Epilogue and Conclusion

This concluding chapter falls into two principal parts, an epilogue and a summary, to each of which I have devoted two sections. In section I, I shall deal briefly and selectively with the background to the Victorian reform of the law of sanctions. I shall stress those developments that reveal the nature of the near impasse that confronted the English in the administration of criminal justice by the early nineteenth century.

From the perspective I have chosen, the movement for reform of sanctions appears to have involved, inter alia, a widespread rejection of traditional assumptions about the virtues of jury-based intervention and, indeed, about the entire longstanding system of mitigation. Although the precise reasons for this transformation in contemporary thought remain elusive, the sea change it reflected seems, as I shall suggest in section II, a most natural denouement to the centuries-long process I have been describing. In section III, I discuss the themes of the book at length and identify some important questions that my work raises but which I am as yet unable to answer; I also allude to problems that fall within the subject of this book but which I do not treat in any of the essays that I have brought together. In the final section, I recapitulate my central arguments in a more direct fashion.

I

The movement for reform of the law of sanctions gained momentum in the early decades of the nineteenth century and bore fruit by the early years of Victoria’s reign. Between 1830 and 1840, Parliament removed the capital sanction from many of the less serious offenses. Capital punishment was retained for those offenses for which, as it happened, juries had from earliest times been relatively willing to convict offenders; it was no longer the nominal punishment for those offenses for which the jury had long served as one of the principal institutions of mitigation. Reform of sanctions thus brought to an end a long phase in the history of the English criminal trial jury. Jury-based mitigation of sanctions would continue, but at a greatly reduced level. In the popular mind, and in reality, the jury would usually adhere to the letter of the law.
The widely observed role of the jury as mitigator of the law of sanctions figured prominently in several aspects of the early-nineteenth-century movement for law reform. This is the final stage in the English debate over the trial jury that I shall discuss. My discussion will be brief, for the movement for reform has been thoroughly chronicled, and my own purposes are limited. For the most part, my observations are retrospective, offered by way of conclusion.

The movement for reform of sanctions had its roots in the mid-seventeenth-century movement for law reform. But it was the statutory manipulation of benefit of clergy in the early eighteenth century that represented the first important step in the direction of reform. We have seen that the resulting practical penology of the period both built upon longstanding mitigation practice and accommodated the notion that the threat of death was a necessary deterrent. Capital punishment would be imposed in only a handful of cases, but those cases would be identified as the residue of a winnowing process. The offender would be kept in doubt as to his fate for as long as it was deemed necessary and appropriate. Reform was shaped—and limited—by the perceived need for an element of terror in eighteenth-century penology.

Contemporaries sometimes explained the need to maintain the death sanction as the price for not maintaining a large and professional police force. Resistance to abandoning the legacy of a makeshift local and amateur constabulary prevailed not only among the county-based justices and their allies but also among the urban working class. Fears that a national police force would spawn both political centralization and oppression by the employer class intensified toward the end of the eighteenth century. Proponents of a police system succeeded in 1792 in

passing an act for a stipendiary magistracy, but not until 1829 did they secure legislation establishing the basis for a truly professional force. In the intervening years the movements for reform of sanctions and for establishment of a professional police system dovetailed. The proponents of each reform fought against the common rationalization of the prevailing scheme of criminal administration: a police system would invite tyranny; in its absence, order depended upon the threat of the gallows; the decision regarding the gallows ought to be intrinsic to the prosecution of each individual offender.

In theory, the selection of offenders for capital punishment on a case-by-case basis need not have involved the criminal trial jury more than for the initial determination of whether the suspect was guilty. Once the jury had found the defendant guilty the matter of sentencing could have been left to the bench and the Crown. We have seen that most eighteenth-century criminal law reformers, as well as apologists for the prevailing system of criminal law, favored centering the entire mitigation process (to the extent that it was to exist) in the Crown. We have also seen, however, that most reformers viewed such a resolution of existing problems as unrealistic. They recognized that, in practice, the jury would not always find the defendant guilty and leave his fate to higher authorities. For the most part, reformers agreed that until the law of sanctions had been altered, juries would inevitably (and justifiably) play a substantial role.

The system was even more complicated than most commentators indicated. In many cases the jury did in fact leave the decision on sentencing to the bench and Crown. But that was within the context of a system in which the jury possessed a great deal of power, should it wish to use it, and in which the jury’s deference to the bench and the bench’s deference to the jury were mutual. Moreover, in many cases involving jury-based mitigation the jury took its lead from the bench; again, the jury’s willingness to do so must be understood in light of the fact that when the jury wanted to go its own way, it had the power to do so. Commentators may not have well understood the dynamics of the system, but their essential insight was correct: so long as the law of sanctions remained harsh, an entirely official system of mitigation of that law could not easily come into being.

Law reformers in the early nineteenth century accepted the jury’s role within the existing system as a given. Like the eighteenth-century reformers, their principal objective was certainty of the law. Thus they

7. Stat. 10 Geo. 4, c. 44.
8. See above, Chapter 7, section III.
argued for reform of the law of sanctions so that mitigation would not often be required. They did not, however, fall back on the argument that mitigation might continue so long as it was solely in the hands of the Crown. Romilly, in his famous speech in Parliament in 1810, framed the issue in terms that others were to follow.\textsuperscript{9} The jury, Romilly argued, had been placed in the impossible position of having to choose in each case between imposing a sanction that it believed to be far too cruel in the hope that the Crown would mitigate it and committing an act of perjury.\textsuperscript{10} Not only did such perjury undermine the system of deterrence, but it also bred disrespect for the law. The reformers chose not to see the jury as part of a quasi-legitimate sentencing process, nor to view the oath as imposing responsibility to do justice in accordance with the terms in which juries had traditionally acted. Thus by the early nineteenth century the jury’s longstanding tradition of merciful application of the law had come to be described as a kind of jury lawlessness. Far from blaming the jury for undertaking this lawless role, however, reformers sympathized with them in their plight, and portrayed themselves as friends of the jury who would save it from the “dilemma” that it faced daily.\textsuperscript{11}

In his 1810 speech Romilly developed a theme that he had introduced decades before. Romilly had originally accepted Paley’s description of the system of criminal law, asserting, in his reply to Madan, that Parliament had not intended that the law be enforced literally.\textsuperscript{12} He had both accepted the notion that Parliament intended the law to be enforced selectively and, true to the principles of the new penology, attacked such a system. By 1810 Romilly had come to believe that, even if Parliament had not intended that the law be enforced literally, there were no clear principles behind the process of selection. On the basis of statistical research, he concluded that patterns of enforcement were always changing and were determined by the mood and inclinations of jury, judge, and Crown.\textsuperscript{13} Romilly now argued, moreover, that the system led in practice to decisions by the judge that ought to have been made, if at all, by the jury. He observed that in many cases where the jury convicted the


\textsuperscript{10} Ibid., pp. 22–23.

\textsuperscript{11} See below, n. 22 and accompanying text.

\textsuperscript{12} See above, Chapter 7, text at n. 139.

