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Robert C. Palmer
The College of William and Mary

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CONSCIENCE AND THE LAW: THE ENGLISH CRIMINAL JURY

*Robert C. Palmer**

VERDICT ACCORDING TO CONSCIENCE. By *Thomas Andrew Green*. Chicago: The University of Chicago Press. 1985. Pp. xx, 409. \$34.

The criminal trial jury has played a central role in Anglo-American history both for the maintenance of order and in the constitutional limitation of governmental power. The jury is an occasion for familiarization of the citizenry with governmental process — a process of co-optation and indoctrination — as well as a means of qualifying power by inserting into the governmental process lay and communal standards. But those standards are discretionary, and the discretionary aspect of the jury, particularly for those subject to its workings, is simultaneously worrying and hopeful.

Verdict According to Conscience analyzes jury discretion in England from the twelfth to the eighteenth centuries. The scope itself makes the work extraordinarily ambitious. And Green's accomplishment is impressive; he has produced a stimulating, thought-provoking study. His focus on jury discretion — the operation of conscience in the rendering of verdicts — yields an intriguing investigation of jury behavior; it also provides a helpful overview of the development of the criminal trial jury into a constitutional right. The book's substance demonstrates thoughtful consideration of the issues involved. Its exemplary organization, with frequent summaries and clearly explained theses, exhibits an extraordinary degree of concern for the reader.

Verdict According to Conscience is in three parts: medieval (Origins), early modern (Transformations), and eighteenth century (Resolutions). Each part contains three chapters. Roughly, the first chapter in each part is an institutional overview; the second examines the role of conscience in trials; the third explores the interaction between jury and bench necessitated by such jury behavior. As might be expected, however, the institutional chapters tend also to include arguments relating to jury behavior; in the second part the institutional overview also provides the chronological coverage of the jury under the Tudors and first Stuarts. The parts also involve different approaches to the topic. The medieval portion is heavily grounded in analysis of com-

* Adler Fellow, Associate Professor of Law, Institute of Bill of Rights Law, Marshall-Wythe School of Law, The College of William and Mary. B.A. 1970, University of Oregon; Ph.D. 1977, University of Iowa. — Ed.

mon-run criminal trials; the other two parts are more, but not exclusively, concerned with treatises and classic great cases.

Green demonstrates a continuity of discretion in the medieval criminal trial jury. When criminal prosecutions utilized presentment juries and the ordeal, the presentment jury presented only those really suspected, protecting those only slightly suspect. When the trial jury replaced the ordeal in the 1220s as the normal method of proof, it assumed part of the discretionary activity of the presentment jury. That assumption of discretion was natural, because the same people often served on both juries. The overlap in membership became impractical in the early fourteenth century with the demise of the general eyre and the adoption of the commission of gaol delivery as the normal judicial commission for the trial of crimes. Nascent ideas of due process reinforced the physical and chronological separation between presentment and trial juries, so that by the mid-fourteenth century the accused faced two discrete panels¹ (Chapter One).

Green traces medieval nullification of the law primarily in homicide cases. Late fourteenth-century coroners' rolls distinguished between "murder" (stealthy homicide) and simple homicide (roughly, manslaughter). That distinction was not legal, since the law dictated that both were capital offenses. But the same social distinction is demonstrable from standardized self-defense verdicts through the fourteenth century, inferable from thirteenth-century evidence, and explicit through the beginning of the twelfth century. The jury felt free, from its inception, to render verdicts according to a social conception that was fundamentally at variance with the letter of the law (Chapter Two).

This jury activity inevitably affected the structure of criminal law. The harsh simplicity of the legal structure within which the jury inserted its verdicts disguised the close cases and complicated factual situations that would have produced fine distinctions. Even so, fourteenth-century criminal law was not static. The category of justifiable homicide grew to include the slaying of burglars, arsonists, and robbers caught in the act, and accidental homicide ceased to require a pardon. But juries protected those guilty of simple homicide by classifying them as self-defenders; that exercise of mercy, with the consequent judicial suspicion of self-defenders, prevented the emergence of sophisticated criminal law. The history of jury nullification of the law explains the structure of medieval criminal law (Chapter Three).

