal only two instances of judicial fining of jurors in common-run cases, both in the years just preceding Kelyng's conflicts with juries. In both cases Hyde fined jurors and bound them over until the next assize (Shrewsbury Assizes, July 25, 1662, Oxford Circuit Crown Book, ASSI 2/1, fols. 83v-84, 93v; Gloucester Assizes, March 31, 1663, Oxford Circuit Crown Book, ASSI 2/1, fols. 95v, 96v). In the first case (homicide), Hyde fined two jurors ten pounds apiece "in regard they were most obstinate and did mislead the rest," and the other jurors four pounds apiece. In the second case (burglary), Hyde fined all the jurors five pounds apiece.

32. See e.g. above, n. 19, and below, nn. 33-36. See also the contemporary accounts listed above, n. 9. My discussion of the fining issue in the several years before the proceedings against Kelyng in Parliament do not appear on the assize records themselves.
In some quarters there were doubts about the legality of fining, especially when it was undertaken by an inferior court. Matthew Hale, Chief Baron of the Exchequer, shared those doubts about what he termed an "arbitrary practice." In his *History of the Pleas of the Crown* he expressed his views as of the mid-1660s: "I have seen arbitrary practice still go from one thing to another, the fine set upon grand inquests began, then they set fines upon the petit-juries for not finding according to the directions of the court." The practice, Hale thought, was both of recent origin and on the increase. Significantly, it was not confined to the highest courts, but it "was endeavored to bring the practice of the King's Bench into use before justices of gaol delivery and oyer and terminer." It is not surprising, then, that in two such cases where fines were estreated into Exchequer, process was stayed "as being contrary to law."33

Fines set directly by King's Bench were less prone to attack. In several 1664 cases, including *Rex v. Selby* and *Leech's Case*, King's Bench ordered an information against the offending jurors and fined them substantial amounts.35 Jurors who refused to pay the fines were imprisoned until they relented. There was no protection available from a sympathetic Exchequer, and contest by means of a writ of habeas corpus brought the jurors back before King's Bench. Thus, in *Wagstaffe's Case*, which resulted from a trial before Kelyng in the summer of 1665, after Hyde's death and before Kelyng rose to Chief Justice, King's Bench tested and upheld the legality of fining.36 The decision, handed down after Kelyng became Chief Justice, set the stage for conflict within governing institutions over the question of coercion.

*Wagstaffe's Case* was typical of many Quaker prosecutions. It was clear that there had been a meeting, but there was no direct evidence that it had been held for religious purposes. Following common practice, Kelyng had instructed the jurors that evidence of a meeting sufficed and that it was for the defendants to prove that the meeting was not "under pretense" of non-Anglican worship. Perhaps out of frustration, he fined the recalcitrant jurors, not even bothering to order an information against

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33. Sir Matthew Hale, *History of the Pleas of the Crown*, 2 vols. (London. 1800), vol. 2, p. 160. It appears that the bench had ruled in 1554 that judges could not fine on assize (but presumably could in King's Bench). See above, Chapter 4, n. 150 and accompanying text. See also Barnes, ed., *Somerset Assize Orders*, p. 32, for coercion of a coroner's jury.


The jurors turned first to Exchequer, certifying Kelyng's action as error and requesting that the fines be removed from the record. Even Hale concurred with his brethren that Exchequer could not review a sister court in such a case. Though he doubted the legality of the fine, Hale directed the petitioners to sue a habeas in King's Bench.

The return to the jurors' writ asserted that the jurors had found "contra directionem curiae in materia legis et contra plenam evidentiam," the form of return that would be employed five years later in Bushel's Case. From what little is preserved in extant accounts, it appears that opposing counsel established a pattern of argument that was to figure importantly in the later case. Counsel for the Quakers asserted that the return failed to state a legal basis for the fine, by which was meant that the return did not (nor could not) restate the entire proceedings in a way that allowed for review of the trial court's conclusion that the jury had found against fact and law. Thus, counsel alleged, there could be no effective remedy against the imposition of such a fine. The power to fine inevitably left lower courts far too much discretion and must, ultimately, undermine the fact-finding role of the trial jury. Maynard, in reply, sidestepped this charge, focusing on the situation that would result if judges did not have the power to fine. He stated Kelyng's views as of the summer of 1665: because attaint did not lie in criminal cases, without the power to fine there would be a failure of justice. A new trial, he asserted, would not be appropriate. In the end, "[t]rust must be laid somewhere," and the law presumed that it must reside in the wisdom and discretion of the judges of King's Bench.

The various reports suggest that all of the judges agreed on several rationales that both upheld the fines and provided some limits upon the fining power. In theory, these unanimously held views might be said to constitute the opinion of the court. But in practice, Kelyng and Twisden were in command, and they were determined to apply the furthest reaching doctrine of the case. So far as they were concerned, there would be no distinction between "superior" courts that could fine and "inferior" ones that might not. Nor would an information be necessary: the fines might be applied directly. As Twisden had stated, "The judge is entrusted with the liberties of the people." The bench would determine whether jurors went against the evidence, for jurors "are not judges of

38. Idem.
41. See above, n. 36.
42. 83 Eng. Rep. 75 (1665).
The precedents that were cited (or that can be found in Kelyng's reports or elsewhere) fall either in Elizabeth's reign or very recently in King's Bench itself. They are surprisingly meager. Kelyng was persuaded by them, but apparently he was moved most by the practical effect of an absence of power to fine.

Kelyng was possibly emboldened by the decision in *Wagstaffe's Case*, for in 1666–67 he attempted openly to control grand and petty jury verdicts, not merely in Quaker cases, where jurors practiced what most observers took to be true nullification of the law, but also (perhaps fatefuly) in homicide trials, where jurors sought to exercise what had long been treated as a quasi- legitimate form of discretion. It was Kelyng's handling of a Western Circuit grand jury, and in particular of one of its members, Sir Hugh Windham, that brought the charges against him in Parliament. Contemporaries identified Windham with the "country party" and some of them seem to have regarded the attack on Kelyng as in large part politically inspired. Nonetheless, Kelyng's behavior in several other cases was also at issue, and there appears to have been strong sentiment against his treatment of juries and in favor of a bill making menacing and fining illegal.

Proceedings against Kelyng commenced October 16, 1667, when the Chief Justice "was complained of by some of the House for his severe and illegal fining and imprisoning juries, both the grand and petty juries, for their verdicts, and also for giving some worthy gentlemen that served uncivil and insolent language." A committee was appointed to study the matter and to report back to the House. According to John Milward, a

44. See also below, n. 177 and accompanying text.
46. Langbein ("Criminal Trial before the Lawyers," p. 299, n. 106) cites Roger North's attribution to his brother Francis of the view that "changing the law" to disallow fining "was popular" [Roger North, *The Life of the Right Honourable Francis North, Baron of Guilford, Lord Keeper of the Great Seal, under King Charles II and King James II* (London, 1742), pp. 66–67].
47. I draw this conclusion from the language of the resolution passed by the House of Commons (see below, text at n. 51) and from the language of the parliamentary diaries. This is not to deny that politics had a great deal to do with shaping attitudes; it is only to say that those attitudes may have come to be sincerely held by some both in and out of Parliament.
member of Parliament who kept a diary of Commons proceedings, the disposition of the House in establishing the committee was "to the intent that a course may be taken that judges may not at their own wills and pleasures impose fines and imprison or affront either grand juries or petty juries for giving and adhering to the verdicts." The committee set forth its charges before the House on December 11, and concluded with a resolution:

That the proceedings of the Lord Chief Justice, in cases now reported, are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequences to the lives and liberties of the people of England; and tends to the introducing of an arbitrary government.

The charges themselves fell under several heads but are beyond precise reconstruction. Apparently, one case was a trial of Quakers at the Old Bailey from the summer of 1665. The case seems to have preceded Wagstaffe's Case by no more than a month and took largely the same form. On trial for their third offense, the defendants said they had come together "[t]o seek God in the spirit." The jury refused to convict them, according to Milward's version of the committee report, "because they had no full proof that there was not any religious [Anglican] worship performed." Kelyng, it was charged, told the jury that the evidence was manifest and sent the jury out again, virtually ordering them to find the defendants guilty. Because "the jury would not alter from their verdict," Kelyng "imprisoned and fined some of them one hundred marks a piece, which fine some of them paid." The committee report stated that Sir William Wild, the Recorder of London, who sat with Kelyng, attempted "to delay the fine" and to give the jury another opportunity to change their minds, but Kelyng "answered that he would make them know themselves, and said they were peremptory saucy fellows."

52. Hatsell (Precedents of Proceedings, p. 114) understandably suggested that the case was Wagstaffe's Case. Thomas Rudyard, who was convicted by a new jury shortly after Penn's jury was sequestered, wrote from Newgate in early 1671 that Wagstaffe's Case was at issue in the proceedings against Kelyng: "Appendix" to William Penn, Truth Rescued from Imposture (London, 1671), in William Penn, A Collection of Works of William Penn, 2 vols. (London, 1726), vol. 1, pp. 511-20. This appears not to have been the case; the jurors in Wagstaffe's Case were all fined in the same amount, which was not true in the case at hand. See below, text at n. 156.
53. Diary of John Milward, p. 159.
54. Ibid., pp. 159-60.
55. Ibid., p. 160.
The other matters charged against Kelyng involved homicide cases. Clearly the most important was the incident that resulted in Windham's Case. Sir Hugh had served on a Somerset grand jury that returned a finding of manslaughter—possibly of death per infortunium—which “did not agree with his Lordship's sense.” When they refused to alter their finding, Kelyng fined the grand jurors “and told Sir Hugh that he was the head of a party.” Windham replied that he was a member of Commons and claimed his privilege, whereupon, according to Milward, “The Chief Justice told him that he would make him know that he was now his servant and that he would make him stoop.” Two other cases involved petty juries that refused to find murder. In one, a master’s helper had beaten a boy “about the head with a broomstaff” for doing careless work. Kelyng would not accept a verdict of manslaughter and threatened the jury with a fine. This produced the result he wanted: murder was found, the defendant was hanged, in spite of the recommendation of “gentlemen” of the county that he be spared. Yet another petty jury responded to Kelyng’s threats by modifying their finding of self-defense to a verdict of manslaughter. There were also one or two other charges of insolent language and arbitrary rulings, but the coercion of juries lay at the core of the charges. Kelyng was said to have so “discouraged” grand and petty jurors that they might refuse to “serve upon any future juries if he be judge at that circuit.” His behavior, the charges concluded, endangered lives and liberties and tended “to the introducing of an arbitrary government.”

The Chief Justice was not without his supporters, several of whom spoke in his defense. They portrayed Kelyng as essentially honest and in the right (though perhaps indiscreet), and moved that the Chief Justice be allowed to defend himself at the Bar of the House of Commons. The

57. *Diary of John Milward*, pp. 162–63; See also Anchitell Grey, *Debates of the House of Commons From the Year 1667 to the Year 1694* (London, 1769), I:62–63: “Sir Hugh Wyndham (who first complained to the House of this business) [Kelyng] reproached for being the head of a faction, for no other cause, than finding a bill according to his conscience. He drew the verdict and made the jury find it. Sir Hugh said, he was the King’s servant and Member of Parliament (upon his reproaches). [Kelyng] told the grand jury they were his servants, and he would make the best in England stoop.”
Kelyng’s speech on his own behalf two months later showed belated tact and careful planning. Though it failed by itself to stem the movement for a bill against the fining of jurors, it largely defused the attack against him.

Kelyng’s most detailed reply was to the charge that he had fined a jury for refusing to convict several Quakers. The case in question appears at length in a manuscript of Kelyng’s reports. It was not included in the printed Reports, perhaps because it had received rough treatment at the hands of the Commons. In the Commons Kelyng claimed that the jury “pretended that they had not full evidence,” and he described how he had questioned the jury on all of the facts that he considered dispositive. The jurors had admitted that the defendants were at the Bull and Mouth, a notorious Quaker meeting place, and that they were “worshipping of God.” But there was no direct evidence “that they were there under pretence of religious worship in other manner than appointeth.” This was clearly a ruse, the same one employed time after time at Hertford, London, and other assizes. Kelyng evidently did not explain to the House that he had charged the jury that the defendants were required in law to prove they were together for a lawful purpose. Nor did he state, as he did in his report, that he told the jury that the defendants’ claim of privilege against self-incrimination was a “confession.” But he did report that the defendants had said the Church of England was not a true church and that this, too, was before the jury. Kelyng must have been confident about his ground: Wagstaffe’s Case had upheld fining in just these circumstances, and Kelyng reminded the House that “it is resolved, by all the judges, that juries are fineable.” Surely the Commons was aware that the jury in the case at hand had taken part in a widespread campaign of the Chief Justice. That although his passions might lead him a little out of the way sometimes, yet he was a very good and just judge, and had done nothing against the law.” Grey, Debates, p. 64: “[Higgins] says, Lord Kelyng [is] a man of choler and passion—Right-handed faults his zeal for the laws, but no ill man of bribery or corruption.” Others who spoke on Kelyng’s behalf were Sir Humphrey Winch, Sir Anthony Jerby, and Thomas Street.

64. Ibid., fol. 35v.
65. See above, text at nn. 20–23.
66. B.L. MS Harg. 103, fol. 35: “I told [the defendants] that they being indicted for an unlawful meeting, the proof lay on their part to make it appear what they were doing, and so to excuse, which they refused to do”; fol. 36: “I told [the jury] that [the defendants] being asked what they were doing, they answered they were not bound to accuse themselves which is a kind of confession that they were there under pretense of religious worship.” See Diary of John Milward, p. 166, for an account of Kelyng’s “defense” of his behavior in this case.
to render an Act of Parliament (the Conventicles Act) ineffective. Given their responses under close questioning, there could be no credible claim that the jurors had exculpatory knowledge of their own or that they did not believe the witnesses. There was no true disagreement on the facts proved but rather upon the question (always one for the bench) of what facts were required to be proved. In reaching its own answer to this question, the jury had taken the law into its own hands, or so it seemed to Kelyng. If this case involved wrongful judicial behavior, it was because threatening and fining were wrong as a matter of constitutional principle, and in all cases short of outright corruption, not simply because jurors might have knowledge of their own.

Kelyng turned next to the several homicide cases, beginning with the fray that ended in a slaying the jurors found to have been self-defense. On his view of the facts, Kelyng thought the case either murder or manslaughter, for the defendant had either commenced the fight or responded to insult with a drawn sword before finding his life in danger and retreating. Evidently, Kelyng charged the jury on a point of law and fined them for their recalcitrance in returning self-defense. Kelyng apparently had no reservation about reporting this case in Commons. The jury, he thought, had clearly found against the facts, refusing to apply rules of the law of homicide that had been settled for centuries.

68. According to Milward (Diary, p. 167) Kelyng told the Commons: "'If he had not thus far proceeded against the Quakers and the jurors he did assure himself that he had not proceeded justly according to the act of Parliament.'"

69. The jurors almost certainly did believe that they had knowledge of their own. From their perspective, the defendants were innocent unless they had engaged in seditious activity. They believed that Quaker worship, though outside the pale of the established Church, was not seditious; their knowledge of the Quakers, of their loyalty to England, and of their religious spirit was an important factor. Given the official interpretation of the Conventicles Act, this did not constitute relevant evidence. The bench could be certain that jurors did not have knowledge of their own that the defendants were engaged either in Anglican worship or in peaceful nonreligious activity.

