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Preface and Acknowledgments

This is a book about the American jury system, both its criminal and its civil forms, and how that system has changed over time, especially during the past half century. I am a political scientist, not a lawyer, and my aim is to examine the jury as Tocqueville saw it: as a political institution, one of several components of a republican regime based on public participation in enforcing as well as making the laws.  

When I first began to think about writing a book on the jury system, it was in the context of a broader interest in the nature of American citizenship. As a political institution, the jury is an expression of the idea of direct participation in government—as contrasted with the more passive experience of voting—and it was this active dimension of jury service that first caught my interest. Jury service seemed different enough from the other political experiences of American citizens to warrant special investigation. My interest was piqued as well by a personal experience with jury duty: being called to the old Middlesex County Courthouse in Cambridge, Massachusetts, to await my turn for voir dire, only to be sent home without being called.

But no sooner had I begun my research than the jury system entered a period characterized by many observers as a crisis. One trial after another contributed to

increasing doubts, among laypeople and professionals alike, about whether juries were working the way they were meant to work. The examples are well known: the acquittal of O. J. Simpson for the murder of Nicole Brown Simpson and Ronald Goldman and his subsequent conviction for civil liability by a second and very different jury; the initial acquittal of Los Angeles police officers in the Rodney King brutality case; the hung jury in the trial of the Menendez brothers for the murder of their parents; the 1992 acquittal of Lemrick Nelson for the murder of Yankel Rosenbaum, a crime to which Nelson later confessed; enormous and allegedly unjustified damage awards in civil trials against “deep pocket” corporations. Reflecting on the lessons of the Simpson trial, legal scholar Albert W. Alschuler came to a grim conclusion: “Our jury system often appears to have grown preposterous.” These cases and others like them have revived a debate about whether juries are the best way to resolve civil and criminal cases—a debate that has been going on, as we will see, for a very long time.

Recent concerns about what the jury system has become only added to my curiosity about what the jury used to be. Where did juries come from? What were they meant to be? What were they supposed to accomplish? These questions led me back to the beginning of our country’s history and beyond, into the ancient thickets of the common law. Trial by jury is an institution so old that no one is quite sure where it came from, and a rich mythology about jury trials has developed over the generations. But the historical record is clear enough to suggest that the jury has been controversial more than once during this time, and the first part of this book covers some of this history to lay the groundwork for an understanding of the emergence of the modern American jury system in the late nineteenth century.

But we cannot understand the jury without also going outside the legal system, to the larger political order of which the jury is a part. If the jury is a political institution, then its functioning cannot fail to shape and be shaped by changes in the regime: changes in prevailing ideas about justice, fairness, and equality; in the popular understanding of common words such as reasonable or biased; and in the definition of who is capable of exercising the most difficult duties of citizenship and what those duties are. Taking this broader view has two immediate advantages: first, it helps us understand more clearly the real significance of the jury system, and second, it helps us see that some of the apparent failures of the jury system are merely symptoms of failure in the polity. The tensions and contradictions of the modern jury are shared by, even produced by, modern democracy itself. In fact, because the jury is so old, so continuously present in the life of the American republic, it can act as a mirror, reflecting the changes taking place around it.

In that miniature version of the nation assembled to deliberate the fate of particular defendants and to judge particular facts, we might witness much larger things: an end to prosecution for seditious libel, new ideas about race relations, a new understanding of what it means to be negligent, new views about the importance of expertise, a new understanding of judgment. We might also witness the failure of citizenship: citizens’ refusal to take their responsibilities seriously, their hostility toward disfavored groups, their fear of judgment itself. Criminal and civil trials and the jury decisions that result from them involve debates about the most fundamental questions of right; therefore, they go to the heart of what makes the nation what it is.

This study is composed, in more or less equal parts, of intellectual and political history, on the one hand, and institutional and policy analysis on the other. Chapter 1 focuses on juries in England and the colonies during the great constitutional struggles to limit the authority of the Crown and to protect the liberty of the citizen—a struggle in which changing ideas about jury trials played an important role. This discussion also introduces an element of colonial juries that received little attention from contemporaries but seems, in retrospect, to have been highly significant: the power of the jury to enforce the community’s understanding of social order on its most recalcitrant members. Chapter 2 considers the jury system during the early decades of the republic, the American jury’s most storied era. This chapter includes a discussion of Tocqueville’s account of the jury system and its significance for American democracy. Chapter 3 looks at the jury during the critical but somewhat indefinite period in which the modern American legal system was being shaped—roughly the 1890s through the 1940s. During this half century American legal ideas and practices underwent significant changes, and these had a major impact on jury trials: the bar was professionalized and subjected to formal, bureaucratic supervision for the first time; judges struggled, with some success, to assert their authority over the plebeian juries created by the extension of the franchise in the previous generation; and the legal system was forced to confront the full complexity of an industrial civilization.

Chapter 4 covers the major changes influencing the postmodern jury, as jury laws were rewritten in response to the civil rights movement and to broad but subtle changes in how the jury’s responsibilities were conceived. This chapter raises questions with direct relevance for contemporary controversies: What constitutes a constitutional jury? Under what conditions can citizens be excluded from a jury or from a jury pool? What does the law require of a juror? What is “bias” in the context of a jury deliberation? Is it ever appropriate to rank otherwise equal citizens with respect to their ability to deliberate and to judge?

Chapter 5 propels the story forward to more recent times and examines why the jury is said to be “vanishing.” In part, this perception has been created by changes in criminal and civil procedure made in earlier decades. There are some in the scholarly, legal, and political communities who look with indifference on the prospect of a vanishing jury, and others who come to the jury’s defense.
Chapter 5 ends with a consideration of four controversial modern trials to see how the previous pages might shed some light on the difficult decisions made by modern jurors.

In conducting the research for this book, I was ably assisted by several generations of students in the Political Science Graduate Program at Boston College, among them Kyle Dell, Kim Kosman, Devin Stauffer, David Trimmer, Charles Robinson, Maggie Lutz, Thomas Schneider, Robert Dealy, Tim Lehmann, and Jessica Goley. I am grateful to all of them for their diligent and skillful assistance. I would also like to thank Jerome Maryon, Esq.—a title to which he is entitled in the fullest sense—for helping me navigate the innards of the (late and unlamented) Middlesex County Courthouse to watch jury selection for a civil trial. What I learned there was invaluable.

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Finally, no acknowledgment would be complete without a special mention of Wilson Carey McWilliams, to whose memory this book is dedicated. As a teacher at Oberlin College, Brooklyn College, and Rutgers University, Carey taught and inspired more students than perhaps even he could have remembered. One of the first lessons I learned from him, way back when, was to pay attention to the things that are most likely to be overlooked, which are often right in front of our noses. All of Carey’s students sought to emulate his methods: look carefully, cherish the odd fact, dig deeper, find the universe in a grain of sand. He was a Democrat, but also a democrat, which means he was also a republican (although never a Republican) and had a great affection for the essential institutions of the American regime: the franchise, elections, political parties, the lively and eccentric politics of local places, the grand spectacle of citizens governing themselves. No one who studied with him ever saw the world the same way again, and without taking a survey, I can guarantee that none of us has ever regretted it. RIP.
Introduction

The Paradoxical Jury

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men.

—G. K. Chesterton

The fundamental democratic paradox is well known and easily stated. In a democracy, governing—a task requiring wisdom, the rarest of human gifts—is open, in principle, to all applicants and, in practice, to many who are not the least bit wise. The resolution of this paradox is written in the ongoing history of democratic governments and, in its broadest sense, is beyond the scope of this book.