Two factors distinguished the early modern jury from the medieval jury. By far the more important was the development of the prosecutor. The Marian bail and commitment statutes of 1554-1555 assured that there would be an official version of the case available to judge

1. The separation between trial and presentment juries also resulted in trial juries of a lower social standing, prompting growing governmental concern about the jury.

and jury and that witnesses would be bound over to give evidence against the accused. The interest in evidence meant that the jury was no longer to be self-informing; the presentation of evidence prompted judicial commentary together with the charge to the jury. Judges also attempted to manage the jury by fining jurors or binding them over for examination by Star Chamber. And the presentation of complicated life situations to the court instead of standardized verdicts allowed the rapid formulation of a much more complex criminal law. The development of this prosecutorial side meant less jury discretion.

At the same time, another institutional factor made the former jury discretion less necessary: the availability of a serious but noncapital punishment for simple homicide. In the fifteenth century benefit of clergy had become available in practice to almost any male offender. Thereafter Parliament excluded the worst categories of offenders from access, but simple homicides retained the benefit. Punishment for such first offenses was branding and imprisonment. The ready availability of benefit of clergy for simple homicide removed the major area of disagreement between the formal criminal law and social attitudes, with the result that the reduced jury role in law nullification was without controversy (Chapter Four).

The continuous history of jury discretion, Green argues, made possible the Leveller argument that jurors were judges of the law. Green uses John Lilburne's trials to trace the development of that radical pro-discretion, anti-rule conceptualization of the jury. Until Lilburne's 1649 trial Leveller rhetoric about the jury was relatively traditional, insisting on local trials and local jurors but adopting the law/fact distinction between the functions of judges and jurors. After the 1649 trial a theory rapidly developed of total jury control over the law, analogous to lay control over the interpretation of Scripture. Then, in his 1653 trial, Lilburne enunciated a radical theory of jury nullification of statute if the jury considered the statute discordant with English fundamental law (Chapter Five).

The recognition of a jury right against coercion incorporated part of the Leveller tradition. Bushel, as a juror, responded to Penn's argument that jurors were judges of the law and acquitted him contrary to the evidence. Imprisoned for his recalcitrance, he came before the king's court by habeas corpus. On that matter Vaughan wrote his famous opinion establishing the jury right against coercion. He based his opinion not on the jury's right to nullify the law, but on its right to find fact. For Vaughan, law did not exist in the abstract; it grew out of fact. Denying the possibility of ascertaining completely objective facts, Vaughan refused to second-guess the jurors' determinations, since their job was to ascertain fact and apply the law to it. The process was too complex, law and fact too intricately interwoven, and jury right over fact-finding too secure to justify judicial disciplining of ju-

rors. Vaughan effectively hid the jury's power over the law within its power over fact (Chapter Six).

Further major change in the criminal trial occurred only late in the eighteenth century or early in the nineteenth century, with the increasing intervention of lawyers in criminal cases and the development of a law of evidence. That development lies outside the scope of Green's analysis. But completely within the eighteenth century the Crown became much more selective in its prosecution. With the availability of transportation as a punishment and with the jury right against coercion, the bench openly admitted the jury into its role of mitigation. While this explicit exercise of authority contrary to oath elicited much criticism, no one doubted its necessity until the law of sanctions was altered. The growing conviction that social factors qualified free will made such reform seem all the more pressing, but it also made the temporary retention of jury mitigation to avoid capital punishment all the more necessary. And the constitutional role of the jury was such that no one wanted to eliminate completely the possibility of jury nullification of the law (Chapter Seven).

Judicial acceptance of jury mitigation in felony cases, however, contradicted the law of seditious libel. In prosecutions for criticism that undermined governmental authority, the bench tried to limit juries to determination only of publication, reserving the seditiousness of the tract as a matter of law. Writers regularly chose to analogize seditious libel with homicide rather than theft. Theft was considered uniformly and always bad, such that jury activity beyond the strict finding of fact would only be in mitigation of the rigor of the law. Homicide, however, was not always bad and could be justified. The jury in homicide thus had a more extensive role to play. If seditious libel was like theft, the bench could logically restrict the jury; if like homicide, it could not. Nonetheless, the acceptance of jury mitigation in felony inevitably affected the role of the jury in seditious libel. Finally, at the end of the eighteenth century, Fox's Libel Act allowed the jury in seditious libel cases to return a general verdict, a verdict thus that could determine the seditiousness of the tract (Chapter Eight).

