The Trial Jury in England, France, Germany 1700–1900

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The English Criminal Trial Jury on the Eve of the French Revolution

Introduction

France adopted a jury for criminal cases patterned on the English jury within the first months of the Revolution and then revised it incessantly across several decades. Over the course of the nineteenth century, most European states adopted some variant of the jury. The path of this European reception of the jury lay squarely through France. The French version of the English jury, rather more than the English institution itself, was studied and emulated elsewhere in Europe.

My main concern in this paper is to present a summary account of the English jury system as it existed in the last decades of the eighteenth century, when the initial transfer to France took place. Because my purpose is to facilitate comparative study, I shall pay special regard to aspects of the English system that became important in the Continental history.

Scope. The essence of a jury system is that laymen — nonjurists — should participate in adjudication. Laymen serve as triers. The jury is, therefore, primarily a matter of court structure. In a legal system like the modern West German that maintains separate codes of court structure (*Gerichtsverfassung*) and criminal prodedure (*Strafprozess*),

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the main rules concerning the participation of laymen in adjudication are found in the statute on court structure.[1]

In order to appreciate the real significance of lay participation in adjudication, however, it is nescessary to inquire more broadly than court structure. If we are to understand the powers and the influence of the laymen, we need to know something of how the laymen are informed and controlled, and what their powers are vis-à-vis the legal professionals. This requires an understanding of the rudiments of both pretrial and trial procedure as it affects the work of the jury. The study of the jury, whether in modern law or in legal history, requires the observer to range over the entire criminal procedural system, but from a special point of view: how the use of lay triers affects the system. That view of the subject has shaped the coverage of this essay.

An Outline of Coverage. Part I of this paper discusses the several forms of jury court in late-eighteenth-century England and their jurisdiction (competence) regarding different classes of criminal offenses. Part II describes the pretrial procedure used to investigate crimes and to gather the evidence that would be submitted to the jury at trial. I review in this connection the tradition of so-called private prosecution in English criminal procedure; the role of the justices of the peace as quasi-examining magistrates; and the function of the grand jury in deciding whether to authorize trial.

Part III is devoted to the composition of the trial jury — the rules and practices governing the qualification of citizens for jury service; selection among those eligible; and the right of challenge. Part IV deals with the process of informing the jury, that is, with some of the rules of trial and proof.

Part V examines the division of powers between judge and jury, including introductory treatment of the law/fact distinction (upon which a separate paper by Professor Thomas Green will expand). I discuss the trial judge's control over the receipt of evidence at trial, and his powers to comment on the facts and to instruct the jury on the law. I emphasize the way in which formal law and actual practice differed sharply on the question of sentence, that is, the nature and severity of the sanction imposed in cases of guilt. I conclude in Part VI with some remarks on the tension between political and ordinary crimes in the historical development of the English jury system.

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[1] Gerichtsverfassungsgesetz §§ 28-59, 76-77, 192-97; for historical background, see *Peter Landau*, Die Reichsjustizgesetze von 1879 und die deutsche Rechtseinheit, in Vom Reichsjustizamt zum Bundesministerium der Justiz, Köln 1977 (Festschrift) 161, at 619ff.; *W. Schubert*, Die deutsche Gerichtsverfassung 1869-1877: Entstehung und Quellen, Frankfurt 1981 (Ius Commune Sonderheft).

The Civil Jury. I wish to emphasize at the outset that in concentrating upon the criminal jury and ignoring the civil jury this paper suffers an exclusion of considerable importance. For many purposes until the nineteenth century the civil and criminal jury were inseparable in the English tradition. We see this attitude both in matters of detail and in considerations of high policy. At the level of detail we can point to the statutes that regulated the qualifications of jurors and the procedures for selecting them, statutes that applied indifferently in most respects to service on both types of jury.[2] At the level of theory, there is a tradition already prominent in Fortescue (c. 1470)[3] of discussing the two juries without distinction. In the eighteenth century we see this attitude continuing in Blackstone's *Commentaries.* Blackstone discusses the virtues of the jury system in connection with his account of the civil jury in Volume III. When he reaches the criminal jury in Volume IV, he simply refers his readers back to the discussion in Volume III.[4]. The jury policies are, in his view, substantially identical in civil and criminal matters.

Only in the middle third of the nineteenth century did the idea gain currency in England that the use of laymen for civil adjudication was less important and more burdensome than in criminal trials. Over the following two generations, civil jury trial entered a period of precipitous decline that resulted in its virtual abolition during and after World War I.[5]

I exlude the civil jury from this paper because the Continental movement for the introduction of the jury was all but entirely confined to the reform of the criminal courts. The men who made the French revolution could sustain no interest in the civil jury.[6] Nineteenth-century European dissatisfaction with the civil procedure of the ius commune resulted in major changes affecting court structure, judicial tenure, and the rules of proof and procedure;[7] but the civil courts

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[2] E. g., 4 & 5 Wil. & Mar. c. 24 (1692); 7 & 8 Wil. 3, c. 32 (1696); 3 Geo. 2, c. 25 (1730).

[3] *John Fortescue*, De Laudibus Legum Anglie (S. B. Chrimes, ed.), Cambridge 1942 (first ed. c. 1470) chs. 21, 25-31, at 45-47, 57-73.

[4] *William Blackstone*, Commentaries on the Laws of England (4. vols.), Oxford 1765-69, III: 379-81, IV: 343.

[5] *R. M. Jackson*, The Incidence of Jury Trial During the Past Century, 1 Modern Law Review 132, 138 ff. (1937); *W. R. Cornish*, The Jury (London 1971 ed.) 230 ff.; *Patrick Devlin*, Trial by Jury, 1956, 130-33.

[6] Regarding the rejection of the civil jury in the Assembly in April 1790, see the citations collected in *E. Garsonnet*, Traité théorique et pratique de procédure (8 vols.), Paris 1898, (2d ed.); I: 83 & n.4. Renewed French discussion on the subject in the nineteenth century is noted, id. at I: 83 n.6.

[7] E. g., *Knut W. Nörr*, Hauptthemen legislatorischer Zivilprozessreform im 19. Jahrhundert, 87 Zeitschrift für Zivilprozess 277 (1974); *Gerhard J. Dahlmanns*, Der Strukturwandel des deutschen Zivilprozesses im 19. Jahrhundert, Aalen 1971.

remained professionalized. From the standpoint of comparative legal history, therefore, it is the English criminal jury that is of interest, and to which this paper is devoted. Nevertheless, in averting attention from the civil jury, we risk missing the true course of some of what occurred in English criminal procedure. Such great eighteenth-century developments in the conduct of criminal jury trial as the appearance of defense counsel and the rise of the law of evidence, both discussed below in Part IV, may have been based in part upon analogy to practices in civil procedure.

I. The Criminal Courts

In eighteenth-century England all cases of serious crime were tried by jury. So too were most but not all lesser offenses. Broadly speaking, offenses were classified into three groups, each triable in a different court. The English division into *felony*, *misdemeanor*, and *summary offenses* continued into the nineteenth century, where it ultimately came to have a crude correspondence to the French and German schema (*crimes*, *délits*, *contraventions*; *Verbrechen*, *Vergehen*, *Übertretungen*).