This book focuses instead on one especially interesting and important example of the democratic paradox at work: the jury system, that peculiar Anglo-American legal institution in which some of the weightiest questions facing society are decided by (usually) twelve people plucked from the civic mass. The jury’s verdict may send a defendant home, to prison, or to death row, or the jury may transfer money—sometimes lots of it—from one litigant to another. Jurors may do these things well or badly, but their decisions are usually final, and in criminal cases a jury’s acquittal is always final. That such a system has lasted so long is often the subject of wonder (and sometimes scorn) among foreign observers of American law, but sometimes (and not only recently) among natives as well.¹

As this quick summary suggests, understanding the jury is a way to understand democracy itself, with all its triumphs and failures. And yet, at its inception, the jury was not a democratic institution at all; it was simply a way for the English

¹. Although Anglo-American might be a better term to use in the context of a historical discussion of juries, the jury is used much less often in Great Britain than it once was. The Canadian, Australian, and New Zealand experiences parallel the British, which leaves the United States as the last country where the jury trial is routinely available in both civil and criminal cases, both the serious and the trivial. The vast majority of jury trials worldwide, therefore, take place in the United States.
monarch to acquire vital information that only local subjects possessed. Its gradual evolution from a "tool of kings" to a "champion of the people’s rights" is part of the long and tangled story of how republican ideas and institutions emerged in Great Britain and its colonies. In Britain’s North American colonies, the jury was, in the beginning, a highly serviceable instrument of self-government, with many more functions than simply rendering verdicts. As colonial and then state governments became more differentiated, the jury’s duties retreated steadily and became mostly judicial, and as state governments became more democratic, with easier suffrage and citizenship requirements, the American jury became what it was when Tocqueville saw it: “the majority vested with the right to pronounce decrees.”

It had also acquired by Tocqueville’s time an additional purpose: educator of democratic citizens. Tocqueville’s is the most famous argument along these lines, but, as demonstrated below, he was not alone in seeing both the need for such education and the possibility that jury service might be an important way to provide it. And here the jury comes very close to revealing the democratic paradox in crystalline form: only the wise are capable of judging rightly, but only those who have experience at judging can learn the wisdom that judging requires. Tocqueville was prepared to accept one of the logical conclusions of this paradox, at least in the case of civil trials: that although the jury system might not be good for litigants, it is very good for jurors, and therefore for society at large.

The jury that Tocqueville envisioned was far more democratic in its composition than the juries of colonial or revolutionary America and, of course, far more democratic than the panels that struggled against the Stuart monarchy or served the Angevin kings. The jury would become even more democratic as the barriers to jury service set by property qualifications, gender, and (illegally after emancipation) race were reduced and then eliminated. In the aftermath of the Jacksonian era, the belief that jury service might educate citizens retreated before questions about the competence of democratic juries chosen from jury pools much less “gentrified” than those in England and the colonies. These questions were followed by even greater doubts about the competence of most Americans to perform the difficult duties imposed by modern citizenship. Lawyers and judges, once universally understood to be the teachers and senior partners of jurors, often came to be seen, and to see themselves, as the jury’s adversaries. Bench, bar, and jury engaged in a three-cornered struggle for control of the courtroom and, increasingly, over the question of who could make decisions about the meaning and requirements of the law, an old problem dating back to the battle over seditious libel verdicts in England.

3. Ibid., 285.
But the debate over whether juries could “find” or “determine” the law was gradually overtaken by one about whether juries could even understand the law, especially as the civil law became more complicated with the dawn of modern business. During the two generations between the Civil War and the Great Depression, doubts about the wisdom of jury trials in civil cases and in difficult or emotionally charged criminal trials grew apace. These doubts paralleled the broad Progressive enthusiasm for public administration, administrative centralization, and the power of professional expertise to resolve disputes “scientifically”—part of a larger movement to increase the weight of expertise in public decision making and to reduce the importance of popular participation. The result was a revolution in the federal courts, and especially in civil jurisprudence, that was accompanied by a gradual diminution in the importance of the jury system in both civil and criminal trials.

By the middle of the twentieth century, juries were still very much with us (thanks to their protected constitutional status), but they were far less important to the system of criminal and civil justice than in the previous century, and support for the jury was softer than ever before. To reformers of the post–World War II era, juries seemed hopelessly amateurish at best, and narrow-minded, bigoted, and ignorant at worst. The jury represented tyranny of the majority in its most virulent form, a view often echoed in popular fiction and in reports of sensational trials gone bad. In the popular stage play and film *Twelve Angry Men*, jurors are eager to vote for a conviction and get on with their lives, and they are stopped only by the heroic intervention of one brave man, “Juror No. 8.” The most visible and grotesque miscarriages of justice took place in those southern courtrooms where justice was so often subordinated to the needs of white supremacy. This phenomenon too made its way into the popular culture—although in *To Kill a Mockingbird*, the heroic Atticus Finch fails in his bid to extract a just verdict from a jury of small-town southern bigots. The contemporary jury has had to bear the weight of these historic and popular suspicions, along with a variety of “postmodern” doubts about the possibility of “objective” deliberation or of a “truth” accessible to human judgment. Perhaps not coincidentally, the latest phase of the jury’s long history evokes fear that the jury is “vanishing,” especially in federal courts, as the number of both civil and criminal jury trials has dropped to levels below those of the 1960s. Jury trials are now a smaller percentage of case dispositions than at any time in our history.

Many fear for the jury, yet many others seek to extend and deepen the experience of citizenship in modern states. The paradoxical meeting of these two separate concerns brings us closer to the problem Tocqueville sought to understand: How can the amateurish and destructive instincts of a democratic regime be educated to a higher sense of responsibility? Is it really possible for ordinary citizens, untrained in the law and picked at random from the crowd, to exercise the wisdom required of rulers? If so, how? Under what conditions and circumstances
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does the jury system best serve the noblest ends of a republican regime? What are the obstacles to its proper functioning, and how can these obstacles be overcome?

These are some of the questions explored in the long discussion that follows. But first it is necessary to examine some of the earlier transformations of the jury system, to learn what it was at the beginning, what it became, and why. Following Aristotle’s useful advice, let us begin at the beginning.
The Common-Law Jury in England and the Colonies

Our ancestors were careful, that all men of the like condition and quality, presumed to be sensible of each other’s infirmity, should mutually be judges of each other’s lives, and alternately taste of subjection and rule, every man being equally liable to be accused or indicted, and perhaps to be suddenly judged by the party, of whom he is at present judge, if he be found innocent.


And hence it is that when a malefactor is asked at his arraignment, How will you be tried? He answers always according to law and custom, By God and my country; not by God and the King, or the King’s deputy.

—John Milton, *Works*

THE PREMODERN JURY

The origin of the medieval English jury is the source of many disputes and not a few legends. Was the jury brought to England by the Frankish kings, or did the

conquerors find it present already? If it was operating in 1066, was the jury an Anglo-Saxon invention, or was it imported by the Danes? Can we trace the jury’s beginnings to those same German forests where historians once believed all free institutions were born? And how important were the thegns of the wapentake, or the Wapentake Code of Ethelred? What did the barons mean when they demanded of King John that no freeman be imprisoned “except by the lawful judgment of his peers or by the law of the land”? 2 Were early juries mostly “self-informing” witnesses who testified to what they knew or had heard around the village? Who were these early jurors, and how far down into the social pile did authorities reach when choosing them?

For a long time, research on early English legal institutions was guided as much by contemporary political preoccupations as by a genuine curiosity about the past. The contest between the proponents of the Anglo-Saxon and the Norman origins of the jury is an obvious example, as is most eighteenth- and nineteenth-century commentary on the jury, which tended to see its history almost exclusively through the lens of the long struggle against the “wretched Stuarts.” Blackstone’s Commentaries falls into this category.