\textsuperscript{13} Romilly, \textit{Observations on the Criminal Law}, pp. 16 et seq. At one point Romilly stated: “In this uncertain administration of justice, not only different judges act upon different principles, but the same judge, under the same circumstances, acts differently at different times” (p. 19). Several years earlier, Romilly had concluded that many capital felonies were the result of changes in the value of money, a severity that resulted from “no intention of the legislature, but altogether from accidental circumstances.” Romilly, \textit{Memoirs}, 2:230 (letter to M. Dumont, Aug. 25, 1807).
defendant, the bench subsequently reprieved him so that a pardon might be sought from the Crown. In these cases, Romilly argued, the bench based its decision upon facts which it itself had found.\textsuperscript{14} Here again Romilly opened up a line of argument that others were to pursue. In the years that followed, the prevailing system of criminal administration was portrayed as totally unpredictable.\textsuperscript{15} According to critics, the jury was left to guess what the bench might do in a given case, while the bench made its own assumptions about the grounds of the jury's decision. The result of the prevailing system of criminal justice, it was asserted, was that it actually produced crime.\textsuperscript{16} In drawing this conclusion, reformers were perhaps fooled by the fact that there were more prosecutions in the early nineteenth century than in the recent past, an increase that probably reflected better enforcement rather than more crime.

Romilly's followers characterized the position of the jury in even more ironic terms. Sir William Grant, Master of the Rolls, argued that the jury was forced to adopt a kind of discretion that the jury was never intended to have.\textsuperscript{17} Although this was true if one looks to the earliest period of the criminal trial jury, it hardly did justice to the long history of official acquiescence in jury mitigation of the law. Grant went on to criticize the exercise of discretion in a conventional manner. The law of sanctions, he argued, forced jurors to violate their consciences.\textsuperscript{18} He played on the famous phrase, "pious perjury": like many of Blackstone's successors, Grant took the term "perjury" very seriously. He suggested that juries did not trust others to use discretion and so took it upon themselves; indeed, he noted, judges encouraged juries to do so. Grant seems not to have supposed that this kind of judicial steering of juries produced a fairly predictable scheme of resolutions. Rather he saw it only as contributing to the jury's dilemma.\textsuperscript{19}

The dilemma of the criminal trial jury was often alluded to by early nineteenth-century law reformers in their argument for reform of the law

\textsuperscript{14} Ibid., pp. 26–27.
\textsuperscript{16} E.g. \textit{A Brief Address to the People of England on the Criminal Law} (London, 1827), p. 10.
\textsuperscript{18} \textit{Ibid.}, p. 13.
\textsuperscript{19} \textit{Ibid.}: "Ought laws to be so framed that there must be a continual struggle in the minds of your jurymen? ... [Jurors] can not be unmindful of the lenity of the judges; but notwithstanding this, they are unwilling to risk anything; they will not trust to another the use of a discretion which they have the power and disposition to exercise themselves." See also Romilly, \textit{Memoirs}, 2:230 (letter to Dumont, Aug. 25, 1807).
of sanctions. In 1819, and again in the 1830s and 1840s, parliamentary committees produced reports on the criminal law which portrayed prosecutors and jurors in the most sympathetic fashion. They had been left, it was asserted, to implement a system that was essentially unworkable, unfair, and counterproductive. Parliamentary deliberations may have been influenced by the testimony of victims of crime, especially artisans and other men of small commerce, who had come to see the role of the jury in the same way that reformers saw it. Prospective victims petitioned Parliament for reform of the law of sanctions, asking that the death sentence be removed from offenses against their property so that offenders would be more likely to suffer some substantial punishment and the law would be more likely to deter criminal behavior. Grand jurors and trial jurors also joined the clamor for reform. They too petitioned Parliament, urging reform that would save jurors from the dilemma that it now seemed nearly everyone agreed was their awful fate.

The movements for reform of the police system and for reform of the law of sanctions coincided with the movement for reform of prisons. Transportation to the American colonies had ended abruptly with the movement for independence, and for a time the English had experimented with incarceration of convicts in the famous “hulks” on the Thames. Transportation to New South Wales began in the late eighteenth century, but by then the movement for incarceration and rehabilitation of convicts in English penitentiaries was already well under way. Some of the literature of this movement, the roots of which reach back into the seventeenth century, featured descriptions of life in English prisons where, it was claimed, conditions were brutal and virtually calculated to produce a large and hardened criminal class.

One of the themes of the prison reform literature dealt with the effect on the criminal class of the prevailing system of sanctions. Prisoners were portrayed as fully aware that participants at every stage in the criminal process sought to prevent imposition of the harsh sanctions provided for by law. In 1831, Edward Wakefield, who had spent time in Newgate,

24. Ignatieff, Just Measure of Pain, pp. 80–81.
25. See e.g. Hanway, Distributive Justice and Mercy, pp. 28 et seq.
described a world in which there was remarkably little fear of the law.\textsuperscript{26} Suspects knew, Wakefield claimed, how to play on the sympathies of prosecutors; it was common knowledge, apparently, that a prosecutor who wanted neither to put a suspect’s life in jeopardy nor to forfeit his own recognizance could be convinced to go through “the form of [his] part in the prosecution, taking care to shape [his] evidence in favor of the accused.”\textsuperscript{27} Suspects also knew, Wakefield alleged, that judges and jurors constantly nullify the law, by saving from capital convictions, one whom they believe to be capitaly guilty. This occurs so frequently, and is so fully brought to the knowledge of the public, in the reports of trials at every Old Bailey sessions, and at every country assize, that I am unwilling to dwell on it at any length.\textsuperscript{28}

Wakefield described mock trials held by the prisoners in Newgate in which the prisoners took the parts of judge, jury, and witnesses, and the prisoner at the bar: “On these occasions the prisoners show a remarkable knowledge of the temper of judges and juries, being in the habit of acquitting many prisoners whom they knew to be guilty.”\textsuperscript{29}

The parliamentary committees on reform of the criminal law had a virtual field day with this kind of material. At the very moment that the nation was establishing a professional police force, it was—or so it seemed—continuing to indulge a system of prosecution, trial, and sentencing that bred disrespect for the law and the notion among the criminals themselves that, having been made the subject of mitigation, they could continue to breach the law with impunity. Doubtless the select committees that issued reports in 1819 and in 1836 interviewed persons who said what the committee members wanted to hear: the evidence that the committees compiled was remarkably one-sided. The testimony of suspects and convicts was nevertheless of some real importance. To the assertion that juries were faced with an awful dilemma was added the charge that juries were mocked by the very persons whose lives they spared. Apparently, capital sanctions failed to produce the terror they had been intended to produce, and the administration of the criminal law was undermining any real possibility of true rehabilitation. Far from inculcating religious values, the system was making a mockery of them. The jury was not, of course, the only participant in this ill-begotten system of criminal justice. But it was a participant whose behavior was difficult to modify. A developing police force could be depended upon to take over

\textsuperscript{26} Edward Gibbon Wakefield, \textit{Facts Relating to the Punishment of Death in the Metropolis} (London, 1831).
\textsuperscript{27} Ibid., p. 58.
\textsuperscript{28} Ibid., p. 61.
\textsuperscript{29} Ibid., p. 62.
the role of defaulting or half-hearted prosecutors, and the bench and other officers of the Crown might respond to Parliament's concerns. But the jury could be reached only through reform of the law of sanctions itself. Not all members of Parliament were in agreement that there ought to be reform. There were those who interpreted statistics showing more numerous convictions for property crimes after the first, limited reduction of capital sanctions as indicating an increase in the number of those crimes rather than as a greater willingness on the part of jurors to comply with the letter of the law once the death penalty was no longer an issue. In the end, however, such doubters were unable to resist the tide of reform. By 1840 Parliament had added large-scale reform of the law of sanctions to reform of policing and incarceration.30

Reform of the law of sanctions had an immediate impact on jury behavior in many trials for felony. Parliament had largely removed the need for massive and daily jury-based intervention on behalf of criminal defendants. This development coincided also with the gradual transformation of the trial itself from a kind of morality play in which the defendant spoke on his behalf in full sight of the jury to a more impersonal and more highly structured trial in which the defendant was represented by counsel and where rules of admissibility governed the presentation of the evidence to the jury. A new world of criminal justice was being ushered in; the old one had surely drawn to a close when, in the light of widely held views, it seemed plausible to say that, after all, the jury had never been intended to be a discretionary body.

