

Thomas Andrew Green

**Verdict
According to
Conscience**

*Perspectives on the
English Criminal Trial Jury
1200–1800*

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THOMAS ANDREW GREEN is professor of
history and law at the University of Michigan.

**For Ruth
and for my mother,
Gladys B. Green
In memory of my father,
Alan B. Green**

Acknowledgments

The essays that are brought together here to form a book on one aspect of the English criminal trial jury, 1200–1800, have evolved over a period of twenty years

That period includes: the years (1964–69) during which I researched (at Harvard and in England) and wrote (while teaching at Bard College) my dissertation on medieval English criminal liability; my Harvard Law School student years (1969–72), when I developed part of my dissertation into the article now revised as Chapter 2; the decade or so that I have been at the University of Michigan (1972–present), during which I wrote the remainder of this book, including the articles now revised as Chapters 3 and 8.

All these years, at all these places, I have been the beneficiary of helpful teachers, colleagues, and students. At the outset of a book that has in some sense been a collective effort, I would like to thank those who have contributed to its coming into being. Many who lent a hand (especially student research assistants) toiled along by-ways—*culs de sac*—that I left unmarked on the terrain mapped by the essays published here. But what has been included has inevitably been influenced by my consideration of matters I have not taken up. Save for those most appropriately mentioned in the preface of my book on the American criminal trial jury (still years—decades?—in the future), I include all of my students who played a part in my ongoing research on the jury: Bruce Howell, Jeffrey Liss, Margaret Mahoney, Neil Mann, Patricia Katzman, Jean Prchlik, Rosalind Rettman, John Dickey, Diana Pratt, Andrew Walkover, Robert Jerry, Janet Parker, Victoria List, Anne Sutherland, Lael Sorensen, Patricia McCune, Ruth Milkman, Karl Kensinger, Susan Tukel, Peter Tjapkes, Nancy Rosenberg, Audrey Krasnow, Lee Wandel, Ann Moyer, and Valerie Sax. Two students played an especially important role: Elizabeth Clark and Alexander Scherr.

Many colleagues read and criticized drafts of the articles mentioned above; my thanks to them are recorded in those articles. I also owe a great debt to those who read a part of the draft of this book: Professors Marvin Becker, Mark Kishlansky, Richard Lempert, Howard Nenner, Robert Palmer, Robert Seaberg and Stephen White; Drs. Francis Boersma and Edward Powell; and Kate Gilbert. Several colleagues deserve mention for

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My work in legal history began under the supervision of Professor Samuel E. Thorne of Harvard University, ever friend, mentor, and source of inspiration. This book is ultimately a product of my association with the University of Michigan, where I have taught, among other subjects, the history of criminal law in the Law School and History Department. Many Michigan students and colleagues have, over the years, listened patiently and responded thoughtfully to my musings about the English criminal trial jury. To the Michigan Law School community I owe a particular debt of gratitude, both for encouraging me to write the kind of history I have wanted to write and for supporting my work, with unexampled generosity, through the resources of the William W. Cook Endowment Fund.

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My wife, Ruth Brownell Green, has, over the years, read and improved this book; it is she who provided the understanding and encouragement that made its completion possible.

I gratefully acknowledge permission to reprint revised versions of the following: Green, "Societal Concepts of Criminal Liability for Homicide in Mediaeval England," *Speculum*, vol. 47 (October 1972), pp. 669–94 (published by the Medieval Academy of America) (Chapter 2 in this volume); Green, "The Jury and the English Law of Homicide, 1200–1600," *Michigan Law Review*, vol. 74 (January 1976), pp. 413–99 (Chapter 3 in this volume); Green, "Juries, Seditious Libel, and the

Criminal Law," in Green and Richard H. Helmholz, *Juries, Libel, and Justice: The Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander* (Los Angeles: William Andrews Clark Memorial Library, University of California, 1984) (Chapter 8 in this volume).