Felony. The distinguishing characteristic of felony was that the crime was nominally capital. Under the heading of felony were found not only homicide, arson, and rape, but all property crimes involving goods valued at one shilling or more. The death penalty applied in theory to all felonies. The English did not, of course, punish most routine larceny with death. In the realm of property crimes the death penalty was in practice limited to the more serious forms of theft, especially those like burglary and robbery that risked injury to the person. Even there, we shall see, juries and judges had means of discretion to mitigate the punishment.[8]

The transformation from a capital to a predominantly noncapital system of sanctions for felonies was achieved through a complex development of statute and case law under the doctrinal rubric of "benefit of clergy;" I have recently had occasion to summarize this saga elsewhere.[9] For most of the eighteenth century, the main noncapital sanction employed to punish persons convicted of felony was so-called transportation, that is, a term of servitude (usually seven years) in British America, mostly in the colonies of Virginia and Maryland. When the War of American Independence broke out in the mid-1770s, trans-

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[8] Infra Part. V.

[9] *John H. Langbein*, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 University of Chicago Law Review 1, 37-41 (1983) [hereafter cited as "Ryder Sources"].

portation became impractical and the sanction of long-term imprisonment as a punishment for serious crime finally entered English law.[10]

Technically, one category of serious crime punishable by death lay outside felony, treason (which, incidentally, included counterfeiting). Procedurally, however, treason and felony were ordinarily handled identically, and what is said in this paper about jury trial in cases of felony should be taken to apply to cases of treason as well.

Lesser Offenses. The main misdemeanors were so-called petty larceny (theft of goods valued at less than one shilling) and assault (comprising most brawling that did not end in severe injury or death). Misdemeanors were crimes to which the death penalty did not attach. The usual sanctions included fine, whipping, pillorying, and short-term imprisonment; transportation was allowed (although infrequently imposed) for petty larceny. Beneath misdemeanor was the class of summary offenses created by statute, primarily involving economic regulation and punishable mostly by fines and forfeitures.

Still speaking broadly, we may say that this classification of offenses just described corresponded to the main jurisdictional division among the courts. The *assize* courts tried felony; the courts of *quarter sessions* tried misdemeanor; and summary offenses were the business of *petty sessions*. Quarter sessions and petty sessions were sittings of the justices of the peace (JPs) of the county in their capacity as judges.[11] In petty sessions small groups of JPs adjudicated without juries. At quarter sessions (held four times a year, hence the name) the JPs served as trial judges and presided over jury trials.

Hereafter in this paper I shall largely ignore the lesser offenses, and with them the courts of quarter and petty sessions. I shall discuss only serious crime, the province of the assize courts, where the main development of the English jury system occurred.

Assizes. The assize court sat twice a year in each county of England (except for London and the adjoining county of Middlesex, whose particular assize-equivalent court, the Old Bailey, is discussed below). Assizes were held in the spring, usually in late March; and again at the end of the summer, usually in August. The nation was divided into six

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[10] For a history of the sanction of transportation emphasizing its effects upon the development of the criminal justice system, see *John M. Beattie*, Crime and the Courts in England: 1660-1800 (Princeton, N. J./Oxford 1985). For summary discussion of the history of transportation, see *John H. Langbein*, Torture and the Law of Proof: Europe and England in the Ancien Régime, Chicago 1977, 39-44 [hereafter cited as "Torture"]. The classic work is still *Abbot E. Smith*, Colonists in Bondage: White Servitude and Convict Labor in America: 1607-1776, Chapel Hill 1947.

[11] *Blackstone*, supra note 4, at IV: 266-69, 277ff.

assize circuits, groups of contiguous counties. Two royal judges from London would literally "ride" each circuit from one county to the next, holding civil and criminal trials.[12]

The twelve royal judges of England presided over criminal jury trials at these assizes for a few weeks per year. Otherwise, the judges had virtually no contact with the administration of the criminal law. They were members of the three central courts (King's Bench, Common Pleas, and Exchequer), whose workload was all but exclusively civil. The King's Bench had a residual criminal jurisdiction that was activated in a few eighteenth-century cases, but crime was of no quantitative significance to King's Bench. The other two courts had no criminal business. Thus, one of the peculiarities of the English legal system when viewed from the perspective of the Continental tradition is that there was no branch of the judiciary specializing in criminal law.[13]

Another characteristic of the English court structure for cases of serious crime that sometimes seems peculiar from the vantage point of later Continental efforts to design jury courts is that the English trial bench was ordinarily noncollegial. A single professional judge presided at the trial, instructed the jury, and passed sentence if the jury convicted. Although assize judges rode circuit in pairs, one conducted civil trials in a separate courtroom while his colleague tried all the criminal cases. This want of collegiality was not a subject of concern or criticism, doubtless because the division of power between judge and jury was thought to diminish the danger of judicial arbitrariness to an acceptable level.

The Old Bailey. The closest approximation to a specialized criminal trial judge in England was the officer known as the Recorder of London, who sat in the assize-equivalent court for serious crime in London, the Old Bailey. Its jurisdiction included the inner core of London, the so-called "City," and the environs in the county of Middlesex. The Old Bailey handled criminal business only; civil trial business was handled separately (at so-called *nisi prius* courts).

The Old Bailey sat eight times a year, in order to deal with the criminal caseload of the metropolis. Ordinarily, each of the eight sessions lasted three or four days, during which time the court conducted between 50 and 100 felony trials. These trials took place sequentially in a single

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[12] See generally *J. S. Cockburn*, A History of English Assizes: 1558-1714, Cambridge 1972. For description of an assize sitting in 1754, see "Ryder Sources," supra note 9, at 115-23. A French official observed assize procedure in Yorkshire in 1818 on behalf of his government and published his account. Charles Cottu, De l'administration de la justice criminelle en Angleterre, Paris 1820, translated as On the Administration of Criminal Justice in England, London 1822.

[13] Discussed in Ryder Sources, supra note 9, at 31-36.

courtroom, not in multiple simultaneous sittings. For each of the Old Bailey's eight annual sessions, the Recorder of London was assisted by two or three of the royal judges, who served in much the way they would when taking their turns as assize judges in the provinces. At each sessions of the Old Bailey, the recorder and the judges rotated among themselves the job of presiding judge.[14]

The Old Bailey was for many reasons the premier criminal trial court of the Anglo-American world in the eighteenth century. It sat frequently and had enormous caseloads. Because London was the financial and commercial center, the Old Bailey saw more of the sophisticated, high-stakes property crimes, including embezzlement, commercial fraud, and forgery. Further, the size, wealth, and impersonality of the metropolis attracted ruffians, who formed gangs to engage in robbery, burglary, and other theft. This urban underworld of quasi-professional criminals placed special strains on the primitive policing arrangements of the time, and exacerbated the want of a professional magistracy to conduct pretrial investigations.

Throughout the eighteenth century and beyond, shorthand reporters attended Old Bailey trials and transcribed the proceedings. Their reports were edited and compressed into pamphlet accounts that were published promptly and sold on the streets of London as popular literature. These pamphlets — the Old Bailey Sessions Papers (or OBSP) — have many shortcomings as legal historical sources, but it seems increasingly clear that they are reliable in what they report. They were not fictionalized.[15] Because jury trial was conducted orally, it left few traces in the official records. The OBSP allow us to reconstruct some of what transpired at these trials, and much of what I say about jury trials of the eighteenth century is based upon OBSP sources.