II

Jury-based intervention did not end in the middle of the nineteenth century. It remains a pervasive and vital aspect of the (so-called) fact-finding process even in lesser felonies, where life is not at stake. In that setting, however, it has not always been noticed. Perhaps jurors themselves are, typically, unaware of the degree to which discretion creeps into the fact-finding process. It was the sanction of death that made jury law-finding in routine cases an important and recognized aspect of English culture. Jury mitigation of the law soon passed from public consciousness, save for episodic reappearances in what society has taken to be special circumstances. Late nineteenth- and early twentieth-century historians made relatively little of the fact that a tradition of jury intervention in common-run felonies had for centuries been central to the administration of the criminal law. Until recently, historians have por-

30. For a listing of capital statutes as of 1839 see Radzinowicz, History of English Criminal Law, 1:733–34.
trayed jury law-finding mainly as a matter of resistance to authorities in political cases, and they have viewed those cases in isolation from the general run of jury trials. They have viewed jury nullification the way they have viewed monarchical depositions: as sudden outbursts, undertaken in extreme circumstances, and seemingly lacking a basis in daily practices and attitudes.

It seems fitting that the foundation for the abolition of open and massive jury intervention was laid in the course of the debate over reform of the English police system. In earliest times the jury had played an evidence-gathering role, making up for the Crown's lack of policing and prosecutorial capacity. Subsequently that role was played by justices of the peace, constables, and the other minor officials that composed England's protopolice force. The limits of that meager force were widely recognized. Although authorities came to possess the capacity to gather evidence in cases that were scheduled for trial, they remained largely reactive, lacking the strength and numbers to prevent criminal activity. Partly for that reason, capital sanctions were maintained. The maintenance of those sanctions in turn made continuation of jury intervention inevitable. The development of the prosecution was a gradual process. Only very slowly did authorities achieve the capacity to control the jury, and even when they had done so there were reasons for allowing the jury to share the power of mitigation. The transformation of criminal procedure in the early modern period thus eventuated in a system of trial wherein juries that no longer controlled the production of evidence nevertheless frequently and openly rendered verdicts against the evidence produced in court. The struggle for control of the law was by that time very complex. The jury was coming to be a quasi-arm of the bench even as it remained an extension of society. At one level, procedural developments touching the jury reflected the fact that the criminal process was becoming increasingly formal; at another level, the jury remained a mediating institution that served multiple interests.

It is difficult to determine precisely how this two-sided relationship between authority and the jury began. I have characterized the jury as possessing the greatest degree of power during the medieval period. But it must be remembered that in those times the Crown and bench were relatively weak, so that the advantage they stood to gain from an alliance with men of substance in the local community was correspondingly great. Moreover, even if before the sixteenth century the bench could not have prevented jurors from behaving as they did, authorities may nonetheless have benefited from that behavior and felt little inclination to prevent it. I have suggested that, in the main, legislative and judicial devices for controlling the jury were not created in order to deal with jury-based intervention that took the relatively benign form of merciful verdicts in
run-of-the-mill cases. Authorities did not seek to end that aspect of the jury's role; rather they sought to manage it, to set clear limits to its operation, and to create the means whereby they could monitor verdicts for what they considered true abuses.

By the eighteenth century authorities had gained so much control over the practice of jury-based mitigation that it had become an integral aspect of the official sentencing procedure. In form, of course, the jury continued to determine only the question of guilt or innocence, and it was in part the fiction so frequently involved in this aspect of its role that was bringing jury-based intervention into disrepute. By then, too, it had become clear just how powerful the jury could be. Its place in the constitution had been marked out in the constitutional and political crises of the seventeenth century and again in the late eighteenth century during the debate over the law of seditious libel. The constitutional role of the jury combined with the long-standing ethic of jury-based intervention in routine cases to produce a formidable political and legal ideology. Yet at a deeper level, an increasingly widespread concern for clarity, certainty, and predictability of the law—a concern shared by both proponents and opponents of reform—was feeding into the stream of opposition to jury-based discretion.

Reform of the libel law took the wind out of the sails of the movement for the right of the jury to find law (though not out of the tradition of resistance to unpopular political prosecutions, as the acquittals of, inter alia, Hardy, Tooke, Thelwall, and Hone demonstrate). Although the claim to that right was reasserted during the next decade, by and large conferral of the power to render a general verdict altered the nature of discourse concerning the jury. Jury discretion in seditious libel could now be concealed within the fact-finding process, as it had long been concealed in treason. Arguments might arise over the definition of the law, but they would be resolved by legislative decree or judicial elaboration of existing standards. True jury nullification (as distinct from discretionary, merciful verdicts) would continue episodically. But so long as such verdicts remained concealed or, if open, ad hoc and unaccompanied by a general claim to a right to find law, they could be—and down to our own day have been—accepted as anomalies and as one of the costs of the jury system. Ultimately, the reform of the law of sanctions had a similar impact on the tradition of merciful verdicts in routine felonies: by the later nineteenth century, jury discretion had largely been hidden from view. Moreover, the period of intense reform activity and criticism on all sides of the jury's supposed "dilemma" had conditioned much of society to think in terms of the jury's responsibility to adhere to the rule of law.

It is impossible to ascribe the demise of discretionary fact-finding (or law-finding) to a single cause. Reform of the law of sanctions was, of
course, crucial, but that reform came about only after the assumptions that underlay the preexisting system were somehow no longer tenable. We have seen that the reform of the police system played a significant, albeit indirect and catalytic role, as did the movement for reform of English prisons. The emphases in the new penology on humanity and on the certainty of the law were also significant: what began as a claim that certainty was required for reasons of deterrence ended as a claim that certainty was necessary for fairness to the defendant. Rationality regarding penology was closely related to rationality regarding the nature of the trial itself. The sequencing of the trial in the early eighteenth century may have resulted from developments in the law of evidence, including the rules regarding the burden of going forward and the burden of proof. But the law of evidence developed more rapidly in the nineteenth century when Englishmen were no longer satisfied with a cumbersome system of posttrial reprieve and royal pardon on grounds of an unsafe verdict. It is possible that the law of evidence developed only after changes had been effected in policing, in sanctions, and in the structure of jury trial, but jurisprudence probably led as much as it followed. One might speculate that the increasing recourse to counsel by defendants was crucial for the development of the law of evidence, a development that probably predated the acceptance of other reform demands. In the end, however, although we can roughly date the close of the centuries-long phase of jury trial history that we have traced, we can as yet do little more. We await an informed analysis of the manner in which the end of that phase came about; the much-needed history of the rise of the modern trial has yet to be written.