Contemporary historians are not without their own political obsessions, of course, especially concerning the “social” and “class” context of medieval legal institutions, which undoubtedly showed a more kindly face to the sober and industrious than to the rough and rowdy. But twentieth-century historiography has profited from the careful study of a surprisingly large collection of legal records stretching back to the twelfth century and earlier. A good example is the collection known as the Pipe Rolls, which recorded financial matters for the Exchequer. Since the administration of the courts involved the collection of fines for the Crown, the Pipe Rolls contain a wealth of information about trials and prosecutions. As English legal historian Naomi Hurnard put it, “there was money to be made by the Crown out of the punishment of crime,” and royal revenues required good record keeping. 3 In addition, the various assizes (royal courts convened in the counties at more or less regular intervals) left their own records of cases and dispositions. From these records it is possible to learn much about the way legal institutions operated at the local level, generating accounts of the jury’s origins that are in agreement on a number of elements. What emerges from these accounts is a picture of the jury that, like the portrait of an ancient ancestor, bears an uncanny resemblance to its contemporary descendant. Several features of this portrait stand out.

The sworn inquest, which used local witnesses to present information about local crimes, can be found as early as the late-tenth-century reign of Ethelred II.

These were the so-called presentment juries utilized in criminal cases, along with similar institutions summoned to give evidence about such matters as boundaries, feudal obligations, and debts. Such panels were used, for example, to construct the Domesday Book under William I—which recorded for each shire in the kingdom both physical and legal details about the possession of land—and to settle disputes about the control of particular properties (the so-called possessory assizes, the medieval ancestor of the civil jury). The underlying principle of these jury inquests was the same: local subjects had knowledge that, whatever its limitations, was treated as probative with respect to the matters under review, enabling the settlement of questions that might otherwise lead to festering conflicts and family feuds. It is not insignificant that such assizes also provided useful information to the Crown about who owned what, and under what terms. In criminal matters, however, the presentment juries were more like grand juries than petit juries, since their function was simply to bring cases to the attention of local justices. Guilt or innocence was determined either by compurgation (bringing witnesses to attest to the character of the accused) or by ordeal (the judicium Dei), which required the defendant to undergo a particularly nasty physical test, the passing of which indicated God’s favor and, thus, acquittal.

The Normans gradually introduced changes to the practices they encountered in England, but without altering the most important aspects of English legal traditions. The role of compurgators, for example, was eliminated from the trial phase, which was conducted entirely through ordeal or through the common Norman practice of wager of battle. But defendants, provided they were not “notorious,” could still call on compurgators in the indictment phase, avoiding presentment altogether if “twelve good men and true” testified to the soundness of their character. This was the beginning of the separation of indictment from trial and, ultimately, of the grand jury from the petit jury, but it was not entirely intentional. To address local matters effectively, the king had no alternative but to deal with local people, and presentment juries were an efficient way to bring to the court’s attention local crimes about which neither the king nor his agents could have independent information. In fact, local subjects were obligated, under penalty of fines, to report all crimes to the justices in a timely fashion. That they did not always do so is suggested by the need to fine them.

Although gentlemen and knights played an important role in these early presentment juries, subjects of the “middling sort”—yeoman farmers, tradesmen, and artisans—also served as jurors, often making up the majority of the panels. Based on their varied stations in life, jurors were expected to know something about the circumstances of the cases they were presenting, and this required sub-

jects who were close to the common folk, or even of them, provided they were “good men and true.”

The monarchy sought to centralize this system, especially after the Conquest, but the Crown could not (or at any rate did not) dispense entirely with the decentralized nature of English public life, law enforcement included. As Hurnard put it, “The Angevins found the system of communal presentment in existence” in England and “appear also to have found in it an effective barrier” against the full centralization of the legal system in the hands of the Crown. “To this practice was opposed, not an institution which Henry himself had introduced, but the custom of the land.” 7 That is, the institutions and practices that would eventually become the petit jury began in the counties, hundreds, and vills that had been part of the English government for centuries. It was partly this decentralization that guaranteed the participation of subjects of the middling sort on presentment juries. Decentralization also fixed the jury in the public’s imagination as the “popular” element of the judiciary, enforcing the local understanding of such matters as criminal liability, even in the face of competing conceptions held by the royal justices, the Crown, and, in later generations, the Parliament. Locals had so much control over criminal prosecutions, in fact, that leniency toward criminals became something of a scandal at times, denounced from the pulpit, court, and throne alike. Especially with respect to homicide cases, trial jurors were often reluctant to convict defendants they believed “did not deserve to be hanged, even though they may actually have committed the crime for which they were being tried.” 8

All accounts recognize the importance of the events of the late twelfth and early thirteenth centuries to the subsequent development of the jury system. Three events were of special significance. In 1166 Henry II promulgated the Assize of Clarendon, which codified the traditional role of the presentment jury, even augmenting it in some respects. The assize also stipulated that all those accused of crimes would have to “seek their proof” through the “ordeal of water,” unless the jury chose to offer the accused compurgation—apparently under the assumption that this would not be a common choice. From the perspective of the presented defendant, a successful compurgation would be tantamount to a not-guilty verdict, although it was much closer to what a modern grand jury does when it refuses to return an indictment.

The year 1215 saw two events of importance to the jury: the signing of the Magna Carta, in which the barons exacted a promise from King John to respect

8. The Statute of Westminster (1275) complains that “the peace is less kept, and the laws less used, and offenders less punished than they ought to be.” Bernard William McLane, “Juror Attitudes toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings,” in Cockburn and Green, Twelve Good Men, 58.
“judgment by peers” (among many other demands, including the forgiveness of certain debts owed to Jews), and the decision by the Fourth Lateran Council, at the urging of Pope Innocent II, to ban clerical participation in the ordeals, which effectively meant their abolition. The Magna Carta established that “the lawful judgment of his peers” would be, in effect, a constitutional privilege of English subjects—initially, of course, the “peers of the realm.” But over time, the idea of judgment by one’s peers came to represent a much broader claim that criminal defendants should be judged by their fellow subjects and not by magistrates acting alone in the name of the king. The effective abolition of trials by ordeal, meanwhile, created a hole that needed filling—a new way to reach credible judgments about criminal cases that would satisfy both the king and the local community. The presentment jury, already a customary institution of long standing, was ready to acquire a slightly different purpose.

With due allowance for local variations, then, the English legal system codified by the Assize of Clarendon, and subsequent decisions by Henry II and his successors, operated approximately as follows, until the abolition of the ordeal: A presenting jury—twelve subjects chosen from the vills, along with four knights chosen from the hundreds (subdivisions of the counties)—would bring to the attention of the justices accusations against members of the local community thought to have committed some offense. These accusations were often based on rumor, in which case the accused, if a person of good repute, would be offered compurgation. If successful, the defendant would be “quit” of the charges against him, amounting to acquittal via character reference. If, however, the accused were a “notorious” fellow known to be a habitual troublemaker, or if the presentment jury could produce facts in evidence against him (for example, that he had been captured in flight, that he had in his possession property belonging to the victim, or that there were witnesses to the crime), then the judge would either convict on the spot, if the evidence was conclusive, or require the accused to “seek his proof” through the ordeal.