70. Diary of John Milward, pp. 160, 167. According to the charge against Kelyng, "'There happened a fray in which one man was slain; it was proved that the man that killed him was set upon and so did it in his own defense.'" Kelyng described the case in Parliament as follows: "'Two men fell out, had their swords drawn and were parted, and after a while fell to fighting again. One of them was slain, but because it was said that he that killed the other fled to the wall and afterward slew him therefore the jury would not find it murder.'" It appears that this was a typical case of generous application of the law of self-defense. It is difficult to see how Kelyng thought "'murder'" not only an appropriate but the preferred verdict, but it is easy to understand the view that a verdict of manslaughter, not self-defense, was called for: the slayer had engaged in the fight before retreating. Moreover, the evidence of retreat probably was given in pro forma fashion, according to a tradition of which Kelyng disapproved (but in which the bench had long acquiesced).
Kelyng's *Reports* evidence great attention to the substantive law of homicide and his insistence upon verdicts that were commanded by the law.\(^{71}\) One ancient doctrine concerned the manner in which a master or his helper might punish an apprentice, the subject of another of the cases charged against him. In his defense to this charge in Commons, Kelyng first cited a particularly gruesome case (as though it had been charged against him in the Commons, though it had not) wherein “a smith struck his prentice with a bar of iron [and] broke his skull.” The jury, Kelyng said, would not find murder until he threatened them. Subsequently, he stated, “the judges in Westminster Hall gave their opinion that it was murder,” for one may not chastise with “any . . . weapon or instrument to kill them.”\(^{72}\) According to Kelyng's *Reports*, this case was tried in London, not on the Western Circuit, and the jury returned a special verdict, though it is possible they had been urged to do so.\(^{73}\) The Westminster bench ruled in this case that the facts amounted to murder. It thus provided Kelyng with powerful precedent and, moreover, allowed him to parade his generosity of spirit, for, as he stated in the Commons, after the Westminster ruling the defendant (presumably with Kelyng's leave) was pardoned due to his good reputation.\(^{74}\) Kelyng appears to have employed this case tactically in the Commons in order to buttress his defense on the charge of inducing a murder verdict in the case actually charged against him. Though in the case charged the “instrument” of chastisement was less lethal (a broomstick), the master's servant, Kelyng apparently said, “beat [the apprentice] about the head . . . until the blood gushed out of his nose, mouth and ears.” Kelyng stated that he caused the jury to “bring it in murder,” for which the defendant was hanged.\(^{75}\)

Again, Kelyng viewed the initial verdicts in the case of the fray and in both of the master-servant cases as directly contrary to settled rules of law. In this he was correct, but possibly on weaker ground, for these cases could be assimilated to cases in which there was room for true disagreement on the facts. Unlike Quaker trials, these were not cases in which the bench was confronted with what could be read as systematic appeals for jury nullification. Admittedly, it is unlikely that a true dispute over either law or fact existed in cases that involved the line between murder and manslaughter, or in ones that involved the line between culpable homicide and self-defense. For example, in even the most

74. *Diary of John Milward*, p. 168: “But although this man was condemned yet because he was very well spoken of (and for) by his neighbors he procured his pardon from the king.”
75. Idem.
egregious case, that of the smith who struck his apprentice with an iron bar, it is unlikely that the jury rejected the proposition that such chastisement might constitute murder; as for the facts, probably so much was proved. But there were other considerations, ones that applied as much or more to the defendant who used a broomstick to chastise. Had the defendant acted out of sudden anger? Did he intend to kill as opposed seriously to hurt the deceased? Was the defendant of good reputation? None of these factors altered the law: strictly speaking, only provocation on the part of the deceased could reduce the crime to manslaughter. Nonetheless, there was in practice room for play, especially where there was no evidence either of true premeditation or of slaying in the course of robbery or burglary. The concept of "deliberateness" could be viewed differently in different cases that fell within the genre of those charged, even, strictly speaking, "against the facts." This was part of the jury's traditional de facto role—the merciful application of law to facts. At times the bench acquiesced in the jury's exercise of such discretion, at times not. The problem for contemporaries was, What might a nonacquiescing bench do to a jury that applied the law to the facts in this way? Kelyng had no doubts, and some precedent; but there was precedent (in the form of practice) in the other direction as well.

Kelyng's handling of the Windham affair in Parliament shows him at his most tactful. He asserted that the grand jury brought in a bill of death per infortunium and that for this reason he had explained to them that they must return either billa vera or ignoramus: "[I]f they find the proofs to be slight or not material, then to find it ignoramus, and if it be sufficiently proved then to bring it in billa vera, and then to leave it to the trial of the court."76 Kelyng told the grand jury, he now said, that it may not judge "of point of law," by which he meant that it must find only the fact of the killing by the accused and not the legal nature of the deed. Because the grand jury persisted in its verdict, Kelyng admonished them "better to consider of it that night," but they did not change their minds. It was for this behavior, Kelyng said, that he fined some of the grand jurors. He had offered to withdraw the fine "if they would submit." When the matter came to a hearing, "the judges with one consent said that I was in the right." Afterward he nonetheless—so he now asserted—"caused the clerk of the assize to remit their fines."77

Kelyng made no reference to his interchange with Windham, and he perhaps took more credit for the discharging of the fine than was his due.78

76. Diary of John Milward, p. 68.
77. Ibid., p. 169.
78. For the alleged interchange with Wyndham, see above, n. 57. According to an anonymous report of the subsequent proceedings before King's Bench, the grand jurors
It appears that the grand jury returned a verdict of manslaughter, not of *per infortunium*, an unimportant slip on Kelyng's part. Nonetheless, Kelyng was correct on the law and must have felt confident about his position so long as he could divert attention from his insults to Windham. Perhaps significantly, Kelyng made no reference to his more extreme view that in some cases of homicide the question of whether the slaying had been murder or manslaughter was not even for the trial jury. On this view, where the Crown produced evidence of deliberation and the defendant failed to show provocation, the trial jury would merely find the fact of the homicide; it was for the court to "imply" malice. If the jury in such a case found a degree of homicide less than murder, it would incur punishment. Indeed, in *Rex v. Hood*, Kelyng fined a petty jury on just those grounds.

According to Milward, the House debated Kelyng's behavior for four hours or more before resolving that fining and imprisonment were illegal and that a bill should be drafted to that effect, but that there should be "no further prosecution or proceedings against the Chief Justice." It is were discharged without fine "because it was a mistake in their judgments rather than any obstinacy." (B.L. MS Harg. 339, fol. 2). Keble [2 Keble 180–81, 84 Eng. Rep. 113 (1667)] reported that the fine was not assessed "because they were gentlemen of repute in the country."

79. B.L. MS Harg. 339, fol. 2. The bill proffered to the grand jury stipulated "murder."

80. Kelyng 50–51, 84 Eng. Rep. 1077–78 (1666). It appears that Kelyng believed it was for the bench to determine whether the defendant had shown provocation: "[U]pon the evidence it appeared that [Hood] killed him without any provocation, and thereupon I directed the jury, that it was murder; for the law in that case intended malice; and I told them they were judges of the matter of fact, viz. whether Newen died by the hand of Hood; but whether it was murder or manslaughter, that was matter in law, in which they were to observe the direction of the Court." Kelyng fined the jurors forty shillings apiece. Hatsell (*Precedents of Proceedings*, p. 114) suggests that *Hood's Case* was among those charged against Kelyng. Probably he confused this case with the one involving the fray (see above, n. 70 and accompanying text). The more common (and the correct) practice was for the judge to charge the jury that absence of provocation implied malice; that whether there had been provocation was a question of fact for the jury to determine; that it was for the jury to apply the law (of implied malice) to the facts the jury found; that the jury was to state in its verdict whether the defendant was guilty of murder, manslaughter, homicide in self-defense, or was not guilty. This practice, of course, enabled the jury to conceal a rejection of the law of implied malice within its finding of fact, and it is this that Kelyng sought to prevent.

81. *Diary of John Milward*, p. 170: "Many did aggravate, others did extenuate [Kelyng's] failings." Pepys recorded: "Here I did also see their votes against my Lord Chief Justice Keeling, that his proceedings were illegal and that he was a contemner of Magna Charta, the great preserver of our lives, freedoms, and properties—and an introduction to arbitrary government—which is very high language, and of the same sound with that in the year 1640'" (*Diary*, p. 577, under date: 12 Dec. 1667. Almost certainly this was the thirteenth of December). According to Grey (*Debates*, p. 67), Wyndham moved "that since the Chief Justice had forgot to answer the reproachful language he gave him, that the House would
impossible to determine the precise reason for the House’s decision on the bill. Possibly it reflected concern about the Crown’s use of the bench, and about the strongly royalist tendency of some of the judges, as well as fear that the bench might use its monitoring of judicial proceedings to fine or imprison its political enemies. Perhaps largely political concerns that were readily translated into “constitutional” concerns fostered widespread doubts about the legality of fining and made acceptable the view that, whatever one might make of the precedents, fining was, pure and simple, unlawful. Had the main consideration been Kelyng’s treatment of recalcitrant juries in prosecutions of Quakers, the result might have been very different, for most Parliamentarians believed that the Quakers posed a threat both to public order and to respect for statute law. But most of the cases with which the House had had to grapple were homicides, where something less was at stake. Kelyng’s behavior—because it touched the most routine area of the administration of the criminal law—may have been taken to suggest how far the Stuart bench was prepared to go to revise long-settled practices involving the criminal trial jury.

The bill to declare illegal the fining and imprisonment of jurors died in committee. It had received two readings before the House in mid-February, 1668, and among those who had spoken to the bill after its second reading was John Vaughan, who would three years later write the opinion in Bushel’s Case. Vaughan appears to have adopted a middle position, arguing that prohibition of “menacing” ought to be dropped from the bill, “it being a word of too large extent.” A judge ought to be able to “tell a corrupt jury of the danger of an attaint, in a case where they shall proceed wittingly against both their oaths and duties.” What Vaughan meant by “corrupt” is unclear; nor can we know whether Vaughan, as of 1668, would have endorsed the fining (as well as the “menacing”) of jurors had he believed an attaint was unavailing and that likewise forget it, for he [Wyndham] did.” See also, Journals of the House of Commons, 9:37, col. 2.


a "failure of justice" was thus possible. The bill was then committed to the study of Vaughan and nearly three dozen others. That committee was subsequently saddled with consideration of a bill regarding the procuring of able and sufficient jurors. Debate resumed in the House in early April, 1668, reviving the Committee's activity concerning judicial treatment of jurors—new complaints, this time regarding Justice Tyrrell, were aired—but the bill never received a final reading. Largely in response to concerns of London authorities about Quaker preaching, the question of continuing the Act to prevent and suppress seditious Conventions seems to have taken precedence, and, perhaps significantly, there was substantial overlap between its members and those on the committee for the jury bill. By the end of the year Vaughan had been appointed Chief Justice of Common Pleas, and complaints about treatment of jurors had diminished. Kelyng, who had formerly been so active, soon passed from the scene altogether.

III

The prosecution of William Penn and William Mead grew out of the continuing struggle between the Quakers and City of London authorities. Despite continued arrests and fines, Quaker leaders continued to preach at large and well-publicized meetings. London officials had ordered that traditional meeting places of the Friends be locked and guarded by soldiers, but this only forced preaching out onto the streets where crowds gathered and—as city authorities saw it—the public order was threat-

84. According to Milward (Diary, pp. 190-91), Vaughan concluded his comments with the observation "that there ought also care to be taken to prevent miscarriage of juries as well as the severity of judges."


86. Journals of the House of Commons, 9:65, 70-71. A total of fifteen more persons were added to the committee (idem).

87. Ibid., 9:74-75, 77, 83-84. See Diary of John Milward, p. 243, for the complaint "brought in against Judge Tyrell [for] forcing a jury to go out again upon a prisoner after he had been tried before Chief Justice Kelyng, and had been acquitted by the jury . . . Judge Tyrell being present at the trial" (April 3, 1668). On that day Milward himself was added to the Committee (Journals of the House of Commons, 9:74). See also B.L. MS Add, 38, 336, fol. 348, regarding activity in the House of Lords: "It was ordered that the Lord St. John have leave to bring in a bill for declaring the fining and imprisoning of jurors illegal. This bill was brought in but did not pass."


89. Kelyng died in May, 1671. He was still on the bench in 1670, but it appears from the printed Reports that he was not present after Trinity Term of that year. See E. Foss, The Judges of England, with sketches of their lives and notices connected with the Courts at Westminster, 1066-1864, 9 vols. (London, 1848-64), vol. 7 (1864), p. 139.
On August 14, 1670, Penn addressed an especially large crowd in Gracechurch Street. Shortly after he began to speak, constables forearmed with warrants signed by the Lord Mayor, Sir Samuel Starling, moved to arrest both him and his copreacher, Mead. According to the document addressed formally to the keeper of Newgate, Penn was arrested for “preaching seditiously and causing a great tumult of people . . . to be gathered together riotously and routously.” Despite the form of this warrant both men were charged under the recently renewed Conventicles Act and might have obtained release sine die through payment of fines. But they refused and instead demanded jury trial, as the Act allowed. They thus remained in custody until the close of their five-day trial, which began September 1 at the quarter sessions held at the Old Bailey.

Neither Penn nor Mead was indicted for attendance at a meeting in breach of the Conventicles Act. Rather, the government charged them with causing an unlawful assembly and a disturbance of the peace, charges that came close to an indictment for insurrection. The indictment alleged that the two men agreed that Penn would preach and that Penn “by abetment of . . . Mead . . . did preach and speak”; it also alleged that “by reason” of the defendants’ actions “a great concourse and tumult of people in the street . . . a long time did remain and continue, in contempt of . . . the King, and of his law, to the great disturbance of his peace.”

At their trial the prisoners were brought forward, a jury was sworn and the indictment read. Asked to plead, the defendants requested a copy of the indictment, but the bench informed them of standard practice: they must plead to the indictment before receiving a copy of it. After extracting promises that “no advantage may be taken against” them, both pleaded “not guilty in manner and form.”

The court recessed until September 3, when the Crown produced three witnesses against the defendants. The first, James Cook, stated that he had been sent for to disperse the meeting. He saw Penn speaking to the people but “could not hear what [Penn] said because of the noise.” He could not approach Penn “for the crowd of people; upon which Capt.

92. Stat. 22 Chas. 2, c. 1 (1670).
94. State Trials, 6:954–55. This account was published originally by Penn and Mead as The People’s Antient and Just Liberties (London, 1670). It contains several appendixes dealing with, inter alia, Magna Carta and the proceedings in Parliament against Chief Justice Kelyng.
95. Ibid., p. 955.
Mead came to me . . . and desired me to let [Penn] go on, for when he had done, he would bring Mr. Penn to me." A constable, Richard Read, corroborated Cook's testimony. Read "found a great crowd of people," "heard Mr. Penn preach to them," and "endeavored with my watchmen to get at Mr. Penn to pull him down, but . . . could not, the people kicking my watchmen and myself on the shins." Read could hear neither Penn's nor Mead's conversation with Cook because of the "great noise." A witness named Whiting saw Penn but not Mead; he supposed Penn was speaking but could not hear him.