II. Pretrial Procedure

A system of jury trial presupposes a pretrial procedure for gathering the evidence that will be presented to the jury at trial. In eighteenth-century England the victim still had the main responsibility for the conduct of this pretrial investigation.

Private Prosecution. We have long been accustomed to say that English criminal procedure operated into the nineteenth century without either professional police or professional prosecution, and there is an important sense in which that is true. Sir Robert Peel's Metropoli-

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[14] Id. at 33ff.

[15] For detail see *John H. Langbein*, The Criminal Trial before the Lawyers, 45 University of Chicago Law Review 263, 267-72 [hereafter cited as "Trial"]; Ryder Sources, supra note 9, at 3-26.

tan Police Act of 1829 founded the "bobbies"; the Director of Public Prosecutions came into existence for a limited sphere of serious crime in 1879, after a remarkable political struggle.[16] These and related developments radically increased the levels of official participation in and control of the processes of detection, investigation, charging, and prosecution.[17]

Nevertheless, it would be quite inaccurate to view the procedure of the eighteenth century as a system of strictly private prosecution. Although the private accuser (virtually always the victim, apart from homicide) was called the prosecutor and played an essential role in most prosecutions, he had official support. Some of the support mechanisms were of considerable antiquity. For cases of homicide, where the victim was by definition unavailable to prosecute, the surviving kin had been afforced since the Middle Ages through the coroner system, which achieved a form of supplementary public prosecution.[18]

For the property crimes that were the main component of felony jurisdiction, victims could call upon the help of constables and JPs. The constable — forerunner of the modern policeman — was an ordinary citizen serving a term as the law enforcement officer of his locality. Within the city of London the constables were reinforced with additional peace officers, the watchmen, who were compensated from the proceeds of a tax on each ward. Although the constable had some power to act on his own motion or on citizen complaint, including the power to arrest at the scene of a felony or in hot pursuit, in general he was subordinated to the direction of the justices of the peace (JPs).

The JP was also an amateur, a citizen rendering part-time and largely uncompensated service in a variety of local-governmental functions. He was a man of higher social status, typically gentry, and he served at the pleasure of the central authorities, usually for many years. At least from the sixteenth century the JP was the principal pretrial officer who investigated cases of serious crime on citizen complaint. This responsibility had its statutory foundation in an act of 1555, the so-called Marian committal statute. The statute authorized the JP to whom a felony suspect was brought to examine the accused and the accusers; to reduce these examinations to writing for the trial court; to order the accused to

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[16] *Philip B. Kurland & D. W.M. Waters*, Public Prosecution in England, 1854-79: An Essay in English Legislative History, 1959 Duke Law Journal 493.

[17] See generally *David Freestone & J.C. Richardson*, The Making of English Criminal Law: Sir John Jervis and His Acts, 1980 Criminal Law Review 5.

[18] See generally *Roy F. Hunnisett*, The Medieval Coroner, Cambridge 1961; *id.*, Introduction, Calendar of Nottinghamshire Coroners' Inquests 1485-1558 (Thoroton Society Record Series), Nottingham 1969; *id.*, Introduction, Wiltshire Coroners' Bills: 1752-1796 (Wiltshire Record Society), Devizes 1981.

be arrested and held for trial; and to require (upon penalty of a fine for noncompliance) the material witnesses against the accused to appear at trial. The statute did not by terms require the JP to investigate a case more widely, for example to search out witnesses who did not volunteer, although such steps were implicit in the procedure and were widely taken.[19] In aid of such investigations the JPs issued search and arrest warrants for execution either by constables or by private complainants.

This peculiar system of having prominent community figures serve as part-time amateur detectives and pretrial committal officers was designed, if that is the word, for provincial conditions. It presupposed a relatively light caseload of serious crime and a group of JPs whose self-interest in keeping local order and reinforcing their own stature in the community would provide sufficient incentive to serve. There was always a problem in getting enough such men to take an active role. The problem worsened appreciably when urbanization occurred in areas with a thinly populated gentry.[20] In metropolitan London, especially in the rapidly growing environs of Middlesex, this problem was acute, and by the eighteenth century it led the central government to begin to compensate a few key persons to assume the office of JP and to conduct pretrial investigations.[21] In the nineteenth century this practice was generalized to other populous areas and acquired a statutory foundation as the so-called stipendiary magistracy. In general, however, in the eighteenth century pretrial criminal investigation was the work of amateurs — the victim, the lay constable, and the lay JP.

For crimes of special concern to the state, this system of amateur law enforcement was supplemented or wholly supplanted by quasi-professional officers. In cases of counterfeiting and mail robbery, the Mint and the Post Office employed solicitors and others to investigate and prepare cases for trial. The revenue authorities had comparable practices for smuggling.[22] Two high officers of state, the Attorney General and the Solicitor General, were available to conduct pretrial (and trial) proceedings in major political cases such as treason and seditious libel.

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[19] Evidence is discussed in *John H. Langbein*, Prosecuting Crime in the Renaissance: England, Germany, France, Cambridge, Mass. 1974, 34-53, 77-97 [hereafter cited as "Renaissance"].

[20] See *Sidney & Beatrice Webb*, English Local Government: The Parish and the County, London 1906, 321; *John Styles*, 'Our Traitorous Money Makers': The Yorkshire Coiners and the Law 1760-83, in An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries (John Brewer & John Styles, eds.), London 1980, 172, 207.

[21] See Ryder Sources, supra note 9, at 57 ff.; *Webb*, supra note 20, at 337 ff.; *Leon Radzinowicz*, A History of English Criminal Law and Its Administration from 1750 (4 vols.), London 1948-68, III: 29 ff.

[22] E. g., *Styles*, supra note 20 (Mint); *Beattie*, supra note 10 (Post).

Indictment. In modern parlance we divide pretrial procedure into the investigative and *charging* phases. In the charging phase, the results of the investigation are evaluated and summarized in a formal document that accuses the defendant and requires him to stand trial. This charging document identifies the precise offense(s) in question, and it describes what conduct of the defendant is alleged to have constituted the commission of the offense(s). In cases of serious crime this charging document is called an *indictment*; for cases of lesser crime, an *information.*

In eighteenth-century practice, the indictment was drafted on behalf of the victim-prosecutor by a solicitor, a JP's clerk, or a clerk of assizes. Whoever drafted it could consult one of the many published form books that contained model indictments. Later in the century, stationers began to sell printed fill-in-the-blank indictment forms that were frequently used for uncomplicated cases. Once drafted for a particular case, this so-called "bill of indictment" was submitted to the body known as the grand jury. Only if the grand jury approved the bill would the defendant be obliged to stand trial. This act of approval (called "finding a true bill") transformed the bill into an operative indictment.

The Grand Jury. In the French reception of the jury system, grand jury procedure was a source of constant trouble until the grand jury was finally abandoned under Napoleon.[23] The attempt to transplant the grand jury into France is one of the most important indications that the men who engineered the French reception of the English jury system may not have had a very firm understanding of the institutions that they were borrowing. In 1789 the English grand jury was largely an anachronism, more a ceremonial than an instrumental component of the criminal procedure.