The Assize of Clarendon formalized these arrangements, requiring that “anyone, who shall be found, on the oath of the aforesaid [the presentment jury], to be accused or notoriously suspect of having been a robber or murderer or thief, or a receiver of them be taken and put to the ordeal of water.” The assize thus confirmed the legitimacy of one particular form of the ordeal and clarified when it would be used; it also stipulated that the decision to put the accused to the risk of ordeal or conviction would be, in the first instance, the jury’s to make, as a matter of fact if not of law. As a result, by the end of the twelfth century, ordeal

9. See Magna Carta, clauses 10 and 11.
by water had become “the normal method of trial in crown pleas”—but only for those defendants to whom the presenting jury had failed to offer compurgation.11

Thus, although the Assize of Clarendon initiated the process of bringing law enforcement more effectively under royal control, it also codified what had long been local practice. Presenting juries were necessarily the first step in the process, for only local subjects had knowledge of what crimes had been committed in the county and who might be responsible for those crimes. Juries used this power to decide, in effect, which subjects would be “indicted” and which would be absolved: only those whom the jury would not absolve could be required, in the words of Glanvill’s Treatise on the Laws and Customs of the Realm of England (1188), to “purge himself by the ordeal.”12

Trusting jurors to distinguish between those defendants who should be allowed compurgation and those who would have to “prove” themselves followed logically, according to one historian, from their responsibility to report accusations in the first place.13 That is, the presenting jury was not necessarily making an accusation on its own; it was merely reporting to the king’s justices that certain accusations were circulating in the county. Jurors could be expected to know something about the relative credibility of these accusations. A certain man might be said, for example, to have committed a rape. Another might be said to have cows in his possession that he could not account for. A spouse might have died under mysterious circumstances, suggesting poisoning. The jury would record its response to such rumors, and one of the frequent responses was that although the defendant had been accused, the jury itself did not suspect him. The records are filled with the formulaic court Latin used to render such “verdicts”: rettati/non malecreduntur (accused/not suspected), dicitur/non malecreditur (it is said/not suspected), and capti/non malecreduntur (captured/not suspected). Or, if the jury recorded that the accusations were believed (rettatus/malecredunt), the accused would face the full harshness of the ordeal, unless he were too notorious to “purge himself.” In such cases, the jury’s decision would amount to a conviction, and the court would immediately impose a sentence.14

The Assize of Clarendon thus strengthened the jury—unintentionally, in Hurnard’s view—by giving more weight to the jury’s verdict, even if it were based only on circumstantial evidence. As compensation, perhaps, for this additional authority, the assize required verdicts from two sets of jurors, including one taken from the neighborhood of the crime. This second jury can be considered the an-

12. Ibid., 576.
cient origin of the petit jury, as distinguished from the presentment jury, which we now call the grand jury.15

As evidence of its authority, a jury could, even at this early date, make judgments about intent. In a case from Stafford in 1199, a man was accused of killing a child with an arrow; his plea was that it had been an accident, and the jurors attested that this was a true account. In a similar case from Yorkshire in 1212, a defendant who killed a man with a stone claimed that the death was accidental. The jurors agreed, and as in the first case, the accused did not have to seek proof through the ordeal. In cases of this sort, the usual next step would be to seek a pardon from the king.16

The juries of the vills and hundreds were operating in effect as gatekeepers, sorting the accused (not defendants, as it was not yet the jury’s function to judge them) into two paths—one leading to compurgation and acquittal, and the other leading to the ordeal and possibly execution. What separated the paths was not what the judge believed, and even less what the king desired, but what the jurors were prepared to attest to—namely, that the accused was or was not credible. Only in the latter case would the ordeal be prepared.17

Medieval ordeals varied by time and place. Some were harder to survive than others and left festering wounds, forcing priests to declare God’s disfavor. Such a verdict normally led to execution by hanging if the crime were a homicide, or branding, mutilation, and banishment in the case of thievery. Surviving the ordeal was a sign of God’s favor, resulting in a verdict of not guilty pronounced by a priest—a practice that the clergy increasingly regarded as “an impious absurdity,” although it may have satisfied the local community that God’s judgment had been clarified, despite some members’ dislike of the result.18

The ordeal stipulated by the Assize of Clarendon, the “ordeal of water,” was one method of revealing God’s will. It involved lowering the defendant, suspended by a rope and clothed only in a loincloth, into a pond at least twelve feet deep, with his hands tied behind his knees. If, in this helpless position, the defendant sank, he was judged to be innocent and pulled from the water—hopefully before drowning. Sometimes the survivor was required to “abjure [leave] the kingdom” or forfeit property to the king but was otherwise un molested. If, however, the defendant floated, he would be judged guilty, taken from the water, and punished appropriately, usually within hours. In homicide cases the

17. Ibid., 5.
defendant would be executed by hanging; otherwise, he would be punished by mutilation, usually branding, but sometimes by more drastic measures such as the loss of a hand or a foot.19

Aside from its brutality, the obvious flaw in this procedure was its arbitrary quality. This became a source of concern to, among others, the clergy (although apparently not to the king). This may be one reason why the records indicate that the vast majority of those sent to the ordeal “passed.” According to the study by Margaret Kerr and her colleagues, in one list of 275 presentments “between 1194 and 1208, an accused was put to death or maimed in only eight recorded cases.”20 Another flaw in the ordeal of water was that it discriminated against women. Even at that time, it was apparently understood that women, having a larger percentage of body fat than men, would almost never sink and would therefore almost never be acquitted. As a result, women were rarely put to the ordeal of water; they were “awarded” the ordeal of hot iron instead.21 For the same reason, rotund, middle-aged men fared worse than fit young men fresh from working the fields (precisely the type who might get into drunken scrapes and accidentally kill someone). This difficulty suggests an important early advantage of the jury: its judgment, its “gatekeeping,” was a comparatively rational method of getting as close to the truth as the community was likely to get. An additional advantage was that the judgment of the jury was seen as the judgment of the community, and for that reason it carried greater weight in practice, however small it might appear in contrast to the judgment of God.

Judgment by a jury chosen from among the familiar faces in a village would have satisfied the locals without inconveniencing the king. The king’s interest was in suppressing violent crime and collecting fines and confiscated property from malefactors. After the Conquest, the most common violent crime in need of suppressing was that committed by Saxons against Normans. But as memories of the Conquest faded, the problem of violence per se would have troubled the king’s subjects as much as it troubled the king himself. In fact, the king’s most important service to his people was often keeping the “king’s peace” on the highways and in the forests. Historian Thomas A. Green reports that “homicide was a daily fact of life in medieval England,” and many other historians report levels of criminality

20. Ibid.
21. Ibid. Looking at the “eyre rolls” (court records) from 1194 to 1208, Kerr et al. found that eighty-four men were ordered to the ordeal, and seventy-nine were sent to the ordeal of cold water. During the same period, only seven women were sent to trial on presentment, and they were all ordered to the ordeal of hot iron; none were sent to the ordeal of water (578–582). The ordeal of hot iron required the defendant to hold a red-hot poker for a stated length of time; the wounds were then bound in cloth, and the defendant was locked up. A priest checked to see if the wounds had been healed by God’s favor. Healing meant acquittal; festering meant conviction.
that contemporaries judged to be scandalous—an implicit rebuke to the king. Under these circumstances, it is not difficult to imagine how a meeting of the minds could emerge between local law-abiding subjects and the king’s justices sent to suppress crime.22

The Lateran Council’s ban on trial by ordeal (followed by a ban on trial by combat, which was already limited to certain classes of the population) applied throughout Europe. What replaced the ordeal depended on local circumstances. On the Continent, the method that filled the void was “the confession as proof,” which led to “torture to obtain it.” In England, however, what emerged was the jury verdict, more or less as it is understood in modern times. One historian concludes: “Eventually, the difference in proofs helps explain how the continental systems became inquisitorial while the English-based systems became accusatorial.”23

Because it depended on local knowledge, the jury anchored the English legal system in the shires, townships, and counties, rather than in the royal court. Even the Crown’s efforts to centralize the administration of justice—such as having circuit judges hold “eyres” in the counties at stated times—tethered the Crown’s justice to the judgment of local subjects. “The trial jury’s power to implement that role,” Green writes, “derived mainly from the fact that the bench was dependent upon the jury for information regarding the circumstances of presented offenses and the credibility of persons presented.”24 But the same arrangement also compelled the participation of local subjects because it required men of the hundreds and the knights who served with them to present information about all crimes, especially homicides, under penalty of fines.25 (They eventually used this author-

25. This was true not only in courts of law. Lay participation was essential to the administration of England’s first “property tax”—the “aid on moveables,” which dated to 1194. This tax, which assessed moveable property such as livestock, household goods, and luxury items, was administered by “juries of assessment” made up of local subjects who could be trusted to know who owned what. See Dennis Hale, “The Evolution of the Property Tax: A Study of the Relation between Public Finance and Political Theory,” Journal of Politics 47, 2 (June 1985): 387–388.
ity to bring charges against royal officials for various kinds of misconduct.\(^{26}\) This system also depended on local subjects because they were the only ones who knew anything about crimes committed in the court’s jurisdiction. Even when trials were held at the royal court in Westminster, the jurors were brought from the crime’s location to testify as to what they had heard or seen.