Penn and Mead occasionally challenged the witnesses, but clearly they believed that any factual errors in the witnesses' testimony should prove irrelevant, for both defendants admitted with pride that they had assembled to preach and to pray. Neither defendant believed that the Crown's evidence, even if true, amounted to the breaking of any law. To their demand that they be shown the law upon which the indictment was based, the Recorder (Howel) replied that the indictment was based "upon the common law" and that he could not "run up so many years, and over so many adjudged cases, which we call common law." This drew Penn's famous retort: "If the law be common, it should not be so hard to produce." Once again he returned to the indictment:

Shall I plead to an indictment that has no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of the indictment, and the guilt, or contrary of my fact? . . . The question is not, whether I am guilty of this indictment, but whether this indictment be legal.

96. Ibid., p. 957.
97. Sir Samuel Starling, An Answer to the Seditious and Scandalous Pamphlet, entitled, The Trial of W. Penn and W. Mead (London, 1671), p. 15. This account, written by the Lord Mayor of London, who presided at the trial, contains this testimony. The "official" account, by Penn, does not. On this point, Starling's account seems credible.
98. State Trials, 6:957. The official account does not contain the name of this witness. Starling's account does (p. 16).
99. Ibid., p. 958. Penn: "We confess ourselves to be so far from recanting, or declining to vindicate the assembling of ourselves to preach, pray, or worship the Eternal, Holy, Just God, that we declare to all the world, that we do believe it to be our indispensable duty."
100. Starling (An Answer to the Seditious and Scandalous Pamphlet, p. 17) asserted that the witnesses' testimony and defendants' "confessions" sufficed for conviction.
101. Ibid., 6:958-59. Starling's account (p. 19) contains a paraphrase of this speech, referring to it as though it had been added post hoc and never spoken in court. Starling also records a comment of his own that he evidently made at about this point in the trial: "Now the Common Law is Common Right, or Lex Rationis, imprinted in every man's understanding" (p. 17).
Irritated by Penn's continued demands, the Recorder insisted that the defendants "speak to the indictment," i.e., that they speak to the evidence presented against them.

[You are now upon matter of fact, which fact you have heard proved against you; you are to answer it: If the fact be found against you, you may then speak to the matter of law, in arrest of judgment, and you shall be heard.]

Penn would have none of this. To make his "best defense" before the jury he must have the Crown's statement of the law. At this point the Recorder, supported by the mayor, ordered that Penn be removed to the bale dock; it was in response to that order that Penn appealed to his jury ("my sole judges") to consider whether he was being tried in accordance with the fundamental laws. Mead soon followed Penn to the bale dock, having stated to the jury ("who are my judges") that his indictment was "a bundle of stuff, full of lies and falsehoods." The Recorder then charged the jury that the indictment was for "preaching . . . and drawing a tumultuous company." From the distant bale dock, the full court heard Penn's parting shot:

I appeal to the jury who are my judges, and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners. . . . And you of the jury, take notice, that I have not been heard, neither can you legally depart the court before I have been fully heard, having at last ten or twelve material points to offer, in order to invalidate their indictment.

In considering their verdict, the jurors agreed that Penn had preached to an assembly of persons, but could agree to no more. They reported to the Court that eight jurors were prepared to return a "guilty" verdict; four were not. Displeased, the bench berated the four and sent the jury

102. Starling, An Answer to the Seditious and Scandalous Pamphlet, p. 18.
103. State Trials, 6:959.
104. Ibid., p. 960. According to Penn and Mead's account, Mead also told the jury that a "riot" involved three or more meeting together "to beat a man, or to enter forcibly into another man's land, to cut down his grass, his wood, or break down his poles." Starling (p. 20) also records this speech and adds that the recorder replied: "[Y]es, and to do any other unlawful act." This has reference to the Conventicles Act, breach of which under these circumstances the Lord Mayor deemed constituted the holding of an unlawful assembly.
105. State Trials, 6:690.
106. Ibid., p. 961; Starling, An Answer to the Seditious and Scandalous Pamphlet, p. 21. The first half of this speech is in both Penn and Mead's account and Starling's account; the second half is in only Penn and Mead's account.
away to reconsider its decision. When the jury returned, the foreman reported that they had found Penn "guilty of speaking in Gracechurch Street," to which the Recorder replied that they "had as good say nothing." The mayor questioned the jury: "Was it not an unlawful assembly? You mean [Penn] was speaking to a tumult there?" But further questioning availed the bench nothing; the jury was not prepared to answer to the core of the indictment. Penn was guilty only of "speaking or preaching to an assembly"; Mead was not guilty. Bushel and the others who would not bring in a guilty verdict stood upon their "conscience," as Penn had exhorted them to do. It was, or so Penn contended, the juryman's "right."

In the end the jury abandoned the device of a truncated verdict and rendered a definitive "not guilty." The trial was over, and the indictment was overturned. The bench was left to assess fines: Penn and Mead for contempt, Bushel and the other jurors for their disobedient verdict. The bench, because it viewed the evidence as manifest, came down harshly on the jurors, fining them for finding contrary both to the evidence ("in matter of fact") and to the instructions ("in matter of law").

Precisely how the jurors perceived the case against Penn is beyond reconstruction. Penn had insisted that the court produce the law on which the indictment was grounded so that jurors "might measure the truth of the indictment, and the guilt of the fact." The recalcitrant jurors may have acceded to the court's view of the law, that preaching to a large and tumultuous assembly in a manner that continued a disturbance of the peace was a high misdemeanor, but doubted whether there was sufficient evidence of a tumult and disturbance of the peace. More likely, however, they both doubted the tumult and believed that the Crown had, in any event, to prove an unlawful intent, especially where the law of criminal trespass was being applied to a man of God preaching His Word to those gathered to hear him.

For Penn the message of his acquittal was unmistakable: the jurors had made their own assessment of the law, or at least had rejected that put forth by the court. What was now awaited—and would surely come—was exoneration of the jurors, who, by assessing the law themselves, had rebuffed the tyranny of the judiciary and vindicated their own true

107. State Trials, 6:961; Starling, An Answer to the Seditious and Scandalous Pamphlet, p. 22.
historical and moral purpose. In the meantime, Penn would spend much of his stay in prison publicizing his case in a series of tracts. These tracts, written by Penn and the Quaker Thomas Rudyard, who was convicted of obstructing justice by a jury sworn in to replace Penn's jury, dealt both with the duties of jurors and with the (alleged) right of the bench to punish them. These tracts appeared between October, 1670 and March, 1671, the period that saw as well the early stages of the legal contest over the fining and imprisonment of Bushel and his cojurors. To what extent the legal and rhetorical campaigns influenced each other we shall probably never know—perhaps they proceeded independently of each other, drawing primarily on a common pool of ideas. As we shall see, the central thrust of Vaughan's opinion, handed down in the fall of 1671, differed significantly both from earlier legal arguments and from those in the contemporary jury-tract literature.

In An Appendix by way of Defense, a tract he attached to his account of the trial, Penn articulated his defense more clearly than he had at the Old Bailey. His position was analogous to the familiar Quaker argument that the jury must look behind the indictment to the law upon which it was based lest the bench and the officials who framed indictments significantly misinterpret the Conventicles Act. But Penn varied the argument slightly. The crucial point of reference for his jury was not statute but the common law regarding the requisites for unlawful assembly and disturbance of the peace. An unlawful assembly required at most either assembling to commit an act that would, if committed, constitute a riot, or refusing to disperse when part of the assembly was threatening to commit such an act; it might also be charged where a large number of persons met under circumstances that created fear of great harm by either those who met or those who witnessed the meeting. It

111. See below, n. 126.

112. The exact date upon which Vaughan issued his opinion is not known. Bushel had sued out his writ in November, 1670. The arguments at bar ensued during the following months. See Clark, The Later Stuarts, p. 108 (giving 1671 as the year of the decision). Rudyard, in his "Appendix" to Penn's Truth Rescued, which was written in Feb.–March, 1671 (see below, n. 122), referred to the case as pending in Common Pleas.

113. State Trials, 6:970–1000.

114. William Hawkins, A Treatise of the Pleas of the Crown, 2 vols. (London, 1716), vol. I, p. 158: "An unlawful Assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion toward the execution of it: but this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together
is unclear whether London authorities counted any assembly in breach of the Conventicles Act as an unlawful assembly. Apparently, authorities believed that a tumult had resulted, or at least had been highly likely to occur. Such a tumult clearly constituted a disturbance of the peace and made the assembly unlawful.

According to Penn, the government had to prove that the defendants had met with an intent to do—or to plan—physical harm to person or property, the traditional sphere in which common law crimes were located. The intent to worship God in a manner and form contrary to statute was clearly not such a design: "[T]hat dissenters meet with no such intention, is manifest to the whole world, therefore their assemblies are not unlawful." The authorities, Penn argued, had resorted to an evil stratagem. The prosecution had "forged" a "romance-indictment" that cited circumstances which did not, in law, amount to an unlawful assembly or disturbance of the peace, but which included those phrases. The hoped-for verdict would then attach to the entire indictment, so that on the basis of evidence of religious assembly only, the jury would have, in legal effect, found an unlawful assembly and disturbance of the peace. Moreover, according to Penn, the indictment had been framed in such a way as to induce a verdict of guilty. It was "swelled with malicious scaring phrases" to give the impression that the defendants were "the most dangerous persons." Precisely because there was so little evidence against them the government had introduced fictitious testimony into the indictment. In short, the indictment was intended to be self-proving.

The jury, applauded the Appendix, had not been fooled. It refused to do more than to find those facts proven at trial and had stated its verdict accordingly, thus comprehending its role as judge not only of fact, but of the law upon which the indictment was based. The jury had responded to the defendants' exhortation not to return a verdict of guilty unless it believed that the facts proved amounted in law to the crime of unlawful assembly. Nor could the jury have done otherwise: "For as well the jury as prisoners, were denied to have any law produced, by which they might concerning the most proper means for recovery of their interests; for no one can foresee what may be the event of such an assembly."

115. State Trials, 6:971–72. Although Penn denied there had been a "tumult," except, perhaps, in response to the "unlawful" acts of the officials who disrupted the lawful assembly, Penn apparently did not believe that the mere fact of a tumult sufficed to make the assembly (which met without the intent to cause such a tumult) unlawful. "In short, because to worship God can never be a crime, no meeting or assembly, designing to worship God, can be unlawful" (p. 971).

116. Ibid., pp. 973–74. Penn made good use of the historical lore concerning Empson and Dudley in his denunciation of the authorities' approach to the indictment process (pp. 989 et seq.).
measure the truth of the indictment, and guilt of the fact.”

Thus, had the bench “produced” the law, as the defendants had demanded, the jury would then have been duty-bound to determine whether the indictment and judicial charge conformed to the law regarding the facts required for the alleged offense. Presumably this determination would have been informed not only by their own understanding of the law but also by their consideration of the defendants’ arguments against the bench’s interpretation of law.

This, then, was Penn’s conception of due process in trials by jury—so far as one can now reconstruct it. Penn’s claim that his jurors were his “sole judges” was not a claim that the bench played no role at all; the bench was to “produce” the law and to charge juries upon it, and even to monitor indictments for just the sort of abuses of which Penn and Mead believed they had been made victims. The jury, one might suppose, would give the bench’s charge due weight. It operated as a shield where necessary, and, for the Quakers, unusual events had created present necessities.

Penn and Mead’s views, and their behavior at their trial, were fiercely attacked by Sir Samuel Starling, the Lord Mayor of London, in a tract written in part as a reply to the defendants’ trial account and the Appendix. Starling, who had presided at the trial, produced an account of the proceedings that differed little in detail from that of the defendants but one that—perhaps sincerely—misconceived the nature of the campaign on behalf of the jury. Starling characterized the defendants’ behavior as insulting attempts to undermine the law, and the jury’s “special” verdict as a nonverdict, an abuse of their duty. Starling never doubted that the jurors merited the fines imposed upon them for their outright nullification of the law: the Crown, he believed, had lawfully charged and definitively proved an unlawful assembly.

Addressing the Westminster bench, Starling devoted much of his tract to a denunciation of Penn’s notion “[t]hat the jury were the proper judges both of law and fact.” Not surprisingly, he thought that Penn’s historical “precedents,” reproduced in the Appendix, falsely demonstrated the jury’s right to find the law. However, he wrongly interpreted Penn’s appeal to the jury as his “sole judges” as an entire renunciation of

117. Ibid., p. 974.
118. Starling, An Answer to the Seditious and Scandalous Pamphlet.
119. Ibid., p. 2: “Now Gentlemen of the long robe look to your selves, and your Westminster Hall: If these learned reformers of religion shall likewise reform your laws and methods of proceedings (as doubtless they design it) and make twelve jurymen, eleven of which it’s possible can neither write nor read, to be the sole judges both of law and fact; farewell then to your great acquisitions, your Year Books then will be out of date, and an ouster will be put to your Books of Entries.”
the powers of the bench, a "claim" he rebutted as absurd and dangerous. The Quakers, Starling asserted, would reduce the justices to "ciphers," a term he may have taken from Lilburne's well known 1649 appeal to his jury. The defendants, he continued, misinterpreted Magna Carta's most famous chapter. "By lawful judgment of his peers, or by the law of the land" did not guarantee trial by peers who acted as judges. As it was in the "disjunctive," the Crown might employ the "law of the land," which must mean trial by both judge and jury ("peers"). Magna Carta was entirely consistent with that well known legal maxim: "[T]he judges respond to questions of law." In claiming trial solely by jurors, Starling concluded, the Quakers aimed at a special sort of jury, not that employed by the common law; they intended ultimately to "turn the judges and juries also out of Westminster Hall and set up a High Court of Justice of Saints." 121

Starling's tract provoked a retort from Penn. *Truth Rescued from Imposture* was written during February and March of 1671, in Newgate, where London authorities had imprisoned Penn anew, this time for breach of the Five Mile Act. Now forced to state more precisely his pro-jury position, Penn defended his view that jurors are judges of law as well as fact, pointing to the form of the traditional charge to the petty jury: "to deliver their verdict or opinion, whether [the defendant] be guilty in manner and form." Since the indictment "comprehends both law and fact," the jury is judge of both, to determine "whether the fact proved be obnoxious to the law." 123 But how does the jury achieve its understanding of the law? This question Penn now answered for the first time. The jurors need not take the law solely from the bench; otherwise, the bench might require a verdict of guilty for "the most lawful act imaginable, it being such as he cannot deny, and which is proved by evidences." While acknowledging that a jury might be so ignorant that "there may be a necessity to inform them of the law, by the better skill of the justices," Penn argued that even in such a case the law stood only as it is understood, digested, and judiciously made the jury's, by their own free will and acceptance, upon their conviction of the truth of things reported by the bench: As a man may be educated in any religion; but to make it his proper religion, it is requisite that he believe and embrace

121. *Idem*.
122. Penn, *Truth Rescued* (see above, n. 52). For Penn's activities between September, 1670, and March, 1671, see Peare, *William Penn*, pp. 127-34. *Truth Rescued* appears to have been written in February, 1671; Thomas Rudyard added an "Appendix" in that month and Penn added a "Postscript" in March, 1671.
Penn thus conceded an important role to the bench, while marking out the limits of its power and articulating his conception of the process by which the jury "finds the law."