The grand jury was the descendant of the medieval "jury of accusation" or "jury of presentment." In the system instituted after the Assize of Clarendon in 1166, presentment juries were assembled periodically from each community (hundred). Royal judges on circuit placed the jurors under oath and required them collectively to report whether they suspected any of their neighbors of crimes. When the jurors accused ("presented") someone of an offense, he had to stand trial — originally by ordeal, later by jury (that is, by trial jury, also called the petty jury to distinguish it from the grand jury).

The presentment system was based on the idea that in small and static communities (mostly rural and engaged in the highly interdepedent form of medieval agriculture known as the open field system[24]), a jury of

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[23] *Adhémar Esmein*, Histoire de la procédure criminelle en France, Paris 1882, 417 ff., esp. 517-26.

neighbors would already possess information about crimes committed. The presentment jurors knew or could find out. In function, therefore, they were the investigators and theirs was indeed the charging decision. Gradually, over the course of the late medieval and early-modern periods, the social basis of the presentment system dissolved; other modes of agriculture displaced the open field system, and urbanization led to more impersonal forms of communal organization. Criminal cases came to be investigated in the way we have described, by the victim and the constable, aided and increasingly directed by the JP as examining magistrate. The active role in the conduct of the charging function passed from the presentment jury to the persons who now gathered evidence and arranged for the drafting of the bill of indictment.[25]

In place of the many presentment juries that had existed in each county, a single (hence "grand") jury came to be empanelled for the entire county. The membership of this grand jury eventually stabilized at 23, of whom a simple majority of 12 had to vote to indict in order to place the accused on trial.[26] The grand jury met at the opening of the assize court (or, in London, slightly in advance of each Old Bailey sessions). There was also a quarter sessions grand jury for lesser offenses; summary offenses were prosecuted on information, hence without the requirement of grand jury approval.

The grand jury met in private; the principle of publicity in judicial proceedings that Europeans so much admired when they visited English trials did not pertain to the business sittings of the grand jury. The grand jury passed upon each bill after hearing the victim-prosecutor and the other accusing witnesses; but neither the defendant nor any witnesses who might have been prepared to speak for the accused were heard. The idea was that the defendant should defend himself at the trial.

Recently, John Beattie has conducted a study[27] of the manuscript records of grand jury activity in the county of Surrey for the whole of the eighteenth century. He finds that the grand juries indicted in a fairly constant proportion of the cases brought before them: They approved between 80 and 90 percent of the bills (rendering them as so-called "true bills" upon which the defendant had to stand trial). Little is known about what factors motivated the grand juries to refuse to indict in the remaining 10 to 20 percent of cases. However, in a system of criminal

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[24] *C. S. Orwin*, The Open Fields, Oxford 1967 (3d ed.).

[25] *Patrick Devlin*, The Criminal Prosecution in England, Oxford 1960, 5-9.

[26] *Blackstone*, supra note 4, at IV: 301.

[27] *John M. Beattie*, Crime and the Courts in Surrey: 1736-1753, in Crime in England 1550-1800 (J.S. Cockburn, ed.), Princeton, N. J. 1977, 155, 163 [volume hereafter cited as "Cockburn Essays"].

procedure that allowed any person who felt himself aggrieved to bring a bill of indictment to the grand jury, it seems reasonable to suppose that most of the cases that grand juries dismissed were groundless or hopelessly weak.

By the later eighteenth century, therefore, the grand jury's role in criminal procedure was unimportant. The grand jury did prevent weak prosecutions from going to trial, but if those cases had been sent to trial, the trial juries would have acquitted promptly enough. What kept the grand jury from being abolished (until 1933) was its honorific quality. In the later eighteenth century it was composed of men of high status, including leading landowners, clergy, and many JPs. Grand jury meetings at the assize town were occasions for the local élites (Blackstone called them "gentlemen of the best figure in the county"[28]) to socialize and to be seen participating in the pageantry of the assize courts. They did not want the grand jury abolished, for reasons having nothing to do with the administration of criminal justice.

III. The Composition of the Trial Jury

Turning now from pretrial to trial procedure, we must examine the structure of the trial jury. Which persons were eligible to serve? And among the eligible, which were chosen and how? I shall continue to speak only of the assize and Old Bailey courts, although much of what follows pertains to quarter sessions juries as well. Juror qualification was a subject largely regulated by statute—not in a single comprehensive code, but through a patchwork of enactments stretching back over the centuries.

Sex and Age. Jurors were men. Women did not qualify until the twentieth century. The men had to be adults between the ages of 21 and 70.[29]

Residence. Like the courts they served, trial juries were county-based institutions. Jurors were men "of the county" (or, for the inner "City" of London and in a few large cities like Bristol and York that had separate assize sittings, men of the city). In medieval practice, when juries had been valued for their actual or potential knowledge of the crimes and alleged criminals, the residence requirement had been even tighter. The jury had been drawn from the hundred (a smallish subdivision of the county). In early-modern times there was still a tradition of having two so-called hundredors among the 12 jurors, but this practice was

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[28] *Blackstone*, supra note 4, at IV: 299.

[29] 7 & 8 Wil. 3, c. 32, § 4 (1696).

probably obsolete by the seventeenth century.[30] In 1751 statute finally eliminated any requirement that hundredors serve on criminal juries.[31]

Property. The most important restriction on eligibility for jury service was the requirement that jurors own property that produced certain annual income. This sum had been two pounds in the early-modern period; it was raised to ten pounds in 1692, where it remained through the eighteenth century.[32] (For London and Middlesex the figure was differently calculated.[33]) Working with sources from Staffordshire, Douglas Hay has recently estimated that the ten-pound requirement limited jury service to men in "the top third of the income scale."[34] But the bottom reaches of "the top third" could be fairly crude. In a tract published in 1785, the Reverend Martin Madan observed that assize juries "usually consist of low and ignorant country people" and he complained that some of them became so drunk with liquor at the assize dinner break that they slept while sitting at the later trials.[35] The occupations of farmer, artisan, and tradesman typify the eighteenth-century juror. The jury was, therefore neither aristocratic nor democratic.

Exemptions and Disqualifications. Men otherwise eligible might be excluded by virtue of occupation. Among those exempted in this way were apothecaries, clergymen, attorneys, coroners, registered seamen, forresters, and butchers. Men previously convicted of felony or perjury were disqualified, as were men who became physically infirm.[36]

Selection by the Sheriff. The names of persons who satisfied the property requirement were compiled annually in each county in a so-called book of freeholders that was prepared under the supervision of the JPs.[37] This list was sent to the sheriff. The sheriff was the principal legal executive officer in the county, responsible for enforcing judicial orders and for other administration incident to the work of the courts.

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[30] *John H. Baker*, Criminal Courts and Procedure at Common Law 1550-1800, in Cockburn Essays, spura note 27, at 23, 301 n. 45.

[31] 24 Geo. 2, c. 18, § 3 (1751).

[32] *Baker*, supra note 30, at 23; *Giles Duncomb*, Trials per Pais: or, The Law of England Concerning Juries by Nisi Prius, London 1766, (8th ed.) 110.

[33] 3 Geo. 2, c. 25, §§ 19-20 (1730); 4 Geo. 2, c. 7, § 3 (1731); *Duncomb*, supra note 32, at 162-64.

[34] *Douglas Hay*, War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts, Past and Present (No. 95) (May 1982) 117, 154 n. 100.