With the abolition of the ordeals, the Crown, “in search of a new method of proof, turned once again to lay cooperation.” This involved the defendant “putting himself on the country.” That is, a jury of twelve would return a verdict of guilty or not guilty, usually by reciting the details of the case and announcing the verdict. But this practice would not have seemed to be a radical departure from custom; rather, it was a “continuation and enhancement of traditional practices.”\(^{27}\) The criminal jury, or something very much like it, was therefore already an “ancient” institution by the middle of the thirteenth century.

After the abolition of the ordeal, the process worked roughly as follows in the case of a homicide: The coroner assembled an inquest jury made up of men from the vill where the killing took place. The coroner noted the cause of death, as well as the names of any suspects supplied by the inquest jury. The sheriff was then directed to arrest the suspect, who would be held for trial by a circuit judge at the next meeting of the court.\(^{28}\) At “gaol delivery,” the suspect was taken from the jail and presented by the sheriff, the charges were read, and the defendant entered a plea, usually not guilty.\(^{29}\) A jury was then sworn, its members having been called from the hundred where the killing took place. After the Assize of Clarendon, jurors were taken from among the presentment jurors, and by the fourteenth century, they came from a separate group of eighteen jurors chosen in the hundreds. Excluded from the jury were relatives of the defendant or the deceased, as well as anyone known to have a grudge against either; however, “with these two excep-

\(^{26}\) Based on the evidence of the 1328 proceedings, local inhabitants had legitimate grounds to complain about such officials as those of Somerton Castle in Kesteven, who often did not pay for supplies taken from neighboring villages, or Ralph Cressy, coroner of Kesteven, who, if over a hundred presentments are accurate, routinely demanded and collected fees before providing services that were supposed to be free.” McLane, “Juror Attitudes toward Local Disorder,” 45.

\(^{27}\) Green, “Retrospective,” 363.

\(^{28}\) These circuit courts were supposed to be convened at regular intervals, although this rule was not always followed, which meant that suspects might be bound over for many months. Beginning in the early fourteenth century, the courts were scheduled to meet twice a year in each county, and that eventually became the norm.

\(^{29}\) The contemporary records (\textit{Placita Corone}, or “Pleas of the Crown”) show that “very few defendants ever confessed.” Green, “Jury and the English Law of Homicide,” 424, n. 44. Before the era of the “correctional institution,” conviction meant corporal punishment, including mutilation and branding for noncapital crimes. With the exception of pleading for the mercy of the court, there was no such thing as plea bargaining.
tions, familiarity with the facts of the case was a desideratum rather than a bar to jury service.”

Evidence on the background of jurors is spotty and comes mostly from periods later than the twelfth and thirteenth centuries, but they were usually taken from social ranks higher (but not much higher) than that of the accused. An early-fourteenth-century assize roll lists jurors in Lincolnshire, for example, and of the 248 individuals who served, 42 had “gentry or equivalent status,” and another 54 had experience in public office either at the local level or in the service of the Crown. These “notables” constituted just about 38 percent of those who served, and we must assume that the others were men of lower ranks: tradesmen, artisans, yeoman farmers, and the like. Similar records from early-fifteenth-century Derbyshire show that the gentry made up 58 percent of jurors. Hertfordshire rolls from the late sixteenth and early seventeenth centuries suggest that individuals of the “middling sort” made up the bulk of jurors, supplemented by varying percentages of men from the gentry. “It was . . . Hertfordshire’s yeomanry that formed the social backbone of the county’s jury system”—that is, property owners, although at the lower end of the scale, holdings would have been small.

Once assembled, the jury would hear the evidence and deliver a verdict. The gaol delivery rolls do not reveal how the jury reached a verdict; jurors would, of course, hear the defendant’s story, and they would have to make up their minds about his alibi or perhaps his explanation, such as claiming he had acted in self-defense. Their general knowledge of the defendant’s character and past behavior, as well as what they had “just learned in the rumor mill of the gaol delivery session,” almost certainly factored into their decision. The judge would also question the defendant in the presence of the jury. The jury’s duty was to “render a verdict on the basis of their knowledge of the facts, whether that knowledge was first-hand or gleaned from those whom they chose to believe. They were gatherers as well as weighers of evidence, and their sworn verdict regarding the facts was determinative.” Juries worked fast, bringing in several verdicts in a single day’s session of court.

The practical importance of the jury can be seen most clearly in homicide cases, especially in the way that juries, over three centuries, “interpreted” the English homicide laws. Those laws, beginning with the Assize of Clarendon, were notoriously harsh, stipulating death by hanging for all forms of “felonious ho-

30. Ibid., 423.
31. McLane, “Juror Attitudes toward Social Disorder,” 42.
Only two categories of “nonfelonious homicide” were recognized by the law: “justifiable” and “excusable.” For example, if a thief were killed while running off with his booty, or if an outlaw were killed while trying to avoid capture, his death would be labeled “justifiable” homicide, and once the facts were accepted by the justice of the peace, acquittal of the killer would be automatic. “Excusable” homicide included killing by accident or killing in self-defense. Perpetrators of excusable homicides were not eligible for acquittal, but they were commonly granted pardons by the king, although they sometimes had to wait several months (in jail) before being pardoned.

The more difficult cases—and there were a great many of them—were the deaths that resulted from common brawling or sudden fits of passion, as well as killing under circumstances that did not meet the narrow Angevin understanding of “self-defense.” By the thirteenth century, self-defense had come to mean “slaying out of literally vital necessity: the slayer, under mortal attack, had acted as a last resort to save his own life.” These homicide statutes, however, were often in direct conflict with local ideas about “just deserts” or “justified self-defense.” Thomas A. Green observes that “in an age when fighting was common and death could result from even a superficial wound,” community sentiment would have defined as noncapital crimes many killings that would have resulted in hanging had the law been strictly enforced. In earlier times, such killings would have been settled between families, through the payment of compensation by kinfolk. These were no longer matters for private bargaining; they were violations of the king’s peace, and the king’s justices presided over their resolution.

The jury’s rendering of a verdict, even if it were subsequently questioned by the judge, “ended the matter”: quites est, for acquittal; suspendatus est (“he is hanged”); or remittitur ad gratiam domine regis (“remitted to the grace of the king,” or authorized to seek the king’s pardon). This was the case even if the jury’s verdict did not quite square with the letter of the law. Judges had no means of second-guessing the jury because they had no independent access to the facts, and in most cases, the coroner’s report was too brief to support an alternative explanation of events.

The finality of jury verdicts is all the more surprising, given the evidence of the assize rolls: a very high percentage of verdicts was for acquittal, and acquittal rates were highest in homicide cases. The reason is almost certainly that jurors, appalled by the harshness of the homicide statutes, were determined to enforce a different understanding of homicide, dividing the universe of killings into categories that were not recognized by the law. On the one hand were the truly egregious killings that deserved capital punishment—killing for gain, killing by stealth, and

35. Ibid., 420–421.
36. Ibid.
37. Ibid., 424–425, 425, n. 47.
killing with “malice aforethought” (the original definition of murder), whether by stealth or not. On the other hand were the most common forms of killing, which did not fall into these categories: killing to avenge an insult; accidental killing during reckless brawling, sometimes under the influence of alcohol; killing in the heat of passion; and killing in self-defense, even if the defendant could have escaped his assailant rather than confront him. Whatever the law might say, juries apparently believed that “a violent attack could be met with a violent response. A man whose life was threatened did not have to seek some means of escape; indeed, he need not do so though he was not in danger of losing his life.”