Penn's views found support in Thomas Rudyard's *Dialogue, in a Plain and Friendly Discourse between Student and Citizen*. The tract referred to Penn and Mead's trial, the Appendix, and to the trial of Rudyard, Francis Moor, and several others, all of whom were convicted by a jury that replaced the jury that had tried Penn and Mead. In *Dialogue*, a self-styled student of the common law explains the importance of jury duty, the nature of the juror's role, and the unlawfulness of the punishment of jurors for finding according to their conscience. Echoing Penn (and well-settled Quaker strategy), the Student advises the Citizen as juror to observe the indictment closely so as to determine whether the evidence offered proves the defendant guilty not only of the acts alleged in the indictment but also of the "manner" ("which they call law"), for "though a person be proved to be guilty of some fact or misdemeanor, yet if it be not also proved to be done in such manner and form as the party stands indicted, he is not guilty, and ought to be acquitted by you." To the Citizen's query, "But is not there both law and fact in an indictment, as those against W.P. and W.M. and the rest of the Quakers last sessions? And how shall a jury deal in such cases?" the Student replies that the jury may return a special verdict, finding the fact and asking the Court to apply the law.

Citizen: What's the reason then, that the Court will not accept of such

124. Ibid., p. 502.
125. Thomas Rudyard, An Appendix, by way of Dialogue, in a Plain and Friendly Discourse between a Student in the Laws and Liberties of England, and a true Citizen of London (London, 1670). This tract was appended to The Second Part of the Peoples Antient and Just Liberties (London, 1670) that was itself part of an expanded edition of Penn's account of his trial. The Second Part recounted the trial of Thomas Rudyard.
126. The Second Part of the Peoples Antient and Just Liberties Asserted. This account was probably written by Penn and Rudyard. It states that after Penn's jury had been incarcerated, a new jury was called to try Rudyard (who had taken part with Penn and Mead in convoking the assembly in Gracechurch Street) and about a dozen others for obstructing the prosecution for sedition of Samuel Allinbridge. To obtain the new jury, the account alleges, the clerk "picked here and there such persons that were judged the most likely to answer the malicious ends and horrid designs of [the] Bench, calling not the jury-men in order and direct course, as is usual in all courts of justice, where right is impartially administered; and withal, bidding the prisoners to look upon the jurors, and before they were sworn to make their challenges" (p. 364).
128. Ibid., p. 397.
special verdicts, but frequently turn the jury back, till they bring in general?

Student: Because then they have your oaths as well for law as fact; and if the judgments be severe, it shall lie at your door.\textsuperscript{129}

This was, of course, a far riskier tactic than that of a simple statement of the facts that had been found unaccompanied by a request to apply the law.\textsuperscript{130} Because it left the bench the legal right to enter a verdict of guilty, however, it could prove much more embarrassing.

The Student goes on to charge, along the lines of Penn and Mead’s \textit{Appendix}, that the authorities systematically loaded down indictments with incriminating terms: verdicts of “guilty” on insufficient facts might then be applied to the entire indictment. Moreover, the “City Magistrates” had a “further artifice.” They indict persons “by the common law, and waive intermeddling with any of the statutes in force against such misdemeanors, as they pretend the persons indicted are guilty of.”\textsuperscript{131} Thus, stated the author, in an obvious reference to Penn and Mead’s case, the bench, when asked to produce the law on which the indictment is based, answers that it is “\textit{Lex non scripta}.”

By this means the prisoner is incapacitated to make his defence, and the jury kept ignorant, whether the offence charged to be done by the prisoner be innocency or guilt. . . . [T]hey might have framed an indictment against a man for (\textit{vi et armis}) eating meat at his own table. . . . Therefore it concerns you to have great care and regard to the charge you undertake; which is, well and truly to try, and true deliverance make, according to what is evidenced to your conscience.\textsuperscript{132}

Conscience, then, required that jurors do one of two things: Either they ought to return a special verdict and thereby force the bench openly to wrench the law to its own ends, or taking it upon themselves to find the law, they ought to find the defendant “not guilty.”

Of course there were cases—\textit{Penn’s Case} was one—where the bench would not tolerate either course of action, where the bench believed that such jury behavior seriously threatened the social order. For what officials took to be an outright and illegal nullification of the law, the jury

\textsuperscript{129}. \textit{Idem.}

\textsuperscript{130}. In many Quaker cases, including Penn and Mead’s trial, the jury merely stated the facts it had found, omitting any finding whatsoever on what it knew to be the crucial facts. Moreover, it did not request the bench to apply the law. For cases involving Quakers in which jurors rendered such verdicts see e.g. Besse, \textit{A Collection of the Sufferings of . . . Quakers}, I: 48 (1663, Bristol), 634 (1683, Somersetshire), 730 (1684, Sussex). It is not clear how the bench ought in law to have treated such truncated verdicts.

\textsuperscript{131}. \textit{Dialogue, in a Plain and Friendly Discourse}, p. 399.

\textsuperscript{132}. \textit{Ibid.}, pp. 399-400.
Transformations

would be fined and imprisoned until the fines were paid. Inevitably, the question of the legality of the fining and imprisonment of jurors for acquitting in criminal cases "against manifest evidence" was central to the tracts occasioned by the trial of Penn and Mead. In the Appendix and the Dialogue, Penn and Rudyard dealt at length with this question. The defendants had protested at their trial against the bench's treatment of their jury, particularly against the court's refusal to accept the jury's first several verdicts. Penn had asserted that judicial fining of jurors offended the principle, set forth in Magna Carta, that no free man should be amerced "but by the lawful judgment of his peers." Indeed, Penn had made judicial behavior toward the jury a principal basis of his final appeal to the jury that it should consider the entire course of the proceedings against him illegal.133

In the Appendix, Penn developed more fully the question of jury control, recounting both ancient and recent precedents relating to trial by jury. He claimed that jury fining was an innovation, that the Court did "most illegally, tyrannically fine and imprison [the defendants] . . . notwithstanding the late just resentment of the House of Commons, in Judge Kelyng's Case, where they resolved, 'That the precedent and practice of fining, and imprisoning of juries for their verdicts, were illegal.'"134 Rudyard's Dialogue likewise recounted recent events in its argument against the legality of fining jurors. It made effective use of the Kelyng incident and, after summarizing Penn's Case, described the "packing and enforcement" of the jury that convicted Rudyard, Moor, and the others tried before it. The imprisonment of Penn and Mead's jury, the Dialogue asserted, had been directly responsible for the new jury's obsequious behavior.135

Not all of the arguments in the Dialogue were historically based or reduced to mere aphorisms. Some of them went to the nature of the criminal trial, arguing—as Vaughan was to argue—from the logic of the trial to the unlawfulness of fining jurors. Rudyard devoted the opening passages of the Dialogue to the jury's duty to find the fact—and to the proposition that they were better equipped to do so than was the bench. The jury, the Student explained, is drawn from the vicinage "where the fact is supposed to be done or acted" because "it's always presumed that the neighborhood are best acquainted with the persons inhabiting, or the actions and facts. . . . They may know the witness on the one side, or the

133. State Trials, 6:961–69. Penn argued that the proceedings were "most arbitrary and void of all law" because the bench gave "the jury their charge in the absence of the prisoners" (p. 961). Subsequently, he protested against the threatening of the jury by the recorder (p. 965) and then the fining of the jurors for their verdict (pp. 968–69).

134. Ibid., p. 984.

other, to be persons of no credit, or . . . they may know the party accused to be a man otherwise qualified or principled, than to do such an act.”

The Citizen was quick to see the point: it would be “very hard” if the jury were fined, since it may be taking into account things it knows of its own. Moreover, continued the Student, one ought to prefer the “knowledge of twelve men, agreeing together” to the “single apprehension of any one person whatsoever.”

The Dialogue also confronted—as would Vaughan—the logic of concluding, in a particular case, that the jury had found “against the law.” The Student, quoting Coke, explained that since “the law grows out of the root of the fact,” if the jury does not find the fact, then the jury “cannot be said to find against the law, which is no other than a superstructure of fact.” The Student conceded that if the jury openly find the fact and then find against the law, “the Court ought to give judgment according to law.”

Finally, the Dialogue produced an unusual argument regarding the problem of appellate review. Because no writ of error lay in such a case, jurors would be “remediless of relief” if judges could fine them, and thus they would be “in worse condition than the criminals that are tried by them.” If the bench moved by way of attaint, the first jury would have some safeguard, as “the truth or falsehood of a juror’s verdict, in matters of fact, may be tried.” But in a criminal case, “the jurors are concluded, by reason that whether they have found with or against their evidence, can never be tried.” The Dialogue thus appears to assume that attaint lay only in civil cases, and it employed this assumption in its argument against the fining of jurors.

Starling’s reply to the Appendix had included a lengthy discourse on the subject of fining. First Starling cited a string of cases, only one earlier than 1660, in which juries had been fined for verdicts unacceptable to the courts. These cases, Wagstaffe’s Case and Leech’s Case among them, were the backbone of the pro-fining argument, and Starling concluded from them that “[t]he fining of jurors that find contrary to their evidence is no innovation, but always practised.” Like Rudyard, Starling concluded that attaint did not lie in criminal cases, but he drew from this fact a very different conclusion. Not surprisingly he couched his argument against attaint in legal rather than theoretical terms, for any philosophical argument against attaint of juries could also cut against their being fined.

136. Ibid., pp. 391–92.
137. Ibid., pp. 392, 394.
138. Ibid., p. 394.
139. Ibid., p. 393.
140. Starling, An Answer to the Seditious and Scandalous Pamphlet, pp. 32–33. Starling’s statement that the jury in Leech’s Case was fined (p. 33) was rebutted by Rudyard in his “Appendix” to Truth Rescued at p. 514.
Starling cited Coke and Fitzherbert for the proposition that "attaint lies [for] ... false verdict ... against the Plaintiff or Defendant ... in a plea, real or personal, sued out by writ or bill," but not in a criminal case. "It is agreed by all sides, that an attaint lieth not in an indictment of treason, murder or felony; much less in an indictment of trespass, which . . . is far lesser offence than them aforementioned." He relied on Brooke for the maxim that "where the King is the sole party, attaint doth not lie." Finally, he cited statutes establishing the remedy of attaint in certain cases and argued from this that its nonexistence at common law must be inferred. The strength of the government's case lay in the fact that, without the power to fine, there would be no remedy for an acquittal against manifest evidence; instead there would be, pure and simple, a "failure of justice." 141 Thus Starling, like counsel for the Crown who were busily attempting to justify the imprisonment of Bushel, echoed Chief Justice Hyde's admonition in 1665 that "jurors ought to be fined if they . . . take bit in mouth and go headstrong against the court . . . seeing the attaint is now fruitless." 142

Truth Rescued from Imposture, Penn's answer to Starling's tract, contains an appendix by Thomas Rudyard which takes issue with the claim implicit in the title of Starling's section on fining, "The Fining of That Jury, that Gave Two Different Verdicts Justified." 143 Although Starling abandoned the charge in the body of the work, the implication of perjury is important, for such behavior might have justified the fines imposed on Bushel and the other jurors. Rudyard sought to show that the verdict rejected by the court, "Guilty of speaking in Gracechurch Street," and the general verdict of "not guilty" were not contradictory. The jury had been forced to resolve its verdict one way or another; Starling, Rudyard charged, has "a very treacherous memory, which is an ill companion for a Liar." 144

Rudyard agreed with Starling on the technical aspects of the attaint issue, but went on to make a broader claim that implicated fining as well. "[We] not only grant to him that no attaint lies against such jurors, but that it is horrid injustice and oppression to punish them by that, or any other way." 145 In a gloss on Starling's bald statement that where the king

141. Starling, An Answer to the Seditious and Scandalous Pamphlet, pp. 31, 33–38. "As nature abhors a vacuum in the universe, so it is the honour of our law, that it will not suffer a failure of justice" (p. 31).
143. Thomas Rudyard, "Appendix" (see above, nn. 52, 122).
144. Ibid., p. 512.
145. Rudyard cited Horn's Mirror on judicial abuses of juries, and the parliamentary statutes on attaint, saying that if attaint lay in such a case, it would be clear from the statutes. Ibid., p. 519 (emphasis added).
is the sole party, there is no remedy of attaint, Rudyard asserted that an
element of corruption must be present before a verdict is punishable,
because although the indictment is prosecuted in the name of the King, he
is acting in the interests of the public. Cannot the public, Rudyard asked,
be entrusted with their own protection and safety?146 Thus did Rudyard
attempt to avoid Starling's (and the Crown lawyers') conclusion regarding
a "failure of Justice."

Continuing (more cogently) his attack on fining, Rudyard denied that
there was any, except recent, precedent for fining, and cited the censure
of Justice Kelyng as invalidating the post-Restoration cases cited by
Starling. Following the line of argument he had established in the
Dialogue, Rudyard asserted that the procedure used in fining denied
jurors the "due process of the common law," in that the jurors were
condemned without trial, with no possibility of review or appeal, and
without the lawful judgment of their peers. Rudyard cited Coke on the
common law of England, particularly on the maxim that Lex intendit
vicinum vicini facta scire, and claimed that, according to Coke's "ratio
legis," the law would have "left all controversies to [the judges'] sole
arbitrary determination" had judges been better equipped to hand down
verdicts.147 Two interests, Rudyard asserted, were represented by those
who argued against fining: the freedom of jurors, and the freedom of the
people of England. In the interests of these freedoms, all Englishmen on
trial should be judged by "twelve honest men of the neighborhood," who
are presumed to be more fit to hand down a verdict than a judge, both by
their numbers, "since . . . twelve men may neither be so easily corrupted
as one single person, nor their judgment of such fact . . . so likely to be
erroneous" and because, being of the "neighborhood where the offence
was committed," they may be expected to have a fuller understanding of
the crime than the judge. In this way, "lives and liberties can be secured
against the lusts of . . . petty prerogatives."148

Rudyard's arguments against the practice of jury fining seem less an
extension of either the Quaker "law-finding" theory or the older notion of
the merciful verdict than elaborations upon the much more modest theory
that he set forth in the Dialogue.149 This theory was more difficult for the
bench to refute, for it emphasized the inscrutability of fact that resulted
from the possibility that the jurors possessed personal knowledge. If
Rudyard's true claim was that, because the jury was judge of both law and
fact, it could not in any way be coerced or punished for its verdict, the

146. Idem.
147. Ibid., pp. 513-17.
148. Ibid., p. 516.
149. See above, n. 136 and accompanying text.
claim was well hidden by the arguments that focused mainly on the fact-finding aspect of the jury’s role, its claims to superior knowledge. Rudyard constructed a defense behind which the jury might effectively act as independently of the bench as if they were judges both of fact and law, but his view was bound to be much more acceptable to the bench, for it largely avoided the overtones of insurrection which made the “law-finding” theory so unpalatable. In this respect, Rudyard’s argument against fining suggested the strategy that Vaughan was to follow, but Rudyard’s central argument, based on the proposition that jurors were still self-informed, was to become only one—and perhaps the less significant—element of the Chief Justice’s famous opinion.