[35] [*Martin Madan*], Thoughts on Executive Justice, with Respect to Our Criminal Laws, Particularly on the Circuits, London 1785, (2d ed.) 148-50.

[36] 6 Wil. 3, c. 4 (1694) (apothecaries); 7 & 8 Wil. 3, c. 21 (1696) (seamen); *J. Shaw*, Parish Law, London 1750, (7th ed.) 369 (attorneys, butchers, clergymen).

[37] 3 Geo 2, c. 25 (1730). For a published example from Wiltshire for the year 1736, see Wiltshire Quarter Sessions and Assizes: 1736 (Wiltshire Archaeological and Natural History Society) (J.P.M. Fowle, ed.) (Devizes 1955) 130-49.

The office of sheriff in each county was held for a one-year term by a prominent citizen of the county appointed by the crown (in London the city government had the right of appointment). The sheriff was aided by a more permanent staff of undersheriffs and other subordinates who did most of the work, especially the clerical work.

The sheriff was responsible for selecting from the book of freeholders a group of potential jurors, so-called veniremen, for each assize sessions. In the eighteenth century, he produced a list of 48 men as veniremen for the criminal side of assizes (as well as a further list of 48 or more for the civil cases that were tried on the civil side).[38] The sheriff issued an official summons to each venireman, ordering him to attend the assizes for potenial jury service.

How did the sheriff get from a list of many hundreds of freeholders to two lists of 48 veniremen? How did he decide which men to return for civil jury service, and which for the criminal jury? We have as yet no answer to these questions. We do not know whether the sheriff himself exercised much influence, or whether the staff of undersheriffs and lesser officers had the real responsibility. Nor do we have any idea of what principles or practices may have constrained the selection process — whether veniremen were selected randomly, or were screened for particular traits. John Beattie has found that in Surrey, where assize sessions were rotated among several towns, there was a pronounced tendency to draw the veniremen from the part of the county where the particular assize sessions took place — suggesting, therefore, that simple geographical convenience was a criterion of selection in an era when travel was still difficult.[39]

In the OBSP sources for the early part of the eighteenth century, I have found considerable evidence of repeat service on Old Bailey juries. Many of the jurors served as often as once a year.[40] It is especially hard to understand why this happened in a populous area where the sheriffs should have found it especially easy to spread the burden of jury service among a wide class of eligible men. These repeat jurors may have enjoyed the position and volunteered for service. Or they may have had a reputation for competent service that encouraged the sheriffs to prefer them.

It seems likely that, at least outside the major cities, men eligible for jury service resented the burden of repeat service. As early as 1696, legislation pertaining only to the huge and sparsely populated county of Yorkshire provided that eligible men could not be summoned for jury

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[38] 3 Geo. 2, c. 25, § 8 (1730); see *J. Impey*, The Office of Sheriff, London 1786, 341.

[39] *Beattie*, supra note 27, at 164, 334 n. 29.

[40] Trial, supra note 15, at 276.

service more frequently than once every four years.[41] An act of 1730 imposed a two-year interval for repeat service in the other counties (exempting, however, the major cities that had separate assize sittings).[42] This legislation remained in force through the eighteenth century.

Empanelling a Trial Jury. I have been speaking of the selection process that produced a list of 48 veniremen from a freeholders' book containing the names of hundreds or more eligible men. I now turn to the final step by which a jury of 12 was selected from the 48. Statute required that the 48 names be written on 48 separate slips of paper; and that the slips be put in a box and 12 drawn randomly.[43] If any of the 12 men defaulted on appearance (for which he would be fined) or was challenged by the accused (discussed below), additional names were to be drawn in the same manner.

Throughout the eighteenth century it was common for one criminal trial jury to sit for many cases. In the early part of the eighteenth century the jury customarily heard several trials before retiring to deliberate and formulate verdicts in all the cases. From the 1730s, however, the practice settled that the jury should decide each case at the conclusion of that trial.[44] In most cases, the jury did not leave the courtroom to deliberate. Rather, the jurors simply huddled together for a few seconds or a few minutes and agreed on their verdict. This astonishing rapidity of trial and verdict is what facilitated the use of a single 12-man jury to try many cases. At some assize sessions only a single criminal trial jury would be needed, at others two or more. It seems likely that the custom was to use only one jury, unless a complicated case arose in which the jury wanted to take more than a few minutes to deliberate. In those circumstances the jury withdrew from the courtroom, and a new jury was empanelled for the next cases.[45]

At the Old Bailey until the 1770s it was usual for two 12-man juries to sit for several days and to discharge the entire caseload of 50 to 100 trials for that sessions. One jury was drawn from the inner "City" and called the London jury, the other from the county of Middlesex. Cases were allocated between the two juries according to the venue of the crime. Cases involving crimes committed in Middlesex were tried to the Middlesex jury. When a case arose in which the Middlesex jury wished to withdraw from the courtroom to deliberate, London cases would be tried to the London jury. When the Middlesex jury returned with its

[41] 7 & 8 Wil. 3, c. 32, § 6 (1696).

[42] 3 Geo. 2, c. 25, § 3 (1730).

[43] Id. § 11; see also *Impey*, supra note 38, at 341.

[44] See *Beattie*, supra note 27, at 174.

[45] See Ryder Sources, supra note 9, at 118-19; *Beattie*, supra note 27, at 165.

verdict in the previous case, it was ready for more trials. The two juries alternated in this way through the session.[46] In the 1770s, when caseloads began to grow larger, the Old Bailey began to employ two London and two Middlesex juries for each sessions.

Challenge. A defendant accused of felony had the right to insist upon rejecting up to 20 of the veniremen without having to give reasons. This right of so-called peremptory challenge was, however, seldom exercised in the eighteenth century, either at assizes or at the Old Bailey, although the clerk of the court was supposed to instruct the defendants that they had the right. John Baker has speculated: "Either [defendants] did not know the jurors or anything against them, or did not act quickly enough, or were simply too over-awed to understand what the clerk had told them."[47] I would offer a further conjecture: The defendant may have feared that exercising his challenge right without weighty cause would be resented by the court and by the substitute jurors ultimately empanelled to try him. The prosecution had a somewhat different power to reject jurors, but this too was virtually never used.[48]

Special Forms of Jury. Special rules of jury selection pertained in a few circumstances. Persons of noble status were entitled to be tried by a jury of peers in the House of Lords.[49] Since the English nobility was a tiny group whose members were rarely given to criminality (treason apart), the jury of peers was not an important phenomenon in the general administration of the criminal law.

When the defendant was a foreign citizen, he was entitled to a jury composed half of Englishmen and half of foreigners (the foreigners could be of any nationality, not necessarily the nationality of the accused). This body was called the jury *de medietate linguae* ("of the half tongue").[50] In the Old Bailey a few defendants — mostly French and Dutch — elected this form of jury from time to time, although most foreign defendants did not exercise the right. My impression from the OBSP reports is that these special juries almost always convicted. If this tendency were widely known, it would explain why few defendants exercised their right.

The most important form of irregular jury in criminal matters was the "jury of matrons" that was employed in post-verdict proceedings.[51]

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[46] Described for the period into the 1730s in Trial, supra note 15, at 274.

[47] *Baker*, supra note 30, at 36.

[48] Id. (discussing the "stand by" practice).