In such cases jurors would simply return a verdict of “not guilty,” just as in earlier decades they had refused to “present” such cases for trial (finding that the defendant was “accused but not suspected”). In the post-ordeal era, verdicts were more precise but not less inscrutable. In case after case, juries released defendants that the king gladly would have hanged, and these freed defendants often engaged quietly in the kin bargaining the law aimed to supplant. In cases of self-defense, for example, the accused would often be found to have met the exacting standards of the statute, even when the evidence suggested otherwise. A jury might find that the defendant had “attempted to flee” from his assailant, only to be “overtaken,” giving him no choice but to pull his dagger and stab his attacker in the chest. Or, while attempting to flee, the defendant may have been chased to a place from which he had no egress: a hedgerow, a ditch, or, even more suspiciously, a wall. Defendants who had killed during a brawl were excused by saying they had been attacked while trying to “break up” the fight. And so forth. When the court had no independent access to evidence, these justifications, even when they sounded fishy, had to be taken at face value. Eventually, many judges came to accept that such explanations reflected community sentiment and, for that reason, should be respected. Green reports the following judge’s remarks for the record in 1454:

If a man assaults you in order to beat you it is not lawful for you to say you want to kill him and to endanger his life and limb: but if the case is such that he has you at such advantage that he intends to kill you as you seek to flee . . . or if you are on the ground under him; . . . then it is lawful for you to say that if he won’t desist, you want to slay him to save your own life, and thus you may menace him for such special cause.

As early as the fourteenth century, then, the job of the juror had evolved into something that a modern lawyer, and a modern juror, would recognize without much difficulty. Jurors listened to evidence “and use[d] their common sense to figure out what really happened and whether the law had been violated.”

Sometimes they followed their own understanding of the law rather than the court’s, and they were frequently more lenient toward lawbreakers than the statutes required. But for good or ill, the jury system meant that the English judiciary had its roots in a popular institution in which men of several ranks shared the task of judging, giving the English jury the reputation it carried into the seventeenth century as the “palladium” of English liberties.

But to know whether the law has been violated, one must first know what the law is. Even a juror determined to “shade” or to “fudge” the law needs to understand the law, if only to be able to get around it effectively. So in addition to using common sense about the facts of a case, and whatever knowledge they might possess about the character of the litigants or defendants, jurors were sometimes required to determine “what the meaning of the law was and whether it applied to the specific circumstances at hand”—although, as will become apparent, there were narrower and broader interpretations of this deceptively simple idea.

To say what the law is and whether it applies to a particular set of circumstances is a great power, and under the English legal system, it was clear where this power resided: with judges. The steadily accumulating body of common law represented the collective wisdom of generations of English jurists ruling in cases touching on every aspect of the law and every detail of daily life. But there was almost always some room for jurors to make judgments about what the law required and what it meant. This was the case with respect to the homicide laws, and it is clear that jurors used their discretion to return “merciful” or partial verdicts (guilty on some charges but not on others) that spared the defendant from the gallows. Juries exercised their discretion even more aggressively after the Crown began to use magistrates to present to local juries, in the king’s name, both the


41. The phrase is Blackstone’s, from *Commentaries on the Laws of England*: “So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.” William Blackstone, *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England* (New York: American Bar Association, 2009), 459–460.

accusation and the evidence against local defendants. This form of centralization had long been sought by the monarch and resisted by local subjects, in all three estates. The consequence was an increase in partial verdicts, some of them skirting the boundary of outright resistance.

A jury’s refusal to convict when the facts clearly indicate guilt is known in modern times as “jury nullification”—effectively repealing a law by refusing to convict anyone accused of violating it, however obvious his guilt. Green refers to the rendering of merciful and partial verdicts as “quasi-nullification” and notes that it was rarely punished. (Briefly, in the seventeenth century, uncooperative jurors were sometimes bound over for Star Chamber proceedings, or they were fined on the spot by the judge.) What is now referred to as true nullification—the absolute refusal of a jury to convict a clearly guilty defendant on the grounds that either the law in question or its particular application is illegitimate—would not have found many supporters up to the sixteenth and seventeenth centuries. And those who supported the jury’s right to reach a “contrary” verdict did not call it nullification—they referred to it as “judging the law” or “finding the law,” a point taken up in more detail in the next chapter. But the conflicts between king and Parliament from the Civil War through the Restoration transformed the local jury’s inevitable discretion over partial and merciful verdicts into something with a sharper political edge: the “ancient right” of jurors to defend subjects’ liberty by applying the relevant law in a way that differed from the judge’s instructions, effectively blocking prosecutions that jurors thought unjust.

The power to render such “general verdicts” put the jury on a collision course with royal authority, but it was the very possibility of such power, and its use in cases with political significance (unlike ordinary homicide cases), that led to the popular link between trial by jury and the defense of liberty. A good example is Joseph Towers’s pamphlet An Enquiry and Observations on the Rights and Duties of Juries, published in London in 1764 and reprinted in 1785. Towers asserts what was then a common view: that the purpose of jury trial is to serve as a check on royal power, thus making it central to English freedom, especially in cases of “seditious libel.” This requires that the jury have the authority to determine the law as well as the facts: “But if juries should ever be tame and senseless enough to give up the right of determining the law, as well as the fact, in libel causes, the liberty of the press is then wholly at the discretion of the judges.”

44. Ibid., 45.
assumes that this “ancient” right of juries has been curtailed by the king in modern times and that the rights of Englishmen are threatened as a result. Consequently, Towers’s pamphlet is directed to jurors themselves—a plea to take their responsibilities more seriously, to stop doing the bidding of the Crown by convicting defendants of seditious libel.

Jurors render these suspect verdicts, Towers argues, because they fail to appreciate their power to determine law as well as fact. By limiting the jury to the consideration of only “fact”—that is, did the defendant publish the offending pamphlet?—the Crown can expect to win every case, since the defendant would not be in court in the first place if he had not published the pamphlet. The real question is whether the content of the pamphlet constitutes a violation of the law, and according to Towers, that is not a matter that has traditionally been left exclusively to judges to decide. Towers argues that juries have customarily considered questions of law, citing the fact that English juries have always had the power to decide whether a killing was murder, manslaughter, or self-defense. Finally, Towers argues that a statement must be false in order to be libelous; indeed, indictments for seditious libel frequently charged the defendant with making a “false, scandalous, malicious” statement against the king or his ministers. It follows, therefore, that a jury is fully entitled to consider the truthfulness of the statement claimed to be libelous, and if the jury finds that the charges against the government are true, the defendant cannot be guilty of libel—that is, of making a “false” statement. How this claim worked out in practice—and its legacy for the English and colonial understanding of the jury—can be seen from a consideration of the great cases in which the right to speak the truth was proclaimed most triumphantly: Bushell’s Case in 1670, the Case of the Seven Bishops in 1688, and the trial of printer John Peter Zenger in colonial New York in 1735.