IV

Two and a half months after the final, tense day of Penn and Mead’s trial at the Old Bailey, Edward Bushel, who had been imprisoned in Newgate for refusing to pay his fine of forty marks, sued a writ of habeas corpus out of the Court of Common Pleas. He claimed that the fine had no basis in law and that he was, therefore, being held without lawful cause. Bushel’s suit, in which three of his fellow jurors joined, brought to a head the recent political and legal ferment over the issue of fining jurors.150 Five years had passed since Wagstaffe’s Case, when most of the bench

150. T. Jones 14, 84 Eng. Rep. 1123 (1670). The three who joined Bushel were John Hammond, Charles Milson, and John Bailey, all “merchants and tradesmen” and citizens and freemen of London. The other eight jurors “paid their fines and were soon discharged.” See The Case of Edward Bushel [et al.] . . . stated and humbly presented to the Honourable House of Commons assembled in Parliament (London, 1671?). This petition is in Lincoln’s Inn Library, Miscellaneous Pamphlets, vol. 104 at p. 37. The petition refers to the successful resolution of the case, which occurred in late 1671, and states that the jurors were discouraged by counsel “to seek [further] remedy or satisfaction in the courts of Westminster.” Hence the petition to Commons. Subsequently, Bushel and Hammond did attempt to sue the mayor and recorder who had presided at Penn and Mead’s trial, but their suits were rejected. For Bushel v. Starling see 3 Keble 322, 84 Eng. Rep. 744 (1674): suit for false imprisonment fails because “no writ of error lies . . . but he must be delivered by certiorari or habeas corpus and no other ways.” For Bushel v. Howell see 3 Keble 358, 84 Eng. Rep. 765 (1674): action upon the case fails because “this action will not lie against a judge.” See also Bushel’s Case, 1 Mod. 119, 86 Eng. Rep. 777 (1674). For Hamond (sic) v. Howell see 2 Mod. 218, 86 Eng. Rep. 1035 (1677): suit for false imprisonment fails because “it was an error in [the judges’] judgments for which no action will lie” (ibid., p. 1037). The defendant may bring a certiorari; “the Barons of the Exchequer might refuse to issue process upon” an erroneous judgment (idem). “[T]he whole court were of opinion, that the bringing of this action was a greater offense than the fining of the plaintiff, and committing of him for non-payment; and that it was a bold attempt both against the Government and justice in general . . . though the defendant here acted erroneously, yet the contrary opinion carried great colour with it, because it might be supposed very inconvenient for the jury to have such liberty as to give what verdicts they please” (ibid., pp. 1036–37).
had concluded that such fining was indeed legal. Now, in a more prominent case, the matter came again before the royal justices, this time before the Court of Common Pleas. In a decision that definitively overturned the ruling in *Wagstaffe's Case*, Chief Justice Vaughan finally laid the problem to rest.

It is not entirely clear why Bushel's counsel turned to Common Pleas rather than to the more appropriate forum, King's Bench. They may well have believed that he would receive a friendlier hearing from the court presided over by Vaughan, who had played a prominent (though ambiguous) role in the parliamentary proceedings involving Kelyng, than he would from Kelyng's former associates on King's Bench.\(^{151}\) Ironically, Vaughan was opposed on jurisdictional grounds to granting the habeas corpus but was outvoted by his fellow justices.\(^ {152}\) In the event, it would be Vaughan who, in consultation with all the justices of the king's courts, wrote the opinion that addressed the merits of the case.

With a few significant exceptions, Vaughan's opinion followed the contours of the arguments made by Bushel's counsel and by Serjeants Ellis and Baldwin. Those arguments largely rehearsed the case earlier put, without success, on behalf of Wagstaffe: the return was too general; it failed to state the legal standards laid down by the bench and rejected by the jury as well as the facts that the jury had allegedly found against; even if one conceded the sufficiency of the return, one need not concede that it was demonstrable that the jurors had gone against the court. Some of the arguments that went beyond those made in *Wagstaffe's Case* paralleled those in the tract literature—just then appearing—that Penn and Mead's trial had generated: e.g., the juror might have knowledge of the "falsity" of evidence presented in court, and as a consequence, because law arises from fact ("*ex facto jus oritur*"), one could not conclude that the jurors went against the law.\(^ {153}\)

There were, however, several new arguments. Judges as well as jurors, it was observed, might mistake the law; it would, therefore, be unreasonable to penalize the jury while the judges themselves were not subject to

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151. Kelyng was still Chief Justice of King's Bench, but his illness kept him from taking part in judicial matters; technically, the other judges of King's Bench were current, not former, associates. Possibly counsel for Bushel believed that Kelyng still exerted influence over the bench; they might even have feared that the Chief Justice would feel his health returning when presented with the opportunity to rule personally on the habeas!

152. T. Jones 14, 84 *Eng. Rep.* 1123 (1670). According to Vaughan: "This court has no cognizance of crimes . . . [The court may hear cases] between subject and subject, but in a criminal case the plea is between the King and his prisoner." See also Vaughan's view that Common Pleas was not the appropriate forum in a case a year later: *Anonymous*, Carter 222, 124 *Eng. Rep.* 928 (1671).

penalty for error. In any case, one ought to assume the good faith of jurors, as one did judges, for jurors were "judges" of the fact. Jurors, it was urged, have "divisum imperium" with the judge. One of Bushel's counsel addressed this issue with a phrase that anticipated the most original part of Vaughan's opinion: jurors, Broome asserted, "are to satisfy their own consciences."

These last arguments, which went to the heart of the question of the jury's duty, left open the problem of the possible "failure of justice" that had seemingly determined the outcome of Wagstaffe's Case and that counsel for the Crown relied upon heavily in the present case. Bushel's counsel seemed by and large to accept the possibility with equanimity; it was a part of the system, perhaps no greater a threat than that of judicial error. Serjeants Ellis and Baldwin, in favor of Bushel, argued that there was a remedy: an attaint would lie, they said, a view ultimately rejected by Vaughan. Because attaint lay in this kind of case, if Bushel and his fellow jurors might also be fined they would be subject to a double penalty. In making this point Ellis distinguished between capital cases, where, in favorem vitae, attaint did not lie, and the case at hand, one of mere misdemeanor.

Nudigate and Baldwin argued, as Vaughan later would, that according to the precedents fining was appropriate only for true jury misdemeanor (in the sense of outright corruption). Baldwin's handling of the two major precedents put by counsel for the Crown may not have been entirely honest. Wharton's Case, he asserted, was never cited as precedent but had been passed sub silentio. As for Wagstaffe's Case, it had probably involved "some [true] misdemeanors," for the jurors, Baldwin wrongly claimed, were fined in unequal amounts: ten were held to pay 100 marks; two were fined only five marks. It is possible that Baldwin (and subsequently Vaughan) was confused by the report of the case (very similar to Wagstaffe's) that had been charged against Kelyng in the House of Commons. In that case, the report of which Vaughan's committee (and now Baldwin) may have had in hand, Kelyng had indeed fined the jurors different amounts. Kelyng's report, however, makes clear that those fines were assessed simply for finding against the direction of the court. Only a very hurried and careless review of the report would have left a reader in doubt on that score. More than likely, Baldwin (and perhaps Vaughan) honestly mistook the case for that of Wagstaffe and wittingly misread it to suit his own end.

156. 1 Freeman 2, 4–5, 89 Eng. Rep. 2, 4 (1670). For reference to, and discussion of,
For the Crown, Scroggs, Maynard, and Powis relied heavily upon *Wagstaffe's Case*, hardly going beyond it to meet those arguments for Bushel that might be deemed novel. Powis seems to have stressed the possibility of a "failure of justice," the point that had so exercised Kelyng and Twisden (and before them, Hyde). Maynard, presumably to the same end, insisted that an attaint did not lie on an indictment. But for the most part, the Crown's argument rested upon a defense of the generality of the return, the assertion that Bushel's appropriate remedy was a writ of error and the fact that the jury might have escaped their dilemma by returning a special verdict. Scroggs came closest to meeting the opposition's stress on the importance of maintaining some degree of jury independence. There was, he said, a danger both ways: the jury might be overawed, but then, too, the defendant might "lose all he has by the wilfulness of the jury and have no remedy." This argument, which overlooked the possibility of a judicial reprieve, apparently was in reply to Broome's assertion that the power to fine would destroy the jury's independence of mind. It was this issue that Vaughan was to make central in his opinion and for which he was to supply an as-yet-unstated rationale. In doing so, he would sidestep the main argument of the Crown and, without condoning law-finding—either true nullification or merciful discretion—take the case on behalf of the jurors a long step beyond the arguments both of counsel and of the tract writers.

Vaughan's opinion, holding for the Court of Common Pleas (and indeed for all the justices of England but one) that jurors may not be fined or imprisoned for their verdicts, is remarkable for how little it addressed the most volatile issues of the day. Vaughan's absolute conviction that jurors were judges only of fact and not of law, was left largely implicit, despite the fact that Penn and Mead had emphasized the issue of law-finding. The opinion contains no hint of the struggle between bench and jury that typified many Quaker prosecutions. It is an oddly and confusingly organized opinion whose central theme is difficult to discern. Vaughan's contemporaries seem to have concluded that the decision turned on the argument that jurors might in any given case have knowledge of their own and thus could not be charged with finding either against evidence or against law. A close reading of the case suggests


160. See below, text at nn. 213–32, for a discussion of tracts by John Hawles and Henry Care, who claimed that Vaughan endorsed jury law-finding, but who seem also to have
that there was more to it than that.

Vaughan divided his opinion into four principal sections: the sufficiency of the return to the writ of habeas corpus; reasons against fining; consideration of precedents regarding fining; and consideration of precedents regarding the power of Common Pleas to discharge, upon habeas, persons imprisoned by other courts. This last matter need not detain us beyond recitation of the argument that, Vaughan implied, convinced the Court of its power to discharge the imprisoned jurors:

[W]hen a man is brought by habeas corpus to the Court, and upon return of it, it appears to the Court, that he was against the law imprisoned and detained, though there be no cause of privilege for him in this Court, he shall never be by the act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of injustice in imprisoning him, de novo, against the law, whereas the great charter is, quod nullus libet homo imprisonetur nisi per legem terrae.161

Vaughan had opposed issuing the writ of habeas corpus, but having been outvoted by his brethren he was determined to see the case through to its conclusion.

Vaughan’s arguments regarding the sufficiency of the return of the writ of habeas corpus dealt first with the allegation that the jury had found "contra plenum et manifestam evidentiam" and then with the allegation that the jury had found "contra directionam curiae in materia legis." On the question of finding against the evidence, Vaughan observed: "The Court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame and dark, or indeed evidence at all material to the issue. . . ."162 How far, then, ought one to credit the bare assertion of a court that the evidence given to the jury was full and manifest? Laying an important foundation stone for the arguments that were to follow, Vaughan firmly denied that the judgment of the bench was beyond inquiry. Though a judge’s "ability, parts, fitness for his place, are not to be reflected on," a judge is not to be presumed "unerring in [his] place." No one with any interest by virtue of "the judgment, action, or authority exercised upon his person or fortunes . . . must submit . . . to the implied discretion and unerringness of his judge, without seeking such redress as the law allows him."163 Vaughan referred to the frequent review and reversal of judicial judgments, whether of "inferior" or "superior" courts, and concluded, perhaps gratuitously, that "corrupt

based their views of Vaughan’s fact-finding argument mainly on Vaughan’s references to the jurors’ possession of out-of-court evidence.

and dishonest judgments... have in all ages been complained of to the King in Star Chamber, or to the Parliament.” He made reference to such instances down to the impeachment of the judges who ruled for the Crown in the Case of Ship Money. Kelyng was not mentioned, perhaps because he was neither “corrupt” nor “dishonest.” Perhaps (but not likely) he had not even come to Vaughan’s mind.

Vaughan’s opening sally overrode the distinction between “superior” and “inferior” courts, a distinction even Hale had conceded in his grudging admission that King’s Bench might not be reviewed by a common-law court. In logic, Vaughan had established only that King’s Bench was reviewable by Parliament; in effect, however, given his refusal to remand a person imprisoned “against the law,” Vaughan had announced that once a habeas had issued, the power of review extended even to the Court of Common Pleas. Vaughan’s second argument on the sufficiency of the return set forth a critical rule of law regarding “fineable fault” in jurors. Jurors, he asserted, may be fined only for finding against their own view of the evidence. That amounted to perjury, in effect to a true misdemeanor. The return was deficient for failing to state that the jury had so found. Vaughan found support for this proposition in Bracton and Fleta, but his own rationale is of greatest interest. People commonly disagreed, he observed, about evidence in many contexts. Barristers and judges deduced “contrary and opposite conclusions out of the same case. And is there any difference that two men should infer distinct conclusions from the same testimony?” By what logic, then, must “one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the judge and jury.” Vaughan had gone well beyond claiming that the return was insufficient. He had asserted that the bench could not fine a jury unless it could prove bad faith out of the mouths of the jurors themselves.

Vaughan made short work of the question of sufficiency of return regarding acquittal “against the direction of the court in matter of law.” The allegation is meaningless, said Vaughan, unless it means that the judge, having taken upon himself knowledge of the fact, directed the jury on the law. But if the judge is to find the fact, why use a jury? Vaughan’s premise was:

Without a fact agreed, it is impossible for a judge, or any other, to know the law relating to that fact or direct concerning it, as to know an accident that hath no subject.

164. Idem.
Hence it follows, that the judge in logic can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot in logic go against his direction in law, for he could not direct. 166

Vaughan conceded that a judge might nearly know how the jury has found the fact before he directs them. In some "special trial," the judge might ask the jurors how they found a certain fact or whether they find the matter of fact to be as such a witness, or witnesses have deposed." But even here the judge's direction ought to be "hypothetical, and upon supposition, and not positive, and upon coercion," for "until a jury have consummated their verdict . . . they have time still of deliberation." Regardless of their previous reply to the judge on matters of fact, "they may lawfully vary from it if they find cause." 167

This last assertion, that the jury may "vary from" its answer if "they find cause," was the weakest link in Vaughan's chain of reasoning. He must have realized that in some cases the jury had revealed enough of its findings on fact for the bench to conclude that the jury knowingly was going against the evidence. Indeed, in what is clearly an earlier, tentative draft of his opinion, Vaughan had conceded that where the verdict contradicted the jury's announced findings, and the jury failed to correct itself, the verdict was to be "set aside and a new trial . . . directed." 168

Presumably, where in such a case the jury refused to "correct itself," it could be punished for perjury. Only subsequently—in the final (published) version of his opinion—did Vaughan alter his views crucially and further limit the scope of the judge's power to conclude that the jurors had committed perjury, asserting that, after they gave their in-court answers, but before they pronounced their verdict, the jurors (or any one of them) might have (honestly) changed their minds regarding the evidence. 169

If Vaughan meant to suggest that jurors in such cases typically did change their minds on the evidence, he was being insincere. His opinion carries force only to the extent that it argues that a jury might have honestly reassessed the evidence and that the judge could never be certain it had not done so. Vaughan's opinion is least convincing regarding prosecutions under the Conventicles Act where the defendants admitted attending the meeting but failed to show that religious worship

166. Ibid., p. 147, 124 Eng. Rep. 1012.
168. B.L. MS Lansd. 648.9, fol. 315v.
169. The new-trial remedy seems to have been a substitute for proceedings by way of attainit, the remedy Vaughan had assumed existed in such cases only three years earlier. See above, text preceding n. 84. If so, what Vaughan had meant by "corrupt" in his speech in the Commons in 1668 was not limited to verdicts resulting from bribes but included those in which the jury simply did not believe.
The Principle of Noncoercion: Contest over the Jury Role

(against Anglican form) was not involved. Acquittals in such cases (as in later prosecutions for seditious libel) were clearly based on rejections of the bench’s view of the law. In other cases, including several of the homicide cases that Kelyng addressed in Parliament and prosecutions for unlawful assembly (the offense charged in Penn and Mead’s case), the possibility of honest reassessment was not automatically excludable. As we shall see, Vaughan’s failure to distinguish between those kinds of cases made it possible for later writers to employ his language in their justification of acquittals in cases of seditious libel.