III

The movement for reform of the law of sanctions prepared the way for the modern view regarding the role of the criminal trial jury. The traditional view eroded suddenly, reflecting its fragility and inducing us to forget how long it had endured and how deeply it had been embedded in the English culture. We would do well, therefore, to end our study of the interplay of institutions, ideas, and behavior with a lengthy retrospective. I should state at the outset that I have sought in these chapters not only to answer some difficult questions but also to raise others for which I have found no satisfactory answer. I shall in the course of my summation review some of the unresolved problems that I have identified. This review will, I hope, make clear the limits of the present work, and thereby help to set a research agenda for those who share my particular interest and approach to the social and intellectual history of the criminal law and the criminal trial jury.
I have discussed the origin and early development of the criminal trial jury against the background of what I have called the Angevin transformation in the criminal law. That transformation—the gradual absorption into royal jurisdiction of virtually all felonies—prepared the way for a near-universal capital sanction. Why did the Crown embark on such a harsh sanctions policy? To what extent did authorities expect compliance? From one point of view, the capital sanction merely represented a return to an older and more primitive approach to the criminal law. The Anglo-Saxon system of relatively moderate punishment (i.e., monetary composition) had developed as a result of the Crown’s interest, and perhaps that of society generally, in stemming the more ancient practice of the feud. We must not forget that for those few most serious offenses over which the Crown even in Anglo-Saxon times exercised exclusive jurisdiction, punishment was typically capital. One might conjecture that so long as the Crown had a monopoly on punishment, that punishment would be very severe.

On yet another view, the Angevins and their successors sought to make the strongest possible statement against criminal activity, but believed that enforcement ought to take account of both the circumstances in which offenses had been committed and the reputation of the offender. Roger Groot has shown that, at least in practice, the presentment jury undertook a good deal of selection among offenders. The presentment jury first named all those who were accused and then named those whom they truly suspected. The evidence does not allow for the conclusion that the presenters exercised discretion and stated that they did not suspect some persons whom they in fact suspected but chose mercifully (or on any other grounds) to exonerate. I have suggested, however, that we should not be surprised to discover that the presentment jury did operate on this basis. As I have tried to show, the trial jury did play such a role and played it in an expansive fashion. One must consider the adoption of the trial jury (and even the adoption of the harsh law of sanctions) in light of earlier experience with jury-like institutions. It is possible that, by the 1220s, the Crown assumed that trial juries would behave just about as they did. Certainly it is possible that the tension between authorities and juries that I have depicted in the medieval period reflected no more than disagreement about the degree of discretion that ought to be exercised.

Those who view the eighteenth-century system of criminal administration as one in which authorities made active and calculated use of selective enforcement might see in the twelfth-century transformation of the criminal law an early form of this approach to governance. Such an argument, it seems to me, would be difficult—though perhaps not
impossible—to sustain. Except in homicide, royal pardons were fairly
unusual before the end of the thirteenth century; most selective enfor­
sement was in the hands of the jury before that time. It is possible to argue
that the jury was itself an extension of the Crown, at least in the earliest
period, when the trial jury was often merely a subset of the presenting
jury. On this view the Crown struck an alliance with the most established
free men of the local communities, placing in their hands the power of life
and death over the populace on the countryside. By the end of the
thirteenth century (the argument might run) the Crown was attempting to
play a more prominent role in the granting of mercy: hence the increasing
flow of royal pardons of grace. It would stretch the point too far to say
that royal complaints about jury-based nonenforcement of the law were
really aimed at shoring up the royal purchase on the power to dispense
merciful judgments. There remains, nonetheless, fertile ground for inves­
tigation. Surely the Crown engendered deference through its use of the
pardon, whether or not one views royal policy as involving conscious
manipulation of the law in order to engender it.

My own view, as the essays in Part I of this volume suggest, is that the
Crown’s participation in the process of selective enforcement came about
largely by way of accident, and that that policy was only one of many
contradictory policies authorities pursued. It is difficult to explain the rise
of universal capital sanctions in terms of a desire to achieve the deference
of society through merciful nonenforcement of the law. We still know too
little about penological theory in the twelfth and thirteenth centuries,
especially about Continental practices and their influence within English
ruling circles. There is need for research on the development of capital
sanctions, on Continental influences, and on their melding with the
administration of the criminal law in England.

I have suggested that authorities were well aware that juries manipu­
lated the evidence in order to give effect to their views regarding just
deserts and that the Crown and bench were unable to prevent juries from
playing this role. But I have also suggested that authorities were not
particularly ill-disposed toward this form of jury behavior. Other prob­
lems must have seemed more important, and there may not have been a
great deal of distance between lay and official views regarding the
appropriate sanction in most of the routine cases in which jurors exer­
cised discretion. It is even possible that from fairly early on the Crown
actively encouraged juries to play the role that I have described. Although
judicial encouragement of jury mitigation of sanctions does not become
visible to us until the sixteenth century, there is no reason to believe that
this tradition began so late. The development of the prosecution and of
means to control the jury made judicial participation in merciful verdicts
in “appropriate cases” more affordable, but the Crown and bench had
probably long before not only acquiesced in social standards but upon occasion encouraged them. It is true that one would expect to find some indication of this attitude in Bracton, *Placita Corone*, or in other law books of the thirteenth and fourteenth centuries. But the fact that one does not is hardly conclusive. To say the least, the last word has not been written on the role of medieval institutions in the granting of mercy. It is no longer so fashionable as it once was to focus on the machinery of the criminal law or on theories of kingship and justice in the Middle Ages. Attention has shifted to the sociology of crime, surely an important subject. Somehow bridges must be created among all these fields. The bridge I have attempted to create through an analysis of the judges' shaping of the law of homicide is no more than a beginning.

Crucial to the developments I have traced is the origin of the investigative activities of the justices of the peace and the place of those activities in the transformation of criminal procedure in the late fifteenth and sixteenth centuries. Although the developments involved were not undertaken in a conscious attempt to reduce trial jury discretion, they contributed indirectly to that end. Thus it was in this period that authorities largely brought the trial jury under their control. I have argued that the form of control that emerged allowed for a substantial degree of jury discretion. Although judges frequently steered juries not only to convict but also to acquit or to render a partial verdict, they did so in a way that preserved to some extent the reality and to a large extent the psychology of trial jury independence. This last proposition is, of course, the most difficult to prove. The leading authority on criminal procedure and jury trial in the sixteenth and early seventeenth centuries believes that juries exercised very little independence even in the assessment of questions of fact. In James Cockburn's view, juries knew what result the bench thought appropriate and gave their verdicts accordingly, so that, in effect, what appears to be jury independence was in reality fairly automatic jury ratification of judicially mandated mitigation. I have outlined the difficulties involved in this reading of the evidence relating to criminal assizes. Beyond the realm of this study, there is also evidence, effectively marshaled by Cynthia Herrup, that in the late sixteenth and early seventeenth centuries juries exercised very substantial discretion at quarter sessions, particularly in relatively minor cases, either on their own or by leave (but not solely on the order) of the bench. Although we must be cautious about generalizing from jury behavior where life was not at stake to jury behavior in capital offenses, it is difficult to imagine that
society did not develop expectations about jury practice on the basis of the very common use of the jury in relatively minor cases.