Introduction

I

This book treats the history of the English criminal trial jury from its origins to the eve of the Victorian reforms in the criminal law. It consists of eight free-standing essays on important aspects of that history and a conclusion. Each chapter addresses the phenomenon that has come to be known as “jury nullification,” the exercise of jury discretion in favor of a defendant whom the jury nonetheless believes to have committed the act with which he is charged. Historically, some instances of nullification reflect the jury’s view that the act in question is not unlawful, while in other cases the jury does not quarrel with the law but believes that the prescribed sanction is too severe. Order is imposed on the book not by time but by a unity of concern. This approach trades the continuity of a comprehensive narrative for a more detailed treatment of issues and events of particular significance.

With one exception, these essays are not concerned with establishing the fact of nullification. No one who has studied the history of criminal law doubts that on occasion this practice occurs. (Indeed, the practice is a central topic in many of the important studies of the social history of crime that have appeared in recent years.) What interests me most is not the persistence of nullification but its impact through time on the substantive law, on the administration of the law, and on the ways in which Englishmen—officials, jurists, and laymen—thought about both the jury and the law. It is on these aspects that I focus, and it is that focus that makes the book (at least in the author’s mind) a general social and intellectual history of an important element of English criminal law.

In writing this book I have been aided by scholarship on the history of criminal law, and at times I draw heavily on such work. Some of my most important intellectual debts are to those with whom I disagree. This will be clear at a number of points where I state how my own view of the criminal law—of its administration and place in English culture—differs from that of those who have gone before. I hope that the reader will be stimulated by these disagreements and will find my citations to the recent scholarship that relates to each chapter useful. More generally, I am aware that the story I am telling cannot be told fully without a great deal

more attention to many matters that, given the particular focus of each chapter, I barely touch. If this book provides a framework within which broader discussion of the subjects I treat can be placed, or if it stimulates scholars interested in those subjects to test the plausibility of the framework I advance, it will have served its purpose.

The separate chapters in this volume represent different styles of historical writing. The problem I examine is best approached through the study of official and lay commentary on the jury specifically, and on the criminal law in general. That literature is, of course, very sparse before the sixteenth century. Thus, early chapters draw upon medieval trial records, in the traditional mode of legal history, whereas the later chapters depend on texts of a kind familiar to readers of political and intellectual history. Moreover, parts of both early and late chapters are best described as historical sociology of the kind that characterizes much recent writing on the history of crime. By and large, I have not sought to minimize these differences in approach and tone.

Some readers may find the transitions both in subject matter and approach more than a little jarring. We are used to such differences between books, not between chapters in one book by a single author. My own view is that the analysis of most historical problems requires a variety of approaches and that historians may fail to exploit their subjects fully if they insist on a single approach or a satisfyingly consistent voice. This is particularly true with regard to legal history; for the development of legal doctrines and institutions is in part a matter of internal logic, in part a matter of the relationship between institutions and society, and in part a matter of pervasive cultural attitudes. But there is, I concede, another, more personal point. Simply put, I enjoy trying my hand at different kinds of historical scholarship. The justification I have given stands, but it is a fair criticism that, where there may be conflict between my readers' sensibilities and my own, I have consistently erred on the side of self-indulgence.

The essentially hybrid nature of this book is revealed in yet another way. I have tried to present a unified (if tentative and partial) account of the history of the criminal trial jury that will profit specialists and lay readers alike. The former will find some of the bridge material unnecessary; the latter will not wish to pursue some specific subjects quite so far as the text and copious footnotes pursue them. It is hoped that readers will make the use of this book that their personal interests dictate without feeling it necessary to focus on material presented for the convenience of other readers.

A final note: The history of the criminal law, long (and I sometimes think, mercifully) neglected, now boasts nearly as many scholars as there ever have been justices of the peace. Even criminals undetected in their

own day, long since dead and resting peacefully, are hunted down, classified, quantified, and correlated—treated less respectfully, all in all, than those caught, convicted, hanged, and dissected. In the next several years, scores of articles and upward of a dozen books will be published dealing with the English criminal law before 1850. The present study makes reference to many recent and forthcoming works, but it attempts no definitive listing of the literature in this rapidly changing field. Instead, I have been guided throughout by an effort to make use of, and to cite, those very recent works that bear most importantly on the episodes in the history of the criminal trial jury that I treat in greatest detail.

II

Most of the chapters in this volume are self-contained and can be read on their own. To aid the reader whose interests are selective I have tried to place each essay within the context of the unfolding story that the book relates. This necessarily entails some repetition for those who read the story straight through.