Vaughan’s listing of reasons against fining includes significant additions to those he gave in his discussion of sufficiency of return. He began with a reference to the argument for which the opinion is famous, that the judge could not direct because “he can never know what evidence the jury have.”

But before stating the reasons why the judge was in this position, Vaughan returned to the most original premise of his opinion: even were the jury to have no evidence other than that deposed in Court, “even then the Judge and jury might honestly differ in the result from the evidence, as well as two Judges may, which often happens.”

The more famous arguments, concerning out-of-court evidence, head a catchall list of points that appear to have been culled from arguments made at bar. On the whole, they were unoriginal and routinely made. Vaughan stated that jurors were supposed to have “sufficient knowledge” to try a case in which no evidence on either side was produced in court. Moreover, they might have “personal knowledge” that conflicted with what was deposed in court. Finally, the “jury may know the witnesses to be stigmatized and infamous.” These curt observations were followed by reference to jurors having the view of premises (“to this evidence likewise the Judge is a stranger”), which affected civil but rarely criminal cases; mention of the dilemma posed by the possibility of attaint (though Vaughan no longer believed that attaint lay in criminal cases); recapitulation of rules presupposing that juries were self-informed and impartial (the vicinage rule, rules of challenge, the freehold requirement, the view). To what end, he summarized, once again moving back to the true basis for his opinion,

must [juries] undergo the heavy punishment of the villainous judgment, if after all this they implicitly must give a verdict by the dictates and

171. Idem.
172. This argument, which does not appear in the manuscript draft of Vaughan’s opinion, appears to have been added either carelessly or insincerely (as a makeweight).
173. Idem.
authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge:

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are foresworn, at least in foro conscientiae.\textsuperscript{174}

Vaughan thus turned away from standard arguments derived from jury practices, some of which practices were becoming outmoded or pertained mainly to civil cases, to restate the fundamental, and original,\textsuperscript{175} element of his discussion of the sufficiency of the return. Even if the judge had all of the evidence before him, judge and jury might disagree, and jury trial was premised on a preference for the jury's assessment of that evidence.

The remainder of this section of Vaughan's opinion reveals the extent of his reliance on civil cases. It is not surprising that Vaughan drew his examples from his own domain in Common Pleas. Most significantly, he insisted that jury independence in criminal cases should be as great as in civil cases, where judges could not fine. Nowhere in his opinion did Vaughan give space to Kelyng's and Twisden's concern about a "failure of justice." If in criminal cases there was liability neither to attain nor to fine, presumably it was because the defendant, not the Crown, had more at stake.\textsuperscript{176}

Vaughan's discussion of precedents follows, in the main, that of counsel at bar. He was fully prepared to sanction fining of a jury for accepting a bribe or for committing any other true ministerial breach—including, of course, giving a verdict provably against oath. Most of the precedents that others had cited, he asserted, either certainly or at least apparently fell into the class of legitimate impositions of fines. The two most prominent criminal cases commonly thought to be precedents for fining jurors who gave verdicts against the evidence were \textit{Wharton's Case} and \textit{Wagstaffe's Case}. Vaughan stated that even those cases might have involved true jury misdemeanor. Probably he allowed his reading of main trends to influence his view of particular cases.\textsuperscript{177} In any event, at several


\textsuperscript{175.} The last twenty-seven words ("and though . . . conscientiae") do not even appear in Vaughan's tentative manuscript draft.

\textsuperscript{176.} Vaughan 146, 124 Eng. Rep. 1011: "If [the judge] could not [fine the jury] in civil causes . . . he could not in criminal causes upon indictments . . . for the fault in both was the same, namely, finding against the evidence and direction of the Court, and by the common law; the reason being the same in both, the law is the same."

\textsuperscript{177.} Vaughan appears to have followed Baldwin on these two precedents. See above, text at n. 156. Vaughan evidently preferred to think that the best report of \textit{Wharton's Case} was Noy's, which suggested that the fine was imposed because "the judges conceived the
points he commented on the absence of clear evidence that courts had fined in accordance with the allegations in the return in Bushel's Case. There was, he said, no evidence that the common-law bench or Star Chamber had ever fined "only for (i.e., as the judge inferred) finding against the evidence"; in civil cases, there was no evidence of fining at common law before statutes of attainder, or thereafter, "until Popham's time," when the fines were not clearly other than for jury misdemeanor.178

Taken at face value, Vaughan's opinion rested ultimately on two propositions: the common law required trial by jury; in such trials, without the confession of the jurors themselves, it could never be shown that the jurors had gone against fact or, hence, that in applying the law the jurors had rejected judicial instructions on how the law ought to be applied. Further than this he did not go. Although jurors might "resolve both law and fact complicately," presumably they were supposed to follow instructions on the law. He cited no exception to the rule that jurors were to adhere to the facts they had found. The word "mercy" does not appear in his opinion.

Some of Vaughan's arguments based on the self-informing role of the jury ring false, for they hark back to much earlier times; but others do not. Jurors' knowledge of reputation was still sometimes an important evidentiary guide, both in criminal cases and in the civil trials from which Vaughan took his lead. The rule that jurors must go only by evidence produced in court had not yet been firmly settled in criminal cases, and certainly it was not considered wrong for a jury to acquit on outside evidence. But it remains unclear just how significant these arguments were for Vaughan. As he stated, even if the judge did know all the evidence, judge and jury might nevertheless disagree. The judge could not assume perjury; the jury was bound to swear to what it believed, however an outsider might have viewed the case, however wrong the jury might be. Moreover, objective truth was not easily obtained in such matters: Vaughan compared the assessment of witness testimony to the interpreta-

tion of religious texts. Finally, no matter how wrong the jurors were in their sincere belief, the law guaranteed resolution of guilt or innocence according to their ‘‘understanding.’’ Although the king might pardon a defendant convicted against the fact, as it appeared to the judge, acquittal by the jury was final.

It is useful to compare Vaughan’s opinion with an anonymous (and hitherto unnoticed) contemporary manuscript tract, or draft argument, ‘‘Reasons against the Fine and Commitment of the Jurors.’’

‘‘Reasons,’’ which appears to pre-date Bushel’s Case, almost certainly was occasioned by the fining of jurors in a case involving the Quakers. It is unlikely that the case was Wagstaffe or the very similar one charged against Kelyng in the House of Commons, for here the jurors were imprisoned until all of the 100 mark per juror fines (‘‘imposed jointly and severally’’) had been paid. The arguments in ‘‘Reasons’’ bear close relationship to those made by Serjeant Ellis in Wagstaffe’s Case: great emphasis is placed on the notion of a ‘‘divisum imperium’’ between judge and jury and on the fact that judges are not punished for their errors. But ‘‘Reasons’’ contains a religious motif all its own. Though it takes the form of a lawyer’s brief, it might have been a lay tract designed to make the strongest case for juror independence and for verdicts reached according to conscience without the barest suggestion that jurors ought to engage in law-finding.

‘‘Reasons’’ contained most of the arguments that Vaughan made in support of the jury’s right to be free from coercion. Like Vaughan, the author of ‘‘Reasons’’ confines fineable wrongdoing to perjury and other true misdemeanors. ‘‘Reasons’’ implies that the precedents for fining were actually cases involving some jury misdemeanor, but it relies ultimately on the view that precedent ought not to be followed if it is

180. B.L. MS Sloane 827, fols. 35–42v. To my knowledge, this manuscript has never before been discussed in print.
181. Ibid., fol. 42.
182. Ibid., fol. 36: ‘‘If not according to their consciences then they offend God and incur punishments both temporal and eternal’’; fol. 38v: ‘‘[N]either is it superfluous to consider that this trial by a jury in criminal cases is said to be a trial by God and the country which seems to imply the absoluteness of it, so that the acquittal by the country is an acquittal by God and finding guilty by the country a finding guilty by God.’’
183. ‘‘Reasons’’ refers to the reign of Henry VIII as ‘‘perhaps . . . not beyond the memory of some men living’’ (fol. 40v). It also refers to the Petition of Right (1628) (fol. 35); a person born in the last year of Henry VIII’s reign would have been eighty-one in 1628. The author probably means that some living persons have heard or read about the time of Henry VIII. Clearly, ‘‘Reasons’’ bears all the marks of the mid-to-late-1660s jury-right debates. In my view, it was the work of Ellis or of someone influenced by his arguments in Wagstaffe’s Case.
"against reason and the principles of justice." The tract makes the increasingly commonplace arguments that jurors have knowledge of their own and that, as law arises from fact, the judge cannot direct on the law until the jurors have pronounced their verdict.\textsuperscript{184}

"Reasons," like Vaughan's opinion, holds that attaint does not lie, but it confronts the possibility of a failure of justice, as Vaughan did not do. First, the author concedes that "the administration of the law must be entrusted somewhere and there must be a \textit{ne plus ultra} in all controversies." This trust had been distributed between judge and jury, both of whom are on oath to do justice. There is little reason to think, the author continues, that acquittals will cause a great deal of harm. That "one or two juries in an age are mistaken" does not suggest that many more will be, for "persons of their conditions" have more at risk than "persons of greater rank" who "are perhaps better guarded."\textsuperscript{185} Moreover, trial by jury assumes jury independence. Here the author compares civil (i.e., Roman and canon) law with common law. In the latter system, evidence is given viva voce and is not made part of a sworn record that remains for later examination. Testimony given at common law, "upon a sudden altogether," cannot be sifted in the same way, nor "so well observed or remembered, for \textit{vox audita perit}." It would be unreasonable "that men's lives, liberties and estates should be bound up in so narrow and dangerous a compass as the direction of a judge against evidence seeming so to him."\textsuperscript{186} The author of "Reasons" thus supplied a more powerful version than did Vaughan of the argument for relying upon twelve men's memories. And it was not only a matter of accurate observation and recall. The reason for using a form of trial to which jury independence was integral was that "no man if he be condemned can blame the King or the nobles or the judges or men of power, the frequent objects of envy, but his own peers and so every man rests content and his government secured."\textsuperscript{187}

Vaughan was content to take the jury as a given; it required no justification beyond the comment that one man's memory is less accurate than that of twelve men. It was enough to observe that the jury was on oath to give a verdict according to \textit{its} understanding. The problem for Vaughan resided more in the realm of science than in the realm of politics. Because people drew different conclusions from the same evidence, one could not presume insincerity. It was a point that Ellis and his fellows had not seen and that escaped the author of "Reasons." But it was also a

\textsuperscript{184.} \textit{Ibid.}, fols. 40v, 38v, 40.
\textsuperscript{185.} \textit{Ibid.}, fol. 41.
\textsuperscript{186.} \textit{Ibid.}, fols. 38v–39.
\textsuperscript{187.} \textit{Ibid.}, fol. 39.
point that begged the question, Why depend so heavily upon laymen's "understanding"? Surely the answer could not be solely that they might have knowledge of their own, for they could (and often did) report that knowledge to the judge. As "Reasons" implied, the true answer to the question, Why a "divisum imperium"—i.e., Why use a jury in the first place?—involved considerations of trust and politics which took account of the fact that the judiciary was in reality, or in common supposition, capable of exercising tyrannical powers. This was ground upon which Vaughan would not unnecessarily tread.

Vaughan broke relatively little new ground in his opinion. Where he did adduce novel arguments, he did so in a modest way. He denied that attain would lie in a criminal case, but he took his lead from the lack of precedent rather than from the rights of Englishmen. He suggested that if fines were not imposed in civil cases, a fortiori they ought not to be in criminal cases. His language was softer than that of Hale. 188 If judge and jury disagreed on questions of fact, the jury prevailed, according to Vaughan, both because otherwise the institution would be a waste of time and because it was unreasonable to make jurors swear to what they did not believe. Preference for the jury's view was implicit in institutional arrangements; for Vaughan, historical usage ipso facto suggested correct practice.

Vaughan used extreme care to avoid any argument that smacked of the politics of the day. His legal precedents were similarly uncontroversial, drawn almost without exception from before the Interregnum and not tainted by any recent political maneuvering or misuse of power; indeed, he ignored the series of contemporary cases on which proponents of jury fining relied as precedent, save for the most important one, Wagstaffe's Case. Perhaps for this reason Vaughan did not rely on the proceedings relating to the censure of Justice Kelyng, although as a party to the proceedings he was certainly aware that many in Commons supported his stand on fining. Nor, in his discussion of attain, did he seek support from Hyde, who had called attain a "fruitless remedy." 189 Instead, without endorsing either side in the Quakers' struggle with authorities, or even acknowledging the turmoil, Vaughan attempted to settle this controversial question simply on the basis of "reason" and his own (perhaps idealized) view of the old common law.

188. Hale, History of the Pleas of the Crown, 2:311-12: "[I]t were impossible almost for any judge or jury to convict a jury upon such an account, because [it is] impossible that all the circumstances of the case, that might move the jury to acquit a prisoner, could be brought in evidence; this therefore seems to me to be but in terrorem."

189. See above, nn. 31-32.
It is difficult to tell from Vaughan's opinion the influence he expected it would have on the jury law-finding debate. The opinion seemingly took little notice of the real world: it was grounded in legal theory, and what followed from that theory was not his concern. If Vaughan had any thoughts about law-finding or the jury's right to apply law mercifully, he kept them to himself. Penn's entreaties, as well as those of the Quakers for nearly a decade, seem, in the light of Vaughan's opinion, wrongheaded and irrelevant, and to have had little or no effect on the outcome of Bushel's Case. And yet it is difficult to believe that Vaughan failed to realize that the fact-finding role as he depicted it would be used by the pro-jury elements to forward their cause. To Vaughan's mind, legal reasoning and precedent followed the Quaker pro-jury arguments up to but not including the point where they advocated jurors' control over the law. Pro-jury interpreters of Bushel's Case, however, did not stop where Vaughan did; instead, they glossed his opinion, employing it in their forthright arguments for jurors as judges of law.

V

The ruling in Bushel's Case probably had little impact on proceedings in most routine felony trials. In the great majority of such cases bench and jury continued to function as before, in tandem and without open conflict. In those few cases where the bench found itself impatient with a too merciful—or simply dishonest—jury, the judge employed mechanisms short of outright coercion that typically afforded the bench effective control. True jury intransigence, though now protected by law, was probably very rare.

Political trials, such as those for treason, the unlicensed printing of news, and seditious libel, presented a different situation. Since authorities were more likely to take a strong interest, the risk of disagreement with a resolute jury was substantially greater. In these and similar cases the transition from the principle to the practice of noncoercion was probably slow. The nearly two decades between Bushel's Case and the Glorious

190. See below, Chapter 7, sections I and II, for discussion of the typical felony trial in the late seventeenth and eighteenth centuries.

191. See below, Chapter 7, text at nn. 36–39.

192. Joseph Besse (A Collection of the Sufferings of . . . Quakers, I) claimed that the bench sometimes refused to accept acquittals in trials of Quakers [pp. 106 (1675, Cheshire), 110 (1683, Cheshire)]. When a jury that acquitted was ordered to go out again to reconsider, one juryman objected, whereupon Peniston Whaley, one of the justices, was enraged and said he hoped that the king would get rid of juries. He allegedly told another jury that "[i]f they did not agree, they should be kept there till they died" and they complied [p. 560 (1676, Nottinghamshire)].
Revolution were testing years for the bench and criminal juries, grand and petty. The complicated and oft-described political trials of the most tumultuous years, 1678–83 (the period of the Popish Plot and its aftermath) need not be retold in detail here. Our immediate interest lies mainly in one aspect of the legacy of those years, the fate of Vaughan's opinion in the hands of a few publicists writing in 1680. For our purposes a brief background of the political trials of the period will suffice.