I have dwelled at length on changes in substantive law and the law of sanctions that I believe reflected attempts to accommodate long-standing social attitudes. Although these changes reduced the need for jury discretion, they recognized the implicit or "silent" power of the Tudor-Stuart jury; i.e., as the law (and especially its judicial application) was brought into closer conformity with deep-seated and long-manifested social attitudes about just deserts, and so long as the bench recognized the limits that those attitudes established, the new instruments of control could develop and be applied with relatively little tension. These changes in legal rules and sanctions recognized also the realities of pretrial stages where the community as well as royal officials played a role in sorting out potential defendants. Research (now underway) that embraces the administration of the criminal law at all levels, and that analyzes that administration in terms of prevailing social and religious attitudes toward crime and criminals, will, I believe, support my view of a complex and two-sided judge-jury relationship. I suspect, however, that it will also lay bare, in a way I have not, the influence of local politics and the contest among central and local authorities for control over jury selection and over jury resolution of many kinds of cases. Jury independence from royal officials may often have reflected jury dependence upon local ones.

It remains likely that in the sixteenth and seventeenth centuries criminal assize juries behaved largely as they did in the following century. That is, juries were frequently influenced by the bench, and usually resolved cases in a way the bench approved of, but in many cases were left by the bench to determine the matter on their own. And even where the bench revealed its view of how a case ought to be resolved, it left the jury in a position whereby it might resolve the case as though it were resolving it for itself. Juries both followed the bench—i.e., took their view of the case largely from the bench—and believed they were making their own assessment both as to fact and as to the appropriate sentence. From the perspective of the jury, the judge's view was simply one very important consideration that ought to be taken into account. That, at least, is the way many contemporaries viewed the process in the eighteenth century, when the tools for steering the jury were just as strong, if not stronger. It is unlikely that in the earlier period jurors (and the denizens of England's local communities who observed them) thought juries played a less significant role.

Mid-seventeenth-century writings on the jury are an important source of evidence about contemporary perceptions of the institution and its behavior. As we have seen, this evidence, too, is ambiguous. Some evidence for the existence of the most basic form of jury independence
resides in the tracts attacking the jury as composed of know-nothings and asserting that there were not enough qualified persons to serve. Had jurors simply ratified explicit judicial mandates, the deficiencies of jurors would have been less obvious and seemed less important. But this does not prove that jurors went beyond the finding of fact; it may prove no more than that some contemporaries doubted jurors' capacity to make accurate factual assessments independently.

The Interregnum tracts that argued for greater jury power pose even more difficult problems. These radical jury tracts clearly reflect the view that, at least in political cases, the bench steered juries far too strongly. But what of trials in more routine felonies? For the most part, the tracts place the true law-finding jury deep in the historical past; it cannot be found—one infers from the tracts—at the contemporary assize or quarter-session proceedings. But the tract writers equated true law-finding with a degree and form of jury power that we are certain did not exist in the sixteenth and seventeenth centuries. The tracts simply do not speak directly to the question of whether juries in routine cases exercised some more modest degree of discretion.

It is by no means clear why radical jury proponents were inattentive to the jury practices I have traced. Were they unfamiliar with the handling of criminal cases at assizes and quarter-sessions? Or should we conclude that juries did not exercise even the modest kind of discretion in routine cases that I have labored to show that they did exercise? My tentative view is that these writers probably were aware of contemporary practices but that, from their perspective, those practices were barely worth discussion. For what authorities saw as nearly too much jury autonomy, radical jury writers viewed as far too little. How had this come about?

I have suggested that the early modern bench steered juries, that jury discretion was to a large degree undertaken with judicial leave or encouragement, and that the local community largely accepted this judicial role. For the most part, the community believed it was doing justice as much on its own terms as was appropriate. Those relatively few political dissidents who strenuously opposed the common-law bench—as the radical jury writers certainly did—perhaps viewed the modest degree of jury-based discretion that characterized routine felony trials as a mere remnant of what they supposed was a once fully manifested, God-given duty. In their view, that duty had become a peripheral, judicially manipulated power; no longer was it the very essence of the trial jury's right. The tract writers thus reflected the existence of an ongoing tradition in a curious way. Contemporary jury discretion gave them a clue to the jury's "true" role even while it appeared to them to have been nearly destroyed by the bench.
It is also significant that mid-seventeenth-century jury proponents sometimes failed to distinguish between civil and criminal trial juries. Like the Wilkites of the following century, the Levellers were concerned with private law as much—if not more—than with criminal law. Both groups sought a simpler, more accessible system of law to govern their acquisition, transfer, and protection of property. But the Levellers sought more than a reduction of both the mysterious forms of the common law and the discretionary powers of the common-law bench; they looked to the local community to judge cases, whether crimes, civil trespasses, or disputes over property rights or contracts. Lilburne’s invocation of Littleton is of interest not only because the Leveller misread his chief source for the proposition that the jury possessed the right to find law. The jury that Lilburne (wrongly) claimed Littleton endowed with law-finding power was a civil jury. Jurors in private-law disputes no doubt continued to exercise discretion in their fact-finding role, and this probably shaped their behavior when the same persons sat in criminal cases. But because of the formal separation of law and fact in civil cases, the civil jury had long before surrendered much of the power still retained by the criminal trial jury. How this separation had come about is beyond the scope of the present study. The influence of civil-jury practice upon criminal-trial-jury behavior, and the attitudes of contemporaries toward the civil jury, are, however, matters that do touch my own concerns, though I have left them for others to pursue. Lilburne, it seems to me, reflected an outmoded school of thought in his reference to the civil jury’s law-finding power. By his day, the claim of the criminal trial jury’s “right” to find the law mercifully, or to nullify judicial pronouncements upon the law, was based largely upon the fact that it was the Crown that brought (or stood behind) the prosecution. It was a tradition that gained its force from the threat of capital punishment, its justification from the defendant’s “choice” to put himself upon the country, and its eventual spread to noncapital, high misdemeanors from the fact that the alleged “victim”—political authority—was, in one of its manifestations, the bench that presided over the trial and charged the jury to do justice.

The background to Bushel’s Case reveals, we have seen, the tension between judge and jury that sometimes accompanied the tradition of generally accepted de facto jury independence. In several homicide cases Chief Justice Kelyng challenged a kind of jury behavior that, from all one can determine, was not atypical. Although it is possible that the jurors whose verdicts he coerced had in fact been guilty of corruption, Kelyng’s critics did not assume that was the case. Their response suggests that jury fact-finding was sancrosanct even when it appeared on the facts that the jurors had indulged in a substantial degree of discretionary decision making. Vaughan’s opinion can best be understood against a background
of criminal proceedings in which judge and jury typically were in agreement not only on the facts but also on the merits of merciful discretion. The jury’s right to an untrammeled general verdict could be vindicated precisely because there were few cases where judge and jury were likely to clash. I have suggested that the most important idea in Vaughan’s opinion was not his statement that the jurors might have knowledge of their own but rather that the jury might see things in their own way. It is not clear what Vaughan meant by the term “conscience,” but surely whether or not he was sincere Vaughan was pointing to some element in contemporary social thought. Vaughan’s opinion suggests once more that the notion that the jury had an ultimate right to go its own way in its assessment of fact was not foreign to the period.