[49] See *James C. Oldham*, The Origins of the Special Jury, 50 University of Chicago Law Review 159 n. 109 (1983).

[50] Id. at 167-71.

[51] Id. at 171-72.

When a female defendant had been convicted of a capital crime (by a normal trial jury) and was brought before court for sentencing, she could plead in arrest of sentence that she was pregnant. A jury of twelve women was then empanelled to examine her physically and report whether or not she was pregnant. If they reported her pregnant (as they did, rather more often than seems likely to have been accurate) execution was respited, supposedly pending the birth of the baby, but often in practice permanently.

I cannot conclude this discussion of jury selection practices in the eighteenth century without remarking on how tentative and unsatisfactory our knowledge of the detail really is. What we now know comes mostly from the statute books and the sheriffs' practice manuals. Fortunately, the main manuscript sources have largely survived in local and national archives—freeholder lists, jury lists, and so forth. Valuable research is waiting to be done from these primary sources.

IV. Trial Procedure

I turn to the question of how the English trial jury became informed about the criminal case — how the legal system arranged for these lay triers to acquire the factual basis that they needed for their work of adjudication. I deal with this large subject quite selectively, emphasizing those aspects that appear material to comparative historical study of the jury.

Arraignment. Trial commenced[52] with a brief ritual called arraignment, whose function was equivalent to the exchange of pleadings in civil procedure. A clerk (called the clerk of arraigns) read or summarized the indictment. The defendant responded to this formal accusation by denying guilt (pleading not guilty).[53] This ceremony framed the issue upon which evidence would then be received.

The Prosecution Case. By the late eighteenth century, Anglo-American criminal procedure had acquired one of the characteristics that continues to distinguish it in modern times from Continental nonadversarial procedure: The presentation of evidence was divided into "the prosecution case" and "the defense case."[54] Accusing evidence was presented and tested first, then defensive evidence.

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[52] The arraignment proceeding could be separated and held in advance of the trial, although in the eighteenth century it was virtually always held in conjunction with the trial. In modern practice the arraignment hearing ordinarily precedes the trial, sometimes by weeks or months.

[53] The defendant could also plead guilty, although in the eighteenth century he virtually never did. See Trials, supra note 15, at 278-79; Ryder Sources, supra note 9, at 121.

[54] Id. at 130-31.

Ordinarily, the trial began with the victim-prosecutor telling what happened to his property or to himself. Few victim-prosecutors were represented by counsel. If counsel were employed, he would "open" the case by telling the jury what witnesses were about to appear for the prosecution and what they were meant to prove; counsel would then call and question the victim-prosecutor and the witnesses. When counsel was not employed, the victim-prosecutor and his witnesses told their own stories, aided by the questioning of the judge. The defendant (and his counsel, if any) had the right to "cross-examine" the victim-prosecutor and the prosecution witnesses, that is, to question them further about their testimony.

We may conveniently categorize prosecution witnesses into five main types.

(1) The most common were identification witnesses, persons who claimed to have seen the defendant commit the crime.
(2) Others, often constables and watchmen, were pursuit witnesses, who told of chasing or arresting the defendant.
(3) In stolen goods cases, it was common to have witnesses testify either to the defendant's being found in possession of the goods, or to his attempting to sell them.
(4) In many cases there was testimony about the defendant's pretrial statements, especially confessions made before the examining JP.
(5) Occasionally, in cases involving several criminals and in which guilt could not otherwise be proved, a so-called crown witness or accomplice witness was heard. He was one of the culprits; the JP investigating the case had induced him to testify for the prosecution in exchange for the guarantee that he would not himself be prosecuted.

The Defense Case. In many, perhaps most cases, the defendant did not undertake any serious defense. He might admit the crime and apologize, saying that it was his first offense, or that he was very young, or that he was drunk, or that he was hungry. Another common format in these hopeless cases was that the defendant would deny his guilt but offer no reason why anybody should believe him in the face of strong prosecution evidence. None of this is surprising. Most of these defendants had been caught in the act, or in flight, or with stolen goods. On the merits, they had no defense.

When a defendant did contest his culpability in a serious fashion, the defense usually followed one of several patterns.

(1) He most often claimed mistaken identification, probing the testimony of the prosecution witnesses and sometimes offering an alibi.

(2) The other common defense was justification. "I found the stolen goods." "I bought the goods from a Jew in Covent Garden." "I did not rape her, she consented." "The sheep wandered into my field." "I did not steal the prosecutor's watch, he gave it to me in exchange for sexual favors." "I killed the deceased only when he drew his knife and attacked me."

(3) Rarely, and mostly with the aid of counsel, the defendant would challenge the legal sufficiency of the indictment — contending that the conduct charged should not be deemed criminous. The newer statutory property crimes, especially embezzlement and some varieties of commercial fraud and forgery, mainly gave rise to such a defense.

(4) Some defenses were based on the allegation that the prosecution was not merely mistaken (as in misidentification cases) but malicious, that is, knowingly false. In crown-witness cases, the defendant often complained that the accomplice was falsifying his testimony in order to obtain immunity for his own crime. Malice was often alleged by defendants in prosecutions for those few crimes, especially highway robbery, for which legislation had authorized the payment of a reward upon conviction. Defendants in these cases commonly claimed that the prosecution was falsifying the evidence for the sake of the reward money.[55]

The defendant was treated differently from other defense witnesses. Unless he was represented by counsel, he was responsible for cross-examining the victim-prosecutor and the other prosecution witnesses after each had testified. At the conclusion of the prosecution case, the defendant was encouraged to speak to the merits, but he was not allowed to testify on oath. Because he was unsworn, he was not cross-examinable on what he said, although rebuttal witnesses could contradict what he said. From the early eighteenth century, however, defense witnesses were sworn and cross-examinable.

Both the articulation of the trial into prosecution and defense "cases" and the rule that the defendant could not be cross-examined were traits that diminished the importance of the defendant as a testimonial resource by comparison with the European procedure, where the tendency has been to begin the trial with the examination of the accused. Both traits were still relatively recent growths in eighteenth-century English procedure.

Orality. Perhaps no attribute of eighteenth-century English criminal jury trial made so great an impression upon European observers as the orality of the proceedings. Theorists have subsequently identified many

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[55] On the reward system see id. at 106-14 and sources there cited.

purposes and virtues in orality. Orality preserves so-called "demeanor evidence," which supposedly heightens the reliability of the trier's evaluation of the credibility of witnesses. Europeans saw in orality a safeguard against political subservience and bias in the professional magistracy. And orality was one way of assuring that the defendant would have full knowledge of the charges against him and the identity of his accusers — policies having to do with disclosure and confrontation.

None of this was much celebrated in contemporary England. Some of the rules of evidence (discussed below) such as the hearsay and best evidence rules certainly presupposed and reinforced the oral tradition. So did the primitive English pretrial procedure. The English pretrial process had been organized at the end of the Middle Ages to assure the production of witnesses at oral public jury trial.[56] The JPs did transcribe pretrial examinations of accused and accusers, but these so-called depositions were seldom used in later eighteenth-century trials except to contradict an accused or a witness whose trial testimony departed from his pretrial statement.