The Popish Plot was the invention of Titus Oates, who convinced a gullible court and a more gullible populace of Jesuit plans to kill the king, massacre Protestants, and engineer the succession of Charles's Catholic brother, James. As a result of ensuing arrests and prosecutions, between 1678 and 1681 some twenty people were either executed or died in prison. In the first two years of the crisis, the virulently anti-Papist Chief Justice (King's Bench) Scroggs worked his relentless will on defendants and took a strong lead with juries, who were for the most part ready to follow. But as doubts about Oates (if not the Plot itself) set in, Scroggs scrupulously and skillfully exposed false accusations, incurring the wrath of anti-Papist mobs. The Court, which had been thrown off balance by Oates's accusations and the resultant move in Parliament for exclusion of James from the order of succession, gradually recovered maneuvering room. Already in 1680, there were prosecutions of Protestant publicists whose anti-Papist attacks were alleged to blame the crisis on the Court's encouragement of Catholic hopes. The following year only the resistance of Protestant London grand juries frustrated royal efforts to destroy Shaftesbury, the leader of the nascent Whig party. The pendulum soon swung fully against the most outspoken of the pro-Exclusion Protestant Whig leaders. Stephen Colledge was convicted by an Oxfordshire jury on charges of treason in 1681; Edward Fitz-Harris was convicted and executed for treason later that year. The purge reached its height two years later in the wake of the discovery of the Rye House


196. See below, text at nn. 207–8.

197. See below, n. 225 for recent discussions of the proceedings against Shaftesbury.
Plot to seize the king. Among the victims were Lord Russell and Algernon Sydney, though neither had in fact been part of the plot. Jeffreys's role in the anti-Whig prosecutions as an implacable foe of opposition to authorities, first as Crown counsel and then as Lord Chief Justice, is now famous.198

The bullying tactics of the Stuart bench during this period should not blind one to the fact that in many instances the prosecutions were popular. Local officials returned juries sympathetic to the Crown as often as they returned juries likely to engage in some resistance. Jury packing was common and practiced on all sides.199 The changing winds of local or national politics determined whether such pretrial manipulation would favor or disadvantage the defendant. Defendants in such cases were not themselves strangers to tactics that might lawfully be employed in court to secure favorable or at least open-minded jurors: in some cases challenges were frequent. The bench played both ways the rule that jurors must be freeholders, sometimes challenging jurors as nonfreeholders, sometimes denying that the rule grounded a challenge for cause.200 Some juries were harangued and berated by the prosecution or bench; others—where the bench was confident that the jurors could be trusted to convict the "guilty"—were told that they must determine the truth according to their own consciences.201 Conscience might thus be invoked in the apparently magnanimous spirit of encouraging jury independence of mind. Yet again, invocation to "conscience" might reflect judicial doubts about the evidence for the Crown. In late 1679 Scroggs, standing against the tide of anti-Jesuit feeling, urged Wakeman's jury to regard the evidence, not public feelings: "Never care what the world says, follow your consciences."202 The courageous jury found Wakeman not guilty.

For Scroggs, of course, the claim to conscience was a claim upon the jurors' honest assessment of fact. No hint of law-finding was intended. And like Vaughan, Scroggs recognized that factual assessment was not an

201. E.g. *Rex v. Green, Berry and Hill, State Trials*, 7:220. Scroggs made it clear that he believed the defendants were guilty and then told the jury: "So I leave it to your consideration upon the whole matter, whether the evidence of the fact does not satisfy your consciences, that these men are guilty. And I know you will do like honest men on both sides."
The juror was sworn to say what he believed was true, not to achieve objective truth. Scroggs made this point in his charge to Henry Care's jury in 1680 in an effort to forestall a verdict of not guilty on grounds the evidence did not yield an absolute certainty of guilt.

You must take evidence in this case, as you do all year long, that is, in other cases, where you know so: for human frailty must be allowed; that is, you may be mistaken. For you do not swear, nor are you bound to swear here, that [Care] was the publisher of this book; but if you find him guilty, you only swear you believe it so. God help juries, if so be in matter of fact they should promise otherwise. They cannot swear to it.

The uses to which the claim upon conscience might be put were many. Vaughan's language seems to reverberate in the Reports of Restoration political trials. It clearly reverberates—but to very different effect—in the jury tract literature of the day. John Hawles, whose Englishman's Right was published in 1680 and enjoyed wide readership, many successive reprints, and unending quotation, drew so heavily upon Vaughan's arguments as virtually to be a gloss upon the opinion. Hawles set the tone for many pro-jury writers down to Fox's Libel Act. His characterization of Vaughan's opinion also became the accepted pro-jury view in America, though the influence of his tract there was insubstantial until Zenger's Case in 1735.

Hawles's tract, as well as large portions of a book by Henry Care, were occasioned by the spate of prosecutions for unlicensed printing of news, seditious libel, and treason during the first years of the Popish Plot. Although neither tract mentions the prosecutions in 1680 of Benjamin Harris and of Care himself, it seems likely that those trials, and what Hawles and Care took to be judicial rulings on the law of seditious libel

203. This is not to deny, however, that the Restoration bench approached fact-finding in a more "scientific" manner than had earlier jurists. It is only to say that the political cases (and the problem of coercion) of the period resulted in emphasis on the juror's "conscience" and understanding, and in assertions that the juror's sworn "belief" be respected whether or not it accorded with objective truth. Perhaps increasing confidence in the (relatively) "scientific" aspect of jury fact-finding made it easier to adopt such a stance. For an important discussion of contemporary notions about the science of fact-finding see Barbara J. Shapiro, Probability and Certainty in Seventeenth-Century England (Princeton, 1983). And see below, Chapter 7, text at nn. 15-17.

204. State Trials, 7:1128. (Alternatively spelled: Carr.)
207. Henry Care, English Liberties: or, the Free-Born Subject's Inheritance (London, 1680).
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The law of seditious libel was still taking shape during the first two decades of the Restoration. Its roots lay in Star Chamber practice,209 and certain rules of law—e.g., that truth was no defense—might be expected to have been inherited and reaffirmed by the common law bench. But questions regarding the allocation of duties between judge and jury, concerning, i.e., what was law and what was fact, were less clearly questions to be answered by reference to Star Chamber practice. Whether a writing was seditious might fairly be claimed a matter of fact for the jury to decide; it might also be insisted that criminal intent should not be implied by the bench but should be determined instead by the jury. The settlement of the Stuart doctrine of seditious libel was not in any simple way a result of the ruling in Bushel's Case. It may be that the principal basis for the practice in seditious libel cases—that the jury was to find only whether the defendant "published" (wrote, printed, or published) the words in question whereas seditiousness and intent were matters of law for the bench—was the fact that a record of the allegedly offensive words existed, so that those words were, unlike all other criminal "acts," available for judicial inspection.210 Nonetheless, it seems likely that the

208. Rex v. Harris, State Trials, 7:926–32; Rex v. Care, Ibid., 1111–30. See Philip Hamburger, "The Origins of the Law of Seditious Libel" (ms. pp. 32–37), Stanford Law Review (forthcoming). All Hamburger pp. herein referred to are from ms. When published, Hamburger's study will importantly modify all earlier work on the pre-1730 law of seditious libel. Hamburger argues, inter alia, that Harris's prosecution was for "a strange combination of seditious libel and Scandalum Magnatum" (p. 32) and that Care's prosecution was, strictly speaking, for unlicensed printing (pp. 34–37). The defendants, states Hamburger, were charged with, among other things, publication of "seditious libels"; Hawles "professed to think" that such cases "were but poorly conducted common law seditious libel prosecutions." He complained, "with uncertain ingenuousness, that traditional powers of juries in libel trials were being abused" (p. 36, n. 73). Whether or not Hawles was "ingenuous," I believe his writings were taken seriously, especially as prosecutions that were clearly for seditious libel became common.


210. See Holdsworth, History of English Law, 8:343; see also Thomas A. Green, "The Jury, Seditious Libel, and the Criminal Law," in Green and Richard H. Helmholz, Juries, Libel, and Justice: The Role of English Juries in 17th–18th Century Trials for Libel and Slander (Los Angeles, 1984). Hamburger ("Origins of the Law of Seditious Libel") has reassessed the applications of these doctrines in the period 1660–95. His work rests on only a few cases, partly because he has excluded those cases that he believes were in fact prosecutions for unlicensed printing. As to the issue of "libelousness," Hamburger concludes: "In the seventeenth century, the bench determined in practice whether a
tensions between judge and jury that the Quaker trials occasioned and that culminated in Bushel’s Case affected the development of the law of seditious libel.

The Quakers’ opposition to the Conventicles Act of 1664, and especially their assertion that jurors ought to determine the meaning of the Act, pushed the bench to declare that jurors were to determine only the question of whether the defendant had attended the alleged meeting. The bench would decide whether such attendance at the alleged meeting implied unlawful religious worship. (This was so, at least, if the defendants did not show that the purpose of the meeting was not religious or, if religious, not contrary to Anglican forms.) We have also seen that Chief Justice Kelyng attempted to reduce the jury’s scope of fact-finding in homicide. Where murder was alleged, and no provocation was shown, the jury was to find whether the defendant intentionally slew the deceased; if so, the court would determine whether the act implied malice. Thus judge-jury conflicts in the early 1660s led the bench to reserve to itself as questions of law matters that had traditionally been left to the jury as questions of fact.

Bushel’s Case increased the importance of placing limitations upon the scope of fact-finding. It may have encouraged the bench to reserve to itself—where it could—the kinds of determinations within which jury law-finding or merciful verdicts might otherwise be concealed. As we shall see, only in seditious libel did the bench succeed in restricting the jury to largely stipulated facts and thus force a jury that did not want to convict to return a verdict that was flagrantly contrary to the evidence. Although some juries adopted a ruse analogous to that employed in Quaker prosecutions, and returned a verdict of “guilty of publishing writing’s content was defamatory or libelous.” He implies that juries could have (though they rarely dared to do so) disagreed with the bench (pp. 53-54). As to intent, Hamburger states (pp. 55-60) that the bench followed the law of homicide, wherein murder was presumed unless the defendant produced evidence of provocation, accident, etc., in which case intent became a matter for the jury. In seditious libel, the defendant might similarly produce evidence that he lacked knowledge or malice. Hamburger concedes that the defendant’s task was not easy: “In the 1680s, judges and Crown lawyers disparagingly referred to questions of knowledge and malice as mere formalities, in order to remove such issues from the control of the jury” (p. 59). Apparently, judicial treatment of the defendant’s exculpatory evidence depended upon the judge’s view of the publication—whether it was sufficiently or “insufficiently defamatory to imply malice.” Even on Hamburger’s analysis, then, in practice, in most seditious libel cases, libelousness and intent were implied or not by the bench, not by the jury. In homicide, it should be pointed out, defendants might claim provocation almost as a matter of course. They (or their witnesses) were not embarrassed by an act that lived on for judicial inspection. They might be countered by witnesses for the Crown, but the testimony of witnesses was always open to attack, and the question of credibility of all witnesses was conceded to be a jury question.

211. See above, n. 80 and accompanying text.
only,'" given the establishment of the principle of noncoercion, the Stuart doctrine of seditious libel was particularly advantageous to the Crown. The application of that doctrine in the prominent trials of 1680 thus provoked Hawles and others to come to the defense of the jury and, specifically, to "find" in the principle of noncoercion support for very far-reaching propositions about the right to find law as well as fact.

Hawles's *Englishman's Right* is cast as a dialogue between a barrister and a juryman. The barrister stresses the importance of the duty to serve on juries and instructs the juryman regarding his proper function. The juryman, for his part, asks all the "right questions." Whether Hawles was concerned with the increasing use of packed juries, the rate at which Englishmen avoided jury service, or the ignorance and timidity of jurors in the face of the Stuart bench, his message was the same: "[T]he office of a juryman is, conscientiously to judge his neighbour; and he needs no more law than is easily learnt to direct him therein."212

Hawles adopted virtually all of Vaughan's language. All discourses by the judge to the jury on the law "ought to be hypothetical, not coercive." The judge should so charge juries because "*ex facto jus oritur*, all matter of law arises out of matter of fact, so that until the fact is settled there is no room for law." Hawles also endorsed Vaughan's view of the impenetrability of the fact-resolving role of the jury. He followed Vaughan closely in saying that since the jurors were drawn from the neighborhood, they might be supposed to have knowledge of their own touching the facts of the situation and the credibility of witnesses. The jury's verdict, formed in good conscience, was determinative. The judges, said Hawles, "do often recapitulate and sum up the heads of the evidence; but the jurors are still to consider whether it be done truly, fully and impartially (for one man's memory may sooner fail than twelve's)."213 In the end, Hawles repeated Vaughan's effective formulation, "A man cannot see by another's eye";214 if judges and jury disagreed, so be it. Trial by jury was trial by peers, not by judges.

At a crucial point in the dialogue the juryman asks whether juries are restricted entirely to the finding of fact. Through the response of the barrister, Hawles developed the law-finding argument that was to be for more than a century the lodestar of many of the opponents of the seditious libel doctrine. Hawles implied that he had derived the argument from Vaughan, but in fact he simply attached it to one of Vaughan's most conventional statements. The jury, Hawles noted (quoting Vaughan), must deal with law "as it arises out of, or is complicated with, and

influences the fact." Vaughan meant—but failed explicitly to state—that the jury must take the law from the bench and must apply it in the manner that the bench has ruled it should. Hawles drew an opposite inference which deserves close study. Hawles's barrister begins by conceding that matters of fact constitute the jury's "proper province" and "chief business." But this, he states, does not determine the matter:

For to say, [the jury] are not at all to meddle with, or have respect to law in giving their verdicts, is not only a false position, and contradicted by every day's experience; but also a very dangerous and pernicious one, tending to defeat the principal end of the institution of juries, and so subtlety to undermine that which was too strong to be battered down.

The jury must "apply matter of fact and law together; and from their consideration of, and a right judgment upon both, bring forth their verdict." The barrister's examples, borrowed from Vaughan, are not startling: the general issue in trespass, breach of the peace, felony, and seditious libel. In homicide, e.g., the jury is free to return "murder, manslaughter, per infortunium, or se defendendo, as they see cause." Did this mean for Hawles, as it did for Vaughan, only that the jury must apply the law, as stated to them by the bench, or did "right judgment" mean something more?

Clearly Hawles meant more, but he could find no further support in Vaughan's opinion. Thus he turned to other sources. Apparently borrowing from a tract on Penn and Mead's case, Hawles has the barrister ask, "[T]o what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the jurors, but only that they may judge, whether or not the matter be within that statute?" This appears to go beyond Vaughan, but its full meaning remains ambiguous. Read in the light of Quaker prosecutions under the Conventicles Act, it seems to adopt a far-reaching position: the jury must not feel bound to "'apply' the statute as interpreted by the bench. Then, perhaps taking his lead from an account of Lilburne's dispute with the bench in 1649, Hawles drew upon the passage from Littleton, stating "'[t]hat if a jury will take upon them the knowledge of the law upon the matter, they may.' This, Hawles suggested, was conclusive. We have seen how weak a reed this passage was, and Hawles, a trained barrister, must also have known it proved less

215. Ibid., p. 10.
216. Ibid., pp. 10-ll.
217. Ibid., p. ll.
218. Idem.
219. Idem. For Lilburne's use of Littleton see State Trials, 4:1381 and above, Chapter 5, text at nn. 70-76.
than he asserted for it. But the position of juries in seditious libel cases seemed to him untenable; juries, he said, might be turned into "engine[s] of oppression." Their right, and duty, to judge the law was self-evident.