But Vaughan’s opinion raises as many questions as it answers. Why did Vaughan not allude to the most relevant aspect of the background to Bushel’s Case? Why was he silent about the line of cases involving Quakers in which juries had, from the standpoint of authorities, threatened the public order by making a mockery of the law and bringing courtroom proceedings to a virtual standstill? And why did not Vaughan lay down a rule (as he might have) that placed some limits upon the jury’s power to frustrate both the bench and the law? Vaughan’s draft opinion leaves the impression that he had at first intended to set some limits to jury deviation from the facts adduced in court. Subsequently he altered his opinion, providing what must have seemed to contemporaries a lame excuse: a jury, after it had been questioned by a judge, might somehow have changed its mind (in the direction of innocence) in the intervening time. Vaughan might have ruled that a jury that rendered a verdict totally in the face of the evidence presented in court (as it seemed to the bench) but could not explain why it had done so had gone beyond legal limits. For reasons that are difficult to uncover, Vaughan seems ultimately to have responded almost viscerally to a deep-seated notion concerning the sanctity of the juror’s conscience. It is probably true that Vaughan and his judicial brethren could afford to do so since there were relatively few cases in which jury discretion born of “conscience” might lead to real conflict with the bench. But that is only to affirm rather than to deny the existence of the concept of verdict according to conscience.

Thanks to recent research, we now know a great deal about crime and criminal prosecution in the eighteenth century. John Langbein has shown, for instance, how cut and dried the trial process could be. Because, however, that process was employed for “selection” of offenders for one or another level of punishment (as Langbein and John Beattie have
demonstrated), the trial inevitably took on several related but not always consistent social meanings. It is not surprising, for instance, that to many contemporaries the trial appeared to be open-ended and even arbitrary. Nor is it surprising that contemporaries disagreed about whether the judge or the jury was in control. There are, moreover, matters about which we cannot as yet be certain. How, e.g., did most of the populace view the trial? Did they identify the criminal trial jury as an extension of society or as an arm of authority? Did they regard jury verdicts as arbitrary, or did they possess a settled understanding of the kinds of offenders and offenses that were singled out for the various levels of available sanctions? Did they perceive the jury as a bulwark of liberty, or did they see jurors as pliant and venal (as some literary sources depicted them), as simply actors in a grand farce?

I have suggested that we must be cautious about assimilating jury trial to those institutions and procedures by which eighteenth-century authorities manipulated the affections of society at large. Although I am not certain that any institution or procedure ought to be viewed mainly in that way, some of them were handled in a manner that greatly strengthened the hand of authorities. However we characterize the intent of Crown and bench in these instances, we must distinguish the jury from other institutions on the basis of the effect its use had both on governance and on the relationship among the political and social orders of the eighteenth century. It is of course true that the criminal trial jury offered an important opportunity for cooptation of the middling and lower ranks of lay society. Authorities’ use of the jury—and the apparent esteem in which the jury was held by the contemporary establishment—doubtless contributed to the stability of their rule. Through the jury, England’s rulers extended the “beneficence” of the law to virtually all social orders. Judicial endorsement of jury verdicts was bound to enhance the position of authorities, whose mandates were implemented by an institution that many people probably viewed as reflecting the standards of society at large.

It is also true, however, that the jury’s usefulness to authority depended upon the reality of the jury’s independence both historically and in terms of contemporary decision making. The relationship between authorities and the institution of the jury was symbiotic. Authorities took their standards at least in part from juries; through the jury, authorities achieved more substantial enforcement of those standards than they might otherwise have achieved. Might one, then, postulate the existence of a “ruling class” that comprised the orders that served as judges, jurors, and prosecutors (many of whom were too poor to serve as jurors but sufficiently well-endowed to be the chief prey of thieves)? On such a view, upper, middling, and lower-middling orders created an alliance in order to
govern, according to their own shared standards, the lowest orders—perhaps fully a third—of society. To a significant degree, this is an appropriate characterization of what actually occurred. But jurors commonly took their own standards from a variety of sources, and it seems likely that they saw the world through the eyes of frightened defendants even as they saw it through those of their own more insulated social betters with whom they presumptuously identified and whom they often sought to please. Jurors mediated by bringing rulers and ruled closer together. The standards that they accepted were for both practical and truly substantive reasons that much more acceptable to those above and below them. The power exercised by eighteenth-century authorities was very great, but the substance of the justice they provided, merciful as well as merciless, through their (unavoidable) use of juries reflected the interests of much of society. To put it slightly differently: authorities’ power to determine the content of this substantive justice—to establish the terms upon which substantive rules would be applied—was severely limited, and no institution reflected this limitation more dramatically than the criminal trial jury.

This limitation was reflected not only in institutional realities and in widespread social expectations regarding the administration of justice; it was reflected also in influential contemporary discourses on the English constitution and on the lessons of history. Although truly radical Intercrregnum thought was never assimilated by later jury proponents, the nullification theory espoused by Lilburne (as of 1653), Penn, Hawles, and those who opposed the later Stuarts’ manipulation of grand and petty juries achieved more than surface respectability. Having rested their legitimacy in part upon their defense of the historical constitution, the Whig government could not unilaterally determine the meaning of the post-1688 settlement. Eighteenth-century authorities might claim that, although the jury was still in use, it was no longer required as a bulwark against tyranny, but that claim was open to rebuttal by the political opposition. As I have argued, the longstanding ethic of jury discretion and the more episodic tradition of true jury nullification fused both in practice and in theory; they are not entirely separate even in the pages of so strong an ally of the prevailing political order as Blackstone.

I have devoted little space to the motives that underlay the mitigation of the law. This is of course an enormous subject, for motives varied from time to time and place to place. They varied, too, depending upon the background, character, age, and gender of the defendant (or the victim); upon the persons responsible in given cases for mitigating the law; and
upon the stage of the prosecution at which those persons undertook to do so. By and large, I have treated the subject only very generally. I have focused instead on the way the English thought about the practice of jury-based mitigation, and I have left to the many scholars now at work on the history of criminal law the tasks of analyzing and characterizing geographical, temporal, and other variations in the behavior of juries (including the important differences between the treatment of men and women) and of assessing that behavior in the light of the history of the many other stages in the enforcement of the criminal law. A truly comprehensive history of jury-based mitigation of the formal law awaits the results of these forthcoming studies. I should conclude this section, however, with some brief observations on the matter of motives—that is, the attitudes that led society to mitigate the law—and on the relationship between that important subject and my own study of the criminal trial jury.

Students of Tudor and early Stuart England have pointed to the fit between, on the one hand, a system of criminal justice that announced legal imperatives in definitive terms but provided abundant opportunities for bestowing mercy and, on the other, a religious ethic that portrayed all men as sinners, as subject to temptation and transgression, but proffered opportunities for redemption to all but the worst of the fallen. Legal and religious systems of maintaining order and saving souls, they have asserted, in reality constituted a single system. Not only did society at large see the matter in this fashion, but authorities also explained it in these terms. Professor Herrup has developed this argument with particular force, characterizing Elizabethan and Jacobean enforcement of the criminal law as part of a religion-based process of rehabilitation, or moral regeneration. This seems to me, in fact, a plausible way of understanding the practical application of legal rules across the entire period, 1200–1800.

My own study of the history of the criminal trial jury points to some contours of the evolution of this worldview that, in some dimension, is with us still. The tendency to assimilate the law to prevailing religious notions is undoubtedly age-old. Religious and secular norms were not viewed as separate in the Middle Ages. Post-Reformation Puritanism intensified belief in the omnipresence of sin and the capacity for moral regeneration, but it did not mark a new departure in the identification of serious criminal offenses with breaches of divine command. The royal pardon had always carried with it—or was supposed to carry with it—the imprimatur of Godly Mercy; the refusal to forgive an offender, and the ritual of execution, were imbued with the notion that the offender was in the eyes of God beyond earthly redemption.