Pretrial investigation in England was conducted by amateurs (victims, lay constables, lay JPs), although in London, as we have said, some of the JPs were beginning to be less amateurish. If circumstances had forced the English to develop a large and professional corps of investigating magistrates of the sort that grew up on the Continent to produce documented dossiers, orality might well have declined. The English might have done what the French and the later European imitators of jury trial were so tempted to do — read the dossier aloud to the jury and call that orality.

Counsel. The modern Anglo-American trial is lawyer-dominated. The prosecution is invariably represented by counsel, and in cases of serious crime the defendant is too. Counsel make opening and closing statements; they examine and cross-examine witnesses; and by means of motions and objections they manipulate an ever-growing body of procedural and evidentiary rules. Almost none of this lawyerly presence was visible at the outset of the eighteenth century, and not until well into the nineteenth century did this so-called adversary system begin to look recognizably modern. At the time of the French Revolution, cases of serious crime were still commonly tried without counsel on either side, althouth the use of counsel was steadily increasing in this period.

Prosecution counsel had always been allowed. Statute authorized defense counsel in treason cases in 1696, and in the 1730s the courts began to allow felony defendants to have the assistance of counsel in examining and cross-examining witnesses. Not until 1836 did statute put

[56] Renaissance, supra note 19, at 21ff., 122-25.

defense counsel on complete parity with prosecution counsel, allowing defense counsel to make a closing address to the jury.[57]

In the absence of counsel, it fell to the trial judge to question each witness, both in order to elicit his story (examination), and to probe for contradiction or other weakness (cross-examination).

The Law of Proof. It was no accident that jury trial entered the European legal systems during the period when the medieval European law of proof (the system of so-called statutory proofs) that had led to judicial torture was being abolished. The new law of proof ceased to restrict the use of circumstantial (non-eyewitness) evidence or otherwise to predetermine the quality of proof. Under the substitute theory of moral proofs, conviction required the moral persuasion of the trier (*conviction intime, freie Beweiswürdigung*). This conception of proof had been in effect in England for centuries as a natural result of the use of jury trial. Moral persuasion was the only workable standard of proof in a system of lay adjudication. Laymen could never have mastered the law of proof of the ius commune; and, in any event, the purpose of that body of law was to control the professional judiciary.[58]

The English did have some rules about proof, the so-called rules of evidence, which began an enormous expansion in the second half of the eighteenth century that continued to modern times. The origins of this development are little understood. It was probably associated with the rise of counsel in criminal trials and seems to have been heavily influenced by patterns of pleading and proof-taking in civil jury procedure.

The distinctive attribute of the developed English law of evidence is the calculus of admission and exclusion. The law requires the court to conceal from the jury certain forms of probative but awkward evidence, for fear of the jury's inability to evaluate it well. Thus, hearsay evidence is refused because the witness is reporting what a nonwitness said, and the nonwitness cannot be sworn, confronted, and cross-examined. The modern hearsay rule presumes conclusively that the trier could not correct for these deficiencies in estimating the weight to attach to such evidence; whereas in modern Continental practice the tendency is to receive such problematic evidence and trust the trier to discount its weaknesses properly.

The law of evidence has become a vast, clumsy, largely self-defeating body of rules, creating work for lawyers and appellate courts, while making jury trials so complex and time-consuming that they can no

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[57] 6 & 7 Geo. 4, c. 114 (1836).

[58] See Torture, supra note 10, at 1-8.

longer be regularly employed.[59] There is no sadder paradox in comparative legal history than to observe the English in the later eighteenth century beginning to produce a law of proof nearly as bad as the one that the Europeans were just then abolishing.

V. Judge and Jury

A maxim of deceptive simplicity governed the relations of judge and jury. The maxim was familiar enough in the 1620s when Sir Edward Coke dressed it up in Latin: *ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores.*[60] Judges decide law and jurors fact. Professor Green's paper for this volume will discuss some of the theoretical tensions that lay beneath that seemingly neat division of function, tensions that come to the surface in political cases. In the routine administration of criminal justice that I am describing, however, the judge/jury relationship was ordinarily harmonious and effective, and the law/fact distinction operated smoothly. The hidden truth that the jury's verdict was a mixed determination of law and fact did not have to be faced.

Trial Conduct. The judge supervised the conduct of the trial. When objections were made to the competence of a witness or to the admissibility of evidence, the judge decided the point. Even in cases in which counsel participated, the judge retained and exercised the power to question witnesses. The judge customarily kept for his own reference a notebook in which he compiled a curt summary of the main evidence that was presented at trial.

The jurors, by contrast, sat passively. Occasionally, in the OBSP pamphlet reports we see a juror asking a question about some aspect of the evidence, or interposing a comment (for example, about the reputation of a witness or the physical characteristics of the scene of the crime), but by the later eighteenth century such contributions appear to have declined.

Summation and Instruction. At the conclusion of the proof-taking phase of the trial (the hearing of the witnesses), the judge *summed up* the evidence and *instructed* the jury. For his summation the judge referred to his notebook. He restated the main facts that had been alleged in the testimony of the witnesses.

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[59] This point is developed in *John H. Langbein*, Torture and Plea Bargaining, 46 University of Chicago Law Review 3 (1978).

[60] *Edward Coke*, First Part of the Institutes of the Laws of England, or Commentary upon Littleton, London 1628, 155 b.

Summation. We have little historical record of how the judge conducted his summation, which was, of course, entirely oral. The OBSP reporters virtually always omitted mention of the summation from their pamphlets. Thus, for example, we suspect but we cannot be certain that in easy cases the judge felt free to omit the summation altogether. The judge sometimes used the summation to "shape" the facts for the jury — for example, by emphasizing those issues of fact that the judge thought to be important and by communicating his own view of the probabilities on those matters.

Instruction. The distinction between summation and instruction corresponded to that between fact and law. The judge's opinion upon a matter of law was in theory binding upon the jury. Once again, we know very little about how much the judges used their power to instruct. Most cases of serious crime were difficult if at all only on the facts — the hard question was whether the defendant did what he was charged with, not whether the charge amounted to burglary, theft, murder, or whatever. We doubt that the jury was much instructed in routine cases.

Directed Verdicts. It is clear from the OBSP reports that the judges used their power over the law to terminate many prosecutions in favor of the defendant by ordering what is now called a *directed verdict*, that is, a directed acquittal. In the Old Bailey in the later eighteenth century, directed verdicts were fairly common in three situations:

(1) *Insufficiency of the Evidence.* At the conclusion of the prosecution case the judge could conclude that the accusing evidence was so weak that the defendant should not be bothered to reply to it. The judge could reach this conclusion on his own motion or at the behest of counsel. This form of directed verdict was commonly applied to one or two codefendants among a larger group.

The directed verdict for insufficiency of the evidence presupposed some notion of what level of proof was sufficient for a criminal case. Early in the nineteenth century the modern standard of proof (beyond reasonable doubt) was articulated, but it seems to have been crudely implicit long before.

(2) *The Accomplice Rule.* The rule developed in the middle third of the eighteenth century that the testimony of a crown witness required corroboration.[61] Independent evidence of the defendant's complicity was required to compensate for the inherent untrustworthiness of the accomplice, who was obtaining immunity for his testimony. When corroboration of an acceptable quality failed to materialize at the trial, the judge directed an acquittal.

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[61] Ryder Sources, supra note 9, at 84ff.