The lively tradition of respectable jury mitigation of the law ended, however, roughly with the eighteenth century. The development of the law of evidence and the intervention of counsel in criminal trials elevated the value of consistency in determination, whereas jury mitigation operated in a random manner. More to the point, parliamentary reform of the law of sanctions eliminated many of the capital offenses that had made jury intervention seem necessary. Jury intervention, while far from dead, no longer played the constitutional or normal role it once had (Chapter Nine).

Green's view of jury activity is a complex of social, legal, and intellectual history. Throughout he emphasizes the relationship between

jury activity, general social attitudes, and the formation of substantive law. That relationship was interactive, not linear. His versatility is impressive. His sensitivity to his sources and their context is laudable. He is confident of his sources, and he has established a framework for future research. The establishment of that framework is a great service, even though the sheer volume of research on the criminal trial jury dictates that many of Green's particular arguments will be superseded.

* * * * *

Verdict According to Conscience is above all a history of the criminal trial jury. But the criminal law was not a world to itself. Justices presided over both criminal and noncriminal juries. A priori, study of the normal common law jury should reinforce study of the criminal trial jury. Such a perspective, not usual among historians of medieval criminal law, alters the characterization of the Angevin revolution, the origins of trial jury discretion, and the continuation of jury discretion beyond its origins.

The Assize of Clarendon² (1166) and the Assize of Northampton³ (1176) first mandated extensive use of presentment juries. Green portrays those enactments as a jurisdictional revolution: decisive royal assertion of "jurisdiction over trial and execution for all felony at the expense of existing, competing jurisdictions" (p. 7). Maitland similarly characterized the origins of the possessory property actions as a decisive assertion of royal jurisdiction at the expense of competing jurisdictions. Newer scholarship portrays these legal changes as regulatory innovations, not as jurisdictional transfers.⁴ The question of appropriate characterization is relatively unimportant for Green's concerns, but it affects the way in which his work relates to general legal history.

Other Angevin legal innovations outside the context of property were regulatory. The Constitutions of Clarendon⁵ (1164) was an attempt to set down English custom regarding conflicting royal and ecclesiastical matters; its primary concerns were regulatory.⁶ That

2. 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 76-80 (C. Stephenson & F. Marcham eds. & trans. 1937).

3. *Id.* at 80-83.

4. S. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976); Palmer, *The Economic and Cultural Impact of the Origins of Property, 1180-1220*, 3 LAW & HIST. REV. 375, 375-96 (1985) [hereinafter cited as Palmer, *Economic and Cultural Impact*]; Palmer, *The Feudal Framework of English Law* (Book Review), 79 MICH. L. REV. 1130 (1981); Palmer, *The Origins of Property in England*, 3 LAW & HIST. REV. 1 (1985).

5. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 73-76.

6. The traditional view considers the Constitutions of Clarendon as either a defense or an assertion of royal power. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 138-48 (2d ed. 1898); 2 *id.* at 198. The Constitutions were regulatory in that, while the king acknowledged a certain separateness to ecclesiastical organization, he wanted to assure royal supervision, whether before his justices or in his feudal court. Chapters 2-4 and 7-12 accord with the regulatory purpose; the remaining chapters, 1, 5-6, and

provision preceded the Assize of Clarendon and mentioned presentment jurors who could be made available to ecclesiastical courts.⁷ The regulatory context of this first major appearance of the presentment jury, together with the new view of noncriminal actions already mentioned, suggests a regulatory purpose behind the presentment jury provision in the Assize of Clarendon.

The supposition that Angevin crime-oriented innovations were essentially similar to other innovations demands a difficult reconceptualization. The supposition receives some support from the contemporary perception that the provisions of the Assize of Clarendon and the Assize of Northampton were temporary.⁸ Jurisdictional transfers tend to be permanent. One could argue that the provision was regulatory in providing for royal supervision of preexisting presentment juries.⁹ A better argument would be that the presentment jury was not originally a strict alternative to private appeals of felony, but a mechanism to supervise such appeals. The presentment jury provided the accusation when the appeal procedure failed. That perception allows a consistent portrayal of Henry II as not replacing older forms or consciously centralizing, but only assuring that current procedures operated effectively.