It may be that from the outset of the common-law period it was assumed that a variety of institutions, the jury included, would apply the
law in a merciful fashion. We simply do not know how far authorities countenanced such behavior. At the very least, if authorities did believe that prosecutors, grand jurors, and trial jurors should conform to the formal rules of law, they also believed that the Crown should apply those rules in accordance with the standards of divine justice. I have suggested that society's reluctance to adhere to formal rules was far greater than authorities had at the outset assumed it would be. Indeed, society's disposition was apparently more merciful than that of the Crown, for early on the Crown left itself relatively few opportunities to intercede to prevent executions. Social (including religious) attitudes that were themselves in part—but only in part—engendered by secular and religious authorities combined with the relative lack of royal institutions of mitigation to produce a powerful degree of community intercession.

We have seen that authorities reacted to widespread social intercession in a variety of ways. In some of its manifestations that reaction must be viewed as an attempt to monopolize and to limit the exercise of mitigation. To the extent that they were unable to do so, and especially with regard to those instances where they viewed the extension of mercy as both inevitable and just, authorities came to understand the system of criminal administration in terms that both accommodated the divine aspect of secular justice and accorded with the realities of practice. This is, then, how I would interpret the perspective of authorities by the Tudor period. Authorities had by that period made sense for themselves and for others of the practices over which they were coming to exert greater, though still far from total control. Their assimilation (to a substantial degree) of society's definition of the role and purpose of legal institutions had already taken place and so constituted one of the limiting factors that prevented them from willing, or attempting, a more complete form of control. Within the context of prevailing legal and religious norms, norms to which authorities gave significant degrees of definition and shape, authorities sought both to control and to share the power of mitigation. They were influenced in their views regarding both the appropriateness of mitigation and the institutions that ought to bestow it by the kinds of cases with which they were confronted and by the realities of the still-early stage in the evolution toward relatively greater royal control that the system of criminal administration had reached.

The evolution toward royal control (I have suggested) is difficult to trace precisely because control came to involve manipulation of lay institutions, including the jury, even while the power of pronouncing the resolution of cases was left in lay hands. Thus it is difficult for us—as indeed it was for contemporaries—to determine whether the late seventeenth- and early eighteenth-century criminal trial jury was a relatively independent mitigator or a relatively dependent one. Authori-
ties and society at large probably viewed the institution differently in this regard; it is possible that when authorities and jury proponents clashed it was as much because of social assumptions about what juries did, and were supposed to do, as because of what, at least in most cases, juries in fact did.

By the dawn of the modern era the understanding of the purpose of the institution of the jury may have altered in yet another significant way. New ways of thinking about human behavior had slowly emerged, mainly changing, but also weakening, the grip of religion upon society's understanding of the operation of the criminal law. As before, the law served to control and to rehabilitate, but the concept of rehabilitation was being transformed by the increasing emphasis upon the social origins of criminal behavior. Jurors sometimes took such notions into account in their decisions about the fate of offenders. For their part, authorities interpreted the jury's role as co-mitigator in terms of jurors' inclination to 'use' the law to sort out the blameworthy at least partly in terms of the constraints under which offenders had acted and the likelihood that the new sanctions of transportation and hard labor would reform them. This more secular perspective on the causes of criminality and the prospects for reform was intimately joined with the more traditional religious conception of sin and redemption. Few contemporaries thought about them as truly separate interpretations of human behavior. But the implications of the new perspective should not be minimized, for that view contained a threat to the most crucial assumption that underlay the system of criminal law.

By the eighteenth century, if not long before, some contemporaries had come to hold two potentially contradictory views concerning human behavior: offenders were the product of social circumstances; offenders acted freely and should be held criminally responsible for their acts. The prevailing system of administration of the criminal law highlighted this contradiction. The maintenance of the death penalty alongside an open search for reasons not to apply it focused attention on, among other things, the degree of constraint under which a given offender had acted. Authorities, and apparently much of English society, accepted the fact that such constraints were very powerful. The pardon process itself, and certainly the reasons for which many pardons were granted, testified to this understanding of the nature of much human behavior.

Critics of the prevailing system made their own use of the same insight: the death penalty was unjust in many cases because the criminal was a mere product of his background—his upbringing, associates, and needs. At the same time, it was assumed that there was a realm within which people acted freely. Few writers attempted to draw a line between the act for which one was responsible and the act for which one was not. It was
as though most critics assumed that, with reform of the law of sanctions, the problem of constraint would melt away. They seem to have shared an almost universal view that the disparity between the nature of the offense and the level of the proposed punishment determined the relevance of evidence bearing on the defendant’s freedom to have done otherwise than he did. But this was neither a new phenomenon nor one that died with the reforms of the nineteenth century. Perhaps we will come closer to understanding this aspect of eighteenth-century English mentality when we consider the way in which the same contradiction prevails in our own assumptions and language regarding criminal justice.

It is conventional to say that we believe that nearly all offenders—indeed nearly all persons—are mainly free, and thus mainly responsible for their acts, save for the few “insane” who, we agree, bear no responsibility at all. Some, we believe, are more free than others, and it is the degree of freedom or nonfreedom that we, like those before us, take into account. The sanction of death is reserved, on this view, for those whose acts are, as it seems to us, both extremely serious and at least substantially free. That is a modern view, but it is useful to keep it in mind as one studies the history of criminal law from medieval to modern times.

IV

The foregoing essays explore various aspects of the history of verdict “according to conscience,” stressing the relationships among them. These relationships are often difficult to establish, for the various motives they reflect were not always separate in the minds of jurors, officials, or contemporary observers.

I have given considerable attention to the idea of the jury as a bulwark against tyranny, an idea that, from the seventeenth century until recently, has loomed large in historical scholarship. But I have attempted to demonstrate that this traditional view does not capture what was behaviorally the most significant aspect of the jury’s place in medieval and early modern English culture. Pride of place must be reserved for the jury’s role as a mitigator of capital sanctions in felony trials. This aspect of jury history, which bears a complicated relationship to the political role of the jury, is itself a multifaceted phenomenon.

We can best understand jury mitigation by focusing on jurors’ attitudes regarding the appropriateness of punishment for specific defendants who had acted in particular ways. The most prevalent attitude was, in its most general form, a belief that the defendant did not deserve as harsh a punishment as the law provided. Such a belief is, of course, consistent with any number of specific attitudes toward the defendant or his behavior. For example, the defendant’s peers may view his act as lawful,
or they may view it as unlawful but not so serious as to merit the prescribed sanction. The latter, by far the more common view, may reflect either the view that the defendant has suffered enough or the view that, although the defendant has not suffered enough, the prescribed sanction would make him suffer too much. Either stance may spring from the common feeling that defendants deserve mercy if they repent of their behavior and/or if their behavior was in some significant degree the product of forces beyond their control.

In studying the effects of these aspects of jury behavior, I have developed several main themes. First, I have sought to show that the jury’s role as mitigator was a by-product of institutional arrangements that were themselves (albeit indirectly) the result of the tensions between legal rules and social norms occasioned by the Angevin revolution. To a certain extent, the political implications of those tensions would in any case have made it difficult for authorities to develop an administration of the criminal law that was managed entirely by officials and so contributed to the need for a jury-like institution. But the existing weaknesses in English bureaucratic and policing capacities perhaps counted even more heavily: simply put, lay cooperation was required at every stage in the legal process. Once the institution of the jury came into being, both jury-based intervention and a struggle to limit its reach were virtually inevitable.