Bushell’s Case was the result of the prosecution of William Penn and William Mead for “unlawful assembly and disturbing the peace,” the disturbance in question being a public Quaker meeting. Since there was no question that Penn and Meade were Quakers and that they had held a public meeting as charged, the Crown expected a quick conviction. The jury, however, acquitted the two men, and the judge took that decision as an act of defiance. He told the jurors that they must continue their deliberations until they reached “a verdict the Court will accept.” When they still refused to convict, the judge fined them and sent them back to deliberate some more. Once again, the jury refused to convict, forcing the judge...
to relent, but he continued the jurors’ fines.\textsuperscript{50} The jury foreman, Edward Bushell, refused to pay his fine and was jailed. He took his case to the Court of Common Pleas, where Chief Justice Vaughan issued the famous verdict that ended the practice of “attaint,” that is, the punishment of jurors for reaching verdicts that displeased the court.\textsuperscript{51}

The Case of the Seven Bishops followed James II’s Declaration of Indulgence in 1687, which removed many of the obstacles to Catholic worship and Catholic participation in the public life of the kingdom, to the great dismay of the nation’s Protestants.\textsuperscript{52} The king, acting as head of the Church of England, had ordered that the declaration be read from the pulpits of all Anglican churches; seven bishops of the Church of England refused, on the grounds that the king’s declaration repealed an act of Parliament, a power that, under the laws of England, the king did not possess (said the bishops).\textsuperscript{53} When they sent James a petition setting forth this argument, he responded by charging them with seditious libel and locking them in the Tower of London. A jury in the Court of King’s Bench found the bishops not guilty, going against the instructions of several members of the panel of judges presiding at the trial. Soon thereafter James was deposed, and the English Bill of Rights of 1689 specifically protected the “right to petition” without fear of punishment.\textsuperscript{54} The jurors in the Case of the Seven Bishops, it was said, thus helped pave the way for the Glorious Revolution.

John Peter Zenger, publisher of the \textit{New York Weekly Journal}, was indicted in 1735 for publishing seditious libel against colonial officials in New York.\textsuperscript{55} As

\textsuperscript{50} See ibid., citing “Penn & Mead’s Case,” 6 Howell’s 951 (1670): “Gentlemen,” said the judge, “you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it.”

\textsuperscript{51} “Case of the Imprisonment of Edward Bushell.”

\textsuperscript{52} See Declaration of Indulgence of King James II, April 4, 1687: “We do . . . declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the Sacrament, or for any other nonconformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.” Andrew Browning, \textit{English Historical Documents 1660–1714} (New York: Oxford University Press, 1953), 395.

\textsuperscript{53} Green, “Jury, Seditious Libel and Criminal Law,” 37.

\textsuperscript{54} See An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights, 1689): “That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.” http://www.avalon.law.yale.edu/17th_century/england.asp (accessed January 9, 2014).

in England, the law did not consider truth to be a defense to criminal libel. However, Zenger’s attorney, Andrew Hamilton, argued that since the things Zenger had published about the officials were true, they could not be libelous. The jury acquitted, against the instructions of the judge. From then on, colonial officials were reluctant to bring seditious libel charges against the colony’s newspapers, and the Zenger trial (and his bold rescue by a “jury of his peers”) became a famous milestone in the history of freedom of the press. In this understanding, the jurors in these cases were not defying the law or reaching a verdict contrary to the evidence. They were simply finding that the defendants in question had not “in fact” committed libel and therefore could not be guilty of seditious libel.

In practice, jurors and judges did not locate the line between “fact” and “law” in precisely the same place—a difficulty that would be carried forward into the nineteenth and twentieth centuries. That a particular subject had written a particular pamphlet was no doubt a fact, but the pamphlet’s tendency to incite sedition (or not) was no less of a fact. Since, by its very nature, the crime of sedition must touch the sentiments of ordinary Englishmen, or else it could have no effect, it followed (according to many pamphleteers) that ordinary Englishmen were the best judges of what is and is not seditious. So argued, among many others, Robert Morris in his 1770 letter to Sir Richard Ashton: “Who [is] more interested than juries (for juries are composed of the people) to preserve the peace and order of the state? . . . Juries are a tribunal ever changing as the times; they judge of men’s writings and actions by what they see and feel.”

As time went on, the English libel cases acquired a mythic importance in political debate, and the myth obscured some important details. For example, Vaughan’s ruling in Bushell’s Case did not declare or discover an unambiguous or unlimited right of jurors to ignore a court’s instructions on the law. But because all these cases concerned manifestly political charges—unlawful assembly and seditious libel—the “ancient jury right” to reach an independent judgment about the law became synonymous with the jury’s role as the defender of English liberty. What Vaughan’s decision unquestionably established is that a juror cannot be punished for reaching a verdict that seems to reject the court’s instructions on the law. The practical effect of this ruling was clear: with nothing to fear from an attaint, jurors could return any verdict they pleased. If they returned a general

58. See, for example, David Pepper’s discussion of this point in “Nullifying History: Modern-Day Misuse of the Right to Decide the Law,” Case Western Reserve Law Review 50 (Spring 2000): 599–643.
verdict—a single finding of guilty or not guilty—it would be impossible to know whether their verdict (if it seemed to depart from the court’s instructions on the law) was based on a judgment about the facts or a disagreement about the law. In a general verdict, Vaughan reasoned, jurors “resolve both law and fact complicately, and not the fact by itself.”59 If a jury could not come to its own conclusion about what the law required, it could return a “special verdict,” finding the facts and asking the judge to apply the relevant law to generate a verdict. An English court could also require the jury to return a special verdict, but such orders were rare in England.60

This mixing of law and fact reveals a larger difficulty: even when a jury listens attentively and respectfully to what the judge has to say about the meaning of the law, applying the judge’s instructions to the facts of the case requires the jury to exercise a certain amount of discretion. The law uses words that need to be defined, and there may be disagreements about the meaning of what the judge has said. If trials are presided over by more than one judge (as was fairly common in the seventeenth and eighteenth centuries), there may be disagreements from the bench as well, requiring the jury to make up its own mind.

This is perhaps most clearly true in libel cases. A charge of libel is, in part, simply a matter of fact and therefore easily settled by the jury: did defendant X publish article Y, and did the statements made therein clearly indicate particular persons in authority (known as “establishing the innuendo”)? This was the law as explained to the jurors in the Zenger case and in all libel cases in England prior to the passage of Fox’s Libel Act in 1792.61 But under the old law, if the jury answered “yes” to the standard questions posed by the judge, it would have to find the defendant guilty as charged.

But according to another view, the matter is more complicated. In the Zenger trial, in addition to arguing that the jury should have a hand in interpreting the law, the defense pointed out that in a libel prosecution, the jury “should find that statements must be false before they can be deemed libelous.”62 This was not, however, how the law defined libel. Under the controlling English statute of the day, the definition of libel was almost comically broad: “written censure upon

59. “Case of the Imprisonment of Edward Bushell.”
60. Leon Green, Judge and Jury (Kansas City, MO: Vernon Law Book Co., 1930), 379.
61. 32 Geo. 3, c. 60 (1792). The legislative title of this act was An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, and it confirmed a jury’s right to return a general verdict in a libel case without being “required or directed by the court . . . to find the defendant . . . guilty merely on the proof of the publication.” In effect, it gave the jury the right to decide whether a particular publication was, in fact, libelous.
any public man whatever for any conduct whatever or upon any law or institution whatever." In this view, truth was not a defense in a libel case; in fact, it was a liability: “the truer the statement the greater the libel” was a rule based on the (not entirely fanciful) notion that if the terrible things said about the government turned out to be true, they would be all the more damaging to public order and tranquility.

Zenger’s attorney appealed to what he claimed was the traditional English common-law view (as opposed to the parliamentary statute), in which a statement’s falsehood had been a requirement in libel prosecutions. The judge and prosecution, Hamilton claimed, had simply misstated the higher, common law of libel, and it was the jury’s obligation to correct them. Simply put, a true statement could not be libelous. Hamilton’s example was the Case of the Seven Bishops. In that case, he explained, the jurors had recognized that “the petition of the bishops [was] no libel, that is [it contained] no falsehood [or] sedition, and therefore found them not guilty.” The bishops’ petition expressed no more than the settled law of England. Likewise, if the jury in New York could not determine that Zenger had deliberately published a falsehood, it could not find him guilty of libel. Hamilton was, in essence, calling on the jury to perform the role that the judge had failed to carry out (in Hamilton’s view). “Rather than a call to reject the law,” one historian concluded, “this was a call to apply it in good faith.”