A brief summary of contents may serve to guide those whose concerns lie in a specific period or aspect of legal history, or whose curiosity about the jury, though more general, falls short of an obsession. Chapter 1 is an introduction to the institutional setting of the medieval criminal trial jury. Resting almost exclusively on secondary writings, it offers an interpretation of how changing institutional arrangements paved the way for the jury to play an active, albeit *de facto*, discretionary role. Jury discretion was most common in cases of sudden, unplanned homicides and in thefts that did not involve physical violence or housebreaking. In these cases, which had been settled by “composition” in pre-Angevin times, juries frequently manipulated the fact-finding process to prevent the imposition of capital punishment. They thus blunted the impact of the Angevin reforms, accommodating those reforms to long-held social concepts of liability and just deserts. Chapter 2 further explores this subject through an extensive empirical analysis of jury behavior in homicide cases. The law of homicide is the focus partly because of the relative richness of the extant evidence and partly because in homicide cases, unlike theft, jury discretion reflected opposition not merely to the level of sanction but also to the rules of the substantive law itself. Although homicides decreased over the centuries covered in this study, in the medieval period they were common and made up a very large percentage of the court agenda. As I shall show, the jury’s role in homicide cases shaped the way people thought about what the jury was supposed to do. The influence of the jury’s role in homicide long outlived the period of frequent homicide prosecutions and was felt in other areas of the law.

The impact of jury behavior on the evolution of the substantive law in the medieval period is the subject of Chapter 3. This important aspect of the relationship between law and society is one to which historians have seldom attended and one which readers not trained in law understandably find very difficult. I have tried to minimize the difficulties while giving the history of homicide doctrine its due. My hypothesis is that the relationship between law and society was one of constant interaction: the evolution of jury discretion reflected the influence of legal institutions and ideas that were themselves at least in part the by-product of jury-based discretion. Moreover, one of the few indices of the societal reaction to jury behavior in the medieval period is the approach that officials who were aware of that behavior took in the elaboration and application of the law. Although the central subject matter of Chapters 2 and 3 is the law of homicide, I have drawn inferences from developments in that sphere to elucidate similar developments in theft, the other common felony where jury discretion was frequent. I also discuss the relationship between the particular kind of jury behavior that I am describing in Part I and the administration of the medieval criminal law generally. Jury nullification of the law of sanctions, I suggest, was accommodated by authorities who did not foresee the long-run implications of their acquiescence in this relatively benign form of jury-based intervention.

Chapter 4 deals with changes both in procedure and in substantive law in the sixteenth and early seventeenth centuries. These changes involved the decline of the self-informing jury, the rise of the prosecution, and the development, for the first time in English history, of effective means for controlling the criminal trial jury. The question I am concerned with is how these developments affected the role and impact of jury-based discretion. The chapter argues that authorities used their new powers selectively and, having to some extent tamed the jury, continued to acquiesce in a substantial amount of jury discretion which the bench saw as harmless. The result was that while authorities provoked a reaction to their attempts at jury control in some kinds of cases, for the most part they further sanctified the ancient tradition of jury "law-finding." This argument requires me to establish the relationships among many early modern developments in the administration of the criminal law. Thus, Chapter 4, like Chapter 1, may be read as an interpretive overview and introduction to the two chapters that follow it.

Those chapters (5 and 6) deal with the emergence and maturation of the claim that the jury has the right to "find law." These matters require an understanding of how seventeenth-century writers viewed both the history of the jury and the place of the criminal trial jury in the English constitution. Chapter 5 focuses on Interregnum (mainly Leveller) ideas concerning law-finding. I discuss those ideas against the background of