Second, the history of legal doctrine was itself affected by the interaction of legal and social tensions with the institutional arrangements embedded in the administration of the criminal law. The law of homicide and the rules of forfeiture and of statutory benefit of clergy reflected responses to social realities. Tensions were muted not by head-on collisions between judge and jury but by the manipulation of categories, by the creation of alternative punishments, and by the powerful ethos inherent in the ritual and substance of the royal pardon. The evolution of the substantive criminal law cannot be understood apart from social processes; yet the relationship between the doctrine of the criminal law and other social processes was so complicated that we may never be able to sort out fully the strands of that relationship.

Third, the ideology of jury mitigation (the more modest law-finding tradition) was relatively stable even though the specific motives that underlay mitigation were ever-changing. The community’s attitudes toward criminal offenders were in part a product of transient notions regarding appropriate behavior, but they were also a product of more enduring relationships between individuals and society. Those attitudes were, moreover, in part a product of the very fact of jury participation. Institutional realities created or reinforced social norms and expectations. Man was not simply to be judged but, apparently, to be judged by his
fellowmen. He might be the subject of divine mercy, but divine mercy was to be granted not only through God's vicar, the king, but also through all of God's subjects, the community as represented by the jury. Secular and religious authorities might help define the concept of mercy in cases in which juries participated, but so, too, did both episodic movements and longstanding traditions within the community at large. Verdicts that were at one level routine, even cynical, repudiations of the capital law and that registered instead approval of a harsh, lesser sanction were conceptualized (or at least rationalized) by participants and by both lay and learned observers in terms of the prevailing understanding of merciful verdicts according to conscience.

Fourth, the more radical tradition of the jury as judges of law as well as fact underwent important changes between the time of Lilburne's first trial and passage of Fox's Libel Act. It was a tradition born of, and influenced by, English constitutional and political conflict. The criminal trial jury came to represent the community in the face of (allegedly) tyrannical or otherwise illegitimate authority, and as concepts of political legitimacy changed, so too did the radical conception of the jury's law-finding role: from the true and sole judges to monitors of a legitimate but potentially abusive bench. Appeals to history played an especially important role in this tradition: the Levellers invoked an equalitarian Anglo-Saxon past; Hawles drew upon the "persecutions" of Lilburne and Penn; many Hanoverian critics of seditious libel doctrine took their stand upon the nullifying juries of the Restoration. The relationship between the radical tradition and the jury's role as mitigator in more routine cases was complex. We are still far from understanding the influence of jury-based mitigation on Leveller thought. Vaughan's defense of uncoerced fact-finding was open to misappropriation by political dissidents who probably cared little about the fate of common-run thieves. Even among those who shared eighteenth-century reformers' opposition to what appeared to be an ad hoc system of justice, the daily role of the jury in helping to resolve routine cases could be turned to advantage. As the two traditions drew closer together, at least in some corners of contemporary political rhetoric, the more radical view was restated in terms that invoked the purposes and values implicit in the more commonplace and officially assimilated view—making control of the latter all the more significant to all concerned.

Fifth, the struggle to define the terms on which mercy was to be granted, or to define the limits of appropriate jury behavior in common-run cases, was integral to the entire administration of the criminal law. Authorities might manipulate some stages of that administration with what seems like almost a free hand. If we focus on the shaping of indictments by officials, on their handling of royal pardons or mitigatory
legislation, on the judge's role when passing sentence, or on the words and demeanor of royal officials at executions, we are likely to stress the degree to which the criminal law—and especially selective enforcement of that law—was an instrument of royal power. If we focus on the jury, the matter is more ambiguous. Although juries might be packed, harangued, threatened, and even, before 1670, coerced, there were always practical limits to the control authorities might exert. Moreover, acquiescence in jury intervention in some kinds of cases weakened attempts to control them in others. In the institution of the jury, one sees most clearly the dialectical aspect of the administration of the criminal law. Official attitudes, not only as they expressed themselves in judge-jury relations, but also as they were revealed in legislation, in judicial development of the law, and in the entire field of royal administration of both mercy and unforgivingness, reflected an assimilation of community attitudes. This fact does not vitiate the power of the concepts of class conflict and domination. It does suggest an approach—by no means a novel one—to the application of those concepts, one that might help us to understand a particular complex of forces at work in the English past. At least with respect to the use of the criminal trial jury, the phenomenon of domination might best be understood in terms of the widespread, community-based attitudes that officialdom assimilated, in part reshaped, and then imposed as though they were largely of its own creation.

Sixth, the English system of criminal administration that I have described involved substantial costs, only some of which were recognized by contemporaries. It involved a form of jury behavior that distorted and perhaps delayed development of the criminal law. By providing an opportunity for jurors to select from among those whom the law had doomed those whom the community would save, and those whom it would not, it gave vent to, and legitimated, not only merciful attitudes but also (we can be certain) the meanest sort of prejudices. As a result of the system, some judicial attempts to prevent juries from exercising mercy in common-run felonies were perhaps wrongly thought to reflect a taste for the gallows rather than principled opposition to jury law-finding and the belief that all mitigation ought to be left to Crown and bench. Though the problem of uncertainty of the law was ultimately recognized (and then perhaps even exaggerated by contemporaries), for long the perceived advantages of the approach to penology that the system accidentally produced delayed legal reform. Indeed, it delayed reform until jury trial had come to be viewed (in some quarters) as an open farce, risking the result that all jury discretion might come to be viewed as unlawful or unwise.

Finally, the roots of mitigation are embedded not only in religious norms, intracommunity relationships, legal mandates, and political reali-
ties; they are embedded also in the particular and enduring human response, in given cases, to excuse persons who have acted as those who sit in judgment of them might have acted, or with respect to whom (though the reason may not be clear) anger has subsided. The truly evil who deserve to die do so because—as it seems to jurors and other judges—the wrongs they have done are "unforgivable," which is to say, beyond earthly redemption. However, the perception of what is unforgivable is colored by personal and status relationships to the accused and the degree to which those who judge him are able to get beneath his skin, or, if they stand back, how much they come to understand his apparently criminal act as the product of forces over which he had little, if any, control.

It is difficult to trace the impact that notions of constraints on human behavior had on both official and lay participation in the administration of the criminal law. By the late eighteenth century, however, the trial had evolved to a large degree into a sentencing process in which the element of social determinism undoubtedly played a significant, if sub rosa, role. At the same time, determination of guilt or innocence had become so confused with the issue of the appropriate sentence that the entire proceeding was subjected to scorching criticism. The reform of the law of sanctions in the nineteenth century lessened the pressure on juries to find a basis for partial or entire exculpation in evidence suggesting that the defendant's behavior was to a significant degree beyond his control. Thus, the reforms, undertaken in order to produce certainty and, thereby, to deter criminal behavior, had the additional virtue of safeguarding the notion (ought one say: fiction?) that wrongdoers typically act with sufficient free will as to justify their conviction. As I plan to demonstrate in future studies on the jury, the concept of will, and the criminal law, one of the most significant characteristics of modern Anglo-American jurisprudence has been its tendency to separate the two determinations that the centuries-long evolution of English criminal administration had forced together. First the post-1850 jury would determine whether the defendant was guilty, in the sense of having "voluntarily" committed an unlawful act; then the defendant would be sentenced, often (by virtue of later reforms) in the light of a presentencing report in which he appeared as the plaything of social forces. This institutional solution to the ambivalence about the nature of human behavior that has increasingly afflicted modern culture has, for better or worse, served the purposes not only of those who rule us but of all of us as we rule each other and ourselves.