(3) *The Confession Rule.* The defendant's pretial confession was regarded as inadmissible if it had been elicited by the promise of lenity. The OBSP in the later eighteenth century contain a steady trickle of directed verdicts in which such suspicious confessions constituted the only important proof.

Judge/Jury Disagreement. A potential for conflict nesessarily inhered in the division of responsibility between judge and jury. The judge's view of the facts as communicated in his summation might not appear correct to the jury. Or, the jurors might resist the judge's instruction on the law. In actual practice, ordinary criminal trials were conducted so rapidly that we can be confident that judge and jury regularly worked in harmony. Nevertheless, because disagreements did occur in exceptional cases, it is important to understand where the ultimate balance of power lay.

If the jury attempted to return a verdict (whether of guilt or innocence) that displeased the judge, the judge had the power to reject it provisionally. He would then question the jurors about their thinking, explain to them why he differed with them (be it on matters of law or fact), and require them to deliberate and decide again. It took a determined jury to resist such pressure.[62]

If the jury persisted in returning a verdict contrary to the judge's wishes, it mattered greatly whether the verdict was one of conviction or acquittal. Juries all but never convicted against the will of the judge, because they knew it would be futile. The judge effectively controlled the pardon process by which the conviction could be vitiated (technically, the king alone exercised the pardon power, but he invariably deferred to the recommendation of the trial judge).[63] As a practical matter, therefore, acquittal was the important sphere of potential judge/jury disagreement. Even there, however, it is hard to detect instances of disagreement about acquittal in the later eighteenth century, apart from a few political offenses, of which seditious libel was the most important.

Jury Discretion in Sentencing. In theory, the jury decided guilt and the judge decided sentence. In practice, the jury had more discretion in sentencing than the judge.

By modern standards, the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that

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[62] Trial, supra note 15, at 284-300.

[63] Ryder Sources, supra note 9, at 19-21, 30.

sentence (unless he thought in the circumstances that the sentance was so inappropriate that he should invoke the pardon process to commute it).

The sanction-specific quality of the substantive criminal law is what permitted the jury to exercise a de facto sentencing discretion, since the jury had the power to choose among different offenses for the conduct charged. Suppose, for example, that the defendant were accused of burglary — the indictment alleged that he broke into a house at night and stole five pounds worth of goods. Although the indictment charged burglary, for which the sanction was death, the jury had the power to convict the defendant of a lesser offense. It might (and it often did) return a verdict of "not guilty of burglary, but guilty of the theft." The effect of this formulation was to spare the defendant from the death penalty, and to consign him to transportation (later imprisonment) for grand larceny. If the jury were extraordinarily concerned to be lenient, it could (but seldom did in such a case) find the defendant guilty of a theft to the value of ten pence, hence mere petty larceny, for which the main sanction was whipping. Thus, the jury in this example could choose among three sentences — death, transportation, or whipping — by manipulating the offense. This mitigation practice was widespread and immensely important. In a famous phrase, Blackstone called it "pious perjury,"[64] by which he meant that the jury knowingly returned a false verdict (in our example, theft rather than burglary) in order to reduce the sanction.

Indeed, one way to understand the English criminal jury trial of the later eighteenth century is to say that it was primarily a sentencing proceeding. Since most defendants had been caught in the act, or in flight, or with the goods, or were otherwise unmistakably culpable, the main purpose of the trial was to inform the jury's exercise of its de facto sentencing power. At the trial the jury would study the circumstances of the crime and the criminal in order to decide whether and how much to reduce the otherwise applicable sanction.

Appeal. The scope for appellate review of verdicts was extraordinarily narrow. By the later eighteenth century the rule was already ancient that no appeal lay to reverse a verdict of acquittal. This rule continues in force in modern Anglo-American procedure. The prosecution may not appeal a verdict.

Appeal against conviction was possible in theory, but only for a few inconsequential technicalities. The judges did develop an informal means of review for doubtful questions of law, including some mixed law/fact issues such as sufficiency of the evidence, in the *reserved judgment* procedure. The trial judge could respite execution of sentence

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[64] *Blackstone* IV: 239.

and consult the other royal judges, the so-called "Twelve Judges," who met together informally as an advisory panel. If they thought that the conviction was improper, they would recommend a royal pardon.[65]

In general, however, appeal to higher courts played an inconsequential role in English criminal procedure until well into the nineteenth century. Since the jury's verdict gave no reasons, there was little to review. This aspect of the English jury tradition contrasts strongly with the long Continental tradition of appellate supervision of criminal trial courts.

The Special Verdict. English criminal procedure knew two forms of verdict, general and special. The ordinary verdict of "guilty" or "not guilty" that we have been discussing was a general verdict. The general verdict was a judgment that contained neither findings of fact nor legal reasons.

When a case of legal difficulty arose — for example, whether a certain act of provocation reduced the severity of a homicide from murder to manslaughter — the judge might encourage the jury to avoid deciding the case by returning a special verdict.[66] This was a verdict in which the jury set forth a summary of the facts in some detail. Typically, counsel for the prosecution and defense framed a draft statement for the jury to adopt; otherwise, we suspect, the judge or the clerk framed the draft. The trial judge then laid the special verdict before the Twelve Judges at their next meeting; in the light of their collective decision, the trial judge then applied the law and formulated the judgment of guilty or not guilty.

The special verdict involved a radical reallocation of responsibility between judge and jury, and it was seldom employed. It is worth mention in this paper because it is the closest that the English procedure came to the devices that the nineteenth-century Europeans attempted to design, in which the judges put questions regarding the facts to the jury while reserving the actual judgment to the judiciary.

Unanimity. The twelve jurors had to agree upon their verdict in order to convict. In theory, if they disagreed a so-called *mistrial* resulted and a new trial would be held before another jury at another sessions. In practice, we have almost no evidence of such cases. The pressure for agreement must have been strongly felt in a system that processed such large trial caseloads so rapidly.

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[65] *Baker*, supra note 30, at 47-48.

[66] *Blackstone* IV: 354.

VI. Conclusion

Criminal jury trial developed in England as an instrument of mass justice, and I have been concerned in this paper to describe this routine character. The system enabled a handful of royal judges to try all the cases of serious crime in England, and to do the job in only a few weeks of trial time per year. Jury trial was crude, fast, and cheap.

In cases of ordinary — as opposed to political — crime, judge and jury shared a moral consensus about their work that promoted cooperation and amity. Neither judge nor jury wanted robbers or murderers to escape punishment; and neither wanted innocent defendants to suffer. This moral consensus about the purposes of the substantive criminal law is what permitted criminal jury trial to operate so rapidly and smoothly, despite the potential for struggle that inhered in the division of adjudicative power. Judge and jury virtually never disagreed about anything.

Political cases, especially the offense called seditious libel, strained that consensus. Everybody thought robbery should be a crime, not everybody agreed that vigorous criticism of the government should be a crime. Increasingly in the eighteenth century, prosecutions for seditious libel found juries resisting judicial guidance and instruction. These cases exposed the ambiguity in the law/fact distinction, and they led in 1792 to parliamentary redefinition of the judge/jury relationship. This movement is the subject of Professor Green's paper. From the standpoint of comparative legal history, we conclude with the observation that it is ironic that the European reception of the jury (especially in nineteenth-century Germany) tended to emphasize political cases — just the sphere where the jury system had proved itself most troubled in England.