Green derives the origins of juror discretion from the work of the early presentment jury. In this he relies on Groot's studies of the origins of the criminal trial jury and the activity of the presentment juries.¹⁰ Groot's work indicates a certain discretion on the part of the presentment jury, and his logic suggests likewise that the trial jury assumed part of that discretionary role (pp. 7-11). Green's reliance on Groot's work, however, leads to omission of the more important element in the origins of jury discretion.

Green's view represents the best of traditional scholarship. That tradition views the ordeal as asking essentially a factual question of God: did the accused commit a felonious homicide? Included in this factual question, but never spelled out, would be imponderables for which God would be eminently competent, such as *mens rea*.¹¹ While there is some documentary support for the factual nature of the ordeal

13-16, separate out issues that would cause conflict. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 73-76.

7. Constitutions of Clarendon, c. 6.

8. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1, 4 (1982); Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 ENG. HIST. REV. 374, 391 (1941).

9. See H. RICHARDSON & G. SAYLES, *THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA 198-202* (1963). Green indicates that his remarks about the Assize of Clarendon may only be applicable to later practice. P. 7 n.17.

10. Groot, *The Jury in Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113 (1983); Groot, *supra* note 8.

11. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 90, 98-100 (M. Arnold, T. Green, S. Scully & S. White eds. 1981).

question,¹² it was probably essentially moral.

Word usage illustrates the difference between the factual question and the moral question. Coroners' rolls reported that an individual *felonice interfecit*: he feloniously slew (p. 35). The accusation was fact-oriented, about a past event and intent. The jury's verdict, however, was present tense and concerned guilt: *culpabilis est* (he is guilty). Properly the concern was not only with the commission of the crime but also with present stance — the appropriateness of punishment now. That concern could include repentance, reputation, reparation, recidivism. God, however, might be more forgiving than the accused's community, and certainly more forgiving than the king. Green asserts that these questions later seem to have been relevant for trial juries (pp. 64, 98, 380). The concerns were plausibly original.

The moral nature of the ordeal question finds some basis in literary accounts. In *La Mort le Roi Artu*¹³ from around 1230 Sir Lancelot killed Sir Gawain's brother, and Gawain rightfully wanted revenge: Lancelot had clearly committed the homicide. Lancelot, however, offered reparation: he abased himself, offered to do homage to Gawain and to go on pilgrimage alone. Gawain refused to accept this extraordinary offer from a very proud knight and insisted on proceeding instead to battle. Sir Yvain, good friend to Gawain, thereafter scolded him for not accepting Lancelot's reparation:

"My Lord, why have you undertaken this battle, and wrongly too, because he will defend himself with justice on his side? You have certainly never done anything so foolhardy.

....

"He made such a great offer there," said Sir Yvain, "that I can only see unreason on our side in Gawain's refusal. May God grant that things do not turn out too badly for us, because I have certainly never feared disaster as much as I do now; I see right on their side and wrong on ours."¹⁴

And indeed, after a long-fought battle — to show the balance between Lancelot's reparation and his guilt of the factual past event — Lancelot successfully proved his innocence.¹⁵ "Innocence" here, however, only concerned present inappropriateness of punishment. An offer of reparation, refused, reversed the appropriate result. This account of a trial by battle suggests strongly a similar conclusion about the ordeal. The question asked was not factual but moral, not about a past event but about present standing before God.

A tenth-century account of an ordeal yields a similar framework.

12. The Assize of Clarendon, c. 2, requires that the oath preceding the ordeal be factual: "so far as he knows, he has not been a robber or murderer or thief, or a receiver of them, since the lord king has been king." SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 77. That oath was not the typical ordeal oath, but it reflected the immediate royal concern.

13. THE DEATH OF KING ARTHUR (J. Cable trans. 1971).

14. *Id.* at 177-78.

15. *Id.* at 179-85.