Thus, the heart of Hawles's argument dealt not with the problem of judicial directions on the law but with the problem of defective indictments. Here it was that Hawles grafted the claims of Lilburne, Penn, and opponents of the seditious libel doctrine in his own day onto the opinion in Bushel's Case:

And . . . it is false to say that the jury hath not power, or does not use frequently to apply the fact to the law; and thence taking their measures, judge of, and determine the crime or issue by their verdict.

As juries have ever been vested with such power by law, so to exclude them from, or disseize them of the same, were utterly to defeat the end of their institution. For then if a person should be indicted for doing any common innocent act, if it be but clothed and disguised in the indictment with the name of treason, or some other high crime, and proved by witnesses to have been done by him, the jury, though satisfied in conscience, that the fact is not any such offence as it is called, yet because (according to this fond opinion) they have no power to judge of law and the fact charged is fully proved, they should at this rate be bound to find him guilty.

Hence, the central point of the tract and the core of the juryman's right and duty was this: the jury, to render a guilty verdict, must be satisfied in conscience not only that the fact has been proved but also that the fact constitutes an offense under the law. There can be little doubt that Hawles held the same views regarding judicial charges. The argument was not new; Quaker writers had made it since the Restoration. Now, however, it was made with reference to indictments for treason and seditious libel, and it was clothed in and accorded the respectability of the words and (seemingly, though not really) the logic of the opinion in Bushel's Case.

Hawles's law-finding argument comes in the middle of his tract. It is followed by lengthy borrowings from Vaughan's arguments against the fining and imprisonment of jurors and is thus made to seem an integral part of Vaughan's opinion. The barrister comments that the recent appearance of Vaughan's Reports is an important event; all prospective jurymen ought to read it, along with Magna Carta, the Petition of Right, and other fundamental statements of Englishmen's rights. Jury trial, as defended by Vaughan and defined by Hawles, was central to those rights. As the barrister concludes (in what were in fact Lilburne's words):

221. Ibid., pp. ll-12.
[T]he law of England has not placed trials by juries to stand between men and death or destruction to so little purpose, as to pronounce men guilty without regard to the nature of the offence, or to what is to be inflicted thereupon.222

Hawles's gloss upon Bushel's Case was adopted by Henry Care, who published English Liberties: or the Free Born Subject's Inheritance shortly after his trial in 1680 for printing unlicensed (and seditious) news. Care lifted whole passages from Hawles, including Hawles's commentary on indictments. Elaborating on Hawles's argument, Care asserted that if the indictment put words of law wrongly in apposition to the facts it is an apparent trap at once to perjure ignorant juries, and render them so far from being of good use, as to be only tools of oppression, to ruin and murder their innocent neighbors with the greater formality: for though it be true, that matter of fact is the most common and proper objective of a jury's determination, and matter of law that of the judges, yet as law arises out of, and is complicated with fact it cannot but fall under the jury's consideration.223

Once again, Vaughan's words appear: No allegation "contra materia legis" will be heard, for "ex facto jus oritur"; law is "complicated with fact." These phrases, which had become code words for the pro-jury writers, were harnessed to the arguments developed by Hawles. For many, the meaning that Hawles and Care read into those words would quickly come to stand for the essence of the Englishman's right to trial by jury.224

The petty jury was only the final bastion of opposition to allegedly tyrannical prosecutions. Grand juries might (and sometimes did) refuse to return a true bill, whether the charge was homicide, theft, or a political crime.225 In the years following Bushel's Case, the Crown fought a two-tiered struggle in some political cases, first to secure an indictment

223. Care, English Liberties, p. 259.
and then to obtain a trial jury conviction. At either stage, Crown officials might be hard pressed to convince jurymen that the official characterization of an offense coincided with the law. Hawles's *The Grand-Jury-Man's Oath and Office Explained*, which appeared in the same year as *Englishman's Right*, argued that grand juries ought to return an *ignoramus* if they believed that the offense alleged was not a crime. The grand jury, according to Hawles, must look to facts, not to words of form inserted by zealous prosecutors:

Here lies the knot, the pinch of the business, which rightly understood, would silence this controversy for ever. You must note therefore, that sometimes these words are only of course, or matter of form, raised by a just and reasonable implication of law; but sometimes they may be thrust in to raise a pretence or colour of crime, where there is really none.226

Hawles therefore asked the grand jury to distinguish two kinds of case. In one, the act charged is itself criminal, whether or not it is "malicious" or "seditious," etc. If the jury is satisfied that the act is criminal and that the person charged probably is guilty of the act, it must return a true bill. In the other case, however, the act is innocent or indifferent unless it is undertaken with a "malicious" or "seditious" intent. In this instance, the jury must be satisfied that the "words of form" are proved, or else it must reject the indictment. Since they judge fact, grand juries must find the facts which make an act criminal; they ought not to find noncriminal facts and then leave to the bench, under the rubric of law, the determination of criminality. If they do so, said Hawles, they might indict for treason one charged with "looking on the tombs at Westminster" or for high misdemeanor one charged with printing the Bible.227

For a grand jury to reject a bill because the act charged was neither criminal nor committed with criminal intent it had, of course, "to take upon [itself] the knowledge of the law."

[Grand] jurors are to consider both law and fact or else they will never deliver just and lawful verdicts. To what purpose does the law provide, that jurors should be so well qualified as to estate, understanding and sufficiency, and so strictly sworn, but only to detect offenders and preserve the innocent from needless vexation and trouble? How far juries are judges of law as well as of fact is pretty well set forth in a small treatise lately published, entitled, *The Englishman's Right*.228

With this allusion, Rawles united his argument for a true shield at the grand jury stage with his claim that the trial jury possessed the power to decide law as well as fact, a strategy that Care and the author of *The Guide* also subsequently adopted.\(^{229}\)

In the period we have reviewed, the pro-jury position became, in fact, several different positions. The tract writers moved easily from one argument to another, sometimes confusing them but always uniting all of them under the rubric of the Englishman’s right to trial by jury.\(^{230}\) At times the assertion that juries ought to decide law was inseparable from claims to control over fact. To understand the entire complex of pro-jury arguments, therefore, it is necessary to separate the various strands of jury theory and to view them in relation to earlier thinking.

The basis of the jury’s power was, of course, the right to resolve issues of fact. Following Vaughan’s logic, this implied the right to apply the law to the facts. Because “law arose from fact,” unless the jury rendered a special verdict, no one other than the jurors had an opportunity to play this role. This concept of “application of law” was the most limited of the contemporary theories of law-deciding. It presumed, for many (certainly for Vaughan), jury adherence to the judicial interpretation of the law. The judge could do no more than put hypotheticals, but that was because he could not be sure of the fact. Once the jury found the fact and determined to which hypothetical it corresponded, application of the law could follow automatically.\(^{231}\)

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\(^{229}\) Care, *English Liberties*, p. 261; *A Guide to Juries*, pp. 59–62, 68. See also *Twenty-four Sober Queries Humbly Offered to be seriously considered by all juries in city and country* (London, 1680, printed for Benjamin Harris).


\(^{231}\) Some tract writers who were not explicit about the jury’s right to render merciful verdicts, or who even opposed such verdicts, nonetheless described the jury’s role in terms that may have seemed to leave room for such discretion. See [Giles Duncombe] *Tryals Per Pais: or the Law of England Concerning Juries by Nisi Prius, etc.*, By S. E. (2nd ed., rev., London, 1682). The first edition of this tract, signed S. E. [Samson Euer] contains little commentary on the scope of the criminal trial jury’s power. In Duncombe’s 1682 edition there is a commentary on *Bushel’s Case* at pp. 441 et seq.: “[A]nd that question which has made such a noise, viz. whether a jury is fineable for going against their evidence in court, or the direction of the judge? I look upon that question, as dead and buried, since Bushel’s case, in my Lord Vaughan’s reports” (p. 443). Duncombe then accurately deals with Vaughan’s opinion (pp. 444–45). He subsequently notes that juries may take the law unto themselves where law and fact are joined, but concludes (unlike Vaughan) that if they
Some, perhaps most, would have agreed that the jury's method of applying the law was not always required to be absolutely mechanical. Indeed, judges had long encouraged jury leniency in many cases involving homicide or minor theft, a practice that continued, perhaps even increased, after the Restoration. It became commonplace to assert that the jury ought to apply the law mercifully. Although in theory juries were to apply the law as it was stated for them, in practice they applied the law to conform to their own rough sense of justice. Only when, in a given case, the bench deemed jury leniency inappropriate was the issue of jury deviance raised. Vaughan's opinion in Bushel's Case, which Hawles and Care took to address Kelyng's behavior in homicide cases as well as the treatment of the jury in the case of Penn and Mead, thus strengthened the jury's hand. Among the tract writers this right of merciful application of the law became the most common "proof" of the jury's right to decide law and fact "complicately."

At the other extreme was the most pronounced form of law deciding: the right of the jury to determine whether the act with which a person was charged constituted a crime. Here, according to some tract writers, the jury's power and right were definitive. Neither the language of the indictment nor the judge's direction should divert the jury's attention from this duty. To pronounce guilt when one believed in conscience that no true crime had been charged was to commit "murder." This argument was also extended to grand juries where, in the light of the proceedings against Shaftesbury, it was absorbed into the historical myth of the grand jury as a shield against, rather than a sword of, the Crown. It merged also with the older attack on the use of informations. Right to jury was right to judgment by two lay bodies, mainly to provide a double check on fact but also to prevent prosecutions for activity that was not truly criminal.

As we have seen, the tract writers urged juries to assess the words used in indictments that made otherwise innocent acts criminal. Without evidence of criminal malice or seditiousness there should be neither indictment nor conviction. In the case of the petty jury, this argument is complex; the series of propositions (which were never spelled out as such) runs as follows. First, the jury was to decide law; i.e., it was to decide whether as a general matter the act charged was criminal. Second, the jury would decide fact; i.e., if the act was criminal, the jury would mistake the law they run the danger of an attaint. Finally, Duncombe states that juries "determine the law in all matters where issue is joined and tried, but [not] where the verdict is special. . . . [I]n such cases, the judge cannot of himself answer, or determine one particle of the fact, but must leave it to the jury, with whom let it rest and continue forever, as the best kind of trial in the world for finding out the truth, and the greatest safety of the just prerogatives of the Crown, and the just liberties of the subject; and he who desires more for either of them is an enemy to both" (pp. 447-48).
determine whether the defendant had committed it. If (as the jury saw it) the act charged was criminal only when committed with a certain intent, the jury would determine whether the defendant had committed it with that intent. This second, fact-finding stage, of course, could involve a degree of law-finding. For, as stated above, in reaching its verdict the jury would apply to the facts it had found the law as stated by the bench, but in a manner dictated by considerations of mercy. So long as the bench approved of the (merciful) verdict, this last form of law-finding was assimilated to the mechanical application of the law as stated by the bench.

The Stuart bench conceded, at least in theory, that it could not coerce convictions. As of 1671, it conceded both in theory and in practice jury finality concerning fact and concerning the application of the law to fact—with one important proviso: that the jury apply the law as stipulated by the bench. It would not tolerate, as a general matter, jury determination of criminality; nor would the bench tolerate a "merciful" verdict if it thought that the verdict disguised a rejection of the law as stated by the bench. Instead, as we have seen, the bench retreated, where it could (and where it felt it imperative), to the device of reserving to itself certain "questions of law." And thus it was that in cases of seditious libel the bench hoped by severely restricting the scope and nature of the facts to be found to eliminate the jury's power to conceal law-finding within fact-finding.

It was at just this point, however, that the Stuart bench suffered a major setback, one that ensured that the Restoration legacy of the criminal trial jury would be complex, confusing, and even contradictory, and that the contest over the true meaning of Vaughan's opinion in Bushel's Case would continue into the eighteenth century. This setback occurred on the eve of the Glorious Revolution in the prosecution of the seven bishops who refused to read James II's second Declaration of Indulgence.232 When the bishops petitioned the Crown, stating their reasons for refusing to read the Declaration, they were indicted for publishing a seditious libel. Their trial focused the growing opposition—an opposition that reached far into the political establishment—to James II's policies and religion, and to the behavior of the Stuart bench during the preceding decade.233 At the trial the bench badly divided on the question of whether the bishops' petition was libelous and, hence, whether it implied mal-

In the end the jury was left to decide the issues of intent and libelousness in the most highly charged political context possible. The subsequent acquittal of the bishops was greeted with great celebrations, and was taken to signal the victory of the jury as a bulwark of the constitution against executive and judicial tyranny. It perhaps rekindled memories of the appeals of the hapless Colledge and Fitz-Harris, seven years before, to their juries as judges "of law and fact." Momentarily, at least, the Stuart regime had worked a fusion of the proponents of the radical law-finding position and much of the Whig establishment.

As we shall see, this final Restoration episode became a central event for eighteenth-century constitutional and legal theorists. But it was an event from which different persons could draw very different conclusions. It perhaps reinforced the almost universally held view that jury verdicts were final, but it in no way settled the question of the legitimacy of judicial steering of juries that might otherwise find against manifest evidence: most eighteenth-century observers believed that the jury had found the facts correctly. Nor did the Seven Bishops' Case settle the question of the doctrine of seditious libel. Virtually all commentators deemed that doctrine dangerous, even illegitimate, when exercised by a "dependent" bench, as, from the perspective afforded by the watershed of the Glorious Revolution and the Act of Settlement of 1701, the Stuart bench seemed to have been. But was the doctrine inherently wrong? Could not an independent judiciary be entrusted to apply it fairly? For many the jury had proved itself a vital element during one stage in the development of the constitution. Jury intervention, they concluded, had been a crucial defense against tyranny; true it was that the jury might again play that role, should England ever suffer at the hands of a tyrannical Crown and bench, but such a retrograde development was (so they thought) unlikely ever to recur.

For others, however, the right to jury trial meant the right to a jury verdict on all the facts, including intent and seditiousness. A bench that withheld that right was per se tyrannical. If the post-1689 bench pronounced the law of seditious libel in its original form, the jury ought to reject that judicial pronouncement, for in such circumstances—and possibly in some others—the jury had the right to decide law as well as

234. For a discussion of the Seven Bishops' Case, see below, Chapter 8, text at nn. 8–10.
236. Hamburger ("Origins of the Law of Seditious Libel," pp. 88 et seq.) has shown that the doctrine of seditious libel not only survived the Glorious Revolution but was thereafter substantially broadened (to include "seditious" criticism of the government, not merely of specific government officials; to include mere writing, whether or not publication was intended); moreover, the de facto control of the bench over the question of libelousness became de jure.
fact. The legacy of the Restoration was thus severalfold. Though, as we shall see; there emerged a settled division of authority between judge and jury in routine cases, that division remained unresolved and problematic in many political contests. Nor could these two kinds of cases remain entirely separate. The two traditions of jury law-finding that passed on into eighteenth-century thought and practice influenced each other in important ways. Most significantly, the merciful discretion that survived the Tudor transformation in criminal administration and that was safely left to juries in common-run felonies (though it clearly went beyond Vaughan's identification of "conscience" with a good-faith belief regarding fact) was bound to affect views regarding the legitimacy of true nullification in prosecutions for seditious libel.237

237. See below, Chapter 8.