the 1649 and 1653 trials of John Lilburne, and in the light of the tracts that those trials provoked. Although some pamphleteers argued against the legitimacy of the judiciary and for comprehensive jury law-finding, by the mid-1650s the dominant pro-jury position accepted the judiciary as the ordinary interpreters of the law. The jury's law-finding role was to nullify judicial instructions in those (presumably rare) cases where the instructions, in the eyes of the jury, clashed with the "true" English common law. Chapter 6 deals with Restoration thought regarding the right of the jury to be free from judicial coercion. The centerpiece of the chapter's lengthy narrative is Chief Justice Vaughan's famous opinion in *Bushel's Case* (1670–71), in which Vaughan held such coercion to be unlawful. I attempt to establish the relationship between the law-finding tradition and Vaughan's opinion. To put it simply, Vaughan steered clear of that tradition, but his opinion was subsequently glossed and appropriated by late-Restoration proponents of the law-finding jury. These two chapters introduce a major focus of the second half of the book, the ideological relationship between the jury's "merciful" role in routine felonies, where the community's quarrel was rather more with the capital sanction than with the definition of crimes, and the jury's more dramatic nullifying role in some political cases, where elements in the community viewed the law itself as an aspect of governmental tyranny.

The last part of this book carries the story down to the early nineteenth century. Chapter 7 begins with another overview, a brief discussion of changes in the administration of the criminal law in the century following the Glorious Revolution. There is now a substantial literature dealing with the criminal trial and the administration of the criminal law in the eighteenth century, and my own work ought to be read in conjunction with that literature. The emphasis in Chapter 7 is on the way in which some contemporaries viewed the role of the jury in routine felonies. As is well known, many English jurists and lay writers who were influenced by the Continental movement for law reform became critics of jury-based mitigation. Yet, if I am correct, these critics, reflecting certain distinctively English ideas about the criminal law, lent some support to jury-based mitigation even as they argued for a criminal justice system in which such jury behavior would be unnecessary.

In Chapter 8, the last of the essay chapters, I address the political and legal struggle in the eighteenth century surrounding the law of seditious libel. The celebrated criminal libel trials of this period became the occasion for a wide-ranging debate over the jury's right to find law as well as fact. Passions ran high, and both official and lay commentators were involved. I pay particular attention to the impact on this debate of the jury nullification in more routine cases that authorities countenanced with relative equanimity. The chapter concludes with an assessment of the

manner in which the centuries-long tradition of jury nullification influenced the development of what might be called the constitutional role of the criminal trial jury. I attempt to bring together two problems that are too often kept separate in historical scholarship: the daily administration of the law in routine cases, and the more episodic, and epiphenomenal, “political” trials that generated far-reaching claims about the rights of Englishmen.

Chapter 9 concludes this history with a brief commentary on the relationship between the role of the jury and the partial reform of the law of sanctions in mid-nineteenth-century England. I link this commentary to my concluding discussion and summary of the main themes of this book on the relationship between social attitudes, legal institutions, and legal doctrine. Here, as at earlier points, I assess the influence of the history of the jury on contemporary views regarding criminal justice and discuss the unity implicit in the centuries-long dialectic that I have traced.

III

Jury nullification, the concept that lies at the heart of the various essays in this book, may take on a variety of meanings or shades of meaning. In some of its senses, the jury’s war with the law and the judges who represent the law is a strong conflict, and in other senses it is much less so. Although I try to keep the different meanings clear as I write, I believe the reader will find that a general discussion of the term is a helpful prelude to the substantive chapters.

Jury nullification in its strongest sense occurs when the jury recognizes that a defendant’s act is proscribed by the law but acquits because it does not believe the act should be proscribed. The behavior, in other words, is not criminal in the eyes of the jury, and the jury is willing to assert its view in the face of what it is told by the judge. An intermediate form of nullification reflects the jury’s view that although the act proved is properly classified as criminal, it is within a class of acts that do not deserve the punishment prescribed for them. Such nullification serves to protect defendants from punishments that are regarded as excessive. A relatively weak form of nullification reflects the jury’s view that although the act proved is criminal and falls in a class of acts that may well deserve the prescribed punishment, such punishment is inappropriate in the case at hand. When nullification is in this way *ad hoc*, a defendant, because of personal characteristics or the particular features of the case at hand, will escape the generally fair sanctions that a concededly just law prescribes.