A slave had committed a crime, unknown to his master. The master offered to give the presiding official both the slave and a pound of silver to save the slave's life; the slave's relatives also made proffers. The reeve, however, was arrogant. He put the slave to the ordeal of fire, heating the unjustly large piece of iron unusually hot. The slave experienced pain; and the community, observing the healing process, saw the signs of guilt: pus and decay. The slave himself was guilty. But the arrogant official did not see those signs and, humiliatingly, had to pronounce the slave innocent.¹⁶ Vis-à-vis the master, the official was in the wrong, because he had refused appropriate reparation. The ordeal yielded not a factual answer about a past event, but an evaluation appropriate for God: the calculus of present moral standing, albeit related to the past factual event.

Henry II's concern with the ordeal, then, would not indicate that the ordeal was in disrepute. Henry was more concerned with the factual than with the moral question. Disreputable people caught with stolen goods did not go to the ordeal.¹⁷ Bad reputation could exile one cleared by the ordeal.¹⁸ The ordeal was simply fashioned for a different question. Since the ordeal concerned present moral status, community certainty about commission of the crime would not be discordant with an acquittal. The ordeal could fall into disrepute only when theologians opposed demanding an answer from God or when kings decided that factual questions were of paramount importance.

That conceptualization of the ordeal explains trial jury discretion. The trial jury was the proof hesitantly substituted for the ordeal when the Fourth Lateran Council prohibited the participation of clerics. Monarchs were not sufficiently dissatisfied with the ordeal to abolish it on their own or to have a ready substitute. But the trial jury, replacing the ordeal, could render a general verdict concerning guilt in the present tense. If the ordeal investigated present moral status, the trial jury could naturally have undertaken such matters also. Nor would the bench at first have been shocked that it did. The question put to the jury would itself tend to continue that concern, although the Crown's interest in the factual question would generate some tension. Jury nullification of the law is more intrinsic to the trial jury than even Green suspected.

The continuation of that discretion was not simply inertia. Green senses the bench's concern about jury nullification in its sensitivity to self-defense verdicts (pp. 67-68). The concern, however, could not have been great. Those same justices presided over property cases in which a jury, in an action on a writ of entry, could retail a version of a

16. Hyams, *supra* note 11, at 93-94. Hyams uses the account to stress the political nature of community life, rather than reflecting on the nature of the question being asked.

17. Assize of Clarendon, c. 12.

18. Assize of Clarendon, c. 14.

factual situation that directly contradicted the account rendered pursuant to a writ of novel disseisin.¹⁹ In such cases the jury was apparently nullifying the law in favor of a "just" result. Nor was attaint the brutal instrument it might seem. Justices only amerced jurors convicted by attaint when the verdict had been complicated with law.²⁰ The issue of the grand assize,²¹ moreover, compelled jurors to consider a complex of both law and fact. Justices were sufficiently comfortable with jurors meddling in law that it took a statute to compel them to allow the jurors in an assize of novel disseisin to render a special verdict.²² In many areas justices were accustomed to seeing juries handle law.

Justices also were familiar with the problems inherent in trespass, with its fictional allegation of jurisdictional codes. Those allegations allowed inappropriate suits to enter the king's court in disguise.²³ For the system to work, juries had to overlook the jurisdictional words. To give justice in the case, the jurors had to render a verdict under oath that was not strictly true, but rather somewhat embroidered. This situation is particularly interesting. Trespass was a wrong closely associated with crime, and it used the same general issue. Why would justices feel more uncomfortable with the criminal jury than with other juries? In short, the concern felt by medieval justices at jury nullification could not have been too deep; the criminal trial jury was no different from other juries. These concerns integrate the history of the criminal trial jury with the history of English law as such. They also explain the continuity of criminal jury intervention in medieval England.

The self-informing character of the jury plays a large role in Green's analysis. He supposes, guardedly, that the jury remained mainly self-informing until the mid-fifteenth century (p. 105). The implication is that evidence was not presented until then. But already in the 1290s the presentation of evidence was separate from pleading in trials concerning property.²⁴ The expectation that evidence would be

19. See R. PALMER, *THE WHILTON DISPUTE, 1264-1380: A SOCIAL-LEGAL STUDY OF DISPUTE SETTLEMENT IN MEDIEVAL ENGLAND* 119-22 (1984).