In the prosecution of Penn and Meade for unlawful assembly and disturbing the peace, the jury was presented with a similar difficulty. At one level, the facts of the case were not in dispute. Penn and Meade had held a public gathering of Quakers at a time when such meetings (indeed, all services outside the Church of England) had been banned by the Conventicle Act of 1664—thus the charge of

64. See Harold L. Nelson, “Seditious Libel in Colonial America,” American Journal of Legal History 3, 2 (April 1959): 160. During the republican era in the United States, the claim that truth is no defense to a libel charge was often attributed to the judges of the Star Chamber. The defense in People v. Croswell made this claim: “The opposite doctrine, which mentions that a writing is equally libelous, whether true or false, originated in a polluted source, the despotic tribunal of the Star Chamber.” People v. Croswell, 3 Johns. Cas. 337 (1804), 12. The Croswell case is discussed in chapter 2.
65. Pepper, “Nullifying History,” 603, n. 16.
66. Ibid.
67. Their petition was so far from sedition, in fact, that five of the seven bishops refused to swear allegiance to William in 1689, for which defiance they were dismissed from their bishoprics. See Thomas Babington Macaulay, The History of England from the Accession of James II, vol. 3 (New York: Cambridge University Press, 2008).
68. Pepper, “Nullifying History,” 617, n. 16.
“unlawful assembly.” As in a libel trial, the defendants’ guilt seemed to be only a matter of establishing whether they had in fact committed the acts named in the indictment—acts the defendants themselves did not deny. But the defendants urged the jury to look beyond the indictment to the common-law understanding of “unlawful assembly and disturbance of the peace,” an understanding that did not include (according to the defendants) the peaceable behavior named in the charge. What, after all, could be less “disorderly” or “riotous” than a Quaker meeting? The jury’s responsibility was therefore to “judge the law”—that is, to understand and then apply the law correctly, not in the incorrect manner urged by the court. Because the traditional understanding of “disturbing the peace” did not include the events named in the indictment, the court’s instructions on the law were simply wrong and, for that reason, should be ignored. In this way, by coming to a conclusion about a fact (a true statement is not libelous, and a peaceful meeting is not a public disturbance), the jurors would also be reaching a conclusion about a law (the law cannot mean truth-telling when it says “sedition,” and it cannot mean a Quaker meeting when it says “disturbance”).

This was not, it should be stressed again, the view of Chief Justice Vaughan in the decision that freed Bushell in 1670 and ended the threat of attainder. Vaughan’s argument was both more subtle and less congenial to popular sensibilities. First, the division of responsibilities in court is clear and logical, according to Vaughan: the jury is responsible for judging the facts, and the judge is responsible for explaining the law. Second, this arrangement is natural because it is based on the respective capacities of both parties. The presumption that a jury can render a judgment about the law is “not intelligible,” Vaughan insisted, for “no jury can be charged with the trial of matter in law . . . no evidence ever was or can be given to a jury of what is law or not; nor no such oath can be given to, or taken by, a jury to try matter in law.”

Likewise, the judge cannot tell the jury what the evidence is or what that evidence signifies. The judge “can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.” That evidence is “much other than” the evidence heard in court, because the law supposes that the jurors know the vicinage and its affairs and are therefore in possession of “personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court is absolutely false; but to this the judge is a stranger.”

69. 16 Car. 2, c. 4 (1664). The act forbade assemblies of more than five persons worshipping outside the Church of England.
71. “Case of the Imprisonment of Edward Bushell.”
72. Ibid.
In other words, the jury can know what is going on in town; it can know the cast of characters and their various quirks and habits, and thus it can judge their credibility—just as juries had done in the twelfth century, when they offered some of the accused compurgation rather than sending them to the ordeal. This was perhaps the distinctive characteristic of the ancient “witnessing jury,” in which “twelve good men and true” from the village testified as to what they knew about the parties to a dispute, the character of the defendant, the events leading up to an altercation, or who had made promises to whom. But in this view, although the jurors could know the facts, they could not possibly understand the law itself, anymore than the judge could have any real knowledge of the rustic surroundings in which the trial took place.

This view of the jury’s role took shape in a world of vills, shires, hundreds, and market towns, where any civil dispute or criminal act would involve persons and events known to everyone in town, including the jurors, but not the judge, who occupied an entirely different social rank and commonly rode the circuit from county to county, never acquiring a close association with any particular town. However, even in 1670, this would not have been an accurate description of most English courtrooms, and certainly not those in London: judges still rode circuits, but towns and even villages had grown larger than the rural communities served by the twelfth-century jury. Nonetheless, the role of the jury as “fact finder” has rested, for much of our history, on the claim that juries can know, or understand, what judges cannot. Chief Justice Vaughan did not dispute this view. “It is absurd a jury should be fined by the judge for going against their evidence,” he concluded, “when he who fineth knows not what it is.”

But by the same reasoning, judges know what jurors cannot know: the law itself. For this reason, jurors are required to defer to the opinion of the court on matters of law—indeed, in Vaughan’s formulation, it would be impossible for jurors, given their loutish ignorance, to have any opinions on the law whatsoever. If they returned a verdict the court disagreed with, it would have to be because of

73. See John Langbein, “The Criminal Trial before the Lawyers,” *University of Chicago Law Review* 45 (1978): 263–298. Langbein points out that because the vicinage requirement had been abandoned in favor of countywide jury lists long before the Bushell case, Vaughan’s decision made no sense, relying as it did on an obsolete understanding of the jury (that jurors know the local facts; that they know who is lying and who is telling the truth). But Vaughan may have been playing the statesman in this case, trying to draw a line between the rights of the jury and the authority of the court so that, although the court was in control, something was left (or so it seemed) for the jury. Vaughan’s decision seems determined to preserve a significant purpose for jury trials. We should not be surprised to see this political result from such a political trial. See also Stern, “Note: Between Local Knowledge and National Politics.”

74. “Case of the Imprisonment of Edward Bushell.”
their judgment about the facts.\textsuperscript{75} No other explanation could possibly make sense. And disagreements between judge and jury about such factual matters are to be expected, Vaughan declared: “I would know whether anything be more common than for two men, students, barristers or judges, to deduce contrary and opposite conclusions out of the same case in law. And is there any difference that two men should infer distinct conclusions from the same testimony? . . . And this often is the case of the judge and jury.”\textsuperscript{76}

Such artful Tory subtlety about dimwitted jurors and learned judges would become increasingly unpopular, especially in colonial America. The colonial jury was already a more important and more powerful institution than the common-law juries in England, and the grand jury, in particular, had evolved into an important institution of local government in the New World.\textsuperscript{77} By the time of the American Revolution, this kind of jury was as familiar to Americans as the legislative assembly, the town meeting, and the sanctity of contract, and its importance extended far beyond its role in the trials involving seditious libel. Few Americans would have quarreled with John Adams’s conclusion that if a judge’s view of the law violated a fundamental political principle, then “it is not only . . . [the juror’s] right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”\textsuperscript{78} By the late eighteenth century, the right to find a “verdict according to . . . conscience” had achieved the status of conventional wisdom. Thus, the British cabinet’s decision to remove customs violations from the purview of the jury was seen by the colonists as virtually a declaration of war against the colonies.\textsuperscript{79}

\textsuperscript{75} See also Green, Verdict According to Conscience, 256–264; Langbein, “Criminal Trial before Lawyers.” This is further evidence of Vaughan’s political art: what is left on the court’s side is what is most important—namely, to say what the law means.

\textsuperscript{76} “Case of the Imprisonment of Edward Bushell.”


\textsuperscript{78} John Adams, Diaries of John Adams, entry for February 12, 1771, Adams Family Papers, Massachusetts Historical Society, Boston.