Nullification begins in the medieval period with jury mitigation in routine felonies. It appears that the jury was in part disagreeing with substantive legal rules and in part merely mitigating the sanction provided

by law. Because of the available data, I pay most attention to the subset of legally nonpardonable homicides that juries characterized as pardonable self defense. The cases in which jurors so characterized killings, and thereby preserved defendants from death, fall primarily into the intermediate category of systemic nullification of the law of sanctions but also, no doubt, contain instances of the other two types. It appears that the typical situation was one in which death was thought too severe a penalty for a wrongful, but victim-provoked, killing. In other cases of victim provocation the act was probably viewed as blameless in the first instance, and in still other cases there was an ad hoc quality since the defendant apparently benefited from his good reputation. Nullification in the case of theft, the other common capital felony, appears almost always to be systemic rejection of the capital sanction or an ad hoc merciful acquittal. The jurors had no quarrel with the laws protecting property, but they apparently believed that some kinds of theft should not be punished capitally and that specific defendants or those thieving in certain, special circumstances did not deserve to die. While the data permit us to identify such law-evading leniency, they do not always allow us to be certain of the jurors' motives. It is also probably the case that in some instances in which the jury appears to have been conforming, despite their sentiments, to the law, they were in fact engaging in ad hoc harshness. Thus, the refusal to return a life-sparing verdict for the kind of crime that usually elicited one may reflect disapproval of the defendant rather than the fortuitous assembly of twelve men who approved of the law or who, while disapproving, believed they should defer to it.

Later chapters of the book analyze jury nullification in political cases, and so engage true, or "strong" nullification. The state's problem is not that the jury disbelieves the proof offered in support of an indictment; rather, it is that the jury does not believe that the behavior the indictment alleges should be a crime. One major theme of these later chapters is the interrelationship between, on the one hand, systemic and ad hoc nullification of capital sanctions (merciful acquittals) in common-run felonies and, on the other, strong nullification (repudiation of the law) in political offenses.

The judicial perspective on the jury's behavior is significant, because our characterization of the jury's behavior must be made in the light of the bench's stance toward the law. Strong nullification, as I am using the term, assumes that the judge adheres to the legal rule and believes the jury ought to adhere to it. Thus the strongest form of jury nullification represents a repudiation of the rules set forth by the bench, and it is not surprising that it led to official attempts to restrain or redefine the role of the jury. This contrasts with the systemic or ad hoc nullification in common felonies, which frequently met with the acquiescence or en-

couragement of the bench. Indeed, where judges encouraged or acquiesced in merciful verdicts, we might wonder whether there was nullification at all. From one perspective, we might say that the bench was, in effect, suspending the law, or interpreting the law in such a way that the jury's action was consistent with it. Where the bench disagreed with the jury, it might have viewed what was for the jury an ad hoc nullification as an instance of systemic nullification, or it might have appreciated the ad hoc nature of the verdict but believed it inappropriate in the given case. In either instance, the jury's leniency might be regarded as a serious abuse of the jury's de facto power. Political conflict has never been essential to judicial criticism of what juries do.

It must also be noted that juries nullified the law in many instances not out of mercy but out of fear of the defendant's friends or relatives, or for political favor, or even, perhaps, for monetary gain. The bench could not always be certain whether the jury's motives were mercenary or merciful, and such doubts must have influenced their response to life-sparing verdicts. Although this book concerns the phenomenon of "conscientious" verdicts, it will be necessary to keep in mind that some verdicts were corrupt and that the bench had to guard against them.

Verdicts that reflect systemic and ad hoc mercy have, once we take account of the bench's perspective, two histories: as quasi-legitimate responses permitted by the bench and as illegitimate, law-flouting responses. As we shall see, some lay writers extrapolated from judicial acquiescence in cases involving quasi-legitimate "nullification" to a right of juries to nullify even when the bench objected. The bench, on the other hand, sometimes viewed what were in fact ad hoc nullifications of the weakest form as true repudiations of substantive legal standards. The several strands of nullificatory behavior that I have tried to separate in theory were in practice intimately intertwined, and, as we shall see, were often confounded by those in the thick of the debates concerning the jury's role.

Note.—Unless otherwise indicated, quotations from antiquarian English sources have been modernized throughout this volume. Titles of antiquarian English sources have been left in their original form. Original foreign language quotations have been extended; punctuation and capitalization remain as in the original. All unpublished archival material not otherwise identified in the footnotes is from the Public Record Office, London, England.