20. *Id.* at 78-83.

21. The issue is "who has greater right," representing a complex mixture of law and fact. *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 33 (G. Hall ed. & trans. 1965).

22. Statute of Westminster II, 1285, 13 Edw. 1, c. 30.

23. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 286-90 (2d ed. 1981).

24. See R. PALMER, *supra* note 19, at 228-31. The first form of evidence in property cases was probably written evidence, which could not be thrust on the jurors: they had to ask for it. In the 1290s the party or his lawyer could present the facts as he saw them, although there was no submission of testimony under oath or formal cross-examination. *Id.* In the criminal case, counsel was not formally allowed and the accused was specifically not to testify under oath. Testifying under oath, it should be noted, was not a burden, but a benefit, since it reinforced the credibility of the testimony given.

presented, as well as the procedures for punishing maintenance, would not encourage the noncriminal trial jury to engage in information-gathering. And if the jury was essentially not self-informing in non-criminal areas, the jurors in a criminal trial might well not expect to be self-informing either. The first form of evidence to be expected would be the accused's version of the facts. The standardized renditions of self-defense situations could thus be as much a result of jury acceptance of the accused's story as of jury fabrication of a story of its own.²⁵ The judges might then have commented on such evidence. We do not know. But if the criminal trial jury remained self-informing for two centuries longer than other juries, that would be both surprising and interesting.

The few surviving reports of criminal cases would have fortified Green's treatment.²⁶ They graphically illustrate the unmediated confrontation between the justice and the accused.²⁷ But they also show that strict pleading carried over from the common law. One justice was willing to ignore double jeopardy considerations because of the order of pleading.²⁸ These reports are too interesting to pass by lightly.²⁹

Green notes that the criminal trial jury was immune from attainder process. He rejects, properly, the argument that that immunity was a holdover from the divine orientation of the ordeal. He prefers the explanation that jury discretion simply was always a given (pp. 19-20). His explanation is not completely satisfying. There are two instances in which attainder was allowed on criminal trial juries in Guernsey and Jersey.³⁰ Subjecting the criminal trial jury to attainder was thus not un-

25. At one point Green allows that the accused might have told his story. P. 96. That would make good sense from the 1290s on. If the accused told his own story, the jury might simply follow that account. That form of proceeding would yield a rather more passive jury intervention than Green envisages. Overall he supposes a very active jury, one that purposely embroidered the facts. If the jury merely followed the lead of the accused, one would then have to account for the characterization that such accused persons used. In part, people would simply have known how to characterize what had happened: they had seen criminal trials, been on criminal juries, or heard of cases. In part, however, they would have been informed of the proper defense by lawyers. Although they ought not to have had access to counsel, those accused still could rely on their lawyers. *Duffhus v. Merk* is a case in which a lawyer lost his retainer for not rendering advice to one indicted for homicide, despite the fact that by law he ought not to have done so. Palmer, *The Origins of the Legal Profession in England*, 11 IRISH JURIST (n.s.) 126, 130-31 (1976).

26. 3 YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST 528-45 (1863) [hereinafter cited as YEAR BOOKS]. Other criminal reports have survived, but they are not as illuminating on these points as those from the 1290s. See 1 THE EYRE OF NORTHAMPTONSHIRE, 1329-1330, at 151-244 (D. Sutherland ed. & trans. 1983).

27. 3 YEAR BOOKS, *supra* note 26, at 529-32.

28. *Id.* at 537.

29. Green adverts to these reports only by way of Summerson's paper. Pp. 15 n.47, 18 n.58.

30. [E]adem jurata dicebat ipsum esse infidelem inponens ei crimen latrocinii, unde idem Galfridus occasione veredicti illius jurate fugit ad ecclesiam . . . Quia vero idem Galfridus postea ad nos accessit et optulit ponere se super veredictum xxiiij. proborum et legalium hominum trium vicinarum villatarum de crimine illo, et petiit a nobis id ei concedi, tibi

thinkable. In those two cases, however, the plaintiff had escaped and was outside the appropriate jurisdiction. Those convicted within England were hanged so quickly, perhaps, that no substantial body of complainants survived to make such reconsiderations worth a regular remedy. Beyond that practical lack of pressure, the criminal trial jury probably seemed more like the grand assize, which was never subject to attain. Both the grand assize and the criminal trial jury considered the broadest possible relevant question and were concerned with finality.³¹

The medieval part of Green's book requires some alterations. None of them, however, affects the main thesis. And the utility of his framework is that it both encourages the formulation of questions and suggests the significance of possible answers.

* * * * *

Verdict According to Conscience is intentionally episodic. Green refers to his book as a series of essays (p. ix). The book is much more than that, although it does fall short of an integrated history of the criminal jury. The omissions, thus, are worthy of note, at least to indicate further avenues into the subject.³² Those areas include the early seventeenth-century history of the criminal trial jury, the role of Magna Carta, c. 29,³³ and the nature of seventeenth-century treatises.

Green's treatment of the seventeenth-century jury concentrates on the trials of Lilburne, Penn, and Bushel. That is indeed where the major emphasis should fall. A comprehensive treatment, however, would include the Petition of Right.³⁴ The Petition of Right was a source of Lilburne's thought.³⁵ One of the concerns in the Petition was martial law prosecutions for ordinary felony cases; it referred specifically to Magna Carta, c. 29.³⁶ The argument had to go beyond mere due process to a claim of trial by jury. The growing opposition

precipimus quod secundum consuetudinem predictae insule juratam xxiiij. proborum et legalium hominum ei inde habere facias

2 CLOSE ROLLS OF THE REIGN OF HENRY III PRESERVED IN THE PUBLIC RECORD OFFICE 597-98 (1905); see also 3 *id.* at 172, 177, 334, 355, 511.

31. This suggestion is original. Milsom has accepted a different argument: that attain was not available on a criminal trial jury because the "jury was the defendant's own proof, chosen by himself." S. MILSOM, *supra* note 23, at 411. The accused, however, did not actually choose his jurors. He could only challenge jurors, and the challenges would be tried. Moreover, it is hard to believe that choice had any influence on the availability of attain on the petty assizes.

32. One omission, probably wisely made, is the perplexing problem of whether or not there was an increase in crime during times of food shortage. Even though this might have been a major area of jury intervention, the whole subject is still so controverted that little can be concluded thus far.

33. 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 115. Note that the classical c. 29 was c. 39 in the 1215 version of the Magna Carta.

34. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 19-21 (1971).

35. See L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 289 (1968).

36. 1 B. SCHWARTZ, *supra* note 34, at 20-21.

to Charles I at the time of the Petition was such that juries would have tended to be merciful. Royal use of martial law acknowledged that possibility. The importance is not less for being implicit. The force of Lilburne's argument rested in part on its foundation in the Petition of Right.

Both Lilburne and the Quakers relied on Magna Carta, c. 29, in asserting jury control over the law. Green dissects the course of the debate that led up to Vaughan's decision in *Bushel's Case* but pays little attention to the role of Magna Carta. The history of Magna Carta in the seventeenth century, however, may be particularly relevant. That provision concerned proceedings "by lawful judgment of his peers or by the law of the land."³⁷ "Lawful judgment of his peers" had originally referred to judgment by feudal court, which was a true communal court that did not use juries.³⁸ The community, one's peers, rendered judgments, not verdicts. The presiding officer merely presided. Equation of "peers" with members of the trial jury,³⁹ however, yields the odd result that a jury could render a judgment ("by the lawful *judgment* of his peers"), whereas juries properly gave verdicts and justices rendered judgments.

That historically accidental linguistic paradox probably played a substantial role in the more radical theories calling for jury control of the law. Green's rendition of even Starling's commentary on Penn would indicate such an interpretation:

The defendants, [Starling] 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"). [p. 229]

Starling seemed to accept that the first part of the disjunctive provision would yield jurors as judges. The Crown, however, could choose to utilize also the second half, which introduced a more substantial role for the justices. Green does not delve into this linguistic derivation of jury right; it would be interesting to know how important it was.

Seventeenth-century treatises raise an equally interesting question. Writers worked in a seeming air of unreality. How could it have been a matter of controversy whether attaint lay on a criminal trial jury? Attaint had never been available on properly English criminal juries (pp. 19-20). The last expansion of attaint was in 1275.⁴⁰ But since the petty assizes had largely gone out of use, so had the attaint.⁴¹ The

37. 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 121.

38. Palmer, *Economic and Cultural Impact*, *supra* note 4, at 392-95.

39. That equation can already be observed in the 1290s. 3 YEAR BOOKS, *supra* note 26, at 531.

40. Statute of Westminster I, 1275, 3 Edw. 1, c. 38 (1275), expanded attaint from the possessory assizes to other inquests relating to free tenements, subject to special mandate from the king.

41. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 117 (2d ed. 1979).

discussion was academic, but also pressing. The old writs were valuable sources of legal principle, even if they were no longer in use; that style of argument is familiar both from Coke⁴² and from Blackstone.⁴³ The minor debate over attaint must seem perplexing without reference to the character of seventeenth-century legal debate.

The argument of Chapter Four, it should be noted, is somewhat strained. That chapter is the institutional overview and serves to establish the continuity of jury nullification, albeit at a lesser level than in the fourteenth century. Less ground work has been done in common-run felony. Green realizes that the argument is strained (pp. 150-52), but he is convincing nonetheless. Given both the fifteenth- and seventeenth-century record, it would be very hard to imagine sixteenth-century juries as completely passive and never inclined to render merciful verdicts.

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One of the more interesting aspects of eighteenth-century treatises dealing with the jury in seditious libel prosecutions is the choice of analogies. Pro-jury writers analogized seditious libel to homicide. Green points out the strength of the homicide analogy and raises as his own alternative an analogy to theft (pp. 343-45). Since homicide can be justified or properly excused, juries in homicide cases have a larger role and thus a greater capacity for intervention. Theft would have provided an analogy more favorable to traditional seditious libel doctrine.

But the choice between homicide and theft is somewhat more complex. Hamburger, in a recent article on seditious libel,⁴⁴ reaches a different conclusion. Homicide, he says, produced a rebuttable presumption of malice; larceny produced no such presumption, so that it was better to acquit in doubtful cases.⁴⁵ For Hamburger, an analogy with larceny would have yielded not a stronger but a more lenient law of seditious libel.

The impact of the analogy with theft is perhaps less important than the possible impact of blasphemy and obscenity. Historians have treated seditious libel as an isolated category. But blasphemous and obscene libel were also criminal libels, exactly analogous to seditious libel.⁴⁶ The law for criminal libel was consistent, and Fox's Libel Act⁴⁷ in terms concerned criminal libel and apparently applied also to

42. See 12 E. COKE, REPORTS 74; S. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628, at 51-52 (1979).

43. 3 W. BLACKSTONE, COMMENTARIES *268-69.

44. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985). Green uses the article. P. 253 n.208.

45. Hamburger, *supra* note 44, at 704 (citing both Coke and Hale).

46. Blackstone treats them all together. 4 W. BLACKSTONE, COMMENTARIES, *150-51.

47. 32 Geo. 3, c. 60 (1792).

blasphemous and obscene libel. Blasphemy and obscenity in the eighteenth century could hardly have seemed justifiable or properly excusable. Seditious libel might seem likewise unexcusable, such that from a merely legal perspective only the fact of publication would remain for jury determination. That stronger analogy renders the old doctrine of seditious libel somewhat more understandable.

Verdict According to Conscience is well-written, thoughtful, and thought-provoking. Green admirably pulls together current research and provides a structure for future research on the criminal trial jury. No work of this scope can be definitive. Nor did Green intend to be definitive in setting out these essays. His book will be subject to continuing attack on many fronts, as others fill omissions in his coverage and correct elements of his thesis. That is the burden of making a broad contribution to a subject rich in specialized researchers. His basic thesis will survive. But the book was not even intended to stand forever. By providing a coherent focus and context for the subject, *Verdict According to Conscience* will further the specialized research that will make it obsolete. For now, however, it is the mandatory starting point for understanding the history of the criminal trial jury.